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### The Psychotherapist-Patient Privilege

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## The Psychotherapist-Patient Privilege

Cover Page Footnote

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## THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

*Honorable Michael L. Orenstein*<sup>1</sup>

What is striking about the psychiatric or psychotherapist-patient privilege is that the Supreme Court of the United States recognized it as a federal common law privilege in a very interesting manner. It came up as a result of a plaintiff seeking the defendant's psychotherapist's records.<sup>2</sup> Generally what we see, at least before Magistrate Judges in discovery, is the defense seeking the plaintiff's psychiatric or psychotherapy records.<sup>3</sup> In the view of one person, however, the world's finest psychiatrists are not licensed mental health therapists.<sup>4</sup> As a result, the United States Supreme Court failed to recognize the privilege protecting the therapy that was offered by mothers and

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<sup>1</sup> Michael L. Orenstein is a United State Magistrate Judge for the Eastern District of New York. Judge Orenstein received his B.A. degree from Cornell University in 1961 and his J.D. from New York University Law School in 1965. In 1985 he became Chief Clerk of the Nassau County Supreme Court and remained such until his Federal Judicial appointment in 1991.

<sup>2</sup> *Jaffee v. Redmond*, 518 U.S. 1, 5 (1996). In *Jaffee*, the defendant, a former police officer, shot and killed a man in the line of duty. *Id.* at 3. The petitioner, administrator of the decedent's estate, filed suit alleging that the defendant had violated the decedent's constitutional rights by using excessive force. *Id.* at 5. The petitioner sought to enter into evidence statements that the defendant made to her therapist after she shot the decedent. *Id.*

<sup>3</sup> See, e.g., *Schwenk v. Kavanaugh*, 4 F. Supp. 2d 116, 117 (N.D.N.Y. 1998); *Brown v. Telerep, Inc.*, 693 N.Y.S.2d 34, 35 (N.Y. App. Div. 1999); *Connell v. Beaulac*, 507 N.Y.S.2d 556, 557-58 (N.Y. App. Div. 1986).

<sup>4</sup> *Jaffee*, 518 U.S. at 22 (1996) (Scalia, J., dissenting).

bartenders.<sup>5</sup> This distinction was pointedly made and addressed by Justice Scalia in his dissent in *Jaffee v. Redmond*.<sup>6</sup> He stated:

[f]or most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends and bartenders — none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.<sup>7</sup>

Instead, the Supreme Court recognized the common law psychotherapist-patient privilege in federal question cases such as in § 1983<sup>8</sup> and presumably Title VII<sup>9</sup> cases. They said, “[w]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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

<sup>8</sup> Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2003). *See, e.g.*, *Ziemann v. Burlington*, 155 F.R.D. 497, 506 (D.N.J. 1994) (holding that there is a marriage counselor privilege that grows out of the psychotherapist-patient privilege); *Plowman v. U.S. Dep’t of Army*, 698 F. Supp. 627, 634 (E.D. Va. 1988) (holding that, under certain circumstances, a plaintiff’s right to privacy in information concerning his medical condition is not absolute and limited disclosure is admissible).

<sup>9</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2004). *See, e.g.*, *Lefave v. Symbios, Inc.*, No. CIV.A.99-Z-1217, 2000 WL 1644154, at \*1 (D. Colo. Apr. 12, 2000) (holding that a plaintiff seeking emotional distress damages, in a Title VII claim, may constitute a waiver of the psychotherapist-patient privilege); *Santelli v. Electro-Motive*, 188 F.R.D. 306, 309 (N.D. Ill. 1999) (holding that a plaintiff seeking to receive damages for emotional distress may escape waiver of her psychotherapist-patient privilege by limiting her claim to particular emotions).

treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”<sup>10</sup> Eight Justices agreed with the opinion written by Justice Stevens.<sup>11</sup> They noted that Rule 501 allows the courts to define the new evidentiary privileges as dictated by interpretation of the principles of common law and by reason and experience.<sup>12</sup> As such, those Justices found that private and public interests support the psychotherapist-patient privilege.<sup>13</sup>

The privilege exists in some form in all fifty states.<sup>14</sup> It serves private interests by promoting the confidence and trust necessary for effective psychotherapy.<sup>15</sup> The Justices analogized the privilege to the spousal privilege and the attorney-client privilege.<sup>16</sup> The Court recognized that the possibility that

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<sup>10</sup> *Jaffee*, 518 U.S. at 15. FED. R. EVID. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim of defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 8.

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.* at 14 n.13.

<sup>15</sup> *Jaffee*, 518 U.S. at 11.

