

Position Statement on No “Dangerous Patient” Exception to Federal Psychotherapist-Patient Testimonial Privilege

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"Policy documents are approved by the APA Assembly and Board of Trustees...These are...position statements that define APA official policy on specific subjects..." – *APA Operations Manual*.

It is the position of the American Psychiatric Association that there should be no “dangerous patient” exception to the federal psychotherapist-patient privilege.

Prepared by the Council on Psychiatry and the Law.

No “Dangerous Patient” Exception to Federal Psychotherapist-Patient Testimonial Privilege

BACKGROUND INFORMATION

The findings, opinions, and conclusions of this report do not necessarily represent the views of the officers, trustees, or all members of the APA. Views expressed are those of the authors.

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In its landmark 1996 decision in *Jaffee v. Redmond*, the US Supreme Court established a federal psychotherapist-patient privilege (i.e., a right for patients to preclude testimony in federal courts by mental health professionals about information that patients communicated to them in confidence). In this decision, the Court recognized the importance of the privilege in encouraging treatment, and of its being predictable, so that patients can anticipate the degree of protection that their confidential information will receive. The Court rejected the use of a balancing test weighing the value of the testimony against the value of maintaining the privilege in each case, because of its inherent unpredictability. However, in a footnote in *Jaffee*, the court said, “Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”

The federal circuit courts are split as to the meaning of this footnote. Two federal circuits have interpreted this footnote to mean that there is a federal “dangerous patient exception” to privilege, i.e., that the privilege does not apply when patient is believed to present a danger to other people. However, two other federal circuits have found that there is no such “dangerous patient” exception to privilege. Since the federal circuit courts are split on this issue, it is likely that the US Supreme Court eventually will hear a case to resolve the conflict.¹

Supporters of an exception to the privilege when patients are believed to be dangerous to others usually base their arguments on the need to protect public safety. However, existence of a privilege—which is limited to the judicial setting—does not preclude therapists from acting to prevent violence by their patients, including by disclosing otherwise confidential information, when a threat arises. Indeed, most states have adopted some version of a duty for therapists to act in this way. By contrast, cases in which the federal government has sought to call mental health professionals to testify about statements made by their patients (or to introduce healthcare records containing those statements) have typically involved criminal prosecutions occurring well after the therapeutic encounter and that are designed to determine guilt and punishment for the patient’s past behavior.²

All 50 states have adopted some form of psychotherapist-patient privilege. The value of these state privileges would be undermined if there were a “dangerous patient” exception to the privilege in federal courts -- as the US Supreme Court itself recognized in *Jaffee v. Redmond* -- since patients would remain uncertain about the scope of legal protection for their communications in treatment.

At first glance, it might seem appropriate to recognize an exception to privilege in those rare situations in which testimony in federal court may be sought to prevent a future danger. However, such testimony would rarely, if ever, really be needed to avert a future danger, and opening up this possibility has led to an absence of evidentiary privilege after all danger has passed, leaving its real application to determinations of guilt and punishment. Moreover, it appears that the exception to the privilege, once found, has not been limited to situations of future danger. When a “dangerous patient” exception to privilege is found because the patient was dangerous at an earlier time, courts have found that there is no privilege at a later criminal trial when punishment and not prevention of future danger is the real concern.³

Allowing a “dangerous patient” exception to privilege will seriously undermine the privilege itself, which is a critical element in assuring patients that information they share will be held in confidence and not used to punish them in subsequent court proceedings. Since patients’ openness in treatment can be a prerequisite to resolving the problems leading to potential violence, any impediment to such openness resulting from uncertainty as to whether a privilege exists would limit the ability of treatment to resolve such problems. As such, it potentially could increase the danger to society. When an acute danger to other persons exists, every jurisdiction has exceptions to confidentiality that permit or require disclosures (or allow compulsory hospitalization) to protect victims and to prevent violence. These preventive interventions do not depend on curtailing the state’s psychotherapist-patient privilege.

In sum, the problems and dangers created by a “dangerous patient” exception to the federal psychotherapist-patient privilege outweigh any possible advantages.

1. It seems likely that the footnote was intended simply to acknowledge that psychiatrists and other mental health professionals are permitted or required by state law, as well as by ethical norms of their professions, to disclose otherwise confidential information when necessary to prevent harm to the patient or others. In such cases, the obligation to preserve confidentiality “must give way” to the need to prevent harm. A testimonial privilege would be implicated, if at all, only in judicial proceedings aiming to avert impending harm, such as civil commitment proceedings. If so understood, the footnote was not intended to open the door to an exception to the federal psychotherapist-patient privilege in any subsequent judicial proceedings, and certainly not in a criminal prosecution.

2. The federal privilege does not have any practical application in proceedings for civil commitment since these almost always occur in state courts.

3. California, which has a “dangerous patient” exception to its psychotherapist-patient privilege (Section 1024 of the California Evidence Code), and the federal jurisdictions that have found a “dangerous patient” exception to the federal privilege have held that the privilege disappears if



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at any time in the past the patient was dangerous. Danger at the time of trial is not even a relevant consideration. In the California Supreme Court decision in (*People v Wharton*, 53 Cal. 3d 522 (1991)), a patient feared harming his girlfriend, and the therapists warned the victim. When the patient subsequently killed the victim, the Court found no evidentiary privilege at a later criminal trial because the patient had been considered dangerous by the therapists in the past with disclosure necessary prior to the murder. Since the patient had confessed the murder to the police, the therapist's testimony at trial was not necessary for a conviction, but was used for the sole purpose of proving premeditation and thereby establish-

ing a necessary legal predicate for a death sentence. The patient was found guilty of first-degree murder with special circumstances and sentenced to death. The California Supreme Court allowed the testimony of the therapists on the basis of a dangerous patient exception to privilege, given that the patient previously had been considered dangerous. This case illustrates the ultimate result of this line of reasoning in that concerns expressed by a patient in treatment can be used at a later trial for punitive purposes alone. Such risks of confiding in a therapist in jurisdictions with such a privilege exception cannot possibly instill trust in treatment by potentially dangerous patients.