2013 - 2015 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

Part I

January 15, 2015

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Unified Mental Health Service Provider Privilege

Introduction

Over the past two terms, the Evidence Committee has worked on developing a unified mental health service provider privilege to replace the different and sometimes inconsistent privileges that now exist for communications between patients and various mental health service providers. In order to ascertain whether there was support for a unified privilege and to obtain input on a draft rule, the Committee has twice sought the input of organizations that may have a stake in a unified privilege. In response to the request for input, the Committee received many thoughtful comments, many of which were used to shape the draft of N.J.R.E. 534, Mental Health Service Provider—Patient Privilege (see below for proposed rule), creating a unified mental health service provider privilege. The Committee recommends adoption of the proposed rule.

Procedural History

In 2011, the Supreme Court authorized the Committee to undertake a comprehensive study of the various mental health service provider evidentiary privileges with the goal of determining whether to recommend that New Jersey replace these many privileges with one unified privilege for all mental health care providers. Judge Messano, Chair of the Committee, appointed a subcommittee to study the issue, chaired by Appellate Division Judge Mitchel Ostrer.

During the 2011-2013 term, the Committee reached out to the public to determine whether there was any support for the general concept of a unified privilege, but without proposing any specific rule. The Committee, by individual letter, requested

comments from over fifty organizations that might have an interest in the subject of a unified mental health service provider privilege. To seek comments from a broader audience, on June 1, 2012, Judge Grant published a Notice to the Bar requesting input from any interested parties on the concept of a unified mental health service provider privilege. The request stated that the Committee was considering a unified privilege for communications with mental health service providers that would modify or replace the current privileges found in: N.J.R.E. 505 (N.J.S.A. 45:14B-28), the Psychologist-Patient Privilege; N.J.R.E. 506 (N.J.S.A. 2A:84A-22.1 to -22.7), the Patient-Physician Privilege; N.J.R.E. 510 (N.J.S.A. 45:8B-29), the Marriage Counselor Privilege; N.J.R.E. 511 (N.J.S.A. 2A:84A-23), the Cleric-Penitent Privilege; N.J.R.E. 517 (N.J.S.A. 2A:84A-22.13 to -22.16), the Victim-Counselor Privilege; N.J.R.E. 518 (N.J.S.A. 45:15BB-13), the Social Worker Privilege; and N.J.S.A. 45:8B-49, the Licensed Professional Counselor Privilege.

The Evidence Committee received over 20 responses from government agencies, academic institutions, bar associations, professional organizations of mental health providers, and other interest groups. The overwhelming majority of the responses favored adoption of some type of unified privilege. Many respondents, however, reserved their final opinion until seeing the proposed draft of the unified privilege. Many comments were similar to this one from the National Association of Social Workers:

> Neither the interests of consumers of mental health services in New Jersey nor the providers of such services benefit from the uncertainty that surrounds the confidentiality of their discussions.

> A unified evidential privilege that extends to all mental health services providers in New Jersey has the potential to provide that certainty. Whether this potential is realized depends upon the provisions of such unified privilege. For the goals of certainty and predictability to be achieved, the unified privilege must be based upon the highest common denominator among the evidential privileges in question.

This view was shared by the New Jersey Psychiatric Association, representing psychiatrists in New Jersey, which stated, "[T]he privilege, to the extent it is allowed by law, should be the same for every mental health professional."

Based on the comments received, the subcommittee prepared a draft rule, N.J.R.E. 534, setting forth a unified privilege. The initial version of N.J.R.E. 534 **(Appendix A)** was captioned as a "Discussion Draft" so as to reflect that it was a work in progress. On April 1, 2014, Judge Grant published the Discussion Draft along with the subcommittee's "Interim Report" **(Appendix B)** seeking comments from interested groups and individuals. The Committee also forwarded for comment the Discussion Draft and Interim Report to the over 50 organizations it had previously identified as interested parties.

The Committee received 21 comments (list of comments attached as **Appendix C)**, ranging from general support of the draft rule, to suggested modifications, to outright opposition. A memorandum summarizing the comments is attached as **Appendix D.** Carefully considering the responses, the subcommittee made numerous changes to the Discussion Draft, incorporating the commentators' meritorious suggestions. The modifications made to the Discussion Draft are explained in a memorandum dated October 22, 2014 attached as **Appendix E.**

On October 28, 2014, the Committee approved the revised version of N.J.R.E. 534 that follows, with only one member opposed to the draft rule, and solely with respect to the Committee's recommendation to replace the current absolute statutory privilege protecting communications with victim counselors with the qualified uniform privilege.

Discussion

I. Background

In initially seeking the Supreme Court's approval to undertake a study of New Jersey's mental health service provider privileges and the advisability of a unified privilege, the Committee noted that the extent of the privilege that applies to a communication between a patient and a mental health service provider often depends on the license or professional credentials of the provider. The Evidence Rules provide for different and sometimes inconsistent privileges for communications between a patient and a psychologist, N.J.R.E. 505; a physician, N.J.R.E. 506; a marriage counselor, N.J.R.E. 510; a cleric, N.J.R.E. 511; a victim counselor, N.J.R.E. 517; and a social worker, N.J.R.E. 518. Statutory privileges for some other mental health service providers inexplicably have no analogs at all in the Rules of Evidence. See, e.g., N.J.S.A. 45:14BB-3, N.J.A.C. 13:42A-6.3 (psychoanalysts); N.J.S.A. 45:2D-3 and N.J.A.C. 13:34C-4.5 (alcohol and drug counselors); and N.J.S.A. 45:8B-48 (professional counselors).

The existing regime, whether by design or by happenstance, creates a hierarchy of privileges. Communications with psychologists are generally afforded greater protection than communications with psychiatrists, who fall under the physician-patient umbrella.

State v. McBride, 213 N.J. Super. 255, 270 (App. Div. 1986), certif. denied, 107 N.J. 118 (1987) (“the psychologist-patient privilege affords even greater confidentiality than the physician-patient privilege”). In other respects, however, the "marriage and family therapist privilege . . . may be somewhat broader than the psychologist-patient privilege." Kinsella v. Kinsella, 150 N.J. 276, 298 n. 1 (1997). The victim counselor privilege has been described as "absolute." State v. J.G., 261 N.J. Super. 409, 419 (App. Div.), certif. denied, 133 N.J. 436 (1993). Weakest among the mental health service provider privileges in the Rules of Evidence is the social worker privilege, which provides more limited protection of a patient's confidential communications.

This disparate treatment is difficult to justify by reference to the two apparent policy goals of a privilege governing communications with a mental health service provider: (1) to encourage utilization of mental health services, which we refer to as the utilitarian justification; and (2) to protect the patient's privacy, which we refer to as the privacy justification. See Kinsella, supra, 150 N.J. at 330 ("[T]he psychologist-patient privilege serves the functional purpose of enabling a relationship that ultimately redounds to the good of all parties and the public. The psychologist-patient privilege further serves to protect an individual's privacy interest in communications that will frequently be even more personal . . . than those between attorney and client."). Although some have questioned the empirical support for the utilitarian justification for the privilege, see, e.g., Development in the Law - Privileged Communication: IV. Medical and Counseling Privileges, 98 Harv. L. Rev. 1530, 1531, 1542-44 (1985), and Jaffee v. Redmond, 518 U.S. 1, 18-36, 116 S. Ct. 1923, 1932-41, 135 L. Ed. 2d 337, 350-60 (1996) (Scalia, J., dissenting), there seems to be little room for debate that communications with mental

health service providers are often of an intensely personal nature, and disclosure would often subject the patient to potential embarrassment and stigma. The utilitarian and privacy goals would seem to apply equally to a communication with a mental health service provider, regardless of his or her professional credentials.

Persons of lesser means may be more likely to turn to mental health service providers such as social workers, or licensed professional counselors, than psychiatrists and psychologists. A privilege regime that accords less protection to communications with the former group of providers may therefore have an undue impact on economically disadvantaged patient populations.

Disparate treatment of mental health privileges also adds complexity to a court's analysis of a claim of privilege over mental health communications. The court must discern the professional credential of the mental health service provider to whom the claimed privileged communications were made. At times, the documents provided for a court's review do not clearly indicate those credentials. In cases where a patient was treated by multiple providers — for example, in a hospital setting — the results may be inconsistent, although the contents of the communications are identical.

II. Recommended Rule Creating Unified Mental Health Service Provider Privilege -- Draft N.J.R.E. 534

Draft N.J.R.E. 534, set forth below, generally follows the structure of Rule 503 of the Uniform Rules of Evidence Act (1999) of the National Conference of Commissioners on Uniform State Laws. Draft N.J.R.E. 534, like U.R.E. 503, includes: a definitional subsection that defines a confidential communication, a mental health service provider and patient; a subsection establishing the general rule of the privilege; a subsection on

who may claim the privilege; and a subsection on exceptions to the privilege. Draft N.J.R.E. 534 also adds a fifth subsection addressing a court's authority to compel disclosure when a statement is made in compliance with a statutory duty to report abuse and neglect and a sixth subsection addressing waiver and constitutional rights. Although draft N.J.R.E. 534 follows the structure of U.R.E. 503, in many ways it differs substantively. The following discussion focusses on ways in which the N.J.R.E. 534 would resolve differences among New Jersey's existing mental health service provider privileges.

A. Definitions and Protected Communications

The draft definition of "confidential communications" limits the privilege to information transmitted between the mental health service provider and a patient that is "in the course of treatment of or related to that individual's condition of mental or emotional health." Draft N.J.R.E. 534(a)(1). This would ensure that the privilege does not extend to communications with providers unrelated to mental or behavioral health treatment.

Thus, for example, "confidential communications between physician and patient," as set forth in N.J.R.E. 506, can include statements that pertain to treatment of mental or emotional conditions — whether to a psychiatrist or other physician — or they can include statements pertaining to physical conditions unrelated to mental or emotional conditions. The latter statements would not be covered by the proposed definition of "confidential communications."

The "in the course of treatment" language was added to the definition of "confidential communications" at the suggestion of several commenters to emphasize

that virtually all communications with providers whose practice is focused on mental health — e.g., a psychologist or psychiatrist — would likely fall within the privilege, thereby avoiding (or at least reducing) the routine need for burdensome line-by-line in camera reviews of treatment records created by such mental health professionals. For example, discussion of family finances in the course of marriage therapy would be covered as confidential communications. However, in the case of communications with a non-psychiatric pediatrician, for example, the proponent of the privilege would need to establish that the pediatrician was engaged in a course of treatment for a condition of mental or emotional health, or the communication related to such condition. For example, communications with the pediatrician regarding the treatment of a child's broken wrist would not be covered.

The proposed definition includes information "obtained by an examination," as does N.J.R.E. 506. For example, a patient's suicidal ideation or self-harming tendencies may be conveyed to an examining provider by physical presentation — e.g., evidence of an overdose, or evidence of cutting — without an oral communication. The definition would include such information within "confidential communication."

The definition of "confidential communications" provides that the communication be transmitted in confidence and not intended for disclosure to third parties, except as otherwise provided. Exceptions include "those present to further the interest of the patient in the diagnosis or treatment," with "diagnosis and treatment" defined as including "consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment." Draft N.J.R.E. 534(a)(1)(i) and (a)(2). This exception largely

mirrors U.R.E. 503(a)(1), although the draft N.J.R.E. 534 enlarges the list of undertakings to add screenings, assessments, evaluations, diagnosis and treatment.

A second exception includes "those reasonably necessary for the transmission of the information, including the entity through which the mental health service provider practices." Draft N.J.R.E. 534 (a)(1)(ii). This tracks U.R.E. 503(a)(1), but adds a reference to the practicing entity. A third exception, like U.R.E. 503(a)(1), includes persons participating in the undertaking "under the direction of a mental health service provider, including members of the patient's family." However, draft N.J.R.E. 534 requires that family members be "authorized," a change that was incorporated at the suggestion of a commenter. Draft N.J.R.E. 534 also adds the patient's guardian or conservator, or the personal representative of a deceased patient.

The draft's definition of "mental health service provider" is the means by which the rule would identify and unify the various providers covered by the privilege. The Committee opted for a specific listing of those persons covered. As a drafting matter, it did not adopt the purely functional approach in U.R.E. 503, which defines "mental health providers" generally as individuals authorized to engage in the diagnosis or treatment of a mental or emotional condition. Rather, the Committee followed the more specific model of the California Evidence Code § 1010. Although California adopts the term "psychotherapist," as opposed to mental health service provider, the California Code then identifies various credentialed professionals, including physicians, psychologists, marriage and family therapists, clinical social workers, and professional clinical counselors, and others in training and internship roles.

