

5.08. Social Worker (CPLR 4508)

(a) Confidential information privileged. A person licensed as a licensed master social worker or a licensed clinical social worker under the provisions of article one hundred fifty-four of the education law shall not be required to disclose a communication made by a client, or his or her advice given thereon, in the course of his or her professional employment, nor shall any clerk, stenographer or other person working for the same employer as such social worker or for such social worker be allowed to disclose any such communication or advice given thereon; except

1. that such social worker may disclose such information as the client may authorize;

2. that such social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;

3. where the client is a child under the age of sixteen and the information acquired by such social worker indicates that the client has been the victim or subject of a crime, the social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry;

4. where the client waives the privilege by bringing charges against such social worker and such charges involve confidential communications between the client and the social worker.

(b) Limitations on waiver. A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to

any person shall not be deemed to have waived the privilege created by this section. For purposes of this subdivision:

1. “person” shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

2. “insurance benefits” shall include payments under a self-insured plan.

Note

This section is reproduced verbatim from CPLR 4508 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4508).

The statute that embodies this rule establishes a privilege for a confidential communication between a licensed social worker and his or her client made during professional employment (*see Matter of Rutland v O’Brien*, 143 AD3d 1060, 1063 [3d Dept 2016] [in an action to modify a prior order of custody, the father could not call the daughter’s counselor, a licensed clinical social worker, to testify about their privileged communications in the absence of a knowing waiver from the daughter “notwithstanding the absence of any objection by the attorney for the children”]).

The “social worker” must be a “licensed master social worker or a licensed clinical social worker” pursuant to Education Law article 154 (*cf. Matter of Humberstone v Wheaton*, 21 AD3d 1416, 1417 [4th Dept 2005] [a child’s communications to a “school guidance counselor” who was not (as then required) a “certified” social worker were accordingly not privileged]; *People v Bridges*, 142 Misc 2d 789, 790 [Monroe County Ct 1989] [a communication between a patient and a hospital’s volunteer counselor who was not a certified social worker was not protected by the “social worker” privilege]).

The privilege extends to any “clerk, stenographer or other person working for the same employer as such social worker or for such social worker” (CPLR 4508 [a]; *cf. Matter of Grand Jury Proceedings [Doe]*, 56 NY2d 348, 353 [1982] [a hospital that is the subject of a grand jury investigation for crimes committed upon its patients may not decline to honor a grand jury subpoena for a patient record

on the ground that it includes notes of a communication between its social worker and a patient]).

The privilege only protects a communication to a social worker that was intended to be confidential (*People v Alaire*, 148 AD2d 731, 737 [2d Dept 1989] [the defendant's statement to his social worker "was made in the presence of a third party, namely (a police sergeant) and (the sergeant's) presence was known to the defendant. In view thereof, it cannot be said that the defendant intended his statement to be confidential and thus, the privilege did not attach"]; *Matter of Allers [G.P.]*, 37 Misc 3d 1219[A], 2012 NY Slip Op 52095[U] [Sup Ct, Dutchess County 2012]).

A communication that reveals the contemplation of a crime or harmful act, though purportedly intended to be confidential, is by statute expressly not privileged (CPLR 4508 [a] [2]).

Similarly, a purported confidential communication of a child under 16 that indicates the child has been the victim or subject of a crime is not privileged when the social worker is required to testify at a proceeding in which the commission of the crime is a subject of inquiry (CPLR 4508 [a] [3]; *see* Social Services Law § 413 [social worker and others required to report cases of suspected child abuse or maltreatment]; Family Ct Act § 1046 [a] [vii] [neither the spousal, physician-patient, psychologist-client, or social worker privilege "shall be a ground for excluding evidence which otherwise would be admissible" in child protective proceedings]).

The client may expressly waive the privilege and thereby permit the social worker to testify to their communications (CPLR 4508 [a] [1]). The client may also impliedly waive the privilege by bringing charges against the social worker which involve the confidential communications (CPLR 4508 [a] [4]), or by otherwise affirmatively placing his or her medical and psychological condition in issue (*see Abraha v Adams*, 148 AD3d 1730, 1731 [4th Dept 2017] [in a medical malpractice action the "plaintiff waived any privilege afforded by CPLR 4508 by affirmatively placing her medical and psychological condition in controversy through the broad allegations of injury in her bills of particulars"]; *Velez v Daar*, 41 AD3d 164, 165 [1st Dept 2007] [in medical malpractice action for psychological and emotional injuries suffered because of a failure to diagnose a cancer, "(p)laintiff clearly waived his statutory social worker-patient confidentiality privilege (CPLR 4508) by placing his psychological condition in controversy, which he did by acknowledging in his testimony that factors other than his thyroid cancer were causes of his psychological symptoms"]; *Robles v Merrill Lynch/WFC/L, Inc.*, 40 AD3d 412, 412 [1st Dept 2007] ["Plaintiff waived the relevant privilege (CPLR 4508) by alleging injuries in her bill of particulars that affirmatively placed her mental condition in issue"]).

By subdivision (b), the client does not waive the privilege for all purposes by simply authorizing disclosure of the privileged communications to obtain insurance (*compare People v O'Gorman*, 91 Misc 2d 539 [Sup Ct, Suffolk County 1977] [privileged information was waived with respect to information given to establish or maintain eligibility for public assistance]).

By a separate statute, the privilege is not lost for the “sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication” (*see* CPLR 4548).

A privilege may be breached in a criminal proceeding when necessary to enforce a constitutional right of a defendant (*see Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness’s credibility was “crucial” and there was a good faith basis to believe that her testimony was false, the psychologist privilege “must yield to defendant’s constitutional right of confrontation”]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; *cf. People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined that the “defendant's interest in obtaining the records to be outweighed by the complainant's interest in confidentiality; and defendant's interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal”]).