

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

The Psychotherapist Privilege Applies to Nonverbal Communications

The U.S. Supreme Court first recognized the “psychotherapist privilege” in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The privilege—which applies in both civil and criminal cases—protects communications between a patient and his or her mental health provider made in the course of seeking or receiving diagnosis or treatment. The privilege is meant to promote effective psychotherapy by fostering an atmosphere of confidence and trust in which a patient is willing to make a full and frank disclosure of facts, emotions, memories, and fears. Although the existence of the privilege is well-settled, little case law exists addressing the scope of the “communications” that are covered by the privilege—and, in particular, whether (and, if so, to what extent) the privilege protects nonverbal communications.

In *United States v. Ray*, 2022 WL 374367 (S.D.N.Y. Feb. 8, 2022),

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U.S. District Court Judge Lewis J. Liman for the Southern District of New York recently addressed the application of the privilege to non-

In this edition of their Southern District Civil Practice Roundup, Edward M. Spiro and Christopher B. Harwood analyze the holding in ‘United States v. Ray’, in which Judge Liman recently addressed the application of the psychotherapist privilege to nonverbal communications. Although ‘Ray’ is a criminal case, its holdings apply equally to civil actions.

verbal communications. Although *Ray* is a criminal case, its holdings apply equally to civil actions. The defendant in *Ray* sought the psychotherapy records of his alleged victims, including records

that reflected the observational notes of the victims’ therapists. Judge Liman concluded that to the extent the observational notes included information that the victims had conveyed to the therapists—whether in words or through nonverbal acts—the notes fell within the scope of the privilege and properly were redacted. Judge Liman held, however, that to the extent the information in the notes did not reflect actual communications (such as where the notes reflected a therapist’s observation of a victim’s physical appearance), the information was not covered by the privilege. Judge Liman also held that the privilege did not extend to information that the victims may have communicated to medical professionals before they sought or received treatment from mental-health providers, such as information that the victims communicated to intake staff at a general hospital or emergency room.

‘U.S. v. Ray’

Ray involved allegations of sex trafficking, extortion, and racketeering on a college campus. Specifically, after defendant Lawrence V. Ray was released from prison in 2010, he moved

into his daughter's dormitory at Sarah Lawrence College where he cast himself as a mentor to other students and young people. After gaining their trust, the defendant allegedly isolated them from their families, demanded their money, and manipulated them into sex acts, all while using threats of violence to keep them in submission. The defendant ultimately was convicted of sex trafficking, extortion, racketeering, and 12 other counts following a four-week trial in March and April 2022.

Before trial, the defendant sought materials from the victims' psychotherapy sessions. Judge Liman issued subpoenas to the victims' mental-health providers, and the providers produced their records to the court and counsel for the victims. The victims' counsel then produced a set of redacted records to the defendant. Many of the redactions were based on the psychotherapist privilege.

The defendant objected to the redactions on several grounds, including that they included not only the victims' verbal communications to the therapists, but also the therapists' observational notes from sessions with the victims. The defendant argued that mere observations of a patient—including a therapist's notes about the patient's mood or affect—fall outside the scope of the privilege. The defendant also argued that the redactions improperly included prescription records, diagnostic test results, and medical intake records. With respect to the intake records, the defendant asserted that intake records could fall within the

scope of the psychotherapist privilege only if they reflected statements that were made (1) to a mental-health provider and (2) in the course of diagnosis or treatment. The defendant conceded that statements made as part of the intake process at a psychiatric facility would be covered by the privilege, but he argued that statements made to intake staff at a general hospital or emergency room would not.

Judge Liman agreed in part with the defendant's positions, but he disagreed that a psychotherapist's observational notes necessary fall outside the scope of the privilege. Judge Liman ruled that the privilege protects a patient's nonverbal communications to his or her therapist, such as the patient's gestures, mood, and affect. Thus, to the extent the observational notes reflected such nonverbal communications, they appropriately were redacted. Judge Liman ruled, however, that to the extent the notes reflected non-communicative information (such as a therapist's notes about a patient's physical appearance), the information fell outside the privilege's scope and was not properly redacted. Judge Liman also agreed with the defendant regarding intake information, ruling that although intake information at a mental-health facility is privileged, the same information at a general hospital or emergency room is not (assuming it is taken from a patient who has not engaged a mental-health provider and is not at the time seeking mental-health treatment).

