

OPINION NO. 88-027**Syllabus:**

1. Under R.C. 2921.22(F)(1), a licensed psychologist is not required to report a felony which has been or is being committed when such information is privileged under R.C. 4732.19 due to the psychologist-client relationship.
2. Under R.C. 2921.22(G), a licensed psychologist who voluntarily discloses privileged information to law enforcement authorities in reporting that a felony has been or is being committed is not subject to any liability or recrimination for breach of privilege or confidence for such disclosure.
3. The privilege between a licensed psychologist and his client protects communications between the client and those unlicensed supervisees of the psychologist enumerated in R.C. 4732.22(C), (D), and (E).
4. Under R.C. 2921.22(F)(1), those unlicensed supervisees of a licensed psychologist enumerated in R.C. 4732.22(C), (D) and (E) are not required to report a felony which has been or is being committed when such information is privileged under R.C. 4732.19 due to the psychologist-client relationship.
5. Under R.C. 2921.22(G), those unlicensed supervisees of a licensed psychologist enumerated in R.C. 4732.22(C), (D) and (E) who disclose privileged information to law enforcement authorities in reporting that a felony has been or is being committed are not subject to any liability or recrimination for breach of privilege or confidence for such disclosure.

To: Julia Wright, Ph.D., President, Ohio State Board of Psychology, Columbus Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, April 21, 1988

I have before me your request for my opinion on several issues concerning privileged communications between a licensed psychologist and client. I have rephrased your questions as follows:

1. In light of the privilege between licensed psychologist and client, how does the requirement in R.C. 2921.22 to report a felony affect the position of a licensed psychologist?
2. Does the privilege between licensed psychologist and client extend to an unlicensed supervisee who is providing services under the direction and responsibility of a licensed psychologist?
3. Are the unlicensed supervisees of a licensed psychologist subject to the felony reporting requirements of R.C. 2921.22?

Privilege in Ohio is "governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience." Ohio Evid. R. 501.¹ The General Assembly has provided for a privilege between psychologist and client in R.C. 4732.19, which states:

The confidential relations and communications between a licensed psychologist or licensed school psychologist and client are placed upon the same basis as those between physician and patient under division (B) of section 2317.02 of the Revised Code. Nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

R.C. 2317.02 sets forth the privilege between physician and patient as follows:

The following persons shall not testify in certain respects:

...

(B)(1) A physician concerning a communication made to him by his patient in that relation or his advice to his patient, except as otherwise provided in this division and division (B)(2) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code [dealing with child abuse cases] to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

See also R.C. 2317.02(B)(3) (defining "communication" for purposes of R.C. 2317.02(B)(1)); 7 Ohio Admin. Code 4732-17-01(C)(1) (the client, rather than the psychologist, holds and may assert the privilege which is intended to protect the client by encouraging free disclosure to the psychologist and preventing disclosure to others); 7 Ohio Admin. Code 4732-17-01(C)(2) (privilege attaches only where the relationship between psychologist and client is for diagnosis and treatment). *See generally* 1987 Op. Att'y Gen. No. 87-005 (concerning the types of communication between counselor and client which qualify for the privilege granted by R.C. 2317.02); 1975 Op. Att'y Gen. No. 75-062 (concerning the types of communication between physician and patient which qualify for the privilege granted by R.C. 2317.02). Thus, the General Assembly has provided that the privilege between psychologist and client is on the same basis as that of the privilege between physician and patient as set forth in R.C. 2317.02.

In your first question you ask how the requirement in R.C. 2921.22 to report a felony affects the position of a licensed psychologist, in light of the foregoing privilege between licensed psychologist and client. R.C. 2921.22 provides, in pertinent part:

(A) No person, knowing that a felony has been or is being committed,² shall knowingly fail to report such information to law enforcement authorities.

....

(F) Division (A)...of this section does not require disclosure of information, when any of the following applies:

(1) The information is privileged by reason of the relationship between...licensed psychologist or licensed school psychologist and client.... (Footnote added.)

R.C. 2921.22(A) requires a person who knows that a felony has been or is being committed to report such information to law enforcement authorities. However,

¹ Fed. R. Evid. 501 provides that in civil actions in which state law supplies the rule of decision as to an element of a claim or defense, privilege is governed by state law. In all other cases, privilege is generally to be governed by common law as interpreted by the courts "in the light of reason and experience."

