INSTILLING CONFIDENCE BY PRESERVING CONFIDENCES: AN EXAMINATION OF THE GRADUALLY EMERGING EAP PRIVILEGE

“[Employee Assistance] Program success and credibility hinge on confidence by all parties that the EAP respects their privacy and will appropriately protect the information that they disclose.”

I. Introduction

Employee assistance programs (“EAPs”) provide employees with employer-sponsored counseling services designed to help them identify and resolve personal and work-related problems. In addition to the assistance they provide to the employees who use them, EAPs benefit employers by improving employee job performance, reducing absenteeism and work-related injuries, and facilitating the retention of employees whose problems may be threatening their careers. Thus, from relatively modest beginnings in which they were used primarily to address employee alcohol and drug abuse, EAPs have evolved to the point where they are now used to assist employees in addressing a much broader range of behavioral health problems.

As in other psychotherapeutic settings, the matters addressed in an EAP counseling session may be extremely private. Potential discussion topics include not only alcoholism and other substance abuse issues, but such equally sensitive and potentially embarrassing subjects as anger management, marital and family discord (including, in some instances, domestic violence and abuse), sexual orientation and other sexual matters, personal and family health issues, and legal and financial problems.

Given the sensitive nature of these subjects, some assurance of confidentiality is often essential to an employee's willingness to seek or participate in EAP counseling. Thus, many EAPs (and EAP counselors) inform employees that the confidentiality of their communications will be maintained. Even without such assurances, EAP counselors may be contractually or ethically bound not to disclose information imparted to them in confidence by the employees they are counseling.
However, these various indicia of confidentiality may not be sufficient to protect the privacy of employees receiving EAP counseling, in which case they may be reluctant or even unwilling to seek such counseling. Because some EAP counselors have been forced to disclose confidential information obtained during the course of their counseling activities, the courts (and some state legislatures) have begun to consider whether communications between employees and EAP counselors should be protected by a formal evidentiary privilege. One jurist explained the additional protection a privilege would provide in the following terms:

[C]omplete confidentiality can generally be guaranteed only if an evidentiary privilege applies. In the absence of a privilege, a person called as a witness can normally be compelled to disclose confidential communications, regardless of any professional standard of confidentiality and regardless of what personal assurances or contractual commitments were given to the communicants.

This article explores the merits of this potential privilege. Part I discusses the relatively few reported cases in which courts have considered the privilege. In Part II, the author examines the impact of *Jaffee v. Redmond*, a United States Supreme Court decision recognizing a federal common law psychotherapist-patient privilege that has provided the basis for the occasional recognition of an EAP privilege and various other mental health care privileges. Part III considers some potential exceptions to the psychotherapist-patient privilege that also might apply to an EAP privilege. The author ultimately concludes that the courts—state legislatures—should adopt an EAP privilege that, because of the unique nature of psychotherapeutic counseling, is subject to few if any exceptions.

II. Cases Considering the EAP Privilege

A. Greet v. Zagrocki

The first reported judicial recognition of an EAP privilege occurred in *Greet v. Zagrocki*. The case involved a federal civil rights claim asserted against the City of Philadelphia alleging that one of the City's police officers had forced his way into the plaintiffs' apartment and held them at gunpoint. Among other things, the plaintiffs claimed the City knew the officer was an alcoholic and had abused his authority on other prior occasions.

During discovery the plaintiffs sought production of the City's EAP file pertaining to the officer. The City objected to the production of this information on the ground of privilege, arguing that the EAP was “required to maintain the confidences of its clients,” and could not even share information obtained during its counseling sessions with the City's police department. The City explained that “this policy of confidentiality is designed to encourage officers to be forthright about personal issues with the assurance that their supervisors will not become privy to such information.”

While the City did not identify the specific privilege on which it was relying, the court assumed its argument was based on the psychotherapist-patient privilege, which the Supreme Court had recognized just six months earlier in *Jaffee v. Redmond*. With little supporting analysis, the *Greet* court held that the information contained in the officer's EAP file was protected from disclosure by the *Jaffee* privilege. In reaching this result, the court did not address whether the officer received counseling from a “psychotherapist,” but instead apparently concluded that the fact that he received “some form of counseling” from the EAP was sufficient to bring “the communications and products of that counseling” within the ambit of the privilege.
*88 B. Oleszko v. State Compensation Insurance Fund

In *Oleszko v. State Compensation Insurance Fund*, the Ninth Circuit “became the first federal appellate court to expand the psychotherapist-patient privilege to unlicensed mental health workers serving in ‘employee assistance programs.’” The plaintiff in *Oleszko* asserted a claim against her employer under Title VII of the Civil Rights Acts of 1964, alleging that she had been subjected to unlawful harassment, discrimination, and retaliation. She sought discovery from the employer's EAP in an attempt to establish that the employer had engaged in a pattern of discrimination against its employees. The EAP objected to this discovery on the ground that its counselors' communications with employees who utilized its services were privileged. The district court agreed with the EAP and denied the plaintiff's motion to compel the requested discovery, and the plaintiff appealed.

The Ninth Circuit affirmed the district court's ruling. It relied on *Jaffee* and *Greet* in extending the psychotherapist-patient privilege to confidential communications between employees and unlicensed EAP counselors. In reaching this result, the court did not focus on the professional credentials of the EAP counselors, but instead emphasized the critical role EAPs play in providing the public with access to mental health care. Because EAP counselors are privy to the same types of highly sensitive information that is protected by the *Jaffee* privilege when disclosed to a licensed psychotherapist, and the potential disclosure of such information might deter employees from seeking therapeutic assistance, the court concluded that the recognition of an EAP privilege was necessary to assure that people who cannot afford to consult with licensed psychotherapists have meaningful access to mental health treatment.

C. Student 1 v. Williams

*Oleszko* is binding in federal question cases arising in the Ninth Circuit, and may be persuasive in federal question cases arising in other circuits as well. The *Oleszko* case also may “influence similar cases arising in state court,” particularly in states situated within the geographical boundaries of the Ninth Circuit. But while the courts in several subsequent cases have agreed that an EAP privilege should be recognized, the analysis in *Oleszko* has not been universally embraced.

The opposing view is represented by the federal district court decision in *Student 1 v. Williams*. Although the case involved counseling provided by a community mental health facility, rather than an EAP, the plaintiffs relied on *Oleszko* in arguing that the psychotherapist-patient privilege recognized in *Jaffee* should encompass confidential therapeutic communications with unlicensed mental health care providers.

*91* While distinguishing *Oleszko* on its facts, the *Student 1* court also rejected the Ninth Circuit's reasoning, insisting that the *Jaffee* Court “considered the professionals' licensed status to be an important prerequisite to the privilege,” and that the court in *Oleszko* “missed the significance” of this limitation. The *Student 1* court maintained that limiting the privilege to licensed psychotherapists establishes “a bright line for the boundaries of the privilege, so that both professional and patient may be clear about the confidentiality of their communications.” Espousing a view that has been questioned by some commentators, the court added that licensure provides “a minimum, if rough, measure of assurance that the privilege is implicated only when the patient communicates with one who, by satisfying the requirements for licensure, has demonstrated some threshold level of ability to assist the patient in improving her mental health.”

*92* III. The Proper Interpretation of Jaffee
The assertion that the *Jaffee* Court limited the application of the psychotherapist-patient privilege to confidential therapeutic communications with licensed professional counselors is unpersuasive. After invoking Rule 501 of the Federal Rules of Evidence to recognize the privilege as a matter of federal common law, the *Jaffee* Court addressed whether the privilege should be extended to licensed social workers, and ultimately held that it should. In reaching this conclusion, the Court noted that the clients of licensed social workers “often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals.”

This is persuasive reasoning, reflecting the fact that social workers provide “a significant amount of mental health treatment,” and the Court's conclusion that “drawing a distinction between the counseling provided by costly psychotherapists and that provided by more readily accessible social workers serves no discernible public purpose.” Indeed, one influential scholar, writing more than two decades before *Jaffee* was decided, anticipated this aspect of the Court's decision:

Social workers, the mainstay of staffs of most public health facilities, are called the “poor man's psychiatrist.” Their clients are referred to as “patients.” Since it is the therapeutic function, rather than any particular group, that the law on privilege is theoretically designed to protect, there is little justification for extending privileged status to one group and denying it to another that is functionally accomplishing the same thing.

However, licensed social workers are hardly alone in providing the type of mental health counseling persons of modest means may be unable to obtain from licensed psychiatrists and psychologists. Nurses, rape crisis counselors, victim advocates, domestic abuse counselors, clergy members, marital and family counselors, and various other “psychotherapists” --many of whom are unlicensed--also provide affordable mental health care to those in need of such services.

The *Jaffee* Court itself did not address whether the privilege it was recognizing encompasses therapeutic communications with these often unlicensed mental health care providers. The court in *Student 1 v. Williams* concluded that this omission reflected an intent to limit the privilege to licensed professionals, despite acknowledging that it was unnecessary for the *Jaffee* Court to reach that question. However, the *Jaffee* Court did not explore the privilege's application to unlicensed counselors because the case did not involve communications with an unlicensed counselor, and not because the Court necessarily intended to limit the scope of the privilege to licensed professionals.

In fact, the Court's analysis clearly permits the lower federal courts to expand the scope of the psychotherapist-patient privilege beyond its initial parameters. This is what the *Oleszko* court and several other lower federal courts have done, and what a number of states also have done, or are at liberty to do. Indeed, the incremental judicial expansion of the federal psychotherapist-patient privilege to encompass communications with EAP counselors and other unlicensed mental health care providers is a textbook example of the common law in operation. This is precisely what Congress intended when
it enacted Rule 501, and what the Jaffee Court envisioned when it adopted the privilege as a matter of federal common law. Insofar as the EAP privilege is concerned,

the Supreme Court ... did not make explicit the limits of the privilege. Rather, courts deciding similar cases in the future were assigned the task of identifying the appropriate boundaries. Armed with such discretion, the court of appeals in Oleszko broadened the immunity to apply to confidential communications between employees and unlicensed counselors within an employee assistance program.

This extension of Jaffee is also a logical interpretation of the privilege recognized in that case, as the same concern for the mental health of “the poor and those of modest means” that led the Jaffee Court to extend the privilege to licensed social workers applies with equal force to unlicensed counselors. In short, it would be as “unjust to exclude the impoverished from the privilege of confidential disclosures merely because they are unable to afford a licensed practitioner” as it would have been for the Jaffee Court to exclude their communications with licensed social workers from the protection of the privilege. The Ninth Circuit employed precisely this reasoning when it extended the Jaffee privilege to EAP counselors.

IV. Potential Exceptions to the EAP Privilege

As a variant of the psychotherapist-patient privilege recognized in Jaffee, any federal common law EAP privilege presumably would be subject to the same exceptions as the Jaffee privilege. Although the Jaffee Court itself did not recognize any such exceptions, it left the door open for the lower federal courts to do so in future cases. The question of what exceptions the courts should recognize is thus one of the critical unresolved issues surrounding the Jaffee decision --and one that is likely to be as challenging as the underlying question of whether the privilege recognized in that case should encompass confidential communications with EAP counselors.

A. The Rule 504 Exceptions

Lower federal courts construing and applying the Jaffee privilege frequently look to proposed Rule 504 of the Federal Rules of Evidence for guidance. That rule would have created a federal psychotherapist-patient privilege more than two decades before Jaffee was decided, and also would have created three specific exceptions to the privilege. Although the rule was not adopted, it “remains a persuasive statement of federal common law on the psychotherapist-patient privilege.” Thus, like the rule's basic definition of the privilege, its enumerated exceptions should provide the courts with guidance in interpreting and applying the privilege.

*100 1. The Involuntary Hospitalization Exception

The first exception to the psychotherapist-patient privilege described in proposed Rule 504 would have allowed psychotherapists to disclose their patients' confidential communications “in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.” This is a relatively uncontroversial exception, even though the drafters' assertion that its recognition would be unlikely to deter patients from seeking treatment is not entirely persuasive.

The Sixth Circuit explained the rationale underlying this exception in United States v. Hayes, where it noted that the professional duty to protect third parties from harm that has evolved from the California Supreme Court's seminal decision in...
Tarasoff v. Regents \textsuperscript{101} of University of California\textsuperscript{154} may permit a psychotherapist to testify against a patient in proceedings “directly related to the patient's involuntary hospitalization.”\textsuperscript{155} The recognition of an exception to the psychotherapist-patient privilege applicable in this situation is deemed necessary to prevent the privilege from interfering with this professional obligation:

[T]he federal psychotherapist/patient privilege will not operate to impede a psychotherapist's compliance with the professional duty to protect identifiable third parties from serious threats of harm .... [P]sychotherapists will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient, to comply with their “duty to protect” the patient or identifiable third parties.\textsuperscript{156}

2. The Court-Ordered Examination Exception

The second exception to the psychotherapist-patient privilege contained in proposed Rule 504 would permit the disclosure of communications between an individual and a psychotherapist that occur during the course of a court-ordered mental examination.\textsuperscript{157} This exception would apply when a court orders a criminal defendant “to undergo an examination to assess his competency to stand trial or his mental competency \textsuperscript{102} at the time the criminal acts were allegedly committed,”\textsuperscript{158} or a civil litigant who is claiming mental or emotional injuries to submit to an examination to assist the court in evaluating that claim.\textsuperscript{159}

Although this proposed exception would rarely arise in the EAP context,\textsuperscript{160} its recognition otherwise seems unremarkable.\textsuperscript{161} The Federal Rules of Civil Procedure have long authorized the courts to order a party to submit to an independent medical examination “if the party's mental condition is ‘in controversy’ and there is ‘good cause shown,’”\textsuperscript{162} and the drafters of proposed Rule 504 concluded that an exception to the privilege “is necessary for the effective utilization of this important and growing procedure.”\textsuperscript{163} Similar reasoning supports application of the exception when a court orders the defendant in a criminal case to undergo a mental examination,\textsuperscript{164} although in that situation the defendant's communications with the examining psychotherapist cannot \textsuperscript{103} be admitted in evidence for the purpose of determining the defendant's guilt or innocence.\textsuperscript{165}

Nevertheless, individuals submitting to court-ordered medical examinations might be more forthcoming if their communications with the examining psychotherapist were privileged.\textsuperscript{166} This suggests that even if the exception is recognized,\textsuperscript{167} it should permit psychotherapists conducting court-ordered examinations to testify concerning their observations or diagnoses of the individuals they examine,\textsuperscript{168} but should not be interpreted to permit them to testify about their communications with those individuals.\textsuperscript{169}

\textsuperscript{104} In any event,\textsuperscript{170} several state courts have held that their states' versions of the court-ordered examination exception apply only if the psychotherapist advises the putative “patient”\textsuperscript{171} in advance of the examination that their communications will not be protected by the privilege,\textsuperscript{172} and any comparable exception to the federal privilege could be similarly limited.\textsuperscript{173} A patient who elected to proceed with the examination after \textsuperscript{105} receiving such advice could be deemed to have waived the privilege,\textsuperscript{174} making the recognition of an exception to the privilege unnecessary.\textsuperscript{175}

Finally, even if the exception is not subject to legitimate waiver analysis,\textsuperscript{176} judicial recognition of the exception might be unnecessary because under proposed Rule 504 (and also under Jaffee)\textsuperscript{177} “only ‘confidential communications, made for the purpose of diagnosis or treatment’ of a mental condition are privileged from disclosure.”\textsuperscript{178} Individuals submitting to court-ordered examinations are not consulting a psychotherapist for the purpose of treatment,\textsuperscript{179} and thus even without an explicit warning \textsuperscript{106} from the psychotherapist,\textsuperscript{180} could not reasonably expect their communications to remain confidential.\textsuperscript{181} In short, because the privilege itself would not apply in this situation,\textsuperscript{182} there appears to be no need for the judicial recognition of an exception to the privilege.\textsuperscript{183}
3. The Patient-Litigant Exception

Rule 504 also would have created a “patient-litigant” exception to the psychotherapist-patient privilege permitting the disclosure of “communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense.” This exception is premised upon the perceived unfairness of allowing litigants to place their mental or emotional conditions at issue while simultaneously invoking the privilege to prevent an opposing party from exploring the issue.

The patient-litigant exception appears to be the most widely accepted of the proposed Rule 504 exceptions, and it unquestionably is the one the courts have addressed most frequently. However, because the exception applies only when litigants voluntarily place their mental or emotional conditions at issue, it is actually more a matter of waiver than it is a true exception to the privilege. Indeed, the drafters of proposed Rule 504 explained the underlying principle as a question of waiver, despite using the term “exception” in Rule 504 itself.

Regardless of how this limitation on the psychotherapist-patient privilege might be labeled, its precise application is uncertain. The principal debate over the exception's application involves the question of whether litigants waive the privilege simply by placing their mental or emotional conditions at issue, as a literal reading of Rule 504 would seem to suggest, or whether they actually must offer their otherwise privileged communications as evidence in order to be deemed to have waived the privilege. Under the latter “narrow” or “conservative” view of the exception, as long as the party “does not call as a witness a person who has provided her with psychotherapy, and does not introduce into evidence the substance of any communication with such a person, the communication between her and her psychotherapist is privileged.”

Although both approaches purport to be faithful to Jaffee, the narrow view of the exception appears to be more consistent with the Supreme Court's analysis in that case. Parties who have merely placed their mental or emotional conditions at issue (by, for example, asserting claims for emotional distress in a civil case or an insanity defense in a criminal case) have made their communications with their psychotherapists relevant, which is a de facto prerequisite to the exception's application. However, that is all they have done. Much evidence that is shielded from disclosure by the psychotherapist-patient privilege (or any other testimonial privilege) is likely to be relevant, but that fact provides no basis for recognizing an exception to the privilege. One federal court explained this in the following terms: “Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.”

B. Additional Common Law Exceptions

The patient-litigant exception is the only exception in proposed Rule 504 that has received a great deal of judicial attention. When the Supreme Court decided Jaffee nearly a quarter of a century after it recommended adoption of the rule, the lower federal courts had provided litigants with “little to no analysis of the federal psychotherapist-patient privilege,” and there were, in particular, no broadly recognized exceptions to the privilege. While there have been numerous federal court decisions examining the privilege in the years since Jaffee was decided, the extent to which the privilege is subject to exceptions remains unclear.
Nevertheless, the rule's drafters clearly intended for there to be exceptions to the privilege, and a number of state legislatures have adopted the exceptions that were included in the proposed federal rule. While neither fact mandates the judicial recognition of the rule's exceptions as a matter of federal common law, both the terms of the proposed federal rule and the exceptions to the psychotherapist-patient privilege recognized by the various states may be instructive in construing the federal common law privilege. This suggests that the federal courts are ultimately likely to recognize the three unenacted Rule 504 exceptions to the privilege.

The federal courts seem less likely to recognize exceptions to the privilege that are not contained in the proposed rule, even though a few courts (and some commentators) have suggested that there may be a “need to expand the range of exceptions to the privilege beyond those contained in Proposed Rule 504.” On the one hand, the drafters' inclusion of three specific exceptions in the proposed rule may reflect their implicit rejection of any additional exceptions, and limiting the exceptions to those contained in the rule would promote the predictability the Court deemed essential to the privilege's effectiveness. One commentator construing a state evidentiary rule containing the same three exceptions explained this in the following terms: “Given that the Rules of Evidence specifically lay out the privilege and the exceptions in the same rule, it suggests that an individual need not look further in the law to know the ... limitations of the privilege.”

Nevertheless, the Supreme Court's analysis in Jaffee does not prevent the lower courts from recognizing additional exceptions to the psychotherapist-patient privilege, and neither does unenacted Rule 504. Noting that the scope of the privilege is to be determined by common law principles “as they may be interpreted ... in the light of reason and experience,” one federal court observed: “While recognizing Proposed Rule 504 as a general guide, ... this court believes that further exceptions to the general operation of the privilege might well be indicated in the light of reason and experience.”

1. The Dangerous Patient Exception

The courts have identified several potential common law exceptions to the federal psychotherapist-patient privilege that do not appear in Rule 504, although none of these exceptions has yet been definitively established. Perhaps most notably, in what is now often simply referred to as the “Jaffee footnote,” the Supreme Court itself suggested there might be a “dangerous patient” exception to the privilege that does not appear in Proposed Rule 504. In this controversial footnote, the Court stated:

Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations where 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.

Despite the presumptive force of this observation, several courts have refused to recognize a dangerous patient exception to the federal psychotherapist-patient privilege. These courts hold that the Jaffee footnote simply means the privilege “will not operate to impede a psychotherapist's compliance with the professional duty to protect identifiable third parties from serious threats of harm.” Under this view, the footnote might support the recognition of a common law “involuntary hospitalization” exception akin to the one proposed by the drafters of Rule 504, but it does not provide a basis for permitting psychotherapists to reveal their patients' confidential communications in other legal proceedings.

This view is perhaps best represented by the Ninth Circuit's decision in United States v. Chase, where the defendant was convicted of making threatening statements against FBI agents. The evidence presented at trial included a psychiatrist's
testimony, over the defendant's objection, concerning statements the defendant made during their therapeutic counseling sessions. The district court held that the psychotherapist-patient privilege did not apply, and that the psychiatrist's testimony was therefore admissible, because she properly determined that the defendant's threatening statements “were serious when uttered, that harm was imminent, and that disclosure to authorities was the only means of averting the threatened harm.”

The defendant appealed his conviction, arguing that the psychiatrist should not have been permitted to testify about their conversations. A three-judge panel of the Ninth Circuit concluded that “the district court correctly found that the psychiatrist's testimony was not barred by the psychotherapist-patient privilege because the ‘dangerous patient’ exception to the psychotherapist's obligation of confidentiality extends to the psychotherapist's permitted testimony under the same circumstances.” Recognizing the disagreement among the federal appellate courts over the existence of this exception to the testimonial privilege, the Ninth Circuit then ordered that the case be reheard by the court sitting en banc.

The en banc court began its analysis by characterizing a psychotherapist's duty to disclose a patient's serious threats of harm under Tarasoff v. Regents of University of California as an exception to the psychotherapist's duty of confidentiality to the patient, which is distinct from the psychotherapist-patient testimonial privilege. While the court held that the psychiatrist properly disclosed the defendant's threats to law enforcement officials, it indicated that the more difficult question was whether the courts “should recognize a dangerous-patient exception to the federal testimonial privilege arising out of, or coextensive with, the dangerous-patient exception to confidentiality.”

Turning to this question, the Chase court declined to recognize a dangerous patient exception to the psychotherapist-patient privilege. Unlike the three-judge panel and other courts that have considered the issue, the Ninth Circuit found little connection between a psychotherapist's duty to report a patient's threats to the intended victim (or to law enforcement authorities) under Tarasoff and the propriety of permitting the psychotherapist to testify concerning those threats in a subsequent civil or criminal proceeding.

The court noted that the Tarasoff duty is premised on the societal interest in protecting potential victims of a dangerous patient, which is deemed to outweigh the “deleterious effect” disclosure of a patient's confidences may have on the psychotherapist-patient relationship. However, because the psychotherapist's testimony at a subsequent trial ordinarily would be offered only after the threats were acted upon - that is, the testimony would be offered for the purpose of “establishing a past act” rather than to prevent future harm to a potential victim - the court concluded that the recognition of an exception to the testimonial privilege would not serve a compelling societal interest.

On the contrary, “the gain from refusing to recognize a dangerous-patient exception to the psychotherapist-patient testimonial privilege outweighs the gain from recognizing the exception.”

Although the Ninth Circuit's en banc decision in Chase reflects the view of the majority of federal courts that have addressed the issue, it is not necessarily the definitive word on the subject. While pertinent case law remains sparse, other federal courts (and some commentators) have been receptive to the notion of a dangerous patient exception to the psychotherapist-patient privilege. In United States v. Glass, for example, the Tenth Circuit held that an exception to the privilege exists “where a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.” Although the analysis in Glass has been criticized by commentators and was rejected by the en banc court in Chase, the dangerous patient exception finds support in other federal cases, including, arguably, a dissenting opinion in United States v. Hayes and a concurring opinion (and the three-judge panel decision) in Chase itself.

* Perhaps of particular significance to the present analysis, support for the exception also can be found in United States v. Murillo, an unpublished but potentially influential Fifth Circuit decision arising in the EAP context. In Murillo,
an employee was convicted of transmitting threats in interstate commerce based in part on his EAP counselor's testimony concerning a counseling session in which the employee stated that he would like to “Glock out the whole management team.” When the employee asserted that the admission of this testimony violated his psychotherapist-patient privilege, the government argued that the privilege did not apply because the counselor's disclosure of the employee's threat to their respective supervisors reflected the counselor's professional determination that the employee's supervisor could be in danger—a prerequisite to the counselor's duty to warn under Tarasoff. Although the court found it unnecessary to reach the issue, it indicated that the government's interpretation of the privilege was “[m]ost likely ... correct.”

