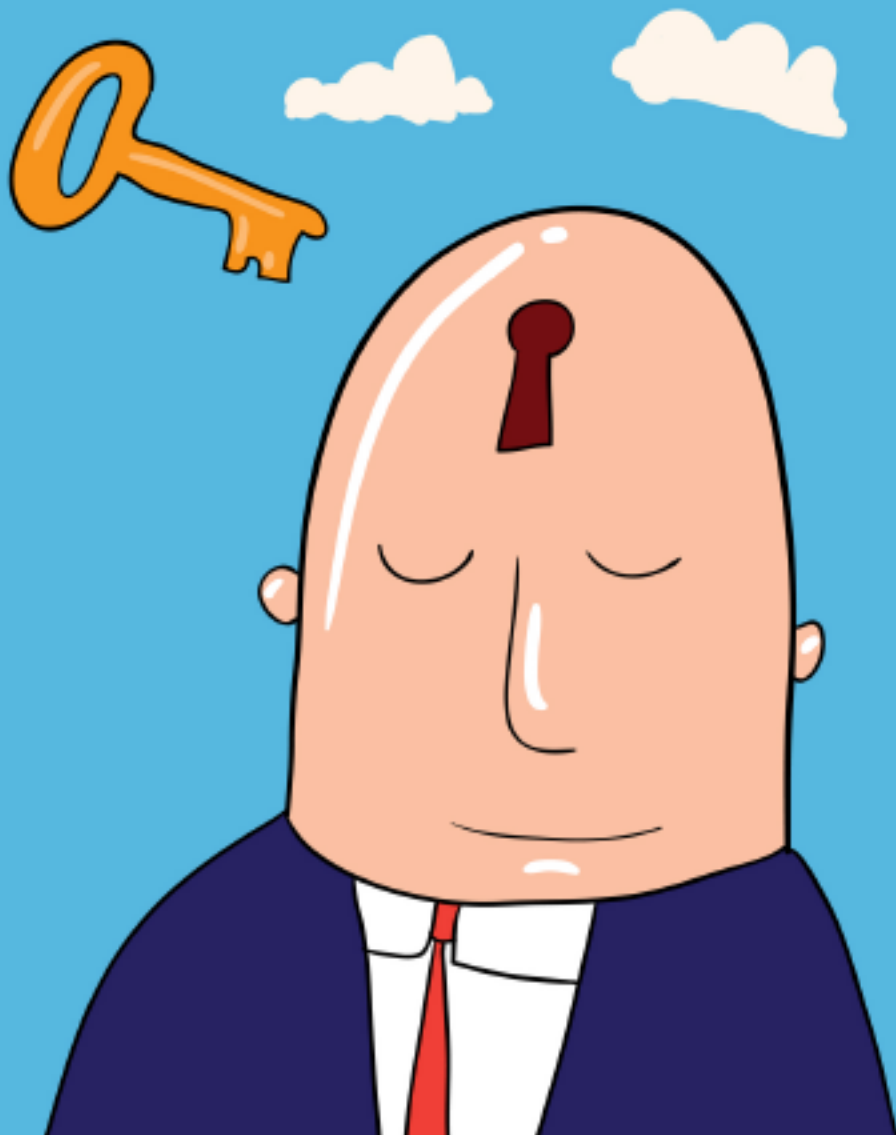
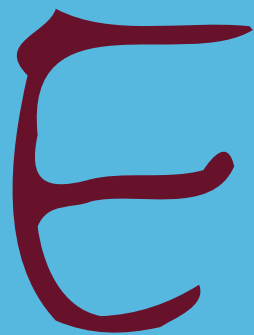


Protecting Confidential Communications

EMPLOYEES AND WORK COUNSELING

BY MICHAEL D. MOBERLY





mployee assistance programs are employer-sponsored counseling services designed to help employees identify and resolve personal and work-related problems. In addition to the assistance they provide to employees, such programs—known as EAPs—benefit employers by improving employee work performance, reducing absenteeism and work-related

injuries, and, in some instances, enabling employers to retain employees whose problems are threatening their careers.¹ Thus, from relatively modest beginnings in which they were used primarily to treat employee drug and alcohol abuse, EAPs have evolved to the point where they are now used by employers throughout the country to assist their employees in addressing a broad range of behavioral health problems.²

The matters addressed in an EAP counseling session may be extremely private.³ Potential discussion topics may include not only alcoholism and other substance abuse issues,⁴ but such equally sensitive and potentially embarrassing subjects as anger management problems,⁵ marital and family discord⁶ (including, on occasion, domestic violence issues),⁷ sexual orientation,⁸ health problems,⁹ and personal financial difficulties.¹⁰

