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The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law

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The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law

Melissa L. Nelken *

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I. Introduction

As a practicing psychoanalyst as well as a law professor, I have more than an academic interest in the fate of the recently

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recognized psychotherapist-patient privilege in federal court.¹ While a similar privilege already exists in all fifty states, its recognition by the United States Supreme Court has both practical and symbolic value. From a practical standpoint, the decision in *Jaffee v. Redmond*² decreases the likelihood that a particular confidential communication will be held inadmissible in state court, but admissible should suit be brought in or removed to a federal court sitting in the same state. On a symbolic level, federal courts have not been hospitable to claims of privilege in the nearly thirty years since Congress rejected proposed privilege rules recommended by the Judicial Conference Advisory Committee.³

From the viewpoint of a practitioner, the Supreme Court’s strong support for a therapist-patient privilege in this era of managed mental health care is striking and is in stark contrast to the assaults on privacy and confidentiality that abound in the current push toward computerization of health care information. The policy reasons articulated by the Court for adopting the privilege rest squarely on the heightened need for confidentiality in psychotherapeutic relationships. While the privilege itself applies only in federal litigation, the Court’s reasoning in adopting it may prove persuasive in other contexts in which psychotherapists seek to protect the confidences of their patients from disclosure.⁴ Nonetheless, there

¹. See *Jaffee v. Redmond*, 518 U.S. 1 (1996) (holding that a psychotherapist-patient privilege protected from discovery the conversations and notes taken by a social worker during therapy sessions with a police officer sued for civil rights violations).


³. For a history of the present federal privilege rule and the policy behind it, see generally CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §§ 5421-22 (West 1989).

⁴. In November 1999, the United States Department of Health and Human Services issued proposed privacy regulations for healthcare records. See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (1999) (proposed Nov. 3, 1999) (to be codified in 45 C.F.R. pts. 160-64). The preamble to the proposed regulations cited *Jaffee* approvingly. 64 Fed. Reg. at 59,941-42. But the proposed regulations themselves did not expressly recognize the psychotherapist-patient privilege. They did provide for numerous instances in which psychotherapy notes would be subject to disclosure without patient consent. 64 Fed. Reg. at 59,942. Now that the public comment period has ended, it remains to be seen what special protections will be given to psychotherapist-patient communications in the final version of the regulations. See also UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF THE SURGEON GENERAL, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 449 (1999)
will inevitably be limits to the protection afforded by this new privilege. While there is a public interest in protecting patient confidences, that interest is not absolute.

In this Article, I discuss the major developments in the federal law of psychotherapist-patient privilege since Jaffee and explore some of the questions left open by the Supreme Court, particularly regarding who is a “psychotherapist” for purposes of the privilege and what exceptions to the privilege should be recognized in light of competing public policy concerns. I argue that the federal courts should apply the privilege to communications with licensed psychotherapists as well as those reasonably believed to be psychotherapists by the patient holding the privilege. While state privilege law may be looked to for guidance in determining who qualifies as a psychotherapist for purposes of the privilege, the federal courts should seek to develop a uniform approach to this issue in light of the policies behind the Jaffee decision. I also argue that in recognizing exceptions to the privilege, courts should be aware of the subjective nature of psychotherapeutic communications. The courts should also look to the analogous attorney-client privilege explicitly relied on by the Supreme Court in Jaffee and should formulate any exceptions narrowly to protect the important public and private interests served by the psychotherapist-patient privilege.

II. The Jaffee decision

In Jaffee v. Redmond the United States Supreme Court recognized a new privilege in federal courts for confidential communications between a psychotherapist and her patient. Although a psychotherapist-patient privilege was among the privileges recommended to Congress in 1972 by the Judicial Conference Advisory Committee, Congress ultimately created no specific privileges and instead adopted Federal Rule of Evidence 501, which provides that privileges in federal court “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." 7 Since that time, every state has enacted some form of psychotherapist-patient privilege. 8 But the federal circuits that considered the issue before Jaffee were split. 9

The Supreme Court in Jaffee concluded that Rule 501 "did not freeze the law regarding the privileges of witnesses in federal trials at a particular point in history" but allowed for adaptation of the law to changing circumstances. 10 The Court noted the states’ unanimous legislative determination that a psychotherapist privilege is warranted and also examined the history in the federal courts of the psychotherapist privilege proposed in rejected Federal Rule of Evidence 504. 11 In addition, the Court considered whether the private and public interests served by the proposed privilege were sufficiently important to outweigh the general rule in favor of using all available evidence to ascertain the truth at trial.

The Court first noted that "[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust."" 12 The patient’s private interests in confidentiality are significant, the Court concluded, because successful psychotherapy depends on the patient’s willingness to discuss "facts, emotions, memories, and fears," public disclosure of which "may cause embarrassment or disgrace."” 13 The public interest is also served by protecting therapist-patient communications because doing so facilitates treatment and the "mental health of our citizenry, no less than its

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7. FED. R. EVID. 501.
8. See, e.g., ALA. CODE § 34-26-2 (1975); CAL. EVID. CODE ANN. §§ 1010, 1012, 1014 (West 1995); N.Y. CIV. PRAC. LAW § 4507 (McKinney 1992).
9. The Second and Sixth Circuits had recognized the privilege, as did the Seventh Circuit in its decision below in Jaffee, but the Fifth, Ninth, Tenth, and Eleventh Circuits had declined to do so. Jaffee, 518 U.S. at 7.
10. Id. at 8-9. Since no psychotherapist-patient privilege was recognized at common law, this interpretation of the language of Rule 501 allowed the Court to create one "in the light of reason and experience." FED. R. EVID. 501.
11. See id. at 11 n.11. Rejected Federal Rule of Evidence 504 would have created a privilege for confidential communications between a psychiatrist or psychologist and her patient. See generally, WRIGHT & GRAHAM, supra note 3, §§ 5521-52.
13. Id. The Court distinguished this aspect of psychotherapy from medical treatment for physical problems, which can often be based on objective information and test results. See id.
physical health, is a public good of transcendent importance.14 Weighing these considerations, the Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”15

In fashioning the new privilege, the majority disagreed with the Seventh Circuit’s ruling that this privilege should be subject to a balancing test in each case to determine whether the need for the evidence in question outweighed the patient’s interest in confidentiality.16 Having concluded that “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment,” the Court ruled that the privilege would be ineffective in promoting appropriate treatment if patients could not know in advance that their statements to therapists would be protected from disclosure.17 “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.”18

Like the attorney-client privilege, the privilege created in Jaffee is unconditional rather than qualified. In so holding, the Supreme Court went beyond the holdings of any of the circuit courts that had previously recognized the psychotherapist-patient privilege.19 The Supreme Court did not, however, attempt to fully delineate the scope of the privilege, leaving that to be developed on a case-by-case basis in the lower courts.20 The lower federal courts have already begun to grapple with the difficult task of upholding the

14. Id. at 11.
15. Id. at 15.
16. See id. at 17-18.
18. Id. at 17.
19. The Second and Sixth Circuits, like the Seventh Circuit below in Jaffee, applied a balancing test to assertions of the privilege. See In re John Doe, 964 F.2d 1325 (2d Cir. 1992); In re Zuniga, 714 F.2d 632 (6th Cir. 1983). Such a test does not afford much predictability for the patient, as the Second Circuit acknowledged: “Indeed, the 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.” John Doe, 964 F.2d at 1329.
policy behind the privilege while limiting its scope in various ways, including defining the characteristics of a psychotherapist and creating certain exceptions to the privilege.

III. Who is a "Psychotherapist"?

During the 1950s and 1960s, when state privilege statutes were first being adopted, psychoanalysis and psychoanalytic psychotherapy were the dominant forms of non-physical treatment for mental and emotional problems. In the United States both were almost exclusively practiced by psychiatrists. These therapies are based on Sigmund Freud’s ideas about the importance of unconscious processes in motivating people’s actions and in determining the conscious concerns and symptoms that bring them to therapy. The psychoanalytically oriented therapist relies on the patient’s free associations—the attempt to say whatever comes to mind, no matter how shameful or distressing, without censoring or editing thoughts—to help the patient understand how his mind works and how his conscious concerns have been shaped by unconscious factors. In recommending the adoption of Federal Rule of Evidence 504 in 1972, the Judicial Conference Advisory Committee recognized that such complete disclosure of thoughts and feelings requires the utmost confidentiality between therapist and patient: “[A] psychiatrist’s ability to help her patients ‘is completely dependent upon [the patients’] willingness and ability to talk freely.’” This view was echoed by various professional mental health organizations acting as amici curiae in the Jaffee case twenty-five years later:

21. See Paul W. Mosher, M.D., Psychotherapist-Patient Privilege: The History and Significance of the U.S. Supreme Court’s Decision in Jaffee v. Redmond (1999) (unpublished paper available at http://psa-unity.org/jru/) (discussing the centrality of the psychoanalytic model to the development of psychotherapist-patient privilege laws.) Dr. Mosher has also set up a website devoted to developments in federal psychotherapist-patient privilege law, including the briefs from Jaffee and information about subsequent cases and research in the area. The website is available at http://www.jaffee-redmond.org.