<sup>16</sup> *Id.* at 10 (“Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is ‘rooted in the imperative need for confidence and trust.’”) (citing *Trammel v. United States*, 445 U.S. 40, 51

confidential information shared with a psychotherapist could be disclosed might impede development of the confidential relationship needed for successful treatment.<sup>17</sup> The privilege facilitates private and public interests by allowing effective treatment which in turn helps to promote the mental and emotional health of its citizens.<sup>18</sup>

Another interesting aspect of the *Jaffee* decision is that it rejected a balancing component of the privilege.<sup>19</sup> Previously, the circuit courts and other courts recognizing the psychotherapist-patient privilege used a balancing test.<sup>20</sup> They weighed the need for the evidence versus the patients' interests and their privacy.<sup>21</sup> The Supreme Court stated:

Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some certainty whether particular discussions will be protected. An 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."<sup>22</sup>

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(1980)).

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

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *Id.* at 17.

<sup>20</sup> *Jaffee*, 518 U.S. at 17.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 17-18 (citing *Upjohn v. United States*, 449 U.S. 383, 393 (1981)).

However, the Court left it to everybody else to figure out what the contours of the privilege are and would be. It said that since *Jaffee* “is the first case in which we have recognized a psychotherapist patient privilege, it is neither necessary nor feasible to delineate its full contours.”<sup>23</sup>

The Court had some very interesting footnotes, one of which was footnote fourteen.<sup>24</sup> There the Court stated that the patient, of course, may waive the protection.<sup>25</sup> In footnote nineteen, the Court said:

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.<sup>26</sup>

What is interesting about that footnote is that it came about twenty years later than the duty to disclose by a psychotherapist came about in *Tarasoff v. Regents of University of California*.<sup>27</sup> *Tarasoff* was probably the leading case of warning by psychotherapists and the duty to warn, which had been recognized by the courts.<sup>28</sup>

As a result of footnote nineteen, courts have engaged in an

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 15 n.14.

<sup>25</sup> *Jaffee*, 518 U.S. at 15.

<sup>26</sup> *Id.* at 18 n.19.

<sup>27</sup> 551 P.2d 334 (Cal. 1976).

idea or discussion as to what exceptions may exist.<sup>29</sup> One exception is the dangerous person. Twenty-two years after *Tarasoff*, a Tenth Circuit case, *United States v. Glass*,<sup>30</sup> involved the prosecution of someone who wanted to kill the president. In *Glass*, the trial court rendered a determination about the exception.<sup>31</sup> On appeal, the circuit court accepted the idea of the exception as set forth in footnote nineteen, but remanded the case to the District Court to determine whether the conditions for the exception existed.<sup>32</sup> That is, whether when uttered, there was a threat of serious harm and whether disclosure was the only means of diverting harm.<sup>33</sup> On remand, the defendant's psychiatrist and the secret service agent to whom the confidential information was disclosed gave testimony.<sup>34</sup> The psychiatrist testified that once Mr. Glass was stabilized on Haldol and had stopped hallucinating about killing the president, he was discharged to his father's care.<sup>35</sup> A few days later, the psychiatrist learned that Mr. Glass left his father's care and his whereabouts were unknown.<sup>36</sup>

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<sup>28</sup> *Id.* at 342-43.

<sup>29</sup> *Jaffee*, 518 U.S. at 18 n.19.

<sup>30</sup> 133 F.3d 1356 (10th Cir. 1998).

<sup>31</sup> *Id.* at 1357 (noting the district court's determination that the "broad privilege recognized by *Jaffee* is inapplicable" when there has been "an express threat to kill a third party by a person with an established history of mental disorder").

<sup>32</sup> *Id.* at 1360.

<sup>33</sup> *Id.*

<sup>34</sup> Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1, 35 (2000) (citing *United States v. Glass*, No. CR-96-94-T (W.D. Okla. Apr. 9, 1998)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Concerned about Mr. Glass' lack of supervision and fearing that he would again discontinue his medication, the psychiatrist concluded that Glass now posed a serious threat to the president and that involuntary commitment was not available because Glass had disappeared.<sup>37</sup> Likewise, the Secret Service agent testified that based on Glass having money available for travel and a prior history of investigation for similar threats, he considered the threat serious.<sup>38</sup> Accordingly, the district court denied Glass's motion to exclude that evidence or the statements he made to the psychiatrist, holding that they were "properly admissible as an exception to the psychotherapist-patient privilege."<sup>39</sup>

After *Glass*, about two years later, a case was brought in the Sixth Circuit, *United States v. Hayes*.<sup>40</sup> The court in *Hayes* denied the dangerous person exception in the context of a criminal proceeding.<sup>41</sup> The defendant did not waive the privilege by continuing to talk to therapists about threats even after being told by the therapists of their duty to protect others.<sup>42</sup> The court held that such duty to protect was not a warning that the therapist

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Nelken, *supra* note 34, at 35 (citing *Glass*, No. CR-96-94-T, at 8).