In response to several comments, the draft rule states that the term “mental health service providers” is “specifically intended to include” instead of “apply to” the enumerated list of professionals. The Committee believes substituting “include” for “apply to” would eliminate the ambiguity, to which the commenters objected.

The draft’s "mental health service provider" definition includes persons "reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition[.]" Thus, the privilege would apply under those circumstances, even if the provider has misrepresented his or her credentials or licensing status to an unwitting patient. In that respect, draft N.J.R.E. 534 follows N.J.R.E. 506, the patient-physician privilege, which expressly covers communications with a person "reasonably believed by the patient to be authorized, to practice medicine[.]" Also, a person who mistakenly, but reasonably, believes a person is “authorized” to treat a mental or emotional condition, need not subjectively believe the person is one of the enumerated professionals.

Draft N.J.R.E. 534 generally includes those disciplines already covered by the existing Rules of Evidence, but expands them to include persons not licensed but authorized by law to practice in the field. Thus, the psychologist privilege would extend to: persons trained in psychology who are employed to practice in state institutions, N.J.S.A. 45:14B-6(a)(1); certified school psychologists, N.J.S.A. 45:14B-6(b) and (g); psychology interns, N.J.S.A. 45:14B-6(c); and persons practicing under temporary authority, N.J.S.A. 45:14B-6(d), (e), and (f). The social worker privilege would be extended to cover social work interns and certified school social workers. N.J.S.A. 45:15BB-5(b) and (c). In response to a comment, the Committee modified the

definitions of marriage and family therapists and professional counsellors to explicitly extend these definitions to include certain unlicensed persons who engage in these activities, including interns. Draft 534(a)(3)(iii) and (viii).

Draft N.J.R.E. 534 also includes providers who are now covered by statutory privileges that are not currently codified in the Evidence Rules. These include alcohol and drug counselors, professional counselors, and psychoanalysts. Draft N.J.R.E. 534(a)(3)(vi), (viii) and (ix). Draft N.J.R.E. 534 also includes nurses. Draft N.J.R.E. 534(a)(3)(vii). It does not include gambling counselors, as a separate discipline.

Responding to a comment from various licensing boards, the Committee explicitly incorporated midwives and physician assistants into the definition of “mental health service providers.” Midwives are regulated by the Board of Medical Examiners. N.J.S.A. 45:10-1. They "attend[] a woman in childbirth as a midwife," but must call a physician if there are any "abnormal signs or symptoms." N.J.S.A. 45:10-8. Certain midwives who are also certified nurses may prescribe drugs so long as they are working with a "collaborative physician." N.J.S.A. 45:10-18. Before entering into practice, they must "enter into an affiliation with a physician who is licensed in New Jersey." N.J.A.C. 13:35-2A.6. By regulation, they are permitted to practice "maternity care and well woman care." N.J.A.C. 13:35-2A.5.

Physician assistants are also regulated by the Board of Medical Examiners, and work under the direct supervision of a physician. N.J.S.A. 45:9-27.15; 45:9-27.18. The list of procedures they may perform is regulated and limited by statute. N.J.S.A. 45:9-27.16. A physician assistant "shall be conclusively presumed to be the agent of the

physician under whose supervision the physician assistant is performing." N.J.S.A. 45:9-27.17(c).

These professions may not be authorized to engage in the direct diagnosis or treatment of mental or emotional conditions. Nonetheless, a patient may consult with such professionals about such conditions, and the professionals may engage in preliminary assessments, leading to a referral to another professional. Those communications should be covered.

The Committee also added pharmacists to the list of covered mental health service providers at the suggestion of the Dean of the Rutgers School of Pharmacy. The role of community pharmacists in mental health has expanded recently, and a specialty sub-group exists for Psychiatric and Neurologic Pharmacists. See Patrick R. Finley, et al., Evaluating the Impact of Pharmacists in Mental Health: A Systematic Review, 23 Pharmacotherapy 12 (2003) ("For over 30 years, clinical pharmacists have contributed to these care models in capacities ranging from educator to consultant to provider."). Our initial research reveals that an apparent minority of states have adopted a form of a pharmacist-patient privilege. Georgia has a pharmacist-client privilege, see Ga. Code § 24-9-40 (2014). Indiana protects prescriptions, drug orders, records, and patient information. See Ind. Code §25-26-13-15(a) (2014). Ohio protects "communication between a patient and a pharmacist in furtherance of the physician-patient relation." Ohio Rev. Code. § 2317.02 (2014); see also Cal. Evid. Code § 912 comment d (2014) (same). On the other hand, most states have been "reluctant to recognize" a pharmacist-patient privilege. Sharon R. Schawbel, Comment, Are You Taking Any Prescription Medication?: A Case Comment on Weld v. CVS Pharmacy,

Inc., 35 New Eng. L. Rev. 909, 962-63 nn.425-27 (2001). Even taking that national trend into account, the Committee was persuaded that pharmacists should be included within the scope of the uniform privilege in this State, consistent with the Dean's suggestion.

The draft incorporates victim counselors within the definition of "mental health service provider." Thus, a victim's "confidential communications" — that is communications related to an individual's "condition of mental or emotional health" — would be subject to the same exceptions that apply to communications with other mental health service providers. A majority of the Committee was unpersuaded that draft 534 should afford "confidential communications" with a victim counselor greater protection than "confidential communications" transmitted to other mental health service providers.

A majority of the Committee also declined to include a so-called "functional" approach to communications by victims that would entail extending the existing "absolute" victim's counselor privilege to cover "confidential communications" by a victim of crime to any mental health service provider. Under current law, the communications of a victim who confers with a psychiatrist or social worker would receive less protection than communications with a victim counselor. A functional approach would address this disparate treatment among providers, but would not address the disparate treatment among communications. (For example, under a functional approach, communications regarding depression triggered by a violent crime would be treated differently than communications regarding depression triggered by other causes.)

Excluding the victim counselor privilege from the unified privilege — either by preserving it or extending it — would be at odds with the overall goal of unifying treatment of mental health service provider privileges. It would also presume that a communications regarding mental health treatment for victims were fundamentally different from, and entitled to greater protection than, communications regarding treatment for other mental health conditions.

The existing victim counselor privilege was based in part on a 1986 model statute that arose out of the recommendations of the "President's Task Force on Victims of Crime, Final Report" (Dec. 1982). The task force concluded that failure to extend confidentiality to counseling risked undermining the effectiveness of counseling. The scope of that confidentiality was not defined. However, the task force noted that at the time many states provided no statutory privilege for communications with crime victim counselors, as contrasted with communications with psychologists and psychiatrists. A 1995 U.S. Department of Justice Report to Congress that proposed model legislation for both absolute and qualified victim counselor privileges noted that victims often seek counseling from counseling centers, instead of a private psychologist, because of economic circumstances, but "[t]he victim's economic status should not result in a victim having less protection from disclosure for her communications to her counselor." U.S. Dep't of Justice, "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors — Findings and Model Legislation" (Dec. 1995).

As with other existing privileges, the draft would leave undisturbed the existing privilege for those communications with a victim counselor that fall outside of the scope

of the kinds of "confidential communications" that are specifically defined under the proposed draft. Draft N.J.R.E. 534(d). Thus, communications regarding a victim's location or relocation would remain covered by the existing privilege. See N.J.R.E. 517(c). So would communications regarding a victim's physical condition. See N.J.R.E. 517(b)(c).

The definitional section defines "patient" in greater detail than either U.R.E. 503(a)(3), or N.J.R.E. 506(a), the physician-patient privilege. The draft provides that a patient is a person who undergoes "diagnosis or treatment . . . for the purposes of diagnosis or treatment related to that patient's condition of mental or emotional health." Draft N.J.R.E. 534(a)(2) defines “diagnosis or treatment” as including consultation, screening, interview, examination, assessment, and evaluation, so all of these activities are also incorporated in the definition of patient. The definition expressly provides that addiction is a condition of mental or emotional health.

The general rule of privilege grants a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication as defined. The draft differs in some respects from U.R.E. 503(b). The draft privilege is expressly limited to disclosure "in a proceeding." The Committee recognizes that the existing statutory privileges limit disclosure in other settings. However, the Committee determined that, consistent with N.J.R.E. 101(a)(2), its draft should apply only to proceedings governed by the Evidence Rules.

The draft provision regarding who may claim the privilege also closely tracks the provision in U.R.E. 503(c), but the draft adds that authorized members of a patient's family, as well as a guardian, conservator, or personal representative of a deceased

patient, may claim the privilege. Draft N.J.R.E. 534(c). Subsection (c) of the draft also includes a provision based on the Lawyer-Client Privilege, N.J.R.E. 504, which states: "The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative[.]" Presumably, this mandate is imported into the Psychologist Privilege, N.J.R.E. 505, which states that confidential communications with a practicing psychologist "are placed on the same basis as those provided between attorney and client[.]" The provision is also similar to California Evidence Code § 1015, which states that a psychotherapist "shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege."

B. Exceptions

Exceptions (1) and (2) pertain to proceedings to establish the capacity or incapacity of a person, or a civil commitment. Exception (1) would address the concern expressed by the Division of Law that an exception does not currently apply to testifying social workers at civil commitment hearings. N.J.R.E. 505, the psychologist-patient privilege, and N.J.R.E. 506(c), the physician-patient privilege, both include a similar exception.

Exception (2) would expressly provide an exception where a criminal defendant's competence to stand trial is put in issue. By contrast, N.J.R.E. 505 refers only to "an action in which the client seeks to establish his competence[.]"

Exception (3) pertains to communications relevant to issues "in a proceeding to recover damages on account of conduct of the patient which constitutes a crime[.]" This is based on provisions in N.J.R.E. 505, the psychologist-patient privilege, and N.J.R.E. 506(c), the physician-patient privilege.

Exception (4) dealing with the validity of a will is identical to existing exceptions found in N.J.R.E. 505, the psychologist-patient privilege, and N.J.R.E. 506(c), the physician-patient privilege. Exception (5) relating to an issue in a proceeding involving a contest over testate or intestate succession also mirrors exceptions found in N.J.R.E. 505 and 506(c).

Exception (6) has no current analog in the Evidence Rules. Yet, the Committee believed it was worthwhile to address the issue of privilege in connection with compelled examinations, such as under Rule 5:3-3(a), as well as examinations compelled in discovery. The exception expressly applies only "with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise." For example, a party who undergoes a court-ordered psychological evaluation in a custody case would have no privilege when the evaluation is used in the custody case. But, the privilege would apply to prevent use of the communications in other contexts, "unless the court orders otherwise." However, the court must "order otherwise" before the communication is made, effectively warning the patient that the evaluation may be used for another purpose. A specific reference is made to the potential use of an evaluation in a subsequent commitment hearing, although it was prepared for a prior one.

Exception (7), regarding an "issue in a proceeding in which the condition of the patient is an element or factor of the claim or defense of the patient," adopts the exception found currently in the physician-patient privilege. N.J.R.E. 506(d). The Committee recognized that a comparable exception does not exist in the psychologist-patient privilege. N.J.R.E. 505.

Exception (8) incorporates the exception currently found in the physician-patient privilege. N.J.R.E. 506(g). The provision essentially creates an exception where the patient has waived the privilege by causing the provider to testify as to his or her knowledge gained through the confidential communications.

Exception (9) incorporates a "crime or fraud" exception. It is based on N.J.R.E. 506(f), physician-patient privilege, and N.J.R.E. 504(2)(a), the attorney-client privilege, which is incorporated by the psychologist-patient privilege. However, the Committee, at the suggestion of the New Jersey Psychological Association (NJPA), has adopted the narrower, "crime or a fraud" formulation currently found in the attorney-client privilege and the psychologist-patient privilege, rather than the broader "crime or a tort" formulation in the physician-patient privilege. The NJPA opposed extending this exception to pierce the privilege when a tort has been committed. It noted that the exception would weaken the marital communications privilege and discourage parties from seeking emotional support in times of crisis. The NJPA stated, "The proposed rule could pierce the psychologist privilege in marital cases, (in addition to others), resulting in such testimony being allowed in Tevis claims." See Tevis v. Tevis, 79 N.J. 422 (1979).

We also propose adding a provision to avoid any conflict with the marital communications privilege. "This exception is subject to the protections found in N.J.R.E. 501 and N.J.R.E. 509, and is not intended to modify or limit them." We recognize that these privileges may be amended in light of State v. Terry, 218 N.J. 224 (2014). In that case, the Court endorsed an amendment to the marital communications privilege to add a crime-fraud exception. Under the Court's proposal, the marital

communications privilege would not shield communications relating to "an ongoing or future crime or fraud in which the spouses were joint participants at the time of the communication," Id. at 247, but "a confession made in confidence to an innocent spouse would remain confidential." Id. at 245.

