

**Rule 504 Physician-patient privilege.** (a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a physician.

(2) A "physician" is a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition, including alcohol or drug addiction, among oneself, the patient's physician, and persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the physician at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness or substance abuse, or in proceedings for the discharge or release of a patient previously hospitalized for mental illness or substance abuse.

(2) Examination by order of court. If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) Proceedings against physician. There is no privilege under this rule in any administrative or judicial proceeding in which the competency, practitioner's license, or practice of the physician is at issue, provided that the identifying data of the patients whose records are admitted into evidence shall be kept confidential unless waived by the patient. The administrative agency, board, or commission may close the proceeding to the public to protect the confidentiality of the patient.

(5) Furtherance of crime or tort. There is no privilege under this rule if the services of the physician were sought, obtained, or used to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or tort.

(6) Prevention of crime or tort. There is no privilege under this rule as to a communication reflecting the patient's intent to commit a criminal or tortious act that the physician reasonably believes is likely to result in death or substantial bodily harm. [L 1980, c 164, pt of §1; gen ch 1985; am L 2002, c 134, §1]

#### **RULE 504 COMMENTARY**

This rule is based upon Uniform Rule of Evidence 503 and the former statute, Hawaii Rev. Stat. §621-20.5 (1976, Supp. 1979) (repealed 1980) (originally

enacted as L 1972, c 104, §1(o); am L 1978, c 52, §1), which codified Hawaii's physician-patient privilege.

The rule makes clear that privileged communications may relate to the diagnosis or treatment of "physical, mental, or emotional condition[s], including alcohol or drug addiction." Designed to encourage free disclosure between physician and patient, the privilege belongs only to the patient and may be invoked by the physician "only on behalf of the patient."

Subsection (d)(4) conforms to the 1978 amendment to the predecessor statute, Hawaii Rev. Stat. §621-20.5 (1976) (repealed 1980).

The federal common law does not recognize the privilege. In *Gretsky v. Basso*, 136 F. Supp. 640, 641 (D. Mass. 1955), the court upheld admission of hospital patients' records against a claim of privilege, ruling: "[T]his is a federal administrative proceeding and state evidentiary restrictions [do] not apply." In *Felber v. Foote*, 321 F. Supp. 85, 87-88 (D. Conn. 1970), the court said: "[T]he common law knew no privilege for confidential information imparted to a doctor.... Whatever protection there is against disclosure of a patient's communications to his physician is afforded solely by the law of the individual states."

#### **RULE 504 SUPPLEMENTAL COMMENTARY**

The Act 134, Session Laws 2002 amendment adds subsections (d)(5) and (d)(6), which are two new exceptions to the privilege coverage of this rule.

Subsection (d)(5), entitled "Furtherance of crime or tort", bears close kinship to the counterpart crime-fraud exception to the lawyer-client privilege, rule 503(d)(1). See the 1992 supplemental commentary to rule 503, explaining that "the paramount policy of the crime-fraud exception is to thwart the exploitation of legal advice and counseling in furtherance of unlawful goals". A similar policy, applicable to physicians' services, informs this exception.

This new exception lifts the privilege shield from communications that reflect a patient's effort to exploit a physician's services for a criminal or tortious purpose, such as the unlawful acquisition of controlled drugs and substances. As the commentary to Cal. Evid. Code §997, which is similar, points out: "[T]here is no desirable end to be served by encouraging such communications."

Subsection (d)(6), entitled "Prevention of crime or tort", is intended to allow physicians to make disclosures to avoid tort liability of the sort imposed by *Tarasoff v. Regents*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976) (psychotherapist's common law duty to warn foreseeable victims of a patient the therapist knows to be dangerous and likely to harm those victims). Hawaii will likely embrace *Tarasoff*, see *Lee v. Corregedore*, 83 H. 154, 925 P.2d 324 (1996), declining to create a duty to prevent a patient's suicide but recognizing a psychotherapist's duty to "disclose the contents of a confidential communication where the risk to be prevented thereby is the danger of violent assault...." Hawaii added a *Tarasoff* exception to its lawyer-client privilege in 1992, rule 503(d)(2), and the present amendment extends the same protection to physicians.

#### **Case Notes**

Physician-patient privilege applicable in criminal cases. 66 H. 448, 666 P.2d 169.

Under subsection (d), doctor's communications with U.S. Attorney, engaged in pursuant to federal district court order requiring that patient be subjected to physical examination, were not privileged. 89 H. 188, 970 P.2d 496 (1998).

Defendant's toxicology report was a privileged physician-patient communication; admission of report into evidence was not harmless beyond a reasonable doubt. 102 H. 449, 77 P.3d 940 (2003).

Where medical records of petitioner's treatment at the hospital was protected by petitioner's physician-patient privilege that was not waived, regardless of any relevancy of those records to the judicial proceeding before the respondent judge, petitioner's right of confidentiality under subsection (b) prohibited any disclosure of petitioner's medical records, including in camera disclosure to the respondent judge. 125 H. 31, 251 P.3d 594 (2011).

Where petitioner was not a party to plaintiff's dog bite lawsuit against defendant, petitioner's health information in petitioner's medical records at hospital was protected by petitioner's right to privacy under the state constitution, article I, §6 and the physician-patient privilege of this rule. 125 H. 31, 251 P.3d 594 (2011).

[Previous](#)

[Vol13\\_Ch0601-0676](#)

[Next](#)