*121 The analysis in Murillo, United States v. Glass, and a few other federal cases suggests that there may be a dangerous patient exception to any EAP privilege derived from the psychotherapist-patient privilege the Supreme Court recognized in Jaffee. However, the uncertain status of the exception leaves EAP counselors and other mental health care professionals with no reliable guidance concerning their rights and responsibilities when an employee or other patient or client threatens a third party, as commonly occurs during EAP counseling sessions.

Citing the Ninth Circuit's extension of the Jaffee privilege to EAP counselors in Oleszko v. State Compensation Insurance Fund, one commentator deemed it “particularly important” for the courts to resolve this uncertainty as the protection afforded by the privilege “continues to expand to encompass more types of professional counselors.” Unless and until the Supreme Court (or Congress) takes up this challenge—an uncertain proposition at best—EAP counselors will remain largely in the dark with respect to their rights and obligations in this situation.

2. The Crime-Fraud Exception

Another potential limitation on the psychotherapist-patient privilege that does not appear in proposed Rule 504 (and also was not discussed in Jaffee) is commonly known as the “crime-fraud” exception. This exception would permit (and perhaps even require) a psychotherapist to reveal a patient's confidential communications when those communications were “intended directly to advance a particular criminal or fraudulent endeavor.”

*123 The crime-fraud exception originated as a limitation on the protection afforded by the attorney-client privilege, and finds its clearest and most compelling application in that context. Because the attorney-client privilege exists primarily to further the interests of justice, and the crime-fraud exception is intended to serve essentially the same purpose, recognizing the exception as a limitation on that privilege is eminently logical:

The rationale for the crime-fraud exception is closely tied to the policies underlying the attorney-client privilege. Whereas confidentiality of communications facilitates the rendering of sound legal advice, which is to be encouraged, it cannot be said that advice in furtherance of a fraudulent or unlawful goal is sound, nor is it to be encouraged. Rather, advice in furtherance of such goals is anathema to our system of justice; hence, a client's communications seeking such advice are not worthy of protection.

This reasoning is not readily applicable to the psychotherapist-patient privilege, which unlike the attorney-client privilege is not intended to serve the interests of justice, but to facilitate the effective treatment of mental health problems. This difference in the purposes of the two privileges led the drafters of the federal evidence rules to include a crime-fraud exception in proposed Rule 503, which would have codified the attorney-client privilege as a matter of federal evidence law, but not to include a comparable exception in proposed Rule 504.
The drafters instead incorporated into Rule 504 the exceptions contained in a Connecticut statute creating a psychiatrist-patient privilege. In an advisory committee note explaining this incorporation, the drafters of the federal rule cited with approval an article by Professors Abraham Goldstein and Jay Katz, who helped draft the Connecticut statute, stating that the failure to include a crime-fraud exception in that statute was deliberate. The drafters of proposed Rule 504 adopted the same approach, apparently having concluded that “the particular nature of the psychotherapist-patient relationship rendered such an exception unnecessary.”

Despite this legislative history and the exception's unique applicability to the attorney-client privilege, some federal courts have extended the exception beyond its original parameters -- most notably to the marital privileges, but also, on occasion, to the psychotherapist-patient privilege. The most prominent case recognizing a crime-fraud exception to the latter privilege is In re Grand Jury Proceedings (Violette), which involved a challenge to grand jury subpoenas issued to two psychiatrists who had provided counseling to the individual who was the target of the grand jury's investigation. When the psychiatrists asserted the psychotherapist-patient privilege on their patient's behalf, the government moved to enforce the subpoenas, arguing that the privilege did not apply because the communications at issue did not occur for therapeutic reasons, but “as part of a scheme to defraud lenders and/or disability insurers.”

After permitting the patient to intervene in the case, the district court found that his communications with the psychiatrists were not privileged because they did not occur during the course of diagnosis or treatment. On appeal, the First Circuit concluded that the evidence supported this finding, which should have obviated any need to address the existence of a crime-fraud exception. One commentator criticized the court's adoption of the exception on this ground: [I]t is unclear why the court chose to create an exception at all. As the appeals court acknowledged - and as the district court explicitly found - the communications at issue were not really made in the course of diagnosis or treatment because the patient's purpose in seeking consultation with the psychiatrists was to perpetrate a fraud. Since that finding alone defeats any claim of privilege, the court need not have gone further to resolve the case.

Nevertheless, the district court also held that the communications were subject to disclosure under the crime-fraud exception and this appears to have been the only ruling the government relied upon on appeal. Although the First Circuit was not bound by this dubious litigation strategy, it chose to address the merits of that ruling, and--in what was essentially a case of first impression--recognized the exception based on what it perceived to be the psychotherapist-patient privilege's similarity to the attorney-client privilege:

In the attorney-client context, we exclude from the privilege communications made in furtherance of crime or fraud because the costs to truth-seeking outweigh the justice-enhancing effects of complete and candid attorney-client conversations. In the psychotherapist-patient context, we likewise should exclude from the privilege communications made in furtherance of crime or fraud because the mental health benefits, if any, of protecting such communications pale in comparison to “the normally predominant principle of utilizing all rational means for ascertaining truth.”

Although federal cases decided prior to Violette were “inconsistent both in recognizing a psychotherapist-patient privilege, and in acknowledging a crime/fraud/tort exception to the privilege,” the First Circuit's analysis may prompt other federal courts (and some states) to recognize the exception in future cases. However, several commentators have been critical of the
First Circuit’s analysis, asserting that the analogy on which it relied is inapt, and that “the federal courts should reject the adoption of a crime fraud exception to the psychotherapist-patient privilege.” These commentators (and some courts) maintain that unlike a client who might consult an attorney to facilitate the commission of a crime or fraud, patients who express to their psychotherapists an intent to commit criminal or fraudulent acts “would rarely be doing so for the purpose of soliciting advice or aid in carrying out that desire; rather, the patient would typically do so for the opposite purpose - to get help in dealing with the desire so as not to carry it out.” Indeed, one commentator asserted that “communications regarding intentions or desires to commit future crimes are at the very heart of why a patient may seek psychotherapeutic care. A patient may reveal these dangerous, criminal impulses to the therapist for the very purpose of overcoming and not acting upon them.”

Moreover, even if an individual does seek a psychotherapist’s assistance in committing a criminal or fraudulent act -- a matter that would be virtually impossible to prove -- the disclosure of that intent would provide the psychotherapist with an opportunity to dissuade the patient from engaging in that criminal or fraudulent conduct. Indeed, the privilege exists largely to encourage patients to disclose such intentions so that the psychotherapist can respond to them effectively.

Similar reasoning actually militates against the recognition of a crime-fraud exception to the attorney-client privilege as well, as the Violette court itself seems to have recognized. As one state court explained: “By encouraging clients to be open with their attorneys, the privilege of confidentiality for attorney-client communications is intended to enhance the ability of lawyers to dissuade their clients from committing fraud.”

In any event, because a crime-fraud exception to the psychotherapist-patient privilege is likely to deter patients from seeking critical psychotherapy, courts contemplating the recognition of such an exception in future cases “will need to revisit the special concerns of the psychotherapeutic context that the Violette court bypassed.” These concerns can be summarized in the following terms:

The psychotherapist ... may in fact better be able to prevent future crimes or torts by not being forced to disclose confidential communications as to these [matters] in legal proceedings. The nature of the relationship being what it is, the fear of disclosing future crimes ... might destroy the possibility of preventing the crime.

Another potential exception to the psychotherapist-patient privilege not mentioned in proposed Rule 504 or discussed in Jaffee is based on the Sixth Amendment’s confrontation and compulsory process clauses. When read together, these clauses provide that “in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.” Under this potential constitutionally-based exception, the privilege would “give way to a criminal defendant’s Sixth Amendment right to present a defense where the privilege, if recognized, would exclude exculpatory evidence.”

This potential “Sixth Amendment exception” was first discussed in a post-Jaffee case in United States v. Haworth, which was decided just three months after the Jaffee decision was issued. The defendants in Haworth moved to compel the production of a prosecution witness's psychological treatment records, arguing that their constitutional right to confront the witness required the court to adopt “an exception to the privilege recognized in Jaffee.” In essence, the defendants were arguing that they had a constitutional right to test the witness's credibility through cross-examination, and that a mental condition for which he was treated might be “highly probative of credibility.”
Despite the legitimacy of the defendants' underlying argument, the court denied their motion, asserting that they were mistakenly equating their Sixth Amendment right to confront the witness with a right to pretrial discovery of privileged information. *133 Relying on Pennsylvania v. Ritchie, a pre-Jaffee case holding that “the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination,” the Haworth court held that the right is not violated by the withholding of privileged information. *134 The constitutional right to confrontation instead “is implicated only when the trial court limits the scope or nature of cross-examination.” A criminal defendant's corresponding right to compel the attendance of a favorable witness under the Sixth Amendment's compulsory process clause has likewise been held to be subordinate to the witness's psychotherapist-patient privilege.

Although the issue has not been definitively resolved, Haworth reflects the hostile reception this potential Sixth Amendment exception to the psychotherapist-patient privilege has received in the federal courts, and from some state courts as well. Like other potential exceptions to the privilege, the recognition of an exception based on a criminal defendant's Sixth Amendment rights would require courts to balance the defendant's alleged need for relevant evidence against the witness's (and society's) interest in maintaining the confidentiality of that evidence. The Jaffee Court rejected the use of such balancing to determine the scope of the privilege, primarily on the ground that post hoc balancing would undermine the predictability essential to the privilege's effectiveness. One state court declined to adopt the exception on precisely this ground:

[D]efendant asks us to hold that the Sixth Amendment confers a right to discover privileged psychiatric information before trial .... [A] persuasive reason exists not to do so. When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon ... to balance the defendant's need for cross-examination and the ... policies the privilege is intended to serve.

If, on the other hand, this prohibited balancing was not necessary because a witness's common law privilege must invariably give way to a criminal defendant's constitutional rights, recognition of the exception would render the privilege virtually inoperable in federal criminal cases. This interpretation of the privilege also runs afoul of the Supreme Court's analysis in Jaffee, which drew no distinction between the privilege's application in civil and criminal proceedings.

In addition, other common law privileges, including the attorney-client and spousal privileges with which the psychotherapist-patient privilege is so often compared, generally are not subordinate to a criminal defendant's Sixth Amendment rights. The same analysis should apply in cases involving the psychotherapist-patient privilege. One federal court explained:

If a victim's attorney or spouse had ... privileged conversations with her that ... might help a defendant's cause if revealed, the confidentiality of those communications does not surrender to the defendant's Sixth Amendment rights. If such were the law, what privilege could survive a defendant's assertion of evidentiary need? Lawyers, spouses, even priests, presumably, could be ordered to cough up their notes or memories about the most private and confidential communications in the face of a subpoena from a defendant in a criminal case.

Indeed, the concept of testimonial privilege arose in response to (and “as a protection against”) the courts' power to compel witnesses to testify, which originated in English law and was firmly established in the American colonies “before
Thus, it would be anomalous for the courts to base the recognition of an exception to the psychotherapist-patient privilege (or for that matter, any other common law privilege) on a criminal defendant's confrontation and compulsory process rights, notwithstanding the founders' subsequent "constitutionalization" of those rights in the Sixth Amendment.

Once a privilege ... has been properly recognized in the affected jurisdiction and has become an integral part of the rules governing the conduct of judicial proceedings, there does not appear to be any legitimate basis to argue that the privilege can be overridden by constitutional concerns relating to confrontation, compulsory process, or general considerations of due process. Rather, the privilege becomes indistinguishable in its impact from such long-recognized privileges arising in the common law as the attorney-client privilege, the priest-penitent privilege, or the spousal privilege.

**138  C. The Possible Evolution of the Potential Exceptions to the Privilege**

As noted earlier, the drafters of proposed Rule 504 recommended the adoption of three specific exceptions to the psychotherapist-patient privilege — "proceedings to hospitalize a patient for mental illness, proceedings to examine the mental or emotional condition of the patient, and proceedings in which the patient's mental or emotional condition is relevant to a claim or defense." Although the Supreme Court invoked the proposed rule when it recognized the privilege in *Jaffee*, it did not indicate that it favored the recognition of the exceptions contained in the rule. Instead, the Court merely hinted at the possible existence of a single "dangerous patient" exception that does not appear in the rule.

Other federal courts (and some commentators) have recognized or recommended the adoption of a crime-fraud exception, which would bear at least some resemblance to the dangerous patient exception. Another potential exception, based on the Sixth Amendment's confrontation and compulsory process clauses, might enable criminal defendants to obtain potentially exculpatory information pertaining to a witness's psychotherapeutic treatment that would otherwise be protected by the privilege.

As discussed earlier, at least three of these potential limitations on the privilege - the court-ordered examination exception, the patient-litigant exception, and the dangerous patient exception - can be analyzed using waiver principles, obviating the need to recognize them as true exceptions to the privilege. The same also might be true of the crime-fraud exception, and in any event the need for that exception can be avoided by limiting the privilege's application (as the *Jaffee* Court intended) to situations in which the patient consults a psychotherapist for the purpose of diagnosis or treatment.

Finally, the “Sixth Amendment exception” (which, it should be noted, would apply only in criminal cases) finds no support in Rule 504 or *Jaffee*, and has been rejected by several other federal courts as well. As a practical matter this leaves only the “involuntary hospitalization” exception, which actually is a true exception to the privilege and can be rationalized on the ground that (at least in theory) its recognition would serve rather than undermine the patient's interests.

**V. Conclusion**

The widespread recognition of an evidentiary privilege protecting an employee's confidential communications with an EAP counselor (and more specifically, an unlicensed EAP counselor) would represent an expansion of the psychotherapist-patient
privilege recognized in *Jaffee*. Nevertheless, “a number of states have begun to recognize such a privilege,” and the federal courts unquestionably possess the institutional authority to do so as well.

*142* Extending the protection of the psychotherapist-patient privilege to unlicensed EAP counselors would be consistent with the *Jaffee* Court’s extension of the privilege to licensed social workers, and by encouraging employees to seek counseling for their problems, would “reinforce both the personal and societal value of seeking help from [a] mental health provider.” In fact, because EAPs play an increasingly pivotal - and unique - role in the nation’s mental health care, both as direct providers and as conduits to other more specialized or credentialed psychotherapists, the failure to extend the protection of the *Jaffee* privilege to EAP counselors would limit the effectiveness of the privilege. For all of these reasons, the lower federal courts should recognize a federal common law EAP privilege analogous to the psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee*.

The extent to which the federal courts should recognize exceptions to these privileges is a more difficult question. The *Jaffee* Court indicated that subject to the patient's ability to waive the privilege and a single possible exception “for serious threats of harm to third persons,” the psychotherapist-patient privilege is absolute. Although it is rare for testimonial privileges to be cast in absolute terms, commentators in the mental health field have long maintained that complete confidentiality is essential to successful psychotherapy, and several of the state statutory privileges upon which the *Jaffee* Court based its recognition of the federal common law privilege are also deemed to be absolute.

The largely unqualified nature of the *Jaffee* privilege suggests that the privilege and any EAP privilege derived from it should be subject to very few exceptions. In fact, with the possible exception of permitting an EAP counselor to testify in favor of (or perhaps against) an employee's involuntary hospitalization, the EAP privilege arguably should not even be subject to the single exception for “dangerous patients” to which the *Jaffee* Court alluded. One federal court explained the need for such an expansive privilege in the following terms:

In the absence of absolute confidentiality ... psychotherapeutic counseling would fail to serve the ends for which it is intended, to wit, the treatment of mental and emotional problems, which cannot be done successfully if patients cannot be assured that the highly sensitive subject matter they are divulging will be kept secret.

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Footnotes

a1 B.B.A., J.D., University of Iowa; Shareholder, Ryley, Carlock & Applewhite, Phoenix, Arizona.


3 See Jacques v. Herbert, 447 F. Supp. 2d 858, 861 (N.D. Ohio 2006) (noting that employees may use EAPs to help with problems at work). See also Hawkins v. Microfibres, Inc., No. 1:94CV86-S-D, 1995 U.S. Dist. LEXIS 21611, at *13 (N.D. Miss. May 10, 1995) (observing that EAPs, “as the name suggests, are intended to assist employees”), aff’d in


5 See Oleszko, 243 F.3d at 1156 (observing that EAPs “reduce absenteeism, on-the-job accidents, and worker's compensation claims”); Watters v. City of Phila., 55 F.3d 886, 893 (3d Cir. 1995) (discussing evidence that “an effective EAP would be of economic benefit [to the employer] by decreasing absenteeism”).

6 See Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606, 610 (4th Cir. 1996). “Employers implement Employee Assistance Programs in order to rehabilitate and retain valuable employees with personal problems.” Id. (quoting arbitrator's decision). See also Hawkins, 1995 U.S. LEXIS 21611, at *13-14. “An EAP also benefits the employer, of course, by allowing it to retain the services of valued employees who are perhaps only temporarily experiencing personal and financial problems with which they need assistance, rather than to dismiss them outright.” Id.

7 See Guggenheim & Werbel, supra note 4, at 34. “[B]urgeoning problems with drugs and alcohol in the late 1960's and 1970's ... spurred industry and the federal government to recognize the benefit of EAPs.” Id. See also Kenneth J. Vanko, Note, In Search of Common Ground: Leveling the Playing Field for Chemically Dependent Workers Under the Americans With Disabilities Act of 1990, 1996 U. ILL. L. REV. 1257, 1302. “EAPs began in the 1960s and were originally associated with alcohol treatment. By the 1970's, when it became apparent that an increasingly large percentage of society's illicit drug users entered the work force each year, EAPs were expanded to provide support for drug dependent workers as well.” Id.

8 See Tyler D. Hartwell et al., Aiding Troubled Employees: The Prevalence, Cost, and Characteristics of Employee Assistance Programs in the United States, 86 AM. J. OF PUB. HEALTH 804 (1996) (discussing that EAPs have evolved into multiservice programs addressing personal and mental health problems).

9 See United States v. Doyle, 1 F. Supp. 2d 1187, 1191 (D. Or. 1998) (stating that people needing “psychological assistance may reveal their most private thoughts to their psychotherapist”). See also Allred v. State, 554 P.2d 411, 417 (Alaska 1976) (explaining further the benefits of psychotherapist sessions). “Patients often make statements in psychotherapy which they would not make to even the closest members of their families. Psychotherapy tends to explore the innermost recesses of the personality, the very portions of the self which the individual seeks to keep secret from the world at large.” Id.

10 See Oleszko, 243 F.3d at 1157 (observing that counselors must “extract personal and often painful information to provide the best assistance”). See also Melissa L. Nelken, The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law, 20 REV. LITIG. 1, 7 (2000) (discussing the difficulties of psychotherapy). “[P]sychotherapy in its myriad current forms ... involves revealing painful, often shameful, thoughts and feelings in hopes of gaining relief from emotional distress and destructive or debilitating patterns of behavior.” Id.

11 See, e.g., Little v. FBI, 1 F.3d 255, 256 (4th Cir. 1993) (describing an EAP designed to help employees suffering from various handicaps, including alcoholism); Zakaras v. United Airlines, Inc., 121 F. Supp. 2d 1196, 1204 (N.D. Ill.
As a benefit to its employees, [the employer] offers an Employee Assistance Program, where employees may meet with a representative to obtain advice about personal problems, such as alcoholism.” *Id.*

*See, e.g., Teahan v. Metro-N. Commuter R.R., 80 F.3d 50, 52 (2d Cir. 1996) (describing an employee who “sought the assistance of [an EAP] employee assistance program for his substance abuse problem”); see also *In re Gen. Motors Corp*, 3 F.3d 980, 982 (6th Cir. 1993) (describing a similar EAP jointly administered by GM and the United Autoworkers). “[A]n Employee Assistance Program (‘EAP’) ... provides counseling and related services for employees with problems such as those stemming from drug and alcohol abuse.” *Id.*


*See Olezko, 243 F.3d at 1159* (stating EAPs address national problems from substance abuse and depression to workplace and domestic violence.”). Jennifer Moyer Gaines, Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?,* 31 TEX. TECH. L. REV. 139, 177 (2000), “Some employers use Employee Assistance Programs (EAPs) to handle domestic violence issues in the workplace and to maintain a supportive environment.” *Id.*

*See, e.g., Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 497 (5th Cir. 2001) (describing an employee who sought assistance with managing her personal relationship). An employee “informed [her EAP counselor] that she was a homosexual and ... asked for help in improving her relationship with her female partner.” *Id. See also Doe v. Garcia, 895 P.2d 1229, 1231 (Idaho Ct. App. 1995) (describing a similar situation). An employee “had consulted an EAP counselor and had disclosed to her that he was sexually attracted to young males.” *Id. See also Guggenheim & Werbel, supra* note 4, at 35 (describing “sexual problems” as among “the most common precipitants” for seeking EAP counseling).


*See generally Hirschfield v. Stone, 193 F.R.D. 175, 186-87 (S.D.N.Y. 2000). “The Supreme Court has recognized the sensitive nature of material revealed during such discourse.” *Id.* (citing *Jaffee v. Redmond, 518 U.S. 1, 10 (1996)). See also *Bond v. District Court of Cty. Denver, 682 P.2d 33, 40 (Colo. 1984* (noting “the sensitive nature of ... therapist-patient communications”)*.)
See, e.g., Place v. Abbott Labs., Inc., No. 94 C 5491, 1999 U.S. Dist. LEXIS 6970, at *20 (N.D. Ill. Apr. 29, 1999). “Plaintiff testified that she spoke to EAP because she knew that what she told to EAP would remain confidential.”

Id. See also Oleszko, 243 F.3d at 1159 (discussing “the necessity of confidentiality in order for EAPs to function effectively”); Guggenheim & Werbel, supra note 4, at 48 (“Employees ... will only turn to EAP counselors if they believe what they tell the counselors will be held in confidence.”).

See, e.g., Ion v. Chevron USA, Inc., 731 F.3d 379, 385 (5th Cir. 2013) (describing an employee's testimony that his EAP counselor “assured him that [his counseling] sessions would be confidential”).

See, e.g., In re General Motors Corp., 3 F.3d 980, 982 (6th Cir. 1993) (“The documents describing the program ... provide that employees' utilization of the EAP will remain confidential.”); Doe v. Garcia, 961 P.2d 1181, 1183 (Idaho 1998). “The materials the hospital distributed to its employees concerning EAP indicate the confidential and private nature of EAP services.” Id.

See, e.g., Zakaras v. United Airlines, Inc., 121 F. Supp. 2d 1196, 1215 (N.D. Ill. 2000) (describing an employer that “breached the confidentiality ... of its EAP”); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ran, 67 F. Supp. 2d 764, 777 (E.D. Mich. 1999) (noting that the employer's guarantee of confidentiality with respect to an employee's participation in its EAP “was unwittingly sacrificed”); see also Guggenheim & Werbel, supra note 4, at 47. “Although the ethical guidelines of all mental health associations and societies are clear regarding the ethical mandate to ensure the confidentiality of therapy communications, the failure to do so resulted in the fourth most frequent ethics complaint reported to the [American Psychological Association] over a five-year period.” Larry J. Bass et al., Professional Conduct and Discipline in Psychology 79 (Am. Psychological Ass'n 1996)).

See, e.g., Lora v. Board of Educ., 74 F.R.D. 565, 575 (E.D.N.Y. 1977). “[U]nlke the patient with physical complaints who will consult a physician regardless of whether confidentiality is guaranteed, a person with emotional and mental problems may seek help only if he is assured that his confidences will not be divulged, even in a courtroom.” Id. See also Lee v. Corregedore, 925 P.2d 324, 337 (Haw. 1996). “Were it not for the assurance of confidentiality in the counselor-client relationship, many in need of counseling would be reluctant to even seek counseling, and those who do seek counseling under such circumstances would probably be deterred from fully disclosing their problems to their counselors.” Id.

See Alisse C. Camazine, The Legal Issues of EAP, THE ALMACAN, Jan. 1987, at 18, 19-20. “There are certain circumstances ... that will require an EAP counselor to disclose [confidential] information without the permission of the client.”. Id. See also Harriet L. Glosoff et al., Privileged Communication in the Counselor-Client Relationship, 78
COUNSELING & DEV., 454 (2000). “Confidential information might ... be disclosed despite a client's desire to keep it private when a counselor is called to testify or produce records in a court of law.” Id.

