

In a federal investigation of a man for bank robbery, the grand jury has reason to believe that the man confided in his psychiatrist that he committed the offense. As a result, the grand jury subpoenaed the psychiatrist to testify regarding the man's statement.

The psychiatrist refuses to testify on the ground of privilege.

Can the psychiatrist be forced to testify?

- A. No, because the psychiatrist must assert the psychotherapist-patient privilege in the patient's absence.
- B. No, because the testimony would violate the man's privilege against self-incrimination.
- C. Yes, because the psychotherapist-patient privilege belongs to the man and may only be asserted by him.
- D. Yes, because the psychotherapist-patient privilege cannot be invoked at grand jury proceedings.

Explanation:

Psychotherapist-patient privilege

Confidential communication between psychotherapist/social worker & patient protected if made during the course of diagnosis or treatment of mental/emotional condition *unless*:
patient's mental condition at issue

communication made during court-ordered mental exam *or*

communication introduced at involuntary-commitment proceeding

Patient holds privilege & psychotherapist must assert in patient's absence

Under Federal Rule of Evidence 501, claims of privilege in federal court are generally governed by the common law.* For instance, the common law **psychotherapist-patient privilege** protects **confidential communications** between a patient and a psychotherapist (ie, psychologist or psychiatrist) or social worker made during the course of **treatment or diagnosis**. Although this privilege belongs to the patient, the **psychotherapist must assert it in the patient's absence**—eg, when the patient is not a party to the proceeding (as seen here) **(Choice C)**.

*Common law governs privilege claims in federal court unless (1) the Constitution, a federal statute, or a rule provides otherwise or (2) the suit is based on [diversity jurisdiction](#) so state rules on privilege must be applied.

(Choice B) The [Fifth Amendment](#) protects a person from being compelled to produce *self-incriminating* testimonial communications (eg, oral testimony). As a result, this would entitle the psychiatrist to refuse to provide incriminating testimony regarding him/herself—but not regarding the man.

(Choice D) Claims of privilege can be invoked at all stages of a legal proceeding, including grand jury investigations.

Educational objective:

The psychotherapist-patient privilege protects confidential communications between a patient and a psychotherapist or social worker made during the course of treatment or diagnosis. This privilege belongs to the patient but must be asserted by the psychotherapist in the patient's absence.

References

Fed. R. Evid. 501 (applicability of common law privileges).