Given the sensitive nature of these subjects, some guarantee of confidentiality may be critical to an employee's willingness to seek counseling. Many EAPs therefore purport to assure employees that the confidentiality of their communications will be maintained.¹¹ However, these assurances often prove to be ineffective,¹² and the courts and some state legislatures have thus begun to consider whether communications between employees and EAP representatives should be protected by a formal evidentiary privilege.¹³

Arizona's Existing Behavioral Health Privileges

Neither the Arizona legislature nor the state's appellate courts have addressed whether an employee's communications with an EAP representative are privileged.¹⁴ However, the legislature has recognized the confidential nature of communications between individuals and several other types of behavioral health counselors.¹⁵ There is at least a colorable argument that the policies underlying these statutory behavioral health privileges are equally

applicable to communications between employees and EAP counselors.¹⁶

Arizona's psychologist-client privilege, for example, generally prohibits psychologists from divulging information disclosed by their patients,¹⁷ provided the information was disclosed in the course of a consultation that was intended to be private and confidential.¹⁸ The state legislature also has extended privileged status to confidential communications between individuals and other behavioral health professionals.¹⁹ These privileges are intended to facilitate the treatment of mental illness by assuring that people will not be deterred from seeking professional help by the fear that their confidential communications will be disclosed to others.²⁰

Although similar policy considerations are implicated by EAP counseling, the legislature has limited the application of Arizona's behavioral health privileges to communications with professionally licensed counselors and therapists,²¹ and the Arizona appellate courts have consistently refused to interpret these privileges more broadly.²²

In *State v. Vickers*,²³ for example, the Arizona Supreme Court held that communications between a prison inmate and a therapist who examined him were not protected by an evidentiary privilege. Although the therapist had a master's degree in counseling psychology, he was neither a psychiatrist nor a licensed psychologist, and thus was permitted to testify at the inmate's subsequent criminal trial concerning incriminating statements the inmate made during the examination.²⁴

Like many other states,²⁵ Arizona does not require EAP representatives or other types of behavioral health counselors to be professionally licensed.²⁶ Thus, although some EAP counselors are licensed psychologists or psychiatrists (and thus potentially covered by one of Arizona's existing privileges),²⁷ many others undoubtedly are not licensed or certified by any state board or agency.²⁸ Accordingly, absent the explicit legislative or judicial recognition of a privilege for unlicensed therapists,²⁹ Arizona employees may be unable to prevent their communications with EAP representatives from being disclosed in subsequent court proceedings.³⁰

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The Ninth Circuit's Recognition of an EAP Privilege

In nondiversity cases litigated in Arizona's federal courts, the trial courts apply federal privilege law,³¹ and specifically decisions of the Ninth Circuit.³² In *Oleszko v. State Compensation Insurance Fund*,³³ a case of first impression among the federal appellate courts, the Ninth Circuit extended the federal psychotherapist–patient privilege recognized by the U.S. Supreme Court in *Jaffee v. Redmond*³⁴ to communications between employees and unlicensed EAP counselors.³⁵

The *Oleszko* court focused on the critical role that EAPs currently play in providing mental health treatment. The court observed that many people could not afford behavioral health care if not for the availability of employer-sponsored EAP services. Because the potential disclosure of the confidential information to which EAP representatives are privy may deter employees from using those services, the court concluded that the recognition of an EAP privilege comparable to the privilege applicable to licensed therapists under *Jaffee* was necessary to assure that people who cannot afford the services of licensed professionals have meaningful access to mental health care.³⁶

The Impact of "Oleszko" on State Privilege Law

Oleszko is not binding in Arizona state court cases.³⁷ Nevertheless, the state's appellate courts could follow the Ninth Circuit's lead and recognize a comparable EAP privilege as a matter of state common law.³⁸ Rule 501 of the Arizona Rules of Evidence authorizes the Arizona courts to develop privilege rules on a case-by-case basis,³⁹ and the analysis in federal decisions like *Oleszko* is likely to be instructive in any state court case in which the adoption of an EAP privilege is being considered.⁴⁰ Indeed, the authors of Arizona's preeminent evidence treatise have indicated that state privilege law may evolve in precisely the manner suggested in *Oleszko*.⁴¹

On the other hand, Rule 501 also confirms the legislature's primary role in developing Arizona's evidentiary privileges.⁴² Where the legislature has exercised this authority—as in the case of Arizona's existing behavioral health privileges—the state's courts have consistently refused to modify or extend those privileges beyond their statutory limits.⁴³ This restrictive view of the judiciary's

role in the development of state privilege law is premised on the assumption that the legislature is better equipped to balance the competing policies at stake,⁴⁴ and has explicitly done so in those instances in which it has created statutory privileges.⁴⁵

