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## The Psychotherapist and the Attorney/Client Privileges as They Arise in Civil Rights Disputes

Cover Page Footnote

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## THE PSYCHOTHERAPIST AND THE ATTORNEY/CLIENT PRIVILEGES AS THEY ARISE IN CIVIL RIGHTS DISPUTES

*Lewis M. Wasserman*\*

Rule 501 of the Federal Rules of Evidence provides for evidentiary privileges in federal practice.<sup>1</sup> Many people incorrectly assume there is a statutory scheme connected to evidentiary privileges in federal court. Although each of the fifty states has a statutory scheme of evidentiary rules, particularly relating to privileges, the federal courts do not.<sup>2</sup> Rather, Rule 501 of the Federal Rules of Evidence directs that “federal common law” applies.<sup>3</sup> Accordingly, in order to determine whether a privilege exists, and whether that privilege has been waived, it is necessary to look to the federal case law. This can be problematic for litigators, particularly when they are dealing with people who expected to retain an evidentiary privilege based on state rules, but then ended up in federal court.<sup>4</sup>

This article briefly reviews the elements of the psychotherapist-patient and attorney-client privileges and how these privileges

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<sup>1</sup> FED. R. EVID. 501.

<sup>2</sup> See *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996) (noting that it is usually appropriate for federal courts to recognize a privilege under Rule 501 where, as in the case of the psychotherapist privilege, the “50 States and the District of Columbia have enacted into law some form of psychotherapist privilege”).

<sup>3</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (applying attorney-client privilege, “the oldest of the privileges for confidential communications known to the common law” pursuant to Rule 501 of the Federal Rules of Evidence allowing federal courts to apply common law when considering privileges).

<sup>4</sup> Although Rule 501 provides that federal common law governs federal question cases and state law governs privileges on state law claims, there is disagreement over how to resolve privileges when the concurrent federal and state claims are brought in federal court. The prevailing view is that federal law will control all claims. See generally Martin A. Schwartz, Section 1983 Litigation, Federal Evidence, Vol. 3, § 7.04 (4th ed. 2007).

may be waived in the context of federal civil rights litigation.

## I. THE PSYCHOTHERAPIST PRIVILEGE

Any discussion about the psychotherapist privilege has to start with *Jaffee v. Redmond*.<sup>5</sup> This 1996 Supreme Court case established a psychotherapist-patient privilege within federal courts.<sup>6</sup> When analyzing whether the privilege exists in any given circumstance, there are three elements that need to be considered. First, the communication may be privileged where it is between a licensed therapist and a patient.<sup>7</sup> At the time *Jaffee* was decided, the circuit courts were not in agreement as to whether federal courts should recognize the psychotherapist-patient privilege.<sup>8</sup> *Jaffee* recognized the privilege and extended it to licensed or certified social workers.<sup>9</sup> Under *Jaffee* three types of therapy privileges may be recognized in federal practice based on the issuance of a license.<sup>10</sup>

The second element requires that the communications must relate to diagnosis or treatment.<sup>11</sup> And third, the communication must be made with an expectation of confidentiality.<sup>12</sup> These three conditions are the analytic framework of this discussion.

Prior to *Jaffee*, many circuit court decisions applied a balancing test to determine if the privilege applied; the courts weighed the benefit to the patient and need for therapy and confidentiality against

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<sup>5</sup> 518 U.S. at 4 (determining whether statements during “counseling sessions are protected from compelled disclosure,” in this case counseling sessions between a therapist and a police officer).

<sup>6</sup> *Id.* at 9-10 (“[T]he question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient ‘promotes sufficiently important interests to outweigh the need for probative evidence . . . .’ Both ‘reason and experience’ persuade us that it does.” (citing *Trammel v. United States*, 445 U.S. 40, 51 (1980))).

<sup>7</sup> *Jaffee*, 518 U.S. at 15.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 3-4, 15.

<sup>10</sup> *Jaffee*, 518 U.S. at 15-16 (holding that the privilege applying to psychiatrists and psychologists “should apply with equal force to treatment by a [licensed] clinical social worker”).

