

Testimony Summary  
House Executive Departments and Administration  
2011 HJR 3

Testimony of David Braiterman, attorney  
Public Member, and Chair, Board of Mental Health Practice  
February 1, 2011

**I. Introduction.**

My name is David Braiterman. I reside and work in Concord, New Hampshire, and have been an attorney for twenty six years, licensed in New Hampshire and Massachusetts. I was initially appointed to the Board of Mental Health Practice in 2006, and am serving my second three year term as a public member. I became Chair of the Board January 1, 2011. It is a privilege to be before your Committee today to speak to HJR 3.

HJR 3 arises from the JLCAR process that reviewed a proposed recodification of the Board of Mental Health Practice's administrative rules, Mhp 300-500.

The joint resolution takes exception to the rule 503.02(e) that provides that a communication of alleged misconduct be forwarded to a licensee. The resolution states it is unclear under what circumstances the Board would forward the communication to the licensee, but in so doing, has also removed the rule that provides that the communication will be sent to the licensee. The Board rule as proposed had specified that the communication would in all cases be sent to the licensee unless forwarding the communication, "would significantly hinder civil or criminal litigation."

The joint resolution also takes exception to Mhp 503.04(b) and 504.09(a) dealing with subpoenas to obtain otherwise privileged client records from licensees in a disciplinary investigation.

**II. Key Points.**

- **Subpoena power for licensing boards co-exists with privileged client relationship for Attorneys, Medical Doctors, LADACs, and for mental health therapists**
- **The Board of Mental Health Practice protects client confidentiality of records it receives concerning patients**
- **Stripping subpoena power of disciplinary boards renders disciplinary action impossible or ineffective**
- **HJR 3 oversteps Legislative authority by directing that the Board of Mental Health Practice "shall not enforce" state law**

### III. Discussion.

A Forwarding Communications of Alleged Misconduct. Circumstances in which the Board would not forward a communication of alleged misconduct to a licensee are rare. In my five years on the Board, one situation arose where the Board did not send a complaint to a licensee out of possibly a hundred or more complaints received in that time. The subject is simply not that important to dwell on. Communications of alleged misconduct are forwarded to the licensees as part of the investigation process and the rules that pertain to the investigation. That will continue to be done by the Board, even if Mhp 503.02(e) is barred from implementation through a joint resolution. The Board's understanding is that sending the communication of alleged misconduct is what JLCAR wants to continue, and it will continue both out of fairness and out of necessity to the investigative process.

If it is possible for the joint resolution to specify that the only offensive language is the exception to sending the communication rather than the general provision that it be sent, that would be better, but the Committee may be limited in its authority to striking a whole rule rather than just a single clause of it.

B. Subpoena Power and Privileged Client Relationships. Mhp 503.04(b) and Mhp 504.09(a) are by far the more serious of the two concerns. Those rules deal with board issued subpoenas for therapists' records. The joint resolution speaks of the Legislature clarifying RSA 330-A:28 in light of the privilege accorded to licensee/client communication in RSA 330-A32. (See appendix A for these statutes.)

Mental health clients have privilege. And the Board of Mental Health Practice has authority under current state law to summon client records for investigation of licensee misconduct. The two statutes are not inconsistent. The subpoena power qualifies or limits the interpretation that the privilege is absolute or without exception.

There are many exceptions to commonly understood privileges. For example, privilege does not apply when there is **child abuse** or **elder abuse** in the context of other state laws that mandate the reporting of such concerns to public investigatory agencies. Privilege goes away if there is a **risk of suicide** or **serious harm to others**. Similarly, absolute privilege in client/therapist records goes away if the therapist is investigated for **professional misconduct**. The records are treated confidentially in the investigation process, and identities are preserved even if the case results in a hearing.

The Board of Mental Health Practice is not the only investigative board in the State that handles privileged client relationships, but that also has subpoena power for confidential client records from licensees. **Attorney's records** are subject to a discovery process and to subpoena in Attorney Discipline cases. See Appendix B. **Medical doctors** have a privilege with their

patient relationships, but the Board of Medicine has subpoena power over the licensee's records as part of their statute. Appendix C. **Licensed Alcohol and Drug Abuse Counselors (LADACs)** have privilege with their clientele, and the LADAC board nevertheless has authority to summon client records. Appendix D. The Board of Nursing, the Board of Optometry, and Board of Dentistry all have subpoena power. Appendix E.

It is simplistic to suggest that privileged communications and a privileged relationship cannot co-exist with an investigatory process conducted by a professional licensing board. Removing subpoena authority on the naive understanding that privilege is or should be absolute would significantly hinder investigative ability and thereby harm the public. Soliciting client consents to access records in many cases will irreparably harm practitioners and undermine the profession. What is paramount to preserving client confidentiality and board ability to investigate fairly is assurance that records obtained by the board be safeguarded and identities of clients be protected.