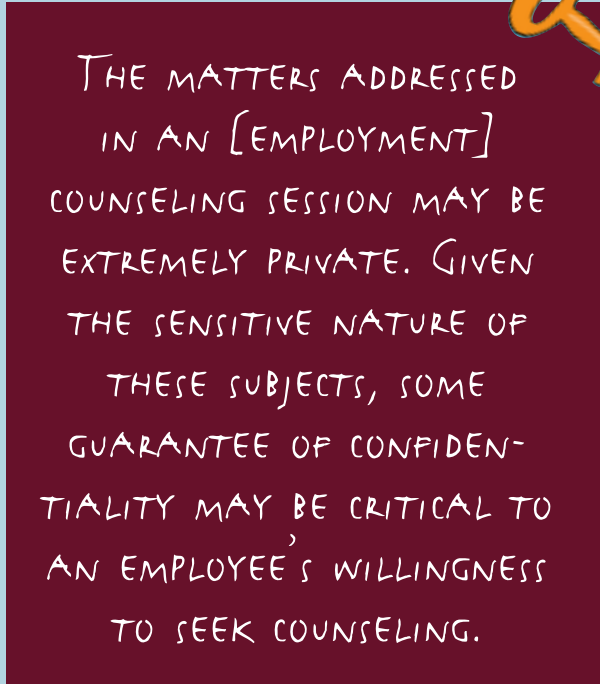
Thus, in *State v. Howland*,⁴⁶ the appellant urged the Arizona Court of Appeals to exercise its authority under Rule 501 to recognize a privilege protecting his communications with an unlicensed psychologist. The court declined the invitation, noting that the legislature has created a psychologist–client privilege that applies only when the psychologist is state-certified.⁴⁷ Implicit in this analysis is the assumption that the principal policy objective underlying the statutory privilege—enhancing the effective diagnosis and treatment of mental illness⁴⁸—would not be furthered by extending its protection to communications with unlicensed therapists.⁴⁹

This conclusion is supported by the analysis in *Jane Student 1 v. Williams*,⁵⁰ one of the few cases to consider the impact of the *Oleszko* decision.⁵¹ The *Williams* court ultimately rejected the Ninth Circuit's analysis,

noting that the recognition of an EAP privilege is contrary to the view prevailing in the overwhelming majority of states, including Arizona,⁵² that have refused to extend their behavioral health privileges to unlicensed counselors.⁵³

The *Williams* court stated that limiting the privilege to licensed therapists establishes "a bright line for the boundaries of the privilege, so that both professional and patient may be clear about the confidentiality of their communications."⁵⁴ More important, the court concluded that this limitation furthers the overriding public policy underlying the privilege of facilitating the treatment of mental health problems.⁵⁵

With respect to the latter issue, the court asserted that the Ninth Circuit misread *Jaffee*, where the Supreme Court implicitly recognized that professional licensing requirements provide "a minimum, if rough, measure of assurance that the privilege is implicated only when the patient communicates with one who, by satisfying the requirements for licensure, has demonstrated some threshold level of ability to assist the patient in improving her mental health."⁵⁶ Other courts have reached essentially the same conclusion,⁵⁷ and even the *Oleszko* court acknowledged that "[a]s state laws begin to catch up with the rapid growth in EAPs, more states will undoubtedly establish licensing programs and state licensure may, in turn, become a more relevant factor in determining whether a particular EAP is legitimate."⁵⁸



THE MATTERS ADDRESSED IN AN [EMPLOYMENT] COUNSELING SESSION MAY BE EXTREMELY PRIVATE. GIVEN THE SENSITIVE NATURE OF THESE SUBJECTS, SOME GUARANTEE OF CONFIDENTIALITY MAY BE CRITICAL TO AN EMPLOYEE'S WILLINGNESS TO SEEK COUNSELING.

The Dangerous Patient Exception

In *Hamman v. County of Maricopa*,⁵⁹ the Arizona Supreme Court adopted the view, widely held by other courts, that in addition to their duty to protect their patients' confidences,⁶⁰ therapists have a potentially conflicting obligation to warn third persons whom their patients have threatened to harm.⁶¹ The Arizona legislature's subsequent attempt to limit the latter duty to situations in which a patient explicitly threatens to seriously injure or kill a specific individual was found to be unconstitutional in *Little v. All Phoenix South Community Mental Health Center, Inc.*⁶²

The common law duty recognized in *Hamman* and reaffirmed in *Little* is now codified in Arizona's licensed behavioral health counselor privilege, which expressly recognizes a therapist's obligation to warn potential victims and "appropriate authorities" when a client poses an imminent danger to others.⁶³ Although a privilege protecting an employee's communications with an unlicensed EAP representative presumably would be subject to the same limitation,⁶⁴ it is not entirely clear whether this "dangerous patient exception" would permit EAP representatives to testify about otherwise privileged communications in subsequent court proceedings.⁶⁵

