

Testimonial Privilege and the Problem of Death: The Vincent Foster Case and Beyond

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This article discusses what happens to testimonial privilege following a patient's death. First, the article reviews the concepts of confidentiality and testimonial privilege. Second, the article discusses the case of *Jaffe v. Redmond*, in which the Supreme Court ruled that testimonial privilege applies to licensed psychotherapists under Rule 501 of the Federal Rules of Evidence. Third, the article examines the case of *Swidler & Berlin v. United States*, in which the Supreme Court directly addressed the question of whether testimonial privilege survives death. Finally, the article comments on the implications of these rulings for mental health professionals.

What happens when a subpoena arrives for the records of a patient who has died? Does death attenuate or dissolve the bonds of confidentiality? The case of Vincent Foster raised this question. While at issue were the records of Foster's attorney, the Supreme Court's reasoning and final decision have enormous implications for mental health professionals.

In January of 1993, following the 1992 presidential election, Vincent Foster was made Deputy Counsel at the White House. That May, an administration official dismissed several career employees of the White House travel office. The

dismissals created a firestorm of controversy, and soon a number of investigations into the matter were under way. By early July, the Clinton Administration had completed its own internal investigation, which resulted in reprimands for four individuals working with or at the White House. While Vincent Foster himself was not the subject of a reprimand, the investigation's report had recounted his role in the affair. Unfortunately for Foster, far from quieting the controversy the reprimands seemed the catalyst for several additional investigations into the legality of the dismissals.

On July 11, Foster sought the legal representation of James Hamilton, an attorney at the law firm of Swidler and Berlin. Foster and Hamilton met for two hours; during the meeting Hamilton took three pages of written notes, at the begin-

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ning of which was the notation "privileged." Nine days after this meeting, on July 20, Vincent Foster committed suicide.

In 1996, the Independent Counsel, Kenneth Starr, was authorized to expand his Whitewater inquiry to determine whether individuals at the White House had made false statements, obstructed justice, or committed perjury or other crimes during the initial investigations into the travel office dismissals. Starr, believing the July 11 notes taken by James Hamilton might be relevant to his investigation, issued subpoenas both to Hamilton and to the law office of Swidler and Berlin. Hamilton, arguing that the notes were protected by attorney-client privilege and that the privilege extended beyond the client's death, refused to comply with the subpoena. In doing so, Hamilton and his law firm set in motion a legal battle that eventually reached the U.S. Supreme Court.

This article examines how the Supreme Court analyzed the question of whether testimonial privilege survives the death of a client. First, the article defines "confidentiality" and "testimonial privilege" and shows how the values upon which these concepts are built sometimes come into conflict with other values important to society and the law. Second, the article discusses the pivotal case of *Jaffe v. Redmond*,¹ in which the Supreme Court ruled that testimonial privilege applies to licensed psychotherapists under Rule 501 of the Federal Rules of Evidence. The *Jaffe* opinion provided an important foundation when the Court addressed the question of whether records remain con-

fidential after a client has died. Third, the article examines the analysis and holding in *Swidler & Berlin and James Hamilton v. United States*,² in which the Supreme Court ruled on whether James Hamilton and his law firm would have to hand the notes of the July 11 conversation over to the Independent Counsel. Fourth, the article offers concluding thoughts and observations on how the Court's holding in *Swidler* may apply to cases involving mental health professionals.

Definitions

Confidentiality is a concept with legal, ethical, and interpersonal dimensions.³ From a *legal* perspective, certain statutes obligate mental health professionals to maintain confidentiality, while others entitle patients to the guarantee of confidentiality. The legal obligation and entitlement are that mental health professionals keep within the bounds of the professional relationship whatever is communicated within the context of the professional relationship. From an *ethical* perspective, confidentiality is premised upon values our society holds dear, those of privacy and individual autonomy. Confidentiality ensures that patients are free to decide for themselves with whom they will share what is most intimate to them and that what they choose to share will remain private. From an *interpersonal* perspective, confidentiality goes to the very heart of the professional relationship. To keep communications confidential is to treat the patient with dignity and respect, and so to build trust. Trust is the foundation that creates and defines the

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space where two people may work together toward a mutual goal.

Testimonial privilege, often referred to simply as "privilege," flows from the same values as does confidentiality—privacy, individual autonomy, and trust—but is a concept narrower in both theory and practice. Testimonial privilege is the patient's right to keep confidential communications from being disclosed in a legal or quasi-legal proceeding. Because of privilege, a patient has the prerogative to prevent a mental health professional from testifying or releasing records in a court of law, a deposition, or an administrative hearing. When a patient decides not to allow a mental health professional to disclose confidential information, the patient is said to "invoke privilege." When a patient invokes privilege, the mental health professional may not discuss the patient, or release any of the patient's records, unless ordered to do so by a court.

