



## Saved by the [Church] Bell



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Continuing on the theme of the Counsel's Column article *Right to Testify Deemed Wrong* (February 2015), whereby the issue of whether confidentiality or privilege protected a client/patient from the testimony of the psychotherapist in a criminal trial, this article focuses on a similar issue relevant to disclosure of counseling records pursuant to a grand jury subpoena. Of course, the assertion of rights to refuse to produce records will be based, in part, on the profession and licensure status of the treating practitioner. In order to provide effective mental health services, some level of confidentiality and/or protection of disclosure through the assertion of a privilege is likely necessary. Such protections promote candid communications between the professional and client/patient, and facilitate effective services based on full disclosure of the relevant facts and circumstances. In 1996, the United States Supreme Court recognized the existence of a psychotherapist–patient privilege in the case of *Jaffee v. Redmond*, 518 U.S. 1 (1996). The scope of the privilege applies to “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment.” What may be at issue is what constitutes a licensed psychotherapist. Consider the following.

A criminal case was initiated in federal court resulting in an indictment of the defendant for crossing state lines to engage in specific sexual acts with victims under the age of 12. The defendant filed a motion to suppress certain counseling records that had been requested through a grand jury subpoena.

### Counsel's Column

The defendant alleged such records were privileged and, thus, not entitled to discovery via the subpoena. The defendant's claims of privilege were premised upon a psychotherapist–patient privilege and the clergy privilege. The defendant, as the petitioning party, bears the burden of proof that the materials subject to the subpoena are privileged and not otherwise subject to disclosure.

The parties agreed that the *Jaffee* case cited above establishes the psychotherapist–patient privilege related to confidential communications between therapist and patient. However, the United States argued that the *Jaffee* privilege does not apply in this circumstance because the person (practitioner) who provided services and developed and maintained the records was not a licensed psychotherapist. The practitioner has a doctorate in Christian counseling from the American Christian College and Seminary; a doctorate in

Christian counseling from Patriot University; a master's in theological studies and a master's in Christian ministry, both from the International School of Theology; and a bachelor's in business administration from Texas Christian University. In addition, the practitioner is board-certified in professional counseling with the American Psychotherapy Association and an ordained minister with the Church of God. As argued by the United States, while the practitioner's credentials in the field of counseling may be voluminous, his lack of licensure by the state of Oklahoma renders his records subject to disclosure.

The defendant submitted an affidavit as to his belief that the practitioner was a licensed professional counselor and/or psychotherapist. He also stated that he considered the information divulged to be personal and confidential and not subject to disclosure without a release. Thus, he argued in favor of a reasonable belief test, whereby the defendant reasonably believed that the practitioner was licensed and thus subject to privileged and confidential communications. The court framed this issue as whether the defendant established that he is entitled to protection from disclosure because the privilege is not limited merely to licensed psychotherapists but extends also to those reasonably believed by the patient/client to be licensed.

The court noted that there is no consensus among the federal courts regarding this issue. Indeed, the *Jaffee* privilege has been extended in subsequent cases to unlicensed counselors of the State Compensation Funds Employee Assistance Program, as well as to rape crisis counselors who were not licensed

psychotherapists or social workers but were under the direct control and supervision of a licensed social worker, psychologist, nurse, psychiatrist, or psychotherapist. Further, courts have extended the privilege to unlicensed social workers working for the Veterans Administration and to communications to an unlicensed counselor who worked under the direct supervision of a licensed social worker at a domestic abuse resource center.

In spite of these exceptions, the court in this case was not persuaded by the previous jurisprudence and, citing additional case law, held the need for a "bright-line test" requiring licensure as a prerequisite to availing oneself of the privilege. It held that the United States Supreme Court in *Jaffee* extended the privilege to relevant persons who are "licensed"; and absent licensure of the practitioner in this case, the court declined to extend the privilege to his records.

Next, the court turned its attention to the defendant's assertion of the clergy-communicant privilege and again cited the lack of authority in the relevant appellate court. But, the court had "little difficulty concluding that the Supreme Court would acknowledge such a privilege..." The court cited a previous case and noted privilege as including "communications to a member of the clergy, in his or her spiritual or professional capacity, by persons who seek spiritual counseling and who reasonably expect their words will be kept in confidence." Under the facts of the current case, the court noted the defendant's affidavit and his representations of communicating with the practitioner for purposes of spiritual advisement. Also, the practitioner is ordained and

devotes his practice to Christian counseling and spiritual advisement. Thus, the defendant's communications were subject to the clergy privilege and not subject to disclosure under the subpoena.

Finally, the court addressed the issue of whether the practitioner was subject to mandatory reporting of suspected child abuse. In fact, the practitioner disclosed to the defendant the mandatory reporting requirement but made no effort to contact the relevant child protective services. "To the contrary, [practitioner] and his attorney concluded that he did not have evidence which triggered the [reporting] statute." To this conclusion, the court agreed and further noted that any such reporting requirement would not eliminate the privilege related to statements made by the defendant to the practitioner that were not directly relevant to any allegations of child abuse. Thus, certain records would remain privileged in spite of any mandatory reporting requirement.

Accordingly, the court held that the records requested under the grand jury subpoena were not subject to disclosure, as they were protected by the clergy-communicant privilege. Determining when one must disclose patient/client records without a release can present difficult decisions for licensees and certain unlicensed practitioners as well. Further complicating matters is the divergence among the many states regarding the duties and privileges of practitioners.

***United States v Durham***, 2015  
U.S. District LEXIS 21126  
(U.S. Dist. Ct. OK 2015)