The Tale of Joe Lifschutz: Showdown Over Confidentiality

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As I write this, I am in the Sierras, mid-way between the Gold Country and the high elevations. The Tales of the Wild West genre thus offers itself to mind. And maybe it's the right genre for this story of a psychotherapist who wouldn't back down.[1]

In 1959, give or take a year, Joseph Housek went to San Mateo psychiatrist and psychoanalyst Joseph Lifschutz, M.D. for psychotherapy. He was in therapy for 6 months. Some years later, he suffered a physical assault. He sued his assailant, and his lawsuit included an allegation that he had suffered "severe mental and emotional distress" as a result of the assault and an argument that should receive monetary compensation for this injury.

While being deposed by the opposing attorney, he revealed, probably under direct questioning, that he had previously been in psychotherapy with Dr. Lifschutz. This information could not fail to be of interest: Defense lawyers are often quite interested in anything that could be used to argue that the emotional problems of the plaintiff are not the result of the defendant's actions because the plaintiff was playing with less than a full deck before he or she ever met the defendant. Soon after, Dr. Lifschutz was the unhappy recipient of a subpoena from the defense attorney, instructing him to make available for copying all written records of his treatment of Mr. Housek and to make himself available for questioning under oath.

Mr. Housek, through his attorney, raised no objection. The patient being the owner of the privilege, there was no legal obstacle to the disclosure of the details of the therapy. Nevertheless, Dr. Lifschutz was deeply disquieted at this prospect of violation of confidentiality. He was concerned that the spectacle of a therapist revealing, in a highly public setting, material that had been shared in the privacy of the therapy office would undermine, for other therapy patients, the sense of privacy and separateness from everyday affairs that is central to the "frame." He retained an attorney, who searched for legal precedents of a psychotherapist asserting confidentiality when the patient had not done so. He found none, and asked Dr. Lifschutz if he was interested in establishing a precedent. Fatefully, he replied, "Sure."

Dr. Lifschutz attended the deposition where he had been instructed to hand over his records but stated that, on behalf of his profession and the institution of psychotherapeutic treatment, he would not reveal anything beyond confirming that he had treated Mr. Housek, a fact which was already well known. This refusal led to a series of court appearances before a Superior Court judge. Dr. Lifschutz's attorney presented his arguments as to why this material should not be disclosed. The judge, we may assume, listened and deliberated. He then ordered Dr. Lifschutz jailed. The bailiff took him into custody.

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[1] This account is drawn from Bollas & Sundelson (1995) *The new informants: The betrayal of confidentiality in psychoanalysis and psychotherapy*. (Northvale, NJ: Jason Aronson) and from conversations with Dr. Lifschutz.

After three days, the California Supreme Court intervened, its justices feeling, according to Dr. Lifschutz, "there's a psychiatrist in jail, we can't let this go on!" In due time, they heard the case as to whether he should be required to turn over his notes and to testify.

Dr. Lifschutz's attorney argued to the Supreme Court that the lower court order for the disclosure of the records violated:

- the constitutional privacy rights of his patients
- his personal constitutional rights of privacy
- his right to practice his profession *effectively*
- his right to equal protection (because clergyman could not be compelled to disclose information under similar circumstances)

Of these arguments, the Court ultimately accepted…none. They declined to limit the court's access to psychotherapy material beyond the limits that had already been imposed by the Legislature in the statutes establishing psychotherapist-patient privilege, except in one respect. In their decision, *in re Lifschutz*, they established that only material relevant to the specific legal matter must be disclosed to the parties or to their attorneys. Thus, a therapist may send requested materials directly to the judge, asking that he or she review them privately and disclose only those that are sufficiently relevant to the case.

In a conversation with Dr. Lifschutz, I asked how disappointed he was by losing his case, in that the Court did not accept any of the arguments he and his attorney presented. He responded that he never considered the decision a loss, not only because it limited access to psychotherapy material but also because of the strong language the court used in affirming the importance of confidentiality. He also referred to the subsequent decision by the U.S. Supreme Court's in the Jaffee v. Redmond case, which established psychotherapist-patient privilege in Federal courts and which states, in part:

> Effective 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…The mere possibility of disclosure [to a third party] may impede the development of the confidential relationship necessary for successful treatment.

The U.S. Supreme Court's Jaffee decision cites *in re Lifschutz*, so we know they were influenced by it. But beyond that: Dr. Lifschutz was in the courtroom as the U.S. Supreme Court deliberated the case. Was it harder for the U.S. Supreme Court justices to dismiss the importance of confidentiality in psychotherapy while in the presence of someone who had gone to jail for it? We can only speculate. But we know that their decision has become the single most influential legal statement of the need for confidentiality to support effective psychotherapy, which they describe as a transcendent value for society.

Every good Wild West tale needs a denouement, and this one involves the fate of the records of Joseph Housek's therapy. Where did the California decision leave Dr. Lifschutz and

his subpoena?, you may ask. After all, the California Supreme Court decided that someone in his situation must deliver the notes to the judge.

I once heard a workshop instructor say that Dr. Lifschutz was jailed repeatedly over several months and then, despite all his valiant efforts, his notes were ultimately disclosed. You already know that this statement about his incarceration is wrong: Three days was as long as the legal system saw fit to keep him behind bars. It turns out that the statement about the disclosure is wrong, too. As he was required to if he wished to avoid an indeterminate jail sentence, Dr. Lifschutz gave his notes to the trial judge. She reviewed them, decided that nothing in them was pertinent to the lawsuit, and returned them to Dr. Lifschutz, in whose safekeeping they have remained.