

Privilege - Psychotherapist  
FRE 501  
B.R. 7026

Huntley v. Snyder  
In re Gerald V. Snyder

Adv. No. 95-6190-fra  
Main Case No. 695-61784-fra7

1/19/96

FRA

Unpublished

The Plaintiff filed a motion for an order compelling the production of psychiatric records held by two doctors relating to their treatment of the debtor. The debtor responded that the records are protected by a psychotherapist-patient privilege and are thus not subject to the Plaintiff's subpoena. Because a determination of dischargeability under § 523 (the basis of Plaintiff's adversary proceeding) is dependant on federal bankruptcy law, rather than state law, FRE 501 requires that the court look to federal common law to determine whether a privilege applies. As the Ninth Circuit does not currently recognize a psychotherapist-patient or physician-patient privilege, the court held that the records are subject to Plaintiff's subpoena. Access to the records was limited by the court under B.R. 7026, however, to only those persons who need them to prepare the case for trial.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

IN RE	)	
	)	
GERALD V. SNYDER,	)	Case No. 695-61784-fra7
	)	
<u>Debtor.</u>	)	
	)	
GLORIA HUNTLEY, Personal	)	
Representative of Louise	)	
Billie Williams Estate,	)	
	)	
Plaintiff,	)	
vs.	)	Adversary No. 95-6190-fra
	)	
GERALD VERNON SNYDER,	)	
	)	MEMORANDUM OPINION
<u>Defendant.</u>	)	

Plaintiff in this action has filed a motion for an order to compel the production of the psychiatric records of the debtor which are currently in the possession of two physicians who have been treating him. The Defendant responds that those records are protected under a psychotherapist-patient privilege. Plaintiff argues that the debtor has waived that privilege. For the reasons that follow, this court holds that the records in question are not  
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1 protected under a physician-patient or psychotherapist-patient  
2 privilege.

3 FACTS

4 Plaintiff, as personal representative of Ms. William's estate,  
5 filed a wrongful death complaint against the debtor in Coos County  
6 Circuit Court. A default judgment in excess of \$200,000 was  
7 entered by the Circuit Court. The debtor subsequently filed for  
8 bankruptcy under Chapter 7. This adversary proceeding was  
9 instituted by the Plaintiff to challenge the dischargeability of  
10 the state judgment under 11 U.S.C. § 523(a)(6). In furtherance of  
11 her case, the Plaintiff wishes to compel production of medical  
12 records relating to debtor's psychiatric treatment.

13 PSYCHOTHERAPIST-PATIENT PRIVILEGE

14 The evidentiary rule in federal court regarding a person's  
15 right to keep privileged communication confidential is found in  
16 F.R.E. 501. That rule reads as follows:

17 Except as otherwise required by the Constitution of the  
18 United States or provided by Act of Congress or in rules  
19 prescribed by the Supreme Court pursuant to statutory  
20 authority, the privilege of a witness, person,  
21 government, State, or political subdivision thereof shall  
22 be governed by the principles of the common law as they  
23 may be interpreted by the courts of the United States in  
the light of reason and experience. However, in civil  
actions and proceedings, with respect to an element of a  
claim or defense as to which State law supplies the rule  
of decision, the privilege of a witness, person,  
government, State, or political subdivision thereof shall  
be determined in accordance with State law.

24 In other words, if the dispute in federal court must be  
25 resolved with reference to state law, then the existence and extent  
26 of an evidentiary privilege is determined by state law. However,

1 in a federal civil action where the controlling law is federal law,  
2 the Court must look to federal law to determine whether a privilege  
3 exists.

4 The Plaintiff has asked the court in this adversary proceeding  
5 to find that the claim held by her is nondischargeable under 11  
6 U.S.C. § 523(a)(6). Resolution of that question is a matter of  
7 federal bankruptcy law.

8 The Ninth Circuit Court of Appeals held in a 1989 opinion that  
9 "[t]his circuit has not recognized a psychotherapist-patient  
10 privilege in a criminal context. Neither have we adopted a  
11 physician-patient privilege." They further stated that "[t]he  
12 psychotherapist-patient privilege has developed by state statutory  
13 enactment" and does not exist at common law. In re Grand Jury  
14 Proceedings, 867 F.2d 562 (9th Cir. 1989).