<sup>40</sup> 227 F.3d 578 (6th Cir. 2000). The federal government prosecuted the defendant for making threats, during several psychotherapy sessions, to murder his supervisor at the United States Postal Service. The defendant filed a motion to suppress medical records prepared by his psychotherapists, and to exclude the therapist's expected testimony, on the grounds that the medical testimony and records were privileged. *Id.* at 579.

<sup>41</sup> *Id.* at 586.

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

might assist in the procuring of the conviction and incarceration.<sup>43</sup>

Just recently in the Ninth Circuit, in an *en banc* decision in *United States v. Chase*,<sup>44</sup> the court also rejected the dangerous person exception.<sup>45</sup> However, in all circuits, whether it is the Tenth Circuit in *Glass*, the Sixth Circuit, or the Ninth Circuit, there is no issue regarding the duty to warn either the victim or law enforcement. These courts have said is that it is the disclosure during testimony that is privileged, not the duty to warn in order to avert something happening to a victim.<sup>46</sup>

Another exception which has been recognized by the courts is the crime fraud exception.<sup>47</sup> This particular exception was recognized in the First Circuit case *In Re Grand Jury*

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<sup>43</sup> *Id.*

<sup>44</sup> 340 F.3d 978 (9th Cir. 2003), *cert. denied*, 540 U.S. 1220 (2004). The United States prosecuted defendant for making threats against agents of the Federal Bureau of Investigation. The threats on which the defendant's conviction was based were made to a telephone operator at a clinic. The threats on which defendant was acquitted were communicated during therapeutic sessions, to his psychiatrist, who testified about them. On appeal, defendant argued that the psychotherapist-patient privilege precluded the psychiatrist's testimony. *Id.* at 979.

<sup>45</sup> *Id.* at 992. The court reasoned:

A dangerous-patient exception to the federal psychotherapist-patient testimonial privilege would significantly injure the interest justifying the existence of the privilege; would have little practical advantage; would encroach significantly on the policy prerogatives of the states; and would go against the experience of all but one of the states in our circuit, as well as the persuasive Proposed Rules.

*Id.*

<sup>46</sup> *See id.* at 985-92; *Hayes*, 227 F.3d at 583-84; *Glass*, 133 F.3d at 1359.

<sup>47</sup> *In re Grand Jury Proceedings* (Gregory P. Violette), 183 F.3d 71, 79 (1st Cir. 1999).

*Proceedings (Gregory P. Violette)*.<sup>48</sup> The court indicated that where the communication is intended directly to advance a particular criminal or fraudulent endeavor, it is not privileged.<sup>49</sup> The rationale expressed in *In re Grand Jury* is that the policy underlying the psychotherapist-patient privilege is similar to that of the attorney-client privilege.<sup>50</sup> Thus, courts look to case law interpreting the crime fraud exception in the attorney-client privilege arena and apply it to the psychotherapist-patient privilege.<sup>51</sup>

The court in *In re Grand Jury* based its determination on the fact that a communication expressing the purpose of furthering a crime or fraud is not a communication for the purpose of diagnosis or treatment.<sup>52</sup> Now, I find it very interesting after having read *Glass*, *Hayes*, and *Chase* that none of the courts, the district courts or the circuit courts, even thought about the possibility that someone expressing the fact that they are about to do harm to someone else never thought of this as an exception falling under the crime fraud exception. They kept talking about it under the dangerous person exception.<sup>53</sup>

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<sup>48</sup> *Id.* at 71.

<sup>49</sup> *Id.* at 77.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 79 (stating that “[t]he case law dealing with the crime-fraud exception in the attorney-client context makes it transparently clear that the client’s intentions control. We see no credible basis for applying a different rule in the psychotherapist-privilege context.”).

<sup>52</sup> *In re Grand Jury Proceedings*, 183 F.3d at 73-74.

<sup>53</sup> *See Chase*, 340 F.3d at 979 (declining “to craft a ‘dangerous patient’ exception” to the federal psychotherapist-patient privilege); *Hayes*, 227 F.3d at

Other possible exceptions which have not been discussed recently is the person who is involuntarily hospitalized for a mental disease or defect or someone subject to a court-ordered psychiatric examination. These are exceptions I have yet to see in the case law, most likely because they are fundamentally sound as exceptions to the psychotherapy privilege.

Now, who is a psychotherapist? After all, we are talking about a psychotherapist-patient privilege. Well, as we know from *Jaffe*, licensed social workers are included.<sup>54</sup> In *Jaffe*, Ms. Beyer was a licensed clinical social worker.<sup>55</sup> As for a licensed psychologist or a licensed psychiatrist courts will probably look to state law to determine whether or not these people have certification or licenses since federal law does not encompass the licensing procedures or the licensing requirements of these people.

