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§5.35 Psychotherapist-Patient Privilege

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§5.35 Psychotherapist-Patient Privilege

Although the psychotherapist-patient privilege evolved from the physician-patient privilege,¹ it has now achieved an independent status and a degree of acceptance exceeding that of its progenitor.²

The justifications for a psychotherapist-patient privilege are viewed as stronger than those underlying the physician-patient privilege.³ A psychotherapist relies almost entirely on disclosures from the client, whereas the physician often treats injuries or illnesses that can be observed, diagnosed, and treated by procedures not dependent on patient communications.⁴ Matters disclosed in psychotherapy are often more personal and more likely to cause embarrassment (or potential civil or criminal liability) than matters disclosed to a physician,⁵ leading some to conclude that the privilege has a constitutional basis in the right to privacy.⁶ Society has an interest in successful treatment of persons who might pose a danger to the community because of their mental illness. Persons in need of psychotherapy generally require greater incentive to disclose than persons seeking medical attention for an injury or illness,⁷ and the privilege is intended to serve this instrumental function.⁸

§5.35 1. Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 *Wayne L. Rev.* 175 (1960) (recounting history of privilege).

2. The drafters of the Federal Rules of Evidence proposed a psychotherapist-patient privilege but not a physician-patient privilege. *See* proposed-but-rejected FRE 504. *See also* URE 503 (1974) (psychotherapist-patient privilege modeled after proposed-but-rejected FRE 504 with state option to extend privilege to physicians).

3. *See* Louisell, *The Psychologist in Today's Legal World: Part II*, 41 *Minn. L. Rev.* 731, 745 (1957) (because there is "hardly any situation in the gamut of human relations where one human being is so much subject to the scrutiny and mercy of another human being as in the psychodiagnostic and psychotherapeutic relationships" it is hard to see how such functions "adequately can be carried on in the absence of a pervading attitude of privacy and confidentiality").

4. *See* Report No. 45, *Group for the Advancement of Psychiatry* 92 (1960), quoted in ACN, proposed-but-rejected FRE 504 (psychiatrist has a "special need" to maintain confidentiality because his capacity to help his patients "is completely dependent upon their willingness and ability to talk freely").

5. *See* Guttmacher & Weihofen, *Psychiatry and the Law* 272 (1952) ("The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they know that all they say—and all that the psychotherapist learns from what they say—may be revealed to the whole world from the witness stand.").

6. *See, e.g.,* *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007) (defendant's right to privacy in communications with psychotherapist are grounded in federal and state constitutions; admitting such communications violated due process); *In re Zuniga*, 714 F.2d 632, 641 (6th Cir. 1983) (noting that "inability to obtain effective psychiatric treatment may preclude the enjoyment and exercise of many fundamental freedoms"), *cert. denied*, 464 U.S. 983.

7. *See* *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) (while physical ailments "might be treated with some degree of effectiveness by a doctor whom the patient did not trust," a psychiatrist "must have his patient's confidence or he cannot help him").

8. The available data on the extent to which the privilege facilitates psychotherapist-patient communications is based only upon surveys, and rigorous empirical research has yet to be conducted. *See* Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 *Yale L.J.* 1226, 1255 (1962) (73 percent of laypersons surveyed believed their communications with a therapist would be inhibited by absence of a privilege); Corcoran, et al., *Absence of Privileged Communications and Its Impact on Air Force Officers*, 19 *A.F. L. Rev.* 51, 56 (1977) (survey showed most Air Force officers preferred civilian to military psychiatrists, primarily for the reason that there is no privilege under military law). *But see* Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60

All 50 states recognize some form of psychotherapist-patient privilege,⁹ often based on proposed-but-rejected FRE 504 or URE 503.¹⁰

Federal privilege recognized

In the landmark decision of *Jaffe v. Redmond*,¹¹ the Supreme 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 FRE 501. The Court concluded on the basis of “reason and experience” that such a privilege “promotes sufficiently important interests to outweigh the need for probative evidence.”¹² The Court was persuaded that if the privilege were rejected, confidential conversations between psychotherapists and clients “would surely be chilled,” particularly where it was foreseeable that such statements might be used in litigation.¹³ Because the types of statements most useful in litigation, such as incriminating admissions by a patient, would probably not be made in absence of a privilege, it was thought unlikely that recognition of the privilege would cause a significant loss of evidence.¹⁴ *Jaffee* was a breakthrough decision not only in recognizing the psychotherapist-patient privilege as a matter of federal privilege law (prior authority on point was very sparse), but in drawing heavily on the privilege law of Illinois (where the *Jaffee* suit was brought) in fleshing out the substance of the federal privilege, apparently recognizing the value of the extensive experience behind state privilege law in shaping federal law.