15 LIMITS ON DISCLOSURE

16 While the records are not subject to any evidentiary privilege  
17 in this Circuit, there can be no doubt that Defendant has an  
18 interest in maintaining the privacy of the records. See United  
19 States v. Diamond, 964 F.2d 1325 (2d Cir. 1992), Jaffee v. Redmond,  
20 51 F.3d 1346 (7th Cir. 1995) (Both cases recognizing a federal  
21 psychotherapist-patient privilege). As the Diamond court pointed  
22 out:

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1 [I]t can hardly be disputed that communications  
2 between a patient and a psychotherapist typically involve  
3 far more intensely personal information than  
4 communications to other kinds of doctors, a fact that  
5 accounts for the somewhat wider recognition of a  
6 privilege in the case of psychotherapists than in the  
7 case of physicians generally. See *Developments*, 98  
8 Harv.L.Rev. at 1539. The diagnosis of a psychotherapist  
9 may also involve matters that a patient regards as highly  
10 personal. Disclosure of communications to  
11 psychotherapists and their diagnoses would frequently be  
12 embarrassing to the point of mortification for the  
13 patient. Nor can it be seriously disputed that  
14 unrestrained disclosure might discourage persons from  
15 seeking psychiatric help. 964 F.2d at 1328.

9 The Circuit Court in In re Grand Jury Proceedings, *supra*, did  
10 not have to wrestle with this consideration, given the non-public  
11 nature of grand jury proceedings. (The target of the grand jury's  
12 investigation is referred to in the opinion as "Jane Doe".) This  
13 is not to say that the case is readily distinguishable: The  
14 Court's reasoning that the privilege has never existed in common  
15 law, is just as applicable in this context. However, where there  
16 are no guarantees of privacy as exist in grand jury proceedings,  
17 compelled disclosure of such sensitive matters should be  
18 conditioned in a manner which strikes a reasonable balance between  
19 the patient's interests and the demanding party's right to  
20 discovery. Fed. R. Civ. P. 26(c) (made applicable to bankruptcy  
21 cases by B.R. 7026) authorizes orders limiting use or disclosure of  
22 information obtained in discovery in order to avoid embarrassment  
23 of a party or other person.

24 In this case, the records sought by Plaintiff -- and any  
25 copies thereof -- must be maintained and used so as to limit  
26 disclosure of the information contained therein to those who need

1 it in order to prepare this case for trial. Accordingly, the court  
2 will order that the records, once delivered, be maintained in a  
3 place not accessible to persons with no need to view them, and that  
4 they be revealed to or discussed with only those members of  
5 Plaintiff counsel's staff involved in the case, and any expert  
6 witness engaged by Plaintiff for the purpose of evaluation or  
7 testimony about Defendant's condition. Disclosure to Plaintiff  
8 herself is permitted to the extent reasonably necessary to allow  
9 her to make informed decisions about the conduct of the case. All  
10 persons to whom disclosure is made are to be bound by the  
11 restriction on further disclosure contained in the order. In the  
12 event records are to be filed with court, the filing party shall  
13 ensure that they are filed under seal.

14 DISCOVERY BAR DATE

15 Defendant argues that the motion should be denied in light of  
16 this Court's order closing discovery prior to the time Plaintiff  
17 moved to compel production of the records in question. The order  
18 was part of a standard scheduling order entered shortly after the  
19 answer was filed. It provided that discovery would close 70 days  
20 after entry of the order -- in this case, on November 14, 1995.  
21 The motion was filed on December 1, 1995.

22 Scheduling orders are designed to expedite cases, and the  
23 business of the court. Relief from the effect of such orders  
24 should not be denied where no prejudice attaches. Defendant does  
25 not argue, nor does the record reflect, that he has been prejudiced  
26 by the delay.

1 CONCLUSION

2 Because resolution of this adversary proceeding is dependent  
3 on federal bankruptcy law, the Court must look to federal law to  
4 determine whether the records sought are subject to a  
5 psychotherapist-patient privilege. As no such privilege is  
6 recognized under federal law in the Ninth Circuit, the records are  
7 not protected by privilege and are subject to the Plaintiff's  
8 subpoena duces tecum. An order consistent with this opinion will  
9 be entered.  
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12 FRANK R. ALLEY, III  
13 Bankruptcy Judge  
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