22. See id.

23. Jaffee, 518 U.S. at 10 (quoting Advisory Committee’s Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)).
The central challenge of psychoanalytically-based psychotherapy lies in the fact that it is not easy to bring into conscious awareness that which is unconscious. Generally, emotions, thoughts, or experiences remain out of consciousness because they are shameful, frightening or otherwise "not acceptable to the patient." . . . Individuals develop strong unconscious defenses or "resistances". . . to keep knowledge of these disconcerting thoughts and feelings from becoming conscious. To further patients' understanding, the psychoanalytic therapist helps them to overcome these "resistances" using techniques whose prerequisite is a safe, confidential treatment situation.24

Although the influence of psychoanalysis has declined considerably since the 1950s, psychoanalytic psychotherapy is still widely practiced.25 While many other schools of therapy and groups of practitioners have also developed and expanded, psychotherapy in its myriad current forms still involves revealing painful, often shameful, thoughts and feelings in hopes of gaining relief from emotional distress and destructive or debilitating patterns of behavior. Today, in addition to psychiatrists and psychologists, social workers, marriage and family therapists, and counselors of varied backgrounds and training all provide psychotherapy. The rationale for the privilege recognized in Jaffee has its roots in Freudian psychoanalysis, but the Supreme Court in determining the new privilege's scope also took into account the considerable

24. Brief of the American Psychoanalytic Association, Division of Psychoanalysis (39) of the American Psychological Association, and the National Membership Committee on Psychoanalysis in Clinical Social Work as Amici Curiae in Support of Respondents at 6. Jaffee v. Redmond, 518 U.S. 1 (1996) (No. 95-266) (citations omitted) [hereinafter APA Brief]. In deciding Jaffee, the Supreme Court was persuaded by these arguments to conclude that "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears." Jaffee, 518 U.S. at 10.

25. See APA Brief, supra note 24, at 5-6 (citing L. Luborsky ET AL, PREFACE, PSYCHODYNAMIC TREATMENT RESEARCH: A HANDBOOK FOR CLINICAL PRACTICE (N. Miller et al eds., 1993)).
changes that have occurred in the practice of psychotherapy since the
time Federal Rule of Evidence 504 was proposed.26

A. Extension of the Privilege in Jaffee

In Jaffee the Supreme Court put itself squarely on the side of
democratizing the psychotherapist-patient privilege. The Court
affirmed the Seventh Circuit's ruling that the privilege should apply
to social workers as well as psychiatrists and psychologists and
thereby expanded the coverage contemplated by the drafters
of rejected Federal Rule of Evidence 504.27 Acknowledging the
changes in the mental health field in the quarter century since Rule
504 was proposed, the Court concluded:

Today, social workers provide a significant amount of
mental health treatment. . . . Their clients often
include the poor and those of modest means who
could not afford the assistance of a psychiatrist or
psychologist, . . . but whose counseling sessions serve
the same public goals.28

In deciding to extend the privilege to communications with social
workers, the Court was again influenced by state legislation, noting
that most states provide such a privilege.29

The only other guidance the Supreme Court supplied in its
holding was that the psychotherapist must be "licensed" and that the
confidential communication must take place "in the course of

27. See id. at 16-17. Rejected Federal Rule of Evidence 504(a)(2) defined a
"psychotherapist" as:
(A) a person authorized to practice medicine in any state or nation, or
reasonably believed by the patient so to be, while engaged in the
diagnosis or treatment of a mental or emotional condition, including drug
addiction, or (B) a person licensed or certified as a psychologist under the
laws of any state or nation, while similarly engaged."
Proposed Rule] (emphasis added).
29. Id. at 16-17.
diagnosis or treatment." Apart from the extension of coverage to social workers, the holding tracks rejected Federal Rule of Evidence 504, which defined a psychotherapist as someone "authorized to practice medicine" or "licensed or certified as a psychologist" under state law, and provided a privilege for confidential communications made while that person was "engaged in the diagnosis or treatment of a mental or emotional condition." The Court's rationale for extending the privilege to social workers, however, suggests that other licensed mental health professionals will also be found to come within the privilege in the future. Indeed, under many states' laws the therapist-patient privilege already extends to other groups such as marriage and family therapists and professional and lay counselors in settings such as schools and rape crisis centers. As I discuss below, the lower courts have already tended to broaden the definition of who is a psychotherapist for purposes of the privilege by looking primarily to the counseling purpose of the consultation in question as evidence of its privileged nature.

B. Subsequent Developments in Federal Court

1. Broadened Definitions of "Psychotherapist"

Some courts since Jaffee have already indicated that they will extend the privilege beyond the three professional groups listed by the Supreme Court. In Equal Employment Opportunity Commission v. St. Michael Hospital the court assumed, without discussion of what license the therapist held, that the plaintiff's "marriage

30. Id. at 15.
32. See Jaffee, 518 U.S. at 15-16 (extending the privilege to social workers because they often perform the same functions as psychologists).
33. The District of Columbia, for example, includes the following as "mental health professionals" covered by its privilege: licensed physicians; psychologists; social workers; professional marriage, family, and child counselors; rape crisis or sexual abuse counselors; licensed professional psychiatric nurses; and anyone reasonably believed to be any of the preceding. D.C. CODE ANN. § 6-2001(11) (1981).
“counseling” records fell within the privilege established in *Jaffee*. In *Fox v. Gates Corp.*, an Americans with Disabilities Act claim, the defendant sought the plaintiff’s psychotherapy records, which the plaintiff claimed were privileged under *Jaffee*. Although the court did not specify what license the plaintiff’s therapist held, it noted that “[t]he court uses the term ‘psychotherapist’ generically to include a psychologist, psychiatrist, counselor or other mental health therapist.” Similarly, in *Greet v. Zagrocki*, a federal civil rights case, the plaintiff alleged that he had been held at gunpoint for an hour by the defendant policeman for no apparent reason. During discovery, the plaintiff sought various documents from the City of Philadelphia, including those “maintained by any in-house alcohol dependency program operated for the benefit of police personnel.” The City asserted that the documents were privileged without citing what privilege the City believed would apply. The district judge, having originally ordered production of the documents, reconsidered his ruling in light of *Jaffee* and concluded that the psychotherapist privilege applied because the “EAP [Employee Assistance Program] engages in sensitive counseling on problems of alcohol dependency.” The court made no finding regarding what “licensed psychotherapist” the police officer may have consulted through the EAP but concluded that the privilege applied since “counseling” was involved.

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35. *Id.* at *7*. In addition to psychiatrists, psychologists, and social workers, marriage and family therapists, psychiatric nurses, and professional and non-professional counselors of many backgrounds all provide psychotherapy. The training and licensing requirements for these different groups vary from state to state, as does the availability of a psychotherapist-patient privilege.


37. *See id.* at 304-05.

38. *Id.* at 305 n.2.


40. *See id.* at *1.

41. *Id.*

42. *Id.*

43. *Id.* at *2*. *See also* U.S. v. Lowe, 948 F. Supp. 97 (D. Ma. 1996). In that case, the court in *dicta* concluded that a client of a rape counseling center “holds some form of a federal privilege” for communications with a rape crisis counselor, based on the policies discussed in *Jaffee*. *Id.* at 99. However, since the counselor in question was not a licensed psychotherapist or social worker, the court concluded that the federal psychotherapist-patient privilege recognized in *Jaffee* did not apply.
By contrast, in *United States v. Schwensow* the defendant argued on appeal to the Seventh Circuit that statements he made to volunteer workers at an Alcoholics Anonymous office were privileged under *Jaffee* and should not have been admitted into evidence. The Seventh Circuit upheld the district court's decision to admit the evidence, pointing out that the workers did not possess[] credentials that might qualify them as licensed to receive privileged communications. Nor did they act or hold themselves out to be acting in the capacity of counselors, much less licensed counselors. They did not identify themselves as therapists or counselors, nor did they confer with Schwensow in a fashion that resembled a psychotherapy session.

Only one case has been found dealing with the application of the privilege to someone "reasonably believed" by the patient to be a psychotherapist but who was not actually a psychotherapist. In *Speaker v. County of San Bernadino* the defendant police officer was ordered to undergo confidential counseling after a shooting incident that led to a federal civil rights action. The counselor in question, Bonnie Mathews, was a licensed marriage, family and child counselor (MFCC). The defendant asserted the psychotherapist privilege when the plaintiffs sought to discover the records of the counseling sessions. In ruling on the plaintiffs' motion, the court avoided the question of whether the federal privilege extended to MFCCs by concluding that Mathews had not been acting within the scope of her license when she provided "critical intervention/post-traumatic stress" counseling to the police officer. Instead, the court analyzed whether the police officer's reasonable belief that his conversations with Mathews were privileged was

44. 151 F.3d 650 (7th Cir. 1998).
45. *Id.* at 657.
46. *Id.*
47. 82 F. Supp. 2d 1105 (C.D. Cal. 2000).
48. *Id.* at 1107.
49. *Id.* at 1110-11. California law limits the practice of MFCCs to services "for the purpose of achieving more adequate, satisfying, and productive marriage and family adjustments." *Cal. Bus. & Prof. Code* § 4980.02 (Deering 2000).
sufficient.\textsuperscript{50} Looking to the analogous law that allows attorney-client privilege when a client reasonably but mistakenly believes his confidant is a lawyer, the court upheld application of the psychotherapist-patient privilege.\textsuperscript{51}