Social workers

The *Jaffee* decision goes beyond proposed-but-rejected FRE 504 and the law in a number of states by extending the psychotherapist-patient privilege to licensed social workers as well as licensed psychiatrists and psychologists.¹⁵ The Court found that the reasons for recognizing the privilege apply with equal force to social

N.C. L. Rev. 893, 924-925 (1982) (concluding from a research study that patients rely primarily on medical Code of Ethics to protect confidentiality and that “patients are probably not deterred from seeking psychiatric help to any significant degree” by absence of the privilege); Imwinkelried, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court’s Instrumental Reasoning in Jaffee v. Redmond*, 49 *Hastings L.J.* 969 (1998) (arguing that instrumentalist justification for privilege has not been made and privilege should rest on right of privacy).

9. *Jaffee v. Redmond*, 518 U.S. 1, 12 n.11 (1996) (listing state provisions). Such state provisions must be followed in federal proceedings where state law supplies the rule of decision. *See Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467 (11th Cir. 1984). *See generally* §5.7, *supra*.

10. *See* 13A U.L.A. 1 (listing states adopting URE 503).

11. 518 U.S. 1, 15 (1996).

12. *Id.* at 9-10.

13. *Id.* at 11-12.

14. *Id.* *See generally* Mueller, *The Federal Psychotherapist-Patient Privilege After Jaffe: Truth and Other Values in a Therapeutic Age*, 49 *Hastings L.J.* 947, 955-957 (1998) (although *Jaffe* may be criticized as overbroad or too narrow, decision merits respect as “a compromise between functionality and precision”).

15. *See, e.g.*, proposed-but-rejected FRE 504(a)(2) (limiting definition of “psychotherapist” to persons “authorized to practice medicine” and licensed or certified psychologists). Courts disagree over extending the privilege to communications with unlicensed counselors. *Compare Oleszko v. State Compensation Insurance Fund*, 243 F.3d 1154, 1157-1158 (9th Cir. 2001) (extending privilege to unlicensed counselors employed by Employee Assistance Programs) *with United States v. Dunham*, 93 F. Supp. 3d 1291, 1295 (W.D. Okla. 2015) (adopting a “bright-line” rule requiring licensure for privilege to apply).

workers, at least when they are engaged in psychotherapy rather than other types of social services.¹⁶ However, given the wide variation in state licensing standards for social workers, the persons protected by this new privilege may differ significantly in education, training and qualifications.

The privilege applies only to communications, although some state courts have defined “communications” broadly.¹⁷ The communications must be made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition.¹⁸ The communications must be made in confidence, which means that unprivileged third parties cannot be present, although the presence of others who are participating in the diagnosis or treatment under the direction of the psychotherapist does not destroy confidentiality.¹⁹ The privilege does not attach to communications by a patient, such as threats of violence, where the psychotherapist has informed the patient in advance that such communications will be reported to proper authorities.²⁰

Scope

Marital counseling normally involves a significant emotional component making it subject to the privilege, but vocational and educational counseling generally do not. Although some courts have held that the privilege does not protect the identity of the client or the fact of consultation,²¹ the privacy interests of the client would seem to justify such protection.²²

The privilege extends to preliminary communications made for the purpose of establishing a psychotherapist-patient relationship, even where no such relationship is actually formed, provided the psychotherapist has indicated an apparent willingness to enter such a relationship.²³ At least one court has

16. The Court noted that social workers provide a significant amount of mental health treatment to poor clients or clients of modest means and found no public purpose to be served by drawing a distinction “between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers.” 518 U.S. at 17.

17. *See In re Doe*, 98 N.M. 442, 649 P.2d 510, 514-515 (1982) (protected communications to psychotherapists include not only verbal communications, but information derived from observation and personal examination of patient and inferences and conclusions drawn therefrom).