In California and a few other states, therapists not only are permitted to disclose to authorities or intended victims the danger posed by their patients; they also can be compelled to testify in subsequent judicial proceedings concerning threats made by their patients during the course of therapy.⁶⁶ The Ninth Circuit, on the other hand, has held that the dangerous patient exception merely permits therapists to warn authorities or intended victims, and does not authorize them to reveal their patients' confidential communications in court.⁶⁷

The premise underlying the broader view was discussed in *Guerrier v. Florida*,⁶⁸ where the court addressed the reach of a statutory exception to Florida's therapist-patient privilege applicable when a patient threatens to harm someone and the therapist concludes that the patient is likely to carry out the threat. In that event, the therapist is permitted to disclose the patient's otherwise privileged communications to the extent necessary to warn the potential victim or appropriate law enforcement officials.⁶⁹

In concluding that the exception also permits therapists to testify at a subsequent trial in which a patient is prosecuted for harming the person who was threatened, the court indicated that facilitating the prosecution of such crimes furthers the statutory objective of protecting the public from harm.⁷⁰ The rationale underlying this interpretation of the exception is that permitting the therapist to testify increases the likelihood of a conviction, and convicting and in turn incarcerating a dangerous patient "is one way to ensure protection of the intended victim and others."⁷¹

The Ninth Circuit adopted a more restrictive view of the dangerous patient exception in *United States v. Chase*.⁷² The *Chase* court acknowledged that in some cases permitting therapists to testify concerning their patients' threats would further the exception's objective of protecting the public from harm. The court nevertheless concluded that this benefit is outweighed by the detrimental impact such a broad interpretation of the exception would have on the candor behavioral health privileges are intend-

ed to encourage.⁷³ The court explained:

[A]lthough incarceration is one way to eliminate a threat of imminent harm, in many cases treatment is a longer-lasting and more effective solution. A criminal conviction with the help of a psychotherapist's testimony is almost sure to spell the end of any patient's willingness to undergo further treatment for mental health problems.⁷⁴


Though there is some support for this view in other states,⁷⁵ Arizona courts are unlikely to embrace the Ninth Circuit's restrictive interpretation of the dangerous patient exception.⁷⁶ For one thing, Arizona's statutory behavioral health counselor privilege not only acknowledges a therapist's duty to warn potential victims, but it expressly does not extend to cases in which the duty arises.⁷⁷ Arizona's psychologist-client privilege likewise does not apply when psychologists have "a duty to report information"⁷⁸—as they clearly do in dangerous patient cases.⁷⁹ Because no state law privilege applies in these situations,⁸⁰ therapists presumably can testify about their patients' threatening communications in Arizona state court proceedings.⁸¹

More generally, the balance struck by the Ninth Circuit in *Chase* simply does not reflect the Arizona courts' restrictive view of evidentiary privileges⁸² (and, by implication, their correspondingly broad view of exceptions to those privileges),⁸³ particularly in criminal cases.⁸⁴ Most notably in this regard, the Arizona Court of Appeals has indicated that the public policy favoring the prosecution of criminals outweighs the confidentiality interests served by the state's behavioral health privileges⁸⁵—an observation that has particular resonance in dangerous patient cases.⁸⁶

The Arizona courts' view of these issues is especially compelling in the present context in view of the frequency with which EAP representatives are privy to threatening communications,⁸⁷ as one federal court implicitly recognized.⁸⁸ Indeed, given the alarming prevalence of violence in the modern workplace, requiring EAP representatives to stand silent when employees actually carry out their threats to harm others would seem to be a particularly inappropriate result.⁸⁹

Conclusion

The recognition of a privilege for unlicensed EAP representatives would significantly expand Arizona's existing behavioral health privileges.⁹⁰ Nevertheless, the privilege may be warranted by the critical gate-keeping role EAPs now play in the provision of mental health services⁹¹ and, more specifically, by the fact that some employers "even require assessment by an EAP before they will pay for mental health treatment for their employees."⁹²

Although the Arizona courts are unlikely to recognize a common law EAP privilege,⁹³ the Arizona legislature ultimately may perceive a need for such a privilege.⁹⁴ However, even if Arizona were to recognize this privilege,⁹⁵ it is unlikely to be an absolute one,⁹⁶ as its federal counterpart has been described.⁹⁷ Any state EAP privilege instead presumably would be subject to the same dangerous patient exception as Arizona's existing behavioral health privileges.⁹⁸ 