How about the employee assistance program counselor?

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579 (declining to recognize a “‘dangerous patient’ exception to the federal psychotherapist/patient testimonial privilege under Fed. R. Evid. 501.”); *Glass*, 133 F.3d at 1357. The district court recognized and found the dangerous patient exception applicable to the case at hand. *Id.* On appeal, the Tenth Circuit remanded the case to the district court to determine whether the dangerous patient exception would apply to the case. The district court had to determine whether “the threat was serious when it was uttered and whether its disclosure was the only means of averting harm to the President when the disclosure was made.” *Id.* at 1360.

<sup>54</sup> *Jaffe*, 518 U.S. at 15 (concluding that the “federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy.”).

<sup>55</sup> *Id.*

In *Oleszko v. State Compensation Insurance Fund*,<sup>56</sup> the privilege was extended to EAP counselors, who are unlicensed, because while they do not engage in psychotherapy, they are the employee-patient's access to therapists and treatment. Therefore, the presence of an EAP counselor can be analogized to situations when someone else is in the room with the person to whom the confidential communication is made.<sup>57</sup>

How about the general practitioner? Is that person qualified for the psychotherapist-patient privilege? In *Finley v. Johnson Oil Co.*, communications with the general practitioner at a health clinic for the purpose of obtaining psychotherapy were held protected by the privilege.<sup>58</sup>

How about an unlicensed social worker or unlicensed professional counselor at a mental health clinic? In *Jane Student v. Williams*, the court followed a very bright line rule and held that the privilege did not apply.<sup>59</sup> It said no license, no

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<sup>56</sup> 243 F.3d 1154 (9th Cir. 2001).

<sup>57</sup> *Id.* at 1158. The Ninth Circuit extended the psychotherapist-patient privilege to include "communications with EAP personnel" due to the "public and private interests" served by EAPs, "the necessity of confidentiality in order for EAPs to function effectively, and the importance of protecting this gateway of mental health treatment by licensed psychiatrists, psychologists, and social workers." *Id.* at 1159.

<sup>58</sup> 199 F.R.D. 301, 303-04 (S.D. Ind. 2001) (holding that "the federal common law privilege relating to disclosure of mental health communications" apply to the general practitioner-patient relationship).

<sup>59</sup> 206 F.R.D. 306, 309 (S.D. Ala. 2002) (stating that "the licensing requirement establishes a bright line for the boundaries of the privilege, so that both professional and patient may be clear about the confidentiality of their

privilege.<sup>60</sup> The court relied upon the language in *Jaffee*.<sup>61</sup> Others who have discussed this issue say that if the communications to an unlicensed person were found to be privileged, then Charlie Brown's communications to Lucy, his psychotherapist, would be privileged.

What about the Alcoholics Anonymous telephone volunteers? Privileged or not? No, says the Seventh Circuit in *United States v. Schwensow*.<sup>62</sup> Obviously the fact that certiorari was denied only means that four judges did not want to take the case. I think they are probably waiting for other case law to develop before deciding on that issue. In *Schwensow*, the Seventh Circuit relied upon the facts that the interactions did not involve diagnosis, treatment or counseling.<sup>63</sup> The volunteer workers had not received any mental health training and did not identify themselves as therapists or counselors.<sup>64</sup> Additionally, AA did not have any indicia of providing counseling services.<sup>65</sup> However, what if the volunteer identified himself as Father

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<sup>60</sup> *Id.* at 310 (holding that the "federal psychotherapist privilege does not extend to unlicensed social workers or unlicensed professional counselors.").

<sup>61</sup> *Id.* (concluding that the "psychotherapist privilege attaches only to 'confidential communications between [the licensed professional] and her patient in the course of diagnosis and treatment' or 'in the course of psychotherapy.'" (quoting *Jaffee*, 518 U.S. at 15).

<sup>62</sup> 151 F.3d 650 (7th Cir.), *cert. denied*, 525 U.S. 1059 (1998).

<sup>63</sup> *Id.* at 657-58 (finding that defendant did not speak to the two Alcoholics Anonymous phone operators to seek "diagnosis, treatment, or counseling . . . for purposes of attempting to treat his alcoholism" and therefore, the court held the communications between the defendant and the two operators were not confidential).

<sup>64</sup> *Id.* at 657.

Smith, a priest or a rabbi? What about the clergy-penitent privilege? What do you think would happen there? We will have to wait for a case on that one. Now, in these situations, where someone calls in and they receive counseling on the phone, there is an issue of confidentiality. I think we can probably agree that the caller expects confidentiality, so we meet the first criteria. But what if during that phone call you hear the announcement that the call is being monitored for quality control or for training purposes? Does confidentiality exist under those circumstances? Probably not because the caller has been warned.

