Legal Eagles – To give records, or not to give? That is at the top of the list of questions I get from CAC folks.

I start with the general proposition, "No, unless a judge says so." I start from this proposition because of the various statutes that make records that tend to be in a CAC's possession confidential, privileged, or a combination of both.

But that leaves some circumstances unanswered. What happens if the request for records comes in the form of what appears to be a valid authorization, notarized for that extra sizzle? Or what if the request comes at a time where there is no court case pending? After all, if there is no court case, there can be no judge to say so, right?

Those circumstances will remain unanswered for now. For purposes of this Legal Letter, I'd like to discuss a very recent case that again supports the general "No, unless a judge says so" rule.

Importantly, today's case is a procedure-changer for Georgia CACs. Cases that affect an organization's procedures only come along every once in a while, so please take note.

As always, the rules discussed in Georgia cases may have application to your state as well. Your lawyer of choice will have to research a few statutes to make her determination for you, and to decide whether today's Georgia case will at a minimum be a good road map for other states.

Case: Waters v. State, Georgia Court of Appeals, Case No. A09A1980 (Decided March 26, 2010).

Facts: The Defendant was convicted of molesting his 3 ½ year old granddaughter. The victim complained to her mother that her grandfather gave her a "boo boo," pointing to her vagina. A pediatrician examined the child the next day, and while noticing redness determined that it was inconclusive as to evidence of molestation.

However, child protective services (DFACS in Georgia) became involved, and referred the child to a children's advocacy center for a forensic interview. Police interviewed the grandfather, telling him that he would be notified if a criminal warrant was issued. Two days later, the grandfather purchased a one-way ticket to Costa Rica. He was arrested two months later while re-entering the U.S., and was ultimately tried, convicted, and sentenced to 20 years in prison.

On appeal, the Defendant argued that the State's prosecutor did not properly comply with discovery, i.e., the pretrial procedure of exchanging documents, photographs, tangible objects, etc. with the defense attorney. Specifically, the Defendant argued that during trial, he discovered for the first time that the victim had a counselor who had conducted additional sessions of which he was not aware. The Defendant blamed the prosecutor for not turning those session notes over during the discovery process.

Result: Conviction affirmed.

Good rules to know: This case has ***two critical rules*** to know and understand**,** both for counselors who work for CACs and for private practice counselors.

First, I'll discuss prosecutorial duties related to criminal discovery in Georgia. Remember our Legal Eagle mission – Legal Eagles must have an advanced understanding of the legal rules that affect their day-to-day practice, including legal rules that might apply to professionals (such as prosecutors in this instance) outside of their fields, ***so long as those legal rules can indirectly or directly impact them.***

During what is known as "reciprocal" discovery, prosecutors have to provide information to the defense that the prosecutors are going to use in their main case or in rebuttal of the defense case, so long as that information is in the prosecutor's "***possession, custody or control."***

Georgia law also makes clear that the prosecutor has to make an attempt to acquire the information that is required to be produced in discovery. That is, the prosecutor cannot say that since the information is not currently within her possession, she does not have an affirmative duty to attempt to acquire it if she can.

Thus, the question arises: Does that duty to attempt to acquire such information apply to counseling notes by a CAC counselor or a private practice counselor, when that counselor provides services related to the underlying allegations of child sexual abuse? Great question!

Before I answer it, there is some background to discuss, related to the interaction between CAC folks and law enforcement, and between CAC folks and the district attorney's office. In Georgia, I have been adamant in my position when representing CACs in court that the CACs are separate and distinct from law enforcement and the DA's office. It is a well-worn strategy for the defense to either imply or state explicitly that CAC professionals are mere rubber stamps for the prosecution. It is a bias attack that is so routine that it should be no surprise.

CACs pros are not rubber stamps! They must be objective, independent and professional, and follow standards and protocols in order to carry out their responsibilities. They must understand that the DA's office is not staffed with CAC legal representatives. The DA's office is staffed with attorneys who work on behalf of the State of Georgia (or Kentucky)(or California)(or New Jersey).