1. See *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154, 1155-56 (9th Cir. 2001); *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 610 (4th Cir. 1996).
 2. See *Oleszko*, 243 F.3d at 1155. However, providing assistance to employees with substance abuse problems continues to be “a key element of any properly implemented EAP.” *Mountaineer Gas*, 76 F.3d at 610.
 3. See *Oleszko*, 243 F.3d at 1157.
 4. See *Zakaras v. United Airlines, Inc.*, 121 F. Supp. 2d 1196, 1204 (N.D. Ill. 2000); *Hayes v. Sweeney*, 961 F. Supp. 467, 473 (W.D.N.Y. 1997).
 5. See, e.g., *Jordan v. AllGroup Wheaton*, 218 F. Supp. 2d 643, 646-47 & n.4 (D.N.J. 2002).
 6. See, e.g., *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993, 996 (S.D. Ind. 2000); *Collado v. City of Albuquerque*, 904 P.2d 57, 60 (N.M. Ct. App. 1995).
 7. See *Oleszko*, 243 F.3d at 1159.
 8. See, e.g., *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 497 (5th Cir. 2001).
 9. See *In re General Motors Corp.*, 3 F.3d 980, 985 (6th Cir. 1993).
 10. See, e.g., *Crawford v. Martin Marietta/Michoud Aerospace*, 713 So. 2d 781, 782 (La. Ct. App. 1998).
 11. See *Oleszko*, 243 F.3d at 1156 & n.3.
 12. See, e.g., *Zakaras*, 121 F. Supp. 2d at 1215; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ran*, 67 F. Supp. 2d 764, 777 (E.D. Mich. 1999).
 13. See *Oleszko*, 243 F.3d at 1158; Taruna Garg, *Expanding the Psychotherapist–Patient Privilege to Include Unlicensed Counselors*, 29 J.L. MED. & ETHICS 237, 238 (2001).
 14. See generally *Oleszko*, 243 F.3d at 1158 (observing that most states “have yet to create a specific privilege for ... confidential communications to EAP counselors”).
 15. See *Barnes v. Outlaw*, 937 P.2d 323, 327 (Ariz. Ct. App. 1996), *vacated in part on other grounds*, 964 P.2d 484 (Ariz. 1998).
 16. See *Oleszko*, 243 F.3d at 1157; Jack Achiezer Guggenheim & Aaron D. Werbel, *Confidentially Speaking: Why the Psychotherapist–Patient Privilege Should Include Employee Assistance Program (“EAP”) Counselors*, 68 UMKC L. REV. 29, 32-33 (1999).
 17. See A.R.S. § 32-2085.A.
 18. See *Blazek v. Superior Court*, 869 P.2d 509, 515 (Ariz. Ct. App. 1994); *State v. Ortiz*, 698 P.2d 1301, 1302-03 (Ariz. Ct. App. 1985).
 19. See, e.g., *State v. Beaty*, 762 P.2d 519, 526 (Ariz. 1988) (noting that “a psychiatrist is treated as a physician” for purposes of Arizona’s physician–patient privilege) (discussing A.R.S. § 13-4062(4)); *P.M. v. Gould*, 136 P.3d 223, 227 ¶ 15 (Ariz. Ct. App. 2006) (discussing the statutory privilege “for communications between a patient and a behavioral health professional”) (citing A.R.S. § 32-3283).
 20. See *Bain v. Superior Court*, 714 P.2d 824, 827 n.1 (Ariz. 1986).
 21. See *Barnes*, 937 P.2d at 327.
 22. See generally *State v. Melendez*, 812 P.2d 1093, 1095 (Ariz. Ct. App. 1991) (“It is not the court’s prerogative to enlarge privileges.”), *vacated in part on other grounds*, 834 P.2d 154 (Ariz. 1992).
 23. 633 P.2d 315 (Ariz. 1981).
 24. See *id.* at 319-20.
 25. See *Oleszko*, 243 F.3d at 1158 n.5.
 26. See *Barnes*, 937 P.2d at 328 n.2.
 27. See *Oleszko*, 243 F.3d at 1156 n.2 (observing that “many EAPs do have licensed psychologists, psychiatrists, or social workers on staff”).
 28. See, e.g., *Reich v. Price*, 429 S.E.2d 372, 375 (N.C. Ct. App. 1993) (describing an EAP counselor who was “not qualified or licensed as a practicing psychologist”).
 29. See, e.g., *People v. Sisneros*, 55 P.3d 797, 799-800 (Colo. 2002) (discussing Colorado’s statutory psychologist–patient privilege, which applies to an “unlicensed psychotherapist”) (quoting COLO. REV. STAT. § 13-90-107(1)(g)).
 30. Cf. *Cunningham v. Southlake Ctr. for Mental Health, Inc.*, 125 F.R.D. 474, 477 (N.D. Ind. 1989) (refusing to extend the psychotherapist–patient privilege to a social worker who was not “a licensed or certified psychologist”).
 31. See *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1009 (9th Cir. 1996). In diversity cases, by contrast, “questions of privilege are controlled by state law.” *In re Cal. Pub. Utilities Comm’n*, 892 F.2d 778, 781 (9th Cir. 1989) (citing FED. R. EVID. 501); see also *Roelbs v. Minn. Life Ins. Co.*, 228 F.R.D. 642, 644 (D. Ariz. 2005).
 32. See *Southwest Ctr. for Biological Diversity v. Rogers*, 950 F. Supp. 278, 280 (D. Ariz. 1996).