<sup>11</sup> *See id.* at 10 (describing that the purpose of the privilege is to encourage confidence and trust in the therapist so that a “patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears” for the purpose of diagnosis, thus communication relating to diagnosis or treatment should be protected to promote trust and confidence).

<sup>12</sup> *Id.* (suggesting patients would be discouraged from talking freely with their therapists if there was no expectation of privacy or confidentiality).

the broad societal interest in ascertaining the truth.<sup>13</sup> However, *Jaffee* made it clear that the privilege is absolute.<sup>14</sup> Accordingly, if the elements of the privilege are satisfied, then the privilege exists and no judicial balancing is required.<sup>15</sup> Whether the privilege is waived after it comes into existence is a separate legal question.<sup>16</sup>

There have been arguments made that the psychotherapist-privilege is so fundamental that it rises to a constitutional liberty interest.<sup>17</sup> However, courts have frequently shunned any argument that communications to a therapist are constitutionally protected.<sup>18</sup> In other words, to those courts it is only a rule of evidence that can be changed.<sup>19</sup> By contrast, courts have consistently found a constitutional liberty interest implicated by the attorney-client privilege.<sup>20</sup>

One common issue in a psychotherapist situation concerns instances where communications from the patient fall outside of the licensure of the therapist. For example, it is very common in police excessive force cases—where an officer shoots a person—for department rules to require the officer to enter treatment or counseling

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<sup>13</sup> See, e.g., *In re Doe*, 964 F.2d 1325, 1329 (2d Cir. 1992) (“[T]he privilege amounts only to a requirement that a court give consideration to a witness’s privacy interests as an important factor to be weighed in the balance in considering the admissibility of psychiatric histories or diagnoses.”); *In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983) (“[P]rivilege . . . is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure.”).

<sup>14</sup> *Jaffee*, 518 U.S. at 17-18 (describing the balancing test as an “eviscerat[ion] [of] the effectiveness of the privilege”).

<sup>15</sup> *Id.* at 17.

<sup>16</sup> *Id.* at 15 n.14. (“[T]he patient may of course waive the protection.”).

<sup>17</sup> See *Henry v. Kernan*, 197 F.3d 1021, 1030-31 (9th Cir. 1999) (discussing argument made seeking constitutional protection for patient-doctor communication on the basis that compelling a doctor to testify as to the treatment is a constitutional violation of privacy).

<sup>18</sup> *Id.* at 1031.

<sup>19</sup> *Id.* (“[T]here is no constitutional psychotherapist-patient privilege, only a federal evidentiary one.”).

<sup>20</sup> See, e.g., *In re Napster, Inc.*, 479 F.3d 1078, 1090 (9th Cir. 2007) (“The attorney-client privilege protects fundamental liberty interest.”). Due to the importance of the attorney/client privilege, if there is an invasion of the privilege, either by government informants or by workplace rules relinquishing the privilege, there may be constitutional issues and/or a § 1983 action, depending on the case. See, e.g., *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996) (noting that in order to raise a constitutional claim due to the invasion of the attorney-client privilege by the government, the claimant must satisfy the following elements: “(1) the government’s objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; (3) actual and substantial prejudice”); *United States v. Fortna*, 796 F.2d 724, 742 (5th Cir. 1986) (finding that the government impermissibly obtained evidence through a government informant in violation of the attorney-client privilege).

after a death ensues. This workplace requirement serves the purpose of helping the police officer individually, as well as serving the police department as an entity.<sup>21</sup> The communication between the police officer and the counselor possesses characteristics of conventional therapy, and for all intents and purposes is therapy. The problem is that, very often, police departments hire people who are not licensed therapists within the particular state jurisdictional rules.<sup>22</sup> If the communication with the therapist falls outside of the licensure for example, as with a marriage and family therapist, then the police officer may not be able to claim the psychotherapist privilege.<sup>23</sup>

However, there may be another way to protect the communications. There is another doctrine in psychotherapy privilege law, called the “quasi-therapist doctrine.”<sup>24</sup> If the police officer, in a post-shooting situation, communicates with a person that she reasonably believes is a licensed psychiatrist, social worker, or psychologist and the elements of the privilege are otherwise satisfied, those communications may be shielded by the quasi-therapist doctrine.<sup>25</sup>

It is important in establishing the privilege that its proponent include facts supporting the three elements required for the therapist privilege, as well as assert a reasonable belief that the counselor was a licensed therapist and the circumstances under which the belief arose. After all, if the police department sends an officer to see a psychotherapist, it is reasonable for the officer to believe that the person was licensed and or certified.