The Privilege Protects Nonverbal Communications

In rejecting the defendant's across-the-board argument that a therapist's observational notes fall outside the scope of the privilege, Judge Liman concluded that a protected "communication" is not limited to information conveyed during a verbal exchange between a patient and provider. *Ray*, 2022 WL 374367, at *6. Judge Liman noted that "there are many ways that a patient can communicat[e] information"—for instance, with a "facial expression or a physical gesture." *Id.* Thus, that a patient "chooses to express his emotions by non-verbal conduct rather than verbal conduct does not make it inherently non-communicative." *Id.*

Judge Liman cautioned, however, that the privilege does not cover all observational notes (and all non-verbal acts). Citing *Jaffee*, Judge Liman explained that the privilege protects only those communications that depend on an "atmosphere of confidence and trust" between patient and provider. *Id.* Effective treatment, Judge Liman noted, may involve both physical observations and counseling. *Id.* But because only the latter requires "an atmosphere of confidence and trust," the privilege applies only to the patient's communications during counseling—not to the provider's general observations of a patient (including observations made outside of counseling sessions). *Id.*

Based on *Jaffee*, Judge Liman reasoned that the privilege covers nonverbal communications that are “volitional act[s] by which the patient communicates information for the purposes of treatment.” *Id.* Thus, “a treatment provider’s observation of a patient’s affect as a general matter (for example in the waiting room) might not be privileged.” *Id.* at 7. Yet “that same information would enjoy the protection of the privilege if it is conveyed in the course of a session with the treatment provider during which information is being elicited.” *Id.*

Judge Liman thus agreed with the defendant that “information regarding an alleged victim’s ‘appearance’ in an examination may not be redacted,” but held that a therapist’s observations regarding the “victim’s ‘mood’ and ‘affect’ during an assessment” fell within the privilege’s scope. *Id.* The latter information (a nonverbal communication between the patient and provider) “may be redacted based on the privilege.” *Id.* Similarly, Judge Liman ruled that the privilege does not cover prescription records or diagnostic test results, because such information “does not constitute or reveal a communication” and, instead, merely reflects “the therapist’s judgment on how to treat the diagnosis.” *Id.* Although a diagnostic test result “may be useful for treatment,” it does not “reflect the communication of information dependent upon an atmosphere of confidence and trust.” *Id.*

Whether the Privilege Covers Intake Records Depends on the Context

With respect to medical intake records, citing the Eighth Circuit’s decision in *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012), Judge Liman concluded that “general-hospital intake records are not covered by the privilege when they reflect communications not made to a mental-health provider and before a mental-health provider has been engaged and not made by the patient for the purpose of obtaining psychotherapy treatment.” *Ray*, 2022 WL 374367, at *7.

Ghane involved a suicidal defendant who checked himself into an emergency room. During the defendant’s intake interview, he stated that he had cyanide in his apartment. The defendant later tried to suppress those statements by invoking the psychotherapist privilege. In holding that the privilege did not apply, the Eighth Circuit reasoned that the privilege “contemplates treatment,” and the physician’s assistant to whom the defendant spoke during his intake interview had not provided any therapy, diagnosis, or treatment, and was not working under the direction of any mental-health providers during the intake interview. *Ghane*, 673 F.3d at 782.

Consistent with *Ghane*, Judge Liman ruled that “communications made to intake staff at a hospital who are not agents of a mental-health provider, and before a mental-health provider is engaged, are not covered by the privilege.” *Ray*, 2022 WL 374367, at *8. Judge

Liman stressed that the privilege applies only where a patient has a reasonable expectation that his communications will be protected. *Id.* If no provider has been engaged when a person enters an emergency room or a general hospital, Judge Liman reasoned, that person has no reasonable expectation that the privilege will apply to his or her statements. *Id.* Judge Liman noted that the same result would follow even if the patient engaged a mental-health provider after intake. *Id.*

Conclusion

The psychotherapist privilege protects nonverbal communications that a patient makes in the context of seeking mental-health diagnosis or treatment. Accordingly, the privilege protects observations that a provider makes of a patient based on the patient’s nonverbal acts during a treatment session. The privilege does not, however, protect observations that a provider might make of a patient’s nonverbal acts outside of a treatment session. Nor does the privilege protect non-communicative information, such as observations that a provider might make of a patient’s physical appearance, or prescription records or diagnostic test results.