



The Federal Psychotherapist-Patient Privilege

[Jaffee v. Redmond, 518 U.S. 1]

History, Documents, and Opinions

Documents

The Shooting

[As described in Court Document](#)

Jaffee Court Opinions

[Seventh Circuit Court of Appeals](#)
[Supreme Court Majority](#)
[Supreme Court Dissent](#)

Jaffee Briefs

[Petition for Certiorari](#)
[Petitioner's Brief](#)
[Petitioner's Reply Brief](#)

Amicus Briefs

[American Psychoanalytic Assn.](#)
[American Psychiatric Assn.](#)
[American Psychological Assn.](#)
[U.S. Solicitor General](#)
[NASW et. al.](#)

Oral Argument

[Supreme Court, February 26, 1996](#)

Federal Rules of Evidence

[Proposed Rule 504 \(with Advisory Committee Notes\)](#)
[Federal Rules of Evidence](#)
[Rule 501](#)
[Legislative notes on Rule 501](#)

The Earliest Psychotherapist-Patient Privilege Case

[Binder v. Ruvell, 1952](#)

Major Post-Jaffee Issues

1. IS THERE A SO-CALLED "PATIENT-LITIGANT EXCEPTION" (WAIVER) TO THE JAFFEE PRIVILEGE?

YES:

[Schoffstall v. Henderson](#)
[Doe v. Oberweis Dairy](#)

NO:

[Vanderbilt v. Town of Chilmark](#)
[Fitzgerald v. Cassil](#)
[Sims v. Blot](#) **New!**

2. IS THERE A "DANGEROUS PATIENT" EXCEPTION TO THE JAFFEE PRIVILEGE?

YES:

[U.S. v. Glass](#)
[U.S. v. Chase](#) (superseded)]
[U.S. v. Auster](#)

NO:

[U.S. v. Hayes](#)
[U.S. v. Chase](#)
[U.S. v. Ghane](#)

Landmark State Case:

On June 13, 1996, the U.S. Supreme Court established the psychotherapist-patient privilege in the Federal Courts. This important decision was the ultimate societal expression of the need to provide absolute protection from disclosure of communications between psychotherapists and their patients. This WWW site is your link to historical and developing information about this most important factor in protecting the confidentiality of psychotherapy.

Although the **JAFFEE** privilege has been likened by the Supreme Court to the attorney-client privilege, the **JAFFEE** privilege lacks the latter's many years of common law experience. The way in which the new privilege develops is of major importance to all psychotherapists and their patients. It is the goal of this WWW site to increase public awareness of the **JAFFEE** privilege and its important implications for the confidentiality of psychotherapeutic relationships.

Recent Developments

March 9, 2012 -- Eighth Circuit Declines to Recognize a "Dangerous Patient Exception" -- Joining Sixth and Ninth Circuits, the Eighth Circuit has declined to recognize a "dangerous patient exception" to the Jaffee privilege. The Court in [U.S. v. Ghane](#) made clear that the issuing of a "Tarasoff warning," even with the patient's explicit consent to the warning, does not waive the psychotherapist-patient privilege.

October 6, 2008 -- Certiorari Denied in U.S. v. Auster -- The Supreme Court [denied certiorari](#) in the [U.S. v. Auster](#) case (see February 11, 2008 item.) The Fifth Circuit Decision raises troubling questions in regard to what, if anything, patients are told at the inception of treatment about the boundaries of confidentiality, and puts a new spotlight on the previously unexplored implications of **Footnote 12** in *Jaffee*.