 33. 243 F.3d 1154 (9th Cir. 2001).
 34. 518 U.S. 1 (1996).
 35. See *Oleszko*, 243 F.3d at 1159.
- Resolving a split among the lower federal courts, the *Jaffee* Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.” *Jaffee*, 518 U.S. at 15.
36. See *Oleszko*, 243 F.3d at 1157-58.
 37. See *United States v. Chase*, 340 F.3d 978, 991 (9th Cir. 2003) (observing that a “federal testimonial privilege would not apply in state court proceedings”). Even U.S. Supreme Court interpretations of federal privilege law are merely “persuasive, but not binding” in state court. *City of Tucson v. Superior Court*, 809 P.2d 428, 430 (Ariz. 1991).
 38. See Garg, *supra* note 13, at 238 (observing that the Ninth Circuit’s decision in *Oleszko* “is likely ... [to] influence similar cases arising in state court”).
 39. See *City of Tucson*, 809 P.2d at 432 (discussing ARIZ.R.EVID. 501).
 40. See *State v. Malloy*, 639 P.2d 315, 318 n.3 (Ariz. 1981) (noting that the Arizona evidence rules “were modeled after the Federal Rules with the hope that evidence practices would be similar in state and federal court and that federal case law would be useful in Arizona”).
 41. See JOSEPH M. LIVERMORE ET AL., LAW OF EVIDENCE § 501.1, at 122 (4th ed. 2000):
Psychiatrists, being physicians, are protected by a privilege. Psychologists, especially clinical psychologists, argued that they did the same work, heard the same secrets, and to deny them the privilege was ... to burden psychological patients with a risk that they ought not to endure for choosing one form of therapy or one kind of therapist over another. Once psychologists have a privilege, social workers claim the same right, adding that to reserve the privilege to the more expensive counselors is to protect only the secrets of the wealthy. (Footnote omitted.)
 42. See *State ex rel. Thomas v. Schneider*, 130 P.3d 991, 995 ¶ 19 (Ariz. Ct. App. 2006) (“[I]n promulgating its evidentiary rules, the supreme court deferred to any legislative definition of ‘privilege.’ It specified that questions of privilege are governed by the common law except when statute dictates otherwise.”) (citing ARIZ.R.EVID. 501).
43. See, e.g., *Matera v. Superior Court*, 825 P.2d 971, 975 (Ariz. Ct. App. 1992); *Benton v. Superior Court*, 897 P.2d 1352, 1355 (Ariz. Ct. App. 1994).
 44. See generally *Gipson v. Bean*, 753 P.2d 168, 172 (Ariz. Ct. App. 1987) (“[T]he granting or withholding of any privilege requires a balancing of competing policies.”).
 45. See, e.g., *State v. Wilson*, 26 P.3d 1161, 1167 (Ariz. Ct. App. 2001) (“We assume our legislature considered and accounted for the various policy concerns ... when it codified the [physician-patient] privilege.”).
 46. 658 P.2d 194 (Ariz. Ct. App. 1982).
 47. See *id.* at 197-99 (discussing A.R.S. § 32-2085).
 48. See *Bain*, 714 P.2d at 827 n.1.
 49. Cf. *Kansas v. Berberich*, 978 P.2d 902, 909 (Kan. 1999):
The purpose of the privilege is to encourage people to seek and receive treatment for problems society endeavors to improve. At the time the legislature adopted the acts regulating licensed professional counselors and licensed psychologists, it was attempting to regulate and establish minimum qualifications for counselors and psychologists. No reason existed to encourage clients to seek treatment from individuals who were not licensed.
 50. 206 F.R.D. 306 (S.D. Ala. 2002).
 51. There are relatively few cases addressing the applicability of the psychotherapist-patient privilege to unlicensed therapists in any context. See *Speaker ex rel. Speaker v. County of San Bernardino*, 82 F. Supp. 2d 1105, 1114 & n.9 (C.D. Cal. 2000).
 52. See *Williams*, 206 F.R.D. at 310 n.9.
 53. See *id.* at 310.
 54. See *id.* at 309. This assertion is debatable. See, e.g., Guggenheim & Werbel, *supra* note 16, at 44 (observing that “the uniform extension of [a] privilege to EAP counselors ... can improve consistency and thus reinforce both the personal and societal value of seeking help from mental health provider[s]”).
 55. See *Williams*, 206 F.R.D. at 309.
 56. *Id.* In this regard, the *Williams* court asserted that the Ninth Circuit “missed the significance of the Supreme Court’s limitation of the [psychotherapist-patient] privilege to licensed professionals.” *Id.*
 57. See, e.g., *United States v. Whitney*, No. 05-40005-FDS, 2006 WL