Exception (10) is based on the marriage counselor privilege, N.J.R.E. 510, and the social worker privilege, N.J.R.E. 518(c). It would exclude from the privilege communications relevant to a proceeding "against the mental health service provider, arising from the mental health services provided[.]"

Exception (11) would establish a new exception, not found in the Evidence Rules, pertaining to the persons seeking a firearm purchaser identification card, a handgun permit, or the return of a firearm after entry of a domestic violence restraining order. Under current regulations, a person applying for a firearm purchaser identification card or a handgun permit must sign a consent form for a mental health records search. See N.J.A.C. 13:54-1.4(d); N.J. State Police, "Consent for Mental Health Records Search Form (SP-66)," available at http://www.state.nj.us/njsp/info/forms.html. This exception would provide that those mental health records would be admissible in a proceeding involving the identification card, permit, or return of weapons.

C. Statutory Duty to Warn

Paragraph (f) allows a court to compel disclosure of a statement when that statement was made in compliance with a statutory duty to report, such as reports relating to child or elder abuse. This language is included as a separate paragraph instead as an exception under paragraph (e), because, under State v. Snell, 314 N.J.

Super. 331, 338, 338-39 (App. Div. 1998), the original communication between the patient and the provider is considered privileged but the report that is made to the government entity is not. In Snell, the court examined the apparent conflict between the duty to report child abuse under N.J.S.A. 9:6-8.10, and the psychologist-patient privilege, N.J.R.E. 505. The court held that the psychologist-privilege must yield to the duty to report, as it related to communications to DYFS, but "[t]he privilege remain[ed] otherwise intact" as it pertained to testimony by the psychologist regarding the communication that prompted the report. Snell, supra, 314 N.J. Super. at 338.

D. Waiver and Constitutional Rights

Finally, subsection(g) of draft N.J.R.E. 534 expressly preserves the court's power to compel disclosure in the case of waiver, or to avoid a violation of a countervailing constitutional right. This would override the provision in the marriage counselor privilege that generally prohibits waiver of that privilege. See N.J.R.E. 510.

Conclusion

The Committee recommends that the Supreme Court adopt draft N.J.R.E. 534, Mental Health Service Provider-Patient Privilege, as set forth below. The Committee recommends that the Supreme Court adopt and take appropriate steps to implement Draft N.J.R.E. 534.

N.J.R.E. 534 (new). Mental Health Service Provider – Patient Privilege

(a) Definitions. In this rule:

(1) “Confidential communications” means such information transmitted between a mental-health service provider and patient in the course of treatment of, or related to, that individual’s condition of mental or emotional health, including information obtained by an examination of the patient, as is transmitted in confidence, and which is not intended to be disclosed to third persons, other than:

(i) those present to further the interest of the patient in the diagnosis or treatment;

(ii) those reasonably necessary for the transmission of the information, including the entity through which the mental-health service provider practices; and

(iii) persons who are participating in the diagnosis or treatment of the patient under the direction of a mental-health service provider, including authorized members of the patient’s family, the patient’s guardian, the patient’s conservator, and/or the patient’s personal representative.

(2) "Diagnosis or treatment" shall include consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment.

(3) “Mental-health service provider” means a person authorized or reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition, and is specifically intended to include:

(i) Psychologists, consistent with the definition under N.J.R.E. 505 and N.J.S.A. 45:14B-2(a), "licensed practicing psychologist," and N.J.S.A. 45:14B-6(a)(1), (b), (d), (d), (e), (f), and (g), governing persons engaged in authorized activities of certain unlicensed practicing psychologists;

(ii) Physicians, including psychiatrists, consistent with the definition under N.J.R.E. 506 and N.J.S.A. 2A:84A-22.1(b);

(iii) Marriage and family therapists, consistent with the definition under N.J.R.E. 510 and N.J.S.A. 45:8B-2(a), "licensed marriage and family therapist," and N.J.S.A. 45:8B-6, governing unlicensed persons who may engage in specified activities related to, consisting of. marriage and family therapy;

(iv) Victim counselors, consistent with the definition under N.J.R.E. 517(b) and N.J.S.A. 2A:84A-22.14(e);

(v) Social workers, consistent with the definition under N.J.R.E. 518 and N.J.S.A. 45:15BB-3, and including social work interns and certified school social worker as defined in N.J.S.A. 45:15BB-5(b) and (c);

(vi) Alcohol and drug counselors, consistent with the definitions under N.J.S.A. 45:2D-3 and N.J.A.C. 13:34C-4.5 (licensed and certified Alcohol and drug counselors);

(vii) Nurses, consistent with the definition under N.J.S.A. 45:11-23;

(viii) Professional counselors, associate counselors or rehabilitation counselors consistent with the definition under N.J.S.A. 45:8B-40, -41, -41.1 8, and persons authorized to provide counseling pursuant to N.J.S.A. 45:8B-48(b), (c), (d);

(ix) Psychoanalysts, consistent with the definition under N.J.S.A. 45:14BB-3; 45

(x) Midwives, consistent with the definition under N.J.S.A. 45:10-1

(xi) Physician assistants, consistent with the definition under N.J.S.A. 45:9-27.15; and

(xii) Pharmacists, consistent with the definition under N.J.S.A. 45:14-41.

(4) "Patient" means an individual, who undergoes diagnosis or treatment with or by a mental-health service provider for the purpose of diagnosis or treatment related to that patient's condition of mental or emotional health, including addiction to legal or illegal substances, whether referred to as client, victim or some other equivalent term in the context of the relationship.

(b) General rule of privilege.

A patient has a privilege to refuse to disclose in a proceeding, and to prevent any other person from disclosing confidential communications, as defined in subsection (a)(1).

(c) Who may claim the privilege.

The privilege under this rule may be claimed by the patient and, as authorized, members of the patient's family, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the mental-health service provider at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the patient or deceased patient. The mental-health service provider shall claim the privilege unless otherwise instructed by the patient or, as applicable, members of the patient's family, the patient's guardian or conservator, or the personal representative of a deceased patient.

(d) Other Communications.

Nothing in this rule shall be construed to limit or otherwise affect any privileges that may apply to communications outside the scope of confidential communications as defined in subsection (a)(1) above.

(e) Exceptions. There is no privilege under this rule for a communication:

(1) Relevant to an issue of the patient's condition in a proceeding to commit the patient or otherwise place the patient under the control of another or others because of alleged incapacity;

(2) Relevant to an issue in a proceeding in which the patient seeks to establish his competence, or in a criminal matter where the defendant's competence to stand trial is put at issue;

(3) Relevant to an issue in a proceeding to recover damages on account of conduct of the patient which constitutes a crime;

(4) Upon an issue as to the validity of a will of the patient;

(5) Relevant to an issue in a proceeding between parties claiming by testate or intestate succession from a deceased patient;

(6) Made in the course of any investigation or examination, whether ordered by the court or compelled pursuant to Court Rule, of the physical, mental, or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise, and provided that a copy of the order is served upon the patient prior to the communication, indicating among other things that such communications may not be privileged in subsequent commitment proceedings;

(7) Relevant to an issue in a proceeding in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured;

(8) If the court finds that any person, while a holder of the privilege, has caused the mental-health service provider to testify in any proceeding to any matter of which the mental-health service provider gained knowledge through the communication;

(9) In the course of mental health services sought or obtained in aid of the commission of a crime or fraud, provided that this exception is subject to the protections found in N.J.R.E. 501 and N.J.R.E. 509 and is not intended to modify or limit them;

(10) Relevant to an issue in a proceeding against the mental-health service provider, arising from the mental-health services provided, in which case the waiver shall be limited to that proceeding.

(11) Relevant to a proceeding concerning an application to purchase, own, sell, transfer, possess or carry a firearm, including but not limited to applications pursuant to N.J.S.A. 2C:58-3, or 2C:58-4, or a proceeding concerning the return of a firearm pursuant to N.J.S.A. 2C:25-21(d)(3).

(f) Nothing in this rule shall prevent a court from compelling disclosure of a statement by a mental-health service provider, patient or other third party to a public official when such statement is made in compliance with a statutory duty to report to a public official, or information required to be recorded in a public office that was in fact recorded in a public office, including but not limited to reports of child or elder abuse or neglect or the abuse or neglect of disabled or incompetent persons, unless the statute requiring the report of record specifically provides that the statement or information shall not be disclosed.

(g) Nothing in this rule shall prevent a court from compelling disclosure where:

(1) the patient has expressly or implicitly waived the privilege or authorized disclosure;

(2) exercise of the privilege would violate a constitutional right.

II. MATTERS HELD FOR CONSIDERATION

A. Restyling the New Jersey Evidence Rules

In the Fall of 2007, the federal court system undertook a major rewriting of the Federal Rules of Evidence with a goal "to make the [Federal Evidence] Rules simpler, easier to read, and easier to understand without changing their substance."[1] The restyling of the Federal Rules of Evidence was part of a larger effort to revise all the national rules of procedure so that they were all written in plain language with the same clear, consistent style conventions. The last set of federal procedure rules to be restyled were the Evidence Rules. The restyling of the Federal Rules of Evidence was scheduled last, at least in part, because the difficulty of the task was recognized.[2] As a result of this massive, multi-year effort, on December 1, 2011 the restyled Federal Rules of Evidence took effect.

The New Jersey Rules of Evidence were extensively revised in 1991. The 1991 revision was the result of the Supreme Court seeking input from this Committee as to whether New Jersey should adopt the Federal Rules of Evidence. At that time, the Committee recommended against adopting the Federal Rules as a whole, but rather, as it explained, recommended adopting "the substance and language of the federal rules when we considered them equal to or better than our present rules. However, in a number of instances we preferred the prevailing New Jersey law . . . . "[3] Consequently,

[1] Davidson M. Douglas et al., The Restyled Federal Rules of Evidence, 53 Wm. & Mary L.Rev. 1435, 1440 (2012).
[2] Id. at 1444.
[3] 1991 Report of the New Jersey Supreme Court Committee on the Rules of Evidence.

the 1991 New Jersey Evidence Rules generally are largely patterned after the Federal Rules of Evidence in effect in 1991, but are by no means identical to them.

Because of the similarities between the current New Jersey Rules of Evidence and the Federal Rules of Evidence that were in effect before restyling, Chief Justice Stuart Rabner, in late 2011, asked this Committee to study the restyled Federal Rules of Evidence to determine whether our Rules of Evidence would benefit from a similar revision. Chief Justice Rabner charged the Committee with recommending stylistic changes to the New Jersey Evidence Rules that would make the rules simpler and easier to understand, but would not change their substantive meaning.

As a result, in January 2012, Judge Messano appointed a Restyling Subcommittee (Subcommittee), led by Judge Philip Carchman, to embark on an in-depth study of the restyled Federal Evidence Rules. The Subcommittee's membership was carefully chosen to include judges, practitioners and an academic, all with expertise in the evidence rules, and additionally with expertise in varying substantive areas of the law, including civil and criminal practice, appellate practice, personal injury law, family law, and municipal court practice.

The Restyling Subcommittee subsequently undertook a systematic, rule-by-rule, word-by-word review of the New Jersey Rules of Evidence. Consistent with Chief Justice Rabner's charge, the Subcommittee recognized that its recommendations should be limited to making the New Jersey evidence rules clearer, plainer, easier to understand, but without changing their meaning. The Subcommittee decided that initially it would be guided by the style rules and guidelines used by the federal Advisory Committee on Evidence Rules that are set forth as a note after Federal Rule of

Evidence 101. These style rules include eliminating ambiguous words, minimizing the use of redundant intensifiers, and preserving "sacred phrases;" that is, phrases that have become so familiar and have been interpreted so frequently in the case law that to alter them would be disruptive.

In its review, the Subcommittee used a meticulous method of analysis. For each Evidence Rule it considered, it compared the federal rule of evidence before the restyling, the federal rule after restyling, the current New Jersey Rule of Evidence, the notes of the federal Advisory Committee and the notes of the 1991 New Jersey Evidence Committee. The Subcommittee also considered revisions to the federal rules of evidence adopted since 1991.

Last term, the Subcommittee restyled the Article IV evidence rules, N.J.R.E 401 – N.J.R.E. 411. This term, the Subcommittee has completed restyling Articles I, II, III, VI, IX, X, and XI. The recommendations of the Subcommittee on these articles have been adopted by the Committee as a whole. The Subcommittee has begun work on Article VIII, Hearsay, which is comprised of many subsections. Once Article VIII is completed, the Subcommittee has only to complete the restyling of Article VII, Opinions and Expert Testimony, which was put aside pending the completion of the work of the N.J.R.E. 702 Subcommittee. The Restyling Subcommittee will not restyle Article V, Privileges, since this Article consists of privileges that were enacted by statute and incorporated into the Evidence Rules for convenience. See N.J.R.E. 500.