How about the therapist who treats the husband and the wife or a family? The privilege applies if the communication is limited to one where the husband talks about the wife.<sup>66</sup> The communication is not going to be privileged if the husband seeks recompense.<sup>67</sup> If the husband talks solely about himself to that

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<sup>65</sup> *Id.*

<sup>66</sup> The psychotherapists-patient privilege, subject to patient waivers, protects from disclosure all communications that relate to the patient's treatment. *See, e.g.,* Tesser v. Bd. of Educ., 154 F. Supp. 2d 388, 394 (E.D.N.Y. 2001) (holding that husband's "account of his own feelings and emotions concerning his wife that he related to" his psychotherapist and any further communications relating to his treatment did not have to be disclosed).

<sup>67</sup> *See id.* at 395 n.4 (noting that "[g]enerally, a patient waives the psychotherapist-patient privilege by raising his mental condition as an element of his claim or defense."). *See also* Maynard v. City of San Jose, 37 F.3d 1396, 1402 (9th Cir. 1994) (holding that plaintiff "waived any privilege protecting his psychological records when he put his emotional condition at issue during the trial."); Rohda v. Franklin Life Ins. Co., 689 F. Supp. 1034, 1040 (D.C. Colo. 1988) (plaintiff "has impliedly waived the [psychotherapist-patient] privilege because she has injected her mental condition into the case").

therapist, the privilege would probably apply.<sup>68</sup> You wind up having to take an extra step there to find out what it was about. If the statements do not relate to his own treatment and relate instead to another's condition, then it is not privileged.<sup>69</sup> If it is for treatment, then the privilege is upheld as to the one being treated.<sup>70</sup>

On November 13, 2003, the *New York Law Journal* reported a case by the name of *Berger v. Fornari*.<sup>71</sup> A Dr. Berger went to see a Dr. Fornari, a psychotherapist or a psychiatrist.<sup>72</sup> Dr. Fornari took what the patient, Dr. Berger, said to him and he discussed parts of it with members of his synagogue.<sup>73</sup> The problem was that Dr. Berger was also a member of the same synagogue, so word got back to him that Dr. Fornari apparently spoke about those confidential things Dr. Berger told him. Dr. Berger sued Dr. Fornari for violation of a fiduciary duty.<sup>74</sup> During the deposition of Dr. Berger they kept asking him what his damages were. Question: "When you say 'emotional damages,' can you tell me how you've been damaged

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<sup>68</sup> *Tesser*, 154 F. Supp. 2d. at 393 (finding that the need for confidentiality arose "in the context of treatment of the patient making the statements about himself and his condition.").

<sup>69</sup> *Id.* at 394 (holding that if statements made by the patient-husband regarding his wife "were not made in connection with [the husband's] treatment" the statements would not be protected from disclosure).

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

<sup>71</sup> N.Y.L.J., Nov. 13, 2003 at 20 (Suffolk County Sup. Ct., Oct. 30, 2003).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

emotionally?”<sup>75</sup>

Answer: “I was shocked by this. . . . I’ve been very distressed by this. I thought about this quite frequently.”<sup>76</sup>

“Doctor, have you sought any psychiatric or other medical support with respect to the emotional damages that you’ve indicated?”<sup>77</sup>

“No, I haven’t.”<sup>78</sup>

“Do you have any plans to[?]” He hadn’t talked to his attorney yet and responded, “I may. I may. There is someone who I —this has been a tremendous burden for me and there are people —there is somebody who I might seek out to discuss this with.”<sup>79</sup> The Suffolk County Supreme Court upheld the privilege in that case.<sup>80</sup>

Let us talk about police officers. There is a group of cases developing now which deal with the therapy received by

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<sup>75</sup> *Id.*

<sup>76</sup> N.Y.L.J., *supra* note 71, at 20.

<sup>77</sup> N.Y.L.J., *supra* note 71, at 20.

<sup>78</sup> N.Y.L.J., *supra* note 71, at 20.

<sup>79</sup> N.Y.L.J., *supra* note 71, at 20.

<sup>80</sup> N.Y.L.J., *supra* note 71, at 20. The court opined that the plaintiff did not place the issue of his mental or emotion condition in controversy and therefore, the plaintiff did not waive the privilege. *Id.* But see *Berger v. Fornari*, 783 N.Y.S.2d 830 (N.Y. App. Div. 2004). Defendant thereafter appealed and the Appellate Division modified the decision, holding that by commencing the action, Dr. Berger waived the privilege with respect to information defendant divulged to the members of the synagogue. *Id.* at 830. The court, citing *Koump v. Smith*, 250 N.E.2d 857, 861 (N.Y. 1969), held that “when a privilege is designed to protect an individual by keeping certain information or conduct secret, that protection may be deemed waived where the individual affirmatively places the information or conduct at issue.” *Id.* at

police officers after a traumatic incident such as what happened to Mary Lou Redmond in *Jaffee*. In *Speaker v. County of San Bernardino*,<sup>81</sup> the psychotherapist-patient privilege applied where the mental health professional was not licensed, but the patient reasonably believed that the therapist was licensed.<sup>82</sup> In *Speaker*, it happened to be a marriage, family and child counselor who is known under California law as a “psychological assistant.”<sup>83</sup> Moreover, the officer was told that the session was going to be confidential.<sup>84</sup>