Today's case makes that point directly. In today's case, the State's position was that ***"[T]here was no duty for the State to affirmatively seek the therapist's work product, and that it had not seen any of the information contained in the counselor's therapy reports."***

The Court of Appeals agreed. The court held that ***"[C]ontrary to the Defendant's contentions, the . . . discovery act does not provide an independent statutory basis for the discovery of the therapist's files."***

In sum, ***Rule 1***: Prosecutors have no duty under Georgia's reciprocal discovery law to affirmatively obtain the notes of counselors or therapists who treat the alleged sexual abuse victim. An important offshoot of this rule is that counselors and therapists of CACs, and private practice counselors and therapists, are ***not rubber stamps!***

That leads to the second rule of the case, and the rule that I believe sets a new procedure for counselors who treat alleged sexual abuse victims, and whose records are subpoenaed as part of litigation.

Preliminarily, for more than two years on this list I've described at various times Georgia's law related to records and reports of child abuse. Many of you have this statute tattooed on your forehead: O.C.G.A. § 49-5-40 et seq., which by law in Georgia makes reports of alleged child sexual abuse ***confidential***, and requires that access to those records are done only on a ***very, very limited basis***. It also provides that CACs can obtain such records (which they do, e.g., from law enforcement or child protective services or M.D.'s), but that CACs cannot release these confidential records except under very limited circumstances.

I have written in the past that it is incumbent upon CAC professionals in other states to have the lawyer of their choice research their state laws to see whether there is a similar statute, which is likely.

Moreover, in February 2009, in Pareja v. State (673 S.E.2d 343), the Georgia Court of Appeals laid down a rule that an attorney (whether it is a criminal defense lawyer or a plaintiff's lawyer or defense lawyer in a civil case) could not serve a subpoena directly on a Georgia CAC's for the CAC's ***forensic file.***

That is, the Court of Appeals held that under O.C.G.A. § 49-5-40 et seq., and particularly § 49-5-41(a)(2), the proper procedure is for an attorney to request that the ***trial court*** issue a subpoena to the CAC, compelling the CAC to produce the ***forensic file*** to the Court so that the court could conduct an *in-camera* (in her chambers) inspection of these confidential records.

The inspection would be the judge's opportunity to determine whether the records were relevant to the issues in the case, and whether they would be released to the parties.

I said in February 2009 that Pareja v. State was a game-changer. It stated that a subpoena demanding forensic files served directly on CAC by an attorney is ***invalid***. At the time, I wondered whether the Pareja v. State rule applied to CAC counseling records. It wasn't specifically addressed in Pareja.

Houston, we have our answer.

In today's Waters v. State case, the counseling records for the child were analyzed by the Georgia Court of Appeals through the lens of O.C.G.A. § 49-5-40 et seq., which is the exact statute that applies to the confidential nature of records concerning reports of child abuse that was analyzed in Pareja v. State.

The Court of Appeals stated that, ***"Thus, as Waters did not request an in camera inspection of [the therapist's] records . . . the State was not obligated to produce the file and did not violate his due process rights under . . . Georgia's reciprocal discovery act by not providing the file earlier."***

I'm going to read one other thing into today's case, due to some of the language in the Court's quote that I just cited. I do not believe, even if the Defendant requested that the trial court conduct an *in camera* inspection of the therapy records, that the prosecutor would have a duty to produce the therapy file. Instead, it would be the therapist's duty to provide the file to the Court for the *in camera* inspection.

After all, the therapy file does not just contain confidential records of child abuse under O.C.G.A. § 49-5-40, but ***privileged*** information based upon the counseling relationship between the therapist and her client. Thus, the therapist would be the one responding to the *in camera* order, not the prosecutor, which is important because the therapist could then bring issues of counseling privilege to the court's attention as part of the entire analysis the trial judge would have to undertake.

Whew. Heavy lifting today, but nevertheless a very important case. Please feel free to e-mail me with any questions. The importance of today's case is that it goes a long way toward protecting a child's therapy records from unhindered demands.

Best regards.

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