Articles

Klinka, E.. (2009) [It's Been a Privilege: Advising Patients of the Tarasoff Duty and its Legal Consequences for the Federal Psychotherapist-Patient privilege](#)

Appelbaum, P. (2008) [Privilege in the Federal Courts: Should There Be a "Dangerous Patient Exception"?](#)

Mosher, P.W. and Swire, P. P. (2002) [The Ethical and Legal Implications of Jaffee v. Redmond and the HIPAA Privacy Rule for Psychotherapy and General Psychiatry.](#)

Nelken, M. (Winter, 2000) [The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law](#)

Kenney, L.W. (Fall, 2000) [Role of Jaffee v. Redmond's "Course of Diagnosis or Treatment" Condition in Preventing Abuse of the Psychotherapist-Patient Privilege](#)

APA News (Sept. 15, 2000) [Legal Loopholes Could Limit Psychotherapist-Privilege Victory](#)

Beyer, K. (2000) [Jaffee v. Redmond Therapist Speaks](#)

Landau, B.J. (2000) ["Documentation of Psychotherapy" in the Light of the Supreme Court Jaffee v Redmond Decision](#)

** Mosher, P.W. (1999) [Psychotherapist-Patient Privilege: The History and Significance of The U.S. Supreme Court's Decision in the case of Jaffee v. Redmond](#)

** Poulin, A.B., (1998) [The Psychotherapist-Patient Privilege after Jaffee V. Redmond: Where Do We Go from Here?](#) (PDF)

Amann, D.M., Imwinkelried, E.J. (1997) [The Supreme Court's Decision to Recognize a Psychotherapist Privilege in Jaffee v. Redmond. 116 S. Ct. 1923 \(1996\): The Meaning of "Experience" and the Role of "Reason" under Federal Rule of Evidence 501](#)

Archer, M.S. (1997) [All Aboard the Bandwagon: The Uncertain Scope...](#) (PDF)

Stone, M.S.(1997)

New York v. Bierenbaum
[APsaA/NYSPA Brief
 Opinion of the Court](#)

**3. IS THERE A "CRIME-FRAUD"
 EXCEPTION TO THE JAFFEE
 PRIVILEGE?**

YES:

[In Re Grand Jury Proceedings \(Gregory
 P. Violette\)](#)

**4. DOES THE JAFFEE PRIVILEGE
 APPLY TO ALL MENTAL
 HEALTH/MEDICAL INFORMATION OR
 ONLY TO STRICTLY DEFINED
 "PSYCHOTHERAPY"?**

WIDE INTERPRETATION:

[Oleszko v. State Compensation
 Insurance Fund](#)
[Finley v. Johnson Oil Co.](#)

**5. DOES THE 6th AMENDMENT
 CONFRONTATION CLAUSE TRUMP
 THE JAFFEE PRIVILEGE?**

NO:

[Newton v. Kemna](#) **New!**

**HHS Privacy Rule
 Comments**

**General Accounting Office
 Summary**

[Testimony at Senate Committee Hearing
 04/26/00 \(PDF\)](#)

**About "Psychotherapy
 Notes"**

[The American Psychological Association
 Paul W. Mosher, M.D. and Jerome Beigler,
 M.D.](#)
[American Psychoanalytic Association](#)

Other

[American Association of Health Plans](#)
[AAPS](#)
[ACLU](#)
[The American Health Information
 Management Association](#)
[American Hospital Association](#)
[American Medical Association](#)
[American Medical Informatics Association](#)
[American Psychiatric Association](#)
[JAMA Editorial by Paul Appelbaum, M.D.](#)
[Association of Private Pension and Welfare
 Plans](#)
[Bazelton Center for Mental Health Law](#)
[Massachusetts Medical Society](#)
[National CPR](#)
[Workgroup on Electronic Data Interchange](#)

**July 18, 2008 -- Second Circuit upholds
 the privilege in the context of "garden
 variety" complaints** of emotional distress in
[Sims v. Blot](#). This carefully reasoned
 decision upholds the principle articulated in
[Vanderbilt v. Chilmark](#) and other cases.

**February 11, 2008 -- Circuit Split results
 from Fifth Circuit Decision** -- The Fifth
 Circuit has decided in [U.S. v Auster](#) that the
 issuing of a "Tarasoff" warning, in the face of
 a patient's knowledge that such a warning
 would be issued following a threat, places the
 communication of the threat to the therapist
 outside the privilege and therefore makes that
 fact admissible in a subsequent criminal
 proceeding against the patient. This takes
 the opposite view to that taken in [U.S. v
 Hayes](#) (Sixth Circuit) and [U.S. v. Chase](#) (Ninth
 Circuit). [addendum: a certiorari petition has
 been filed]

**March 19, 2007 -- Certiorari Denied in
 Oberweis** -- The Supreme Court [denied
 certiorari](#) in the Oberweis case (see
 November 22, 2006 item.)