2. What Communications are Protected?

Communications must be confidential to qualify for the privilege established in \textit{Jaffee}.\textsuperscript{52} Without an expectation of privacy on the part of the patient, there is no private interest to be protected. Also, there is no public interest in protecting such communications from disclosure in court. Thus, the defendants in \textit{Kamper v. Gray}\textsuperscript{53} sought to protect records of psychological evaluations from discovery by claiming that they were privileged under \textit{Jaffee}. The court ruled that the privilege never attached because Gray had been required as a condition of employment to undergo the evaluations and he knew that the results would be submitted to his employer.\textsuperscript{54} The court stated that:

\begin{quote}
In \textit{Jaffee} it appears that the defendant police officer voluntarily sought counseling and that no reports regarding these sessions were submitted by the counselor to third parties. In contrast, Gray was required to be evaluated \ldots and reports of those evaluations were submitted to Gray's employer. Since he was aware that his evaluations would be reported to his employer, Gray had no reasonable
\end{quote}

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 1112.
\item \textsuperscript{51} \textit{Id.} at 1112-15.
\item \textsuperscript{52} \textit{See Jaffee}, 518 U.S. at 9. There must also be a communication. In Pfeifer v. State Farm Ins. Co., No CIV.A.96-1895, 1997 WL 276085, at *1 (E.D. La. Aug. 8, 1997), the court ordered production of a journal kept by plaintiff at his psychiatrist's suggestion on the grounds that "[n]othing \ldots suggests that his journal was intended to be or actually was used as a communication between him and his therapist."
\item \textsuperscript{53} 182 F.R.D. 597 (E.D. Mo. 1998).
\item \textsuperscript{54} \textit{Id.} at 599.
\end{itemize}
expectation of confidentiality regarding his communications with [the evaluators].

Other cases have held that the privilege does attach even when the psychological evaluations in question are employer-mandated if no report is made to the employer about the content of the sessions. In *Williams v. District of Columbia*, the police department would allow a police officer—who was the defendant in a federal civil rights case—to return to work, he was required to meet with a psychiatrist. The psychiatrist was to make a “‘Yes or No’ recommendation regarding whether the officer should return to active duty” but was not to disclose any psychiatric records or any confidential communications from the officer to the department. Under these circumstances, the court held that the officer had not waived the psychotherapist-patient privilege and denied a motion to compel discovery of the psychiatrist’s records. Similarly, in *Greet v. Zagrocki* the court denied discovery of the records of a police department’s in-house alcohol dependency program because “the EAP [Employee Assistance Program] is required to maintain the confidences of its clients, and is not even allowed to share information with the police department.”

Under the holding in *Jaffee*, communications not only must be confidential but also must be made in the course of diagnosis or treatment. That point seems to have escaped the court in *Williams v. District of Columbia* when it rejected the plaintiff’s argument

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57. See id. at *2.
58. Id.; see also Caver v. City of Trenton, 192 F.R.D. 154 (D.N.J. 2000) (holding that the privilege applies where party had expectation of confidentiality in employer-ordered psychological evaluation).
59. Id. at *2.
61. Id. at *1.
62. See *Jaffee*, 518 U.S. at 16.
that any statements made by the defendant police officer in the course of his post-incident psychiatric "debriefing" were not made for treatment purposes and thus were not privileged. In United States v. Schwensow, however, the Seventh Circuit supported its holding that the Alcoholics Anonymous volunteers in question were not within the Jaffee privilege by noting that Schwensow's conversation with the volunteers appeared to be limited to seeking the address of a detoxification center and using the telephone in their office:

These interactions did not relate to diagnosis, treatment, or counseling of Schwensow for purposes of attempting to treat his alcoholism. . . . Under no circumstances can these communications be interpreted as "confidential communications" entitled to protection from disclosure under Rule 501.66

C. Should the Federal Courts Follow the States' Definition of "Psychotherapist"?

As noted above, the Supreme Court's decision in Jaffee was influenced by the fact that all states recognize a psychotherapist-patient privilege and that most extend it to social workers. Does this mean that the federal courts now should follow the states' laws in defining who is a psychotherapist for purposes of the privilege? To do so would create vertical uniformity between the federal courts and the courts of the states in which they sit. However, it would be at the expense of developing a federal common law of therapist-patient privilege based on the principles enunciated by the Supreme Court in Jaffee. It would also replace reasoned federal judicial decisions

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64. Id. at *2.
65. 151 F.3d 650 (7th Cir. 1998).
66. Id. at 658.
67. Under Federal Rule of Evidence 501 the federal courts are required to follow state privilege laws only in civil cases brought under state law. See, e.g., Whatley v. Merit Distrib. Serv., 191 F.R.D. 655 (S.D. Ala. 2000) (finding that in a civil case, the state where the court sits is determinative as to the choice of law applied). Even in these cases, most courts that have addressed the issue have ruled that federal privilege law governs when both a federal claim and a supplemental state claim are joined in a single action. See, e.g., Hinsdale v. City of Liberal, 961 F. Supp. 1490, 1493 (D. Kan. 1997) (reviewing federal cases).
about the development of the privilege with the political influences that led to state legislative determinations about the scope of the privilege.

The states vary widely in their definitions of who comes within their psychotherapist-patient privileges. As Justice Scalia pointed out in his dissent in *Jaffee*, even the supposed uniformity among the states with regard to the social worker privilege is more apparent than real: "[N]o State has adopted the [social worker] privilege without restriction; the nature of the restrictions varies enormously from jurisdiction to jurisdiction; and 10 States, I reiterate, effectively reject the privilege entirely."

Given the federal courts' general reluctance to create new common law privileges, these courts are unlikely to take as expansive a view as some states do when determining who is a psychotherapist for privilege purposes. Nonetheless, the definition has already widened beyond the bounds set in *Jaffee*, as the cases cited earlier in this section indicate. State law will probably continue to influence, if not determine, the federal courts' thinking in this area because privileges are closely bound up with substantive legislative judgments about out-of-court relationships. Indeed, the

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68. For example, Delaware extends the privilege only to psychotherapists authorized to practice medicine or those reasonably believed to be so authorized, and to licensed and certified psychologists and their assistants. See Del. R. Evid. § 503(a)(3). However, the District of Columbia's statute, D.C. Code Ann. § 6-2001(11) (Michie 1981 & Supp. 2000), is more inclusive and includes persons licensed to practice medicine or psychology; licensed social workers; professional marriage, family, or child counselors; rape crisis or sexual abuse counselors; licensed professional psychiatric nurses; and any person reasonably believed by the client to be a mental health professional.


70. In *U.S. v. Schwensow*, 151 F.3d 650, 657 (7th Cir. 1998), for example, the lower court had looked to the state psychotherapist-patient privilege law for assistance in deciding whether to extend the *Jaffee* definition of psychotherapist to the Alcoholics Anonymous volunteers in question. The Wisconsin law includes within its scope "physicians, registered nurses, chiropractors, psychologists, social workers, marriage and family therapists, and professional counselors." Id. at 657 n.4. On appeal, the Seventh Circuit did not endorse this use of state law as a guide in defining the parameters of the federal privilege, although it noted that the individuals in question would not qualify even under the liberal terms of the Wisconsin law. Id. at 658.

71. See, e.g., *Holland v. Muscatine Gen. Hosp.*, 971 F. Supp. 385, 389 (S.D. Iowa 1997) ("Even when not federally adopted, privileges provided by the law of
Supreme Court’s holding in *Jaffee* that a privileged relationship can exist only with a *licensed* psychotherapist acknowledges the importance of the states’ determinations in this area. Complete deference to the states in determining who is a psychotherapist for purposes of the privilege would seriously undermine horizontal uniformity among the federal courts, which was the goal underlying the creation of federal evidence rules. Since the adoption of Federal Rule of Evidence 501, Congress has let the courts develop privilege rules and has not sought to mandate vertical uniformity between state and federal courts in non-state-law cases. As Justice Scalia pointed out in his dissent in *Jaffee*, this approach to developing the federal law of privilege would be unusual:

The Court suggests one last policy justification: since psychotherapist privilege statutes exist in all the States, the failure to recognize a privilege in federal courts “would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.” . . . This is a novel argument indeed. A sort of inverse preemption: the truth-seeking functions of federal courts must be adjusted so as not to conflict with the policies of the States. . . . Moreover, since . . . state policies regarding the psychotherapist privilege vary considerably from State to State, no uniform federal policy can possibly honor most of them.

In light of these competing policy concerns, the federal courts should not simply adopt state psychotherapist-patient privilege laws to determine who is a psychotherapist. That would inevitably lead to considerable disuniformity within a given circuit, much less among the various circuits. Instead, the courts should continue to develop the federal privilege by examining arguments for extending it to licensed mental health professionals in addition to psychiatrists, psychologists, and social workers. These issues should be examined the forum state should be respected to the extent this can be accomplished at no substantial cost to federal substantive and procedural policy.”) (internal quotes and citations omitted).

72. See *Jaffee*, 518 U.S. at 15.
73. *Jaffee*, 518 U.S. at 24 (Scalia, J., dissenting).
in light of both the underlying rationale enunciated in Jaffee to promote the “confidence and trust” on which effective psychotherapy depends and the reasonable beliefs of the patient about the qualifications of those in whom he confides. In treatment where “frank and complete disclosure” of private information is essential to the therapeutic process, the federal privilege should protect the communications between a therapist and patient.

