Bill Foster
PILLSBURY & COLEMAN LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2024

Degrees of privacy in federal court

THE THREE-WAY SPLIT ON PROTECTION FOR MENTAL-HEALTH-COUNSELING RECORDS

Some of the most contentious discovery disputes center on access to a plaintiff's mental-health treatment records. Defense counsel regularly claim that an allegation of emotional distress opens the door for discovery of these records. Their intentions are often far from pure: mental-health treatment records are highly personal and may contain information that your client is not comfortable having produced. Whether the records are discoverable can have a significant impact on your case.

While federal courts have recognized a broad privilege for mental-health records, the privilege is not absolute. A plaintiff may waive the privilege by placing their mental health at issue in the case. Disputes over whether a plaintiff has waived privilege can be especially difficult in federal court, where there is no single test to determine waiver. This article discusses the three different tests that federal courts apply and practical considerations for protecting your client's interests.

Privilege for mental-health- counseling records in federal court

Federal privilege law applies where the mental-health treatment records at issue relate to a claim brought under federal law, regardless of whether a plaintiff also brings state law claims. Questions about the scope of the privilege often come up where a plaintiff seeks to recover damages for emotional distress, including through claims brought under section 1983, federal employment laws, or federal anti-discrimination statutes. If a plaintiff only brings state law claims, state privilege law applies. State privilege law regarding mental-health-counseling records is outside the scope of this article.

Over 25 years ago, the U.S. Supreme Court held that treatment records and communications with mental-healthcare providers are protected from discovery under Federal Rule of Evidence 501. (*Jaffee v. Redmond* (1996) 518 U.S. 1.) While commonly referred to as "psychotherapist-patient" privilege, the Court explained that the privilege extends to all mental-health-treatment providers, including social workers and psychologists. (*Id*. at 15-16.) The basis of the privilege is straightforward: Effective treatment requires "an atmosphere of confidence and trust" and "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." (*Id*. at 11-12.) If mental-health records are readily discoverable in litigation, it could have a chilling effect on the treatment process, potentially even dissuading someone from seeking help. (*Ibid*.)

However, the privilege recognized in *Jaffee* is not absolute. The Court left open the possibility that the privilege could be waived, but it did not provide clear guidelines on when waiver might occur. (*Jaffee*, 518 U.S. at 15 n. 14., 17-18.) On the one hand, the Court rejected a balancing approach that would make the privilege contingent on a trial judge's "evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure." (*Id.* at 17-18.) The Court also emphasized the importance of a bright line rule that would provide clear guidance on when waiver may occur, explaining that 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." (*Id*. at 18 [citation omitted].) Yet despite the Court's emphasis on the importance of predictability, it provided no additional guidance on how to determine waiver, instead stating that the issue should be assessed on a "case-by-case basis." (*Ibid*.)

The predictable waiver rule envisioned in *Jaffee* has yet to materialize. Instead, there continues to be considerable uncertainty as to when the privilege for mental-health records is waived in federal court. In the years that followed *Jaffee*, neither the Supreme Court nor the courts of appeal have provided meaningful guidance on how to determine whether the privilege has been waived. (See, e.g., *A.H. v. Cnty. of Los Angeles* (C.D. Cal. Jan. 19, 2023) 2023 WL 3035349, at *2.) As a result, district courts have developed three widely differing standards for assessing waiver. The divergent standards can make it quite difficult to predict whether your client's records will be protected from discovery.

The three different standards

The three standards that district courts have come up with to determine when waiver of the privilege occurs are often referred to as the broad, middle, and narrow views.

The broad view

The broad view reflects little deference for the importance of preserving the confidentiality of the therapist-patient relationship. Under this view, a simple allegation of emotional distress waives the privilege. (*Doe v. City of Chula Vista* (S.D. Cal. 1999) 196 F.R.D. 562, 568; *Fitzgerald v. Cassil* (N.D. Cal. 2003) 216 F.R.D. 632, 636.) In other words, a client's treatment records are subject to discovery without any consideration of the severity of their emotional distress or the evidence they intend to rely on to support their claim.

While courts cite the bright line nature of this test as a benefit, its sweeping scope appears at odds with the broad privilege recognized in *Jaffee*. (See *Bryant v. Cnty. of Los Angeles* (C.D. Cal. Nov. 15, 2021) 2021 WL 5353886, at *3.) *Jaffee* recognized that the assurance of confidentiality is particularly important when it is obvious "that the circumstances that give rise to the need for treatment will probably result in litigation." (*Jaffee*, 518 U.S. at 12.) Nonetheless, the broad view effectively creates an exception that swallows the rule. Allowing access to mental-health records based solely on an allegation of emotional distress – no matter its relation to the treatment a plaintiff has received – appears to be directly in conflict with *Jaffee*'s emphasis of a broad privilege that would allow patients to seek treatment, without fear of their records being disclosed in litigation. The broad view, however, results in a privilege that provides little protection.

