The Implications of The Supreme Court's Confidentiality Opinion

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In resolving the questions whether the psychotherapist-client privilege exists and whether it covers clinical social workers, the U.S. Supreme Court eliminated a considerable margin of doubt in this area for future cases. Yet in the wake of the decision, many important questions remain to be resolved. These questions are: whether the privilege is absolute or limited by certain exceptions, whether all or only some communications with a qualified provider are privileged; and whether a provider must be a "licensed psychiatrist, psychologist or social worker" to trigger the privilege. The court's decision provides some guidance on these issues, although it by no means yields up clear answers.

1. **The limits of the privilege**. The court's decision makes clear that the privilege is a broad one. Leaving no doubt that the privilege would be generally available in federal court, Justice Stevens expressly rejected the balancing test adopted by the court of appeals. Justice Stevens stated: "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." The participants in the confidential conversation, he emphasized, must be able to predict "with some degree of certainty" whether particular discussions will be protected. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts' is little better than no privilege at all."

At the same time, the court suggested that "there are situations in which 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." The court declined, however, to identify any specific federal exceptions at this time: "Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would govern all conceivable future questions in this area." The court's approach (enunciating a broad principle and allowing for development of further "common law") may seem slightly evasive, but in fact it is typical for the Supreme Court and reflects the core principle of the Anglo-American "common law" legal tradition. State law
Suggests some potential exceptions that federal courts may invoke in future cases, including the following:

2. **Potential harm to others**. In most states, Justice Stevens suggested, the privilege gives way when the matter involves the potential for harm to others. For example, a client who informs a

therapist of his/her intent to injure another is not entitled to confidentiality of that statement, and most professional codes of ethics and state laws would require the therapist to notify the appropriate authorities if harm to another appeared imminent.

3. **Child custody**. Because the law highly values the protection of children from harm of all sort, some jurisdictions recognized a blanket exception to the privilege in child custody cases. A narrower rule might be that therapist-client communications that are relevant to the health or welfare of the child (such as discussions of sexual abuse) will not be protected.

4. **Mental state at issue**. In some states, the privilege is defeated if the client in litigation places his/her own mental health state in issue, for example, if a personality disorder is offered as a defense to liability.

5. **Criminal charges**. In some states, the privilege is generally unavailable to defendants facing criminal charges (as opposed to civil claims for, e.g., money damages), even though the matter no longer relates to future events, but only past actions. There is no principled reasons for such a broad exception other than the legislative judgment that evidence relevant to criminal guilt should not be suppressed. Whether federal courts would recognized such an exception is unclear.

6. **Are all Communications Privileged?** Another critical issue is whether all communications with a "licensed social worker" are privileged, or whether, as Justice Stevens suggested, only "psychotherapeutic" communications are protectable and, if so, how to distinguish protected from unprotected communications. Obviously, some types of communications are unlikely to be deemed privileged, because they do not relate to the therapy—such as communications about the client's bill or small talk about the weather, sports, and the like. But these are not what would be considered substantive communication. The traditional social worker, working in an agency, for example, may have many substantive communications that still do not qualify as therapeutic, including discussions about such matters as the client's housing, employment, health, children, or benefits programs. One suspects such communications will not be deemed privileged, even if with a "licensed social worker."

It could equally be questioned whether all communications with a licensed psychiatrist or psychologist are privileged, or only "psychotherapeutic" communications. In principle, the court's decision appears to place licensed social workers on an equal footing with the other provider types. Thus, if distinctions are to be made, they should be made across the board. On the other hand, communications with psychiatrists and clinical psychologists are likely to be almost exclusively "psychotherapeutic." While this is also true of clinical social workers, it may not be true of social workers generally. Thus, courts may be tempted to draw distinctions among

types of communication with social workers that would not be drawn with regard to the other disciplines.

7. **Does "Licensed" Always Mean "Licensed"?** Is "licensed" the sine qua non of the privilege? Some states have no licensure statues, but instead have a title-protection law or certification standard or some other regime short of licensure. A federal court confronting such a state's law would likely look to the state's corresponding privilege law. If the state recognizes the privilege even without licensure, and has some basic standard-setting provision, a court is likely to deem this to be equivalent to licensure for privilege purposes. If the state has no such provision, but does recognize the privilege, this will present a very difficult issue for the court. On one hand, the federalism concerned voiced by Justice Stevens militates in favor of harmony between federal and state laws: if the state recognizes the privilege, the federal court should not undermine it. On the other hand, the Supreme Court recognized the privilege for "licensed" providers, and a lower court will feel constrained by that language to exclude those who are not "licensed" from the scope of the privilege.

8. **Are Other Disciplines Excluded from the Privilege?** A related issue is whether licensed (or unlicensed) counselors other than psychiatrists, psychologists, and social workers would or should qualify for the privilege. The policy reasons recognized by the majority might arguably favor a broader application if other disciplines genuinely contribute to the mental health of the citizenry. But again, the court's language was specific to the three principal mental health professions, and 1ower courts may be reluctant to open the door to all sorts of claims of privilege. A court may be influenced by state law here as well, although recognition by the state of these alternative disciplines is much less uniform and established than is the case with clinical social work. The consensus in approach manifested in the state's treatment of social work is not evident with regard to other, less well established disciplines at least not at this time. The foregoing are only the obvious issues arising in the wake of Jaffee. The courts will have to apply the Supreme Court's holding and the underlying principle recognized in the opinion to resolve these questions as they come up. Further refinement by the Supreme Court itself is not inconceivable. It may be decades before a reasonably complete set of rules governing the privilege is well settled.

9. **The Ethical Challenge**. Karen Beyer, the clinical social worker around whom the case revolved, faced an extraordinarily difficult choice. She could obey a federal court order and reveal client confidences, thereby violating her professional and personal code of ethics and potentially causing considerable harm to her client. Or she could disobey the court order and risk official sanction, with potentially grave consequences for herself Believing the court order to be wrong, and placing the good of her client before self-interest, Karen Beyer in effect committed

an act of civil disobedience.

In our systems of laws, it sometimes requires an act of such courage to establish an important new right. Because the Jaffee decision leaves unresolved many issues about the application of the privilege, other clinical social workers may face the same difficult choice that Karen Beyer did. Thus, the vitality, scope, and contours of the privilege will be very much in the collective hands of the practitioners themselves.