Note the tension between the values that lie behind testimonial privilege and the truth-finding mission of a court. The tension arises because testimonial privilege keeps information out of the judicial system. When an individual invokes privilege, information that may be relevant to a legal proceeding is not admitted into evidence, which is why lawyers say that "privilege suppresses truth." Put another way, we could seek complete candor and truth in all legal proceedings were we willing to expose the most intimate details of relationships our society holds dear. However, because of the value we place on preserving the sanctity of certain relationships (such as that between a hus-

band and a wife, a priest and a penitent, an attorney and a client), we declare these relationships "off limits" to the law. We call these relationships "privileged."

Because testimonial privilege limits the amount of information available to the legal system, judges tend to stick very close to the letter of the law when they interpret privilege statutes. Generally, a judge will deem privileged only those relationships explicitly named by the statute; for the most part, a relationship not named in the law cannot hide behind the cloak of privilege to avoid exposure in a legal proceeding.⁴

Jaffe v. Redmond

On June 27 of 1991, Mary Lu Redmond was a police officer working for the village of Hoffman Estates, Illinois. On that day Officer Redmond was called to an apartment complex because of an altercation. According to Officer Redmond, when she arrived at the scene a man (subsequently identified as Ricky Allen) came out of an apartment and ignored her repeated commands to drop a butcher knife he was holding. When it appeared to Officer Redmond that Allen was going to stab another man, she shot him. Allen died.

The administrator of Allen's estate filed a lawsuit, the gist of which was that Officer Redmond had used excessive force against Allen and so had violated his constitutional rights. During the early stages of the lawsuit, it became known that following Allen's death (and apparently at least in part to deal with the trauma of having killed Allen), Redmond had seen Karen Beyer, a licensed clinical

social worker, for approximately 50 counseling sessions. Allen's estate wanted the notes from those sessions, in the hope that something Officer Redmond had said to Beyer would be helpful in showing that she had indeed used excessive force when she shot and killed Ricky Allen. Beyer resisted providing the notes; she argued that her sessions with Mary Lu Redmond were protected by testimonial privilege.

The lawsuit against Redmond was filed in federal court, and a federal judge was therefore to decide whether the notes were privileged. Because courts are loathe to extend testimonial privilege to any relationship not explicitly named in a statute, most *state* legislatures have written statutes that specify exactly whom privilege covers. The clarity of these statutes is enormously helpful to state courts, insofar as judges are able to apply the wording of a privilege statute directly to the case at hand. Federal courts, on the other hand, are given much less guidance regarding which relationships are protected by testimonial privilege.

Guidance for federal courts is found in Rule 501 of the Federal Rules of Evidence, which states simply that whether testimonial privilege applies "shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."⁵ Thus, the federal court in *Jaffe v. Redmond* was forced to make a judgment call: did the common law, interpreted in the light of reason and experience, indicate that the court should recognize a psychotherapist-patient privilege? Recognizing a psychotherapist-pa-

tient privilege would protect Karen Beyer's notes from disclosure—Ricky Allen's estate would never have the opportunity to see what helpful information they might contain. The parties judged the issue to be of such importance that they argued the matter all the way to the Supreme Court.

The Supreme Court applied Rule 501 by first stating the common law principle that truth is essential to justice. A court can know the truth only if individuals provide evidence; hence, every person has a duty to "to give what testimony one is capable of giving."⁶ Because testimonial privileges exempt individuals from testifying, however, they are generally disfavored by the law. Courts will allow a testimonial privilege only when they identify "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."⁷ The Supreme Court then looked to "reason and experience" to determine "whether a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence.'"⁸ The Court in *Jaffe* was to weigh competing interests: on the one hand, a psychotherapist privilege would deprive the law of evidence. Was there a countervailing "other hand" weighty enough to justify this loss?

In determining whether reason and experience would yield "sufficiently important interests" to outweigh the need for evidence, the Court first identified the reasons for keeping psychotherapist-patient communications confidential. Ac-

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According to the Court, a psychotherapist-patient privilege serves both the individual patient, as well as society as a whole. In terms of the individual:

Effective 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. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.⁹

In addition to this “private”¹⁰ end, the *Jaffe* Court said that a psychotherapist-patient privilege serves a “public”¹¹ end as well: “The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”¹² Thus, the Court concluded, a psychotherapist-patient privilege serves private individuals by promoting effective psychotherapy and serves the public by promoting mental health among citizens.