² I am not addressing the issue of whether it is necessary or permissible to report possible future felonies.

R.C. 2921.22(F)(1) provides that it is not mandatory to disclose information which is privileged by reason of the psychologist-client relationship. Therefore, under R.C. 2921.22, a licensed psychologist is not required to report a felony which has been or is being committed when such information is privileged by reason of the psychologist-client relationship.³

I turn now to the question of whether a licensed psychologist is permitted to make such a disclosure. I note first that R.C. 2317.02(B) provides that "[t]he following persons *shall not testify* in certain respects...[a] physician concerning a communication made to him by his patient in that relation...." (Emphasis added.) "Testify" is defined as "to give evidence as a witness; to make a solemn declaration, under oath or affirmation, in a judicial inquiry, for the purpose of establishing or proving some fact." *Black's Law Dictionary* 1323 (5th ed. 1979). Therefore, unless the privilege is waived, R.C. 2317.02 bars a psychologist from testifying under oath in a judicial inquiry as to certain communications between the psychologist and client, but it does not bar a psychologist from reporting such information to law enforcement officials. Furthermore, R.C. 2921.22(G) provides that "[n]o disclosure of information pursuant to this section gives rise to any liability or recrimination for a breach of privilege or confidence." The Committee Comment to House Bill 511, which introduced an earlier version of R.C. 2921.22, stated that this provision "includes disclosure of information which is privileged under the section, and which the person disclosing it is therefore not required to divulge." Committee Comment to H.B. 511, *reprinted in* Page's Ohio Revised Code Ann. Vol. 29, p. 249 (1987). Therefore, I conclude that a licensed psychologist is permitted, but not required, to disclose privileged information to law enforcement authorities in reporting that a felony has been or is being committed and is not subject to any liability or recrimination for breach of privilege or confidence for such disclosure.⁴

In your second question, you ask whether the privilege between licensed psychologist and client extends to an unlicensed supervisee working under the direction of the psychologist. R.C. 2317.02(B) prohibits a physician from testifying "concerning a communication made to him by his patient in that relation." I must determine whether communications made to an unlicensed supervisee are communications made to the licensed psychologist for purposes of the privilege statute.

R.C. 4732.21(A) prohibits persons who are not licensed psychologists from offering or rendering services as a psychologist or otherwise engaging in the practice of psychology for compensation or personal gain. R.C. 4732.22 exempts certain persons from these licensing requirements and includes three provisions dealing with unlicensed supervisees. R.C. 4732.22 provides:

The following persons are exempted from the licensing requirements of this chapter:

....
(C) Any person employed by a licensed psychologist or licensed school psychologist, while carrying out specific tasks, under the licensee's supervision, as an extension of the licensee's legal and ethical authority as specified under this chapter....

(D) Unlicensed persons holding a master's degree or doctoral degree in psychology from a program approved by the board while working under the supervision of a licensed psychologist. The board

³ I note that under very limited circumstances, a licensed psychologist is required to report a felony. See R.C. 2151.421(A)(1) and R.C. 2919.22 (generally, professionals must report suspected child abuse, which under certain circumstances is classified as a felony).

⁴ Under R.C. 4732.17(D), the State Board of Psychology may discipline a psychologist for "[w]illful, unauthorized communication of information received in professional confidence." However, the Board may not discipline where the disclosure of information is authorized under R.C. 2921.22, since R.C. 2921.22(G) prohibits any recrimination for such disclosure. See *generally Cincinnati v. Thomas Soft Ice Cream*, 52 Ohio St. 2d 76, 369 N.E.2d 778 (1977) (specific statute prevails over general statute).

shall establish rules governing such supervisory relationship which shall include a regulation requiring registration with the board of such unlicensed person.

(E) Any student in an accredited educational institution, while carrying out activities that are part of his prescribed course of study, provided such activities are supervised by a professional person who is qualified to perform such activities....