IV. Exceptions to the Privilege

The Jaffee Court did not define the scope of the new privilege beyond what was necessary to decide the case before it. In particular, the Court let the lower courts decide what situations might warrant an exception to the privilege—indicating, however, in footnote 19 that it expected exceptions to arise:

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.

Footnote 19 reveals a tension underlying the Court’s creation of an unconditional privilege for patient-therapist communications. To say that the privilege “must give way” in certain situations is to reintroduce a variation of the balancing component of the privilege

74. Id. at 10. Rejected Federal Rule of Evidence 504(a)(2)(A) would have extended the definition of psychotherapist to include someone “reasonably believed by the patient” to be authorized to practice medicine. Proposed Rule, supra note 27, at 240. I would recommend similarly extending the Jaffee privilege.

75. Jaffee, 518 U.S. at 10.

76. Id. at 18. The Court was only willing to specify that participants in confidential conversations “must be able to predict with some degree of certainty” that the conversation will be protected. Id. (quoting Upjohn Co. v. U.S., 449 U.S. 383, 393 (1981)). The Court recognized that it would be impossible to define the privilege in a way that would “govern all conceivable future questions.” Id. (quoting Upjohn Co., 449 U.S. at 386).

77. Id. at 18 n.19.
that had been recognized by the Seventh Circuit in *Jaffee* and rejected by the majority in the Supreme Court. The quoted footnote does not suggest that a court should undertake this balancing in every case to determine whether to apply the privilege. It does suggest, however, that future development of the privilege will involve recognizing certain recurrent situations in which the need for the evidence in question outweighs the purposes the privilege serves. In these instances, exceptions will be made and otherwise privileged information will be subject to disclosure.

An exception permits disclosure of an otherwise privileged communication in certain specified circumstances. Exceptions to privilege should be distinguished from situations in which the privilege either does not attach (e.g., when a communication was not intended to be confidential) or has been waived (e.g., by voluntary disclosure of a confidential communication). The courts do not always observe these linguistic distinctions, however. The courts often refer instead to "implied waiver" of the privilege (e.g., by a party who makes a claim for emotional distress damages) when recognizing an exception to privilege. There are few exceptions to other established privileges, like the attorney-client privilege, because the policies served by the privilege are embodied in the limiting definition of the privilege itself. The same is true for the psychotherapist-patient privilege, which applies only to "confidential communications" that are made "for the purpose of diagnosis or treatment" between a "licensed psychotherapist" and her patient. If exceptions are common or are broadly defined the privilege will lose the certainty of application that the Supreme Court in *Jaffee* saw as essential to fulfill the policies behind the privilege.

It is important to think about the nature of the communications between a therapist and patient that would be revealed under any recognized exceptions. Psychotherapy focuses more on the psychic reality of the patient and the meaning he gives to his experience than on objective life events. For this reason, a

78. *Id.* at 17.
79. See *WRIGHT & GRAHAM*, supra note 3, at § 5501 ("It is, therefore, important that lawyers understand that in seeking access to allegedly privileged material, the exceptions are a last resort; most privilege claims are defeated by a rigorous application of the terms of the privilege, not by invocation of an exception.").
81. *See id.* at 10-11.
court would lose little of significant value due to recognition of the privilege. As argued in the American Psychoanalytic Association brief in *Jaffee*:

In the attorney-client context, communications are generally aimed at discovering facts that are relevant to the legal issue of concern. Full disclosure in the psychotherapeutic context, by contrast, is not a process concerned with identifying and establishing objective facts but rather a technique designed to explore the patient’s inner perceptions, concerns and difficulties. Patient-therapist confidences, therefore, are generally not reliable sources of “evidence” since they necessarily incorporate feelings and fantasies that, while they have great relevance to the patient’s inner life, may bear very little correspondence to external reality.  

Moreover, there is equally little to be gained by creating broad exceptions to the privilege in the name of making important information available to the trier of fact. The uncertainty that broad exceptions would introduce into the operation of the privilege is costly in terms of both the public and private interests that the privilege furthers. 

Rejected Federal Rule of Evidence 504(d) contained three exceptions to the proposed psychotherapist-patient privilege: for hospitalization proceedings, court-ordered mental exams, and suits in which the patient relied on his mental condition as an element of a claim or defense.  

In light of these proposed exceptions—as well

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83. Rejected Federal Rule of Evidence 504(d) provided for exceptions to the privilege:

(1) . . . in proceedings to hospitalize the patient for mental illness. . . . 
(2) [i]f the judge orders an examination of the mental or emotional condition of the patient. . . (3) as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient’s death, in any proceeding in which any party relies upon the condition as an element of his claim or defense. 

as the "serious threat of harm" exception mentioned by the Court in Jaffee—the lower federal courts have begun to define the contours of the new privilege. I will argue that in this process many courts have weighed the importance of the new privilege too lightly and have created overly broad exceptions to it. In so doing, they have often failed to heed the Supreme Court's explicit analogy between the psychotherapist-patient privilege and the attorney-client privilege, which has only a few narrow exceptions. The adoption of broad exceptions to the psychotherapist-patient privilege goes against the underlying rationale of Jaffee and will jeopardize the important private and public interests the privilege is designed to protect.

A. The Patient-Litigant Exception

1. Civil Cases

To date, more than half the federal cases interpreting Jaffee involve the exception addressed in rejected Federal Rules of Evidence 504(d)(3)—the so-called "patient-litigant" exception under which the privilege may be held not to apply if a party bases a claim or defense on her mental or emotional condition. The most frequent examples are plaintiffs' claims in civil cases for emotional distress damages. See, e.g., Fritsch v. City of Chula Vista, CIV.98-0972-E-CGA, 1999 WL 799213, *7 (S.D. Cal. Sept. 29, 1999) (citing language of the rejected rule as "significant" in adopting broad view of patient-litigant exception); Fox v. Gates Corp., 179 F.R.D. 303 (D. Colo. 1998) (holding that Jaffee does not alter Tenth Circuit law recognizing a broad patient-litigant exception based on the rejected rule); Vasconcellos v. Cybex Inter., Inc., 962 F. Supp. 701 (D. Md. 1997) (citing the rejected rule as the source of a broad patient-litigant exception); Kerman v. City of New York, No. Civ. 7865, 1997 U.S. Dist. LEXIS 16841 (S.D.N.Y. Oct. 24, 1997) (applying the rejected rule to the facts of the case and finding "waiver" of privilege).
distress damages allegedly caused by the defendants’ conduct.\textsuperscript{86} Suits under the Americans with Disabilities Act in which a party’s mental condition may be part of her \textit{prima facie} case on liability under the relevant law are also common.\textsuperscript{87}

Many courts considering the patient-litigant exception since \textit{Jaffee} have defined it broadly. These courts have concluded that the exception applies whenever a party alleges emotional distress damages, regardless of whether the party plans to offer expert testimony about her mental state at trial or has made a claim for more than incidental damages for emotional distress.\textsuperscript{88} Perhaps the most extreme example is \textit{Lanning v. Southeastern Pennsylvania Transportation Authority}.\textsuperscript{89} In that case, the magistrate judge granted the defendants’ motion to compel production of the plaintiffs’ psychiatric records on the grounds that the plaintiffs had sought damages “for injury to their emotional well being,” despite the fact that the plaintiffs stipulated they


\textsuperscript{87} See, \textit{e.g.}, Wynne v. Loyola Univ. of Chicago, 1999 WL 759401 (N.D. Ill Sept. 3, 1999); Patterson v. Chicago Ass’n for Retarded Children, 1997 WL 323575 (N.D. Ill. June 6, 1997); Sarko v. Penn-Del Directory, 170 F.R.D. 127 (E.D. Pa. 1997). In these cases, the plaintiffs alleged that they were covered by the Americans with Disabilities Act due to mental disability and, therefore, had to produce evidence of that disability as part of their case in chief. In most such cases, a plaintiff will have to rely on expert testimony to establish the “mental impairment” that brings her within the ADA, 42 U.S.C. § 12102(2).