**Some examples may illuminate the problem:**

- 1.** Dad complains that his son's therapist has an **unethical dual relationship** because, unbeknownst to Dad at the beginning, the therapist was actually Mom's therapist earlier, and then changed the therapy relationship to the child when the therapist thought she could help there too. Mom doesn't want her records reviewed for the Board to determine whether she ever was a patient and whether the therapist was biased in urging the child's Guardian ad Litem that visiting Dad was a threat to the child's welfare. How should the Board investigate Dad's allegations if it cannot determine whether Mom was a client before the child became a client or whether the therapist developed affinities or preferences for Mom's role before treating the child?
- 2.** Medical Doctor complains to the Board that his female patient reports **having sex with her mental health therapist** both at the therapist's office and at the patient's house. Patient wants the conduct to stop and for the therapist to be disciplined, but is hesitant to allow her mental health records to be examined. Therapist denies having a sexual relationship, and states that visits to the house were to intervene to prevent a crisis for the client whom he knew was seriously at risk of harming herself. Must not the Board examine patient records to determine whether the therapist had a basis for thinking the client a risk, and whether the therapist documented visits to the home as part of patient treatment as compared with a sexual rendezvous? Should the Board simply dismiss the case, despite the grave harm to the public that a therapist having sex with a vulnerable patient might pose both to this patient or to others?
- 3.** Patient complains that mental health counselor **never provided to a court the report** he asked the therapist to provide for his divorce and parenting case. Therapist says he was engaged to provide treatment for the patient, not to provide court testimony. How shall the Board evaluate the scope of the engagement to see whether the therapist is accurate in his contention,

and whether there was informed consent around the risks of the therapist exposing his impressions of the patient in open court?

4. Patient complains that therapist **fraudulently billed** her directly for services after her insurance paid for her sessions. Therapist refuses to give the board billing records for insurance because other patients' information is in the insurance invoices also. Must the Board request permission of every patient in the therapist's practice for release of their information before examining the billing practices of the therapist, and how will harm to that therapist's practice be contained by making such a request to all of his patients? Does not the mere inquiry of clients in the misdirected goal of protecting client confidentiality undermine the practitioner and the practice of mental health counseling?

The role of the Board is to protect the public by insuring "that the services provided are effective and of a quality consistent with the standard of care within each profession, and to safeguard the public against harm which may be caused by untrained, unskilled, or unlicensed practitioners." RSA 330-A:1. One must realistically ask whether that role can be accomplished without subpoena authority. Might not subpoena authority that requires consent of all patients whose records might need to be accessed risk greater harm than a quieter, more contained investigative process?

The Board urges this Committee to exercise considerable caution in stripping or eroding subpoena power of the Board in its investigations, particularly if such legislative action is based on the erroneous understanding that privileged relationships that clients have with certain professionals is absolute or without limitation. Those privileges have never been without exceptions. The privileges exist by virtue of state law, and are also limited by state law across the entire spectrum of confidential professional relationships.

C. HJR 3 language should not direct the Board not to enforce existing state law. The Board takes strong exception to the language of the joint resolution at the very end of the resolution,

"That the board of mental health practice shall not enforce RSA 330-A:28 in such a way as to violate the licensee/client privilege in RSA 330-A:32 and shall not enforce the forwarding of communications as proposed in Mhp 503.02(e)."

It is not appropriate that a joint resolution that is not law and never will be law direct that an executive agency not enforce what is state law. Subpoena authority is the current state law for the Board of Mental Health Practice as well as for other boards (attorneys, doctors, LADACs) who have privilege with their clientele. If and when the Legislature passes a law that modifies RSA 330-A: 32 or :28 either with the Governor's approval (signature, or allowing to become law without signature) or over a veto from the Governor, then the statement is law, and the Board of Mental Health Practice can and should be expected to follow that new law. But a joint resolution cannot mandate that the executive department "shall not enforce" an existing law, and it undermines state law for a Legislative resolution to suggest as much. The Board urges that this last paragraph of the joint resolution be stricken and that the matter of clarifying subpoena authority and client privilege be matters undertaken by your committee when legislation rationalizing those two statutes is more fully considered in a statutory revision.

Thank you, and I will be happy to take questions.

## APPENDIX A

### Board of Mental Health Practice RSA 330-A: 28

V. The board may, with just cause, at any time subpoena mental health records from its licensees and from hospitals and other health care providers licensed in this state. Such subpoenas shall be served by certified mail or by personal delivery to the address shown on the respondent's current license. A minimum of 15 days' advance notice shall be allowed for complying with a subpoena duces tecum issued under this paragraph.