29 See  Oleszko, 243 F.3d at 1158. “Although the majority of state legislatures have yet to create a specific privilege for the confidential communications to EAP counselors, a number of states have begun to recognize such a privilege.” Id. See also DONALD T. DICKSON, CONFIDENTIALITY AND PRIVACY IN SOCIAL WORK: A GUIDE TO THE LAW FOR PRACTITIONERS AND STUDENTS 111 (New York: Free Press 1998). “The confidentiality of conversations made to the EAP professional may be protected by privilege, depending upon state laws.” Id.

30 An ethical or contractual duty of confidentiality “is not the equivalent of an evidentiary privilege.”  Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 70 n.5 (S.D.N.Y. 2010); see also Port Wash. Teachers' Ass'n v. Board of Educ., 361 F. Supp. 2d 69, 80 (E.D.N.Y. 2005) (“[A] testimonial privilege is not the same animal as a general ethical obligation of confidentiality”). Id. See also DONALD T. DICKSON, CONFIDENTIALITY AND PRIVACY IN SOCIAL WORK: A GUIDE TO THE LAW FOR PRACTITIONERS AND STUDENTS 111 (New York: Free Press 1998). “The confidentiality of conversations made to the EAP professional may be protected by privilege, depending upon state laws.” Id.

31 See  State ex rel. Allen v. Bedell, 454 S.E.2d 77, 85 n.10 (W. Va. 1994) (Cleckley, J., concurring) (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.2, at 336 (1994)); see also Doe v. Garcia, 961 P.2d 1181, 1183 (Idaho 1998) . “At the time [the employee] revealed his sexual propensities to the EAP counselor, no statute or common law precedent in this state made the communication privileged. Therefore, the EAP counselor had a duty to disclose the information to others ....” Id.

32 See generally Joel A. D'Alba, Arbitration of Medical and Health Issues: Labor Perspective, PROCEEDINGS OF THE 45TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 52, 66 (1993) (asserting that the “integrity of employee assistance programs is jeopardized if employee communications to counselors are not privileged from disclosure”).

33 See  Oleszko v. State Compensation Insurance Fund, 243 F.3d 1154 (9th Cir. 2001). See also Guggenheim & Werbel, supra note 4. This law review article addressing this topic predates the Ninth Circuit's seminal decision in Oleszko as well as much of the other relevant case law on the subject. The authors of this article favored recognition of an EAP privilege to “reinforce both the personal and societal value of seeking help from mental health provider[s].” Id. at 44.


35 See, e.g.,  Oleszko, 243 F.3d at 1159. “[W]e hold that the psychotherapist-patient privilege recognized in Jaffee v. Redmond extends to communications with EAP personnel.” Id.


37 See generally Deborah Paruch, From Trusted Confidant to Witness for the Prosecution: The Case Against the Recognition of a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege, 9 U.N.H. L. REV. 327, 380 (2011). “[T]he trend among the states is to extend the psychotherapist-patient privilege to a wide variety of mental health professionals, while limiting its use through the creation of numerous exceptions.” Id.

38 See generally Raymond F. Miller, Comment, Creating Evidentiary Privileges: An Argument for the Judicial Approach; 31 CONN. L. REV. 771, 771 (1999). “[T]wo distinctly different mechanisms for the creation of privileges exist in the
United States. The federal system relies almost exclusively on the judicial recognition of new privileges. Alternatively, the states’ system principally adopts new privileges through legislative action.” *Id.*

39  *See Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955).* “The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame.” *Id.* (quoting MANFRED S. GUTTMACHER & HENRY WEIHOEFEN, PSYCHIATRY AND THE LAW 272 (1952)).

40  *See Nelken, supra* note 10, at 43 and accompanying text (asserting that a psychotherapeutic privilege “must be ... subject to exceptions only in rare cases” in order to be effective); Klinka, *supra* note 24, at 882 (“[T]here are few exceptions to the federal psychotherapist privilege.”).


42  *See id.* at **1-2.

43  *See id.* at *2.

44  *See id.*

45  The officer who was the true holder of any applicable privilege had not appeared in the case, and the court observed that the City had no authority to claim a privilege on his behalf. *See id.* at *3 n.2. The court nevertheless asserted its own inherent right to claim the psychotherapist-patient privilege “on behalf of an absent patient.” *Id.*; cf. *State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976).* (“In the absence of the privileged individual, the privilege may be asserted by ... the trial court itself.”) *Id.* (citing CHARLES TILFORD MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 92 (Edward W. Cleary ed., 2d ed. 1972)) (discussing the attorney-client privilege).

46  *See Greet, 1996 U.S. Dist. LEXIS 18635, at* *2-3.*

47  *See id.* at *3; cf. *Vardiman v. Ford Motor Co., 981 F. Supp. 1279, 1281 (E.D. Mo. 1997).* (“The EAP office maintained strict confidentiality of all employee problems brought to them, because the purpose of the EAP program is to allow employees to seek treatment without adverse employment actions.”).

48  *See Greet, 1996 U.S. Dist. LEXIS 18635, at* *3* (“[T]he City did not specify which privilege was the basis for its objection to plaintiffs’ discovery request ....”).

49  *See id.* (“[I]t is apparent from the fact that the EAP engages in sensitive counseling on problems of alcohol dependency that the City is advancing an argument based on the psychologist-patient privilege.”); cf. *United States v. DeLeon, No. CR 15-4268 JB, 2018 U.S. Dist. LEXIS 76212, at* *13 n.5 (D.N.M. Apr. 30, 2018).* (“The psychotherapist-patient privilege would apply ... to documents associated with employer-provided therapy if the patient reasonably believed that the employer would not have access to the information in those documents.”).

50  *See 518 U.S. 1 (1996).* Resolving a split among the lower federal courts, the *Jaffee* Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.” *Id.* at 15. *See infra* Part II (discussing the *Jaffee* case in greater detail).

51  *See Student 1 v. Williams, 206 F.R.D. 306, 309 n.7 (S.D. Ala. 2002).* (“The Greet Court ... offered no explanation for its conclusion that Jaffee 'compels' extension of the [psychotherapist] privilege to EAP files.”); see also Anne Bowen Poulin, *The Psychotherapist-Patient Privilege After Jaffee v. Redmond: Where Do We Go From Here?, 76 WASH. U. L. Q. 1341, 1355 (1998).* “[I]n *Greet v. Zagrocki,* the court held that the privilege applied to records from the police department's Employee Assistance Program without any discussion by the court of the types of counselors who provided the therapy.” *Id.*
See Greet, 1996 U.S. Dist. LEXIS 18635, at *5 (“Jaffee compels the conclusion that the EAP files that plaintiffs sought are protected from disclosure.”).

Cf. Fox v. Gates Corp., 179 F.R.D. 303, 305, 308 n.2 (D. Colo. 1998). The court observed that “communications with a psychotherapist ... are clearly privileged under Jaffee,” and defined “the term ‘psychotherapist’ generically to include a psychologist, psychiatrist, counselor or other mental health therapist.” Id.


See 243 F.3d 1154, 1157 (9th 2001).

See Taruna Garg, Expanding the Psychotherapist-Patient Privilege to Include Unlicensed Counselors, 29 J.L. MED. & ETHICS 237, 237 (2001) (describing Oleszko broadening the immunity to include confidential communications between employees and unlicensed counselors within an employee assistance program).


See Oleszko, 243 F.3d at 1155.


See Oleszko, 243 F.3d at 1155.

See id. The district court denied the motion given that the discovery is privileged based on Rule 501, agreeing with the EAP's refusal to produce the discovery. Id. The court wanted to address whether the privilege needed to extend to clinical social workers. Id.

See id. at 1159 (holding that the psychotherapist-patient privilege extends to communications with EAP personnel).

See id. at 1157. “[O]ur conclusion that the psychotherapist-patient privilege extends to communications made to EAP counselors is supported by ... district court opinions that have also extended the psychotherapist-patient privilege to unlicensed counselors. In Greet v. Zagrocki, ... the court held that EAP personnel were covered under the privilege recognized in Jaffee.” See Oleszko, 243 F.3d at 1157. The Oleszko court also found support for its holding in United States v. Lowe, 948 F. Supp. 97 (D. Mass. 1996), where the court “extended the psychotherapist-patient privilege to rape crisis counselors who were neither licensed psychotherapists nor social workers but were under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist, or psychotherapist.” See id. (citing Lowe, 948 F. Supp. at 99).

See id. at 1156. The EAP was “staffed by a coordinator and three consultants.” Oleszko, 243 F.3d at 1156. None of these individuals was “a licensed psychiatrist, psychologist, or social worker.” Id. However, the consultants all had
backgrounds in psychology or social work, including relevant clinical or field experience, and each of the staff members received “ongoing training and education on EAP-related issues.” *Id.*

65 See *Oleszko*, 243 F.3d at 1157. “The EAP ... assists in resolving employees' mental health problems, which *Jaffee* unequivocally determined to be a ‘public good of transcendent importance.’” (quoting *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996)). *Id.*

66 See *id.* at 1158. “EAP personnel ... serve as a primary link between the troubled employee and psychotherapeutic treatment .... [T]hey have access to much of the same highly sensitive information that is protected by privilege when revealed to a treating psychiatrist or social worker.” *Id.*

67 See *id.* at 1156 n.3. “[S]tudies have shown that many employees view confidentiality as an important prerequisite to their use of an EAP”; *cf.* Guggenheim & Werbel, *supra* note 4, at 45. “Considering the expectations clients and counselors have regarding the confidentiality of communications in a therapy relationship, it is not surprising that perceptions of confidentiality in an EAP directly influence an employee's willingness to make use of the program.” *Id.*

68 See *Oleszko*, 243 F.3d at 1158. “EAPs help employees who would otherwise go untreated to get assistance .... EAPs also assist those who could not otherwise afford psychotherapy by providing and/or helping to obtain financial assistance.” *Id.*

69 See *id.* at 1116, 1119 n.2 (9th Cir. 2000). “Once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it.” *Id.* See also *United States v. Sig Ellingson & Co.*, 164 F. Supp. 7, 8-9 (D. Mont. 1958). “[A]pplicable decisions of the Ninth Circuit are binding on the district courts within the Ninth Circuit.” *Id.*

70 See, e.g., *United States v. Robinson*, 5 F. Supp. 3d 933, 938-39 (S.D. Ohio 2014). The *Robinson* court relied on the *Oleszko* court's rejection of “the notion that the psychotherapist-patient privilege is limited to licensed therapists” in extending the privilege “to individuals engaged in admitting a patient for mental health treatment.” *Id.* See also *Richardson v. Sexual Assault/Spouse Abuse Res. Ctr.*, 764 F. Supp. 2d 736, 740 (D. Md. 2011). The court held “the same rationale that the Ninth Circuit employed [in *Oleszko*] applies to extend the privilege to an unlicensed counselor ... who worked under the supervision of a licensed social worker to make counseling services available.” *Id.*

71 See *Garg*, *supra* note 56, at 238. See also *Oleszko*, 243 F.3d at 1159, and accompanying text.

72 See, e.g., *Miller v. Pac. Trawlers, Inc.*, 131 P.3d 821, 838 n.23 (Or. Ct. App. 2006). “Although not bound by federal decisions from the Ninth Circuit, Oregon courts often give particular weight to those decisions because Oregon lies in that circuit.” *Id.* *But cf.* *Schuster v. Prestige Senior Mgmt., LLC*, 376 P.3d 412, 419 (Wash. Ct. App. 2016). “We bodily lie within the Ninth Circuit Court of Appeals. Nevertheless, we rule that we are no more bound by Ninth Circuit cases than other Circuit Court of Appeals decisions.” *Id.*

73 See, e.g., *Zakaras v. United Airlines, Inc.*, 121 F. Supp. 2d 1196, 1204 (N.D. Ill. 2000) (asserting that “communications between an employee and his or her EAP Representative are privileged”); see also *United States v. DeLeon*, No. CR 15-4268 JB, 2018 U.S. Dist. LEXIS 76212, at *13 n.5 (D.N.M. filed Apr. 30, 2018). “[W]hen an employer provides mental health services to its employees as part of their compensation, the employer does so for its own benefit, *i.e.*, to attract and retain desireable [sic] employees. No one believes, however, that the psychotherapist privilege ceases to apply just because an employer foots a therapist's bill.” *Id.*

See Student 1, 206 F.R.D. at 310 (S.D. Ala. 2002) (concluding federal psychotherapist privilege does not extend to unlicensed social workers or unlicensed professional counselors).

See id. at 310. See also Coy C. Morgan, Three Generations of Injustice Are Enough: The Constitutional Implications Resulting From the Criminalization of the Mentally Ill, 45 S.U. L. REV. 29, 46 (2017). Due to deficiencies in the public services available to the mentally ill, states such as Alabama, where the Student 1 case arose, “have become dependent on privately managed community mental health facilities to ... reduce their mental health costs.” See also William Whitmore Hague, Comment, The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics, 58 WASH. L. REV. 565 (1983) (discussing one state's application of the psychotherapist-patient privilege in this context).

See Oleszko, 243 F.3d at 1158. EAPs “embody what may be viewed as a team approach to providing mental health services.” Id. Like EAPs, community mental health facilities “increasingly have been using an approach in which teams of specialists from many fields coordinate their expertise in the treatment of the patient.” Richard Delgado, Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 CAL. L. REV. 1050, 1055 (1973).


See Student 1, 206 F.R.D. at 309: The personnel at issue in Oleszko were shown to have “backgrounds in psychology or social work, including relevant clinical and/or field experience” and to “regularly participate in ongoing training and education on EAP-related issues,” and they were “trained as counselors, were held out as counselors in the workplace and, like psychotherapists, their job was to extract personal and often painful information from employees in order to determine how best to assist them.” The plaintiffs, despite months to research the issue and a court order encouraging them to do so, have made no similar showing .... Id. (quoting Oleszko 243 F.3d at 1156-57).

See id. “Nor is the Court persuaded that Oleszko was correctly decided even on its very different facts.” Id.

See id.; see also U.S. v. Murra, 879 F.3d 669, 680 (5th Cir. 2018). “Jaffee made clear that an essential premise of the psychotherapist privilege is that the challenged communications must have been made to a licensed psychiatrist, licensed psychologist, or licensed social worker in the course of psychotherapy.” Id. (citing Jaffee v. Redmond, 518 U.S. 1, 15 (1996)).

Student 1, 206 F.R.D. at 309. The Student 1 court also observed that “[w]hile the Jaffee Court stressed the importance of finding a 'consensus' of state privilege law favoring the privilege, the Oleszko Court established an EAP privilege even though only seven or eight states have done so.” Id. (quoting Jaffee, 518 U.S. at 13)).

See id.; see also M. Brett Fulkerson, Note, One Step Forward, Two Steps Back: The Recognized But Undefined Federal Psychotherapist-Patient Privilege, 62 MO. L. REV. 401, 422 (1997). Fulkerson asserts that the privilege “should apply ... to only those therapists licensed by their respective states” because “certainty may require ... a bright line as to whom the privilege applies.” Id.

See, e.g., Robert D. Blair & Christine Piette Durrance, Licensing Health Care Professionals, State Action and Antitrust Policy, 100 IOWA L. REV. 1943, 1960 (2015). “Occupational licensing arguably serves the public interest by protecting consumers from charlatans and incompetents. Thus, we should expect licensing to improve quality. The empirical evidence on this issue is fairly limited, but the evidence that does exist fails to support much of a claim to improved quality.” Id. See also Catharina J.H. Dubbeday, Comment, The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved, 34 EMORY L.J. 777, 814 (1985). “Licensing and certification do not always provide
completely adequate measures of competence, and licensing and certification do not necessarily lead to the screening out of incompetents.”  Id.

85  See Student 1, 206 F.R.D. at 309; cf. Stacy Aronowitz, Note, Following the Psychotherapist-Patient Privilege Down the Bumpy Road Paved by Jaffee v. Redmond, 1998 ANN. SURV. AM. L. 307, 346 & n.277. “[L]icensing and certification requirements include factors such as education, training, and experience” that “are good indicators of whether the counselor has the ability to offer therapeutic services to patients.” Id.

86  See, e.g., Bose v. Rhodes Coll., No. 16-cv-02308-JTF-tmp, 2017 U.S. Dist. LEXIS 166289, at *14 (W.D. Tenn. Oct. 6, 2017). “[G]iven that the Supreme Court specified that the district courts would be tasked with shaping the privilege, the court is unconvinced that Jaffee established a bright line rule requiring treatment providers to be licensed.” Id.  See also Whitfield v. Pathmark Stores, Inc., No. 96-246 MMS, 1999 U.S. Dist. LEXIS 7096, at *8 (D. Del. Apr. 29, 1999). “[T]he Supreme Court, in establishing a common-law psychotherapist-patient privilege in federal court, stressed that it wished to avoid drawing lines between types of therapists ....” Id.

87  See In re Grand Jury Subpoena (Miller), 397 F.3d 964, 978 (Sentelle, J., concurring), reh'g en banc denied, 405 F.3d 17 (D.C. Cir. 2005); In re Grand Jury No. 91-1, 795 F. Supp. 1057, 1058 (D. Colo. 1992). Congress enacted Rule 501 in 1975 in lieu of adopting a series of enumerated privileges the Supreme Court had proposed. Id. The rule states, in relevant part, that unless otherwise provided by the United States Constitution, a federal statute, or a Supreme Court rule, the “common law - as interpreted by United States courts in the light of reason and experience - governs a claim of privilege” in federal question cases. FED. R. EVID. 501. See generally Comment, “In the Light of Reason and Experience”: Rule 501, 71 NW. L. REV . 645 (1976) (containing an early scholarly examination of the rule).


89  See Cappetta v. GC Serv. Ltd. P'ship, 266 F.R.D. 121, 127 n.7 (E.D. Va. 2009). “One of the issues the Court considered in Jaffee was whether the psychotherapist-patient privilege should extend beyond psychiatrists to licensed social workers in the course of psychotherapy.” Id.


Like the psychotherapist-patient privilege from which it is derived. See Guerrier v. State, 811 So.2d 852, 855 (Fla. Dist. Ct. App. 2002), People v. Bass, 529 N.Y.S.2d 961, 962 (Sup. Ct. 1988) (“[t]he social worker privilege was unknown at common law.”). However, the Jaffee Court was not the first federal court to recognize a social worker-client privilege. See, e.g., In re Production of Records to Grand Jury, 618 F. Supp. 440, 441 (D. Mass. 1985). “[T]his court recognizes as a matter of federal evidentiary law, a qualified privilege for ... communications made to a social worker in his or her professional capacity ... insofar as the communication relates to the care and treatment of the patient.” Id.


See **Jaffee, 518 U.S. at 15**; see also **People v. Scala, 491 N.Y.S.2d 555, 564-65 (Sup. Ct. 1985)** ("Clinical social workers ... provide the majority of the psychotherapeutic services rendered in the United States ..."); Bruce J. Winick, Note, The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View, 50 U. MIAMI L. REV. 249, 264 (1996). "In reality, an increasing amount of patient contact involves psychiatric social workers, rather than psychiatrists and psychologists." Id.

See **Jaffee, 518 U.S. at 17** (quoting Jaffee v. Redmond, 51 F.3d 1346, 1358 n.19 (7th Cir. 1995), aff'd, 518 U.S. 1 (1996)); cf. Winick, supra note 94, at 264. "Recognizing a privilege that extends ... to psychiatrists and psychologists, but not to psychiatric social workers, would in effect create a second-class professional relationship for people lacking the financial means to hire the more expensive psychiatrist or psychologist." Id.


The recognition of a federal psychotherapist-patient privilege was "advocated by several respected commentators" long before **Jaffee** was decided. See **In re Zuniga, 714 F.2d 632, 639 (6th Cir. 1983)**; see also Lauren Messersmith, Comment, The Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501, 23 WASHBURN L.J. 706, 706 (1984). "The case for a privilege protecting the psychotherapist-patient relationship has been strongly advocated." Id.

See Ralph Slovenko, Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope, 23 CATH. U.L. REV. 649, 664 (1974); see also David W. Louisell, The Psychologist in Today's Legal World: Part II, 41 MINN. L. REV. 731, 742 (1957). "Certain of the approved functions of non-psychologist social workers would seem to be sufficiently similar to corresponding functions of psychologists as to justify the privilege for clients of the former if it exists for those of the latter." Id.

See **Jaffee, 51 F.3d 1346, 1358 n.19** ("Professionals with quite a variety of job titles and descriptions provide mental health care to patients."); aff'd, 518 U.S. 1 (1996); Karasek v. LaJoie, 699 N.E.2d 889, 891 (N.Y. 1998). "Such diverse professionals as psychiatrists, social workers, clerics, guidance counselors, substance abuse counselors, lay therapists and faith healers may play a part in the diagnosis and treatment [of mental health issues]." Id.

See, e.g., **State v. Maness, 677 S.E.2d 796, 804 (N.C. 2009)** (describing "a detoxification nurse involved in mental health counseling and in working with substance abusers"); see also NYE, supra note 24 §4.9.1, at 4-5. "[M]uch mental health care, including psychotherapy, is provided by clinical social workers and nurses." Id.

See **Commonwealth v. Wilson, 602 A.2d 1290, 1295 (Pa. 1992)**. "Rape crisis centers are ... staffed with counselors extensively trained in crisis counseling. These counselors provide victims with much needed physical, psychological and social support during the recovery period that the victim otherwise might not be able to afford." Id.
See In re Crisis Connection, Inc., 930 N.E.2d 1169, 1173 (Ind. Ct. App. 2010) (“[T]he victim-advocate privilege is meant to provide victims of lesser economic means with the same confidentiality that would exist if the victim were able to afford private psychotherapeutic treatment.”), adopted in part and vacated in part, 949 N.E.2d 789 (Ind. 2011).

See People v. Turner, 109 P.3d 639, 643 (Colo. 2005). “Domestic violence organizations also help to reduce the economic gap between abuse victims who can and those who cannot afford to secure the service of paid therapists.” Id.


See Miller v. Roberts, 38 Pa. D. & C.3d 74, 80 (Pa. Ct. C.P. Northampton Cnty. 1985) (“[T]he psychotherapeutic function is performed by psychiatric social workers, family counselors and marriage counselors.”); see also Nelken, supra note 10, at 7 (noting that “marriage and family therapists ... provide psychotherapy”).

See Wei v. Bodner, 127 F.R.D. 91, 97 (D.N.J. 1989) (“Psychotherapist is a broad, imprecise term that can encompass psychiatrists, psychologists, social workers, clergy and others.”); see also Nelken, supra note 10, at 7 (“Today, in addition to psychologists and psychiatrists, ... counselors of varied backgrounds and training all provide psychotherapy.”).

See Dunn v. Dunn, 219 F. Supp. 3d 1100, 1133 (M.D. Ala. 2016) (contrasting psychiatrists and psychologists with other “mental health professionals,” such as social workers ... and counselors, some of whom are unlicensed”); Clifford S. Fishman, Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records, 86 OR. L. REV. 1, 6 (2007) (noting that “in many states, ... counselors are not licensed psychiatrists, psychologists, or social workers”). See generally Aronowitz, supra note 85, at 325 n.120. “The term psychotherapist itself connotes no licensing; to call oneself a psychotherapist does not require a degree of special training.” Id.

See Edourd, 854 N.W.2d at 459 (Hecht, J., concurring in part and dissenting in part). “Physicians, psychologists, nurses, professional counselors, social workers, marriage and family therapists, and alcohol and drug counselors ... fill specialized, technical roles in the realm of psychiatric care, and perform highly specialized functions in providing professional mental health services for clients and patients.” Id.


See David A. Sharar, Do Employee Assistance Programs Duplicate With Services Offered Through Mental Health Benefit Plans?, COMP. & BENEFITS REV., Jan./Feb. 2009, at 67, 68-69. “The advent of licensure under a counseling title in most states ... has created a new supply of licensed professionals doing EAP ... work.” Id.

See, e.g., Reich v. Price, 429 S.E.2d 372, 375 (N.C. Ct. App. 1993) (describing an EAP counselor who was “not qualified or licensed as a practicing psychologist”); see also Oleszko, 243 F.3d 1154, 1158 n.5 (“Because of the rapid growth of EAPs, states are only just beginning to establish licensing requirements for EAP personnel.”).

Nielsen, supra note 90, at 1156-57 n.183; Garber, supra note 109, at 926 (noting that “EAP counselors [who] are not licensed ... provide a similar service as a licensed counselor” (citing Oleszko, 243 F.3d at 1158)).
See, e.g., United States v. Lowe, 948 F. Supp. 97, 99 (D. Mass. 1996). “Jaffee does not control a determination of whether the federal privilege extends to communications with a rape crisis center employee or volunteer who is not a licensed social worker or psychotherapist.” Id.