In *Caver v. City of Trenton*,<sup>85</sup> the officer was told and reassured that the psychological records and reports would be kept confidential and not disclosed to the city.<sup>86</sup> It was involuntary counseling because there had been a traumatic incident and the officer was sent to the counselor for therapy or to discuss it.<sup>87</sup>

Compare those two cases to *Kamper v. Gray*.<sup>88</sup> In *Kamper*, the officer knew the counselor would report his findings

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<sup>81</sup> 82 F. Supp. 2d 1105 (C.D. Cal. 2000).

<sup>82</sup> *Id.* at 1112.

<sup>83</sup> *Id.* at 1111 (citing CAL. BUS. & PROF. CODE § 2913 (2000) which states in pertinent part: “A person other than a licensed psychologist may be employed by a licensed psychologist, . . .”).

<sup>84</sup> *Id.* at 1115.

<sup>85</sup> 192 F.R.D. 154 (D.N.J. 2000).

<sup>86</sup> *Id.* at 157.

<sup>87</sup> *Id.* at 164 (holding cases involving psychiatric evaluations are privileged communications and protected from disclosure).

<sup>88</sup> 182 F.R.D. 597 (E.D. Mo. 1998) (holding that the communication was not privileged because the officer had no reasonable expectation of confidentiality).

and it was involuntary counseling.<sup>89</sup> Now, in *Williams v. District of Columbia*, there was an interesting quirk.<sup>90</sup> Williams, the officer, was sent to the psychotherapist for an evaluation and treatment, if necessary. The psychotherapist was to report back on whether the officer should be reactivated on the force.<sup>91</sup> So the officer had a reasonable belief that all of the things that he told the psychotherapist would be kept confidential, except that he knew that there would be a decision of yes or no as to his reactivation.<sup>92</sup> Generally, the police department EAP counselors' policy, where a policy exists, is that records of counseling are to remain confidential.<sup>93</sup>

Who claims the privilege? The privilege belongs to and is for the benefit and protection of the patient.<sup>94</sup> So, obviously the patient may assert the privilege. Likewise, a guardian or conservator may assert the privilege on behalf of the patient.<sup>95</sup> An executor or administrator of the estate of a patient may claim the privilege.<sup>96</sup> A therapist can claim the privilege, but only on

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<sup>89</sup> *Id.* at 599.

<sup>90</sup> No. CIV.A.96-0200-LFO, 1997 WL 224921, at \*1 (D.D.C. Apr. 25, 1997).

<sup>91</sup> *Id.* at \*2 (stating because there was no disclosure of confidential communication, rather simply a "yes or no" recommendation, the officer did not waive the psychotherapist-patient privilege).

<sup>92</sup> *Id.*

<sup>93</sup> *Oleszko*, 243 F.3d at 1156.

<sup>94</sup> *Id.* at 1159.

<sup>95</sup> See *Daniel A. v. Walter H.*, 537 N.W.2d 103, 112 (Wis. App. 1995).

<sup>96</sup> See *Dixon v. City of Lawton*, 898 F.2d 1443, 1450 (10th Cir. 1990). In *Dixon*, there was an inference that the privilege would be upheld, but there was a limited waiver. *Id.* at 1451-52.

behalf of a deceased patient.<sup>97</sup>

Now, consider the following footnote in the *Greet v. Zagrocki*<sup>98</sup> where the court stated, “[n]evertheless, it is generally held that a court can assert a privilege on behalf of an absent patient.”<sup>99</sup> Further, the court noted, “Officer Zagrocki has not made an appearance in this action, nor does he appear to be represented by counsel. Therefore he is ‘absent’ and we may assert the psychotherapist-patient privilege on his behalf.”<sup>100</sup>

In regards to waiver, there are three views. I am going to go through them very quickly because frankly, whether you accept the broad view or the narrow view, it is probably not going to make any difference because the middle ground approach is really going to be the one in play throughout.<sup>101</sup> Generally, the broad view is that if you plead or claim emotional distress, even garden-variety emotional distress, you waive the psychotherapist-patient privilege.<sup>102</sup> The courts that adhere to that

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<sup>97</sup> See *In Re Grand Jury Proceeding* (Gregory P. Violette), 183 F.3d 71 (1st Cir. 1999); *United States v. Hansen*, 955 F.Supp. 1225 (D. Mont. 1997) (holding that the therapist may assert the privilege on behalf of a deceased patient).