\textsuperscript{88} See, \textit{e.g.}, Fritsch v. City of Chula Vista, CIV.98-0972-E-CGA, 1999 WL 799213, *7 (S.D. Cal. Sept. 29, 1999) (adopting “broad” view of patient-litigant exception); McKenna v. Cruz, CIV.A.98-1853, 1998 WL 809533, *2 (S.D. N.Y. Nov. 19, 1998) (rejecting plaintiff’s argument that exception does not apply when garden-variety emotional distress damages are sought); Equal Employment Opportunity Comm’n v. Danka Indus., Inc., 990 F. Supp. 1138, 1142 (E.D. Mo. 1997) (adopting a “broader” interpretation of exception). In some cases, a claim for emotional distress damages is part of the “boilerplate” included in any suit alleging personal injuries. In others, the plaintiff alleges “substantial” or “severe” emotional distress resulting in large damages or brings a separate cause of action for intentional infliction of emotional distress.

will not seek damages for psychiatric/psychological injury[;] ... will not offer expert testimony in support of their claim for emotional distress[;] ... do not seek recovery for treatment of emotional distress; and ... have not alleged an independent tort-like action for emotional distress.90

Other courts, however, have taken a closer look at the patient-litigant exception and have interpreted it more narrowly in light of similar exceptions to the attorney-client privilege. In Vanderbilt v. Town of Chilmark,91 for example, the plaintiff sued for employment discrimination and sought damages for emotional distress in six of the eight counts of the complaint.92 After analyzing Jaffee and other lower court opinions, the Massachusetts district court held that merely making a claim for emotional distress damages was not enough to warrant breaching the psychotherapist-patient privilege: the plaintiff “must use the privileged communication as evidence herself before she waives the privilege.”93 Compelling disclosure of confidential communications simply because the plaintiff claimed emotional distress damages would confuse relevance and the limits of privilege:

After Jaffee, a court cannot force disclosure of [relevant] evidence solely because it may be extremely useful to the finder of fact. Giving weight to the usefulness of the evidence as a factor in a decision regarding the scope of the privilege would be a balancing exercise that was barred by Jaffee.94

In dicta, the Vanderbilt court said it would permit discovery of privileged communications only in situations where the communications themselves were the basis for the lawsuit—such as

90. Id. at *3. Under the circumstances, the plaintiffs might have fared better had they simply amended their complaint to exclude any claim for emotional distress damages.
92. Id. at 226.
93. Id. at 228.
94. Id. at 229.
a suit for malpractice based on the advice or findings of a therapist—or where the patient or therapist testified to the substance of the communications in support of an emotional distress claim.\textsuperscript{95}

The court in \textit{Vanderbilt} analogized the situation present in the case to a situation in which the rules of evidence recognize an exception to the attorney-client privilege because the attorney’s advice has been put at issue in a lawsuit.\textsuperscript{96} A later case, \textit{Hucko v. City of Oak Forest},\textsuperscript{97} further developed the \textit{Vanderbilt} court’s analogy and showed why the patient-litigant exception should not be construed as broadly as most courts have done.\textsuperscript{98} In \textit{Hucko}, the plaintiff was found not guilty of a crime by reason of insanity. He later sued the city and individual police officers for violating his civil rights and claimed that he suffered “humiliation [and] emotional distress” because of the officers’ misconduct during his arrest.\textsuperscript{99} He moved for a protective order when the defendants sought his psychiatric records. In a detailed opinion, the district court discussed the proper scope of the patient-litigant exception to the psychotherapist-patient privilege, looking first to the Supreme Court’s rationale for creating the privilege in \textit{Jaffee}:

In light of the Supreme Court’s view that the psychotherapist-patient privilege serves private and public interests similar to those advanced by the attorney-client privilege, this Court agrees that the principles governing implied waiver of the attorney-client privilege should apply in determining what is sufficient to constitute an implied waiver of the psychotherapist-patient privilege.\textsuperscript{100}

The court then went on to look at Seventh Circuit law on waiver of the attorney-client privilege and concluded that the advice of counsel would be placed in issue for purposes of creating an exception to the privilege only if a party “asserts a claim or defense, and attempts to prove that claim or defense by disclosing or

\textsuperscript{95} Id. at 229-30.
\textsuperscript{96} See \textit{Vanderbilt}, 174 F.R.D. at 229.
\textsuperscript{97} 185 F.R.D. 526 (N.D. Ill. 1999).
\textsuperscript{98} See id. at 530.
\textsuperscript{99} Id. at 527.
\textsuperscript{100} Id. at 528-29.
describing an attorney client communication." The plaintiff in *Hucko* had not indicated any intent to offer evidence relating to communications with his therapists; therefore, the court concluded he had not waived his privilege in the records sought by the defendants. The court held that the mere fact that the plaintiff claimed emotional harm made his psychiatric records *relevant* to the case but was not enough to override the privilege:

The Court recognizes that, at first blush, it may appear anomalous that a plaintiff who seeks damages for emotional pain and suffering may be privileged from producing medical records that may shed light on that claim. However, that is no more anomalous than allowing a defendant in a patent case to deny willful infringement and at the same [sic] maintain the privilege in an opinion letter of counsel that might shed light on that claim. In both instances, that is the price we pay for recognizing a privilege, a price that the law deems necessary in order to obtain the supervening private and public benefits that inure from recognition of the privilege.

In *Allen v. Cook County Sheriff’s Department*, a sexual harassment case decided two days after *Hucko*, the court drew a similar distinction. The court denied a motion to compel depositions of the plaintiff’s therapists, holding that the plaintiff’s allegations of

101. Id. at 529 (emphasis added).
102. See *Hucko*, 185 F.R.D. at 529.
103. Id. at 531. Such an interpretation of the patient-litigant exception differs from that proposed by the drafters of rejected Federal Rule of Evidence 504(d)(3), who would have applied the exception whenever the privileged communications were “relevant” to an element of a party’s claim or defense. Proposed Rule, *supra* note 27, at 241. However, the court in *Hucko* did not consider itself bound by the Rule 504 standard. The court concluded that Congress’s failure to adopt the proposed rule indicated its view that the “law of privilege was still evolving.” *Hucko*, 185 F.R.D. at 530. The Supreme Court’s decision in *Jaffee* to extend the privilege to social workers offers further support for this view. *Jaffee*, 518 U.S. at 15. *See also In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 75 (1st Cir. 1999) (“When reason and experience lead us in a different direction than a rejected provision in the proposed rules, we are bound by law to follow the former.”).
emotional distress were not enough to put her mental state at issue. The district judge noted, however, that the situation would be different if the plaintiff were to indicate an intention to call her therapist as an expert witness on the issue of emotional distress:

Fundamental fairness demands that the defendants should have ample opportunity to scrutinize the basis for the opinions of Allens' therapists if she attempts to elicit therapist testimony or evidence to prove her damages caused by her alleged emotional distress. In that instance, Allen would necessarily implicate the substance of her confidential patient-therapist communications and thereby waive her privilege.106

A party who intends to prove emotional distress solely through her own testimony can be deposed on that subject, and this discovery will be sufficient to prevent unfair surprise at trial without violating the confidentiality of the therapeutic relationship. The courts' reasoning in Vanderbilt, Hucko and Allen is supported by the Supreme Court's policy judgments in Jaffee and by the Court's emphasis on predictable application of the new privilege. It is one thing for a party knowingly to waive the privilege in order to gain the benefit of a therapist's expert testimony on emotional distress damages; it is quite another for a defendant to be able to force discovery of confidential patient-therapist communications whenever an opposing party alleges emotional distress. For example, in McKenna v. Cruz the court rejected the plaintiff's argument that the patient-litigant exception should not apply to "garden-variety" or

105. Id. at *1.
106. Id. at *2. See also, Booker v. City of Boston, No. 97-CV 12534-MEL, No. 97-CV-12675-MEL, 1999 WL 734644 (D. Mass. Sept. 10, 1999) (finding that because of the "exceptionally strong language" of Jaffee, privilege is not waived unless the plaintiff "makes positive use of the privileged material in the prosecution of her case").
108. See Jaffee, 518 U.S. at 17-18.
109. See, e.g. Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994) (finding no waiver of privilege in the attorney-client context unless the "client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue").
“boilerplate” claims for emotional distress damages. The court worried that attempting to distinguish between garden-variety and non-garden-variety emotional distress claims during a lawsuit would “re-introduce the very uncertainty the Supreme Court eliminated when it endorsed the psychotherapist-patient privilege as an unconditional privilege.” In so ruling, the McKenna court used the Supreme Court’s emphasis on certainty of application of the privilege to justify an exception to that privilege.

By contrast, several more recent cases have reasoned that a claim for incidental emotional distress damages does not automatically trigger the exception. For example, in Jackson v. Chubb Corp., an employment discrimination case, the court adopted the broad view of the patient-litigant exception, but stated in dicta that a party making only a general claim for emotional distress damages would not meet the threshold requirements for the exception:

Simply put, where a plaintiff merely alleges garden-variety emotional distress and neither alleges a separate tort for the distress, any specific psychiatric injury or disorder, or unusually severe distress, that plaintiff has not placed his/her mental condition at issue to justify a waiver of the psychotherapist-patient privilege.

111. Id. at *2-3. (adopting the broad view that the patient-litigant exception applies to “any” claim for emotional distress).
112. Id. at *2.
113. See id.
116. Id. at 225 n.8.
The *Vanderbilt-Hucko-Allen* approach to the scope of the patient-litigant exception is also supported by the Federal Rules of Civil Procedure, which explicitly limit discovery to “any matter, *not privileged*, which is relevant to the subject matter involved in the pending action.”\(^{117}\) Federal Rule of Civil Procedure 35 also provides for a court-ordered independent mental examination when good cause is shown.\(^{118}\) This examination avoids any intrusion into the therapeutic relationship and provides the opposing party with expert information regarding the mental state of the patient. Traditionally, these examinations have not been routinely ordered because of the invasion of privacy involved.\(^{119}\) In light of the psychotherapist-patient privilege recognized in *Jaffee*, however, ordering these examinations is more justifiable than creating a broad patient-litigant exception to the new privilege. Nonetheless, at least one court since *Jaffee* has interpreted the patient-litigant exception broadly, while at the same time ruling that the party’s mental condition was not sufficiently “in controversy” to warrant a Rule 35 exam.\(^{120}\) Given that the first avenue of discovery intrudes on a privileged relationship and the second does not, this ruling takes too broad a view of the patient-litigant exception to the privilege, while carefully protecting the party’s privacy interest in avoiding an independent mental exam.\(^{121}\)

\(^{117}\) FED. R. CIV. P. 26(b)(1) (emphasis added).