Having identified the values promoted by the privilege, the Court then examined what price the judicial system would pay in terms of lost evidence. Here the Court made an interesting point: if there were no psychotherapist-patient privilege, candid conversation between psychotherapists and patients would likely be discouraged. Put another way, knowing what they said could be disclosed in a legal

proceeding, patients would be far more circumspect in what they chose to share with a psychotherapist. As a consequence, reasoned the Court, little evidence helpful to a legal proceeding would be lost in adding the privilege, since without the privilege patients would tend to be silent on matters that could harm their interests. The price to be paid for having the privilege would therefore not be great.

The Court held that Rule 501’s “reason and experience” test favored a psychotherapist-patient privilege for licensed psychotherapists: the privilege would promote important values and would cost little in terms of evidence lost to the judicial process. In the language of the Supreme Court, a psychotherapist-patient privilege “promotes sufficiently important interests to outweigh the need for probative evidence.”¹³ Karen Beyer would not have to turn over her notes.

In reaching its decision, The *Jaffe* Court made a final point that was to have important implications for the Vincent Foster case. Before the case reached the Supreme Court, the Court of Appeals had held that the psychotherapist-patient privilege should be subject to a balancing test, whereby a trial judge would determine on a case-by-case basis whether the need for evidence a psychotherapist might have was greater than the patient’s right to confidentiality.¹⁴ If the trial judge were to determine that the need for the evidence was great, and the patient’s confidentiality interest not significant, the communications would be disclosed. To take the case of Mary Lu Redmond as an example, the trial court judge would have read Karen Beyer’s notes and determined

whether there was evidence of sufficient relevance to the case that the need for that evidence outweighed Mary Lu Redmond's interest in keeping the communications confidential. Based on this determination, the trial court judge would issue an order either that the records be disclosed or that they remain protected by privilege and so not be disclosed.

The Supreme Court explicitly rejected the use of a case-by-case balancing test in applying testimonial privilege. If such a rule were to be adopted, explained the Court in *Jaffe*, any trial judge could abrogate the privilege simply by ruling that need for disclosure outweighed the patient's privacy interest. The Court pointed out that the consequence of such a case-based rule would be directly contradictory to the very purposes of establishing the privilege in the first place:

... if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."¹⁵

The Court was clear: the "reason and experience" test of Rule 501 called for a psychotherapist-patient privilege and trial courts were not to engage in balancing to determine whether the privilege applied in a particular case. These holdings played a central role when, two years later, the Supreme Court was faced with another question involving testimonial privilege: does testimonial privilege survive a client's death, when evidence is needed to aid an ongoing criminal investigation?

Swidler & Berlin v. United States

Kenneth Starr badly wanted the notes from that July 11 conversation between Vincent Foster and James Hamilton. Foster had known James Watkins, the administration official who actually fired the travel office employees; better yet, Foster was known to have spoken with Hillary Clinton about the dismissals, and Mrs. Clinton was said to have taken an active interest in the matter. If individuals had committed perjury or obstructed justice, what Foster said to Hamilton during that meeting could prove invaluable in making a case. Because the matter was in federal court, however, the Independent Counsel would have to meet the Rule 501 test: he would have to show that "reason and experience" argued in favor of James Hamilton handing over his notes.

Starr made a series of arguments to the Supreme Court, the first of which was that privilege ends after a client's death. In applying the "reason and experience" test of Rule 501, the Court forcefully stated that the very reasons for having the privilege while a client lives remain after the client dies. Although the immediate issue before the Court involved attorney-client privilege, the Court's language and reasoning in *Swidler* are strikingly similar to the language and reasoning of *Jaffe*, in which the psychotherapist-patient privilege was under consideration, "There are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel."¹⁶ Starr then argued that privi-

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lege should end when the client dies if testimony is needed for a *criminal matter*. The Court again returned to the reasons for having an attorney-client privilege:

While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.¹⁷

Three points are important: first, the Court rules that the attorney-client privilege remains in effect after the client has died, in both civil and criminal contexts; second, in reaching this conclusion the Court steadfastly maintains its focus on the purpose served by having the privilege; and finally, the Court's reasoning and conclusion appear to apply with equal force to both attorneys and mental health professionals.

In addressing several other arguments made by the Independent Counsel, the Court elaborated on its initial holding. Two such elaborations stem directly from *Jaffe* and merit discussion. The first argument against the Court's ruling is that having a posthumous privilege would exact too high a price in terms of evidence lost to the judicial process. The Court explained that such a loss was uncertain at best:

Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamil-

ton if he had not been assured the conversation was privileged.¹⁸

The Court concluded that the price for having the privilege extend past the client's death was slight.