<sup>98</sup> No. CIV.A.96-2300, 1996 WL 724933, at \*1 (E.D. Pa. Dec. 16, 1996).

<sup>99</sup> *Id.* at \*1 n.2.

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-38 (N.D. Cal. 2003) (discussing the three types of approaches that the courts have used in determining whether to allow privileged psychotherapist-patient information to be waived and explaining the middle-ground approach).

<sup>102</sup> See, e.g., *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 556 (N.D. Ga. 2001) (discussing the approaches by different jurisdictions and stating the types of circumstances where privilege is waived); *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 221-27 (D.N.J. 2000) (discussing that plaintiff waives

view appear to be saying waiver applies when seeking damages for emotional distress which places the mental condition at issue. The courts which follow the narrow approach indicate that there is no waiver if it is found that the person does not rely upon the advice or findings of the psychotherapist for the purpose of the case.<sup>103</sup> Thus, the psychotherapist-patient privilege is not being used as a sword, but as a shield, analogizing it to the attorney-client privilege.

Yet, there is a middle ground approach to waiver, most likely based upon the case law that deals with a Rule 35(a) examination.<sup>104</sup> Generally, if you bring an action for intentional infliction of emotional distress claiming that you have suffered a psychiatric disorder, and if you further claim that you are going

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psychotherapist-patient privilege once she puts her mental condition at issue); *cf.* *Ruhlmann v. Ulster County Dep't of Soc. Serv.*, 194 F.R.D. 445, 448-51 (N.D.N.Y. 2000) (discussing that a party does not put her emotional condition in issue by merely seeking "garden variety" damages and thus does not waive the psychotherapist-privilege).

<sup>103</sup> See *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 230 (D. Mass. 1997) (holding that so long as plaintiff does not call a witness to testify to the substance of the communication plaintiff does not waive the psychotherapist-privilege).

<sup>104</sup> FED. R. CIV. P. 35(a) provides:

When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

to bring in an expert to testify on your behalf, such as a psychotherapist, you will be held to have waived the psychotherapist-patient privilege.<sup>105</sup>

Now, there are an interesting couple of cases alleging a loss of consortium in which the court found a waiver of the privilege.<sup>106</sup> You will find that the issues that come about as a result of the psychotherapist-patient privilege are all over the lot throughout the country. There are cases which accept that broad view, there are cases which accept the narrow view, but I believe that what will hold true is the middle ground approach which we have seen in a variety of cases very recently.

PROFESSOR SCHWARTZ:<sup>107</sup> Michael, what is your understanding of a garden variety emotional distress claim as compared to some other claim of emotional distress? That is

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<sup>105</sup> See *Fitzgerald*, 216 F.R.D. at 637 (citing *Jackson*, 193 F.R.D. at 216) (explaining that courts interpreting rule 35(a) have required that the plaintiff to have fulfilled a number of requirements for there to be waiver concerning Rule 35(a)).

<sup>106</sup> See *Vasconcellos v. Cybex Int'l, Inc.*, 962 F. Supp. 701 (D. Md. 1997). In *Vasconcellos*, the employee brought an action against her employer claiming that, as result of the sexual harassment, she required medical attention for serious health conditions and that symptoms included rapid heartbeat and loss of consortium. *Id.* at 703. The judge gave plaintiff the right to amend her pleading and remove certain specified emotional damages to ensure that defendant would not be able to subpoena her medical records. *Id.* at 709. See also *Sorenson v. H & R Block, Inc.*, 197 F.R.D. 199, 201-02 (D. Mass. 2000) (discussing plaintiff's numerous damages claims, including loss of consortium).

<sup>107</sup> Professor Martin A. Schwartz, a panelist at the conference, has written extensively on § 1983 litigation. See MARTIN A. SCHWARTZ, § 1983 LITIGATION CLAIMS AND DEFENSES (4th ed. Supp. 2004).

where I think the difficulty may be.

JUDGE ORENSTEIN: Well, there is a tremendous amount of difficulty. There are cases I have looked at where the person has testified at deposition, “I have felt inadequate, I have felt isolated, I was hurt, I was shocked, upset, sad, worried, cried, lost sleep, lost appetite, embarrassed.” They considered suicide. “I experienced family tension.”<sup>108</sup>

PROFESSOR SCHWARTZ: Is this garden variety?

JUDGE ORENSTEIN: This is garden variety.

PROFESSOR SCHWARTZ: So what is not garden variety?