**November 22, 2006 -- Certiorari Petition
 Filed in Case Raising "At Issue"
 Exception** -- The Supreme Court has been
[asked to review a Seventh Circuit ruling](#)
 which supports the so-called "patient-litigant"
 exception to the **Jaffee** privilege. In [Doe v
 Oberweis Dairy](#) the Seventh Circuit held that
 psychotherapy records were not protected by
 the **Jaffee** privilege in light of a claim for
 ordinary mental distress. [The petition](#) claims
 that this holding is in conflict with holdings in
 two EEOC cases in the Fifth Circuit.

**June 13, 2006 -- Tenth Anniversary of
 Jaffee Decision** -- The **Jaffee** decision,
 handed down June 13, 1996, has now been
 on the books for 10 years. Developments in
 the law following **Jaffee** have begun to define
 the "contours" of the privilege, but there is still
 much to be decided. [An article in Psychiatric
 News](#) (American Psychiatric Association)
 addresses **Jaffee's** relevance today.

**July 5, 2005 -- Ninth Circuit Rules that
 Statement Made to Therapist outside
 Scheduled Session is not Privileged** --
 The Ninth Circuit has ruled in [U.S. v Romo](#)
 that a statement made to a psychotherapist in
 a private non-scheduled meeting (a
 "session?") is not "in the course of diagnosis
 or treatment" and is therefore not privileged!
 One judge was of the opinion that such a
 meeting [is part of the treatment relationship](#)

[The Supreme Court Adopts a Federal
 Psychotherapist-Patient Privilege](#)

Lombardo, P.(1996)
[The Newest Federal Privilege](#)(1996)

APA Monitor [Supreme Court protects
 patient-therapist privilege](#) (1996)

R. Slovenko, [The psychotherapist-patient
 testimonial privilege](#)(1996) \$\$

Imwinkelried, E. J., [A new threat to
 plaintiffs' discovery rights?](#) (1996) \$\$

Paul S. Appelbaum, [Jaffee v. Redmond:
 Psychotherapist-Patient Privilege in the
 Federal Courts](#) (1996)

B.J. Winick, [The psychotherapist-patient
 privilege: a therapeutic jurisprudence view](#)
 (1996)

Mosher, P. (1995) [American
 Psychoanalytic Assn. Files Brief in Jaffee](#)

and therefore a statement made in such a meeting is protected by **Jaffee**.

June 27, 2005 -- U.S. Supreme Court declines to hear appeal on reporters' privilege -- Reporters Judith Miller and Matthew Cooper refused to disclose sources to a Federal Prosecutor and were found in civil contempt by a district court. The judgement of the district court was sustained in a [decision by the DC Circuit Court of Appeals](#). In this decision the appellate court discussed the issue of a supposed federal reporters' privilege in relation to the absolute **Jaffee privilege**, and agreed that, if such a reporters' privilege exists, **it is not absolute**. In refusing to review this decision, the Supreme Court declined an opportunity to establish the existence of a federal reporters' privilege *despite the existence of "shield laws" in a number of states*.

March 26, 2004 -- Seventh Federal Circuit Rejects a Federal Privilege in the "Partial Birth Abortion" Records Case -- An Illinois Federal District Court [ruled \(full text\)](#) that records of patients who underwent abortions are privileged in the Federal Courts either because the HIPAA Privacy Rule "no preemption" provision imports Illinois state privilege law into federal courts in Illinois or because records of such patients are deserving of privilege protection based on the reasoning in Jaffee. A three judge panel of the 7th Circuit has rejected both rationales. In its [decision \(full text\)](#), the panel denied Government access to the records based on the more common "undue burden" provision of the Rules of Civil Procedure.