As in the case of the federal restyling effort, the Subcommittee has found that the restyling process is arduous and time-consuming. Nevertheless, the Subcommittee has established a schedule for completion of the restyling of all of the rules and is confident

that its work will be completed during the 2015-2017 term. When the restyling is completed, this Committee will present the entire restyled Evidence Rules to the Supreme Court for its review and approval.

B. N.J.R.E. 1001(c) and (d), Definitions of Original and Duplicate—Admission of Fax and Electronic Copies.

In April 2011, a private attorney who represents companies providing telepsychiatry services wrote to Judge Jack Sabatino, Chair of the Civil Practice Committee, requesting that that Committee consider an amendment to R. 4:74-7(b)(1) to allow electronic or facsimile copies of clinical certificates to be accepted into evidence at civil commitment hearings. A copy of the letter was sent to Judge Messano asking, in the alternative, that N.J.R.E. 1001 be amended to "specifically permit fax or electronic copies to be deemed originals under appropriate conditions . . . ." Judge Messano formed a Subcommittee on N.J.R.E. 1001 (Subcommittee), chaired by Judge Weissbard, to consider this issue.

In the 2011-13 term, the Subcommittee recommended expanding the definition of "original" in N.J.R.E. 1001(c) to include "any electronically transmitted images." The full Committee was unsure whether such an expansion was advisable, because the added language would make it possible to turn a duplicate into an original simply by faxing it to someone. So, the Committee sent the issue back to the Subcommittee for further study.

In the meantime, the Civil Practice Committee, in response to the April 2011 letter, recommended a change to R. 4:74-7(b)(1) that would permit a court to accept "a facsimile of the original screening certificate in lieu of the original." The Supreme Court adopted this recommended rule change on July 10, 2012.

In the 2013-15 term, the N.J.R.E. 1001 Subcommittee, after further study, proposed amending N.J.R.E. 1000(c) to provide (**additions bolded** [deletions bracketed]**)**:

> (c) *Original.* --An "original" of a writing is the writing itself or any counterpart intended by the person or persons executing or issuing it to have the same effect. An "original" of a photograph includes the negative or any print therefrom. [If data are stored by means of a computer or similar device] **With respect to electronically created documents**, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

The Subcommittee reasoned that this proposal would solve the problem raised by the Committee since an already existing duplicate faxed or scanned into a computer would no longer become an original. It would also resolve the perceived problem that the only original of an electronically created document is the hard disk itself.

The Subcommittee also recommended amending the definition of duplicate in N.J.R.E. 1001(d) to provide **(additions bolded):**

> (d) *Duplicate.* --A "duplicate" is a counterpart**, other than an original,** produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and reductions, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

The Subcommittee believed that this amendment would avoid the potential of any one document constituting both an original and a duplicate.

The Committee has not yet discussed the Subcommittee's proposal to amend N.J.R.E. 1001(c) and (d). These recommendations will be held for consideration in the 2013-2015 term.

III. OTHER BUSINESS

A. Supreme Court Request to Report on N.J.R.E. 702, Admission of Expert Testimony

In its 2011-13 Report, the Committee requested the Supreme Court's guidance on whether it should again undertake a study of the standard for admission of expert testimony set forth in N.J.R.E. 702, in light of the fact that the Committee had twice before considered the same subject matter. The Court asked the Committee to report on whether 1) "N.J.R.E. 702 and related case law are so unclear that New Jersey's trial courts are applying inconsistent standards in admitting expert testimony;" and 2) "current law is creating other problems, such as attracting a disproportionate number of negligence cases to the State, especially mass tort cases, that might otherwise be filed in other jurisdictions."

Judge Messano, Chair of the Committee, appointed Judge Happas to chair a subcommittee to study and report on the issues the Court raised. The N.J.R.E. 702 Subcommittee issued a comprehensive report on the subject, which the Committee unanimously adopted. The Subcommittee's report is reprinted in full in Part II of the Committee's report.

IV. CONCLUSION

The members of the Supreme Court Committee on the Rules of Evidence appreciate the opportunity to serve the Supreme Court in this capacity.

Respectfully submitted,

Hon. Carmen Messano, P.J.A.D., Chair
Hon. Jamie D. Happas, P.J.S.C., Vice-Chair
Matthew Astore, Deputy Public Defender
Daniel Bornstein, Deputy Attorney General
Hon. Philip S. Carchman, J.A.D. (ret.)
Lori E. Caughman, Esq.
John C. Connell, Esq.
William F. Cook, Esq.
Hon. Michele M. Fox, J.S.C.
Husain Gatlin, Esq.
Benjamin Goldstein, Esq.
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Hon. Sherry Hutchins-Henderson, J.S.C.
Hon. Robert Kirsch, J.S.C.
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Hon. Harvey Weissbard, J.A.D. (ret.)
Alan L. Zegas, Esq.
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APPENDIX A

Discussion Draft

Dated: 3/7/14

Rule 534. Mental Health Service Provider – Patient Privilege

(a) Definitions. In this rule:

(1) "Confidential communications" means such information transmitted between a mental health service provider and patient related to that individual's condition of mental or emotional health, including information obtained by an examination of the patient, as is transmitted in confidence, and which is not intended to be disclosed to third persons, other than:

(i) those present to further the interest of the patient in the consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment;

(ii) those reasonably necessary for the transmission of the information, including the entity through which the mental health service provider practices; and

(iii) persons who are participating in the consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment of the patient under the direction of a mental-health service provider, including authorized members of the patient's family, the patient's guardian, the patient's conservator, and/or the patient's personal representative.

(2) "Mental-health service provider" means a person authorized or reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition, and is specifically intended to apply to:

(i) Psychologists, consistent with the definition under N.J.R.E. 505 and N.J.S.A. 45:14B-2(a), "licensed practicing psychologist," and N.J.S.A. 45:14B-6(a)(1), (b), (d), (d), (e), (f), and (g), governing persons engaged in authorized activities of certain unlicensed practicing psychologists;

(ii) Physicians, including psychiatrists, consistent with the definition under N.J.R.E. 506 and N.J.S.A. 2A:84A-22.1(b);

(iii) Marriage and family therapists, consistent with the definition under N.J.R.E. 510 and N.J.S.A. 45:8B-2(a);

(iv) Victim counselors, consistent with the definition under N.J.R.E. 517(b) and N.J.S.A. 2A:84A-22.14(e);

(v) Social workers, consistent with the definition under N.J.R.E. 518 and N.J.S.A. 45:15BB-3, and including social work interns and certified school social worker as defined in N.J.S.A. 45:15BB-5(b) and (c);

(vi) Alcohol and drug counselors, consistent with the definitions under N.J.S.A. 45:2D-3 and N.J.A.C. 13:34C-4.5 (licensed and certified Alcohol and drug counselors);[4]

(vii) Nurses, consistent with the definition under N.J.S.A. 45:11-23;

(viii) Professional counselors, consistent with the definition under N.J.S.A. 45:8B-48;[5]

(ix) Psychoanalysts, consistent with the definition under N.J.S.A. 14BB-3.[6]

The following footnotes are provided for explanatory purposes, to assist in understanding the genesis of the draft rule and would not be included a final, codified rule.

[4] Although not included in the Rules of Evidence, a privilege is created by N.J.S.A. 45:2D-11, which states:

> An alcohol and drug counselor or clinical alcohol and drug counselor certified or licensed pursuant to the provisions of this act, or his employee, shall not disclose any confidential information that the counselor, or his employee may have acquired while performing alcohol and drug counseling services for a patient unless in accordance with the federal regulations regarding the confidentiality of alcohol and drug patient records pursuant to 42 C.F.R. 2.1 et seq.

[5] Although not included in the Rules of Evidence, a privilege is created by N.J.S.A. 45:8B-49, which states: "Any communication between a licensed professional counselor, licensed associate counselor or licensed rehabilitation counselor and the person or persons counseled while performing counseling or rehabilitation counseling shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver, except when disclosure is required by State law or when the licensed professional counselor, licensed associate counselor or licensed rehabilitation counselor is a party defendant to a civil, criminal or disciplinary action arising from that counseling or rehabilitation counseling, in which case the waiver of the privilege accorded by this section shall be limited to that action."

[6] Although not included in the Rules of Evidence, a privilege is created by N.J.A.C. 13:42A-6.3, which states:

> A State-certified psychoanalyst shall preserve the confidentiality of information from a patient in the course of the State-certified psychoanalyst's teaching, practice or investigation. However, the State-certified psychoanalyst shall reveal the information to

(3) "Patient" means an individual, who undergoes consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment with or by a mental-health services provider for the purpose of diagnosis or treatment related to that patient's condition of mental or emotional health, including addiction to legal or illegal substances, whether referred to as client, victim or some other equivalent term in the context of the relationship.

(c) General rule of privilege.

A patient has a privilege to refuse to disclose in a proceeding, and to prevent any other person from disclosing confidential communications, as defined in subsection (a)(1).

(c) Who may claim the privilege.

The privilege under this rule may be claimed by the patient and, as applicable, members of the patient's family, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the mental-health services provider at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the patient or deceased patient. The mental-health services provider shall claim the privilege unless otherwise instructed by the patient or, as applicable, members of the patient's family, the patient's guardian or conservator, or the personal representative of a deceased patient.

(d) Other Communications.

Nothing in this rule shall be construed to limit or otherwise affect any privileges that may apply to communications outside the scope of confidential communications as defined in subsection (a)(1) above.

(e) Exceptions. There is no privilege under this rule for a communication:

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appropriate professionals, public authorities and threatened individual(s) or their representatives only if in the State-certified psychoanalyst's judgment, exercised in accordance with the standards of the profession, any one of the following circumstances occur:

1. There is a clear and imminent danger to the individual or the public;
2. There is probable cause to believe that an identifiable potential victim of a patient is likely to be in danger; or
3. Release of such information is otherwise mandated by law.

Relevant to an issue of the patient's condition in a proceeding to commit the patient or otherwise place the patient under the control of another or others because of alleged incapacity;[7]

Relevant to an issue in a proceeding in which the patient seeks to establish his competence, or in a criminal matter where the defendant's competence to stand trial is put at issue;[8]

Relevant to an issue in a proceeding to recover damages on account of conduct of the patient which constitutes a crime;[9]

Relevant to an issue in a proceeding as to the validity of a will of the patient;[10]

Relevant to an issue in a proceeding between parties claiming by testate or intestate succession from a deceased patient;[11]

Made in the course of any investigation or examination, whether ordered by the court or compelled pursuant to Court Rule, of the physical, mental, or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise, and provided that a copy of the order is served upon the patient prior to the communication, indicating among other things that such communications may not be privileged in subsequent commitment proceedings;[12]

Relevant to an issue in a proceeding in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured;[13]

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[7] N.J.R.E. 505(a).

[8] N.J.R.E. 505(a). This language was imported from N.J.R.E. 505(a), and does not attempt to expand or alter the provisions regarding competency hearings in N.J.S.A. 2C.

[9] N.J.R.E. 505(a).

[10] N.J.R.E. 505(b). This is based on N.J.R.E. 505(b), but modifies the language "validity of a document as a will of the client." The subcommittee notes that the current rule does not address the validity of any other document.

[11] N.J.R.E. 505(c).

[12] Not in N.J.R.E. Partially incorporating La.C.E. Art. 510 B(2)(g)(ii) (proviso clause). Cf. N.J.R.E. 518d ("use of privilege would violate the defendant's right to a compulsory process or the right to present testimony and witnesses on that person's behalf").

[13] N.J.R.E. 506(d). This is a significant area where the physician privilege in N.J.R.E. 506 is currently weaker than the psychologist privilege, N.J.R.E. 505. See People v. Wilkins, 480 N.E.2d 373 (N.Y. 1985) (highlighting but criticizing a similar distinction between the

If the court finds that any person, while a holder of the privilege, has caused the mental health service provider to testify in any proceeding to any matter of which the mental health service provider gained knowledge through the communication;[14]

In the course of mental health services sought or obtained in aid of the commission of a crime or tort, or to escape detection or apprehension after the commission of a crime or a tort;[15]

In which the patient has expressed or manifested an intent to engage in conduct likely to result in death or serious bodily injury to the patient or another individual;[16]

Which the mental-health service provider or the patient is required to report to a public official or as to information required to be recorded in a public office, including but not limited to reports of child or elder abuse or neglect or the abuse or neglect of disabled or incompetent persons, unless the statute requiring the report of record specifically provides that the information shall not be disclosed;[17]

Relevant to an issue in a proceeding against the mental-health service provider, arising from the mental-health services provided, in which case the waiver shall be limited to that proceeding.[18]

Relevant to a proceeding concerning an application to purchase, own, sell, transfer, possess or carry a firearm, including but not limited to applications pursuant to N.J.S.A. 2C:58-3, or 2C:58-4, or a proceeding concerning the return of a firearm pursuant to N.J.S.A. 2C:25-21(d)(3).[19]

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psychiatrist and psychologist privileges under New York law). This proposed exception would uniformly adopt the standard now applicable to psychiatrist-patient communications.

