



## SECOND CIRCUIT REVIEW

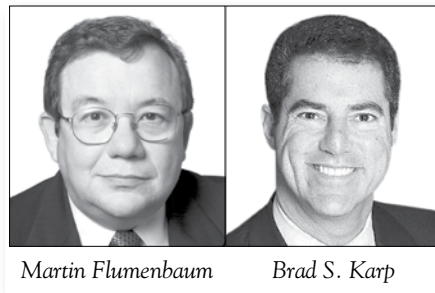
BY MARTIN FLUMENBAUM AND BRAD S. KARP

### *Standard for Waiver of Psychotherapist-Patient Privilege*

In this month's column we discuss *In re Sims*,<sup>1</sup> in which the U.S. Court of Appeals for the Second Circuit addressed for the first time the issue of waiver or forfeiture in the context of the psychotherapist-patient privilege.

The court held, in a decision written by Judge Amalya L. Kearse and joined by Judges Pierre Leval and Jose Cabranes, that the district court abused its discretion in ordering disclosure of a prisoner's mental health records in a civil lawsuit brought against correction officers for use of excessive force because the prisoner had not waived or forfeited the psychotherapist-patient privilege.

The Second Circuit noted that waiver of the privilege is implied in certain circumstances when necessitated by fairness, as with other testimonial privileges such as the attorney-client privilege. The court ruled that, in this particular case, fairness considerations weighed in favor of upholding the privilege: the privilege holder expressed that he did not seek to affirmatively inject his mental condition into the litigation as part of his claims or defenses; he did not seek damages for emotional injury; and the only statements made about his emotional distress were at a deposition where the plaintiff reluctantly appeared pro se. The Second Circuit rejected a variety of theories put forth by defendants



Martin Flumenbaum

Brad S. Karp

in support of waiver and forfeiture, leaning against making any holdings that would erode the confidentiality of psychotherapist-patient communications.

#### **Background and Procedural History**

Nathaniel Sims was an inmate at the Sing Sing Correctional Facility when Sing Sing corrections officers physically assaulted him, allegedly without provocation or justification. Mr. Sims filed a pro se civil rights action against the officers, pursuant to 42 U.S.C. §1983 for alleged use of excessive force.

During discovery, defendants noticed Mr. Sims' deposition. Mr. Sims requested that the district court either relieve him of the obligation to provide deposition testimony or appoint counsel to represent him, but both requests were denied. At his deposition, Mr. Sims, without counsel, testified that he had been in the prison's mental health unit prior to the incident. Mr. Sims provided detail as to why he had been sent there and spoke about the conversations he had with psychiatric personnel in the unit. When asked about any emotional or psychological injuries resulting from the incident, Mr. Sims testified that he suffered from recurring dreams and anxiety.<sup>2</sup>

In October 2001, the district court granted Mr. Sims' renewed request for the assignment of counsel. Subsequently, defendants served a demand for production of Mr. Sims' psychiatric records from the start of his incarceration in 1993. Mr. Sims' newly appointed attorneys objected to this request on the basis of the psychotherapist-patient privilege. They represented to the district court that Mr. Sims did not seek to make his mental condition an issue at trial by asserting any claim or defense involving his mental condition; nor did they intend to offer evidence of Mr. Sims' placement in the mental health unit or his conversations with psychiatric personnel.

The district judge ruled, however, that Mr. Sims' deposition testimony constituted a waiver of his psychotherapist-patient privilege, and that he "may not unring the bell."<sup>3</sup> The district judge found that Mr. Sims "testified freely as to communications with mental health professionals and as to the supposed circumstances of his placement in the [mental health unit]" and that fairness required that defendants have access to his mental health records because they would otherwise be disadvantaged in their inability to prove specific facts, and generally in being unable to test Mr. Sims' credibility.<sup>4</sup>

In August 2003, the district court dismissed the action, without prejudice, based on Mr. Sims' failure to exhaust his administrative remedies as required by 42 U.S.C. §1997e(a). In 2004, Mr. Sims filed the renewed action, based on the same allegations as in the original action. Defendants sought to invoke the district court's order requiring Mr. Sims to disclose his psychiatric records. The district judge granted defendants' motion, without issuing a new opinion on the matter. The court

**Martin Flumenbaum and Brad S. Karp** are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP, specializing in complex commercial and white-collar defense litigation. **Julie S. Romm**, a litigation associate at the firm, assisted in the preparation of this column.

explained in its oral ruling that Mr. Sims had waived his psychotherapist-patient privilege by claiming the attack on him was unprovoked, since his “psychiatric records might show that he had masochistic or suicidal tendencies undermining his claim.”<sup>5</sup>

