Social Workers and Psychotherapist-Patient Privilege:
*Jaffee v. Redmond* Revisited

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The landmark Supreme Court decision on the protection of psychotherapist–patient privilege is *Jaffee v. Redmond*, 518 U.S. 1 (1996). The case created by common law the right for federal litigants and witnesses to keep their private psychotherapy records out of the courtroom, rejecting an approach that would have permitted federal judges to review and weigh the value of the potential evidence excluded under the privilege.

The *Jaffee* decision is notable in several respects. For social workers, it is a landmark ruling recognizing the professionalism and relevance of social workers providing psychotherapy in today’s mental health treatment milieu. For trial lawyers and their clients, *Jaffee* presented a new rule of evidence, drawing a bright line around a certain type of evidence that is inaccessible for legal probing. For mental health clients, the case bolsters the wall of protection afforded the intimacy of the therapeutic relationship. *Jaffee* has also contributed to the treatment of health privacy in the HIPAA regulations.

Although *Jaffee* is only directly applicable to cases filed in federal court, many states have had occasion to review the *Jaffee* decision as they decide similar matters under their jurisdiction. Three U.S. Circuit Courts of Appeal have also ruled on a controversial “dangerous patient exception” to *Jaffee*. These decisions will be analyzed in this Legal Issue of the Month article.

**Jaffee Reviewed**

The facts of *Jaffee* involved a police officer (Redmond) who shot and killed a man while on patrol. Redmond sought counseling with a clinical social worker afterwards to deal with the traumatic incident. The family of the deceased man sued Redmond and her employer in a civil action for monetary damages and sought the release of the clinical social worker’s notes to use as evidence.

Following a jury verdict for the family and a Court of Appeals reversal, the U.S. Supreme Court determined that “it is appropriate for the federal courts to recognize a psychotherapist privilege . . . [as] confirmed by the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege.” (*Jaffee* at 10). The Court added, “We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy.” (*Jaffee* at 13). Significantly, the Court rejected an approach that would have allowed judges to balance the rights of the respective parties after privately reviewing the counseling records, although reported cases in some state courts permitted such a review.

The key teachings of *Jaffee* have been reinforced by the body of law building around this core decision. These principles are as follows:
Psychotherapist–patient communications are beneficial to society by promoting mental health. Assurance of confidentiality is necessary to encourage these communications. It is in the public interest to ensure confidentiality of psychotherapist–patient communications by providing a legally protected privilege from disclosure. Mental health clinicians, including social workers, have an obligation to protect confidential client information, using the legal process if necessary. Clinical social workers are recognized as licensed professionals with the authority to diagnose and treat mental disorders.

The Jaffee decision is remarkable in that it created an absolute privilege, or bar, to disclosure of confidential psychotherapeutic records in legal proceedings. For example, in Newton v. Kemna, 354 F.3d 776 (2004), a convicted murderer sought habeas corpus relief, claiming that the lower court erred when it failed to conduct an in camera (in chambers) review of a witness’ psychiatric records. The U.S. Court of Appeals for the Eighth Circuit observed that Jaffee prohibits this and that no other federal appeals courts have permitted this since Jaffee was decided.

Some state courts permit judges to weigh the value of allowing or barring the introduction of psychotherapy evidence before deciding on its admissibility. Thus, in the process of determining admissibility of confidential information, in some states the information is disclosed to the judge for private, in camera review. By contrast, the Jaffee privilege available to clients in federal court proceedings is more protective of individual patient privacy.

Client Waiver of Privilege
Psychotherapy clients are permitted to waive (or “give up”) the right to privilege and there is variation among the courts as to what constitutes a waiver. An explicit signed waiver of privilege would normally be effective, assuming the client is legally competent.

In some cases a client is deemed to have given up the right to keep psychotherapy records confidential in legal proceedings if they are engaged in litigation and intend to use a mental health legal claim or defense. For instance, if the client sues a former employer for sexual harassment and claims that it caused a specific mental health disorder, such as depression or post-traumatic stress disorder, it is unlikely that the client’s mental health records will be protected from disclosure. In Cuoco v. United States Bureau of Prisons, 2003 WL 1618530, a prison inmate sued based on the use of force when she was transferred to another cell and restrained. At issue in the decision was the use of the prison psychologist’s psychotherapy notes. The federal district court found that by claiming “mental trauma,” “mental pain,” and “emotional injury” as part of her complaint, Cuoco had waived the right to privilege. The court also determined that Cuoco’s lawsuit alleged more than the “garden-variety” claim for emotional distress. A litigant cannot claim a mental health injury and seek monetary recourse from the alleged perpetrator without an expectation that some proof of the plaintiff’s mental health injury and treatment will be required.