\(^{118}\) See FED. R. CIV. P. 35(a).

\(^{119}\) See, e.g., *Turner v. Imperial Stores*, 161 F.R.D. 89, 97 (S.D. Cal. 1995) (explaining that Rule 35(a) is not meant to be applied broadly and that certain conditions must exist before defendant will be allowed this examination will be ordered). When an exam is ordered, the party ordered to be examined is entitled to receive a copy of “a detailed written report of the examiner setting out the examiner’s findings, including results of all tests made, diagnoses and conclusions.” FED. R. CIV. P. 35(b)(1). By requesting a copy of the examiner’s report, the party obligates itself to provide, upon request, reports of any examinations it has made of the same condition. See id.


\(^{121}\) The court in *Fox* noted that a majority of courts will not order a Rule 35 exam unless, in addition to a claim for emotional distress

one or more of the following factors is also present: (1) a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged a specific mental or psychiatric injury or disorder; (3) plaintiff has claimed unusually severe emotional distress; (4) plaintiff has offered expert testimony in support of her claim for emotional distress.
The court in *Vasconcellos v. Cybex International, Inc.* took a more sensible approach. It ruled that the plaintiff’s claims for substantial emotional distress damages and for intentional infliction of emotional distress had placed her mental state in issue. At the same time, the court limited the defendant’s right of discovery “in light of the important public policy behind the . . . psychotherapist privilege.” Not only would the defendant be “limited to information that is directly relevant to the lawsuit,” but he also would have to establish that “such an intrusion into the therapeutic relationship is the only possible means to obtain relevant information.” Since the plaintiff had offered to undergo an independent psychiatric evaluation, the defendant would likely have difficulty convincing the court it was necessary to destroy the confidentiality of the plaintiff’s therapeutic relationship in order to defend against her claims.

Most courts considering the patient-litigant exception to the *Jaffee* privilege have failed to analyze the analogy to the attorney-client privilege carefully and to consider how the exception should appropriately be limited. Some courts have instead adopted the view that fairness to the opposing party, who would otherwise be denied access to evidence likely to bear on a plaintiff’s claimed injury, requires an exception. In *Equal Employment Opportunity Commission v. St. Michael Hospital*, for example, the plaintiff alleged that racial discrimination by the defendant resulted in emotional pain and suffering and caused marital difficulties that led...
to counseling. The court denied the EEOC's motion for a protective order prohibiting discovery of the counseling records, saying that "it is axiomatic that a plaintiff cannot brandish a sword and deny the defense a shield. Thus, the privilege must be waived or the EEOC shall be precluded from seeking damages related to any alleged harm done to Ms. Johnson's marriage." The court's reasoning ignores the fact that the plaintiff had not indicated any intent to use the counselor's testimony to support her emotional distress claim. It also assumes that the relevancy of the records trumps the privilege—despite the Supreme Court's explicit judgment in Jaffee that protection of the therapeutic relationship outweighs the value of truth-seeking in these circumstances.

Many cases since Jaffee have recognized a broad patient-litigant exception consonant with the mere "relevancy" standard of rejected Federal Rule of Evidence 504(d)(3). However, their numbers are deceiving. Many of the courts reached the same results they would have reached under the narrow interpretation adopted in Vanderbilt, Hucko, and Allen. Usually this occurs either because the party-patient does in fact intend to call the therapist to testify about emotional distress, will need expert testimony to establish that he is a member of a protected class because he has a mental impairment, or has conceded the waiver. In Jackson v. Chubb Corp., for example, the court adopted the broad view of the

128. Id. at *7.
129. Id.
130. See Jaffee, 518 U.S. at 11-12.
132. See, e.g., Sarko v. Penn-Del Directory, 170 F.R.D. 127, 131 (E.D. Pa. 1997) (alleging emotional distress in an Americans with Disabilities Act claim); see also Wynne v. Loyola Univ. of Chicago, No. 97-C06417, 1999 WL 259401, at *2 (N.D. Ill. Sept. 3, 1999); Patterson v. Chicago Ass'n for Retarded Children, No. 96-C4713, 1997 WL 323575, at *3 (N.D. Ill. June 6, 1997). Sarko is the leading case cited by courts for a "broad" view of the patient-litigant exception where emotional distress damages are sought. Since it is an ADA case, however, the plaintiff in that case could not establish liability without proving that she had or was perceived as having a mental disability.
exception after a careful analysis of the conflicting case law. At the same time, the court qualified its decision by noting that the result in the case would be the same under the narrow view, since the plaintiff "clearly intends" to present expert testimony on her mental condition. Further the court opined in dicta that claims for incidental emotional distress are not even sufficient to trigger the exception.

2. Criminal Cases

The patient-litigant exception also applies in criminal cases when, for example, a defendant raises an insanity defense. However, there are few post-Jaffee cases in which the issue has arisen. In United States v. Sturman the defendant notified the government as required by Federal Rule of Criminal Procedure 12.2(b) that he might offer expert psychiatric testimony "to demonstrate that he lacked the requisite specific intent to commit the alleged crimes." The government then subpoenaed the records of four doctors who had treated the defendant in the past. The government argued that the defendant put his mental state in issue by indicating that he might present psychiatric testimony at trial. In granting the defendant's motion to quash the subpoenas, the court noted that specific intent is an element of the government's case in chief, rather than an affirmative defense for which the defendant has the burden of proof. Therefore, if the prosecution's evidence on specific intent was not persuasive, the defendant would be unlikely to present any psychiatric testimony of his own at trial. Taking a narrow view of the patient-litigant exception under these circumstances, the court ruled that the "[defendant's] mental condition, while unquestionably conspicuous in pretrial litigation, has not been placed in issue for purposes of trial. Unless and until [he] proceeds with such a defense at trial, he cannot be said to have waived his rights under the psychotherapist-patient privilege."
United States v. Hansen\textsuperscript{142} deals with an aspect of the patient-litigant exception addressed in the second part of rejected Federal Rule of Evidence 504(d)(3): What happens when the patient is deceased and another party relies on the patient’s mental condition as an element of that party’s claim or defense.\textsuperscript{143} The defendant in Hansen sought the psychotherapy treatment records of the deceased murder victim.\textsuperscript{144} The court concluded that the privilege survived death and the deceased’s therapist could properly assert it on behalf of his former client.\textsuperscript{145} The court nonetheless held that the facts of the case mandated disclosure:

In Jaffee, the Court found that the important public and private interests underlying the privilege outweighed the “modest” evidentiary benefit that would likely result from denial of the privilege. . . . Here, in contrast, the likely evidentiary benefit is great: the defendant is charged with homicide and faces a possible loss of liberty. The mental and emotional condition of the deceased is a central element of her claim of self-defense.\textsuperscript{146}

The court decided that the patient’s private interest in maintaining confidentiality was minimal because he was dead and that the public interest in assuring the confidentiality of therapist-patient communications, while significant, had to give way under the facts of the case.\textsuperscript{147}

\textsuperscript{142} 955 F. Supp. 1225 (D. Mont. 1997).
\textsuperscript{143} Rejected Federal Rule of Evidence 504(d)(3) reads: “There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient . . . , after the patient’s death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.” Proposed Rule, supra note 27, at 241.
\textsuperscript{144} Hansen, 955 F. Supp. at 1225.
\textsuperscript{145} See id.
\textsuperscript{146} Id. at 1226.
\textsuperscript{147} See id. at 1225. Although the court in Hansen did not rely on the proposed exceptions in rejected Federal Rule of Evidence 504 in its decision, it did
The exception recognized in Hansen has been cast into doubt, however, by the Supreme Court's most recent privilege decision, a case involving posthumous application of the attorney-client privilege in the context of a criminal investigation. In Swidler & Berlin v. United States the Court was asked to decide whether the Office of Independent Counsel could have access to notes of a meeting between Deputy White House Counsel Vincent Foster and a lawyer with whom Foster consulted shortly before committing suicide. The majority cited Jaffee in rejecting the prosecutor's attempt to carve out an exception to the privilege for criminal investigations:

The Independent Counsel additionally suggests that his proposed exception would have minimal impact if confined to criminal cases. However, there is no case authority for the proposition that the privilege applies differently in criminal and civil cases. Balancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.

The Supreme Court in Swidler was not prepared to say there were no circumstances in which the privilege might be breached in connection with a criminal case. Nonetheless, the majority relied on Jaffee and emphasized the importance of certainty in applying the privilege. In the context of the psychotherapist-patient privilege, the Swidler decision confirms that routine application of a balancing refer to similar exceptions in state privilege rules. See id. Its holding is supported by the language of rejected Rule 504(d)(3). See Proposed Rule, supra note 27, at 241.