Mr. Sims petitioned the Second Circuit for mandamus, contending that he did not waive the privilege and that he did not put his mental health in issue by alleging that the corrections officers attacked him or by responding to questions in a deposition where he was unable to be represented by counsel. Defendants argued that the order was an ordinary discovery order that did not involve “any recurring issue” and therefore was not reviewable by mandamus. Defendants also asserted that the district court’s ruling that Mr. Sims waived his privilege was correct because Mr. Sims put his mental state at issue by, among other things, alleging that the officers’ attack was unprovoked and providing deposition testimony that implicated his mental state at the time of the incident and claimed emotional damage.<sup>6</sup>

### The Second Circuit Decision

The Second Circuit determined that mandamus was available in this case because the discovery order involved privilege and (i) “this Court has yet to address the issue of waiver or forfeiture in the context of the psychotherapist-patient privilege; nor have we addressed the degree to which a court should hold a pro se litigant, who is reluctantly proceeding without counsel, to have irretrievably waived that privilege in responding to questions at a deposition”; (ii) the privilege of confidentiality would be lost if review could only be had after a final judgment, by which point the disclosures at issue would have been made; and (iii) it “raises the novel and far-reaching question of whether a plaintiff’s claim for injuries that include only the garden-variety emotional injury that would ordinarily result from a physical assault, constitutes a forfeiture of his psychotherapist-patient privilege.”<sup>7</sup>

### ‘Jaffee v. Redmond’

In its analysis, the Second Circuit first looked to the U.S. Supreme Court’s

1996 decision in *Jaffee v. Redmond*, in which the 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” because “[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.”<sup>8</sup>

In *Jaffee*, the Court noted that strict confidentiality was required because “[e]ffective psychotherapy...depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears...[and] there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment.”<sup>9</sup>

---

*Rejecting [a]... conclusion that Mr. Sims’ psychiatric records were disclosable because he waived the privilege and could not “unring the bell,” the Second Circuit criticized reliance on a case where a witness... knowingly disclosed financial information and then refused to produce tax returns.*

---

Given how vital confidentiality is understood to be for the psychotherapist-patient relationship, the *Jaffee* Court held that the privilege was not subject to a balancing test that would take into consideration the probative value of the information; rather, to serve the purpose of the privilege, there must be some degree of certainty that such discussions would be protected against subsequent disclosure.<sup>10</sup>

Although the question as to waiver or forfeiture of the psychotherapist-patient privilege was one of first impression in the Second Circuit, the court has addressed the “waiver” issue in the context of other

testimonial privileges and has held that waiver may be implied where it is necessary in the interests of fairness, such as where the party attempts to use the privilege both as a “shield and a sword.”

“In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party.”<sup>11</sup> The fairness considerations examined by the Second Circuit include: “whether the privilege holder took affirmative steps to inject privileged materials into the litigation”; whether the decision-maker will accept the privilege-holder’s representations without the opponent having an adequate opportunity to rebut them; and whether the witness’ testimony was given in the absence of counsel.<sup>12</sup>

### Forfeiture of Privilege?

The Second Circuit also drew from the District of Columbia Circuit’s recent case, *Koch v. Cox*,<sup>13</sup> which presented similar questions as to whether a plaintiff forfeited his psychotherapist-patient privilege based on allegations in his pleading or his answers to questions in discovery. In *Koch*, as in this case, the plaintiff made clear that he was not seeking damages for emotional distress nor putting his mental state at issue. The District of Columbia Circuit rejected broad claims of waiver, noting that the plaintiff did not put his mental state at issue by acknowledging that he suffered from depression and that the privilege is not overcome when the plaintiff’s mental state is put in issue only by the defendant.<sup>14</sup>

In keeping with *Jaffee*’s and *Koch*’s solicitous view of the privilege, the Second Circuit expressed an unwillingness to support any rationale for waiver or forfeiture that would render the confidentiality of psychotherapist communications uncertain, or extinguished. For example, among the correction officer defendants’ arguments for waiver or forfeiture of the privilege was that Mr. Sims claimed the assault was unprovoked, thus placing his mental state in issue.