In contrast, in Vanderbilt v. Chilmark, 174 F.R.D. 225 (1997), a federal trial court held that a former employee who sued her employer for discrimination did not waive psychotherapist-patient privilege by seeking damages for emotional distress. The court pointed out that if the plaintiff introduced her psychotherapy records into evidence, then that would constitute waiver. The court explicitly found that the
fact that a litigant consulted a psychotherapist is not privileged information, but the content of the sessions is protected.

In some states, clients who sue for monetary damages and include a general claim for “emotional distress” are deemed to have waived privilege, even though they did not make a claim for a specific mental health injury. Due to the conflicting applications of privilege and waiver in various courts, it may be unclear to a social worker seeking to protect client privacy whether the client has waived privilege or not.

Without a signed waiver of privilege from the client, psychotherapists would be required to resist disclosure of client information sought in legal proceedings and claim privilege on behalf of the client until a judicial determination was made as to the admissibility of the client’s psychotherapy records.

The “Dangerous Patient Exception”
The Supreme Court left open the possibility of exceptions to the strong ruling in Jaffee in its footnote 19:

"Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."

This has spawned conflict across the federal court system, as litigants have sought to clarify its meaning. The language used by the Supreme Court raises many questions about the application of the privilege rule in the context of specific court proceedings:

- Did the Court mistakenly conflate the “dangerous patient exception” with the existing Tarasoff “duty to warn?”
- Under what circumstances would disclosure by a psychotherapist in a court proceeding be the only means necessary to avert harm to the client or others?
- What standards apply to a determination of the patient’s dangerousness and whether disclosure in court is the “only means necessary” to avert harm?

Since Jaffee, the U.S. Courts of Appeal have addressed this issue in a variety of ways. In U.S. v. Glass, 133 F.3d 1356 (1998), the Tenth Circuit Federal Court of Appeals applied a “dangerous patient” exception, drawing on Jaffee’s footnote 19. Under the facts of that case, however, disclosure by the psychotherapist at the patient’s criminal trial did not meet the standard articulated in Jaffee, because it was not considered the “only means necessary” to avoid the harm threatened.

Two years later, the Sixth Circuit reached a different conclusion about the “dangerous patient” exception in United States v. Hayes, 227 F.3d 578 (2000). In that case a client made threats to his therapist regarding the client’s supervisor. The federal court of appeals determined that footnote 19 to Jaffee did not create a “dangerous patient” exception, and that the courts were confusing that with the “duty to warn.”

Finally, in United States v. Chase, 340 F.3d 978 (2003), the Ninth Circuit also declined to recognize a “dangerous patient” exception in a case involving threats against FBI officials.
In all of the above cases the courts were applying the principles articulated in Jaffee, a civil lawsuit, to criminal prosecutions where normally different rules of legal procedure apply. Thus, it remains unanswered by the federal appellate courts how a “dangerous patient” case would be interpreted in a civil litigation.

Conclusions
Jaffee v. Redmond is frequently cited in court decisions and legal journals for the basic principles regarding protection of mental health clients’ privacy, as well as for the recognition given to professional social work practice. Clients frequently waive the right to privilege when they file lawsuits and claim various types of mental injury, although social workers may need a legal consultation to determine if a privilege protects release of the records in a particular case. The “dangerous patient” exception has created a split among the federal appellate courts that may eventually pave the way for a Supreme Court ruling.

Jaffee is significant for social workers in multiple ways. It created a federal, common-law (judge-made law) legal doctrine recognizing “psychotherapist–patient privilege” for social workers as a part of the Federal Rule of Evidence. It also clarified the importance of mental health records and that clinical notes and client communications are distinct from other types of confidential communications and worthy of special protection. It also treated the mental health records of licensed social workers similar to those of psychiatrists and psychologists. As a Supreme Court opinion, it takes precedence over conflicting decisions of the lower federal courts in all 50 states. Thus, in the federal courts Jaffee is applicable on a national level. It is also highly influential in state court proceedings when state statutes that protect psychotherapy communications as privileged communications are at issue. Finally, Jaffee involved a clinical social worker who successfully protected her client’s confidentiality in the face of enormous pressure. Thus, it is clear that “psychotherapist–patient” privilege is a doctrine that applies to clinical social workers and their clients as well as to any psychiatrist or psychologist and patient.

References

Evidence—Federal Testimonial Privilege—Ninth Circuit Holds that There is No Dangerous-Person Exception to the Federal Psychotherapist-Patient Privilege, 117 Harv. L. Rev. 996 (January, 2004).