**330-A:32 Privileged Communications.** – The confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order. Confidential relations and communications between a client and any person working under the supervision of a person licensed under this chapter which are necessary and customary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with the supervising person licensed under this chapter, unless such disclosure is required by a court order. This section shall not apply to hearings conducted pursuant to RSA 135-C:27-54 or RSA 464-A.

APPENDIX B

Attorneys; RSA CHAPTER 311

Unauthorized Practice of Law Section 311:7-b

**311:7-b Investigation by Attorney General. –**

I. The attorney general may investigate any complaint of unauthorized practice of the law and the attorney general, or a deputy attorney general or an assistant attorney general designated by the attorney general, may subpoena witnesses, compel their attendance, examine them under oath, and require the production of any relevant documentary evidence....

III. If a person fails or refuses to obey a subpoena or to testify as to any material matter regarding which the person may be interrogated, the superior court, upon application by the attorney general, may issue to the person an order requiring the person to appear before the attorney general, or a deputy attorney general or an assistant attorney general designated by the attorney general, to produce documentary evidence or testify. Failure to obey the order of the court may be punished by the court as a contempt of court.

IV. When requested, public officers, their assistants, clerks or employees shall furnish to the attorney general, the deputy or an assistant attorney general designated by the attorney general all information and assistance.

V. Investigations under this section shall be confidential. Any person participating in the investigation who, except as required in the discharge of the person's official duties, discloses to any person, other than to a person under investigation, the name of any person under investigation or any witness examined, or any other information obtained in the investigation is guilty of a misdemeanor.

VI. Every person whose conduct is investigated under this section shall be furnished with a written specification of the issues which are to be considered, and shall be given an opportunity to present evidence and be heard upon the specified issues.

Attorneys: Supreme Court Rule 37

*(8) Discovery and Subpoena Power:*

At any stage of proceedings before a panel of the hearings committee or in preparation for a hearing before a panel of the hearings committee, attorneys from the attorney discipline office, counsel for respondent attorneys and respondent attorneys representing themselves may conduct discovery, including interrogatories and depositions, and may issue subpoenas and subpoenas *duces tecum* to summon witnesses with or without documents.

Attorneys : Supreme Court Rule 37A. RULES AND PROCEDURES OF ATTORNEY  
DISCIPLINE SYSTEM

(B) On written request the following information, if relevant or reasonably calculated to lead to the discovery of admissible evidence in the matter, and if within the possession, custody or control of the disciplinary counsel, the respondent or respondent's counsel, is subject to discovery and shall be made available for inspection and copying as set forth in this rule:

- (i) A writing or any other tangible object, including those obtained from or belonging to the respondent;
- (ii) Signed written statements, or taped statements, if any, by any witness, including the respondent;
- (iii) Results or reports of mental or physical examinations and of scientific tests or experiments made in connection with the matter;
- (iv) Names, addresses and telephone numbers of all persons known to have relevant information based on personal knowledge about the matter, including a designation by the disciplinary counsel and respondent as to which of those persons will be called as witnesses;
- (v) Police reports and any investigation reports generated by any agency other than the attorney discipline office;
- (vi) Names and address of each person expected to be called as an expert witness, the expert's qualifications, the subject matter on which the expert will testify, a copy of all written reports submitted by the expert or, if none, a statement of facts and opinions to which the expert will testify and a summary of the grounds for each opinion; and
- (vii) If disciplinary counsel or the respondent are unable to agree on discovery issues, a request must be made for a pre-hearing conference.

(C) This rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or that party's attorney or agents in connection with a disciplinary proceeding. Nor does it require discovery of statements, signed or unsigned, made by respondent to respondent's attorney or that attorney's agents. This rule does not authorize discovery of any internal materials or documents prepared by the attorney discipline office.

## NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

### CLIENT-LAWYER RELATIONSHIP

#### Rule 1.6. Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to secure legal advice about the lawyer's compliance with these Rules; or

(3) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

## APPENDIX C

### Medical Board RSA 329:18

IV. (a) The board, the medical review subcommittee, the board investigator, or the medical review subcommittee investigator, may administer oaths or affirmations, preserve testimony and issue subpoenas for witnesses and for documents and things only in a formal investigation or an adjudicatory hearing, except that subpoenas for medical records and pharmacy records, as provided in paragraph V, may be issued at any time.

(b) The board, the medical review subcommittee, the board investigator, or the medical review subcommittee investigator, may serve a subpoena on any licensee of the board by certified mail, but shall serve a subpoena on any other person in accordance with the procedures and fee schedules used in superior court.

(c) Persons licensed by the board shall not be entitled to a witness fee or mileage expenses for travel within the state, which are necessary to respond to a subpoena.

(d) Any board-issued subpoena related to a board hearing or investigation shall be valid if annotated "Fees Guaranteed by the New Hampshire Board of Medicine."

(e) A minimum of 48 hours' notice shall be given for compliance with a subpoena issued under this chapter.