[14] N.J.R.E. 506(g).

[15] N.J.R.E. 504(2)(a) and N.J.R.E. 506(f). Notably, the Supreme Court has before it a case that raises the question whether the "crime-fraud" exception should apply to the marital communications privilege, N.J.R.E. 509, which, unlike N.J.R.E. 504, does not expressly include the exception. State v. Terry, 430 N.J. Super. 587 (App. Div.), appeal granted, 214 N.J. 233 (2013).

[16] Variation on N.J.R.E. 518b ("clear and present danger to the health and safety of an individual").

[17] Variation of N.J.R.E. 506(e).

[18] N.J.R.E. 510 and N.J.R.E. 518(c).

[19] N.J.A.C. 13:54-1.4(d) (stating that any application for a firearm purchaser identification card or handgun permit shall sign "a consent for mental health records search form designated SP 66"); SP 66, found at htt://www.state.nj.us/njsp/info/forms.html (stating that firearm applicant "consent[s] to the disclosure of my mental health records to the Chief of Police and the Superintendent of State Police, or their designees, for the purpose of verifying my firearms permit application and my fitness to own a firearm under N.J.S.A. 2C:58-3.").

(e) Nothing in this rule shall prevent a court from compelling disclosure where:

(1) the patient has expressly or implicitly waived the privilege or authorized disclosure;[20]

(2) exercise of the privilege would violate a constitutional right.[21]

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[20] N.J.R.E. 518(e). This would apply waiver principles and override the existing anti-waiver provision in the marriage counselor privilege, N.J.R.E. 510. See State v. Mauti, 208 N.J. 519, 539 (2011) ("[I]n addition to the express waiver provided in N.J.R.E. 530, a party can implicitly waive a privilege by conduct — that is, by placing an otherwise protected matter in issue.").

[21] See Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 105, 39 L. Ed. 2d 347 (1975).

APPENDIX B

Interim Report on Discussion Draft of Unified Mental Health Service Provider Privilege

Dated: 3/7/2014

Introduction

During the Evidence Committee's last term, the Committee's Mental Health Privileges Subcommittee (Subcommittee) continued its work on a unified mental health service provider privilege. The Subcommittee solicited the views of numerous interested parties, including providers, educators, and patient groups, as well as organizations of attorneys. Generally, the Subcommittee found broad support conceptually for a unified privilege, although stakeholders expressed concerns that the existing privilege for communications with particular providers would be weakened. The Subcommittee thereafter prepared a draft rule, titled a "Discussion Draft," to reflect that it is a work in progress. The Supreme Court has authorized the Subcommittee to continue its work. Therefore, with the approval of the full Evidence Committee, the Subcommittee is releasing its Discussion Draft to the public, and seeks comments. In light of those comments, the Committee would then determine whether to amend the draft and whether to recommend that the Court approve it, and begin the formal steps toward adoption pursuant to the Evidence Act, N.J.S.A. 2A:84A-33 to -44.

We review below the genesis of the Subcommittee's and Committee's effort; and the results of the outreach to interested parties. We then summarize the Discussion Draft.

Background

In initially seeking the Supreme Court's approval to undertake a study of New Jersey's mental health service provider privileges and the advisability of a unified privilege, the Committee noted that the extent of the privilege that applies to a communication between a patient and a mental health service provider often depends on the license or professional credentials of the provider. The Evidence Rules provide for different and sometimes inconsistent privileges for communications between a patient and a psychologist, N.J.R.E. 505; a physician, N.J.R.E. 506; a marriage counselor, N.J.R.E. 510; a cleric, N.J.R.E. 511; a victim counselor, N.J.R.E. 517; and a social worker, N.J.R.E. 518. Statutory privileges for some other mental health service providers inexplicably have no analogs at all in the Rules of Evidence.

See, e.g., N.J.S.A. 45:14BB-3, N.J.A.C. 13:42A-6.3 (psychoanalysts); N.J.S.A. 45:2D-3 and N.J.A.C. 13:34C-4.5 (alcohol and drug counselors); and N.J.S.A. 45:8B-48 (professional counselors).

The existing regime, whether by design or by happenstance, creates a hierarchy of privileges. Communications with psychologists are generally afforded greater protection than communications with psychiatrists, who fall under the physician-patient umbrella. State v. McBride, 213 N.J. Super. 255, 270 (App. Div. 1986) (“the psychologist-patient privilege affords even greater confidentiality than the physician-patient privilege”), certif. denied, 107 N.J. 118 (1987). In other respects, however, the "marriage and family therapist privilege . . . may be somewhat broader than the psychologist-patient privilege." Kinsella v. Kinsella, 150 N.J. 276, 298 n. 1 (1997). The victim counselor privilege has been described as "absolute." State v. J.G., 261 N.J. Super. 409, 419 (App. Div.), certif. denied, 133 N.J. 436 (1993). Weakest among the mental health privileges in the Rules of Evidence is the social worker privilege, which provides more limited protection of a patient's confidential communications.

This disparate treatment is difficult to justify by reference to the two apparent policy goals of a privilege governing communications with a mental health service provider: (1) to encourage utilization of mental health services, which we refer to as the utilitarian justification; and (2) to protect the patient's privacy, which we refer to as the privacy justification. See Kinsella, supra, 150 N.J. at 330 ("[T]he psychologist-patient privilege serves the functional purpose of enabling a relationship that ultimately redounds to the good of all parties and the public. The psychologist-patient privilege further serves to protect an individual's privacy interest in communications that will frequently be even more personal . . . than those between attorney and client."). Although some have questioned the empirical support for the utilitarian justification for the privilege, see, e.g., Development in the Law - Privileged Communication: IV. Medical and Counseling Privileges, 98 Harv. L. Rev. 1530, 1531, 1542-44 (1985), and Jaffee v. Redmond, 518 U.S. 1, 18-36, 116 S. Ct. 1923, 1932-41, 135 L. Ed. 2d 337, 350-60 (1996) (Scalia, J., dissenting), there seems to be little room for debate that communications with mental health service providers are often of an intensely personal nature, and disclosure would often subject the patient to potential embarrassment and stigma. The utilitarian and privacy goals would seem to apply equally to a communication with a mental health service provider, regardless of his or her professional credentials.

Persons of lesser means may be more likely to turn to mental health service providers such as social workers, or licensed professional counselors, than psychiatrists and psychologists. A privilege regime that accords less protection to communications with the former group of providers may therefore have an undue impact on economically disadvantaged patient populations.

Disparate treatment of mental health privileges also adds complexity to a court's analysis of a claim of privilege over mental health communications. The court must discern the professional credential of the mental health provider to whom the claimed privileged communications were made. At times, the documents provided for a court's review do not clearly indicate those credentials. In cases where a patient was treated by multiple providers — for example, in a hospital setting — the results may be inconsistent, although the contents of the communications are identical.

Public Outreach

The Subcommittee requested comments from over fifty organizations that might have an interest in the subject of mental health service provider privileges. To seek comments from a broader audience, on June 1, 2012, Judge Grant published a Notice to the Bar requesting input from any interested parties on the concept of a unified mental health care provider privilege. The request stated that the Subcommittee was considering a unified privilege for communications with mental health service providers that would modify or replace the current privileges found in: N.J.R.E. 505 (N.J.S.A. 45:14B-28), the Psychologist-Patient Privilege; N.J.R.E. 506 (N.J.S.A. 2A:84A-22.1 to -22.7), the Patient-Physician Privilege; N.J.R.E. 510 (N.J.S.A. 45:8B-29), the Marriage Counselor Privilege; N.J.R.E. 511 (N.J.S.A. 2A:84A-23), the Cleric-Penitent Privilege; N.J.R.E. 517 (N.J.S.A. 2A:84A-22.13 to -22.16), the Victim-Counselor Privilege; N.J.R.E. 518 (N.J.S.A. 45:15BB-13), the Social Worker Privilege; and N.J.S.A. 45:8B-49, the Licensed Professional Counselor Privilege.

The general concept of a unified privilege won the support of the State licensing boards for psychologists, marriage and family therapists, social workers, psychoanalysts, alcohol and drug counselors, and professional counselors; the New Jersey Psychiatric Association; the Division of Mental Health and Addiction Services within the Department of Human Services; the New Jersey Division of Law; New Jersey Mental Health Coalition; the National Association of Social Workers - New Jersey Chapter (NASW-NJ); New Jersey Association of Mental Health and Addiction Agencies, Inc.; Rutgers School of

Social Work; Cape May Prosecutor's Office; The College of New Jersey (TCNJ) Department of Counselor Education; and the Council on Compulsive Gambling of New Jersey. Rutgers School of Social Work, for example, noted the complexity and confusion engendered when a provider fills multiple roles — such as a social worker serving as a marriage counselor, or a victim counselor.

Supporting a unified privilege, NASW-NJ stated:

> Neither the interests of the consumers of mental health services in New Jersey nor the providers of such services benefit from the uncertainty that surrounds the confidentiality of their discussions.
>
> A unified evidential privilege that extends to all mental health services providers in New Jersey has the potential to provide that certainty. Whether this potential is realized depends upon the provisions of such a unified privilege. For the goals of certainty and predictability to be achieved, the unified privilege must be based upon the highest common denominator among the evidential privileges in question.

This view was shared by the New Jersey Psychiatric Association, representing psychiatrists in New Jersey, which stated, "[T]he privilege, to the extent it is allowed by law, should be the same for every mental health professional."

However, some groups related to specific professions, while supportive of a unified privilege, were wary of any weakening of existing protections governing their own specialty. The Board of Medical Examiners supported a unified privilege, so long as it was at least as protective as the current physician-patient privilege. The Department of Counselor Education at TCNJ urged adoption of a unified privilege "that is near absolute, along the lines of the current marriage counselor privilege[.]" The Division of Consumer Affairs, on behalf of the various state licensing boards, favored a uniform privilege that was as protective as the current psychologist-patient privilege. Perhaps mindful that the social worker privilege is not as protective as the existing privilege for certain other mental health service providers, such as psychologists and psychiatrists, NASW-NJ not only endorsed a unified privilege, but advocated the "highest common denominator among the evidential privileges in question."

The New Jersey Mental Health Coalition (NJMHC) also endorsed a unified privilege but emphasized that the Committee should consider that mental health services are delivered by an

"expanded . . . array of professionally trained mental health providers," whose communications with patients deserve protection. These include nurse practitioners, and peer counselors, who may not be adequately covered by an existing privilege. The NJMHC consists of eleven statewide organizations, including patient and family groups, legal advocates, governmental and non-profit providers of mental health and supportive services. Rutgers School of Social Work also noted that the current law is unclear as to its applicability to student interns. The Council on Compulsive Gambling of New Jersey urged extension of a privilege to "interns, trainees, and exempt practitioners, as well as licensed or certified professionals" including certified compulsive gambling counselors, who often hold other credentials such as in social work, alcohol and drug counseling, professional counseling, or marriage counseling. This view was shared by the New Jersey Association of Mental Health and Addiction Agencies. That association supported codification in the Evidence Rules of the privilege found in N.J.S.A. 13:34C-4.5 for licensed clinical alcohol and drug counselors and certified alcohol and drug counselors. The association also urged coverage for communications with certified compulsive gambling counselors.

The Division of Mental Health and Addiction Services (DMHAS) and the Division of Law of the Department of Law and Public Safety urged that the privilege extend to professionals who are exempt from licensure because they are employed in a governmental facility, citing N.J.S.A. 45:14B-6. The Division of Law noted that N.J.R.E. 505 currently limits the privilege to licensed psychologists, but trained psychologists are permitted by statute to practice without a license in a State psychiatric hospital. DMHAS stated, "The privilege should be defined when appropriate by credential, but also by the treatment relationship and the nature of the communications; i.e., those communications made within context of a treatment relationship." The Division of Law highlighted the need to extend the privilege to all members of an interdisciplinary treatment team. The Division of Consumer Affairs also noted the issue of persons practicing without licensure pursuant to statutory exemptions. The Division of Consumer Affairs expressly opposed extending the privilege to communications where the patient reasonably believes the provider is covered by the privilege, but he or she is not.

The Cape May Prosecutor agreed that the current system "may have a disparate impact on persons of lesser means . . . who tend to resort to seeking treatment in the community mental health

clinic (as opposed to a private psychiatrist or psychologist)" where they more likely may receive treatment from a social worker or person with a masters in counseling.