The Psychology Board has promulgated rules, pursuant to R.C. 4732.22(D), which govern the supervisory relationship between a licensed psychologist and an unlicensed supervisee. *See* 7 Ohio Admin. Code Chapter 4732-13-01(A)(3) (supervision rules of Chapter 4732-13 concern all licensed psychologists functioning as supervisors). These rules require that the supervisee act only under the direction and responsibility of the licensed supervising psychologist. *See* 7 Ohio Admin. Code 4732-13-03(I)(4) (supervisee shall perform services in supervisor's office or other legitimate site such as another office where supervisor actively consults; such "supervised activities shall be performed pursuant to the licensed supervisor's order, control, and full professional responsibility"); 7 Ohio Admin. Code 4732-13-03(J)(2) (supervising psychologist "shall have full responsibility for the welfare of the client, diagnosis, intervention, and outcome of the intervention"); 7 Ohio Admin. Code 4732-13-03(J)(7) (supervisor shall have knowledge of client through direct contact or other means and shall use his knowledge to compare and confirm the supervisee's diagnosis and progress); 7 Ohio Admin. Code 4732-13-03(J)(8) ("In all cases the supervising psychologist shall have full control and responsibility for the psychological training and professional behavior of the supervisee").

The Franklin County Court of Appeals examined the relationship between the licensed psychologist and his supervisee in *Serednesky v. Ohio Department of Public Welfare*, No. 78AP-826 (Franklin County Ct. App. November 27, 1979) (unreported). *Serednesky* arose because the Department of Public Welfare had been allowing Medicaid reimbursement for those services performed by a licensed psychologist, but not for those services performed by an unlicensed supervisee of the psychologist. The court, in holding this reimbursement policy impermissible, examined the statutory and administrative code provisions governing the psychologist's use of unlicensed supervisees and concluded that "interns are included in a psychologist's scope of practice for purposes of the Medicaid law." *Id.* at 3547. The court noted that a licensed psychologist's scope of practice "is not confined to the acts of treatment which a licensed psychologist is permitted to perform but includes the manner in which he delivers his services." *Id.* at 3545. *See also* 1986 Op. Att'y Gen. No. 86-078 at 2-442 to 2-443 n. 3 (discussing the *Serednesky* decision).

As the *Serednesky* court pointed out, R.C. 4732.22(C) states that the supervisees described in that subsection are "an extension of the licensee's legal and ethical authority as specified under [R.C. Chapter 4732]." 7 Ohio Admin. Code 4732-13-03(J)(8) provides that "the supervising psychologist shall have full control and responsibility for the psychologist training and professional behavior of the supervisee." *See also* 7 Ohio Admin. Code 4732-13-03(J)(2) (supervising psychologist "shall have full control and responsibility for the welfare of the client, diagnosis, intervention, and outcome of the intervention"). In the context of Medicaid reimbursement, these factors led the *Serednesky* court to conclude that services by the interns of a licensed psychologist are services by the licensed psychologist within his scope of practice. Similarly, I find that for purposes of R.C. 4732.19, communications to a supervisee are communications to the licensed psychologist.

That communications to a supervisee are equivalent to communications with a psychologist is further clarified in the common law recognition that communications with an attorney's agents are generally privileged. In addressing the attorney-client privilege, 8 J. Wigmore, *Evidence* §2301, at 583 (J. McNaughton rev. ed. 1961) states:

It has never been questioned that the privilege protects communications to the attorney's clerks, and his other agents (including stenographers) for rendering his services. The assistance of these agents being indispensable to his work and the communications of

the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents. (Footnotes and emphasis omitted.)

See also id. §2382, at 834 (privilege protects communications to physician's agents just as privilege protects communications to attorney's agents). *See generally Foley v. Poschke*, 137 Ohio St. 593, 595, 31 N.E.2d 845, 846 (1941) (attorney-client privilege is not destroyed by the presence of a third person who is the agent of either the attorney or the client). The psychologist's supervisees, particularly those described in R.C. 4732.22(D) (persons holding master's or doctoral degrees in psychology) and R.C. 4732.22(E) (students from accredited schools carrying out activities that are part of their prescribed course of study), are analogous to attorneys' law clerks. *Cf.* R.C. 4732.10(B)(5) (requiring that before a psychologist is licensed, he must complete two years of professional experience as a supervisee). Moreover, communication between the client and an unlicensed supervisee may be indispensable to the client's treatment, which is carried out under the direction and responsibility of the licensed psychologist. In light of the foregoing, I conclude that the privilege between a licensed psychologist and his client protects communications between the client and those unlicensed supervisees of the psychologist enumerated in R.C. 4732.22(C), (D), and (E).⁵

