

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 498

INTRODUCER: Senator Baker

SUBJECT: Clinical, Counseling, and Psychotherapy Services

DATE: April 20, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HR	Favorable
2.	Daniell	Maclure	JU	Favorable
3.				
4.				
5.				
6.				

I. Summary:

The bill provides that there is no liability on the part of a licensed clinical social worker, marriage and family therapist, or mental health counselor (collectively known as psychotherapists), if the psychotherapist discloses otherwise confidential communications to specified people when, in the clinical judgment of the psychotherapist, there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society.

This bill amends section 491.0147, Florida Statutes.

II. Present Situation:

Chapter 491, F.S., provides for the regulation of psychotherapists by the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling within the Department of Health.¹ Section 491.0147, F.S., specifies that any communication between any person licensed or certified under ch. 491, F.S.,² and his or her patient or client shall be confidential. This secrecy may be waived under the following conditions:

- When the person licensed or certified under ch. 491, F.S., is a party defendant to a civil, criminal, or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action;

¹ See s. 491.004, F.S.

² Persons licensed or certified under ch. 491, F.S., include clinical social workers, marriage and family therapists, and mental health counselors, collectively known as psychotherapists. See s. 491.003(13), F.S.

- When the patient or client agrees to the waiver, in writing, or, when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing; or
- When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society, and the person licensed or certified under ch. 491, F.S., communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

The waiver of confidentiality is permissive and is made by the licensed psychotherapist. A licensed psychotherapist who does not waive confidentiality may not be sued by any individual who is harmed when the client or patient follows through with a threat.³ However, a licensed psychotherapist who discloses confidential information about a client may be sued for emotional distress.⁴ Under current Florida law, a licensed psychotherapist may avoid the threat of a lawsuit by not disclosing any threats of harm by their clients to another.

Section 456.059, F.S., pertaining to communications between patients and psychiatrists, is similar to s. 491.0147, F.S., relating to communications between patients and psychotherapists.

Psychiatrists are medical or osteopathic physicians who specialize in diagnosing and treating mental disorders. Psychiatrists have no liability for disclosure of otherwise confidential patient communications in disclosing an actual threat to physically harm an identifiable victim.

Section 456.059, F.S., provides that communications between a patient and a psychiatrist, as defined in s. 394.455, F.S.,⁵ shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative. However, where:

- A patient is engaged in a treatment relationship with a psychiatrist;
- Such patient *has made an actual threat* to physically harm an identifiable victim or victims; and
- The treating psychiatrist makes a *clinical judgment* that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out that threat,

the psychiatrist may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency. The statute provides that no civil or criminal action shall be instituted, and there shall be *no liability on account of disclosure of otherwise confidential communications* by a psychiatrist in disclosing a threat pursuant to s. 456.059, F.S.

³ See *Green v. Ross*, 691 So. 2d 542 (Fla. 2d DCA 1997) (dismissing lawsuit against mental health work for failure to warn against threat of harm to third party by patient, finding that there is no such cause of action in Florida).

⁴ See *Gracey v. Eaker*, 837 So. 2d 348 (Fla. 2002). However, in *Gracey*, the plaintiffs' claim for emotional damages related to the psychotherapist's breach of confidential communications that were not specifically exempted by s. 491.0147, F.S. Senate professional staff was not able to find a case where the court allowed a case to proceed when a psychotherapist disclosed confidential communications based on one of the statutory exceptions.

⁵ Section 394.455(24) F.S., defines "psychiatrist" to mean a medical practitioner licensed under ch. 458, F.S., or ch. 459, F.S., who has primarily diagnosed and treated mental and nervous disorders for a period of not less than three years, inclusive of psychiatric residency.

III. Effect of Proposed Changes:

The bill amends s. 491.0147, F.S., relating to the confidential and privileged communications between patients or clients and their psychotherapists.⁶ The bill provides that when, in the clinical judgment of a licensed psychotherapist, there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society, and the psychotherapist communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities, there is no liability on the part of, and no cause of action of any nature shall arise against, the licensed psychotherapist for the disclosure of otherwise confidential communications.

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Under the bill, a licensed clinical social worker, marriage and family therapist, or mental health counselor (collectively known as psychotherapists), is granted immunity from liability if the psychotherapist discloses otherwise confidential communications to specified people when, in the clinical judgment of the psychotherapist, there is a clear and immediate probability of physical harm to someone. By limiting liability the bill could be subject to a constitutional challenge under the access to courts provision of the Florida Constitution.

Article I, section 21, of the Florida Constitution provides: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” This right of access “protects only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.”⁷ Under the Florida Supreme Court case *Kluger v. White*:

⁶ The term psychotherapist includes a clinical social worker, marriage and family therapist, or mental health counselor licensed pursuant to ch. 491, F.S. Section 491.003(13), F.S.

⁷ 10A FLA. JUR 2D *Constitutional Law* s. 360 (2007). When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

[W]here a right of access ... has been provided ..., the Legislature is without power to abolish such a right without providing a reasonable alternative ..., unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.⁸

Although possible, it is unlikely that an access to courts issue would succeed. As explained in the Present Situation section of this analysis, s. 456.059, F.S., provides an exception to the general rule that communications between a patient and a psychiatrist are confidential. This exception provides that if a patient has made an actual threat to physically harm an identifiable victim and the psychiatrist makes a clinical judgment that the patient has the capability to commit such an act in the near future, then the psychiatrist may disclose patient communications to the potential victim or to a law enforcement agency. Florida case law has upheld this “dangerous patient exception.”⁹ Section 456.059, F.S., and s. 491.0147, F.S., as amended by the bill, are nearly identical in purpose; accordingly, it would appear unlikely that an access to courts claim would be successful under s. 491.0147, F.S.

Additionally, a *Kluger v. White* claim may not be successful because the psychotherapist-patient privilege created by s. 491.0147, F.S., did not exist at common law.¹⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill eliminates any liability on the part of a licensed psychotherapist, if the psychotherapist discloses otherwise confidential communications to specified people when, in the clinical judgment of the psychotherapist, there is a clear and immediate probability of physical harm to someone. This bill may have an indeterminate positive fiscal impact on licensed psychotherapists who disclose certain confidential information pursuant to s. 491.0147, F.S., because they will not have to worry about the threat of a lawsuit.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

⁸ *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

⁹ *See Guerrier v. State*, 811 So. 2d 852 (Fla. 5th DCA 2002).

¹⁰ *Id.* at 855.

VII. Related Issues:

The bill requires a psychotherapist to use his or her “clinical judgment” to determine whether there is a high probability of physical harm to the patient or another individual in order to disclose confidential information. Neither ch. 491, F.S., nor the bill defines “clinical judgment,” and it is unclear, for purposes of the bill, what the term means.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.