January 9, 2004 -- Eighth Federal Circuit Rules on "Confrontation Clause Issue" -- A defendant convicted of first degree murder attempted to impeach the only eye witness by gaining access to that witness's psychotherapy records. In *Newton v. Kemna*, the Eighth Federal Circuit [ruled \(Full Text\)](#) that the defendant may not invoke a 6th Amendment "confrontation clause" right to access the records because the witness's *Jaffee* privilege is "absolute," i.e., not subject to case-by-case balancing. The court also ruled that the Supreme Court's no-balancing decision in *Jaffee* means that *an in camera examination of the records to determine their possible relevance is not allowed*.

August 22, 2003 -- U.S v. Chase Ninth Circuit Ruling on "Dangerous Patient Exception" Reversed! -- The United States

Court of Appeals for the Ninth Circuit after an *en banc* rehearing of its earlier decision in [U.S. v. Chase](#), has [RULED \(Full Text\)](#) that **there is no so-called "dangerous patient exception" to the Jaffee privilege**. The effect of this ruling is to protect the patient's communications to a therapist from forced disclosure in open court **even if the therapist has issued a "Tarsoff-type" warning**. There is now only one circuit on record on the side of such an exception to the privilege and there are two against such an "exception." (see below)
 [Despite the new ruling, Chase's conviction was not reversed.]

August 21, 2002 -- Another Appellate Ruling on "Dangerous Patient Exception"

-- In the case of [U.S. v. Chase](#), the United States Court of Appeals for the Ninth Circuit has ruled that there **is** a dangerous patient exception to the *Jaffee* privilege, **adopting a position opposite to that taken by the 6th Circuit in [U.S. v. Hayes](#)**. In the three Appellate rulings on this issue so far, the opinions have been: two in support of an exception (U.S. v. Chase and [U.S. v. Glass](#)) and one holding that there is no such exception (U.S. v. Hayes). The issue in large part revolves around the meaning and intent of the so-called "[Jaffee footnote](#)" ([footnote 19](#)).

August 14, 2002 -- HHS Publishes Final Privacy Rule -- Following its proposed revisions to the HIPAA Privacy Rule, HHS published the [FINAL Privacy Rule](#) in the Federal Register. The stringent protection for "psychotherapy notes" **based on *Jaffee*** remains undisturbed. The starting enforcement date for the Privacy Rule is April 14, 2003.

April 14, 2001 -- The HHS Privacy Rule Becomes Effective -- Despite strenuous lobbying efforts by certain health industry participants, [President Bush decided](#) to allow the final HHS Privacy Rule's effective date to remain undisturbed. Therefore, the final Rule, **including the stringent protection of psychotherapy information based on the *Jaffee* privilege**, takes on the force of law as of April 14, 2001. The "enforcement date" is two years later.

March 20, 2001 -- Widening the Privilege -- The Federal Court of Appeals for the 9th District has ruled that **communications between an unlicensed EAP counselor and a patient are protected from**

compelled disclosure by the psychotherapist-patient privilege established in *Jaffee*. The Court took note of the increasing number of employees who must see an EAP counselor as a prerequisite to entering third-party paid psychotherapy. The Court also noted that EAP counselors frequently receive sensitive information from patients under a presumption of confidentiality, in the same sense that psychotherapists do. See [Oleszko v. State Compensation Insurance Fund](#).

January 18, 2001 -- The Outer Limits!! -- In what has to be the broadest imaginable application of *Jaffee*, a Lower U.S. Court has held that the federal psychotherapist-patient **privilege protects the medical records of a general practitioner** simply because the record mentions the patient's mental state. The patient did not have a mental diagnosis, and was not in "psychotherapy." See [Finley v. Johnson Oil Co.](#)

December 28, 2000 -- HHS Final Privacy Rule Published -- The U.S. Department of Health and Human Services publishes "Standards for Privacy of Individually Identifiable Health Information; Final Rule" in the Federal Register. In the light of the Supreme Court's ruling in *Jaffee v. Redmond*, **the Rule extends stringent protection to "psychotherapy notes" which goes far beyond the protection extended to all other medical information.**

The final Rule (which becomes binding in April, 2003 -- changed from February, 2003 by order of HHS, 02/26/01) makes it illegal for an insurer to condition the sale of a policy or payment of claim on a patient's agreement to allow disclosure of psychotherapy notes. *The fly in the ointment: a lack of clarity as to what information an insurer will be able to demand*, i.e., how the Rule will be interpreted by [those who are charged with its enforcement](#) -- and by the courts. This issue will be the next battleground in the protection of genuine confidentiality for psychotherapy.