One of the elements of the psychotherapist-patient relationship is confidentiality.<sup>26</sup> However, a common argument is that if a police officer receives treatment from a therapist, say a psychologist,

<sup>21</sup> See *Speaker v. County of San Bernardino*, 82 F. Supp. 2d 1105, 1116 (C.D. Cal. 2000) (discussing a police officer who as a county employee was required to attend psychological evaluations after he was involved in a shooting).

<sup>22</sup> *Id.* at 1109.

<sup>23</sup> *Id.* at 1110 (indicating that counselors who specialize in marriage counseling, for example, have a limited scope of practice, they may participate only in the “practice of marriage, family, and child counseling[;]” therefore, if the communications are outside the scope of their practice, the privilege does not apply).

<sup>24</sup> *Id.* at 1114.

<sup>25</sup> *Id.* (discussing the ability to seek protection under the quasi-therapist-patient privilege when a patient reasonably believed treatment was provided by a licensed psychotherapist but was mistaken).

<sup>26</sup> *Jaffee*, 518 U.S. at 15 (illustrating that the psychotherapist and psychologist privilege extends to confidential communications).

and knows in advance that the report from the psychologist is going back to the police sergeant, lieutenant, or captain, there could be no expectation of confidentiality and no privilege could arise.<sup>27</sup> There are different rules regarding confidentiality in police departments throughout the country and they may implicate different outcomes for an assertion of the privilege.<sup>28</sup> Some police departments state that the department is only interested in information concerning the officer's ability to return to duty.<sup>29</sup> Others have rules requiring that the report, the contents of the report, and what was communicated to the therapist all be made available to the department.<sup>30</sup>

In analyzing these types of cases, the particulars of the departmental regulations and the information that was given to the police officer must be examined.<sup>31</sup> For example, a police officer might not have been informed as to whether or not communications with the therapist would be confidential. If the police officer reasonably believed that the communications made during therapy sessions were confidential, the officer may be able to claim a privilege if a § 1983 claim arises. In this regard it is important to look at the police union contract to determine what knowledge or expectation a police officer might have before beginning counseling sessions with a therapist. Depending on the language in the contract, there might be a waiver of confidentiality that would otherwise exist.

Another problem that arises is the patient's communications with third parties.<sup>32</sup> There are situations where the police officer, for example, will talk with the therapist, but also with a union representa-

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<sup>27</sup> *Speaker*, 82 F. Supp. 2d at 1116-17 (knowing communications with a therapist that would otherwise be privileged will be distributed to a third party demonstrates that there is no reasonable expectation of confidentiality thus there is no privilege).

<sup>28</sup> *See id.* (explaining that the police officer in this case, unlike police officers in other cases, had a reasonable expectation of confidentiality because he was told that his discussions and sessions with the counselor would remain confidential).

<sup>29</sup> *See* Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1, 13 (2000) (considering whether privilege should still apply when a psychiatrist is "not to disclose any psychiatric records or any confidential communications from the officer to the department" but only make a recommendation whether or not they are fit to return to work).

<sup>30</sup> *Speaker*, 82 F. Supp. 2d at 1116.

<sup>31</sup> *Id.* at 1116-17 (describing that a patient's expectation of privacy and the circumstances surrounding the session must be considered in order to determine whether or not the privilege applies).

