

Circuit Split: Dangerous Patients Exceptions to Psychotherapist-Patient Privilege

Under the Federal Psychotherapist-Patient Privilege, a defendant-patient's communications to a psychotherapist are protected from disclosure. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996). However, the circuits are divided about whether such a communication loses its privileged status when the patient's communication poses a serious threat of harm to others at the time the communication is made. Recently, the Ninth Circuit in *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003) joined the Sixth Circuit in finding such an exception did not exist, differing with the Tenth Circuit that maintains that there is a "dangerous-patient" exception to the privilege.

The defendant in *United States v. Chase* was convicted on one count for making threats against FBI agents, yet acquitted on a second count involving threats to other FBI agents which were communicated to his psychiatrist during therapy. The trial court admitted statements the defendant made to the psychiatrist, including the defendant's admission that he had considered injuring or killing two FBI agents who had investigated complaints lodged by the defendant. The concerned psychiatrist consulted with a supervisor and legal counsel. After the defendant's condition worsened, legal counsel recommended the psychiatrist contact the police. The information was then provided by the psychiatrist to the FBI.

The circuit held the defendant's statements to the psychiatrist were protected by the psychotherapist-patient privilege, and rejected a dangerous-patient exception. [991-92]

Other Privilege Issues Not Addressed

In the wake of the Ninth Circuit's disposition, at least two issues remain open:

- ❖ Whether a crime fraud exception applies to the federal psychotherapist-patient privilege (the First Circuit has noted this exception was applicable in *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 77 (1st Cir. 1999)); and
- ❖ Whether threatening communications made to a



health facility operator were subject to the privilege or confidential.

Circuits Holding a Dangerous Patient Exception Exists

❖ **Tenth Circuit:** *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998) (holding that a psychotherapist may testify about a threat made by a patient if "the threat was serious when it was uttered and . . . its disclosure was the only means of averting harm . . . when the disclosure was made")

Circuits Finding No Dangerous-Patient Exception

❖ **Sixth Circuit:** *United States v. Hayes*, 227 F.3d 578, 585-86 (6th Cir. 2000) (no dangerous-patient exception)

❖ **Ninth Circuit:** *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1220 (2004) (rejecting the dangerous-patient exception to the psychotherapist-patient privilege)

Courts Recognizing Exception As An Open Issue

❖ **U.S. Supreme Court:** *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996) (in dicta, leaving whether a dangerous-patient exception exists as an open issue)



Cross-Reference: For other evidence issues, see FRE 501 (p. **).

Citation: *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003) (en banc) (No. 01-30200) (Graber, Concurring; Kleinfeld; Panel: Schroeder, Pregerson, T.G. Nelson, S.R. Thomas, McKeown, W. Fletcher, Fisher, Gould, Clifton), *cert. denied*, 540 U.S. 1220 (2004).

Type of Action/Claim or Charge: Criminal; 18 U.S.C. § 115(a)(1)(B) (making threat against agents of the Federal Bureau of Investigation).