

Psychotherapist-Patient Privilege

Applying *Jaffee v. Redmond*: Communications to a Psychotherapist Are Not Privileged If They Occur Outside the Course of Diagnosis or Treatment

In *United States v. Romo*, 413 F.3d 1044 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit considered whether the court for the District of Montana had erred in deciding that the defendant's confession to his therapist was not privileged because the communication occurred outside the course of diagnosis or treatment. The district court convicted Mr. Romo, who appealed his conviction, raising the issue, among others, that the counselor's testimony was admitted in violation of the psychotherapist-patient privilege.

Facts of the Case

In October 2002, Mr. Romo requested to meet with Donald LaPlante, the Program Director at the detention facility where Mr. Romo was incarcerated. Before this meeting, Mr. Romo had voluntarily sought mental health treatment while incarcerated, and Mr. LaPlante was his therapist. However, at the time of this meeting, Mr. Romo did not have a scheduled counseling session, and Mr. LaPlante did not know why Mr. Romo wanted to see him. The two met in a private room at the detention facility.

During this meeting, Mr. Romo confessed that he had written and mailed a threatening letter to the President. Mr. LaPlante warned that he would have to report the letter to law enforcement. Mr. Romo continued to tell him the content of the letter, which included a statement that someone should put a bullet in the President's head and he would be the person to do it. Mr. LaPlante called the Secret Service and reported the letter.

At trial, Mr. LaPlante testified that Mr. Romo had told him he had written and sent a threatening letter to the President. The prosecution presented evidence that included testimony by a Secret Service agent to whom Mr. Romo had confessed writing the letter and an inmate transport sheet with Mr. Romo's picture, thumbprint, and signature along with the statement, "So you know whos [sic] coming to kill you

Mr. George W. Bush. . . ." At trial, the jury convicted Mr. Romo of threatening the President.

Mr. Romo appealed his conviction on the basis, in part, that the counselor's trial testimony was admitted in violation of the psychotherapist-patient privilege.

Ruling and Reasoning

The Ninth Circuit affirmed the district court's decision on the issue of privilege. The court concluded that Mr. LaPlante's testimony was not privileged because Mr. Romo's statements to the counselor did not occur during the course of diagnosis or treatment.

The United States Supreme Court affirmed a psychotherapist-patient testimonial privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The requirements of this privilege are: (1) the communications must be confidential, (2) the therapist must be a licensed psychotherapist, and (3) the communications must occur in the course of diagnosis or treatment.

In this case, the district court found the privilege inapplicable based on the third element—that is, that the meeting in which the confession about the threatening letter occurred was not held in the course of diagnosis or treatment. The Ninth Circuit considered the meaning of the third element, noting that the Supreme Court left the task of defining the three elements of this privilege to the lower courts. The Ninth Circuit stated that the third element has not been well defined and that it is "a factual determination that rests on consideration of the totality of the circumstances" whether a meeting occurred in the course of diagnosis or treatment. The court stated that "we pay special attention to the particulars of the meeting during which the allegedly privileged information was exchanged." The court stated that relevant factors that might be included in this determination are historical aspects of the relationship, the patient's purpose in making the communication, the nature of the contact (including timing and location), and whether mental health services were provided or requested during the communication. The court opined that "standing alone, the fact that a therapist has previously provided mental health care to a patient does not establish that a subsequent meeting was in the course of diagnosis or treatment."

The Ninth Circuit also looked to the evidentiary rule on the psychotherapist-patient privilege that was proposed to Congress in 1972. The court stated that,

according to the Proposed Rule 504 definition of “psychotherapist,” the privilege applies only when a therapist is “*engaged* in the diagnosis or treatment of a mental or emotional condition” (emphasis in the original). The court elaborated that the therapist’s intent to provide psychotherapy services during the encounter and the patient’s purpose in communicating with his therapist may be factored into determining whether a communication occurred in the course of diagnosis or treatment. In this case, the Ninth Circuit stated that “LaPlante noted in contemporaneous writing that he did not consider the conversation privileged, which indicates that his purpose was not to provide therapy.” The court held that Mr. Romo’s purpose for the meeting was unclear, but that “the record is devoid of evidence that the meeting involved therapy, diagnosis, or treatment of any kind.” Further in support of this, the court noted that Mr. LaPlante’s job description was wide-ranging and included other duties besides therapy.

One judge concurred with the conviction because of the overwhelming evidence that Mr. Romo had threatened the President, but disagreed with the majority’s conclusion that Mr. Romo’s conversation with Mr. LaPlante was not privileged. The judge noted that the previous time when Mr. Romo and Mr. LaPlante met was a therapy session and the meeting where Mr. Romo confessed his writing of the threatening letter

mirror[ed] the characteristics of a counseling session. When a patient contacts his therapist with whom he has an ongoing patient-therapist relationship, to discuss a problem that patient is having and the patient and therapist subsequently meet and discuss the problem the resulting conference is a counseling session.

Discussion

In this case, the Ninth Circuit considered whether the district court had erred in applying the standards set forth in *Jaffee v. Redmond* to determine whether the psychotherapist-patient privilege applied to a specific communication between a patient and his therapist. The Supreme Court did not elaborate the specific definitions of the three elements of the privilege, leaving this to the lower courts. The requirements of this privilege are: (1) the communications must be confidential, (2) the therapist must be a licensed psychotherapist, and (3) the communications must occur in the course of diagnosis or treatment.

The Ninth Circuit specifically addressed the third element—that is, whether Mr. Romo’s meeting with his therapist in which he confessed writing and sending a threatening letter to the President occurred in the course of diagnosis or treatment. The district court held that it did not, and, therefore, the privilege did not apply. The Ninth Circuit affirmed. One judge concurred with the result, but disagreed that the defendant’s communication with the therapist was not privileged.

The court reasoned that the determination of whether a meeting occurred in the course of diagnosis or treatment rests on considering the “totality of circumstances,” including the history of the relationship, the patient’s purpose in communicating, and the therapist’s intentions that psychotherapy services are being provided. In this case, the majority held that the meeting was not in the course of diagnosis or treatment, despite a history of treatment and the patient’s purpose of meeting with his therapist for help with a problem.

For psychotherapy to be successful, a patient must understand that what is said in the sessions is confidential, aside from the exceptions to confidentiality, such as dangerousness. In this case, a patient met with his therapist in a session that resembled many of his previous therapy sessions; however, the court held that the psychotherapist-patient privilege did not apply because it was not in the course of diagnosis or treatment. (Of note, there was sufficient evidence without the therapist’s testimony to convict Mr. Romo.) Although the court discussed factors to determine whether a meeting is a therapy session, the court did not describe how these factors should be weighed in future decisions. The effects of the Ninth Circuit’s decision on the psychotherapist-patient privilege remain to be seen as the lower courts further define the elements affirmed by the United States Supreme Court in *Jaffee v. Redmond*.

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