See 206 F.R.D. 306 (S.D. Ala. 2002). (concluding that “the federal psychotherapist privilege does not extend to unlicensed social workers or ... professional counselors.”). But see Hague, supra note 76, at 586 (examining amendments to a Washington state act which extended the psychotherapist privilege to mental health clinics.) See also Delgado supra note 77, at 1055-56 (discussing the detriment of societal interests when not extending the privilege to unlicensed social workers in a team setting); see SkyWest Airlines, No. CV 10-2030 RGK(JC), 2011 U.S. Dist. LEXIS 158876, at *4 n.2 (“The Ninth Circuit has extended the privilege to unlicensed counselors” (citing Oleszko, 243 F.3d at 1159)); cf Murra, supra note 81, at 680. “An essential premise of ... the privilege is that ... communications must have been made to licensed psychiatrist, ... psychologist, ... or social worker.” Id. See also Student 1, 206 F.R.D. at 310 (finding no consensus among states extending privilege to unlicensed professionals including social workers and counselors); see also Fulkerson, supra note 83, at 422. “A bright line rule requiring licensure before confidentiality is triggered would enable unlicensed therapists to explain the limits of confidentiality to the patient.” Id. But see Dubbelday, supra note 84, at 814 (stating that having a license does not always mean that adequate and competent care will be provided). But see Aronowitz, supra note 85, at 346 (stating that “licensing ... requirements include ... education, training, and experience” and are good indicators of whether services offered are adequate).

See Student 1, 206 F.R.D. 306, 309. “Had it believed such a privilege appropriate, the Court could have extended it to unlicensed psychiatrists or psychologists, as some states have done. That the Court did not do so suggests that it considered the professionals' licensed status to be an important prerequisite to the privilege.” Id.

See id. (observing that a licensing limitation “was not required ... because the case did not involve a psychiatrist or psychologist, licensed or unlicensed”).

See Kenneth S. Broun, The Medical Privilege in the Federal Courts - Should It Matter Whether Your Ego or Your Elbow Hurts?, 38 LOY. L.A. L. REV. 657, 664 (2004). “The Court in Jaffee used the term ‘licensed’ in referring to the social worker to whom the communications were made, but that was the only fact scenario before the Court.” Id. See also Fulkerson, supra note 83, at 418. “The Court addressed only the two narrowest questions before it: whether the federal courts should recognize a psychotherapist privilege, and if so, whether that privilege should apply to licensed clinical social workers.” Id.

See Aronowitz, supra note 85, at 325. “The Court noted that the social worker in Jaffee was licensed under ... state law, but did not indicate that state licensing is a prerequisite.” Id.; cf. Nelken, supra note 10, at 17. “The Jaffee Court did not define the scope of the new privilege beyond what was necessary to decide the case before it.” Id.

See St. John v. Napolitano, 274 F.R.D. 12, 18 n.5 (D.D.C. 2011). “Jaffee left open the question of whether the privilege extends to mental health counselors other than licensed psychiatrists, psychologists, and social workers, and indicated that future courts would need to ‘delineate the full contours of the privilege.’” Jaffee v. Redmond, 518 U.S. 1, 18 (1996)). See also Unites States v. Schwensow, 942 F. Supp. 402, 406 (E.D. Wis. 1996). “[T]he [Jaffee] Court did not define who falls under the definition of ‘psychotherapist,’ other than licensed psychiatrists, psychologists and social workers. The Court left such details for lower courts to decide on a case-by-case basis.”, aff’d, 151 F.3d 650 (7th Cir. 1998).

See Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1156-57 (9th Cir. 2001). “[T]he Jaffee decision ... explicitly left to later courts the task of delineating the full contours of the privilege. The question we face is whether the psychotherapist-patient privilege recognized in Jaffee extends to unlicensed counselors employed by [an] EAP. We hold that it does.” Id.
See, e.g., Finley v. Johnson Oil Co., 199 F.R.D. 301, 303 (S.D. Ind. 2001). The court used the reasoning in Jaffee to conclude that communication to general practitioners at health clinics will fall within the scope of the federal common law privilege. Id. See also Nelken, supra note 10, at 15 (observing that the federal courts' definition of a psychotherapist “has already widened beyond the bounds set in Jaffee”).

See, e.g., IND. CODE § 25-40-2-2 (2017). Communications made by a client to an employee assistance professional in their capacity are privileged and may not be disclosed by the employee assistance professional. See also Sean A. Devlin, Comment, Union Communications Privilege: Is It Time for Ohio to Protect Union Representative-Member Communications?, 45 CAP. U. L. REV. 677, 716 (2017) (asserting that Ohio recognizes an “employee assistance program counselor-employee privilege”) (citing OHIO REV. CODE ANN. § 2317.02(G) (West Supp. 2016)).

See generally Nelken, supra note 10, at 15. “States vary widely in their definitions of who comes within their psychotherapist-patient privileges,” and federal courts “are unlikely to take as expansive a view as some states do when determining who is a psychotherapist for privilege purposes.” Id.


See Lewis v. United States, 517 F.2d 236, 238 n.4 (9th Cir. 1975). “The legislative history of Rule 501 ... makes it clear that Congress intended that the courts should continue to develop the federal common law of privilege on a case-by-case basis.” Id. See also N.O. v. Callahan, 110 F.R.D. 637, 640 (D. Mass. 1986), “Rule 501 envisions the flexible development of the federal common law of privilege on a case-by-case basis.” Id.

See Fox v. Gates Corp., 179 F.R.D. 303, 305 (D. Colo. 1998). “The Jaffee court declined to define the contours of the privilege, ... noting that such definition was more appropriately resolved on a case-by-case basis.” Id. See also Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997). The Jaffee Court left “the contours of the new privilege to be fleshed out over time on a case-by-case basis.” Id.

See Garg, supra note 56, at 237; see also Aronowitz, supra note 85, at 324. “In extending the psychotherapist-patient privilege to social workers, the Court indicated that this privilege is not frozen, and may be extended to other mental health care professionals.” Id.


Jaffee, 518 U.S. at 191. Counseling would serve the same public good for those of modest means, even though they often cannot afford the counseling. Id.

See Richardson v. Sexual Assault/Spouse Abuse Res. Ctr., 764 F. Supp. 2d 736, 740 (D. Md. 2011). “Unlicensed counselors also provide mental health treatment and often serve “the poor and those of modest means who cannot afford a psychiatrist or psychologist.”” Id. (quoting Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1157 (9th Cir. 2001)).

Bridget M. McCafferty, Note, The Existing Confidentiality Privileges as Applied to Rape Victims, 5 J.L. & HEALTH 101, 118 (1991). Every individual, whether or not impoverished, has a right to seek medical counseling from a licensed
practitioner just as individuals have the right to a confidential privilege with the practitioner. *Id.* Social workers and therapists take an oath of privacy to ensure their clients' confidentiality. *Id.*

132 See, e.g., Albuquerque Rape Crisis Ctr. v. Blackmer, 120 P.3d 820, 826 (N.M. 2005). “It would make little sense for victims of rape to be deprived of the privilege because they seek help from victim counselors at a rape crisis center, while victims with the resources to seek help from a licensed psychologist would benefit from the privilege.” *Id.* See also Dubbelday, supra note 84, at 821. “[I]ndividuals who may not be able to afford the services of a licensed or certified professional should not be subject to having their disclosures publicly revealed simply because they went to someone whom they could afford.” *Id.*

133 See Oleszko, 243 F.3d at 1157. “The reasons for recognizing a privilege for treatment by psychiatrists or social workers apply equally to EAPs. EAPs, like social workers, play an important role in increasing access to mental health treatment.” *Id.*

134 See *id.* (holding that “the psychotherapist-patient privilege recognized in *Jaffee* extends to unlicensed counselors employed by [an] EAP”).


136 See Brian P. McKeever, *Contours and Chaos: A Proposal for Courts to Apply the “Dangerous Patient” Exception to the Psychotherapist-Patient Privilege,* 34 N.M. L. REV. 109, 109 (2004). “The Supreme Court ... sidestepped the question of when exceptions to the psychotherapist-patient privilege might arise.” *Id.* See also Poulin, supra note 51, at 1373. “In *Jaffee*, the Court declined to ... address any of the possible exceptions to the privilege.” *Id.*


138 See Jennifer L. Odrobina, *The Lingering Questions of a Supreme Court Decision: The Confines of the Psychotherapist-Patient Privilege,* 52 CLEV. ST. L. REV. 551, 568-69 (2005). “The Court has ... left lingering questions for the lower courts to determine regarding possible exceptions to the privilege.” *Id.* See also Fulkerson, supra note 83, at 421 (“The *Jaffee* holding ... leaves undecided which exceptions apply to the privilege.”).

139 Compare SAMUEL KNAPP & LEON VANDECREEK, PRIVILEGED COMMUNICATIONS IN THE MENTAL HEALTH PROFESSIONS 61 (1987). “One of the biggest problems of the state legislatures and courts is in determining the scope of the waivers and exceptions.” *Id.* See also Fulkerson, supra note 83, at 421. “The most difficult task faced by the federal courts and ultimately the Supreme Court may be deciding to whom the ... psychotherapist privilege will apply.” *Id.*

140 PROPOSED FED. R. EVID. 504, reprinted in 56 F.R.D. 183, 240-41 (1972). The rule proposes psychotherapist-patient privilege and defines who may claim the privilege exceptions. *Id.*

141 See United States v. Chase, 340 F.3d 978, 990 (9th Cir. 2003). “[B]ecause ‘the Supreme Court has officially recognized the psychotherapist-patient privilege, and cited favorably to Proposed Rule 504 as initially proposed, the contents of the Proposed Rule have considerable force and should be consulted when the psychotherapist-patient privilege is invoked.”’ *Id.* (quoting 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 504.02, at 504-7 (2d ed. 1998) (citing *Jaffee v. Redmond,* 518 U.S. 1, 9-10 (1996))).


In re Grand Jury No. 91-1, 795 F. Supp. 1057, 1058 (D. Colo. 1992). Not only does it coherently and cogently set out the parameters of the privilege, but also it provides a strong indication that the Supreme Court would recognize the existence of such a privilege. Id. See also Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. at 1006. “Though we need not do so, we accept the general outline of Proposed Rule 504 as indicative of how a psychotherapist-patient privilege would operate in federal law.” Id.

See In re Aug., 1993 Regular Grand Jury, 854 F. Supp. 1380, 1391 (S.D. Ind. 1994). “This rule, although rejected by Congress, provides a thorough definition of the privilege and is readily employed by most courts when the circumstances require application of the psychotherapist-patient privilege.” Id.

In rejecting the proposed Model Rule 504, and the other proposed federal privileges, in favor of the more open-ended Federal Rule of Evidence 501, the Senate Judiciary Committee explicitly stated that its action “should not be understood as disapproving any recognition of a psychiatrist-patient ... privilege contained in the [proposed] rules.” Presumably, the rejection of Model Rule 504 similarly did not signify a disapproval of the exceptions to the privilege specified in that model rule.


See In re Sonsteng, 573 P.2d 1149, 1154 (Mont. 1977). “[T]o uphold the assertion of the privilege in commitment proceedings would be to frustrate the state interests involved in the commitment procedure, rendering a patient's true mental condition incapable of proof.” Id.

See PROPOSED FED. R. EVID. 504(d)(1) advisory committee's note (“Since disclosure is authorized only when the psychotherapist determines that hospitalization is needed, control over disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely.”), reprinted in 56 F.R.D. at 244.
though there is a legal distinction between criminal incarceration and involuntary civil commitment, the nuance - in terms of trust and confidence - likely does not matter much to the fellow committed.”

Id. One commentator even asserted that the disclosure of a patient's confidential communications in involuntary hospitalization proceedings would have a “particularly detrimental” impact on the “trust and confidence necessary to a proper therapeutic setting.” Lewis H. Orland, Evidence in Psychiatric Settings, 11 GONZ. L. REV. 665, 678 (1976).

See United States v. Auster, 517 F.3d 312, 319 (5th Cir. 2008). “Though there is a legal distinction between criminal incarceration and involuntary civil commitment, the nuance - in terms of trust and confidence - likely does not matter much to the fellow committed.”

Id. One commentator even asserted that the disclosure of a patient's confidential communications in involuntary hospitalization proceedings would have a “particularly detrimental” impact on the “trust and confidence necessary to a proper therapeutic setting.” Lewis H. Orland, Evidence in Psychiatric Settings, 11 GONZ. L. REV. 665, 678 (1976).


It is noted that “in the event of the disclosure of a serious threat of harm to an identifiable victim, the therapist will have a duty to protect the intended victim ...” Id. See also Timothy E. Gammon & John K. Hulston, The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties, 60 MO. L. REV. 749 (1995) (providing a comprehensive discussion of duties owed to an intended victim).

See 551 P.2d 334, 345-49, 354 (Cal. 1976). The Tarasoff court held that “once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.”

Id. at 345. This holding “has been ‘widely accepted (and rarely rejected) by courts and legislatures in the United States as a foundation for establishing duties of reasonable care upon psychotherapists to warn, control, and/or protect potential victims of their patients who have expressed violent intentions.’” Bradley v. Ray, 904 S.W.2d 302, 307 (Mo. Ct. App. 1995) (quoting Peter F. Lake, Revisiting Tarasoff, 58 ALB. L. REV. 97, 98 (1994)).

See Hayes, 227 F.3d at 586. The Hayes court's characterization of psychotherapists as testifying “against” their patients in involuntary hospitalization proceedings is inaccurate. See People v. Kailey, 333 P.3d 89, 97 (Colo. 2014) (asserting that there is a “difference between testifying in support of a patient's involuntary hospitalization ... and testifying against a patient in a criminal proceeding ...”); Daniel M. Buroker, Note, The Psychotherapist-Patient Privilege and Post-Jaffee Confusion, 89 IOWA L. REV. 1373, 1385 (2004). “[I]n a commitment hearing the psychotherapist acts as the patient's advocate ... Circumstances are vastly different in a criminal trial .... The psychotherapist then is not being called to testify on behalf of the patient, but rather against the patient.”


See United States v. Harper, 450 F.2d 1032, 1035 n.3 (5th Cir. 1971). “We note that the proposed federal rules of evidence would create a psychotherapist-patient privilege. The proposed privilege, however, also contains an exception for court-ordered mental examinations.”

Id. The proposed rule states, in relevant part, as follows: “If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged ... with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.” PROPOSED FED. R. EVID. 504(d)(2), reprinted in 56 F.R.D. 183, 241 (1972).

159 See Cody v. Marriott Corp., 103 F.R.D. 421, 423 (D. Mass. 1984). “[I]t is clear that where ... a plaintiff refers to specific mental and psychiatric injuries, the plaintiff is affirmatively placing in controversy a mental condition. Under those circumstances, it is appropriate for a court to order an examination.” Id.

160 See PROPOSED FED. R. EVID. 504(d)(2), reprinted in 56 F.R.D. at 241. It is difficult to envision a court ordering a litigant to be examined by an EAP counselor. See, e.g., In re Guynup v. Cty. of Clinton, 90 A.D.3d 1390, 1391 (N.Y. App. Div. 2011) (declining to adopt a hearing officer's recommendation that an employee “be required to participate in an employee assistance program ...”). However, an analogy to the exception might apply when an employer orders an employee to undergo EAP counseling. See, e.g., Tanks v. NEAS, Inc., 519 F. Supp. 2d 645, 647 (S.D. Miss. 2007) (describing an employer's “mandatory referral” of an employee to its EAP for counseling). Assuming the employee in this situation understands that the results of the examination will be reported to the employer, he would have “no reasonable expectation of confidentiality regarding his communications” with the counselor. Kamper v. Gray, 182 F.R.D. 597, 599 (E.D. Mo. 1998).

161 See Randleman v. State, 837 S.W.2d 449, 453 (Ark. 1992) (“It seems logical that communications made to a psychiatrist should not be privileged when the court initiated the examination.”); In re M.L., 28 A.3d 520, 524 (D.C. 2011) (“This exception to the ... privilege is logical - a court-ordered examination is not for the purpose of treatment, but is rather geared towards determining the existence of a fact or condition for the court's benefit.”).


163 PROPOSED FED. R. EVID. 504 advisory committee's note, reprinted in 56 F.R.D. at 244.

164 See Sugar and Zipser, supra note 156, at 1328:
In certain civil or criminal proceedings the court may wish to initiate an examination of the mental condition of one of the parties so that [it] may better determine the validity of a claim or defense which is raised. In these cases, the purpose of the examination would be totally frustrated if the examined party's revelations to the psychotherapist were privileged. Id. (footnote omitted).

165 See United States v. Leonard, 609 F.2d 1163, 1165 (5th Cir. 1980) (“Rule 12.2(c) precludes the use upon the issue of guilt of statements made by [the defendant] in the course of [a] court-ordered psychiatric examination. The rule reflects a clear congressional intent that such statements ... be used solely on the issue of sanity.” (discussing FED. R. CRIM. P. 12.2(c))); People v. Stevens, 194 N.W.2d 370, 373 (Mich. 1972). “We ... hold that no statement made by an accused in the course of a court ordered examination shall be admitted in evidence on the issue of guilt at the accused's trial.” Id. (adopting the reasoning of United States v. Albright, 388 F.2d 719 (4th Cir. 1968)).

166 See State v. Evans, 454 P.2d 976, 978 (Ariz. 1969). “We believe that insulating a defendant from the possibility that an examining psychiatrist will repeat on the stand defendant's 'confession' to him or other damaging admissions will promote the free interplay ... essential to obtaining a clear picture of defendant's mental health.” Id. See also State v. Lefthand, 488 N.W.2d 799, 80 (Minn. 1992). “The psychiatric inquiry into a defendant's competency cannot succeed unless the defendant cooperates; a defendant's true mental condition would not be discussed in many instances unless the psychiatrist can engage in a candid conversation with the defendant.” Id.

167 See Caver v. City of Trenton, 192 F.R.D. 154, 164 (D.N.J. 2000). At least one federal court has held that “the psychotherapist-patient privilege as defined in Jaffee is applicable to cases involving involuntary psychiatric/ psychological evaluations,” and that “records relating to such evaluations are protected from disclosure.” Id. See also Commonwealth v. Williams, 571 N.E.2d 29, 33 (Mass. App. Ct. 1991). “Confessions or admissions made by a defendant during the course of a court-ordered psychiatric examination are generally inadmissible.” Id.
See Parsons v. Weber Cty., 151 F.R.D. 130, 132 (D. Utah 1993). “[P]roposed [Rule 504] did not go beyond confidential communications between psychotherapist and patient .... It does not exclude testimony ... which is merely the diagnostic assessment of the psychotherapist.”. Id. See also Commonwealth v. Simmons, 719 A.2d 336, 341 (Pa. Super Ct. 1998). “[T]he privilege is designed to protect confidential communications made and information given by the client to the psychotherapist in the course of treatment .... However, the privilege is not designed to specifically protect the psychotherapist's own opinion, observations, diagnosis, or treatment alternatives ....” Id.

See, e.g., People v. Muskgrove, 358 N.E.2d 336, 343 (Ill. App. Ct. 1976) (permitting a psychiatrist to testify “to his own conclusions,” while excluding private patient statements); [O]ne might argue that a psychotherapist's observations of a patient's physical condition, or a psychotherapist's observations of a patient's emotional state or “affect”, considered as a distinct factor in the diagnosis (apart from the content of what the patient actually said), would not be covered by the privilege. Similarly, one might argue that the privilege would not protect the psychotherapist's ultimate diagnosis of the patient, or the psychotherapist's treatment plan for the patient - even though the privilege might protect the patient's various statements that led the psychotherapist to reach that diagnosis, or to formulate that treatment plan.


Interpreting the exception to prohibit the disclosure of the examinee's communications with the psychotherapist will not necessarily result in the candor essential to an accurate assessment of the examinee's mental or emotional condition, because the examinee may sense that “[a] person's mental health diagnoses ... necessarily reflect, at least in part, his or her confidential communications to the psychotherapist.” Stark v. Hartt Transp. Sys. 937 F. Supp. 2d 88, 91 (D. Me. 2013); cf. Holmes v. United States, 363 F.2d 281, 283 n.7 (D.C. Cir. 1966). A criminal defendant "might be unwilling to give to the examining psychiatrists information relevant to his mental condition but which supports [the] belief that he committed the [charged] offense". Id.

Courts commonly characterize the examinee in this situation as a “patient” or “client” of the psychotherapist. See, e.g., In re Adoption of H.Y.T., 436 So.2d 251, 252 (Fla. Dist. Ct. App. 1983) (discussing "communications ... made in the course of a court-ordered examination of a patient"). However, this characterization is inaccurate. See Commonwealth v. G.P., 765 A.2d 363, 365 (Pa. Super Ct. 2000) (stating that a “court-directed examination did not establish the relationship of client in the psychotherapist-patient privilege”); cf. In re Hoppe, 289 N.W.2d 613, 617 (Iowa 1980). “It is clear that a physician-patient relationship does not arise by reason of a court-ordered examination of the physical or mental condition of a defendant.” Id.

In Massachusetts, for example, “the psychotherapist-patient privilege normally attaches to court-ordered psychiatric interviews unless the interviewee is advised otherwise.” See United States v. Whitney, No. 05-40005-FDS, 2006 U.S. Dist. LEXIS 74522, at *7-8 (D. Mass. Aug. 11, 2006) (citing, inter alia, Commonwealth v. Lamb, 311 N.E.2d 47 (Mass. 1974)). See also Commonwealth v. Benoit, 574 N.E.2d 347, 354 (Mass. 1991) (stating Massachusetts' psychotherapist-patient privilege rule for court ordered examinations). “The privilege does not apply to communications made pursuant to a court-ordered examination where the patient has been warned in advance that his communications would not be privileged” (emphasis added). Id. Kentucky also “appears to limit the use of information from court-ordered examinations to circumstances in which the patient is informed that the communications are not privileged.” Steven R. Smith, Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other, 75 KY. L.J. 473, 518 (1986) (citing KY. REV. STAT. ANN. § 421.215(3)(b)).

See Sugar & Zipser, supra note 156, at 1329 (arguing for court-ordered examination exception requiring notice that patient's communication may be disclosed in court). “[T]he individual being examined] ‘may not be fully aware of the degree of harm to himself which his revelations may cause.” Id. However, exceptions to the federal privilege are governed by common law principles. See In re Pebsworth, 705 F.2d 261, 262 (7th Cir. 1983) (citing FED. R. EVID.
The common law view is that the patient need not be informed that communications made during the course of the court-ordered examination are not privileged. Myers v. Commonwealth, 87 S.W.3d 243, 245 (Ky. 2002).

See, e.g., In re Alvarez, 342 So.2d 492, 494 (Fla. 1977): Appellant was warned that the psychiatrists were going to testify concerning anything told them, and that he had a choice as to whether or not he would talk with the psychiatrists. During the examination, appellant did not express any desire not to talk to the doctors or request the doctors not to testify about anything told them .... Once the privilege was waived by the appellant, he [could not] revoke the [waiver] after the examination was completed. Id.


See Steven R. Smith, Constitutional Privacy in Psychotherapy, 49 GEO. WASH. L. REV. 1, 57-58 (1980): The absence of a privilege during an examination conducted pursuant to a court order may be justified on the ground that, because the patient knows that the therapist is obliged to report to the court, he has no expectation of privacy. Theoretically, the patient may refuse to talk with the therapist or at least to reveal intensely personal information. The voluntariness of this kind of waiver is difficult to accept, however, because patients may be committed or jailed if they refuse to talk with the therapist.

See United States v. Bolander, 722 F.3d 199, 223 (4th Cir. 2013). “[A]s the Supreme Court in Jaffee made clear, the privilege only extends to those psychotherapists who are being consulted for diagnosis and treatment, not under other circumstances.” Id. (citing Jaffee v. Redmond, 518 U.S. 1, 15 (1996)). See generally Lynda Womack Kenney, Note, Role of Jaffee v. Redmond’s “Course of Diagnosis or Treatment” Condition in Preventing Abuse of the Psychotherapist-Patient Privilege, 35 GA. L. REV. 345 (2000) (discussing this aspect of Jaffee).

See In re Aug., 1993 Regular Grand Jury, 854 F. Supp. 1375, 1377 (S.D. Ind. 1993) (quoting PROPOSED FED. R. EVID. 504(b), reprinted in 56 F.R.D. 183, 241 (1972)); see also United States v. Romo, 413 F.3d 1044, 1048 (9th Cir. 2005). “According to the [rule's] definition, the privilege applies only when a therapist practices his craft, not whenever a therapist and a patient communicate.” Id.