<sup>32</sup> *Id.* at 1117.

tive about the same things as the therapist.<sup>33</sup> Clearly, in this situation, the communication is no longer confidential and the privilege is waived.<sup>34</sup>

Another confidentiality issue arises when parents attend the therapy sessions of their children.<sup>35</sup> Frequently, a parent will accompany her child to a therapy session for support and the child knows that the parent will hear what she says. In that situation, a number of cases have held that the presence of the third-party parent does not constitute a waiver.<sup>36</sup>

A similar situation that might arise under the psychotherapist-patient privilege is group therapy. For example, there are civil rights cases where the victim of sexual harassment in a gender discrimination case may enter into group therapy.<sup>37</sup> The question becomes whether there is a waiver due to the presence of third parties.<sup>38</sup> The general rule is that the psychotherapist-patient privilege can be preserved in group therapy.<sup>39</sup> Although it is not uniform among all ju-

<sup>33</sup> See *Administrative Investigations of Police Shootings and Other Critical Incidents: Officer Statements and Use of Force Reports Part Two: The Basics*, Employment Law Section, AELE Mo. L. J., Aug. 2008, at 203 (illustrating that while officers are discouraged from discussing events of a shooting they were involved in with other officers, they are encouraged to see a psychiatrist and may discuss the events with family or a union representative).

<sup>34</sup> *Speaker*, 82 F. Supp. 2d at 1116-17 (describing that there can be no expectation of privacy and confidentiality when communications are disclosed to third parties).

<sup>35</sup> See, e.g., *United States v. Whitney*, No. 05-40005-FDS, 2006 WL 2927531, at \*3 (D. Mass. Aug. 11, 2006) (describing that the presence of third parties generally destroys patient-therapist privilege, however if a parent is present during such his or her child's counseling session, the privilege is usually not considered destroyed or waived).

<sup>36</sup> *Grosslight v. Super. Ct.*, 72 Cal. App. 3d 502, 506 (Ct. App. 2d Dist. 1977) ("Where, for example, the communication to the parent is to further the child's interest in communication with, or is necessary for transmission of information to, a lawyer, a physician, or a psychotherapist, the communication is protected by the pertinent statutory privilege.").

<sup>37</sup> *Minnesota v. Andring*, 342 N.W.2d 128, 133 (Minn. Sup. Ct. 1984) (reasoning that all members of the group seeking therapy "are part of the diagnostic and therapeutic process for co-participants").

<sup>38</sup> See UNIF. R. EVID. 503(a)(5). Defining a psychotherapist as

a person authorized in any State or country, or reasonably believed by the patient to be authorized, to practice medicine, while engaged in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs, or a person licensed or certified under the laws of any State or country, or reasonably believed by the patient to be licensed or certified, as a psychologist, while similarly engaged.

*Id.* See *Andring*, 342 N.W.2d at 133 (raising the question of whether other patients in group therapy destroys the privilege).

<sup>39</sup> *Andring*, 342 N.W.2d at 134 ("An interpretation which excluded group therapy from the scope of the psychotherapist-patient privilege would seriously limit the effectiveness of



risdictions, there exists a strong argument that the privilege should apply to communications made in group therapy.<sup>40</sup>

### A. The “Dangerous Patient Exception”

There are a surprising number of cases where a patient receiving psychotherapy threatens serious violence against a specified person. The threshold issue in such cases is whether, under state law, the therapist has a duty to disclose those statements to the putative target, or others who can protect that target, at least where the threats are credible. In *Tarasoff v. Regents of the University of California*,<sup>41</sup> the seminal case on this issue, the California Supreme Court held that if a patient threatens to harm or kill someone, the therapist has a duty to disclose that communication either to the intended victim, to a police officer, or to a person that is in a position to protect the intended victim.<sup>42</sup> The courts are in universal agreement that a therapist may communicate with the intended victim without violating ethical standards and in terms of fulfilling her duty under state tort law.<sup>43</sup>

Since the therapist’s disclosure to protect a target is permissible or even required under state law, where the threat is a serious one, the question arises as to whether the therapist may be compelled to testify in judicial proceedings about those threats made in the course of diagnosis or treatment. The Circuit Courts are divided on this controversial issue. The Fifth Circuit has held that the psychotherapist-patient privilege does not attach when the therapist has previously advised the patient about the therapist’s duty to disclose those threats to protect the target, since the patient had no expectation of confidentiality concerning the communications.<sup>44</sup> The Sixth<sup>45</sup> and Ninth<sup>46</sup>

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group psychotherapy as a therapeutic device.”).

