

MEMORANDUM

TO: Chairman Owens and Members of the Senate Judiciary Committee
FROM: Katherine McBride, Assistant Revisor
DATE: January 24, 2012
RE: 2012 SB 280

During the hearing on Senate Bill 280, Senator Vratil asked whether a physician-patient privilege can be claimed by a person who has undergone an evaluation. Subsection (d) of K.S.A. 59-29a05 addresses this evaluation, which is conducted after a probable cause determination has been made that a person is a sexually violent predator.

There is no physician-patient privilege at common law. *Armstrong v. Street Railway Co.*, 93 Kan. 483 (1914). Such a privilege was statutorily created by K.S.A. 60-427, which prevents physicians from the disclosure of any confidential communications between them and their patients. The patient is the holder of this privilege. Therefore, it is the patient's privilege to either claim or waive. However, this statutory privilege is subject to several exceptions, one of which is particularly relevant to 2012 SB 280. Subsection (d) of K.S.A. 60-427 provides:

There is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

The involuntary civil commitment process of a sexually violent predator is a civil court proceeding in which the condition of a person is relevant to the issue of whether or not such person should be involuntarily committed to a secure facility for potential long-term control, care and treatment. Thus, any physician-patient privilege created due to an evaluation conducted by a physician for the purpose of determining whether a person is a sexually violent predator is deemed waived under subsection (d) of K.S.A. 60-427. *See, e.g., Werner v. Kliwer*, 238 Kan. 289 (1985) (physician-patient privilege deemed waived where information possessed by wife's psychiatrist as to her fitness as a parent and ability to care for her children relevant to the issue of child custody in divorce action).

In addition, common law has long provided that waiver of a physician-patient privilege can occur when the patient discloses confidential communications to a third-party, or a third-party is present during the disclosure of the confidential communications. *State v. Cofer*, 187 Kan. 82 (1960) (physician-patient privilege deemed waived in prosecution of father for statutory rape and incest of daughter where state's evidence was based upon the psychological evaluation of daughter conducted by a doctor in the presence of third persons). Therefore, if there is concern of the existence of a physician-patient privilege during the court-directed evaluation of a person under K.S.A. 59-29a05, the presence of a third party during the evaluation would effectively waive any physician-patient privilege.

It should be noted that the person conducting the court-directed evaluation under K.S.A. 59-29a05 is an individual “professionally qualified to conduct such an examination.” This could include a psychologist (both M.D. or Ph.D.), master’s level psychologist, clinical psychotherapist, physician’s assistant, advanced practice registered nurse, etc. Currently, only psychologists (Ph.D.) conduct court-directed evaluations determining whether an individual is a sexually violent predator. However, psychologists (M.D.) and master’s level psychologists have conducted such evaluations in the past. Additionally, there is nothing in the statutory language of K.S.A. 59-29a05 prohibiting a clinical psychotherapist, advanced practice registered nurse or physician assistant, or others “professionally qualified” from conducting such evaluations.

Confidential communications between a licensed psychologist and the psychologist’s client are placed on the same basis as confidential communications between an attorney and the attorney’s client. K.S.A. 74-5323. Attorneys may reveal information relating to the representation of a client to the extent the attorney believes necessary to comply with the requirements of the law or order of any tribunal. K.R.P.C. 1.6. Therefore, upon court order, a licensed psychologist may disclose confidential communications. However, such disclosure would only be to the extent that the licensed psychologist reasonably believed would be necessary to comply with such court order.

Finally, even if the exception of subsection (d) K.S.A. 60-427 is inapplicable, the first element of a physician-patient privilege is that communications between the patient and physician were *confidential* (emphasis added). K.S.A. 60-427(b)(1). The amendatory language of 2012 SB 280 requires the person conducting the evaluation to notify the person being detained that such evaluation will not be confidential and that statements made by the person as well as conclusions drawn by the evaluator will be disclosed to the court, the detained person’s attorney, the prosecutor and the trier of fact at any proceeding conducted under K.S.A. 59-29a01 *et seq.* 2012 SB 280, section 1(e).

Another issue that may be raised concerns the HIPAA privacy rule, and whether a physician is prohibited from disclosing protected health information acquired during the court-directed evaluation under K.S.A. 59-29a05. The federal HIPAA Privacy Rule provides privacy protections for individuals’ individually identifiable health information where such information is held by a covered entity. For the purposes of HIPAA, a “covered entity” includes behavioral and physical healthcare providers, such as those based in correctional facilities. However, covered entities may use or disclose protected health information to the extent that such use or disclosure is required by law and limited to the relevant requirements of such law. 45 C.F.R. § 164.512(a).

A covered entity may disclose protected health information in the course of a judicial proceeding in response to an order of the court, provided that the covered entity discloses only the protected health information expressly authorized by such order. 45 C.F.R. § 164.512(e)(1)(i). Therefore, covered entities such as a physician or psychologist that conduct evaluations under K.S.A. 59-29a05 may disclose protected health information pertaining to the detained person subject to (1) an order of the court; and (2) disclosure of only the protected health information authorized by such order.