- 2927531, at *3 (D. Mass. Aug 11, 2006) (“Given the [Jaffee] Court’s express use of the term ‘licensed,’ and in light of the vigorous dissent opposing the extension of the privilege even to licensed social workers, it seems clear that the privilege does not apply to ... counseling personnel who are not licensed, even if they are performing therapeutic functions.”) (citation omitted); see also *United States v. Schwenson*, 151 F.3d 650, 657 n.4 (7th Cir. 1998) (“Other than licensed psychiatrists, psychologists and social workers, the Supreme Court in *Jaffee* did not define ‘psychotherapist.’”).
58. *Oleszko*, 243 F.2d at 1158 n.5.
59. 775 P.2d 1122 (Ariz. 1989).
60. See *Barnes*, 937 P.2d at 328.
61. See *Hamman*, 775 P.2d at 1127-28; see also *Davis v. Mangelsdorf*, 673 P.2d 951, 953 (Ariz. Ct. App. 1983) (discussing *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976)).
62. 919 P.2d 1368, 1375-76 (Ariz. Ct. App. 1995) (abrogating A.R.S. § 36-517.02).
63. A.R.S. § 32-3283.C.1.
64. See, e.g., *Acquarola v. Boeing Co.*, No. Civ. A. 03-CV-2486, 2004 WL 540487, at *3 (E.D. Pa. Feb. 26, 2004) (indicating that an exception to any EAP privilege would apply “if a serious threat of harm to the patient or others can be averted only by disclosure by the therapist”).
65. There is no Arizona appellate authority directly addressing this question, and other courts are split on the issue. See *Chase*, 340 F.3d at 985.
66. See *People v. Felix*, 112 Cal. Rptr. 2d 311, 317 (Ct. App. 2001); *Wisconsin v. Agacki*, 595 N.W.2d 31, 36-38 (Wis. Ct. App. 1999).
67. See *Chase*, 340 F.3d at 984-92.
68. 811 So. 2d 852 (Fla. Dist. Ct. App. 2002).
69. See *id.* at 855 (discussing FLA. STAT. § 456.059(3)).
70. See *id.* at 855-56.
71. *Chase*, 340 F.3d at 991.
72. 340 F.3d 978 (9th Cir. 2003).
73. See *id.* at 990-91. In this regard, the court observed that “patients will be more reluctant to divulge unsavory thoughts or urges if they know that the therapist may be required to testify about the content of therapeutic sessions.” *Id.* at 990.
74. *Id.* at 991; cf. *United States v. Hayes*, 227 F.3d 578, 585 (6th Cir. 2000) (“While ... incarceration would serve the ‘public end’ of neutralizing the threat posed by a patient, the price paid in achieving the neutralization may often be that many patients will not seek the professional help they need to regain their mental and emotional health.”).
75. See, e.g., *People v. Wharton*, 809 P.2d 290, 348 (Cal. 1991) (Broussard, J., dissenting) (“[T]he [psychotherapist-patient] privilege and the exceptions to that privilege should be interpreted to encourage potentially dangerous persons to seek psychotherapy by providing them with protection against the disclosure of their confidences in subsequent criminal proceedings.”).
76. It is not unusual for the scope of an Arizona privilege to differ from that of its federal counterpart. See, e.g., *Roman Catholic Diocese of Phoenix v. Superior Court*, 62 P.3d 970, 974 n.7 (Ariz. Ct. App. 2003).
77. See A.R.S. § 32-3283.C.1.
78. *Id.* § 32-2085.A. Even the attorney-client privilege “yields” when an individual threatens “to cause serious harm to another.” *Martin v. Reinstein*, 987 P.2d 779, 806 ¶ 96 (Ariz. Ct. App. 1999). This limitation on the application of Arizona’s oldest and most “rigorously guarded” evidentiary privilege, *State v. Towery*, 920 P.3d 290, 299 n.6 (Ariz. 1996), is instructive in interpreting the state’s emerging behavioral health privileges. See, e.g., *State v. Sands*, 700 P.2d 1369, 1374 (Ariz. Ct. App. 1985) (psychologist-client privilege).
79. See *Little*, 919 P.2d at 1375-76; *Hamman*, 775 P.2d at 1127-28.
80. Cf. *Wharton*, 809 P.2d at 312 (“[I]f the therapist believes the patient is a danger to another and disclosure is necessary to prevent the danger[], the statute ... provides that there is no privilege.”) (internal punctuation omitted).
81. By way of analogy, a patient impliedly waives Arizona’s physician-patient privilege if he “threaten[s] a third party with his physician-patient communications.” *State v. Wilson*, 26 P.3d 1161, 1167-68 ¶ 17 (Ariz. Ct. App. 2001). Under these circumstances, the “privilege dissolves and the public’s evidentiary interest regains primacy.” *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 764 P.2d 759, 764 (Ariz. Ct. App. 1988); see also *Wharton*, 809 P.2d at 314 (holding that where a therapist’s duty to warn has arisen, the therapist may “reveal, in a later trial or proceeding, ... the patient’s statements, made in therapy, which caused or triggered the warning”).