<sup>40</sup> See, e.g., *Farrell v. Super. Ct.*, 250 Cal. Rptr. 525, 527-28 (Ct. App. 5th Dist. 1988) (holding that participants in group therapy were present to facilitate the treatment of each other and the privilege was not waived); *Cabrera v. Cabrera*, 580 A.2d 1227, 1234 (Conn. App. Ct. 1990) (holding that presence of a spouse at a therapy session did not constitute a waiver of the privilege).

<sup>41</sup> 551 P.2d 334 (Sup. Ct. 1976).

<sup>42</sup> *Id.* at 340.

<sup>43</sup> See, e.g., Michael Ariens, “Playing Chicken”: *An Instant History of the Battle Over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239, 255 (2009).

<sup>44</sup> See *United States v. Auster*, 517 F.3d 312, 314 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 75 (2009) (holding that since defendant had no reasonable expectation of confidentiality when he threatened the managers of his workers compensation claim as required for the psy-

Circuits have held that there is no automatic “dangerous patient” exception to the psychotherapist-patient privilege, apparently requiring an express waiver by the patient before the therapist may testify against the patient as to the threats the patient made in therapy. The Tenth Circuit has held that there is a dangerous-patient exception to the privilege, but whether the exception applies may require findings, including the therapist’s testimony, as to the seriousness of the threat.<sup>47</sup> The Second Circuit has not addressed this particular issue.

Since threats of violence to a federal official are a crime and the therapist may be the only witness to the crime, prosecution of the defendant will necessarily depend on the circuit in which events arose. This may lead to uneven application of justice as applied to the prosecution of such crimes. Where an automatic dangerous-patient exception does not apply, the admissibility of the patient’s statements to the therapist may depend on the clarity of the notice given to the patient and its details as applied to the facts of the case.<sup>48</sup> Moreover, there may be issues concerning the patient’s competency. For example, if the patient’s comprehension and judgment are impaired, that person may not understand the warning given by the therapist. At the beginning of therapy, a psychotherapist should nevertheless give clear notice to the patient of her duties, which may

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chotherapist-patient privilege to apply, he could not bar admission of the statement at trial; defendant knew when he made statement that it would be forwarded to putative targets, given that under state law the therapist had a duty to warn managers and patient had been repeatedly told by therapist during therapy that his violent threats would be communicated to the potential victims).

<sup>45</sup> See *United States v. Hayes*, 227 F.3d 578, 586 (6th Cir. 2000) (holding that the defendant did not waive the psychotherapist-patient privilege by continuing to talk to therapists about his desire to kill his boss, a federal official, after being told of the therapist’s duty to protect; information on duty to protect was not a warning that therapist might assist in testifying against his patient and might assist in procuring a conviction and incarceration).

<sup>46</sup> See *United States v. Chase*, 340 F.3d 978, 987-89 (9th Cir. 2003) (holding that although a criminal defendant’s psychiatrist properly disclosed threats that defendant had related to him during therapy sessions regarding specific individuals, federal psychotherapist-patient privilege precluded psychiatrist’s testimony about what defendant said to therapist during sessions; there is no dangerous patient exception to the federal psychotherapist-patient testimonial privilege).

<sup>47</sup> See *United States v. Glass*, 133 F.3d 1356, 1359-60 (10th Cir. 1998) (holding that defendant charged with threatening life of President of the United States could invoke psychotherapist-patient privilege to protect confidential communication made by defendant to therapist in course of seeking treatment; evidentiary hearing was required to determine whether threat of harm was serious when uttered by defendant to therapist and could be averted by disclosure, such that compelled disclosure of the communication was warranted).

<sup>48</sup> *Auster*, 517 F.3d. at 315.

include warning any possible victims and testifying against the patient in court.<sup>49</sup> There is a case to be made for putting this notice in writing, at least in certain cases, and have its receipt recorded simultaneously with its delivery. Of course, the warning should be communicated in a way which accounts for the patient's level of understanding. There will necessarily be cases where the patient does not have the capacity to grasp the meaning of the therapist's warning. This may involve getting the requisite consent from a guardian or similar representative.