Support for a unified privilege was not unanimous, however. The New Jersey Defense Association instead endorsed a two-tiered privilege, which would provide greater protection for "highly trained health care providers" and lesser protection for others. The former group would include physicians, psychologists, and "mental health providers who meet comparable education and licensing requirements," and "victim counselors, in a limited capacity, if their role follows a medically diagnosed injury or illness." The Defense Association proposed to include social workers among those whose communications would receive less protection. The Defense Association also stated, "no privilege afforded mental health providers . . . should be permitted to impact the well-settled ability of counsel to obtain a complete assessment of a patient's complete physical and/or mental condition during pre-trial discovery when such condition is the potential subject of the patient's claims in civil litigation."

The New Jersey Bar Association declined to express a position on the concept of a unified position, stating that it would withhold comment until the committee prepared a draft.

Opposition to incorporating the victim counselor privilege into a unified privilege was expressed by the New Jersey Coalition for Battered Women (NJCBW). The NJCBW attempted to distinguish the purpose of the victim counselor privilege, which it characterized as an absolute privilege, from other mental health provider privileges. It argued that the victim-counselor privilege shields confidences whose disclosure may subject the patient not only to embarrassment, but to further abuse and injury by his or her victimizer. Confidential communications may address a victim's plan to avoid the victimizer — by relocating or changing one's identity — which would be rendered useless if disclosed.

Commissioner Allison Blake of the Department of Children and Families advocated the preservation of a "robust" victim counselor privilege. On the other hand, she stated that even that privilege should yield to the obligation to report child abuse or neglect. Citing N.J.S.A. 9:8-14, and State v. Snell, 314 N.J. Super. 331 (App. Div. 1998), she wrote, "It is critical that DCP&P continue to receive reports of child abuse from all persons, including mental health providers, victim counselors, and all other persons who enjoy an evidentiary privilege." Also, she urged that any privilege "ensure that adequate and appropriate evidence be available in child protection litigation to provide for the safety and best

interest of children in DCF's care." She noted the department's obligation to preserve the confidentiality of reports of child abuse and neglect, citing N.J.S.A. 9:6-8.10a.

The New Jersey Coalition Against Sexual Assault (NJCASA), representing sexual violence programs in all twenty-one counties and at Rutgers University, stated it was "not opposed to the idea of a unified privilege but would not want to see the victim advocate privilege weakened in any way in the creation of such a unified privilege." Still, NJCASA recognized that advocates "have been trained to let survivors know that communications that disclose harm or neglect of a child may not be held confidential[.]"

Also commenting on exceptions to privileges, both the Division of Law, and the Division of Mental Health and Addiction Services, highlighted that current law provides a privilege exception for testimony by psychologists and physicians at guardianship or civil commitment applications, but does not expressly do so for social workers and nurses. The two agencies also sought express reference in the evidentiary privilege to the duty to warn established by N.J.S.A. 2A:62A-16 and -17.

In sum, the comments received reflected general support for a unified privilege, notwithstanding that those supporting a unified privilege differed regarding the details. The Subcommittee and Committee viewed the comments, as a whole, as an endorsement of its effort. The Subcommittee consequently turned to the drafting of a unified rule.

Discussion Draft

The Discussion Draft generally follows the structure of Rule 503 of the Uniform Rules of Evidence Act (1999) of the National Conference of Commissioners on Uniform State Laws. The Discussion Draft, like U.R.E. 503, includes: a definitional subsection that defines a confidential communication, a mental health service provider and patient; a subsection establishing the general rule of the privilege; a subsection on who may claim the privilege; and a subsection on exceptions to the privilege. The Discussion Draft also adds a fifth subsection addressing waiver and constitutional rights. Although the Discussion Draft follows the structure of U.R.E. 503, in many ways it differs substantively. The following discussion focusses on ways in which the Discussion Draft would resolve differences among New Jersey's existing mental health privileges.

Definitions and Protected Communications

The draft definition of "confidential communications" limits the privilege to information transmitted between the mental health service provider and a patient that is "related to that individual's condition of mental or emotional health." Draft N.J.R.E. 534(a)(1). This would ensure that the privilege does not extend to communications with providers unrelated to mental or behavioral health treatment.

Thus, for example, the definition would not include communications with a social worker outside the scope of mental health services; a social worker may assist a person in accessing social welfare benefits without engaging in mental health treatment. The existing social worker privilege extends beyond communications involving mental health treatment and covers "any confidential information that the social worker may have acquired from a client or patient while performing social work services for that client or patient[.]" N.J.R.E. 518. The marriage counselor privilege simply refers to "[a] communication between a marriage and family therapist and the person or persons in therapy." N.J.R.E. 510. Conceivably, a marriage counselor could assist a couple in developing a common approach to their family budget about which the couple disagreed. Such communications would not be covered by the draft definition of "confidential communications." Similarly, "confidential communications between physician and patient," as set forth in N.J.R.E. 506, can include statements that pertain to treatment of mental or emotional conditions — whether to a psychiatrist or other physician — or they can include statements pertaining to physical conditions unrelated to mental or emotional conditions. The latter statements would not be covered by the proposed definition of "confidential communications." By contrast, N.J.R.E. 505, the psychologist-patient privilege, which refers to communications "in the course of the practice of psychology," appears to encompass only communications pertaining to conditions of mental or emotional health.

The proposed definition includes information "obtained by an examination," as does N.J.R.E. 506. For example, a patient's suicidal ideation or self-harming tendencies may be conveyed to an examining provider by physical presentation — e.g., evidence of an overdose, or evidence of cutting — without an oral communication. The definition would include such information within "confidential communication."

The definition of "confidential communications" provides that the communication be transmitted in confidence and not intended for disclosure to third parties, except as otherwise provided. Exceptions include "those present to further the interest of the patient in the consultation, screening, interview,

examination, assessment, evaluation, diagnosis or treatment." Draft N.J.R.E. 534(a)(1)(i). This exception largely mirrors U.R.E. 503(a)(1), although the Discussion Draft enlarges the list of undertakings to add screenings, assessments, evaluations, diagnosis and treatment. A second exception includes "those reasonably necessary for the transmission of the information, including the entity through which the mental health service provider practices." Draft N.J.R.E. 534 (a)(1)(ii). This tracks U.R.E. 503(a)(1), but adds a reference to the practicing entity. A third exception, like U.R.E. 503(a)(1), includes persons participating in the undertaking "under the direction of a mental health service provider, including members of the patient's family." However, the Discussion Draft requires that family members be "authorized." The Discussion Draft also adds the patient's guardian or conservator, or the personal representative of a deceased patient.

The draft's definition of "mental health service provider" is the means by which the rule would identify and unify the various providers covered by the privilege. The Subcommittee opted for a specific listing of those persons covered. As a drafting matter, it did not adopt the purely functional approach in U.R.E. 503, which defines "mental health providers" generally as individuals authorized to engage in the diagnosis or treatment of a mental or emotional condition. Rather, the Subcommittee followed the more specific model of the California Evidence Code § 1010. Although California adopts the term "psychotherapist," as opposed to mental health service provider, the California Code then identifies various credentialed professionals, including physicians, psychologists, marriage and family therapists, clinical social workers, and professional clinical counselors, and others in training and internship roles.

The Discussion Draft's "mental health service provider" definition includes persons "reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition[.]" Thus, the privilege would apply under those circumstances, even if the provider has misrepresented his or her credentials or licensing status to an unwitting patient. In that respect, the Discussion Draft follows N.J.R.E. 506, the patient-physician privilege, which expressly covers communications with a person "reasonably believed by the patient to be authorized, to practice medicine[.]"

The Discussion Draft generally includes those disciplines already covered by the existing Rules of Evidence, but expands them to include persons not licensed but authorized by law to practice in the field.

Thus, the psychologist privilege would extend to: persons trained in psychology who are employed to practice in state institutions, N.J.S.A. 45:14B-6(a)(1); certified school psychologists, N.J.S.A. 45:14B-6(b) and (g); psychology interns, N.J.S.A. 45:14B-6(c); and persons practicing under temporary authority, N.J.S.A. 45:14B-6(d), (e), and (f). The social worker privilege would be extended to cover social work interns and certified school social workers. N.J.S.A. 45:15BB-5(b) and (c).

The Discussion Draft also includes providers who are now covered by statutory privileges that are not currently codified in the Evidence Rules. These include alcohol and drug counselors, professional counselors, and psychoanalysts. Draft N.J.R.E. 534(a)(2)(vi), (viii) and (ix). The Discussion Draft also includes nurses. Draft N.J.R.E. 534(a)(2)(vii). It does not include gambling counselors, as a separate discipline.

The Discussion Draft incorporates victim counselors within the definition of "mental health service provider." Thus, a victim's "confidential communications" — that is communications related to an individual's "condition of mental or emotional health" — would be subject to the same exceptions that apply to communications with other mental health service providers. A majority of the Committee was unpersuaded that the Discussion Draft should afford "confidential communications" with a victim counselor greater protection than "confidential communications" transmitted to other mental health service providers.

A majority of the Committee also declined to include a so-called "functional" approach to communications by victims that would entail extending the existing "absolute" victim's counselor privilege to cover "confidential communications" by a victim of crime to any mental health service provider. Under current law, the communications of a victim who confers with a psychiatrist or social worker would receive less protection than communications with a victim counselor. A functional approach would address this disparate treatment among providers, but would not address the disparate treatment among communications. (For example, under a functional approach, communications regarding depression triggered by a violent crime would be treated differently than communications regarding depression triggered by other causes.)

Excluding the victim counselor privilege from the unified privilege — either by preserving it or extending it — would be at odds with the overall goal of unifying treatment of mental health service

provide privileges. It would also presume that a communications regarding mental health treatment for victims were fundamentally different from, and entitled to greater protection than, communications regarding treatment for other mental health conditions.

The existing victim counselor privilege was based in part on a 1986 model statute that arose out of the recommendations of the "President's Task Force on Victims of Crime, Final Report (Dec. 1982). The task force concluded that failure to extend confidentiality to counseling risked undermining the effectiveness of counseling. The scope of that confidentiality was not defined. However, the task force noted that at the time many states provided no statutory privilege for communications with crime victim counselors, as contrasted with communications with psychologists and psychiatrists. A 1995 U.S. Department of Justice Report to Congress that proposed model legislation for both absolute and qualified victim counselor privileges noted that victims often seek counseling from counseling centers, instead of a private psychologist, because of economic circumstances, but "[t]he victim's economic status should not result in a victim having less protection from disclosure for her communications to her counselor." U.S. Dep't of Justice, "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors — Findings and Model Legislation (Dec. 1995).

As with other existing privileges, the Discussion Draft would leave undisturbed the existing privilege for those communications with a victim counselor that fall outside the definition of "confidential communications." Discussion N.J.R.E. 534(d). Thus, communications regarding a victim's location or relocation would remain covered by the existing privilege. See N.J.R.E. 517(c). So would communications regarding a victim's physical condition. See N.J.R.E. 517(b)(c).

The definitional section defines "patient" in greater detail than either U.R.E. 503(a)(3), or N.J.R.E. 506(a), the physician-patient privilege. The Discussion Draft provides that a patient is a person who undergoes "consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment . . . for the purposes of diagnosis or treatment related to that patient's condition of mental or emotional health." The definition expressly provides that addiction is a condition of mental or emotional health.

The general rule of privilege grants a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication as defined. The draft differs in some respects from

U.R.E. 503(b). The draft privilege is expressly limited to disclosure "in a proceeding." The Subcommittee recognizes that the existing statutory privileges limit disclosure in other settings. However, the Subcommittee determined that, consistent with N.J.R.E. 101(a)(2), its draft should apply only to proceedings governed by the Evidence Rules.

The draft provision regarding who may claim the privilege also closely tracks the provision in U.R.E. 503(c), but the draft adds that "as applicable" members of a patient's family, as well as a guardian, conservator, or personal representative of a deceased patient, may claim the privilege. The draft also includes a provision based on the Lawyer-Client Privilege, N.J.R.E. 504, which states, "The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative[.]" Presumably, this mandate is imported into the Psychologist Privilege, N.J.R.E. 505, which states that confidential communications with a practicing psychologist "are placed on the same basis as those provided between attorney and client[.]" The provision is also similar to California Evidence Code § 1015, which states that a psychotherapist "shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege."

The Subcommittee also determined not to include the cleric-penitent privilege within the unified mental health service provider privilege, notwithstanding that clergy will sometimes counsel persons regarding mental and emotional conditions.

Exceptions.

The Discussion Draft includes thirteen exceptions to the privilege, in most cases drawing from existing rules.