18. *See proposed-but-rejected FRE 504(b)*.

19. *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006) (relatives of plaintiff in sexual harassment suit, who were present and involved in her psychological evaluation, may intervene to ask court to exclude records pertaining to them). *See also proposed-but-rejected FRE 504(a)(3)*; Cross, *Privileged Communications between Participants in Group Psychotherapy*, 1970 L. & Soc. Order 191. *But see United States v. Bolander*, 722 F.3d 199, 223 (4th Cir. 2013) (any privilege prisoner held in connection with therapists’ reports generated during federal sex offender treatment program was waived when he voluntarily provided reports to expert for use in evaluating his mental condition in connection with civil commitment proceedings).

20. *United States v. Auster*, 517 F.3d 312, 316-317 (5th Cir. 2008) (application of psychotherapist-patient privilege requires reasonable expectation of confidentiality; privilege was unavailable to defendant where defendant had been informed that therapist had duty under state law to disclose defendant’s report that he would seek “violent retribution” against those whom he believed withheld his workers’ compensation benefits and nonetheless chose to inform therapist of his plan).

21. *See In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983) (as general rule, “identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege”), *cert. denied*, 464 U.S. 983.

22. *See Lora v. Board of Educ.*, 74 F.R.D. 565, 586-587 (E.D.N.Y. 1977) (often it is identity “that patients generally wish to have shielded from exposure”). *See generally* Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 188 (1960) (it is “vital to maintain confidentiality as to the fact of treatment” or a person “may hesitate to visit a psychiatrist out of fear that he will be set apart from his fellow men”); Note, *The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 Duke L.J. 1217.

23. *State v. Miller*, 300 Or. 203, 709 P.2d 225, 234-236 (1985) (inculpatory statements made by defendant on telephone to receptionist and psychiatrist at state hospital were privileged even though psychiatrist testified that she was not intending to

held that the privilege applies when the patient reasonably but mistakenly believes that she was being counseled by a licensed psychotherapist.²⁴

The privilege normally covers persons either assisting the psychotherapist or reasonably necessary for the transmission of communications between the patient and psychotherapist.²⁵ In addition, the privilege applies to persons who are present to further the interests of the patient, such as family members participating in the treatment under the direction of the psychotherapist.²⁶

The *Jaffee* decision rejected the argument that the privilege should have a balancing component, because making the promise of confidentiality contingent on a later evaluation by the trial judge of the relative importance of patient privacy against a party's need for the evidence "would eviscerate the effectiveness of the privilege."²⁷ Nonetheless, the Court indicated that there should be some exceptions to the privilege,²⁸ citing specifically the situation where "a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."²⁹ Interestingly, proposed-but-rejected FRE 504 does not contain a future crime or tort exception, seemingly adopting the view that there is less danger of such threats being carried out if patients are allowed the freedom to vent their angers and discuss their criminal intentions with a psychotherapist. The courts are divided on whether a future crime exception should be recognized as a matter of federal common law.³⁰ Some courts hold that even if a psychotherapist has a duty to warn a potential victim,³¹ it does not follow that the threatening statement by the patient is admissible in a later criminal

provide psychotherapy and was interrogating defendant to hold him until police could arrive at pay phone where he placed the call), *cert. denied*, 475 U.S. 1141.

24. *Speaker v. County of San Bernardino*, 82 F. Supp. 2d 1105, 1112 (C.D. Cal. 2000) (privilege applies even though mental health therapist was not licensed to give the type of care involved here, where client reasonably believed that therapist had the necessary license).

25. *See State v. Miller*, 300 Or. 203, 709 P.2d 225, 235-236 (1985) (privilege applied to defendant's murder confession made to receptionist over telephone while seeking to talk with a psychiatrist at state mental hospital; receptionist asked defendant to describe his problem before she would refer him to a psychiatrist), *cert. denied*, 475 U.S. 1141. *But see United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012) (privilege did not cover statements to emergency room physician's assistant performing hospital intake interview for patient seeking psychiatric treatment for suicidal ideation; "passing intake information along in a chart does not suffice as treatment").

26. *See* proposed-but-rejected FRE 504(a)(3).