V. The board, the medical review subcommittee, the board investigator, or the medical review subcommittee investigator, may at any time subpoena medical, pharmacy, or billing records related to medical diagnosis or treatment from its licensees, or other health care providers, health care facilities, health insurance companies, health maintenance organizations, and medical and hospital service corporations licensed or certified in this state to the extent that the records sought are relevant to matters within the board's regulatory authority. Such subpoenas shall be served by certified mail or by personal delivery to the address shown on the respondent's current license or certificate, and shall require no witness or other fee. A minimum of 15 days' advance notice shall be allowed for complying with a subpoena duces tecum issued under this paragraph.

**329:26 Confidential Communications.** – The confidential relations and communications between a physician or surgeon licensed under provisions of this chapter and the patient of such physician or surgeon are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications. Confidential relations and communications between a patient and any person working under the supervision of a physician or surgeon that are customary and necessary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising physician or surgeon. This section shall not apply to investigations and hearings conducted by the board of medicine under RSA 329, any other statutorily created health occupational licensing or certifying board conducting licensing, certifying, or disciplinary proceedings or hearings conducted pursuant to RSA 135-C:27-54 or RSA 464-A. This section shall also not apply to the release of blood or urine samples and the results of laboratory tests for drugs or blood alcohol content taken from a person for purposes of diagnosis and treatment in connection with the incident giving rise to the investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors or controlled drugs. The use and disclosure of such information shall be limited to the official criminal proceedings.



## APPENDIX D

### Licensed Alcohol and Drug Abuse Counselors RSA 330-C:28

IV. (a) The board may administer oaths or affirmations, preserve testimony, and, after consultation with an attorney employed by the state of New Hampshire, issue subpoenas for witnesses and for documents and things only in a formal investigation or an adjudicative hearing, except that subpoenas for medical records and pharmacy records, as provided in paragraph V, may be issued at any time.

(b) The board may serve a subpoena on any licensee or certificate holder of the board by certified mail, but shall serve a subpoena on any other person in accordance with the procedures and fee schedules required in 42 C.F.R. Part 2.

(c) Persons licensed or certified by the board shall not be entitled to a witness fee or mileage expenses for travel within the state, which are necessary to respond to a subpoena issued by the board.

(d) Any board-issued subpoena related to a board hearing or investigation shall be valid if annotated "Fees Guaranteed by the New Hampshire Board of Licensing for Alcohol and Other Drug Use Professionals."

(e) A minimum of 48 hours' notice shall be given for compliance with a subpoena issued under this chapter.

V. The board may at any time subpoena client records from its licensees or certificate holders, or other health care providers, or health care facilities licensed or certified in this state to the extent that the records sought are relevant to matters within the board's regulatory authority. Such subpoenas shall be served by certified mail or by personal delivery to the address shown on the respondent's current license or certificate, and shall require no witness or other fee. A minimum of 15 days' advance notice shall be allowed for complying with a subpoena duces tecum issued under this paragraph.

### **330-C:26 Privileged Communications Between Licensees and Certificate Holders and Their Clients.**

– A person licensed or certified under this chapter or an employee of such person, shall not disclose any confidential information that the licensee, certificate holder, or employee may have acquired while performing substance use counseling services for a patient unless in accordance with the federal regulation regarding the Confidentiality of Alcohol and Drug Abuse Patient Records pursuant to 42 C.F.R. section 2.1 et seq.

## APPENDIX E

### Board of Nursing RSA 326-B: 38

V. The board may at any time subpoena a licensee's health care records, employment records, and nursing education academic records in the possession of its licensees, nursing education programs licensed by the board, or hospitals, and other health care providers and facilities regulated in this state, except that it may not subpoena quality assurance records of health facilities licensed under RSA 151. Subpoenas shall be served by certified mail or personal delivery to the address currently on file with the board in the case of delivery to a licensee. No witness or other fee shall be required. A minimum of 15 days' advance notice shall be allowed for complying with a subpoena issued under this paragraph.

### Optometry RSA 327:22

II. (a) The board shall have the power to administer oaths or affirmations, preserve testimony, subpoena witnesses, and to compel, by subpoena duces tecum, the production of all books, records, files and documents, whether originals, copies, or in electronic or other form, and other materials, relevant to its investigation of any grievance, complaint, or disciplinary proceeding before the board.

(b) The board may issue subpoenas with the approval of the office of the attorney general.

### Dentists RSA 317-A:18

V. The board may at any time subpoena dental records from its licensees and patient records from hospitals, pharmacies, and other health care providers or facilities licensed by or certified in this state. Such subpoenas shall be served by certified mail or by personal delivery to the address shown on the licensee's current license, and no witness or other fee shall be required. A minimum of 15 days' advance notice shall be allowed for complying with a subpoena duces tecum issued under this chapter.