### B. The Crime-Fraud Exception

There is also a crime-fraud exception to the psychotherapist-patient privilege.<sup>50</sup> It arises in Medicaid fraud, Medicare fraud, and personal injury cases.<sup>51</sup> For example, the psychotherapist and the patient create a scenario about how impaired a person should be as a result of the tort, which results in wrongful conduct by both sides. If you can establish a crime-fraud exception with the psychotherapist-patient relationship, you may be able to invade the privilege.<sup>52</sup>

### C. The "Unlicensed but Qualified Person" Exception

It is common knowledge that Alcoholics Anonymous ("AA") is primarily run by laypeople. In fact, a popular perception is that AA is one of the most effective ways of dealing with alcoholics and

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<sup>49</sup> Summary of the HIPAA Privacy Rule, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (last visited Jan. 25, 2010).

<sup>50</sup> *In re Violette*, 183 F.3d 71, 76-77 (1st Cir. 1999) ("In the psychotherapist-patient context, we likewise should exclude from the privilege communications made in furtherance of crime or fraud because the mental health benefits, if any, of protecting such communications pale in comparison to 'the normally predominant principle of utilizing all rational means for ascertaining truth.'").

<sup>51</sup> *Id.* at 77 ("Psychotherapists could use the privilege to deflect investigations into health insurance fraud. Similarly, fraudulent personal injury cases could find effective refuge under the umbrella of the privilege.").

<sup>52</sup> The attorney-client privilege can be broken if the attorney and the client, together or separately, are involved in a criminal conspiracy or similar act, so that the services of the attorney are not really for the rendition of legal advice, but rather to figure out how the legal system can be circumvented for the purposes of committing a crime. *See, e.g., United States v. Zolin*, 491 U.S. 554, 562-65 (1989) ("It is the purpose of the crime-fraud exception to the attorney-client privilege to assure the 'seal of secrecy,' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime.").

getting somebody to stop drinking, at least for the time they have a relationship with AA.<sup>53</sup> The problem arises because laypeople are not licensed to perform counseling or psychotherapy functions. However, there is a growing body of law that would recognize AA “patient communications,” but it is uncertain and the courts are divided.<sup>54</sup> In this instance, legislation would be helpful to clarify the problem.

#### D. Implied Waivers

The Second Circuit recently decided *Sims v. Blot*.<sup>55</sup> The issue concerned what constitutes waiver of the psychotherapist-patient relationship within a § 1983 lawsuit when plaintiff claims emotional distress damages.<sup>56</sup> A plaintiff may request generalized damages that typically accompany an injury, say during or following the application of excessive force, for example, fear or anxiety. These are referred to as *garden variety* emotional distress damages. On the other hand, plaintiffs may assert more profound *emotional distress* damages such as serious depression, suicidal ideation, or similar significant emotional injuries. Depending on how plaintiff pleads the emotional distress damages and what she says in discovery, she may or may not waive the psychotherapist-patient privilege.<sup>57</sup> The issue is one of fairness to the defendant. The more serious the claimed emotional harm, the greater the likelihood that the privilege has been waived. After all, a defendant exposed to significant monetary damages should be able to test the merits of a serious emotional distress claim, including obtaining the pertinent therapy records and examining the psychotherapist. But the clear holding of the *Sims* case is that garden variety emotional distress does not, by itself, trigger a waiver of the psychotherapist-patient privilege.<sup>58</sup>

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<sup>53</sup> See Information on AA, [www.aa.org](http://www.aa.org) (last visited Mar. 17, 2010).

<sup>54</sup> See *Cox v. Miller*, 296 F.3d 89, 92-93 (2d Cir. 2002).

<sup>55</sup> *Sims v. Blot*, No. 09-2060-pr, 2009 WL 4072116 (2d Cir. Nov. 25, 2009).

<sup>56</sup> *Id.* at \*1 (“This action under 42 U.S.C. § 1983 arises out of an altercation between Sims and the defendant-appellees, both guards at the prison.”).

<sup>57</sup> *Id.* at \*2.