The policy behind the psychologist-client privilege reinforces my conclusion that privilege protects communications between supervisee and client. Report No. 45, Group for the Advancement of Psychiatry 92 (1960),⁶ which dealt with the need for confidentiality of psychotherapists, in this case psychiatrists, stated:

The psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication....Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

See also 7 Ohio Admin. Code 4732-17-01(C)(1) (psychologist-client privilege is intended to protect the client by encouraging free disclosure to the psychologist and

⁵ The Ohio Supreme Court has refused to extend the physician-patient privilege to protect communications between a nurse and patient. *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947). The court based its holding on the fact that the nurse-patient relationship was not afforded protection under the privilege statute. *Cf. McCormick on Evidence* §101, at 251 (3d ed. 1984) (criticizing the *Weis* decision). I conclude that *Weis* is not controlling here. There are a number of distinctions between a nurse and an unlicensed supervisee of a licensed psychologist. For example, a nurse is licensed to practice a separate profession, and is not training to become a physician. A nurse does not practice that profession under the authority of the physician's license. Finally, a nurse is not necessarily an agent of the physician, and the nurse's care is not limited to treatment performed solely under a physician's order, control and full responsibility.

I note also that one commentator, in examining the physician-patient privilege, has stated that "the application of strict agency principles...seem[s] inconsistent with the realities of modern medical practice, and the preferable view is that of the courts which have based their decisions upon whether the communication was functionally related to diagnosis and treatment." (Footnotes omitted.) *McCormick on Evidence* §101, at 250 (3d ed. 1984). Communications between client and supervisee are, of course, "functionally related to diagnosis and treatment."

⁶ As quoted in 2 J. Moore, *Federal Rules of Practice, Federal Rules of Evidence* 496 (1988).

preventing disclosure to others). The privilege between a psychotherapist and client is especially vital to the needs of the client. Extending the psychologist-client privilege to the unlicensed supervisee is also necessary to the psychology profession. R.C. 4732.10(B)(5) requires an applicant for admission to the psychology licensing examination to have "had at least two years of supervised professional experience in psychological work of a type satisfactory to the board, at least one year of which must be postdoctoral." Thus, each applicant must have some experience as a supervisee before he becomes licensed. If communications between client and supervisee were not protected by the psychologist-client privilege, such communications would be hindered and the effectiveness of the supervisee's training would be greatly diminished.

I turn now to your third question, in which you ask whether an unlicensed supervisee of a licensed psychologist is subject to the felony reporting requirement in R.C. 2921.22. Because I have concluded that the privilege between a licensed psychologist and a client extends to that psychologist's unlicensed supervisee, I also conclude that the supervisee has the same choices as the psychologist. Therefore, under R.C. 2921.22(F)(1), the supervisee is not required to disclose information which "is privileged by reason of the relationship between" a licensed psychologist and a client. However, under R.C. 2921.22(G), a supervisee who chooses to disclose such information is not vulnerable to any liability or recrimination for a breach of privilege or confidence.

Therefore, it is my opinion and you are advised that:

1. Under R.C. 2921.22(F)(1), a licensed psychologist is not required to report a felony which has been or is being committed when such information is privileged under R.C. 4732.19 due to the psychologist-client relationship.
2. Under R.C. 2921.22(G), a licensed psychologist who voluntarily discloses privileged information to law enforcement authorities in reporting that a felony has been or is being committed is not subject to any liability or recrimination for breach of privilege or confidence for such disclosure.
3. The privilege between a licensed psychologist and his client protects communications between the client and those unlicensed supervisees of the psychologist enumerated in R.C. 4732.22(C), (D), and (E).
4. Under R.C. 2921.22(F)(1), those unlicensed supervisees of a licensed psychologist enumerated in R.C. 4732.22(C), (D) and (E) are not required to report a felony which has been or is being committed when such information is privileged under R.C. 4732.19 due to the psychologist-client relationship.
5. Under R.C. 2921.22(G), those unlicensed supervisees of a licensed psychologist enumerated in R.C. 4732.22(C), (D) and (E) who disclose privileged information to law enforcement authorities in reporting that a felony has been or is being committed are not subject to any liability or recrimination for breach of privilege or confidence for such disclosure.