149. See id. at 402-03.
150. Id. at 408-09.
151. See id. at 408-09 n.3 ("Petitioner . . . concedes that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue since such exceptional circumstances clearly are not presented here.").
152. See id. at 409.
test in criminal cases cannot be justified, even in situations involving a deceased patient.\textsuperscript{153}

\textbf{B. Serious Threats of Harm: the "Dangerous Patient" Exception}

The Supreme Court in \textit{Jaffee} made only one explicit mention of a potential exception to the new privilege. In footnote 19, the Court suggested allowing disclosure of patient-psychotherapist communications if it is the only means to avert a "serious threat of harm to the patient or to others."\textsuperscript{154} Precisely what the Court had in mind in this footnote is unclear. On one hand, it could refer to the language in rejected Federal Rule of Evidence 504(d)(1) creating a narrow exception to the privilege for hospitalization proceedings when a therapist has to testify about the patient’s dangerousness to meet civil commitment standards.\textsuperscript{155} On the other hand, the language of the footnote could suggest a potentially far broader scope for disclosure along the lines of the so-called \textit{Tarasoff} exception to confidentiality, under which a therapist may be held civilly liable for failure to use reasonable care to protect third parties threatened by a patient.\textsuperscript{156} The lack of any clear reference or context for the Court’s

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\item \textsuperscript{153} See \textit{Swindler}, 524 U.S. at 407-08. The holding in \textit{Swidler} suggests that the Supreme Court would likely find that the psychotherapist-patient privilege survives the death of the patient, thus departing from rejected Rule 504 in this respect as it did with application of the privilege to social workers.
\item \textsuperscript{154} \textit{Jaffee}, 518 U.S. at 18 n.19.
\item \textsuperscript{155} Rejected Federal Rule of Evidence 504(d)(1) provided: "There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist, in the course of diagnosis or treatment has determined that the patient is in need of hospitalization." Proposed Rule, \textit{supra} note 27, at 241.
\item \textsuperscript{156} Obligations imposed by the duty to third parties have been variously formulated. In \textit{Tarasoff v. Regents of the University of California}, 17 Cal. 3d 425, 439 (1976), the California Supreme Court held that "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." A later California statute narrowed the situations in which the duty applies to cases of "a serious threat of physical violence against a reasonably identifiable victim." CAL. CIV. CODE § 43.92(a) (West 1999). The statutory duty is discharged by "making reasonable efforts to communicate the threat to the victim . . . and to a law enforcement agency." CAL. CIV. CODE § 43.92(b) (West 1999). Contrary to
footnote in the Jaffee opinion has led the Tenth Circuit to create an overly broad exception to the privilege in one of the few post-Jaffee appellate opinions to date. 157

In United States v. Glass158 the defendant was indicted for threatening to kill the President of the United States.159 The defendant moved to exclude from evidence his statement to the examining psychiatrist in the mental health unit of an Oklahoma hospital that he “wanted to shoot Bill Clinton.”160 The government, relying on footnote 19 in Jaffee, argued that the privilege was not available under the circumstances of the case. The district court agreed.

On appeal, the Tenth Circuit rejected the government’s argument that “Jaffee’s rationale for the privilege ... simply does not apply in a criminal setting.”161 The court held that “upon the record before us the psychotherapist-patient privilege announced in Jaffee is available to protect Mr. Glass’s statements from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”162 However, the court remanded the case for an evidentiary hearing “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.”163 By so ruling, the

the implications of Jaffee’s footnote 19, California courts after Tarasoff have held that there is no duty to warn others when the threat of harm is to the patient himself. See generally Bellah v. Greenson, 81 Cal. App. 3d 614 (Cal. Ct. App. 1978) (holding that therapist was under no obligation to disclose daughter’s suicide threats to her parents). Accord ARIZ. REV. STAT. § 36-517.02 (1999) (obliging mental health provider to report threats against “identifiable victims”); COLO. REV. STAT. § 13-21-117 (1999) (imposing a duty to warn only with “serious threat of imminent physical violence against a specific person or persons”); DEL. CODE. ANN. tit. 16 § 5402 (1998) (stating that liability can arise only if a patient makes threats to kill or seriously injure a “clearly identified victim”).

157. See generally George Harris, The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: the Tarasoff Duty and the Jaffee Footnote, 74 WASH. L. REV. 33 (1999) (suggesting that exception to the evidentiary privilege should be made only if “necessary to prevent future harm to patients or identified potential victims”).

158. 133 F.3d 1356 (10th Cir. 1998).
159. Id. at 1357.
160. Id.
161. Id.
162. Id. at 1360.
163. Glass, 133 F.3d at 1360.
Circuit Court accepted the assertion that the language of Jaffee footnote 19 created an exception to the psychotherapist privilege that would permit admission of the psychiatrist’s testimony in the criminal proceeding against his patient. The court left the district judge to decide only whether the conditions for the exception had in fact been met in this case.

On remand, the district court heard testimony from the psychiatrist and from a Secret Service agent. The psychiatrist testified that Glass had been discharged to his father’s care after his hallucinations of killing the President had stopped and he was stabilized on Haldol. Three days later, the psychiatrist learned that Glass had left his father’s home and that his whereabouts were unknown. Concerned that Glass would again discontinue his medication without supervision, the psychiatrist concluded that Glass now posed a “serious threat” to the President and that involuntary commitment was not an option because Glass had disappeared. The Secret Service agent testified that he considered the threat serious because Glass had money available to travel and had once before been investigated for making similar threats. Based on this evidence, the court denied Glass’s motion to exclude his statements to the psychiatrist and held that they were “properly admissible as an exception to the psychotherapist-patient privilege.”

Neither the district court nor the appellate court in Glass considered whether the justification for the therapist’s revelation of Glass’s threat to federal authorities shortly after it was made—to prevent a future harm—also justified admission of the therapist’s testimony against his patient in a subsequent criminal prosecution. Ethical rules permit psychotherapists to disclose serious threats of harm, and many states impose tort liability by case law or by

164. See id.  
165. See id. The Court of Appeals directed the district court to proceed under Federal Rules of Evidence 104(a), which deals with preliminary determinations by the court concerning, among other things, the existence of a privilege. See id.  
167. Id. at 5.  
168. Id. at 8  
169. See, e.g., AMERICAN PSYCHIATRIC ASSOCIATION, THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY, § 4.8 (1998): (“Psychiatrists at times may find it necessary, in order to protect the
statute on therapists who fail to warn of a patient’s serious threat of harm to a third party. However, as Professor Harris has argued, Jaffee's footnote 19 conflates the Tarasoff exception to confidentiality for serious threats of harm to third parties and the dangerous patient exception to the psychotherapist-patient evidentiary privilege:

The benefits and burdens of the Tarasoff exception to confidentiality and the dangerous patient exception to the evidentiary privilege are dramatically different. There is simply no compelling reason to equate or inseparably link them. Unfortunately, without analyzing or even acknowledging the significant distinctions between the two exceptions, the Jaffee footnote appears to have done just that. When the dangerous patient exception to the evidentiary privilege is analyzed separately, it finds support in the Tarasoff protective rationale only where disclosure of the confidential client communications during the evidentiary proceeding proves necessary to avert a serious, future threat of harm to an identifiable potential victim or the patient.

Having applied the Jaffee privilege to criminal cases like Glass, the Tenth Circuit would have been more consistent if it had ruled that the therapist’s testimony was not admissible against his patient even though his original disclosure might have been proper. At the time of trial, there is no more reason to require a therapist to testify about a patient’s past threat than about a robbery confided to him, and the harm to the privileged relationship from compelling testimony about either is the same. The dangerous-patient evidentiary exception should be limited, as Professor Harris has suggested, to situations in which disclosure is necessary to prevent harm to others, such as hospitalization proceedings or proceedings to

\[\text{patient or the community from imminent danger, to reveal confidential information disclosed by the patient.}\]

\[170. \text{See, e.g., ARIZ. REV. STAT. § 36-517.02 (West 1995); COLO. REV. STAT. § 13-21-117 (West 1995); MASS. GEN. LAWS ch. 123, § 36B (West 1995).}\]

\[171. \text{Harris, supra note 157, at 57-58.}\]
obtain a restraining order.\textsuperscript{172} Even in these limited instances, testimony by a treating therapist should only be permissible as a last resort, since an independent psychiatric examination or other evidence will often suffice to meet statutory requirements without infringing on the confidentiality of the therapeutic relationship.