See Buttrum v. Black, 721 F. Supp. 1268, 1312 (N.D. Ga. 1989) (noting that court-ordered examination is not treatment, which is required for operation of the privilege), aff’d, 908 F.2d 695 (11th Cir.), reh'g denied, 916 F.2d 719 (11th Cir. 1990); In re Eduardo A., 261 Cal. Rptr. 68, 69 (Cal. Ct. App. 1989). “[A] court-ordered psychiatric examination is aimed at determining for the information of the patient and/or for the court, the patient's mental or emotional condition. It is an information-gathering tool, rather than a treatment tool.” Id. See also State v. Cole, 295 N.W.2d 29, 33 (Iowa 1980). “In court-ordered evaluations, ... the communication is not for the purpose of treatment but to determine the existence of a fact or condition for the benefit of the court.” Id.

See, e.g., Subia v. Tex. Dept of Human Servs., 750 S.W.2d 827, 830 (Tex. App. 1988). “The Appellant was examined by ... a psychologist, by order of the trial court. Neither the trial court nor the psychologist informed the Appellant ... that any communications made in the course of the examination would not be privileged.” Id. Subia was disapproved in part on other grounds in In re J.F.C., 96 S.W.3d 256, 267 & n.40 (Tex. 2002).
See Smith, supra note 172, at 517. “Examinations made for courts or for litigation cannot be made with a reasonable expectation of confidentiality because the subject should understand that the information from the interview will be transmitted to others.” Id.


See M.R.S. v. State, 867 P.2d 836, 842 n.4 (Alaska Ct. App. 1994) rev’d on other grounds, 897 P.2d 63 (Alaska 1995). “[S]ome commentators have specifically suggested that an exception for court-ordered psychological examinations is in fact unnecessary because such examinations fall outside the purview of confidential communications.” Id. at 843

See also Randleman v. State, 837 S.W.2d 449, 453 (Ark. 1992). “It is arguable that such an exception need not even have been included in the rule ... because a patient examined on court order is not consulting a psychotherapist ‘for purposes of diagnosis or treatment’ ....” Id. (quoting 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 504(7), at 504-33 (1980)).


See Premack v. J.C.J. Ogar, Inc., 148 F.R.D. 140, 145 (E.D. Pa. 1993). “To allow a plaintiff to hide ... behind a claim of privilege when [the plaintiff's] condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice.” Id. See also Ferrell, supra note 184, at 113. “Important fairness considerations justify this exception: an individual who wishes to receive the benefits of the judicial system should not be allowed to impose an additional burden on the system by withholding necessary information central to her claim.” Id. (quoting Developments in the Law - Privileged Communication, 98 HARV. L. REV. 1530, 1554 (1985)).

See United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1045 (E.D.N.Y. 1976), aff'd, 556 F.2d 556 (2d Cir. 1977). “Even those commentators who vigorously advocate a general broadening of the psychotherapist privilege acknowledge the justifiability of compelling the disclosure of relevant psychotherapeutic communications when the patient has himself raised an issue concerning his mental condition.” Id. See also Poulin, supra note 51, at 1375. “The patient-litigant exception included in Proposed Rule 504 represents the prevailing rule in the states and has been recognized as part of the federal common-law psychotherapist-patient privilege.” Id.

See Robert H. Aronson, The Mental Health Provider Privilege in the Wake of Jaffee v. Redmond, 54 OKLA. L. REV. 591, 606 (2001) (“noting that the majority of the cases interpreting Jaffee deal with ... the patient-litigant exception.”); see also Nelken, supra note 10, at 20. “To date, more than half the federal cases interpreting Jaffee involve the exception addressed in rejected Federal Rules of Evidence 504(d)(3) - the so-called ‘patient-litigant’ exception under which the privilege may be held not to apply if a party bases a claim or defense on her mental or emotional condition.” Id.
See Kronenberg v. Baker & McKenzie LLP, 747 F. Supp. 2d 983, 986 (N.D. Ill. 2010) (“It is only when a party puts his mental state in issue through some action of his own designed to advance his interests in the case ... that the privilege is waived.”); cf. Sims v. Blot, 534 F.3d 117, 134 (2d Cir. 2008). “[A] party's psychotherapist-patient privilege is not overcome when his mental state is put in issue only by another party.” Id.

See Huston Combs, Note, Dangerous Patients: An Exception to the Federal Psychotherapist-Patient Privilege, 91 KY. L.J. 457, 464 (2002). “The patient-litigant exception is in fact more of a waiver than an exception .... [B]y placing one's mental or emotional state at issue, a patient waives the privilege.” Id.

See Dixon v. Lawton, 898 F.2d 1443, 1450 (10th Cir. 1990). “The Advisory Committee Note explained the rationale for the rule: ‘By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses.’” Id. (quoting PROPOSED FED. R. EVID. 504 advisory committee's note, reprinted in 56 F.R.D. 183, 244 (E.D. Wis. 1972)); cf. Flora v. Hamilton, 81 F.R.D. 576, 579 (M.D.N.C. 1978). “Although Proposed Rule 504 recognized the privilege ... it also allowed for that privilege to be waived, whenever the case involves ‘communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense.’” Id. (quoting PROPOSED FED. R. EVID. 504(d)(3)), reprinted in 56 F.R.D. at 241).

See PROPOSED FED. R. EVID. 504(d)(3); see also Hucko, 185 F.R.D. at 530. (stating “Supreme Court Standard 504(d)(3) would have created an exception to the psychotherapist-patient privilege ....”).

See Developments in the Law - Privileged Communication, 98 HARV. L. REV. 1530, 1537 n.39 (1985): The situation in which a patient loses the privilege because she affirmatively places her ... emotional condition at issue is technically a ‘waiver’ because the availability of the privilege depends on the actions of the patient. The term ‘patient-litigant exception’ ... is the commonly accepted label for this waiver situation.

Id.

See Jackson v. Chubb Corp., 193 F.R.D. 216, 222 (D.N.J. 2000). “[C]ourts have arrived at differing conclusions as to the circumstances under which a plaintiff actually places his/her mental state at issue, thereby leaving a patient without any certainty, at the time of psychotherapy, as to whether the communications will remain privileged at a later date.” Id.

Id. at 220. “In what has become known as the broad view, courts have found waiver of the privilege where the plaintiff alleges emotional distress in his/her complaint, thereby placing his/her mental or emotional condition at issue, and seeks monetary damages for the psychological injury.” Id.

See Fritsch v. City of Chula Vista, 196 F.R.D. 562, 568 (S.D. Cal. 1999). “[T]he Supreme Court specifically included an exception in its proposed [rule] that the privilege does not protect communications concerning a plaintiff's emotional condition if the patient relies upon the condition as an element of her claim.” Id. See also Nelken, supra note 10, at 20 n.85. “[S]everal courts have relied on the language of rejected Federal Rule of Evidence 504(d)(3) in applying the patient-litigant exception broadly to any claim for emotional distress damages.” Id.

See, e.g., Vanderbilt, 174 F.R.D. at 229 (D. Mass. 1997). “A patient whose cause of action relies on the advice or findings of her psychotherapist cannot claim the privilege.” Id. See also Howe v. Town of N. Andover, 784 F. Supp. 2d 24, 34 (D. Mass, 2011). “The privilege is waived ... if plaintiff calls the psychotherapist as a witness or introduces into evidence (including by plaintiff's own testimony) the substance of any privileged communication.” Id.

See Auer v. City of Minot, 178 F. Supp. 3d 835, 841 (D.N.D. 2016). “[C]ourts that follow the narrow approach to waiver of the Jaffee privilege conclude that merely bringing a claim for emotional distress is not enough by itself to waive the privilege.” Id. See also Auer v. Trans Union, LLC, 834 F.3d 933 (8th Cir. 2016); Fritsch v. City of Chula Vista, 187 F.R.D. 614, 624 (S.D. Cal. 1999), modified, 196 F.R.D. 562 (S.D. Cal. 1999). “The psychotherapist-patient
privilege is waived only where the patient either calls his or her therapist as a witness, or introduces in evidence the
substance of any therapist-patient conversation” as the “conservative approach to waiver.” (discussing Vanderbilt). Id.

See Vanderbilt, 174 F.R.D. at 230; see also Auer, 178 F. Supp. 3d at 841. “The narrow approach is that the
Jaffee privilege is waived only if a plaintiff calls the psychotherapist to whom the communications were made to testify
about plaintiff's mental state or plaintiff testifies about or otherwise reveals their contents.” Id. See generally Ellen E.
McDonnell, Note, Certainty Thwarted: Broad Waiver Versus Narrow Waiver of the Psychotherapist-Patient Privilege
After Jaffee v. Redmond, 52 HASTINGS L.J. 1369 (2001) (comparing the two waiver approaches of the psychotherapist-
patient privilege).

See Fritsch, 196 F.R.D. at 565. “The courts are divided on the circumstances in which a patient waives her privilege
by bringing a law suit. Both lines of cases attempt to honor the policy concerns expressed in Jaffee.” Id.

sufficient weight to the privacy interests identified in Jaffee that underpin the psychotherapist-patient privilege.” Id.

Fritsch, 187 F.R.D. at 631. “The conservative approach to waiver ... affords greater protection to the psychotherapist-
patient relationship and is truer to ... Jaffee ... in that it results in a more certain, predictable application of the privilege.”
Id.

when she claimed damages for emotional distress in this action ....”); see also Jackson v. Chubb Corp., 193 F.R.D.
216, 225 n.8 (D.N.J. 2000) (“[T]he most common way for a plaintiff to place his/her mental or emotional condition
at issue is to assert an [Americans with Disabilities Act] violation, a claim for intentional or negligent infliction
of emotional distress, or seek damages for severe emotional distress.”).

See U.S. v. Meagher, 531 F.2d 752, 753 (5th Cir. 1976) (“In its Proposed Rules of Evidence, Rule 504, the Supreme
Court ... expressly excepted from the privilege those situations in which the patient relies upon his mental condition as
an element of his defense; i.e., whenever the defendant raises an insanity defense.”); People v. Lines, 531 P.2d 793,
801 (Cal. 1975) (stating that “the patient places her mental or emotional condition in issue ... by pleading not guilty
by reason of insanity”).

See, e.g., Davis v. Ross, 107 F.R.D. 326, 329 (S.D.N.Y. 1985) (“[P]laintiff's mental condition is very much in issue
in this case, and treatment by a psychiatrist is highly relevant.”); see also Owens v. Sprint/United Mgmt. Co., 221
F.R.D. 657, 659 (D. Kan. 2004) (“Generally, ... plaintiff's medical and psychological records are held to be relevant as
to both causation and the extent of plaintiff's alleged injuries and damages if plaintiff claims damages for emotional
pain, suffering, and mental anguish.”).

Gross v. Lunduski, 304 F.R.D. 136, 161 (W.D.N.Y. 2014) (“[A]bsent a showing that the requested discovery seeks
relevant evidence ... there is no need to consider whether responsive information is protected by an asserted privilege,
and, a fortiori, whether such privilege may have been waived.”); Maynard v. Heeren, 563 N.W.2d 830, 838 (S.D.
1997) (“Unquestionably, the privilege is waived under what is often called the 'patient-litigant' exception. Yet discovery
must still be limited to relevant communications between patient and therapist when a mental or emotional condition
arises as an element of a claim or defense.”).

she has not explicitly waived the privilege. All she has done is make her communication with her psychotherapist
potentially relevant.”).
See United States v. Zouras, 497 F.2d 1115, 1119-20 (7th Cir. 1974) (“[E]vidence excluded by any privilege[] is excluded not because [it] is not relevant - by hypothesis it is - but because of independent policy justifications.”); see also Hucko v. City of Oak Forest, 185 F.R.D. 526, 530 (N.D. Ill. 1999) (“[T]he very nature of a privilege is that it prevents disclosure of information that may be relevant ... to serve interests that are of over-arching importance.”).

See Santelli v. Electro-Motive, 188 F.R.D. 306, 308 (N.D. Ill. 1999) (noting that “communications between a psychotherapist and patient may be relevant to a particular issue in a case or significant to the party opposing the privilege”); Brian Domb, Note, I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege, 5 J.L. & HEALTH 209, 236 (1999) (“[I]t is clear that, in certain circumstances, the [psychotherapist-patient] privilege excludes vital relevant evidence, perhaps the only evidence available.”).

See, e.g., Heilman v. Waldron, 287 F.R.D. 467, 475 (D. Minn. 2012) (“Because psychotherapist-patient communications are privileged, the Court may not order these communications produced merely because they are relevant ...”); see also Hucko, 185 F.R.D. at 531 (asserting that “the mere relevance, or even importance, of certain information to a plaintiff's claim is insufficient to strip the plaintiff of the privilege”).


See Nelken, supra note 10, at 42. “The treatment of exceptions to the psychotherapist-patient privilege is still in the early stages of development, and few appellate courts have addressed the issue at all.” Id.


See B. Joseph Wadsworth, Case Note, Recognition of a Federal Psychotherapist-Patient Privilege, 32 LAND & WATER L. REV. 873, 875 (1997) (“[A]t this point, there are no recognized exceptions to the federal psychotherapist-client privilege ....”).

See, e.g., Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000) (“Numerous courts since Jaffee have concluded that ... a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue.”); see also Svetanics, supra note 36, at 758 n.306. “Less than two weeks after the Supreme Court's decision in Jaffee, district courts began the task of defining the scope of the privilege.” Id.

See Odrobina, supra note 138, at 552 (“The appellate courts have been inconsistent in deciding whether to acknowledge the various exceptions.”).

See Combs, supra note 190, at 463-64. “It is clear that the Advisory Committee that drafted proposed Rule 504, with its three exceptions, contemplated the psychotherapist-patient privilege giving way to evidentiary needs.” Id.

See Paruch, supra note 37, at 380. “Currently, some twenty jurisdictions recognize the three exceptions to the psychotherapist-patient privilege contained in Proposed Rule 504 of the Federal Rules of Evidence ....” Id.

See In re Pebsworth, 705 F.2d 261, 262 (7th Cir. 1983). “[T]he contours and exceptions of [federal] privileges are clearly a matter of federal common law; state-created principles of privilege do not control.” Id. See also North Dakota
INSTILLING CONFIDENCE BY PRESERVING..., 15 J. Health &...
INSTILLING CONFIDENCE BY PRESERVING..., 15 J. Health &...
236 See United States v. Ghane, 673 F.3d 771, 789 (8th Cir. 2012) (Loken, J., concurring in part and dissenting in part) ("[T]here may be situations when footnote 19 of the Supreme Court's opinion in Jaffee mandates, or at least strongly supports, adoption of a 'dangerous patient' exception to the psychotherapist-patient privilege in criminal proceedings."); see also People v. Carrier, 867 N.W.2d 463, 479 (Mich. Ct. App. 2015) ("[T]he footnote in Jaffee, 518 U.S. at 18 n.19 ... tends to lend support for recognizing a dangerous-patient exception to the privilege.").

237 See U.S. v. Chase, 340 F.3d 978, 989 (9th Cir. 2003) ("Conspicuously absent from the [rule's] list [of exceptions] was a dangerous-patient exception"); Edwards, supra note 230, at 180 ("When the Proposed Rule 504 was introduced, it included three specific exceptions to the psychotherapist-patient privilege, but it did not include an exception regarding dangerous persons.").

238 See McKeever, supra note 136, at 112 (characterizing the Jaffee footnote as "ambiguous"); Klinka, supra note 24, at 882 (stating that the Jaffee footnote "has drawn much speculation and controversy as to what kind of situations warrant exceptions to the privilege").


240 See Chase, 340 F.3d at 995 (Kleinfeld, J. concurring). In a concurring opinion, Justice Kleinfeld elaborated that the present case is just as the Jaffee footnote surmises, and although is dictum, it is treated with “due deference” by the Supreme Court. Id. See also United States v. Baird, 85 F.3d 450, 453 (9th Cir. 1996); United States v. Highsmith, No. 07-80093-CR-MARRA/HOPKINS, 2007 U.S. Dist. LEXIS 60848, at *6-7 (S.D. Fla. Aug. 20, 2007) discussing footnote 19's “narrow exception to the psychotherapist-patient privilege,” which “carries substantial weight”).

241 See Ghane, 673 F.3d at 784 (noting that the dangerous patient exception has been “discussed, but often rejected, by circuit courts”). In addition, the “majority of states have no such exception as part of their evidence jurisprudence.” Hayes, 227 F.3d at 585.

242 Hayes, 227 F.3d at 585 (discussing the Tarasoff duty); see also United States v. Landor, 699 F. Supp. 2d 913, 925-26 (E.D. Ky. 2009) (quoting and following Hayes); Highsmith, 2007 U.S. Dist. LEXIS 60848, at *6. The Chase and Hayes courts interpreted footnote 19 in Jaffee to recognize the duty a psychotherapist has to warn and protect third parties from serious threats of harm. Chase, 340 F.3d at 984; Hayes, 227 F.3d at 585.

243 See, e.g., Hayes, 227 F.3d at 585 (discussing the Jaffee footnote). The court reasoned that although there is a psychotherapist-patient privilege, occasionally the therapist will have to testify in court to perform their “duty to protect.” Id. For a discussion of the Rule 504 exception, see supra Section III.A.1.

244 See Hayes, 227 F.3d at 586 (clarifying the contours of professional duty when giving testimony). “[C]ompliance with the professional duty to protect does not imply a duty to testify against a patient in criminal proceedings or in civil proceedings other than [those] directly related to the patient's involuntary hospitalization, and such testimony is privileged and inadmissible if a patient properly asserts the psychotherapist-patient privilege.” Id. The only other legal proceeding in which the exception suggested by the Jaffee footnote might apply under the reasoning of these cases is one in which the potential victim is seeking a restraining order preventing contact by the patient perceived to be dangerous: Testimony by a therapist in a restraining order or hospitalization proceeding will often meet the terms of the Jaffee footnote as strictly applied. It may well be that “a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist” in that proceeding.

Harris, supra note 239, at 63 (quoting Jaffee v. Redmond, 518 U.S. 1, 18 n.19 (1996)).
340 F.3d 978 (9th Cir. 2003). One commentator has stated that “[t]he most powerful statement against a dangerous patient exception comes from the Ninth Circuit Court’s opinion in ... Chase.” Paul S. Appelbaum, Privilege in the Federal Courts: Should There Be a “Dangerous Patient Exception”? , 59 PSYCHIATRIC SERVS. 714 (2008). For a comprehensive analysis of Chase, see Recent Cases, Evidence - Federal Testimonial Privilege - Ninth Circuit Holds That There is No Dangerous-Person Exception to the Federal Psychotherapist-Patient Privilege, 117 HARR. L. REV. 996 (2004).


See Chase, 340 F.3d at 979-81.

Id. at 981.

See id. at 981.

Id. at 979.

The federal appellate courts “function principally through divisions of three judges.” Church of Scientology v. Foley, 640 F.2d 1335, 1339 (D.C. Cir. 1981) (Robinson, J., dissenting). A decision issued by a three-judge panel is “binding authority until the decision is withdrawn or reversed by the Supreme Court or an en banc court.” Nichols v. Harris, 17 F. Supp. 3d 989, 993 (C.D. Cal. 2014) (citing cases).

United States v. Chase, 301 F.3d 1019, 1021 (9th Cir.), vacated, 314 F.3d 1031 (9th Cir. 2002).

Id. at 1024. See generally Bradford E. Young, Recent Decision, “Dangerous Patient” Exception to Psychotherapist-Patient Privilege Permits Psychiatrists to Testify Against Their Patients, 38 AM. J.L. & MED. 514 (2002) (discussing the Ninth Circuit's panel decision).

See Chase, 340 F.3d at 985 (“We are faced with an even split between the circuits that have considered the question under Rule 501.”). See also Phillip A. Sellers II, Comment, United States v. Landor: The Federal Circuit Split Over the Dangerous Patient Exception to the Psychotherapist-Patient Privilege, 34 AM. J. TRIAL ADVOC. 417 (2010) (discussing the federal courts' divergent views of the exception).

See United States v. Chase, 314 F.3d 1031 (9th Cir. 2002). The existence of a circuit split may prompt a federal appellate court to review a case en banc. See, e.g., Latta v. Otter, 779 F.3d 902, 904 (9th Cir. 2015) (O'Scannlain, J., dissenting from denial of rehearing en banc) (“Thoughtful, dedicated jurists who strive to reach the correct outcome ... have considered this issue and arrived at contrary results. This makes clear that ... we are presented with a ‘question of exceptional importance’ that should have been reviewed by an en banc panel.” (quoting FED. R. APP. P. 35(a))). However, the Chase court could not have resolved the circuit split by sitting en banc, regardless of how it decided the case. See Chase, 340 F.3d 985 (“[W]hether we decide that there is a dangerous patient exception to the federal psychotherapist-patient privilege, or that there is not, we will have company.”).

551 P.2d 334 (Cal. 1976). For a description of the Tarasoff holding, see supra note 154 (explaining that there are exceptions to a psychotherapist's duty of confidentiality).

See Chase, 340 F.3d at 984, 985.
See id. at 982 (“[W]e differentiate two distinct concepts: confidentiality and testimonial privilege. By ‘confidentiality,’ we refer to the broad blanket of privacy that state laws place over the psychotherapist-patient relationship. By ‘privilege,’ we mean the specific right of a patient to prevent the psychotherapist from testifying in court.”).

See id. at 981, 984-85.

Id. at 985.

See id. at 979, 985.

See, e.g., Harris, supra note 239, at 51 (“In attempting to justify the dangerous patient exception to the evidentiary privilege, ... the Supreme Court of California sought to identify its social purpose with the purpose justifying Tarasoff disclosure ....” (discussing Menendez v. Superior Ct., 834 P.2d 786, 796 (Cal. 1992))).

See Guerrier v. State, 811 So.2d 852, 855 (Fla. Dist. Ct. App. 2002) (“Victim protection may ... require disclosure to law enforcement so that the law enforcement agency may assist in protecting the victim from the threat.”); Bradley v. Ray, 904 S.W.2d 302, 306 (Mo. Ct. App. 1995) (discussing the psychotherapist's duty “to warn the intended victim or to communicate the existence of ... danger to those likely to warn the victim, which may include notifying appropriate law enforcement authorities”) (emphasis omitted).

See Chase, 340 F.3d at 986-87; cf. Harris, supra note 239, at 35 (“It is one thing for a psychotherapist to contact law enforcement or a potential victim to prevent a patient from carrying out dangerous, criminal intentions, and quite another to compel the therapist to testify to confidential conversations with the patient in a later criminal proceeding against the patient.”).

See Chase, 340 F.3d at 987 (“The Tarasoff duty is justified on the ground of protection ....”); compare Harris, supra note 239, at 51-52 (“The Tarasoff policy purpose - the prevention of harm to third parties - supports allowing, or even requiring, that the therapist breach confidentiality to contact law enforcement authorities and/or the intended victim at the time of a serious pending threat.”).

Chase, 340 F.3d at 987. The deleterious effect the compelled disclosure of a patient's confidential communications is likely to have on the psychotherapist-patient relationship has long been recognized: Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication.


See Harris, supra note 239, at 63 (noting that in “a typical criminal proceeding against a patient ... the government may seek to introduce a patient's threat communicated confidentiality to a therapist as evidence of intent or plan to commit the charged crime”).

Chase, 340 F.3d at 987; cf. McKeever, supra note 136, at 127 (“[A]llowing a psychotherapist's testimony in a subsequent criminal trial serves no purpose other than easing the prosecutor's burden to prove a completed crime.”).

See Odrobinia, supra note 138, at 560 (“When the confidences are disclosed in a trial proceeding the imminent danger no longer exists, therefore obliterating the necessity to disclose confidential information in order to protect third parties from harm.” (citing Chase, 340 F.3d at 987)).
See Chase, 340 F.3d at 987 (stating that there “is not necessarily a connection between the goals of protection and proof” when a psychotherapist testifies at a patient's criminal trial); compare State v. Miller, 709 P.2d 225, 236 (Or. 1985) (asserting that the societal interest in protecting a patient's potential victims would “never justify a full disclosure in open court, long after any possible danger has passed”). See generally Harris, supra note 239, at 44 (“Testimony by the psychotherapist ... where the threatened harm has occurred and is the basis of the prosecution, unlike disclosure to law enforcement authorities or a potential victim at the time of the threat, would not serve the purpose of protecting against imminent injury.”).

See Chase, 340 F.3d at 991-92. In reaching this conclusion, the court noted that the privilege is premised “on the assumption that less harm will ensue if patients feel free to ventilate their intentions.” Id. at 989 (quoting Harris, supra note 239, at 38); cf. People v. Wharton, 809 P.2d 290, 348 (Cal. 1991) (Broussard, J., dissenting) (“[T]he privilege and the exceptions to that privilege should be interpreted to encourage potentially dangerous persons to seek psychotherapy by providing them with protection against the disclosure of their confidences in subsequent criminal proceedings.”).