JUDGE ORENSTEIN: Well, when one says, “I had post-traumatic stress disorder. I am depressed.” Generally what we find in these cases is someone sought psychotherapy. When one does that and intends to introduce something from those psychotherapist records on his own behalf, then there is going to be a waiver of the privilege.<sup>109</sup> That is why most of these cases today reveal that someone sought psychotherapy, because in many cases there would not be any other damages.<sup>110</sup> Think about

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<sup>108</sup> *Fitzgerald*, 216 F.R.D. at 636.

<sup>109</sup> *Id.* at 637.

<sup>110</sup> *Id.*

the prison condition case. Often in a strip search case there are very little physical damages. The case is going to involve emotional distress or mental anguish from that strip search.<sup>111</sup>

**PROFESSOR SCHWARTZ:** Why should the waiver depend upon whether the claim for emotional distress is garden variety versus non?

**JUDGE ORENSTEIN:** Although it was not a § 1983 claim, I had a case before me a couple of years ago involving a 10-year-old girl. It came up as a personal injury case, and the injury the person was claiming was a tremendous psychological disorder. She went to soccer camp and sprained her ankle. Her ankle was taped very tightly. As a result, she alleged that she had Reflex Sympathetic Dystrophy. As a young teenager who could not dance anymore and who could not do many of the things she had done, she claimed tremendous psychological depression among other psychological disorders that she had been diagnosed with. However, she did not want to give up those psychological records, or, more likely, her mother did not want them given up. I had some suspicions about the case. I just knew something was wrong here. It turned out that her music teacher had sexually abused this

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<sup>111</sup> See *Leinen v. City of Elgin*, No. 98 C 8225, 2000 WL 1154641, at \*1 (N.D. Ill. Aug. 15, 2000). Plaintiff was arrested by a police officer and taken to the police station. She was strip searched while others watched. Plaintiff claimed that the officers should be found guilty of intentional infliction of emotional distress. *Id.* at \*2.

young woman when she was eight years old. She had told her family about it, and very frankly, she did not get much support from them at the time. The family did not want that information coming out and waived the records. The girl was suicidal. She attempted suicide twice during the pendency of the case. This is something that attorneys must discuss with their clients if they represent plaintiffs.

Furthermore, as an attorney representing defendants, you have to consider very seriously, when dealing with someone of such vulnerability, whether or not you should push this case to that extent or waive your right to the records. Now, I know that is a Hobson's choice.<sup>112</sup> There is a case called *Santelli v. Electro-Motive*<sup>113</sup> which really talks about that Hobson's choice. Sometimes one decides not to bring the claims for psychological distress or emotional distress because of the problems that arise with waiver. Yet, by saying that you will be the only one testifying about your emotional condition and thereby waiving the introduction of medical records as evidence, they are not discoverable.

PROFESSOR SCHWARTZ: Yet, on physician-patient privilege under state law there is a waiver if the plaintiff puts her physical

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<sup>112</sup> THE AMERICAN COLLEGE DICTIONARY 575 (1959). A Hobson's choice is the choice of taking either the thing offered or nothing at all.

<sup>113</sup> 188 F.R.D. 306, 309 (N.D. Ill. 1999) (holding that plaintiff Santelli limited the scope of her emotional distress claim by only stating that she was humiliated or embarrassed).

condition in issue, so the courts do not look at garden variety physical damages versus non-garden variety physical damages.<sup>114</sup> They take the position that if you put a certain issue into the case, you cannot have it both ways.<sup>115</sup> The issue is in the case and the relevant evidence should be explored; the privilege is waived.<sup>116</sup> So why would it be different here?

JUDGE ORENSTEIN: I think for the same reasons that the Supreme Court in the *Jaffee* case distinguished between the physician, medical physician, and the mental health therapist. During the diagnosis of a patient, a doctor does not need confidential information to recognize a heart attack.<sup>117</sup> Nor would a doctor require confidential information to diagnose a sprained ankle. However, in mental health therapy, treatment necessarily requires reliance upon things that are extremely confidential, very sensitive, and there is a tremendous privacy concern.<sup>118</sup> I think the Court in *Jaffee* took great pains to bring that out. Interestingly enough, there is no medical physician-patient privilege in federal law under Federal Rule of Evidence 501.<sup>119</sup> Yet, the privilege exists in the fifty states.<sup>120</sup> That may be the

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<sup>114</sup> *Fitzgerald*, 216 F.R.D. at 637.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Jaffee*, 518 U.S. at 10.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (discussing the emphasis that needs to be placed on the important public interest served by keeping psychotherapist-patient communications privileged).

<sup>120</sup> *Id.* at 12-13.

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next privilege recognized by the United States Supreme Court when it gets a case, but frankly, it is not there yet.<sup>121</sup>

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<sup>121</sup> See *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977) (noting that at common law, there was no physician-patient privilege and that “where it exists by legislative enactment, it is subject to many exceptions and to waiver for many reasons.”).

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