In rejecting this argument, the Second

Circuit noted “[t]his rationale for disclosure could affect virtually every case in which an assault, or the use of excessive force, is alleged.”<sup>15</sup> Due to the breadth of defendants’ assertions—including the theory that essentially anyone seeking damages for pain and suffering has waived the psychiatric privilege—the court stated that “immediate review is needed in order to prevent a proliferation of discovery rulings that could eviscerate the effectiveness of the psychotherapist-patient privilege.”<sup>16</sup>

## Second Circuit Holding

Rejecting the district court’s conclusion that Mr. Sims’ psychiatric records were disclosable because Mr. Sims waived the privilege and could not “unring the bell,” the Second Circuit criticized reliance on a case where a witness in a grand jury investigation knowingly disclosed financial information in a grand jury questionnaire and then refused to produce his income tax returns as called for by the grand jury subpoena by invoking the privilege against self-incrimination.

The context in this case was markedly different, where there was no indication that Mr. Sims was even aware that the psychotherapist-patient privilege existed, let alone that he knowingly chose to waive the privilege. Moreover, as a civil plaintiff, Mr. Sims was entitled to opt not to pursue a claim that would put his mental state at issue.

The Second Circuit also found it notable that Mr. Sims’ statements were made to a civil opponent in a deposition, not before a decisionmaker or factfinder, and therefore there was not the same concern that defendants might be prejudiced at trial if they could not obtain Mr. Sims’ mental health records, particularly in light of the fact that Mr. Sims represented that he would not introduce evidence concerning his emotional or mental state.

The *Sims* court concluded: “that a plaintiff does not forfeit his psychotherapist-patient privilege merely by asserting a claim for injuries that does not include emotional damage; that a plaintiff does not forfeit that privilege by merely stating that he suffers from a condition such

as depression or anxiety for which he does not seek damages; that a plaintiff may withdraw or formally abandon all claims for emotional distress in order to avoid forfeiting his psychotherapist-patient privilege; and that the party’s psychotherapist-patient privilege is not overcome when his mental state is put in issue only by another party.”<sup>17</sup>

The court interpreted defendants’ request and supporting rationale as an attempt to have the privilege breached whenever there is a possibility that psychiatric records may be useful in testing the plaintiff’s credibility or may have some other probative value. But the proposition advanced by defendants contradicts the Supreme Court’s holding in *Jaffee* that the psychotherapist-patient privilege “promotes sufficiently important interests to outweigh the need for probative evidence.”<sup>18</sup>

In this case, the court reasoned that the factors to consider as to whether fairness necessitated waiver of the psychotherapist-patient privilege weighed heavily in favor of no waiver: Mr. Sims expressly represented that he would not inject his mental condition into the litigation; the prior statements related to his mental health were made outside the presence of the decision-maker; and the only statements about Mr. Sims’ emotional distress were made in a deposition where “he reluctantly appeared pro se.”<sup>19</sup> Therefore, the court reversed the district court’s disclosure order requiring that Mr. Sims’ psychiatric records be produced in the litigation and held that Mr. Sims’ assertion of the psychotherapist-patient privilege precluded disclosure.

## Conclusion

The Second Circuit’s decision to reverse the district court’s disclosure order was based on a multitude of factors, not the least of which was the overall importance of the psychotherapist-patient privilege. The court made clear that where a plaintiff does not seek to put his mental state at issue or introduce any evidence of his emotional state, the interests of fairness do not require waiver of the privilege, regardless of whether the claims or defenses

at an earlier point may have implicated the plaintiff’s mental state or whether the plaintiff provided deposition testimony about his psychiatric treatment. Where the privilege-holder did not seek to wield the privilege as both a sword and shield, the court concluded that an order requiring disclosure of psychiatric records was beyond the permissible limits of the district court’s discretion.



1. *In re Sims*, Docket No. 06-0644-op, 2008 WL 2778869 (2d Cir. July 18, 2008).
2. *Id.* at \*2-4.
3. *Id.* at \*7 (quoting the District Court Order dated Feb. 15, 2002).
4. *Id.* at \*7 (quoting the District Court Order dated Feb. 15, 2002).
5. *Id.* at \*8 (quoting *Sims* brief on appeal).
6. *Id.* at \*9.
7. *Id.* at \*9-10.
8. *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).
9. *Id.* at 10.
10. *Id.* at 17-18.
11. *In re Sims*, 2008 WL 2778869 at \*12 (quoting *In re Grand Jury Proceedings*, 219 F.3d 175, 182-183 (2d Cir.2000)) (emphasis in original).
12. *Id.* at \*13.
13. *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007).
14. *Id.* at 390-91.
15. *In re Sims*, 2008 WL 2778869 at \*10.
16. *Id.*
17. *Id.* at \*15.
18. *Jaffee v. Redmond*, 518 U.S. at 9-10.
19. *In re Sims*, 2008 WL 2778869 at \*23.