27. 518 U.S. at 17 (quoting an earlier statement in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."). *See In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1213-1214 (D.C. Cir. 2004) (federal psychotherapist-patient privilege is absolute and not subject to balancing).

28. *Id.* at n.19 (although it is unnecessary and premature to delineate the full contours of the privilege, "we do not doubt that there are situations in which the privilege must give way").

29. *Id.*

30. *Compare United States v. Chase*, 340 F.3d 978, 992 (9th Cir. 2003) (declining to recognize "dangerous patient" exception; exception would "significantly injure" interests justifying privilege, have "little practical advantage," "encroach significantly" on policy prerogatives of states, and "go against the experience" of all but one state in Ninth Circuit, as well as the Proposed Rules) *and United States v. Ghane*, 673 F.3d 771, 784-785 (8th Cir. 2012) (rejecting "dangerous patient" exception; treating psychiatrist should not have been allowed to testify about defendant's confidential communications) *with In re Grand Jury Proceedings*, 183 F.3d 71, 74-78 (1st Cir. 1999) (crime-fraud exception applies to psychotherapist-patient privilege). *See generally* Daniel M. Buroker, *The Psychotherapist-Patient Exception and Post-Jaffee Confusion*, 89 Iowa L. Rev. 1373 (2004).

31. *See Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334, 340 (1976) (psychotherapist may be subject to tort liability for failure to warn potential victims of such threats). *See generally* Stone, *The Tarasoff Decisions: Suing*

prosecution (in effect, the privilege may still apply in this setting).³² Some courts focus on whether the patient was told that threatening statements would be outside the privilege,³³ while others focus on whether the threats are sufficiently serious.³⁴

An exception to the privilege is generally recognized for court-ordered examinations, although the judge has discretion to limit disclosure and maintain the privilege.³⁵ Generally such examinations would not be subject to the privilege in any case because their results are to be reported to the court and parties, thereby negating the requirement of confidentiality. An exception is also usually recognized in proceedings to hospitalize the patient for mental illness.³⁶

The privilege does not apply where the patient or someone acting on his behalf relies upon her mental or emotional condition as an element of a claim or defense.³⁷ However, the privilege is lost only with respect to communications bearing on the particular mental condition at issue.³⁸

Placing mental condition at issue

There is a division of authority on the question whether parties place their mental condition at issue in proceedings to determine child custody, with some courts upholding the privilege³⁹ but others taking the

Psychotherapists to Safeguard Society, 90 Harv. L. Rev. 358 (1976).

32. *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000) (exception to confidentiality and privilege are not co-extensive; psychotherapist who complies with duty to warn is still entitled to invoke testimonial privilege in later criminal proceeding against patient).

33. *United States v. Auster*, 517 F.3d 312, 315-320 (5th Cir. 2008) (patient had no reasonable expectation of confidentiality where psychotherapist had informed patient repeatedly that any violent threats would be communicated to potential victims).

34. *See United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998) (defendant convicted for making threats against President, which were reported to Secret Service by his psychiatrist; trial judge rejected psychotherapist-patient privilege claim relying on future crimes exception; appellate court remands for determination of whether threat sufficiently serious to vitiate privilege and whether its disclosure “was the only means of averting harm to the President”).

35. Proposed-but-rejected FRE 504(d)(2) (“If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.”). The use of statements made by a defendant in the course of a court-ordered examination is often restricted by statute or rule. *See, e.g.,* FRCrimP 12.2(c) (“No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.”). *Cf. Estelle v. Smith*, 451 U.S. 454, 462-463 (1981) (criminal defendant has constitutional right not to answer questions at court-ordered examination where answers may be used against defendant at sentencing hearing).

36. Proposed-but-rejected FRE 504(d)(1).

37. *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (in suit claiming mental and emotional damages from sex discrimination and harassment, plaintiff put psychological condition in issue, hence waived privilege). *But see In re Sims*, 534 F.3d 117, 134 (2d Cir. 2008) (plaintiff does not forfeit privilege by asserting claim for injuries that do not include emotional damage, nor by stating that he suffers condition such as depression for which he does not seek damages; plaintiff may withdraw or formally abandon claims for emotional distress to avoid forfeiting privilege); *Langenfeld v. Armstrong World Industries, Inc.*, 299 F.R.D. 547, 553 (S.D. Ohio 2014) (a plaintiff who limits claims to “garden variety” emotional injuries of only a short-term nature does not waive privilege, but plaintiff sought relief for ongoing and serious emotional disturbance; privilege waived).