Exceptions (1) and (2) pertain to proceedings to establish the capacity or incapacity of a person, or a civil commitment. Exception (1) would address the concern expressed by the Division of Law that an exception does not currently apply to testifying social workers at civil commitment hearings. N.J.R.E. 505, the psychologist-patient privilege, and N.J.R.E. 506(c), the physician-patient privilege, both include a similar exception.

Exception (2) would expressly provide an exception where a criminal defendant's competence to stand trial is put in issue. By contrast, N.J.R.E. 505 refers only to "an action in which the client seeks to establish his competence[.]"

Exception (3) pertains to communications relevant to issues "in a proceeding to recover damages on account of conduct of the patient which constitutes a crime[.]" This is based on provisions in N.J.R.E. 505, the psychologist-patient privilege, and N.J.R.E. 506(c), the physician-patient privilege.

Exceptions (4) and (5), dealing with the validity of a will, or an issue in a proceeding involving a contest over testate or intestate succession, are drawn from N.J.R.E. 505, the psychologist-patient privilege, and N.J.R.E. 506(c), the physician-patient privilege. However, the wording of the draft differs slightly from existing law, by using the phrase "validity of a will" as opposed to "validity of a document as a will."

Exception (6) has no current analog in the Evidence Rules. Yet, the Subcommittee believed it was worthwhile to address the issue of privilege in connection with compelled examinations. such as under Rule 5:3-3(a), as well as examinations compelled in discovery. The exception expressly applies only "with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise." For example, a party who undergoes a court-ordered psychological evaluation in a custody case would have no privilege when the evaluation is used in the custody case. But, the privilege would apply to prevent use of the communications in other contexts, "unless the court orders otherwise." However, the court must "order otherwise" before the communication is made, effectively warning the patient that the evaluation may be used for another purpose. A specific reference is made to the potential use of an evaluation in a subsequent commitment hearing, although it was prepared for a prior one.

Exception (7), regarding an "issue in a proceeding in which the condition of the patient is an element or factor of the claim or defense of the patient," adopts the exception found currently in the physician-patient privilege. N.J.R.E. 506(d). The Subcommittee recognized that a comparable exception does not exist in the psychologist-patient privilege. N.J.R.E. 505.

Exception (8) incorporates the exception currently found in the physician-patient privilege. N.J.R.E. 506(g). The provision essentially creates an exception where the patient has waived the privilege by causing the provider to testify as to his or her knowledge gained through the confidential communications.

Exception (9) incorporates a "crime or a tort" exception. It is based on N.J.R.E. 506(f), physician-patient privilege, and N.J.R.E. 504(2)(a), the attorney-client privilege, which is incorporated by the psychologist-patient privilege. However, the Subcommittee has adopted the broader "crime or a tort" formulation in the physician-patient privilege, rather than the narrower, "crime or a fraud" formulation in the attorney-client privilege. Notably, the Supreme Court has before it a case that raises the question whether the "crime-fraud" exception should apply to the marital communications privilege, N.J.R.E. 509, which, unlike N.J.R.E. 504, does not expressly include the exception. State v. Terry, 430 N.J. Super. 587 (App. Div.), appeal granted, 214 N.J. 233 (2013).

Exception (10) creates an exception for communications pertaining to the expression or manifestation of an "intent to engage in conduct likely to result in death or serious bodily injury." The provision is based on an exception to the social worker privilege, N.J.R.E. 518(b), which is not found in the other privileges in the Evidence Rules.

Exception (11) is a variation of the physician-patient privilege, which requires reports mandated by statute. N.J.R.E. 506(e). The provision expressly includes, but not by way of limitation, reports of abuse or neglect of a child, the elderly, the disabled or incompetent persons.

Exception (12) is based on the marriage counselor privilege, N.J.R.E. 510, and the social worker privilege, N.J.R.E. 518(c). It would exclude from the privilege communications relevant to a proceeding "against the mental health service provider, arising from the mental health services provided[.]"

Exception (13) would establish a new exception, not found in the Evidence Rules, pertaining to the persons seeking a firearm purchaser identification card, a handgun permit, or the return of a firearm after entry of a domestic violence restraining order. Under current regulations, a person applying for a firearm purchaser identification card or a handgun permit must sign a consent form for a mental health records search. See N.J.A.C. 13:54-1.4(d); N.J. State Police, "Consent for Mental Health Records Search Form (SP-66)," available at http://www.state.nj.us/njsp/info/ forms.html. This exception would provide that those mental health records would be admissible in a proceeding involving the identification card, permit, or return of weapons.

Finally, the Discussion Draft expressly preserves the court's power to compel disclosure in the case of waiver, or to avoid a violation of a countervailing constitutional right. This would override the provision in the marriage counselor privilege that generally prohibits waiver of that privilege. See N.J.R.E. 510.

In conclusion, the Subcommittee emphasizes that this Discussion Draft is an initial effort to develop a proposal for a unified privilege. The Subcommittee welcomes comments and suggestions on how it might be improved.

APPENDIX C

	Organization	Letter Dated	Signed by
MH1	Rutgers School of Public Health	April 10, 2014	George G. Rhoads
MH2	Rutgers School of Pharmacy	April 24, 2014	Joseph A. Barone
MH3	NJ Psychological Association	May 22, 2014	Jane Selzer
MH4	Fairleigh Dickinson University	May 23, 2014	Minerva S. Guttman
MH5	Prosecutor's Office (Union)	May 23, 2014	Grace H. Park
MH6	Prosecutor's Office (Hunterdon)	Mary 29, 2014	Anthony Kearns, III
MH7	Center of Violence Against Women and Children	June 5, 2014	Sarah McMahon, Ph.D.
MH8	NJ Coalition for Battered Women	June 2, 2014	Sandy Clark/Mark Ferraz
MH9	Department of Human Services	June 2, 2014	Lisa A. Ciaston
MH10	Public Defender	June 2, 2014	Matthew Astore
MH11	NJ State Bar Association	June 18, 2014	Paris P. Eliades
MH12	NJ Society for Clinical Social Work	Undated	Janice Victor
MH13	Clinical Social Work Guild 49	June 27, 2014	Luba Shagawat
MH14	Social Worker	June 29, 2014	Cheryl Nastasio
MH15	NJ Association of Mental Health and Addiction Agencies, Inc.	July 1, 2014	Debra Wentz, Ph.D.
MH16	Social Worker	July 1, 2014	Judith Cohen Oshinsky
MH17	Disability Rights New Jersey	July 1, 2014	Joseph B. Young, Esq.
MH18	Boards of Medical Examiners	July 2, 2014	Maryann Sheehan
MH19	Caldwell University	July 2, 2014	Robin Davenport
MH20	Clinician	July 22, 2014	Susanne Mars
MH21	Fooks-Michnya Associates, LLC	July 30,2014	Michael Michnya

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MEMORANDUM

DATE: 8/29/14

TO: Judge Mitchel E. Ostrer

FROM: Evan Marc Lazerowitz

RE: **Summary of Evidence Subcommittee Public Comments on Unified Mental Health Service Provider Evidentiary Privilege**

Organization / Person	Summary
Office of the Attorney General (Maryann Sheehan, on behalf of the Boards of Medical Examiners, Nursing, Psychological Examiners, Social Work Examiners, Marriage and Family Therapy Examiners, and the Professional Counselor Examiners Committee, and Alcohol and Drug Counselor Examiners Committee.	The Boards support the proposal and have several suggested modifications. They want to ensure that all professionals licensed by the Boards are covered by the privilege. This includes pediatricians, physician assistants, midwives, licensed social workers, licensed associate counselors, and holders of permits granted by the Boards of Psychological Examiners and Marriage and Family Therapy Examiners. The Board of Nursing also notes that licensed nurses should be covered as they may interact with mental health patients. The Board of Marriage and Family Therapy Examiners would like the Subcommittee to consider broadening the definition of confidential communications to ensure that "patient" includes the family unit or extended family. The Board would also like "all communications with providers" to be privileged. The Alcohol and Drug Counselor Examiners Committee would like the Evidence Committee to consider language that more closely emphasizes the restrictions on disclosure found at 42 C.F.R. Part 2, and to explain the process required to obtain a court order for disclosure set forth in the federal rules. The Committee also wants all parties to be aware of the "extensive restrictions" placed on the disclosure of patient records at 42 U.S.C.A. §§ 2900ee-3, 290dd-3.
New Jersey Division of Mental Health and Addiction Services (DMHAS) (Lisa A. Ciaston)	DMHAS supports the draft in general. Regarding Draft N.J.R.E. 534(a)(1)(i), it asks how the "interest of the patient" is determined. It also asks whether there is a distinction between persons furthering the interest of the patient in 534(a)(1)(i), and those participating in the treatment process in 534(a)(1)(iii). DMHAS also believes the definition of "entity" under

	534(a)(1)(ii) is unclear – does it include the record kept by the provider agency, individuals that are part of a provider agency, or both? It also wonders how broadly the confidential information will be transmitted within an entity; and how the obligations to keep information confidential by an entity are different than those of licensed mental health service providers in the organization. DMHAS suggests modifying 534(a)(2)(vi) to include the phrase "drug and alcohol programming," and "drug and alcohol programs that meet the requirements of 42 CFR part 2." It points to 42 C.F.R. Part 2, and 42 U.S.C.A. § 290dd2, which require federally assisted drug and alcohol program communications to remain confidential. In terms of who can claim the privilege, DMHAS would modify 534(c) to clarify that an authorized relative rather than just members of a patient's family can authorize disclosure. There should also be some "clarification as to whom can authorize a mental health service provider to disclose privileged information." DMHAS does not believe 534(e)(8) is clear and proposes that it instead read "If the court finds that any person holding the privilege has waived the privilege by placing his condition at issue, the mental health service provider may testify in any proceeding regarding knowledge gained through the confidential communication." DMHAS finally believes that 534(e)(10) is too broad and may conflict with the duty to warn, N.J.S.A. 2A:62A-16, 2A:62A-17. DMHAS notes that the exception requires clarification as to how it comports with existing state and federal law governing disclosure in the context of drug and alcohol treatment.
Disability Rights New Jersey (DRNJ) (Joseph B. Young, Esq.)	DRNJ supports the draft.
New Jersey State Bar Association (Paris P. Eliades)	The Bar Association supports the draft.
New Jersey Office of the Public Defender (Matt Astore)	The Public Defender supports the draft, although his position may change if the final result differs from the draft.
Rutgers University Ernest Mario School of Pharmacy (Joseph A. Barone, PharmD).	Rutgers Pharmacy School believes that pharmacists should be included under the definition of mental health providers because they "play many roles and often provide confidential counsel to the patients that they serve."
Farleigh Dickinson University Henry P. Becton School of Nursing and Allied Health (Drs. Diane Dettmore and Louise Gabriel)	FDU suggests adding licensed practical nurses, registered nurses, and nurse practitioners to the list of mental health service providers. FDU also agrees that the privilege should be the same for every mental

	healthcare professional and opposes the two-tier system advocated by the New Jersey Defense Association. FDU believes that there is "no reason that provision of unified privilege would or could have a deleterious effect on the victim counselor privilege."
Judith Cohen Oshinsky, M.S.W., L.C.S.W.	Ms. Oshinsky is concerned that the proposal would "compromise client confidentiality" and deter people from going to social workers.
Robin Davenport (Caldwell University)	As a college counselor, Davenport was concerned at the number of exceptions contained in the report as they affect therapists. While he supports the "duty to warn" exception, he believes that defining a "confidential communication" would be difficult and would damage the therapist-patient relationship. He also believes that if a therapist told a patient all of the legally required exceptions, the patient would terminate the counseling session. He also believes counselor interns should be added to the rule.
Clinical Social Work Guild 49, OPEIU (Luba Shagawat, M.S.W., L.C.S.W.)	The Guild believes that the draft would discourage mental health treatment and is particularly opposed to the definition of "confidential communications." It advocates for a broader definition, and believes that the Subcommittee's definition is a "major change from the current definition of confidentiality recognized by New Jersey and nationally."
New Jersey Society for Clinical Social Work (Jane Victor)	The Society strongly opposes the draft and believes that it creates a "confusing array of additional exceptions that are not currently in place." It asks the Subcommittee to adopt the "federal rules" of confidentiality in Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996).
Cheryl Natasio, M.S.W., L.C.S.W.	Ms. Natasio opposes the rule, finding it "very confusing" and believes it will create more lawsuits "trying to expand the limits of confidentiality as far as possible." She specifically opposes the exception for certain insurance disputes, as well as (partially) the criminal activity exception. Ms. Natasio also advocates the adoption of Jaffee.
Susanne Mars, L.P.C., L.R.C., N.C.C.	Ms. Mars believes the draft is too ambiguous and will be interpreted "very loosely" so as to allow confidential information to be disclosed.
Fooks-Michnya Associates, LLC (Michael A. Michnya, M.Ed., L.P.C.)	Mr. Michnya opposes the draft and relies on an attached article by John A. MacDonald, J.D., who is a former NJ DAG and a board member of the New Jersey Mental Health Counselors Association. MacDonald believes that currently, licensed counselors and therapists have the strongest protections among mental health professionals. The draft, in his view, will weaken the definition of confidential communications and represent a "radical change." He specifically cites the release of a married couple's financial planning information as not included within the definition, even though he believes it is a "major stressor[] that commonly impact[s] mental or emotional well-being."