<sup>58</sup> *Id.*

It does not appear that the testimony focused on Sims’s psychiatric history . . . the references in the closing argument were related to the defendant’s theory of motive. The district court appears to have weighed the

There are variant cases of *Sims* where, for example, during the course of litigation, practitioners may conference with the judge, and the judge may suggest that the emotional distress claim is weak. As such, the practitioners must decide whether to prosecute the emotional distress claim or relinquish it. In dealing with a § 1983 litigation, there are few cases that have awarded substantial amounts of money for emotional distress.<sup>59</sup> Substantial money awards have been given for back pay, attorney fees, and other things, but emotional distress has not historically received great awards.<sup>60</sup> Nevertheless, some practitioners press the issue and sometimes, but not often, win large awards for emotional distress.<sup>61</sup>

*Sims* holds that the plaintiff may have an opportunity to withdraw one aspect of the damages claim, which is often the emotional distress claim. In other words, if the court says, “You are going to have to give up the psychotherapist privilege because you crossed the line and you are talking about severe emotional distress and depression,” there is an opportunity to relinquish that part of your claim and avoid revelations, which may be personally embarrassing or result in other objectionable consequences. Regardless, the court may—due to the existing conditions of the pleadings—find that the privilege was waived. This situation is beneficial to defense counsel because, at least, the emotional distress claim has been dropped. It is also important to note that depending on the nature of communication with the therapist, the communication might be sufficiently embarrassing to get the plaintiff to withdraw that aspect of the complaint.

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prejudice against probative value, as required; it was not in error in admitting this evidence.

*Id.*

<sup>59</sup> See, e.g., *Carey v. Phipus*, 435 U.S. 247, 248 (1978) (holding that students suspended from public elementary and secondary schools without procedural due process were entitled to recover only nominal damages).

<sup>60</sup> See, e.g., *Sevigny v. Dicksey*, 846 F.2d 953, 959 (4th Cir. 1988) (awarding damages in the amount of \$3680, despite finding that Sevigny suffered extreme emotional distress).

<sup>61</sup> See, e.g., *Hetzel v. Prince William County*, 523 U.S. 208, 209 (1998) (awarding damages initially in the amount of \$750,000, although the damages were recalculated to \$50,000 on remand).

## II. ATTORNEY/CLIENT PRIVILEGE AND GOVERNMENT ATTORNEYS

The leading case in this area is *Upjohn Co. v. United States*.<sup>62</sup> *Upjohn* is a private sector case decided in 1981. It involved the application of the attorney-client privilege to officers serving at different levels of the hierarchy within a corporation.<sup>63</sup> Prior to *Upjohn*, there was a doctrine called “the control group test,” meaning if a person were high enough in the corporation, communications with the corporation’s attorney were protected by the attorney-client privilege.<sup>64</sup> *Upjohn* expanded the scope of this rule, and now an attorney can claim a communicative privilege with anybody in the hierarchy of the corporation.<sup>65</sup> The *Upjohn* doctrine has been incorporated into municipal cases, at least with regard to civil litigation, almost completely.<sup>66</sup>

There are four elements to *Upjohn*: (1) the communication with the attorney must be made and authorized by corporate supervisors; (2) the purpose of the communication is to secure, or give legal advice; (3) the communication involves activities within the scope of the lower level employee’s job; and (4) there is an understanding that the material and the communications would be kept confidential.<sup>67</sup>

Problems in applying *Upjohn* arise in suits against municipalities and other governmental entities. Government officials are frequently very informal with the way they communicate with the attorneys. For instance, the superintendent of schools, the assistant superintendent, and a few principals may communicate with the school board attorney at a school board meeting. There are likely other people in the room during the alleged attorney-client communication who may be outside the scope of the communication network that is privileged. The presence of these lower echelon employees, if

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<sup>62</sup> 449 U.S. 383 (1981).

<sup>63</sup> *Id.* at 386.

<sup>64</sup> *Id.* at 391-92.

<sup>65</sup> *Id.* at 397 (“[W]e conclude that that narrow ‘control group test’ . . . cannot, consistent with ‘the principles of common law as . . . interpreted . . . in the light of reason and experience,’ govern the development of the law in this area.”).