See United States v. Parker, 65 F. Supp. 3d 358, 366 n.2 (W.D.N.Y. 2014) (“At least the Ninth, Eighth and Sixth Circuits have held that there is no dangerous-patient exception to the psychotherapist-patient testimonial privilege recognized by Jaffee.”).

See Odrobina, supra note 138, at 566 (“The decision in Chase did not resolve the question of whether the courts should recognize a dangerous-patient exception.”).

See, e.g., United States v. Hardy, 640 F. Supp. 2d 75, 80 (D. Me. 2009) (“The First Circuit has not spoken to this issue.”); see also People v. Carrier, 867 N.W.2d 463, 479 (Mich. Ct. App. 2015) (finding no “definitive federal principle with respect to the applicability of the dangerous-patient exception, given the little, and indeed conflicting, federal case law on the subject.”); Harris, supra note 239, at 35 (“As on the federal side, little state case law addresses the dangerous patient exception.”).

See, e.g., McKeever, supra note 136, at 148 (“Protecting potential victims from the risk of harm posed by dangerous patients justifies a ‘dangerous patient’ exception in criminal cases.”).

See United States v. Alperin, 128 F. Supp. 2d 1251, 1253 n.5 (N.D. Cal. 2001). “The Tenth Circuit has recognized that a post-Jaffee exception to the psychotherapist-patient privilege exists where a serious threat could only be averted by disclosure of the otherwise-privileged communication.” Id. (citing United States v. Glass, 133 F.3d 1356, 1359-60 (10th Cir. 1998)); State v. Orr, 969 A.2d 750, 777 (Conn. 2009) (Palmer, J., concurring in part). “Two federal Circuit Courts of Appeals ... have recognized the dangerous patient exception to the psychotherapist-patient privilege.” Id. (citing Glass, 133 F.3d at 1359-60, and United States v. Auster, 517 F.3d 312, 320 (5th Cir. 2008)).

133 F.3d 1356 (10th Cir. 1998). While in the mental health unit of a hospital, during an examination by Dr. Darbe, Mr. Glass said he wanted to get into the history books by shooting Bill and Hillary Clinton. Id. Several days later, Dr. Darbe released Mr. Glass under the condition that he participate in an outpatient mental health treatment while residing at his father's home. Id. Ten days later, it was discovered that Mr. Glass had left his father's home, and the outpatient nurse notified local law enforcement. Id. Subsequently, the Secret Service contacted Dr. Darbe, who told them Mr. Glass' statement. Id. 

Id. at 1359 (quoting Jaffee v. Redmond, 518 U.S. 1, 18 n.19 (1996)) (emphasis omitted) ruling the psychotherapist-patient privilege was available to protect Glass' statements from compelled disclosure.

See, e.g., Appelbaum, supra note 245, at 715 (asserting that “the Tenth Circuit offered little analysis in support of the exception it recognized, simply relying on the wording of the [Jaffee] footnote”); see also Paruch, supra note 37, at 393.
“Many judges and legal scholars have taken the position that the dangerous-patient exception, as set forth by the Glass court, should not apply in criminal cases.” *Id.*

280 See *Chase*, 340 F.3d at 985 (9th Cir. 2003). Because the defendant's statements were made for the purpose of obtaining treatment, and because there is no dangerous patient exception to the federal privilege that would otherwise apply, Dr. Dieter's testimony about the defendant's communications to her was erroneously admitted. *Id.* at 992.


282 227 F.3d 578 (6th Cir. 2000). Responding to the majority's refusal to adopt the dangerous patient exception, the dissent in *Hayes* argued that a patient's threatening statements made during therapeutic counseling should only be privileged “up to the point at which notice is given that the actual or threatened criminal conduct being discussed is no longer covered by confidentiality.” *Id.* at 589 (Boggs, J., dissenting). Far from being an endorsement of the dangerous patient exception as some commentators have suggested (see infra notes 283 and 285), this is simply an assertion that a patient waives the privilege “by continuing to threaten after he [has] been given notice that his threats would not be held in confidence.” *Id.* (Boggs, J., dissenting); see also *Chase*, 340 F.3d at 988 (characterizing the reasoning of the *Hayes* dissent as “a cousin to a common analysis of the waiver of a privilege”).

283 See Klinka, supra note 24, at 918 (asserting that the concurring opinion in *Chase* “was akin to” the *Hayes* dissent in that it too “favored recognition of a dangerous patient exception, under the *Glass* reasoning” (discussing *Chase*, 340 F.3d at 993-98 (Kleinfeld, J., concurring)).

284 See United States v. Chase, 301 F.3d 1019, 1024 (9th Cir. 2002) (“We find the *Hayes* dissent more persuasive than the majority opinion ....”), vacated, United States v. Tech. Serv., 314 F.3d 1031 (9th Cir. 2002); Recent Cases, supra note 245, at 997 (stating that the “Ninth Circuit panel, in a per curiam opinion, affirmed the trial judge's view that a dangerous-person exception to the psychotherapist-patient privilege existed” (citing *Chase*, 301 F.3d at 1021)).

285 See Paruch, supra note 37, at 366:
The Tenth Circuit, in *Glass*, along with the dissenting judges [sic] in *Hayes* and Judge Kleinfeld, concurring in *Chase*, believed that the Supreme Court suggested it would be appropriate to recognize a dangerous-patient exception to the psychotherapist-patient privilege in situations where a serious threat of harm can only be prevented by a therapist's disclosure.

*Id.*


287 See *id.* *Murillo* “is not controlling precedent, but may be persuasive authority” in other Fifth Circuit cases. See Ballard v. Burton, 444 F.3d 391, 401 n.7 (5th Cir. 2006) (citing 5TH CIR. R. 47.5.4). Oddly, “[u]npublished opinions issued before January 1, 1996 are binding precedent” in the Fifth Circuit. See Macktal v. U.S. Dept of Labor, 171 F.3d 323, 328 n.3 (5th Cir. 1999) (citing 5TH CIR. R. 47.5.3) (emphasis added). See also David L. Horan, *The Rules that Govern the Rules that Govern in the Federal Courts of the Fifth Circuit*, 67 TEX. B.J., Sept. 2004, at 622, 626 (discussing the Fifth Circuit's “rather peculiar rule on the binding effect of unpublished decisions).

288 See *Murillo*, 2000 WL 1568160, at *1 (citing violation of 18 U.S.C. § 875(c)). Glock is the name of a familiar brand of semi-automatic pistols. See Gaffney v. State, 940 S.W.2d 682, 684 n.1 (Tex. App. 1996). However, use of the term as a verb is not unique to the *Murillo* case. See, e.g., Gaffney, 940 S.W. 2d at 684 (“Gaffney mentioned that
he was going to take care of some business, ‘and he was going to Glock some people.’ According to Walker, ‘most people know that means kill them.’”) (footnote omitted).

289 See Murillo, 2000 WL 1568160, at *1, 3.

290 See id. at *1 (noting that the counselor reported the threat to his supervisor, who relayed it to the employee's supervisor, one of the “target[s] of the threat”).

291 See id. at *3 (“The government does assert ... that insofar as [the counselor] professionally determined that [the employee's] statement exhibited the 'potential for homicidal ideations' and that [his] immediate supervisor could be in danger, EAP guidelines required him to disclose [the] statements and alert the supervisor. Thus, no psychotherapist/patient privilege protected such statements.”).

292 See Mavroudis v. Superior Court, 102 Cal.App.3d 594, 600-01, 730 (Ct. App. 1980). (“If the patient does not pose an imminent threat of serious danger to a readily identifiable victim, a disclosure of the patient's confidence would not be necessary to avert the threatened danger and the therapist would be under no duty to make such a disclosure.”) Id. at 600-01. See also Fleming & Maximoy, The Patient or His Victim: The Therapist's Dilemma, 62 CALIF. L. REV. 1025, 1065 (1974) (constructing Tarasoff).

293 See Murillo, 2000 WL 1568160, at *3. The court instead held that the employee waived any privilege he might have claimed when he revealed the substance of his threatening statement to third parties in an internet posting. See Murillo, 2000 WL 1568160, at *1, 3. The court explained that a “voluntary disclosure of information which is inconsistent with the confidential nature of the relationship waives the privilege.” Id. at *3; cf. In re Associated Gas & Elec. Co., 59 F. Supp. 743, 744-45 (S.D.N.Y. 1944) (“Once the confidential matter is voluntarily disclosed to the public, it is no longer a secret and the privilege which might be claimed ... disappears.”).

294 Murillo, 2000 WL 1568160, at *3; cf. People v. Wharton, 809 P.2d 290, 312 (Cal. 1991). “[I]f the therapist believes the patient is a danger to another and disclosure is necessary to prevent the danger[, ... there is no privilege.” Id. (internal punctuation omitted); Collins v. Blue Cross & Blue Shield, 579 N.W.2d 435, 440 n.2 (Mich. Ct. App. 1998). “[W]e note that a patient's threats of violence, made while under treatment, are generally not privileged.” Id.

295 133 F.3d 1356 (10th Cir. 1998) (discussing a dangerous EAP exception that may exist).

296 See, e.g., Acquarola v. Boeing Co., No. 03-cv-2486, 2004 U.S. Dist. LEXIS 4495, at *9 (E.D. Pa. Feb. 26, 2004) (indicating that an exception to the EAP privilege might apply “if a serious threat of harm to the patient or others can be averted only by disclosure by the therapist” (citing Jaffee v. Redmond, 518 U.S. 1, 18 n.19 (1996))).

297 See McKeever, supra note 136, at 109 (stating no uniform test exists to determine when, if ever, a ‘dangerous patient’ exception applies in criminal cases).

298 See, e.g., Jackson v. Univ. of Rochester, No. 04-CV-6067T (F), 2006 U.S. Dist. LEXIS 52418, at *15 (W.D.N.Y. July 31, 2006) (describing an employee who admitted to an EAP counselor that he brought a gun to work to potentially harm his co-workers). Indeed, the opportunity to defuse such threats is one of the perceived benefits of EAP counseling. See Guggenheim & Werbel, supra note 4, at 42 (asserting that “the societal interest in having employees seek EAP counseling is highlighted by the fact that EAP programs for employees play a key role in the prevention of workplace violence”).

299 243 F.3d 1154 (9th Cir. 2001). See supra note 56, at 237 (describing Oleszko broadening the immunity to include confidential communications between employees and unlicensed counselors).
Sellers, supra note 254, at 431 (discussing the federal courts’ divergent views of the exception). See id. at n.118 (referencing Oleszko in extending psychotherapist-patient privilege when communications exist between an EAP counselor and defendant).

See In re Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1005 n.8 (D.N.J.), aff’d, 879 F.2d 857 (3d Cir. 1989). Congress could enact legislation providing that the privilege will “give way ... in certain situations.” Id. at 1004. See also Catherine M. Baytion, Comment, Toward Uniform Application of a Federal Psychotherapist-Patient Privilege, 70 WASH. L. REV. 153, 162 (1995) (“Congress should enact more specific rules to resolve the inconsistencies among the circuits when judges apply the psychotherapist-patient privilege.”). See generally United States v. Gullo, 672 F. Supp. 99, 103 (W.D.Y.N. 1987) (stating that Rule 501 “leaves privileges to statutory and common law development”).

See Appelbaum, supra note 245, at 716 (“With the split among the federal circuits, it seems clear that the U.S. Supreme Court ultimately will need to speak to the question of whether a dangerous patient exception exists in the federal courts and, if so, what its dimensions may be.”); Sellers, supra note 254, at 432 (“As several circuits have not yet ruled on the dangerous patient exception, the Supreme Court should grant certiorari at its next opportunity in order to determine whether the dangerous patient exception in ‘light of reason and experience ... serves the public interest’ by allowing for effective psychological treatment.” (quoting Jaffee v. Redmond, 518 U.S. 1, 8, 11 (1996))).

See Baytion, supra note 301, at 162 (“[T]here is unlikely that the Supreme Court will resolve the many issues that trail the psychotherapist-patient privilege anytime soon. Years could pass before the Supreme Court may address these issues one-by-one as individual cases move through the appellate system.”) (footnote omitted). Congress seems even less likely than the Supreme Court to address this issue in the foreseeable future. See In re Sealed Case, 676 F.2d 793, 807 n.45 (D.C. Cir. 1982) (“Congress has preferred to leave to the courts questions of which privileges to recognize and when to apply them.”); Kelly v. City of San Jose, 114 F.R.D. 653, 656 (N.D. Cal. 1987) (“[T]here has been no codification of federal privilege law .... Instead, Congress left the courts to develop privilege doctrine on a case by case basis.”).

See Elizabeth F. Mistretta & Linda B. Inlow, Confidentiality and the Employee Assistance Program Professional, 39:2 AAOHN J. 84, 85 (1991). “EAP counselors have little or no guidance from the courts and legislatures as to how to deal with impaired employees who may create a danger to themselves or to others.” Id. (citing Alisse C. Camazine & Jennifer Borron, Confidentiality: Absolute or Not?, EAP DIGEST 31 (1985)); cf. NYE, supra note 24 at 4-17. “There is an essential tension between the EAP's need to maintain confidentiality in order to maintain the integrity of the EAP concept and the employer's need to have information with which to protect itself from potentially dangerous situations.” Id.

See In re Sealed Grand Jury Subpoenas, 810 F. Supp. 2d 788, 793 (W.D. Va. 2011). [T]he Supreme Court has not specifically recognized the crime-fraud exception to the psychotherapist-patient privilege. Id. (discussing Jaffee v. Redmond, 518 U.S. 1, 8, 11 (1996)).

See Odrobina, supra note 138, at 565. “[T]he crime-fraud exception to the privilege was not listed in the proposed exceptions; courts have, nonetheless recognized it as an exception.” Id. See also David Weissbrodt et al., Piercing the Confidentiality Veil: Physician Testimony in International Criminal Trials Against Perpetrators of Torture, 15 MINN. J. INT'L L. 43, 67 (2006). “Although the Proposed Rule 504, later rejected by Congress, did not include a crime-fraud exception, one federal court applied the crime-fraud exception to the psychotherapist-patient privilege when a patient allegedly defrauded lenders and disability insurers. Id. (citing In re Grand Jury Proceedings (Violette), 183 F.3d 71, 73 (1st Cir. 1999)).

See Gutter v. E.I. Dupont de Nemours, 124 F. Supp. 2d 1291, 1298 (S.D. Fla. 2000). “The crime/fraud exception requires the disclosure of otherwise privileged communications or material ....” Id. (describing the exception's application in the attorney-client privilege context).
308 See Violette, 183 F.3d at 77 (weighing mental health benefits of protecting communications against excluding communications made in furtherance of crime).

309 See id. at 75 (“This exception grew up in the shadow of the attorney-client privilege.”); see also Chester Cty. Hosp. v. Indep. Blue Cross, No. 02-2746, 2003 U.S. Dist. LEXIS 25214, at *18 (E.D. Pa. Nov. 7, 2003). “The crime-fraud exception was originally established as a caveat to the attorney-client privilege.” Id.

310 See In re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979). “This rule ... is ordinarily viewed as an exception to the attorney-client privilege, and there is no question as to its applicability in that context.” Id. See also Kendall C. Dunson, Comment, The Crime-Fraud Exception to the Attorney-Client Privilege, 20 J. LEGAL PROF. 231 (1996) (discussing the exception's application in the attorney-client context).

311 See Grand Jury Proceedings, 604 F.2d at 802 (“The attorney-client privilege is designed to encourage clients to make full disclosure of facts to counsel so that he may properly, competently, and ethically carry out his representation. The ultimate aim is to promote the proper administration of justice.”) (citation omitted). See also Loustau v. Refco, Inc., 154 F.R.D. 243, 245 (C.D. Cal. 1993). “An attorney client privilege exists to encourage full and frank disclosure of information between an attorney and his client, to further the interests of justice.” Id. See also Chester Cty. Hosp. v. Indep. Blue Cross, No. 02-2746, 2003 U.S. Dist. LEXIS 25214, at *18 (E.D. Pa. Nov. 7, 2003). “The crime-fraud exception was originally established as a caveat to the attorney-client privilege.” Id.

312 See Harris Mgmt., Inc. v. Coulombe, 151 A.3d 7, 14 (Me. 2016) (discussing the purpose of the crime-fraud exception). “The public policies served by the attorney-client privilege must be counterbalanced, however, with the ‘broader public interests in the observance of law and administration of justice’ served by the crime-fraud exception to the attorney-client privilege.” Id. at 16 (quoting In re Motion to Quash Bar Counsel Subpoena, 982 A.2d 330, 336 (Me. 2009)).

313 See U.S. v. Lentz, 419 F. Supp. 2d 820, 830 (E.D. Va. 2005), aff’d, 524 F.3d 501 (4th Cir. 2008); see also In re Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986). “All reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud.” Id.


315 See Dobrowitsky, supra note 314, at 636-37. “Unlike the attorney-client relationship, ... the link between psychotherapy and compliance with the law is unclear .... The rationale for the psychotherapist-patient privilege is not to protect an adversarial process, but rather to promote the public mental health through individual therapy.” Id. See also Parsio, supra note 235, at 658. “The legal system asks for all relevant evidence so that justice may be served, while the psychotherapist-patient relationship asks for a certain degree of confidentiality so that the treatment can be as successful as possible.” Id.

316 See Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1176 (C.D. Cal. 1998) (observing that the attorney-client privilege “encourages observance of the law and facilitates the maintenance of an effective adversarial system of justice,” while the psychotherapist-patient privilege “serve[s] the public interest in providing appropriate ... mental health care”), aff’d, 216 F.3d 1082 (2000).

317 See Chesapeake & Ohio Ry. Co. v. Kirwan, 120 F.R.D. 660, 665 (S.D. W.Va. 1988) (“With regard to the crime-fraud exception, case law, as well as proposed, but unadopted rule 503(d)(1) of the Federal Rules of Evidence, establish that consultations with counsel for the purpose of initiating or furthering a criminal or fraudulent scheme will not be shielded by the attorney-client privilege.”) (footnote omitted).

that the proposed rules of evidence would have given “statutory underpinnings to the [attorney-client] privilege, with exceptions for inter alia furtherance of crime or fraud”).

319  See Broun, supra note 117, at 675 (“Proposed Federal Rule 504 did not contain a crime-fraud exception.”); Weissbrodt et al., supra note 306, at 67 (observing that “Proposed Rule 504, later rejected by Congress, did not include a crime-fraud exception”).

320  See United States v. Chase, 340 F.3d 978, 989 (9th Cir. 2003) (“The exceptions allowed were patterned after those in a then-existing Connecticut statute.” (quoting Harris, supra note 239, at 37)) (bracketing omitted); Dyson v. Hempe, 413 N.W.2d 379, 386 (Wis. Ct. App. 1987) (“[T]he committee of psychiatrists and lawyers who drafted the Connecticut statute concluded that in three instances the need for disclosure was sufficiently great to justify the risk of possible impairment of the relationship .... These three exceptions are incorporated in the [proposed federal] rule.” (quoting Proposed FED. R. EVID. 504 advisory committee's note, reprinted in 56 F.R.D. at 244)).

321  The advisory committee note to proposed Rule 504 states that the exceptions to the privilege that would have been established by the rule “differ substantially from those of the attorney-client privilege, as a result of the basic differences in the relationships.”  Dyson, 413 N.W.2d at 386 (quoting PROPOSED FED. R. EVID. 504 advisory committee's note, reprinted in 56 F.R.D. at 243); see also Cleveland v. Rotman, 297 F.3d 569, 573 (7th Cir. 2002) (noting there are differences between the psychiatrist-patient relationship and the attorney-client relationship).


323  See Chase, 340 F.3d at 989. “The Proposed Rules cited an article by two authors of the Connecticut statute.” Id. (citing PROPOSED FED. R. 504 advisory committee's note, reprinted in 56 F.R.D. at 243-44); see also Recent Case, First Circuit Recognizes Crime-Fraud Exception to Psychotherapist-Patient Privilege - In re Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71 (1st Cir. 1999), 113 HARV. L. REV. 1539, 1544 n.43 (2000). “The Advisory Committee modeled its exceptions on the then-existing Connecticut statute, citing an article written by two of the statute's draftsmen, Abraham S. Goldstein and Jay Katz of the Yale Law School.” (citation omitted). Id.

324  See Goldstein & Katz, supra note 322, at 188 (“It should be noted that our committee deliberately chose not to write a ‘future crime’ exception into the bill.”); cf. Ali v. State, 21 A.3d 140, 168 (Md. Ct. Spec. App. 2010). “[W]e decline the State's invitation to adopt a crime-fraud exception to the statutorily created patient-psychotherapist privilege .... The State has cited no Maryland authority to show that the legislature intended for such an exception to apply and we have found none.” Id.

325  See Recent Case, supra note 323, at 1544 (“The Committee [that drafted proposed Rule 504] chose not to include a crime-fraud exception, apparently having decided that the particular nature of the psychotherapist-patient relationship rendered such an exception unnecessary.”); cf. State v. Miller, 709 P.2d 225, 236 (Or. 1985). “The legislature specifically provided an exception to the attorney-client privilege for [a] client's communications about future crimes, but failed to do so for the psychotherapist-patient privilege. This suggests that the legislature has struck the balance in favor of protecting communications to psychotherapists, even when harm is threatened ....” (citation omitted). Miller, 79 P.2d at 236.

326  Dobrowitsky, supra note 314, at 628; see also In re Grand Jury Proceedings (Violette), 183 F.3d 71, 77 (1st Cir. 1999) (discussing the lack of a crime-fraud exception to the psychotherapist-patient privilege). [T]he rule's drafters “may have thought it self-evident that communications made for the purpose of furthering a crime or fraud would not be ‘made for the purposes of diagnosis or treatment.’” Violette, 183 F.3d at 77 (quoting PROPOSED FED. R. EVID. 504(b), reprinted in 56 F.R.D. 183, 241 (1972)).
See generally United States v. Hayes, 983 F.2d 78, 82 (7th Cir. 1992). “Advisory Committee notes are analogous to legislative history which [courts] use to clarify legislative intent. These notes, however, are not binding on the court.” Id.

See, e.g., Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 587 F. Supp. 2d 548, 566 (S.D.N.Y. 2008). “Plaintiffs’ [sic] have not presented any authority for extending the crime-fraud exception beyond the borders of its standard application to material covered by the attorney-client privilege.” Id. See also Magnetar Techs. Corp. v. Six Flags Theme Park Inc., 886 F. Supp. 2d 466, 488 (D. Del. 2012). “The crime-fraud exception is ... limited to circumstances where the client seeks legal assistance to plan or perpetrate a crime or fraud.” (emphasis added). Id.

See In re Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 420 (2006) (“The exception is not new, and its underlying rationale is so basic and important that it extends to privileges other than the attorney-client privilege.”) (citation omitted), reprinted in 432 F. Supp. 2d 794 (N.D. Ill. 2006); Smith v. United States, 193 F.R.D. 201, 209 (D. Del. 2000). “[The attorney-client privilege] does not rule out the application of the crime-fraud exception in other contexts ... [the] exception has been interpreted ... to apply to other privileges.” Id.

See United States v. Alexander, 736 F. Supp. 968, 1005 (D. Minn. 1990). “A review of the application of the crime-fraud exception to the spousal privilege shows it to have been applied and upheld in the majority of circuits that have been confronted with the question. Id. See also Neil A. Rube, Comment, No More Confidences? The Crime-Fraud Exception as a Bar to the Marital Privilege: United States v. Neal, 59 ST. JOHN'S L. REV. 588 (1985) (discussing the exception's application in the spousal privilege context).

See In re Sealed Grand Jury Subpoenas, 810 F. Supp. 2d 778, 793 (W.D. Va. 2011). The court discussed Violette, 183 F.3d at 78, stating, “at least one Circuit Court of Appeals has recognized the crime-fraud exception to the psychotherapist-patient privilege established by Jaffee.” Id. See also State v. Famighetti, 817 So.2d 901, 911 (Fla. Dist. Ct. App. 2002) (Sorondo, J., dissenting) (noting that the First Circuit has held that “the crime-fraud exception, which is applicable to the attorney-client privilege, is also applicable to the psychotherapist-patient privilege” (discussing Violette)).

Violette, 183 F.3d 71 (1st Cir. 1999). For an interesting summary of Violette by one of the attorneys involved in the case, see Michael D. Love, First Circuit Creates Crime-Fraud Exception to the Psychotherapist-Patient Privilege, 48 U.S. ATT’YS BULL. 19 (2000). For a more comprehensive discussion of the case, see Recent Case, supra note 323.