A second argument suggested by Starr (and contained in the holding of the Court of Appeals¹⁹) is that privilege would hide from the law information of "substantial" importance to a particular criminal case. The argument was that, to counter this loss, a trial court judge should determine on a case-by-case basis whether information otherwise protected by privilege was of substantial importance in a criminal matter, and should issue an order accordingly.²⁰ Harkening back to *Jaffe*, and again returning to the very purpose of having a privilege, the Court rejected this alternative:

... a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post** [footnote not in original text] 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.²¹

Privilege is only meaningful, explained the Court, when reasonably certain. As a consequence, any procedure that introduces "substantial uncertainty" into the application of a privilege defeats the privilege's purpose. *Ex post* balancing, because of its uncertainty, is inconsistent

* *Ex post* balancing refers to a situation in which a court would decide *after* a conversation takes place whether testimonial privilege applies to that conversation. Thus, at the time of the conversation, the parties would not know whether what they communicate to one another is protected by privilege.

with having the privilege and therefore will not be permitted.

The Independent Counsel made one final argument of interest to mental health professionals. He argued that posthumous exceptions to privilege already exist, most notably the testamentary exception, that allows otherwise privileged material to be disclosed when there is a dispute over an estate among a deceased person's heirs. The implication was that an additional posthumous exception, limited to ongoing criminal investigations, would not have a significant detrimental effect on the attorney-client relationship. The Court responded to this argument by pointing out that the purpose of the testamentary exception to privilege is to *further* the client's interests by ascertaining, using the best evidence available, how the client wanted his estate to be distributed. Because a testamentary exception is consistent with protecting a client's wishes when the client himself is not available, this exception is quite different from what the Independent Counsel proposed:

... a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests. A "no harm in one more exception" rationale could contribute to the general erosion of the privilege, without reference to common law principles or "reason and experience."²²

The Court refused to create a posthumous exception to privilege on the basis that another such exception already existed.

In *Swidler*, the Supreme Court applied Rule 501 to the question of whether the attorney-client privilege survives death. Reason and experience said yes. *Jaffe* provided a firm foundation for the

Court's analysis and holding. The Court therefore rejected the Independent Counsel's arguments. What was said during that July 11 conversation at the law offices of Swidler and Berlin would forever remain between Vincent Foster and his attorney, James Hamilton.

Commentary

Swidler is of interest to mental health professionals for several reasons. First and most important, the Court's reasoning and analysis appear directly applicable to mental health professionals. The significance of confidentiality to the development of the professional relationship, the importance of a client knowing that confidentiality will continue even after his death, the likelihood that a client will be reticent to share information unless confidentiality is assured, all apply to the psychotherapist-patient relationship as well as to the attorney-client relationship. Perhaps these similarities explain why the Court so readily looked to its reasoning in *Jaffe* when it came to analyze the problem presented in *Swidler*. The Court's understanding of "reason and experience" strongly suggests that the psychotherapist-patient privilege likewise survives death under federal law.

Second, in both the *Jaffe* and *Swidler* opinions, the Supreme Court stated that testimonial privilege is not absolute. Each case contains a footnote in which the Court observes that some value might outweigh the need for maintaining privilege. In *Jaffe* the Court stated, "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or others can be

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averted only by means of a disclosure by the therapist,"²³ while in *Swidler* the Court remarked, "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege."²⁴ While the Court unambiguously rejected a balancing test by which trial courts would assess the need for maintaining privilege on a case-by-case basis, the Court explicitly left open the possibility that public safety or a criminal defendant's constitutional rights might trump a patient's statutory or common law right to privilege.

Third, the Supreme Court is hungry for empirical research. In *Swidler*, the Court made clear both its discomfort in relying on speculation to debate the effects of privilege, as well as its desire for empirical studies:

While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.²⁵

Mental health professionals are in a unique position to contribute to the law's understanding of how the promise of confidentiality affects the nature and development of a professional relationship. The Supreme Court has offered an open invitation to do so, and the Court's invitation should be understood as encouragement for research into this area of enormous clinical relevance.

Much of legal analysis consists of weighing competing values. The *Jaffe* and *Swidler* cases provide wonderful ex-

amples of the U.S. Supreme Court at work. In each opinion, the Court identifies the values at play and then provides a careful explanation of how those values are to be weighed relative to one another. Mental health professionals should take heart in knowing that the clinically meaningful values behind testimonial privilege—privacy, individual autonomy, and trust—carried the day.

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