<sup>66</sup> See Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 179 (2007) (noting that as a result of *Upjohn*, corporate attorney-client privilege has become “firmly entrenched in legal doctrine”).

<sup>67</sup> *Upjohn*, 449 U.S. at 394.

they are not needed for the rendition of the legal advice or if the purpose of the attorney's communications falls outside their job duties, may result in a failure to establish the attorney-client privilege, or a waiver of the privilege, depending on the particular circumstances.<sup>68</sup> As a result, a plaintiff may be able to procure the information that was disclosed during the course of the communications.

As another example, assume the town attorney, the town political leader, and the union representatives were at a bar talking about an employee they wanted to fire who was related to the supervisor, the town's chief executive officer. Everybody present may assume that because they are talking to the town attorney, the communication is privileged. However, it is not likely going to be privileged because some of the people present are outside the permissible loop to retain the privilege.<sup>69</sup> In other words, a third party who attends the meeting may not have received the confidential information with appropriate board authority, for the purpose of securing legal advice, or in connection with activities within the scope of the third party's government employment, which may result in a waiver.<sup>70</sup> As a result, the attorney can be forced to disclose those conversations, which can be politically embarrassing and perhaps devastating to a pending lawsuit. Thus, attorneys involved in municipal litigation who want to get this type of information should look at the hierarchy and relationships of those present at the meetings. The exclusion or inclusion of someone in the conversation may determine whether the communications were privileged.

An issue also arises in the context of local boards in determining who is the client, with the town board being a separate entity. In New York, for example, a town board typically consists of five individuals, including the town supervisor.<sup>71</sup> Who can waive the privilege on the board's behalf?<sup>72</sup> If one member of the town board de-

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<sup>68</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 (2000) (“[The] attorney-client privilege is waived if the client . . . voluntarily discloses the communication in a nonprivileged communication.”).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., Jeff Leibowitz, *Manmade Ponds Called Peril*, N.Y. TIMES, July 7, 1985, at 111I (noting that the Town Board of Smithtown consists of five members).

<sup>72</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76, Comment G (2000).

[A] member is not authorized to waive the privilege for another member's communication. If a document or other recording embodies com-

cides she is going to speak out and disclose what was said in conference in executive session, does that constitute a waiver? Did that individual, being one of five, have the authority to waive, and is that unauthorized communication something that should be held against the municipality? The law is pretty clear: the attorney-client privilege belongs to the entity.<sup>73</sup>

Another difficulty arises in multiple-defendant cases where both the municipality and individuals associated with the entity are sued. The leading case on this issue is *Ross v. Memphis*.<sup>74</sup> The § 1983 defendant, who was sued individually, claimed good faith and “advice of counsel” in his attempt to mitigate damages.<sup>75</sup> The court said that it is not the individual employee’s right to waive the privilege because the waiver privilege belongs to the government entity.<sup>76</sup> Since the municipality refused to waive the privilege the individual defendant could not present evidence he wished to reveal. Therefore, one has to examine the relationships among the government personnel to discover whether or not the government gave that employee protection by assigning its attorney to the particular individual. It is the employee’s responsibility to clarify this relationship, not the government. Courts will assume the privilege in such situations belongs to the municipality.

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munications from two or more members, a waiver is effective only if concurred in by all members whose communications are involved, unless an objecting member’s communication can be redacted.

*Id.*

<sup>73</sup> See Matthew Altemeier, *Rethinking Selective Waiver: The Argument for Mandatory Disclosure*, 28 REV. LITIG. 629, 651 n.111 (2009) (noting that the privilege belongs to the corporation and not to the employee).

<sup>74</sup> 423 F.3d 596 (6th Cir. 2005).

<sup>75</sup> *Id.* at 598-99 (“Relying on [his attorneys’] advice, Crews claimed, he decided to proceed with Ross’s hearing. Crews argues that his reliance on their advice renders his behavior reasonable, thus entitling him to a defense of qualified immunity.”).

<sup>76</sup> *Id.* at 605 (“Crews certainly could not assert that he relied on privileged communications and then hide behind the privilege, if he ever had it. But it is the City that holds the privilege to these communications.”).