82. See *Indus. Comm’n v. Superior Court*, 595 P.2d 166, 167 (Ariz. 1979) (“Privileges ... lead to the suppression of truth and the defeat of justice. They are therefore to be limited narrowly to their purposes.”); *Waters v. O’Connor*, 103 P.3d 292, 296 ¶ 16 (Ariz. Ct. App. 2004) (“[A]n expansive construction [of an evidentiary privilege] is contrary to how Arizona courts interpret privilege statutes.”).
83. Cf. *People v. Sinolui*, 47 P.3d 629, 639 (Cal. 2002) (observing that “exceptions to evidentiary privileges ... should be construed broadly to promote the admission of all relevant evidence”).
84. See *Roman Catholic Diocese*, 62 P.3d at 976 ¶ 17 (noting that some evidentiary privileges do not even apply in criminal cases because the underlying need to protect confidential communications is often outweighed in that setting “by the need to find the truth”).
85. See *P.M.*, 136 P.3d at 227 ¶ 17 (quoting *Benton*, 897 P.2d at 1354).
86. See *Chase*, 340 F.3d at 998 (Kleinfeld, J., concurring) (“Where disclosure [to a potential victim] was necessary, the social interest in assuring that the judge and jury know the whole truth greatly exceeds the value of preserving any remaining shreds of the confidential therapeutic relationship.”).
87. See, e.g., *United States v. Himelwright*, 42 F.3d 777, 780-81 (3d Cir. 1994); see also Guggenheim & Werbel, *supra* note 16, at 42.
88. See *United States v. Murillo*, 234 F.3d 28, 2000 WL 1568160, at **1, 3 (5th Cir. Sept. 12, 2002) (indicating that an employee’s threat to harm his supervisor was not privileged because the EAP representative to whom it was communicated had a duty to “alert the supervisor”).
89. See *Hayes*, 227 F.3d at 588 (Boggs, J., dissenting); *Guerrier*, 811 So. 2d at 856. The Ninth Circuit’s only allusion to this scenario in *Chase* was its assertion that most patients who threaten to harm others are unlikely to carry out those threats. See *Chase*, 340 F.3d at 989 (quoting Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175, 188 (1962)). Even if this assertion is empirically verifiable, some patients’ threats obviously are genuine. See, e.g., *Little*, 919 P.2d at 1370-71. Given this undeniable fact, any injury to the therapeutic relationship caused by permitting therapists to testify about their patients’ threats seems “a reasonable price to pay for the lives of possible victims that may be saved.” *Tarasoff*, 551 P.2d at 346.
90. See *Garg*, *supra* note 13, at 238.
91. See *Oleszko*, 243 F.3d at 1158 (describing EAP representatives who did “not engage in psychotherapy themselves,” but nevertheless served “as a primary link between the troubled employee and psychotherapeutic treatment”).
92. *Id.* at 1158 n.4 (emphasis in original). The Ninth Circuit has indicated that in these situations, the lack of an EAP privilege would force employees who cannot afford to pay for their own treatment to reveal unprotected confidences “in order to access mental health treatment.” *Id.*
93. Cf. *Sullivan v. Cheshier*, 895 F. Supp. 204, 205 (N.D. Ill. 1995) (holding that the recognition of a privilege for communications with unlicensed therapists “must come from the legislature”).
94. See generally *Roman Catholic Diocese*, 62 P.3d at 976 ¶ 16 (“The Legislature may create or expand privileges by statute.”).
95. See generally *Oleszko*, 243 F.3d at 1158 (asserting that “a number of states have begun to recognize such a privilege”).
96. The psychologist-patient privilege from which the EAP privilege presumably would be derived serves the same purpose as the physician-patient privilege, see *Bain*, 714 P.2d at 827 n.1, and the latter privilege “has never been absolute.” *Benton*, 754 P.2d at 1355.
97. See *Dispennett v. Cook*, No. Civ. 98-1252-ST, 2001 WL 34039134, at *11 (D. Or. Oct. 23, 2001) (citing *Oleszko* for the proposition that the federal privilege “is absolute and has no exceptions”).
98. Connecticut, for example, has a limited statutory EAP privilege. See *Oleszko*, 243 F.3d at 1158 (discussing CONN. GEN. STAT. § 52-146n). However, Connecticut also permits EAP representatives to disclose otherwise privileged information when “necessary to prevent harm to ... others.” *Rosado v. Potter*, No. 3:04 CV 00758(PCD), 2007 WL 30864, at *5 n.1 (D. Conn. Jan. 4, 2007) (citing CONN. GEN. STAT. § 31-128j(b)).