38. *Britt v. Superior Court*, 20 Cal. 3d 844, 862-864, 574 P.2d 766, 777-779, 143 Cal. Rptr. 695, 706-708 (1978).

39. *Navarre v. Navarre*, 191 Mich. App. 395, 479 N.W.2d 357, 358-359 (1991) (legislature did not intend to suspend medical

position that the privilege must yield in order to determine the “best interests” of the child,⁴⁰ at least where the mental health of a party is clearly in controversy⁴¹ or circumstances indicate abuse or neglect.⁴² Some courts hold that a patient’s mental condition is placed at issue when evidence about such condition is necessary for a fair response to an issue raised by the patient.⁴³

When a defendant in a criminal case enters an insanity plea or advances some other defense based on mental condition, many courts conclude that doing so waives a claim privilege for communications to all psychotherapists consulted on the condition,⁴⁴ although some authorities hold that that waiver occurs only when defendant introduces testimony on the mental condition.⁴⁵

Child abuse reporting laws

Today many states have laws requiring psychotherapists and other professionals to report child abuse. Although generally these reporting requirements override the psychotherapist-patient privilege,⁴⁶ careful examination of the statutory scheme is necessary because a reporting law occasionally may require disclosure to a public official without abrogating the privilege of the patient to prevent the psychotherapist from testifying in a judicial proceeding.⁴⁷

Like other privileges, the psychotherapist-patient privilege can be overridden where necessary to protect a defendant’s right of confrontation, as happens where psychiatric history tends directly to impeach a prosecution witness.⁴⁸

privilege in custody disputes); *Peisach v. Antuna*, 539 So. 2d 544, 546 (Fla. App. 1989) (wife’s denials of husband’s allegations that she was mentally unfit to be custodial parent did not place her mental health in issue or “eviscerate” privilege).

40. *In re M.M.*, 569 A.2d 463, 465 (Vt. 1989) (one who “seeks to resist action by the State to terminate his or her parental rights over a child places his or her mental health in issue”), *cert. denied*, 494 U.S. 1059.

41. *Matter of Von Goyt*, 461 So. 2d 821, 823 (Ala. 1984) (where mental state of party in a custody suit “is clearly in controversy” and a proper resolution of custody issue requires disclosure of privileged medical records, “psychologist-patient privilege must yield.”).

42. *See generally* Slovenko, *Child Custody and the Psychotherapist-Patient Privilege*, 19 J. Psych. & Law 163 (Spring-Summer 1991).

43. *See, e.g.*, *Flora v. Hamilton*, 81 F.R.D. 576, 579-580 (M.D.N.C. 1978) (by challenging discharge from employment, plaintiff waived psychotherapist-patient privilege on issue of “ability to work in a structured institution”). *But see* *In re Sims*, 534 F.3d 117, 134 (2d Cir. 2008) (party’s privilege is not overcome when other party puts his mental state in issue).

44. *See, e.g.*, *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976) (claim of psychotherapist-patient privilege cannot be asserted “when the defendant in a criminal trial claims insanity as a defense”), *cert. denied*, 429 U.S. 853. But a psychotherapist who was retained by the defense attorney to examine the client may also be covered by the attorney-client privilege as a “representative of the lawyer.” *See* §5.10, *supra*. On whether such a psychotherapist can be called as a prosecution witness, *see* §5.30, *supra*.

45. *See, e.g.*, Or. Rev. Stat. §40.280 (1991).

46. *See, e.g.*, Del. R. Evid. 503(d)(4) (1991); Wis. Stat. Ann. §905.04(4)(e) (1993). *See generally* Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 Ky. L.J. 473 (1987).

47. *Cf.* *United States v. Hayes*, 227 F.3d 578, 579 (6th Cir. 2000) (suggesting similar result under federal caselaw). Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and Specter of Lawyer as Informant*, 42 Duke L.J. 203, 230 (1992).

48. *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992) (precluding inquiry into psychiatric history of prosecution witness would violate defendant’s constitutional right to cross-examine witnesses). *See generally* §5.5, *supra*.