While this Article was being edited for publication, the Sixth Circuit handed down an opinion holding squarely that there is no "dangerous patient" exception to the \textit{Jaffee} privilege. In \textit{United States v. Hayes}\textsuperscript{173} the defendant postal worker was charged with making repeated threats to kill the postmaster to various treating psychotherapists connected with the Veterans Administration.\textsuperscript{174} After one detailed threat, a therapist he was seeing on an outpatient basis warned the postmaster and the defendant's prosecution for threatening a federal official ensued. The defendant moved to suppress his psychotherapy records and to exclude his therapists' expected testimony. The district court granted the motion and dismissed the indictment. The court of appeals affirmed.\textsuperscript{175}

First, the court of appeals stated that recognizing a dangerous patient exception would "have a deleterious effect on the 'atmosphere of confidence and trust' in the psychotherapist-patient relationship," since a warning that the patient's statements might be used against him in a criminal prosecution "would certainly chill and very likely terminate open dialogue."\textsuperscript{176} Second, the court concluded that footnote 19 in \textit{Jaffee} was intended to refer only "to the fact that psychotherapists will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient, to comply with their 'duty to protect' the patient or identifiable third parties."\textsuperscript{177} Third, the court reasoned that adoption of such an exception would be ill-advised, since no state other than California recognizes it in a

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\footnotetext{172}{See Harris, \textit{supra} note 157, at 62-64. In most states, both the existence of mental illness and present dangerousness to self or others must be established to warrant involuntary hospitalization. See, \textit{e.g.}, CAL. WELF. & INST. CODE § 5150 (West 2000) (basing involuntary civil commitment on dangerousness to self or others as a result of mental disorder).}
\footnotetext{173}{2000 WL 1289028 (6th Cir. Sept. 14, 2000).}
\footnotetext{174}{Id.}
\footnotetext{175}{Id.}
\footnotetext{176}{Id.}
\footnotetext{177}{Id.}
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criminal case and no such exception was included in rejected Federal Rule of Evidence 504:

We hold, therefore, that the federal psychotherapist/patient privilege does not impede a psychotherapist's compliance with his professional and ethical duty to protect innocent third parties, a duty which may require, among other things, disclosure to third parties or testimony at an involuntary hospitalization proceeding. Conversely, compliance with the professional duty to protect does not imply a duty to testify against a patient in criminal proceedings or in civil proceedings other than directly related to the patient's involuntary hospitalization, and such testimony is privileged and inadmissible if a patient properly asserts the psychotherapist/patient privilege.178

Although the Hayes court did not cite Professor Harris's article, its reasoning is similar to his. There is an important distinction, both ethically and in terms of the unconditional privilege recognized in Jaffee, between situations where it is still possible to avert harm by breaching confidentiality and situations where the psychotherapist's testimony can serve only to further prosecution of the patient. The Glass case blurred that distinction and should not be followed.

C. Other Exceptions

Since Jaffee was decided, only a few courts have considered creating exceptions other than the patient-litigant exception and the dangerous patient exception. In these cases, the courts have been scrupulous about protecting the confidentiality of the therapist-patient relationship and have looked to the law on attorney-client privilege to define the parameters of any acceptable exception to the Jaffee privilege.

1. Sixth Amendment Rights

Federal district courts in two states have addressed whether defendants' rights under the Sixth Amendment of the United States Constitution trump the psychotherapist privilege; both have ruled that they do not.\footnote{179} In \textit{United States v. Haworth}\footnote{180} the defendants sought to discover the records of psychotherapists who had examined a witness for the prosecution.\footnote{181} The court held that the records were privileged under \textit{Jaffee} and that the defendants' constitutional right to confront the witnesses against them would permit cross-examination of the witness at trial, but not examination of the treating therapist's records.\footnote{182}

In \textit{United States v. Doyle} the government sought an upward departure from federal sentencing guidelines due to the extreme psychological trauma suffered by the victim.\footnote{184} The defendant subpoenaed the records of the psychologist and the social worker who treated the victim after the crime.\footnote{185} The court rejected the defendant's claim that his Sixth Amendment right to compulsory process outweighed the psychotherapist privilege and stated, "The \textit{Jaffee} court makes it clear that the balancing test advocated by the defendant is not appropriate."\footnote{186} The court emphasized the important role that privileges play in protecting confidential communications: "[P]rivileges . . . encourage[ . . . those in need of psychological assistance . . . [to] reveal their most private thoughts to their psychotherapist knowing that their volunteered statements will not be shared with anyone else without their consent."\footnote{187} The \textit{Doyle} court, like a number of courts that have considered a patient-litigant exception to the privilege, drew an analogy to the attorney-client privilege in refusing an \textit{in camera} inspection of the therapists' records:

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\item 168 F.R.D. 660 (D.N.M. 1996).
\item Id.
\item Id. at 662.
\item 1 F. Supp. 2d 1187 (D. Or. 1998).
\item Id. at 1189.
\item Id.
\item Id. at 1190.
\item Id. at 1191.
\end{enumerate}
\end{footnotesize}
In a different setting, would it be proper for a court to conduct an \textit{in camera} invasion of an attorney-client privilege to determine if the privileged communication was helpful to an accused? \ldots Can anyone imagine the court granting a motion by the defendants to examine \cite{Violette} cooperating defendant's attorney \textit{in camera} regarding the privileged statements made to him to determine if any could be helpful to the defense?  

The sound analysis in \textit{Haworth} and \textit{Doyle} illustrate both the importance of drawing comparisons with the attorney-client privilege in considering exceptions to the \textit{Jaffee} privilege and the fact that the privilege does not apply differently in criminal and civil cases.

2. Crime-Fraud Exception

One appellate court has also considered whether there should be a crime-fraud exception to the psychotherapist-patient privilege similar to that recognized in the attorney-client context.  In \textit{In re Grand Jury Proceedings (Gregory P. Violette)}, the First Circuit ruled to enforce grand jury subpoenas for two psychiatrists whose testimony was sought in the context of an investigation into allegedly fraudulent disability claims by Violette.  In analyzing the applicability of this exception, the court noted that the \textit{Jaffee} Court had "justified the psychotherapist-patient privilege in terms parallel to those used for the attorney-client privilege." Both privileges "exist to foster the confidence and trust required for effective counseling relationships" and both "serve[] the public weal."  

\begin{thebibliography}{99}
\bibitem{Doyle} Doyle, 1 F. Supp. 2d at 1191.
\bibitem{Violette} See \textit{In re} Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71, 72 (1st Cir. 1999). In the attorney-client context, the crime-fraud exception requires a \textit{prima facie} showing "(1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity." \textit{Id.} at 75.
\bibitem{F.3d} 183 F.3d 71 (1st Cir. 1999).
\bibitem{id} See \textit{id.} at 75-76.
\bibitem{Id} \textit{Id.} at 76.
\bibitem{Id} \textit{Id.}
\end{thebibliography}
light of these parallels, the court concluded that a crime-fraud exception to the psychotherapist-patient privilege should also be recognized "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.""

The court was careful, however, to limit the scope of this new exception:

[I]t is important to emphasize that the crime-fraud exception will apply only when the patient’s purpose is to promote a particular crime or fraud. Thus, for example a career criminal’s confessions to his psychotherapist will not fall within the exception even though the therapy may generally increase the patient’s professional productivity.

In this case, the court concluded that the exception should be applied because the affidavit submitted by the government amply supported its claim that Violette’s communications to the therapists in question were part of an effort to defraud lenders and disability insurers. While the exception recognized by the First Circuit is a narrow one that makes sense on its own terms, it is unclear why the court chose to create an exception at all. As the appeals court acknowledged—and as the district court explicitly found—the communications at issue were not really made in the course of diagnosis or treatment because the patient’s purpose in seeking consultation with the psychiatrists was to perpetrate a fraud. Since that finding alone

194. Id. at 77 (quoting Trammel v. United States, 445 U.S. at 50).
195. In re Grand Jury Proceedings, 183 F.3d at 77 (using the recent movie Analyze This, in which a Mafia boss seeks therapy, as a fictional example of a therapy that would not come within the crime-fraud exception to the privilege).
196. See id.
197. See id. Indeed, in discussing why the absence of a crime-fraud exception in rejected Federal Rule of Evidence 504(d) did not preclude the court’s creating one in this case, Judge Selya pointed out that “the drafters [of the rejected rule] may have thought it self-evident that communications made for the purpose of furthering a crime or fraud would not be deemed to be ‘made for the purposes of diagnosis or treatment’” Id.
defeats any claim of privilege, the court need not have gone further to resolve the case.

V. Conclusion

In Jaffee v. Redmond the Supreme Court not only recognized a psychotherapist-patient privilege but also extended it to licensed social workers, who today provide "a significant amount of mental health treatment." Following Jaffee, the lower federal courts that have considered the question of what professionals fall within the privilege have tended to extend the privilege even further to include other kinds of licensed therapists and counselors. Given the reality that psychotherapy is no longer the exclusive province of psychiatrists and psychologists as it once was, this trend is likely to continue. In deciding which psychotherapists the privilege covers, federal courts will look to state law for guidance but must ultimately rely on the public and private interests served by the privilege in determining its outer limits.

The treatment of exceptions to the psychotherapist-patient privilege is still in the early stages of development, and few appellate courts have addressed the issue at all. The Supreme Court in Jaffee emphasized both the strong public policy reasons for creating an unconditional privilege, like the attorney-client privilege, and the importance of predictable application to an effective privilege. At the same time, it predicted in a footnote that there would be some exceptions to the privilege which would limit its scope. As the lower courts have attempted to apply these somewhat contradictory directives, some courts have adopted overly broad definitions of potential exceptions, especially for patient-litigants and dangerous patients, and in the process have often lost sight of the policy concerns supporting the new privilege. Other courts and commentators have taken more careful approaches to these exceptions and have recognized that the well-developed law of attorney-client privilege can provide useful guidance in the attempt both to uphold the principles behind the psychotherapist privilege and to define certain exceptional circumstances in which the privilege must give way.

199. Id. at 16.
In order to be truly effective, the psychotherapist-patient privilege must be subject only to narrow exceptions. If we value the mental health of our citizenry as a public good, patients' belief in the confidential nature of their private communications of distress, fear, and shame must be well-founded. This confidentiality must be protected by a privilege that is subject to exceptions only in rare cases, such as when the holder of the privilege is the subject of hospitalization proceedings or when he sues the therapist or intends to use the therapist as an expert witness at trial.