A summary of all the Rule's provisions relating to psychotherapy notes, as well as links to the entire Rule and information about plans for enforcement, are [HERE](#).

September 14, 2000 - U.S. Court of Appeals for Sixth Circuit Holds That There Is No "Dangerous Patient" Exception to the Jaffee Privilege -- In the case of [U.S. v Hayes](#) a Federal Appellate Court ruled that there is no "dangerous patient exception" to the federal psychotherapist-patient privilege.

In a powerful ruling the Court held that the [so-called "Jaffee footnote" \(footnote 19\)](#) has been misunderstood to suggest that such an exception exists. Rather, the Court held, the footnote means only that a psychotherapist may testify without the patient's consent to **prevent** imminent harm. The ruling makes plain that even if a state law creates a "duty to warn," under which a warning may be given to avert harm, that does **NOT** mean that the therapist may subsequently testify against the patient without the patient's consent

August 18, 2000 - U.S. Court of Appeals for the 8th Circuit Holds That a Patient "Waives" the Privilege by Placing Mental Condition "At Issue" -- In the case of [Schoffstall v. Henderson](#) a Federal Appellate Court ruled that a patient waives the federal psychotherapist-patient privilege by placing her mental state at issue in a claim. This is the first ruling at the appellate level on this issue. Lower federal courts are divided on the issue. See, for example, [Vanderbilt v. Chilmark](#).

December 3, 1999 - U.S. Surgeon General Report on Mental Health in America -- This important document contains a [chapter on confidentiality \(chapter 7\)](#) which begins with a quotation from the Court's opinion in **Jaffee**. The section of the report on [disclosure to third party payers](#) points out that current state laws are too permissive. The report suggest as a model the [very protective 1984 New Jersey statute](#) which prohibits disclosure of psychologist-psychotherapist information to insurers. This statute is based on the District of Columbia [1978 Mental Health Information Law](#) which extends [strong protection](#) to the patients of all psychotherapists in the District. (Federal Employees are not protected.)

November 3, 1999 - U.S. Department of Health and Human Services Issues Proposed Rules for the Privacy of Electronic Health Information -- In this extremely [complicated and detailed proposal](#), HHS has established very special powerful protection for "psychotherapy notes." Quoting extensively from the **Jaffee** opinion, HHS proposed to make it illegal for an insurer to sell an insurance policy in which the psychotherapy coverage requires the patient to agree to the disclosure of psychotherapy information. The proposed rule also makes it illegal for an insurer to refuse to pay a claim because a patient doesn't agree to disclosure of such information.

October 7, 1999 - President Clinton Establishes *Jaffee*-like Privilege for Military Personnel under UCMJ -- President Clinton announced that by executive order he is [establishing a psychotherapist-patient privilege for military personnel](#). The privilege has several stated exceptions tailored to the needs of the armed services. [See also](#).

September 10, 1999 - Federal District Court Decides that Waiver is to be Interpreted Narrowly -- A Federal District Court decision has held that the simple fact that a patient has entered her mental condition into issue in case does not in itself constitute a waiver of the **Jaffee** privilege. Although 6 post-**Jaffee** decisions have taken the opposite stand, the more recent cases seem to be taking a more narrow view of the waiver. The "score" is now 6 to 4. [Booker v. Boston 1999 wl 734644]

August 19, 1999 - U.S. Court of Appeals for First Circuit Establishes First Exception to New Privilege -- Following the Supreme Court's paralleling of the **Jaffee** privilege with the attorney-client privilege, the Court ruled in [In Re Grand Jury Proceedings \(Gregory P. Violette\)](#), that the **Jaffee** privilege is subject to a narrow "crime-fraud" exception similar to that in the attorney-client privilege.

[Comments by E-mail](#)