See Violette, 183 F.3d at 73 (stating Violette's psychiatric records were sought by a grand jury investigating bank fraud); cf. Rademan v. Superior Ct., 103 Cal. Rptr. 2d 283, 293 (Cal. Ct. App.) review denied sub nom. Rademan v. Los Angeles Cty. Superior Ct., No S095745, 2001 Cal. LEXIS 2312 (Cal. Apr. 11, 2001) (discussing early development of the crime-fraud exception). “[E]arlier federal decisions invoke[d] the equivalent of the crime/fraud exception when necessary to review a psychotherapist's records for alleged criminal activity of the psychotherapist.” Rademan, 103 Cal. Rptr. 2d at 293 (emphasis added).

See, e.g., United States v. Hansen, 955 F. Supp. 1225, 1226 (D. Mont. 1997). “Most jurisdictions allow a psychotherapist to assert the privilege on behalf of a patient.” Id. See also Parsons v. Weber Cty., 151 F.R.D. 130, 131 (D. Utah 1993) (holding that the psychotherapist may claim the privilege on behalf of the patient) (citing PROPOSED FED. R. EVID. 504(c), reprinted in 56 F.R.D. 183, 241 (1972)).

See Violette, 183 F.3d at 73 (stating the government buttressed its argument with an affidavit from the case agent).

Id. at 73. “[A] party asserting the psychotherapist-patient privilege must show that the allegedly privileged communications were made ... in the course of diagnosis or treatment.” Id. (citing Jaffee v. Redmond, 518 U.S. 1, 15 (1996)).
337  
See id. at 78; cf. Stidham v. Clark, 74 S.W.3d 719, 724 (Ky. 2002). “[I]f the privilege is viewed from the perspective of what it includes instead of what is excepted therefrom, a communication made for the purpose of committing a crime or fraud is ... not one made for the purpose of diagnosis or treatment.” Id.

338  
See Violette, 183 F.3d at 73 (stating suspect moved to intervene to secure investigative information, or alternatively, case agent's affidavit). But see Mylan Labs. Inc. v. Soon-Shiong, 90 Cal. Rptr. 111, 117 (Cal. Ct. App. 1999). “[T]he holder of [a] privilege has standing to assert the privilege ... simply by virtue of the fact that he or she is the holder of the privilege, and ... there is no need to intervene in order to be able to assert the privilege.” Id.

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See Violette, 183 F.3d at 73-74. “The court's implicit rationale appears to have been that because the communications were made in furtherance of fraud, they could not have served a bona fide therapeutic purpose.” Id.

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See id. at 74. The facts presented afforded “a basis ... for concluding that the communications were made outside the course of genuine diagnosis or treatment”. Id.

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See In re Sealed Grand Jury Subpoenas, 810 F. Supp. 2d 788, 794 (W.D. Va. 2011). “As explained by the First Circuit in Violette, it is questionable whether communications made with a psychotherapist in furtherance of a crime would be protected by privilege because they were not made in the course of 'bona fide psychotherapy.’” Id. (quoting Violette, 183 F.3d at 77); cf. In re Grand Jury Subpoena, 662 F.3d 65, 69 (1st Cir. 2011). “[I]t is not necessary to resort to the crime-fraud exception ... until the privilege itself has ... attached.” Id. (discussing the attorney-client privilege).

342  
Nelken, supra note 10, at 41-42 (footnote omitted); see also Recent Case, supra note 323, at 1544 n.44. “[F]raudulent communications not made in the context of bona fide diagnosis or treatment are not privileged in the first place under Jaffee; therefore, no special exception is needed. Violette probably falls into this category.” Id.

343  
See Violette, 183 F.3d at 73-74. “The district court found that the communications to which the subpoenas related were not made in the course of diagnosis or treatment, and that a crime-fraud exception applied.” (emphasis added). Id.

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See id. at 74. “In this appeal, the government offers only the crime-fraud rationale.” Id.

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See Dugas v. Coplan, 428 F.3d 317, 347 n.41 (1st Cir. 2005) (Howard, J., dissenting). “[I]t is long settled that we are free to affirm on any ground supported by the record - whether that ground has been argued by the respondent/appellee or not.” (citing Sammartano v. Palmas Del Mar Props. Inc., 161 F.3d 96, 97 n.2 (1st Cir. 1998); see also Wojcik v. Mass. State Lottery Comm’n, 300 F.3d 92, 104 n.4 (1st Cir. 2002). “[W]e may affirm on any ground supported by the record and fairly presented to the court below ....” Id. Interestingly, in a subsequent article summarizing the Violette case, one of the government's attorneys insisted that the arguments it made on appeal “were substantially identical to those made to the District Court.” Love, supra note 332, at 20.

346  
See Violette, 183 F.3d at 74. “For simplicity's sake, we ... assume (without deciding) that [the] communications can be said to have been made presumptively in the course of diagnosis or treatment. On this assumption, ... the communications are protected unless an exception pertains. It is to this question that we now turn.” Id.

347  
See id. at 72. “This matter presents an issue of first impression: whether the nascent psychotherapist-patient privilege encompasses a so-called ‘crime-fraud exception,’ parallel to that which we previously have recognized anent the attorney-client privilege.” Id. at 74. “To our knowledge, no court since Jaffee has determined whether the privilege is subject to a crime-fraud exception.” Id.
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See John C. Lore III, \textit{Self-Incrimination in Juvenile Court: Why a Comprehensive Pretrial Privilege Is Needed to Protect Children and Enhance the Goal of Rehabilitation}, 47 U. LOUISVILLE L. REV. 439, 450 (2009) (stating that seven states established an exception where the communication was made or used in furtherance of a crime, tort, or fraud).

351  
See Broun, \textit{supra} note 117, at 676. “The crime fraud [exception] is a significant limitation on the attorney-client privilege. Although the matter ... has come up far less frequently in connection with the psychotherapist-patient privilege, the recognition of the exception in cases such as \textit{Violette} serves notice that it is probably an important limitation on that privilege as well.” \textit{Id.} (footnote omitted).

352  
See, e.g., Recent Case, \textit{supra} note 323, at 1542. “Because the privacy concerns inherent in psychotherapeutic relationships are arguably greater than those in attorney-client relationships, the court's unqualified recognition of the crime-fraud exception was shortsighted.” \textit{Id.}

353  
See, e.g., \textit{Harris}, \textit{supra} note 239, at 61. “Even if one accepts this ... exception as efficacious in the attorney-client context, there are significant differences between the psychotherapist-patient and attorney-client relationships that make the analogy suspect.” \textit{Id.} See also Recent Case, \textit{supra} note 323, at 1541. “The First Circuit, in emphasizing the parity between the utilitarian justifications for the attorney-client privilege and the psychotherapist-patient privilege, failed to address adequately the ways in which the differences between the public interests protected by the two privileges render the latter a less suitable context for the crime-fraud exception.” \textit{Id.}

354  
See Dobrowitsky, \textit{supra} note 314, at 639; see also Robert M. Fisher, \textit{The Psychotherapeutic Professions and the Law of Privileged Communications}, 10 WAYNE L. REV. 609, 634 (1964) (asserting that “there should be no future crimes exception from the [psychotherapist-patient] privilege”).

355  
See \textit{Mutual of Omaha Ins. Co. v. Am. Nat'l Bank & Trust Co.}, 610 F. Supp. 546, 549 (D. Minn. 1985). “This exception does not necessarily extend to the disclosure to a psychotherapist during treatment of a future intent to commit a crime. The patient's purpose in divulging such thoughts may well be to obtain treatment rather than aid in furtherance or concealment of a crime.” \textit{Id.}

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See, e.g., \textit{United States v. Weed}, 99 F. Supp. 3d 201, 206 (D. Mass. 2015). “[T]he evidence ... is sufficient to meet the Government's burden of showing that the attorney's legal expertise and advice was used in furtherance of [an] illegal scheme.” \textit{Id.}; see also Dobrowitsky, \textit{supra} note 314, at 636. “[A]ttorneys can be valuable participants in the execution of a fraud. The legal knowledge and advice given by an attorney may assist clients in illegal conduct.” \textit{Id.}

357  
See \textit{Harris}, \textit{supra} note 239, at 60; see also Dobrowitsky, \textit{supra} note 314, at 627. “Unlike seeking legal advice, patients who desire to break the law seek psychotherapy because they recognize such desire as a problem they hope to correct.” \textit{Id.} See also Goldstein & Katz, \textit{supra} note 322, at 188. “[P]atients willing to express to psychiatrists their intention to commit crime are not ordinarily likely to carry out that intention. Instead, they are making a plea for help.” \textit{Id.}

358  
See \textit{Harris}, \textit{supra} note 239, at 61-62; see also Recent Case, \textit{supra} note 323, at 1543. “Psychotherapy differs from legal counsel in that it by definition involves individuals with particular mental and emotional vulnerabilities, and a patient's expressed intent to break the law will often reflect the very problem for which he legitimately seeks help.” \textit{Id.}
See, e.g., Commonwealth v. Wojcik, 686 N.E.2d 452, 461 (Mass. App. Ct. 1997). “[T]he judge could have found that the statements in question were made not for the purpose of diagnosis and treatment but were part of [a] continuing scheme of insurance fraud.” Id.; see also Dobrowitsky, supra note 314, at 627 (discussing “instances in which a patient's purpose in consulting with a psychotherapist is to further a crime or fraud, rather than to pursue treatment”).

See Genentech, Inc. v. Insmed, Inc., 236 F.R.D. 466, 470 (N.D. Cal. 2006). “The party asserting the crime-fraud exception must establish a prima facie case that the privileged communication was made in furtherance of a crime or fraud. This is a threshold question which is hard to answer without knowing the substance of the privileged communication.” Id.

See Harris, supra note 239, at 62. “Whether or not the patient is truly seeking help to overcome these impulses (a determination that would, in any event, be excruciatingly difficult if not impossible to make), revealing them to the therapist creates an opportunity for intervention that is central to the psychotherapist's professional purpose.” Id.

See Allred v. State, 554 P.2d 411, 429 (Alaska 1976) (Dimond, J., concurring). “[O]ften the purpose of the psychotherapist-patient relationship is the prevention and curing of antisocial behavior .... If this type of activity is successful, then many potential crimes will not be committed.” Id.; cf. Jaffee v. Redmond, 51 F.3d 1346, 1355 (7th Cir. 1995). “The recognition of a psychotherapist/patient privilege can only serve to encourage troubled individuals ... to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors.” Id., aff'd, 518 U.S. 1 (1996).

See In re Public Def. Serv., 831 A.2d 890, 901 (D.C. 2003): A lawyer's advice is ... vital when the client misguidedly contemplates or proposes actions that the client knows to be illegal. The existence of the attorney-client privilege encourages clients to make such unguarded and ill-advised suggestions to their lawyers. The lawyer is then obliged, in the interests of justice and the client's own long-term best interests, to urge the client, as forcefully and emphatically as necessary, to abandon illegal conduct or plans. Id.

See In re Grand Jury Proceedings (Violette), 183 F.3d 71, 76 (1st Cir. 1999). The court suggested “the effects of the crime-fraud exception on the administration of justice are [not] unambiguously positive” because it “surely can be argued that if the veil of secrecy were totally opaque, lawyers might have more opportunities to discourage illegal behavior ...” Id.

See Public Def. Serv, 831 A.2d at 901; see also David F. Chavkin, Why Doesn't Anyone Care About Confidentiality? (And, What Message Does That Send to New Lawyers?), 25 GEO. J. LEGAL ETHICS 239, 256 (2012). “[O]pen communication allows lawyers to protect their clients; if a client intends to break the law and discloses this intention to his or her lawyer, the lawyer has an opportunity to dissuade the client from committing a crime.” Id.

See Dobrowitsky, supra note 314, at 639. “A crime fraud exception to the psychotherapist-patient privilege threatens honest and full disclosure necessary to successful therapy.” Id.

Recent Case, supra note 323, at 1544; cf. Note, The Future Crime or Tort Exception to Communication Privileges, 77 HARV. L. REV. 730, 733 (1964). “It is important that persons intending crime be encouraged to consult either psychiatrist or priest, and the proper functions of both relationships would seem to include the discussion of antisocial conduct. Hence, the privilege should cover statements of illegal intent as well as confessions of past acts.” Id.

Fisher, supra note 354, at 633; see also Goldstein & Katz, supra note 322, at 188. The very making of [statements reflecting an intent to commit crimes] affords the psychiatrist his unique opportunity to work with patients in an attempt to resolve their problems. Such resolutions would be impeded if patients were unable to speak freely for fear of possible disclosure at a later date in a legal proceeding. Id.
See Bassine v. Hill, 450 F. Supp. 2d 1182, 1185 (D. Or. 2006). Jaffee “was a civil case with no confrontation clause or due process considerations implicated.” Id. Thus, the Court “left the lower courts with the task of reconciling [the] privilege with the constitutional rights of a criminal accused.” United States v. Chee, 191 F. Supp. 3d 1150, 1154 (D. Nev. 2016). See also United States v. Alperin, 128 F. Supp. 2d 1251, 1253 (N.D. Cal. 2001). “Jaffee does not discuss how the privilege is to be applied when a criminal defendant's constitutional rights are implicated.” Id. See also Smith, supra note 176, at 57 (noting “the Court's failure to recognize an explicit criminal defense exception in its proposed rules of evidence”).

See State v. Pulizzano, 456 N.W.2d 325, 330 (Wis. 1990). “The two [clauses] have been appropriately described as opposite sides of the same coin and together, they grant defendants a constitutional right to present evidence.” Id.; see also Peter Westen, The Compulsory Process Clause, 73 MICH. L. REV. 71, 182 (1974). “The compulsory process clause of the sixth amendment is a companion and counterpart to the confrontation clause.” Id.

United States v. Shrader, 716 F. Supp. 2d 464, 469 (S.D. W. Va. 2010) (quoting U.S. CONST. amend. VI) (bracketing and ellipses omitted). It has been said that perhaps no constitutional right is “more fundamental to the concept of fair trial than is the right of the accused to confront witnesses and to have process issue to compel attendance of witnesses.” See Calley v. Callaway, 382 F. Supp. 650, 692 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975). It has been said that perhaps no constitutional right is “more fundamental to the concept of fair trial than is the right of the accused to confront witnesses and to have process issue to compel attendance of witnesses.” Id.


See United States v. W.R. Grace, 439 F. Supp. 2d 1125, 1136 (D. Mont. 2006) (contemplating the recognition of a comparable exception to the attorney-client privilege); see also United States v. Brown, 587 F.2d 187, 190 n.7 (5th Cir. 1979). “Although we express no opinion with respect to this issue because it is not properly before us, we find [the] argument that an evidentiary privilege can be outweighed by a defendant's Sixth Amendment right of compulsory process an intriguing one.” Id.

See Thomas J. Reed, The Futile Fifth Step: Compulsory Disclosure of Confidential Communication Among Alcoholics Anonymous Members, 70 ST. JOHN'S L. REV. 693, 749 (1996). One commentator labeled this potential limitation on the psychotherapist-patient privilege “a Sixth Amendment exception for psychiatric information on state's witnesses in criminal prosecutions.”


Compare Haworth, 168 F.R.D. at 661 (noting decision on Sept. 13, 1996), with Jaffee, 518 U.S. at 2, 6, 8, 17 (noting decision on June 13, 1996). A few courts discussed the exception prior to Jaffee's adoption of the psychotherapist-patient privilege. Id. See, e.g., Doe v. Diamond, 964 F.2d 1325, 1328-29 (2d Cir. 1992); U.S. v. Lindstrom, 698 F.2d 1154, 1164-68 (11th Cir. 1983); Brown, 587 F.2d at 190 n.7. However, the continued validity of these pre-Jaffee cases is open to question. See Fishman, supra note 107, at 22 n.89. “[W]hen deciding cases prior to Jaffee, courts did not have Jaffee's mandate against balancing the need for the evidence against the patient's interest in the privilege.” Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 228 (D. Mass. 1997).

See Haworth, 168 F.R.D. at 661. Another decision recognized a compelling need for exceptions in criminal matters. See United States v. Fattah, 187 F. Supp. 3d 563, 566 (E.D. Pa. 2016). “For example, if a prosecution witness had a history of psychosis or hallucinations or certain forms of dementia that affected his or her veracity or recall, a defendant in our view would clearly have a Due Process right to obtain the relevant mental health records.” Id.

See Stevens v. Bordenkircher, 746 F.2d 342, 346 (6th Cir. 1984). “The Sixth Amendment to the United States Constitution confers upon a criminal defendant the right to confront witnesses against him. This guarantee includes the right to test the credibility of prosecution witnesses through cross-examination.” Id. (relying on Davis v. Alaska, 415 U.S. 308, 315-16 (1974); Douglas v. Alabama, 380 U.S. 415, 418 (1965); and Pointer v. Texas, 380 U.S. 400, 404 (1965)).


See Lindstrom, 698 F.2d at 1160 (“Certain forms of mental disorder have high probative value on the issue of credibility.”). However, “[a] holding that any and all aspects of a witness' psychiatric history are probative of credibility would embrace unwarranted stereotypes of persons who seek mental health treatment.” Lewis v. Velez, 149 F.R.D. 474, 484 (S.D.N.Y. 1993).


Ritchie, 480 U.S. at 52. “In Ritchie the Supreme Court held that the confrontation clause is a trial right and not a constitutionally-compelled rule of pretrial discovery.” See Dykhouse v. Mugge, 735 F. Supp. 1377, 1383 (D. Ill. 1990) (noting that non-compliance with a subpoena does not violate a Sixth Amendment confrontation right).


Haworth, 168 F.R.D. at 661; cf. United States v. Gates, 10 F.3d 765, 767 (11th Cir. 1993) (“Confrontation is primarily a trial right.... not a constitutionally compelled rule of pre-trial discovery.” (citing Ritchie)), modified on reh’g, 20 F.3d 1550 (11th Cir. 1994).

United States v. Turkish, 623 F.2d 769, 773-74 (2d Cir. 1980). “Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does not carry with it the additional right to displace a proper claim of privilege ....” Id. See also In re Subpoena No. 22, 709 A.2d 385, 389 (Pa. Super. Ct.) (“.... defendant's constitutional rights to confrontation and

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*See United States v. Chee, 191 F. Supp. 3d 1150, 1153 (D. Nev. 2016).* “Since Jaffee, courts have differed on whether the Sixth Amendment can trump the psychotherapist-patient privilege.” *Id.* “[I]t appears that the lower federal courts are split as to whether a criminal defendant's right to present a ‘valid defense’ under the Sixth Amendment will trump the psychotherapist-patient privilege.” *State v. Johnson, 102 A.3d 295, 305 (Md. 2014).*

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*See, e.g., United States v. Shrader, 716 F. Supp. 2d 464, 472 (S.D. W. Va. 2010)* (“[T]he psychotherapist-patient privilege is not subordinate to the Sixth Amendment rights of Defendant.”); *United States ex rel. Patosky v. Kozakiewicz*, 960 F. Supp. 905, 917 (W.D. Pa. 1997). “Petitioner has failed to demonstrate the existence of a confrontation clause violation based on the psychiatric records to which he was denied access ....” *Id.; see also United States v. LaVallee, 439 F.3d 670, 692 (10th Cir. 2006).* “The Appellants have failed to provide this Court with any relevant authority suggesting that the Confrontation Clause permits [a criminal defendant] to discover the privileged medical records of an adverse witness.” *Id.*

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*See, e.g., Bradley v. Eighth Judicial Dist. Ct., 405 P.3d 668, 674 (Nev. 2017).* “[C]ourts have held that, at least prior to trial, the Confrontation Clause does not mandate disclosure of privileged or confidential communications. We agree with these courts and conclude that [a criminal defendant's] right to confrontation does not overcome the psychologist-patient privilege during pretrial discovery.” *Id. (citations and footnote omitted). See generally Robert Weisberg, Note, Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges, 30 STAN. L. REV. 935 (1978) (discussing the state courts' treatment of the issue).*

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*See In re Grand Jury Empanelled Oct. 18, 1979, 633 F.2d 276, 280 (3d Cir. 1980).* The court required “balancing of the need for the evidence against the validity of the privilege” for exceptions to the privilege. *Id. See also Poulin, supra note 51, at 1347 (“[C]ourts may turn to a balancing test to define the exceptions to the privilege.”).

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*See Sabree v. United Bhd. of Carpenters & Joiners of Am., Local No. 33, 126 F.R.D. 422, 425 (D. Mass. 1989).* “[T]he interests protected by the recognition of a psychotherapist-patient privilege are extensive. They include the interests of the patient in obtaining treatment for mental illness as well as society's interests in the advancement of mental health.” *Id.*

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*See, e.g., United States v. Mazzola, 217 F.R.D. 84, 88 (D. Mass. 2003): [T]his case is a criminal prosecution involving the medical records of a key government witness. The evidentiary benefit of allowing access to such medical records to defense counsel in order to effectively prepare and cross examine [the witness] is great. Although the societal interest in guarding the confidentiality of communications between a therapist and his or her client is significant, it does not outweigh the need for effective cross examination of this key government witness at the criminal trial.* *Id. (citations omitted); see also United States v. DeLeon, No. CR 15-4268 JB, 2018 U.S. Dist. LEXIS 76212, at *16 n.5 (D.N.M. Apr. 30, 2018). “[T]he Jaffee Court's promulgation of an ‘absolute’ privilege must be tempered by constitutional considerations in criminal cases; a case-dependent balance between the need for the privilege and the defendant's need for the evidence will have to be conducted[.]” *Id. (quoting 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 501.02(6) (11th ed. 2017)).

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*See, e.g., In re Sealed Case (Medical Records), 381 F.3d 1205, 1214 (D.C. Cir. 2004).* “[T]he district court ... state[d] generally that ‘privileges are qualified or conditional for a number of reasons, including in the interests of justice.’ That statement is incorrect with respect to the psychotherapist privilege. In Jaffee, the Court flatly rejected the suggestion that the privilege was subject to balancing.” *Id. See also Caver v. City of Trenton, 192 F.R.D. 154, 160 (D.N.J. 2000) (noting Jaffee's rejection of ‘balancing of the need for information against the need for confidentiality’)” (citing Jaffee v. Redmond, 518 U.S. 1, 17 (1996)).
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See People v. Hammon, 938 P.2d 986, 992 (Cal. 1997); see also United States v. Shrader, 716 F. Supp. 2d 464, 472 (S.D. W. Va. 2010). “The Jaffee court explicitly foreclosed the possibility that the privilege contain a balancing test. Defendant, by arguing that the privilege is secondary to his rights under the Sixth Amendment, is explicitly and impermissibly asking the Court to balance his rights with that of the privilege.” Id.

See Commonwealth v Barroso, 122 S.W.3d 554, 558 (Ky. 2003):
The issue ... is not whether [a defendant's] “need” for the evidence should be balanced against [a witness's] interest in maintaining the confidentiality of her psychotherapy, but whether the constitutional rights afforded to a criminal defendant ... prevail over ... an evidentiary privilege. As a general proposition, constitutional rights prevail .... Id.

See, e.g., Fattah, 187 F. Supp. 3d at 565. The court discussed the contention that “Jaffee applies only to civil cases, where the privilege does not present constitutional concerns.” Id.; see also United States v. Chee, 191 F. Supp. 3d 1150, 1154 (D. Nev. 2016). “[S]ome courts have altogether refused to recognize the privilege as precedent in the context of a criminal proceeding.” Id.

See Shrader, 716 F. Supp. 2d at 472. “[T]he emphatic language used by the Jaffee court regarding the fallacy of a balancing test demonstrates that the court intended for the privilege to apply in all circumstances, civil and criminal.” Id.; cf. New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 494 (S.D.N.Y. 2005). “The language and broad applicability of Rule 501 suggests, and Jaffee confirms, that in determining whether to recognize a privilege ..., a court should not distinguish between criminal and civil cases ....” Id., vacated and remanded on other grounds, 459 F.3d 160 (2d Cir. 2006).

In the lower court decision that was affirmed by the Supreme Court in Jaffee, the Seventh Circuit had concluded that “‘reason and experience’ compel the recognition of the psychotherapist/patient privilege in both civil and criminal cases.” See Jaffee v. Redmond, 51 F.3d 1346, 1354-55 (7th Cir. 1995) (quoting FED. R. EVID. 501), aff'd, 518 U.S. 1 (1996); see also United States v. Schwensow, 151 F.3d 650, 656-57 (7th Cir. 1998). The court noted that the Seventh Circuit in Jaffee “joined the Second and Sixth Circuits in recognizing a psychotherapist-patient privilege in both criminal and civil cases.” Id.

See Koch v. Cox, 489 F.3d 384, 389 (D.C. Cir. 2007) (“The [Jaffee] Court ... likened the privilege to the attorney-client and spousal privileges.” (citing Jaffee v. Redmond, 518 U.S. 1, 10 (1996))); see also Ruhlmann v. Ulster City Department of Social Services, 194 F.R.D. 445, 451 (N.D.N.Y. 2000). “The psychotherapist-patient privilege, like the spousal and attorney-client privileges, is ‘rooted in the imperative need for confidence and trust.’” Id. (quoting Jaffee, 518 U.S. at 10).