The middle ground

Courts adopting the middle view hold that waiver occurs where a plaintiff

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2024

alleges more than "garden-variety" emotional distress. (*Carrig v. Kellogg USA Inc.* (W.D. Wash. Jan. 30, 2013) 2013 WL 392715, at *3.) Courts have generally characterized "garden-variety" emotional distress as commonplace emotional responses, such as humiliation, anger, or embarrassment. Courts find that emotional distress goes beyond the garden variety where it has a more significant impact on a plaintiff's life, including limiting their ability to work or causing a "specific psychiatric disorder." (See, e.g., *Robertson v. Cath. Cmty. Servs. of W. Washington* (W.D. Wash. Apr. 10, 2020) No. 2020 WL 1819842, at *4.) Courts also consider the claims that a plaintiff has alleged, including whether there is a claim for intentional infliction of emotional distress. (*E.E.O.C v. Serramonte* (N.D. Cal. 2006) 237 F.R.D. 220, 224.)

The challenge with the middle view – and a criticism that some courts make of it – is the inherent subjectivity of deciding whether a plaintiff's emotional distress is more than "garden variety." (See, e.g., *Bryant*, 2021 WL 5353886, at *3.) More fundamentally, *Jaffee* rejected the use of a balancing test for determining whether mental-health records are privileged. (*Jaffee*, 518 U.S. at 17-18.) The Court explained that weighing the plaintiff's privacy interests against the need for disclosure "would eviscerate the effectiveness of the privilege" by creating uncertainty as to whether records would be protected. (*Ibid.*) As the Court explained, "if the purpose of the privilege is to be served, the participants in the conversation must be able to predict with some degree of certainty whether particular discussions will be protected." (*Id*. at 17 [citation omitted].) Yet the middle ground's nebulous balancing test creates uncertainty in many cases.

The narrow view

Like the broad approach, the narrow view is much more of a bright line, but it's cut in the other direction. Under this approach, courts find that there is no waiver of the privilege unless the plaintiff intends to affirmatively rely on mentalhealth-treatment records to support their claims. (See e.g., *Boyd v. City and County of San Francisco* (N.D. Cal. May 18, 2006) 2006 WL 1390423, at *5.) While some courts have criticized the narrow view as unfairly limiting access to evidence, this approach appears to be the most consistent with the broad scope of the privilege articulated in *Jaffee*. (*Bryant*, 2021 WL 5353886, at *2 [collecting cases].) The broad protection provided by this approach recognizes that preserving the confidentiality of treating records is essential to the treatment process. The approach also has the benefit of a bright line rule that applies only if a plaintiff intends to affirmatively rely on their treatment records. This test provides the certainty and protection envisioned in *Jaffee*.

Practical considerations

Absent a prior ruling from your judge, there is no reliable way to predict the approach that will be applied in your case. Some districts have expressed a general preference for one test over the other two. (*Carter-Mixon v. City of Tacoma* (W.D. Wash. Sept. 20, 2022) 2022 WL 4366184, at *2 ["Courts in this district generally find waiver when the plaintiff asserts 'more than 'garden-variety' emotional distress'"].) But it is much more common for different judges within a district to disagree on the appropriate standard. (Compare *Stallworth v. Brollini* (N.D. Cal. 2012) 288 F.R.D. 439, 443 [applying narrow approach] with *Bangoura v. Andrew-Boudin Bakeries* (N.D. Cal. Oct. 29, 2012) 2012 WL 5349991, at *2 [applying broad approach].)

Regardless of what appears to be the prevailing view in the district where your case is located, there are strong arguments that the narrow view is most consistent with *Jaffee*. As discussed above, the animating idea behind the privilege is the importance of "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." (*Jaffee*, 518 U.S. at 11.). The narrow test serves this interest far better than the other two tests. The narrow test also provides a clear-cut rule that avoids the uncertainty of a balancing test likely to produce inconsistent results. *Jaffee* recognized a privilege that is broad and certain, and the narrow test best serves these aims.

There also appear to be steps that may increase the likelihood of preserving the privilege. Many courts appear to be less likely to find waiver where a plaintiff agrees not to rely on the treatment records or agrees not to offer expert testimony regarding emotional distress. (See, e.g., *Snipes v. United States* (N.D. Cal. 2020) 334 F.R.D. 548, 551 [collecting cases].) Characterizing the claim as one for commonplace emotional distress may also decrease the likelihood of waiver. On the other hand, where a plaintiff brings a claim for intentional infliction of emotional distress or makes detailed allegations regarding the severity of their emotional distress, the court is more likely to find waiver. (See, e.g., *Verma v. American Express* (N.D. Cal. May 26, 2009) 2009 WL 1468720 at *2.) Given the variance among courts, how the claim is framed may determine whether the privilege applies.

At bottom, upfront communication with your client is essential. If everything lines up, a claim for emotional distress can significantly benefit your case. But the potential drawbacks of pursuing the claim – including the possibility of having to disclose deeply private treatment records – may outweigh the upside. Given the divergent law that federal district courts apply, it's important to be proactive on this issue and consider whether to bring a claim for emotional distress and how to present it in a way that best serves your client's interests.

Bill Foster is an associate at Pillsbury & Coleman LLP *who represents clients in insurance coverage and bad faith actions.*