See Delaney v. Superior Court, 789 P.2d 934, 955 (Cal. 1990) (Mosk, J., concurring). “While consistency has not been a hallmark in this area, courts have been extremely reluctant to make incursions into ... testimonial privileges - e.g., the attorney/client, priest/penitent, or marital communications privileges - on Sixth Amendment grounds.” Id.; see also State v. Rinaldo, 673 P.2d 614, 621 (Wash. Ct. App. 1983). “A defendant's constitutional right to compel testimony does not override testimonial privileges such as the husband-wife, priest-penitent, self-incrimination, attorney-client and other such privileges.” Id., aff'd in part and remanded, 689 P.2d 392 (Wash. 1984).
See Shrader, 716 F. Supp. 2d at 473. “[T]he possibility that the psychotherapist-patient privilege is secondary to the Sixth Amendment is directly contrary to other similar privileges. Any court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant's cross-examination needs.” Id.; cf. Windham v. State, 800 So.2d 1257, 1261 (Miss. Ct. App. 2001). “The Supreme Court, in the Jaffee decision, left little doubt that this privilege enjoyed the same stature as spousal or attorney-client privileges in the context of federal litigation.” Id.

See United States v. Doyle, 1 F. Supp. 2d 1187, 1190 (D. Or. 1998). But see United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994). “[T]he attorney-client privilege ... might have to yield in a particular case if the right of confrontation, whether in its aspect as the right of cross-examination or in some other aspect, would be violated by enforcing the privilege.” Id.


See, e.g., Vingelli v. United States, 992 F.2d 449, 452 (2d Cir. 1993). “The most ancient of the common law privileges ... is the attorney-client privilege, dating back nearly 300 years and arising as an exception to testimonial compulsion.” Id.; see also In re Contempt of Wright, 700 P.2d 40, 47 (Idaho 1985) (Bistline, J., concurring). “The concept of privileges arose in England in the 1600's. It developed only after witnesses could be compelled to testify.” Id.; see also Gerard E. Lynch, The Lawyer as Informer, 1986 DUKE L.J. 491, 529. Lynch observed that “evidentiary privileges permit one to refuse to answer questions in proceedings in which compulsory process is available”. Id.

See Sorrells v. Cole, 141 S.E.2d 193, 198 n.4 (Ga. Ct. App. 1965). “It was not until the late sixteenth century that compulsory process was available in the common law courts of England to compel the attendance of disinterested witnesses.” Id. See also Marshall v. State (In re Marshall), 805 N.W.2d 145, 151 (Iowa 2011). “Common law in the fifteenth century did not recognize the right to compel a witness to testify in criminal proceedings. Over time, however, the common law evolved to the point where witnesses had a duty to testify and could be compelled to do so.” Id.

See United States v. Gecas, 120 F.3d 1419, 1452 n.30 (11th Cir. 1997) (explaining how colonial courts expanded the availability of compulsory process for witnesses); see also Westen, supra note 370, at 91 (“The principles that eventually merged into the compulsory process clause had taken root in America long before independence.”).

Prior to Jaffee, some courts held that “the constitutional right to privacy protects communications between a psychotherapist and his patient.” See Shields v. Burge, 874 F.2d 1201, 1211 (7th Cir. 1989) (citing Caesar v. Mountainos, 542 F.2d 1064, 1067 (9th Cir. 1976)); see also U.S. v. Lowe, 948 F. Supp. 97, 99 n.3 (D. Mass. 1996) (arguing “a constitutional right to privacy in counseling communications” retains “some force” after Jaffee). If that is the case, the privilege would be “less vulnerable” to a Sixth Amendment challenge because a “privilege with constitutional dimensions would generally not yield to sixth amendment attacks.” Smith, supra note 176, at 56.

See Valdez v. Winans, 738 F.2d 1087, 1089 (10th Cir. 1984). “[T]he right to compulsory process does not necessarily displace traditional testimonial privileges ... [T]he Sixth Amendment usually has been forced to yield when a testimonial privilege is asserted.” Id.; Robert S. Catz & Jill J. Lange, Judicial Privilege, 22 GA. L. REV. 89, 93 (1987). “In England, the notion of privilege arose with the imposition of compulsory process. Because they evolved together, the right to compulsory process does not override or abolish the ... privileges that are otherwise recognized by common law or statute.” Id. (footnote omitted).

See Davis v. Straub, 430 F.3d 281, 293 (6th Cir. 2005) (Merritt, J., dissenting). The court observed that “the Sixth Amendment's Compulsory Process Clause ... catechized in the Bill of Rights this well-established and fundamental right of English law.” Id.,reh'g and reh'g en banc denied, 445 F.3d 908 (6th Cir. 2006); United States v. Chapin, 231 F. Supp. 2d 600, 606 (E.D. Mich. 2002). “The purpose of the Confrontation Clause ... was to ‘constitutionalize’ the
common-law testimonial guarantees by which an accused could test a witness' perception, memory, ability to relate or communicate, and, perhaps most importantly, sincerity.” *Id.*

Windham v. State, 800 So.2d 1257, 1261 (Miss. Ct. App. 2001) (rejecting that a defendant's Sixth Amendment confrontation rights overrides the psychotherapist-patient privilege); cf. *Commonwealth v. Sims*, 521 A.2d 391, 395 (Pa. 1987). “[T]he right of confrontation, even on its constitutional level, is qualified by the traditional testimonial privileges.” *Id.*

See supra notes 140-147 and accompanying text. In applying the *Jaffee* privilege, courts frequently look to proposed Rule 504 of the Federal Rules of Evidence. See [*United States v. Chase*, 340 F.3d 978, 990 (9th Cir. 2003)].

*Id.* (citing PROPOSED FED. R. EVID. 504(d), reprinted in 56 F.R.D. 183, 241 (1972)).

*See Tesser v. Bd. of Educ.*, 154 F. Supp. 2d 388, 392 n.3 (E.D.N.Y. 2001). “[T]he *Jaffee* Court clearly placed weight on the fact that the proposed rules had been promulgated by the Judicial Conference Advisory Committee of Rules of Evidence and approved by the Judicial Conference of the United States and by the Supreme Court.” *Id.* (citing [*Jaffee v. Redmond*, 518 U.S. at 14-15 (1996)].)

*See, e.g.*, Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000). “The Supreme Court has recognized the psychotherapist-patient privilege in federal question cases, but has not addressed whether the privilege is waived by a patient who places his or her medical condition at issue.” *Id.* (citing [*Jaffee*, 518 U.S. at 15]; see also O'Brien, supra note 228, at 146. “In its recognition of the federal psychotherapist-patient privilege, the *Jaffee* Court did not provide any guidance as to the exceptions to the federal privilege.” *Id.*

*See [*In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 78 n.5 (1st Cir. 1999)]. “The *Jaffee* Court ... suggested that the privilege may be set aside when disclosure could prevent a serious harm, an exception ... not listed in proposed Rule 504.” *Id.* (citing [*Jaffee*, 518 U.S. at 18 n.19]; [*United States v. Auster*, 517 F.3d 312, 315 n.5 (5th Cir. 2008)]. The court asserted that the *Jaffee* Court “contemplated that the privilege must give way in some instances involving dangerous patients.” *Id.* (discussing [*Jaffee*, 518 U.S. at 18 n.19].)

*See, e.g.*, McKeever, supra note 136, at 126 (characterizing the crime-fraud exception as a “sound exception[] to the psychotherapist-patient privilege”); see also Harris, supra note 239, at 59-60. “It might be argued ... that there should be a ‘crime-fraud’ or ‘future crime’ exception to the psychotherapist-patient privilege.” *Id.*

*See, e.g.*, *In re Sealed Grand Jury Subpoenas*, 810 F. Supp. 2d 788, 794 (W.D. Va. 2011). “I am persuaded that the federal common law should recognize a crime-fraud exception to the psychotherapist-patient privilege.” *Id.*

*See, e.g.*, Michael L. Orenstein, *The Psychotherapist-Patient Privilege*, 20 TOURO L. REV. 679, 687 (2004). “I find it very interesting ... that none of the courts ... even thought about the possibility that someone expressing the fact that they are about to do harm to someone else ... fall[s] under the crime fraud exception. They kept talking about it under the dangerous person exception.” *Id.* A number of states also recognize an exception “for cases of suspected child abuse or neglect,” which has been characterized as “a subset of the dangerous patient exception.” Baytton, supra note 301 at 171. However, the only significant support for a federal version of this exception appears in [*United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994)], a pre-*Jaffee* case in which the Tenth Circuit used “a balancing test to determine whether to recognize an exception to the privilege” in a child sexual abuse case. Poulin, supra note 51, at 1374 (discussing *Burtrum*). That approach is inconsistent with *Jaffee*, where the Court “explicitly rejected the balancing test under which the privilege would give way when outweighed by greater public interests.” *Id.*
See Carolyn Peddy Courville, Comment, Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution, 35 HOUSTON L. REV. 187, 219 (1998). “Criminal defendants have argued that the psychotherapist-patient privilege violates their constitutional right to confront witnesses against them and that the Sixth Amendment’s guarantee of the right of confrontation can override the psychotherapist-patient privilege.” Id.

See United States v. Fattah, 187 F. Supp. 3d 563, 566 (E.D. Pa. 2016). “We do not think that the Supreme Court, in a criminal action, would always bar a trial court from disclosing the mental health records of a witness based on a psychotherapist-patient privilege.” Id.

See supra notes 170-175, 187-192, and 282 and accompanying text. See also The Mental Health Provider Privilege in the Wake of Jaffee v. Redmond, 54 OKLA. L. REV. 591, 606 (2001). The court discusses how the majority of cases interpreting Jaffee deal with the patient-litigant exception. Id.

See Sheridan, 412 Mass. 599, 602 (Mass. 1992). A patient “has the right ... to keep privileged any communications made to a psychotherapist in the case of a court-ordered examination, absent a showing that the patient waived such privilege.” Id.

See supra notes 170-175, 187-192, and 282 and accompanying text. See also The Mental Health Provider Privilege in the Wake of Jaffee v. Redmond, 54 OKLA. L. REV. 591, 606 (2001). The court discusses how the majority of cases interpreting Jaffee deal with the patient-litigant exception. Id.

See United States v. Lendor, 699 F. Supp. 2d 913, 925 (E.D. Ky. 2009). A patient would “constructively waive” the privilege by making threatening statements during psychotherapeutic counseling after being “informed ... that [the] treating psychotherapist could testify against him in a criminal proceeding.” Id. (emphasis omitted); cf. United States v. Chase, 340 F.3d 978, 988 n.5 (9th Cir. 2003) (noting that “if a psychotherapist informed a patient ahead of time that she would testify in court” the patient arguably “would be agreeing that the subsequent communication was not confidential”).

Santelli v. Electro-Motive, 188 F.R.D. 306, 308 (N.D. Ill. 1999). The Jaffee court did not indicate “when or how [the privilege] can be waived.” Id. However, as a general proposition, “consent to the disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege.” In re Penn. Cent. Commercial Paper Litig., 61 F.R.D. 453, 463-64 (S.D.N.Y. 1973); see also Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651 (9th Cir. 1978). “Proposed Rule 511 states that a privilege is waived if the ‘holder of the privilege voluntarily ... consents to disclosure of any significant part of the matter or communication.”’ Id. (quoting PROPOSED FED. R. EVID. 511).

See generally Nelken, supra note 10, at 18. “Exceptions to privilege should be distinguished from situations in which the privilege either does not attach (e.g., when a communications was not intended to be confidential) or has been waived (e.g., by voluntary disclosure of a confidential communication).” Id.


If [application of the crime-fraud exception] could be confined to purely prospective criminal activity, lawyers and clients could deal with it. The lawyer simply would need to inform all clients, at the outset of representation, that they should not ask for advice concerning future or ongoing crimes designed to help them engage in the conduct.

Id.

See Tesser v. Bd. of Educ., 154 F. Supp. 2d 388, 393 (2001). “[T]he expectation of confidentiality is not dispositive of whether a communication between a patient and psychotherapist is privileged — Jaffee requires that the communications also be made ‘in the course of treatment.’” Id. (quoting Jaffee v. Redmond, 518 U.S. 1, 15 (1996)).
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432  See Rambus, Inc. v. Infineon Techs. AG, 222 F.R.D. 280, 287 n.19 (E.D. Va. 2004). “[T]he crime/fraud exception is not really an exception ... but instead is an exclusion of certain activity from the protection of the privilege[].” Id. (discussing the attorney-client privilege); Zacharias, supra note 430, at 78. “The crime-fraud exception is not really an exception to privilege. It is a principle that deems communications which would otherwise be considered privileged not qualifying within the ... privilege definition.” Id.


434  See Johnson v. Norris, 537 F.3d 840, 845 (8th Cir. 2008). The court observed that the Jaffee Court “did not consider whether the privilege must give way to the rights of an accused in a criminal case.” Id.; Commonwealth v. Barroso, 122 S.W.3d 554, 558 (Ky. 2003). “The United States Supreme Court has yet to decide whether a criminal defendant has the right to compel a third party to produce exculpatory information protected by an absolute privilege. Jaffee ... was not a criminal case, [and] thus did not reach the constitutional issues.” Id.

435  See, e.g., Combs, supra note 190, at 466. “One potential exception to the psychotherapist-patient privilege that has been rejected by the federal courts rests on a defendant's right to compulsory process.” Id.; see also In re Grand Jury Proceedings, 450 F.2d 199, 223 n.5 (3d Cir. 1971) (Gibbons, J., dissenting). “Scholarly discussion of the full reach of the compulsory process clause has not been extensive. One commentator suggests that the availability of compulsory process is subject to recognized privileges.” Id. (citing John H. Wigmore, EVIDENCE § 2191 69 (McNaughten rev. ed. 1961)), aff'd sub nom. Gelbard v. United States, 408 U.S. 41 (1972).

436  See Parsio, supra note 235, at 650. “Situations may arise where the therapist has taken all reasonable measures to warn and protect the intended victim, yet the therapist still believes the patient remains a threat. In such a situation, it may be proper for the therapist to testify in a ... hospitalization proceeding ....” Id.

437  See generally Developments in the Law, supra note 186, at 1537 n.39. “[E]xception’ refers to situations in which the unavailability of the privilege ... does not depend on the actions of the patient.” Id.

438  See Guggenheim & Werbel, supra note 4, at 46: One study suggested that if psychiatric patients perceived that a breach in confidentiality was “in their best interest,” it would moderate the otherwise negative impact such a breach would have on the relationship. An unauthorized breach of confidentiality due to the lack of a privilege, however, is unlikely to be perceived by a client as in his best interest. Id. (citing Paul S. Appelbaum et al., Confidentiality: An Empirical Test of the Utilitarian Perspective, 12 BULL. AM. ACAD. PSYCHIATRY & L. 109, 115 (1984)).

439  See Hayes, 227 F.3d at 585. “While [the] patient, by definition, will initially reject the prospect of hospitalization, it may ultimately improve his mental state and should not leave a stigma after the stay concludes.” Id.; Rhiver v. Rietman, 265 N.E.2d 245, 250 n.1 (Ind. Ct. App. 1970). “The interests of [the] patient ... call for a departure from confidentiality in commitment proceedings.” Id. (quoting PROPOSED FED. R. EVID. 504 advisory committee's note, reprinted in 56 F.R.D. 183, 244 (1972)); Paruch, supra note 37, at 395. “[I]n commitment proceedings, a therapist retains the role as the patient's advocate and is there to recommend a course of action that will serve the patient's best interests.” Id.

440  The Ninth Circuit has noted that “many EAPs do have licensed psychologists, psychiatrists, or social workers on staff.” Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1156 n.2 (9th Cir. 2001). An employee's confidential communications with those licensed counselors presumably would be protected by the Jaffee privilege. See Wilkinson v. Greater Dayton Reg'l Transit Auth., 295 F.R.D. 262, 268 (S.D. Ohio 2014). “Generally, confidential communications between a patient and his or her psychiatrist, psychologist, or social worker counselor are privileged.” Id. (citing
In fact, the licensed clinical social worker whose communications were held to be privileged in \textit{Jaffee} was “certified by the state ... as an employee assistance counselor.” \textit{Jaffee v. Redmond}, 51 F.3d 1346, 1350 (7th Cir. 1995), aff’d, 518 U.S. 1 (1996).

\textit{See} \textit{In re Sealed Case (Medical Records)}, 381 F.3d 1205, 1214 (D.C. Cir. 2004). “The federal psychotherapist privilege recognized in \textit{Jaffee} extends no further than confidential communications between licensed mental health professionals and their patients.” \textit{Id}. (citing \textit{Jaffee}, 518 U.S. at 15).

\textit{See} \textit{Oleszko}, 243 F.3d at 1158; \textit{see also} Garg, supra note 56, at 238 (stating “there is a gradual movement among states in this direction”).

\textit{See} Guggenheim & Werbel, supra note 4, at 32. “When confronted with the question, lower courts ... have the right to find the existence of an EAP counselor-patient privilege, and should exercise such a right where appropriate.” \textit{Id}.

Guggenheim and Werbel assert that “the policy reasons cited by the Supreme Court for extending the privilege to licensed social workers also apply to EAP counselors.” \textit{Id}. at 32-33.

\textit{See} \textit{Oleszko}, 243 F.3d at 1158. “The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging more people to seek treatment.” \textit{Id}.

\textit{See} Guggenheim & Werbel, supra note 4, at 44; \textit{see also} Garg, supra note 56, at 237-38. “[L]ike licensed clinical social workers, unlicensed counselors within an employee assistance program also undertake a prominent role in increasing access to mental health treatment.” \textit{Id}.

\textit{See}, \textit{e.g.}, Guggenheim & Werbel, supra note 4, at 34. “EAP counselors provide essential workplace therapy which often works to prevent serious situations, such as employee violence.” \textit{Id}.

\textit{See id}. at 42. “[M]ost American workers do not use externally available mental health services or actively avoid such intervention due to the stigma of labeling inherent with mental or emotional difficulties .... [E]mployees might be more likely to seek out internally provided mental healthcare than externally provided mental healthcare.” \textit{Id}.


\textit{See}, \textit{e.g.}, \textit{Oleszko}, 243 F.3d at 1158 (describing EAP representatives’ role as a “primary link between the troubled employee and psychotherapeutic treatment”); \textit{see also} Garber, supra note 109, at 926. Garber notes that an unlicensed EAP counselor may “serve as a liaison to a licensed therapist.” \textit{Id}. (quoting \textit{Oleszko}, 243 F.3d at 1158). \textit{See generally} Vanko, supra note 7, at 1302. “EAPs ... facilitate referral services to appropriate treatment facilities and ensure that the worker is participating through specific follow-up procedures.” \textit{Id}.

\textit{See} Guggenheim & Werbel, supra note 4, at 44. “[L]aws governing privilege which limit protection to only communications with specifically designated mental health providers decrease[,] the effectiveness of the privilege.” \textit{Id}.

\textit{See id}. at 34. “Because of the private interests supporting an EAP counselor privilege and the societal interest in having ... employees seek EAP counseling, and the necessity of confidentiality both to encourage employees to seek counseling and to provide effective therapy, [the] psychotherapist-patient privilege ... should include EAP counselors.” \textit{Id}.

\textit{See generally} Nelken, supra note 10, at 18. “[F]uture development of the privilege will involve recognizing certain recurrent situations in which the need for the evidence in question outweighs the purposes the privilege serves. In these
instances, exceptions will be made and otherwise privileged information will be subject to disclosure." "Id. (quoting Jaffee, 518 U.S. at 18 n.19).

See Auer v. City of Minot, 178 F. Supp. 3d 835, 839 (D.N.D. 2016). “[W]hile the Jaffee Court concluded that the privilege should be absolute and not subject to balancing, it did state in a footnote that, like other testimonial privileges, the psychotherapist-patient privilege could be waived.” "Id. (citing Jaffee, 518 U.S. at 15, n.14 (1996)), appeal dismissed sub nom. See also Santelli v. Electro-Motive, 188 F.R.D. 306, 308 (N.D. Ill. 1999).

See United States v. Glass, 133 F.3d 1356, 1357 (10th Cir. 1998); see also Newton v. Kemna, 354 F.3d 776, 784 (8th Cir. 2004). “[Jaffee’s] potential] serious threat of harm to the patient or to others [exception is the] sole narrow exception suggested by the Supreme Court.” "Id.

In one case decided before Jaffee, the court predicted that if a federal psychotherapist-patient privilege ultimately was recognized “it would not be absolute.” Miller v. Colonial Refrigerated Transp., Inc., 81 F.R.D. 741, 747 (M.D. Pa. 1979); cf. Davis v. Leal, 43 F. Supp. 2d 1102, 1110 (E.D. Cal. 1999). “Like most privileges, the trade secrets privilege is not absolute, but requires a balancing of the need for protecting the secret with the needs of the case.” "Id.; Cinel v. Connick, 792 F. Supp. 492, 498-99 (E.D. La. 1992). “The reporter's privilege is part of the fabric of American law, but it is not absolute.” "Id.

See In re Lifschutz, 467 P.2d 557, 560 (Cal. 1970) (en banc). “[W]e note that a large segment of the psychiatric profession concurs ... that an absolute privilege of confidentiality is essential to the effective practice of psychotherapy.” "Id. See also Violette, supra note 323, at 1541 n.25. “Some in the mental health field have advocated a policy of ‘absolute confidentiality’ with respect to psychotherapeutic communications, under which such communications may not be disclosed for any reason.” "Id. (quoting KNAPP & VANDECRKREEK, supra note 139, at 13, 14).

See, e.g., Hicks v. Talbott Recovery Sys., Inc., 196 F.3d 1226, 1236-37 (11th Cir. 1999). “Georgia law protects as privileged confidential communications between a psychiatrist or licensed psychologist and a patient .... Unless waived, these confidentiality privileges are absolute.”. "Id. (footnotes omitted). See also United States ex rel. Patosky v. Kozakiewicz, 960 F. Supp. 905, 919 (W.D. Pa. 1997) (noting that Pennsylvania's statutory psychologist-patient privilege is “an absolute privilege with no exceptions”); Lore, supra note 350, at 449. “Six states appear to grant an absolute evidentiary privilege for communications made to psychotherapists pursuant to treatment.” "Id.

See Nicholas Sydow, A “Shrink”-ing Privilege: United States v. Romo and the “Course of Diagnosis” Requirement of the Psychotherapist-Patient Privilege, 41 HARV. C.R.-C.L. L. REV. 265, 271 n.44 (2006). “Although Jaffee’s infamous footnote 19 raises the possibility of creating exceptions to the privilege for situations such as averting serious harm to the patient, the basic psychotherapist-patient privilege was intended to be absolute.” "Id.

Read literally, proposed Rule 504 would permit a psychotherapist to testify in involuntary hospitalization proceedings only if he or she "determined that the patient is in need of hospitalization.” PROPOSED FED. R. EVID. 504(d)(1); cf. People v. Gonzales, 296 P.3d 945, 964 n.13 (Cal. 2013). “In many ... states, the psychotherapist-patient privilege statute contains a similarly limited dangerous patient exception under which the privilege is inapplicable in a civil
commitment or hospitalization proceeding only if the therapist has determined in the course of diagnosis or treatment that the patient is in need of commitment or hospitalization.” *Id.* However, this potential limitation on the exception's application has little practical significance because patients, who are the holders of the privilege, presumably would permit their psychotherapists to testify in opposition to hospitalization in any event. *See, e.g., In re J.L.H., CM02607-K, 2008 Del. Ch. LEXIS 282, at *2 (Del. Ch. Jan. 17, 2008).* Here, a psychotherapist “took the unusual step of seeking, then testifying in opposition to, an involuntary commitment” of his patient. *Id.*

462 *See* Klein, *supra* note 54, at 737. “[T]he ‘duty to warn’ is the only exception the Court advocated. The Court implied that ... the duty to warn ... creates in itself an exception to the psychotherapist-patient privilege in a courtroom setting - especially in commitment proceedings.” *Id.*

463 *See* Dispennett v. Cook, No. Civ. 98-1252-ST, 2001 U.S. Dist. LEXIS 22196, at *29 (D. Or. Oct. 23, 2001) (citing *Oleszko*, 243 F.3d at 1156) (asserting that “the federal psychotherapist-patient privilege is absolute and has no exceptions”); Lore, *supra* note 350, at 449 n.27. “There is still uncertainty as to whether the federal privilege contains a ‘danger’ exception for situations where nondisclosure could result in bodily harm to a third party .... Those circuits which hold that there is no danger exception find that the privilege is absolute.” *Id.*