	He also believes that changes to client waiver rules will negatively impact counselors. The "existing privilege cannot be waived by the client." He takes issue with the draft's "implied waiver" and "constitutional rights" provisions – arguing they are ambiguous and will result in a weaker privilege. MacDonald also criticizes the exception for communications obtained in the course of examination of a person that is compelled by court rule. He believes that it could enable parties in civil litigation to access otherwise privileged information. He believes that draft exception 534(e)(10) weakens the duty to warn by removing an immanency requirement. As an example, he notes that the exception could allow disclosure "in all sorts of situations" such as when an alcohol or drug abuser continues driving after several accidents, or if a vision-impaired person expresses an intent to keep driving. Finally, the draft does not protect interns in counseling programs; only social worker interns are protected.
Center for Violence Against Women and Children (Sarah McMahon, Ph.D.)	Dr. McMahon supports the draft; however, she is opposed to the inclusion of the Victim Counselor Privilege and believes that the Subcommittee should "refrain from advocating any privilege scheme that would weaken the privilege around any victim-counselor communication."
Union County Prosecutor's Office (Grace H. Park, Acting Union County Prosecutor)	Ms. Park supports the draft, with one exception. She believes that Draft N.J.R.E. 534(e)(10) would "water down" the existing exception to only allow disclosure when there is death or serious bodily injury. N.J.R.E. 518(b) allows a social worker to disclose when there is a "clear and present danger" to the health or safety of an individual. Ms. Park believes that the new rule would not permit disclosure when child endangerment or endangerment to an incompetent person takes place. She recommends using the "clear and present danger to the health or safety" of an individual standard instead of the "death or serious bodily injury" standard.
Hunterdon County Prosecutor's Office (Anthony P. Kearns III, Hunterdon County Prosecutor)	Mr. Kearns supports the draft. He does not believe that the draft will weaken the protections for any particular profession. He agrees with the weakening of the marriage counselor privilege, especially regarding the crime/tort exception. He believes there should be further discussion regarding the definition of "confidential communications," but believes the current definition is broad enough. He agrees with the Board of Marriage and Family Therapy Examiners' proposal to add family members, etc., to the definition of patient. He believes the draft is unclear as to why it is limited to a "proceeding" as opposed to other scenarios in the N.J.R.E. He also believes that a cleric-penitent privilege should be included in the draft. He emphasizes the same concerns as Ms. Park regarding Draft N.J.R.E.

	534(e)(10). He also supports Draft N.J.R.E. 534(e)(13) regarding firearm permit applications and domestic violence weapon return hearings.
New Jersey Coalition for Battered Women	The Coalition opposes the inclusion of the victim counselor privilege in the draft. It argues that a victim counselor cannot "treat" a victim in the clinical sense; there is always a third, and potentially dangerous person, involved in victim counselor communications; the victim counselor privilege is very susceptible to subpoena; and the draft would weaken the victim counselor privilege. The Coalition advocates a functional approach, as applied only to the victim counselor privilege.
New Jersey Psychological Association (NJPA) (Jeffrey Singer, Ph.D. & Jane Selzer)	NJPA is concerned at the "weakened privilege" in the draft and recommends "retaining [the] current confidentiality and privileges law, and extending it to its allied professions." It believes that the definition of confidential communications is too narrow, and should include all communications. It also ignores "situations when the evaluated person is not the client, but rather the client is an agency or organization." NJPA is concerned with the word "as applicable" in 534(c) (stating who may claim the privilege), and prefers "as authorized or otherwise permitted by law." It is also concerned with many of the exceptions. It opposes 534(e)(4), and advocates retaining the current exception's limitation to the validity of the will itself rather than other specific documents. It also opposes 534(e)(6), which it believes reverses the "default privilege of psychologists not to break confidentiality nor privilege, except if ordered to do so by the court." It is concerned that a subpoena would require disclosure. In the NJPA's view, 534(e)(7) "reduces the psychologist privilege in situations where a patient's mental status is an element of a claim or defense of [a] patient, and the rule instead adopts the weaker physician privilege." It also opposes 534(e)(9) because it extends the piercing of privilege beyond crimes to torts. It believes that psychologists and other marital therapy practitioners "have been granted the same protections [that] apply to the marital communications privilege." It similarly believes that 534(e)(10) weakens the "Duty to Warn Law . . . which requires a Tarasoff-like breaching of confidentiality" when a patient communicates a threat of "imminent serious physical violence." (citing N.J.S.A. 2A:62A-16). The draft's "lack of imminence" opens the door to piercing "even when the threat may be unlikely or too far in the distant future to reasonably predict."

	It is "unclear" whether psychologists will continue to be protected from testifying when mandatory reporting for child abuse occurs, under 534(e)(11). Finally, the NJPA believes that 534(e)(1)[22], which authorizes disclosure when a patient "expressly or implicitly waived the privilege or authorized disclosure" serves to weaken the marriage counselor privilege under N.J.R.E. 510, which "exempts marriage counseling from waiver except where the therapist is a party to a suit."
New Jersey Association of Mental Health and Addiction Agencies, Inc. (NJAMHAA) (Debra L. Wentz, Ph.D.)	NJAMHAA argues that the draft weakens the privilege for many professions. It believes that the definition of confidential communication is too limited and weakens the current protections for social workers, marriage counselors, and physicians. It proposes that the definition include all communications, except as otherwise exempted by reporting laws. NJAMHAA also argues that the definition of mental health service provider is too narrow. It proposes broadening the definition to include the words "screening," "assessment" and "evaluation" of a mental or emotional condition; rather than just "diagnosis or treatment." NJAMHAA proposes to explicitly include all interns and trainees in the definition of mental health service provider. NJAMHAA believes that the draft's listing of professions to be covered is at odds with other language in the rule; specifically, that the definition of mental health service provider includes those "reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition." It would add the word "including" in lieu of "specifically intended to apply to" the list of covered professions 534(a)(2). Finally, NJAMHAA recommends the explicit inclusion of Certified Compulsive Gambling Counselors in the rule.

[22] The final section of the rule is erroneously labeled as "e." It should be section "f" and must be corrected in the final rule.

APPENDIX E

MEMORANDUM

DATE: October 22, 2014

TO: Evidence Committee Members

FROM: Mental Health Privilege Subcommittee

RE: Response to Public Comments on Discussion Draft

We review below our proposed responses to public comments on the Discussion Draft. Conforming changes have been made to the Discussion Draft.

1. 534(a)(1) (definition of "confidential communications")

(a.) Several commenters propose that we broaden the definition of "confidential communications." These commenters include: the N.J. Division of Consumer Affairs within the Department of Law and Public Safety on behalf of the licensing boards for physicians, nurses, psychologists, social workers, marriage and family therapists, professional counselors, and alcohol and drug counselors (Boards); the New Jersey Psychological Association (NJPA); the New Jersey Association of Mental Health and Addiction Agencies (NJAMHAA); the N.J. Division of Mental Health and Addiction Services within the Department of Human Services (DMHAS); and several individual licensed social workers and therapists. These commenters generally are concerned that the draft does not include any and all communications between the provider and patient. They generally fear that uncertainty will be created by the draft's requirement that communications "relate to" the patient's mental health condition.

The "relate to" language was intended to address communications with a licensed provider who offers mental health services as well as non-mental health services — such as a non-psychiatrist physician, or some social workers. The "relate to" language would, for example, encompass a pediatrician's communications with a teen about his depression, but not communications about a broken ankle.

On the other hand, psychologists and other providers who only engage in mental health treatment (e.g. psychiatrists, licensed clinical social workers) argue that all communications between them and their patients should be encompassed by the privilege. Commenters were concerned that the Draft would open the door to line-by-line review of a therapist's treatment notes to determine if a particular entry was "related to" treatment; such reviews

would be time-consuming, burdensome, and undermine a patient's confidence that his or her communications were privileged.

One commenter specifically criticized the point in our report that discussions of family finances by a marriage therapist should fall outside the definition of confidential communications.

Proposed Response:

The subcommittee proposes to revise the definition to cover "information transmitted between a mental health service provider and patient in the course of treatment of, or related to, that individual's condition of mental or emotional health . . . ." (additional language underlined). The revised language would broaden the scope of communications covered. Under this revision, virtually all communications with providers whose practice is focused on mental health — e.g., a psychologist or psychiatrist — would likely fall within the privilege, thereby avoiding burdensome line-by-line reviews. However, in the case of communications with a non-psychiatric pediatrician, for example, the proponent of the privilege would need to establish that the pediatrician was engaged in a course of treatment for a condition of mental or emotional health, or the communication related to such condition. On the other hand, communications with a physician for a broken bone would not be covered.

We also intend to revise the report to recognize that discussion of family finances in the course of marriage therapy are covered as confidential communications.

We considered, but rejected, the idea of adding a provision that created a presumption that communications with certain identified mental health service providers — e.g. psychiatrists, psychologists — were related to a mental health condition.

(b.) The New Jersey Society for Clinical Social Work and an individual commenter urge us to adopt the "federal rule" of confidentiality in Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). As a matter of common law, pursuant to Fed.R.Evid. 501, the Supreme Court in Jaffee adopted a privilege for "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment." 518 U.S. at 15, 116 S. Ct. at 1931, 135 L. Ed. 2d 348. The Court included social workers within that privilege. Apparently, the commenters favor a privilege based on Jaffee because they believe that the Jaffee is less qualified than the privilege created by the Draft.

The U.S. Supreme Court recognized that the contours of the psychotherapist privilege would be defined on a case-by-case basis, including possible exceptions to the privilege. 518 U.S. at 18, 116 S. Ct. at 1932, 135 L. Ed. 2d at 349.

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.
>
> [Id. at 18, n. 19, 116 S. Ct. at 1932, n. 19, 135 L. Ed. 2d at 349, n. 19.]

The First Circuit subsequently applied a crime-fraud exception to the privilege, analogizing from the lawyer-client privilege. In re Grand Jury Proceedings, 183 F.3d 71, 74-79 (1st Cir. 1999). Nonetheless, the Supreme Court held that the privilege would not be subject to a balancing test, in which the court weighed, in each instance, the patient's privacy interests against the evidentiary need for disclosure. The Court held that such balancing would "eviscerate the effectiveness of the privilege." Id. at 17, 116 S. Ct. at 1932, 135 L. Ed. 2d at 349.

Proposed Response: No change. The purpose of the Draft is to codify and detail the contours of the mental health service provider privilege, and to incorporate exceptions included in existing privileges.

2. 534(a)(1)(i) (exception to "confidential communications")

DMHAS questions how it is determined "which individual is presenting the best interest of the patient." This section of the draft largely mirrors U.R.E. 503(a)(1). Interim Report at 12. DMHAS incorrectly believes this provision deals with the "best interest" of the patient. Rather, the rule allows information to be disclosed to persons who are present to further the patient's interest in the "consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment." 534(a)(1)(i). Such individuals could include family members, caregivers, and others. Staff members of the mental health service provider are covered under 534(a)(1)(iii).

DMHAS also asks whether a difference exists between 534(a)(1)(i), which covers those present to "further the interest of the patient"; and 534(a)(1)(iii), which covers persons participating in the treatment process under the direction of a mental health service provider.

Proposed Response: No change. Although there may be some overlap, the role of family members in 534(a)(1)(i) differs from their role in 534(a)(1)(iii). In the former, they are present to further the patient's interest, but need not necessarily participate in the treatment; in the latter, they are participants.

3. 534(a)(1)(ii) (exception to "confidential communications")

DMHAS believes the definition of the term "entity" is unclear. DMHAS asks whether "entity" means the provider's organization, just the individuals who are part of that organization, or both. It also asks how broadly can confidential information be transmitted within an organization, and does the entity have a different obligation than those of its licensed mental health service providers to keep information confidential.

Proposed Response: No change. The Draft is intended to allow a provider's practice organization – such as a hospital or practice group – to store a patient's medical records or transmit them to an authorized recipient, without waiving the privilege. The provision is limited to those "reasonably necessary" for the transmission of information.

4. 534(a)(2) (definition of "Mental-health service provider")

(a.) NJAMHAA asserts that the Subcommittee has created an inherent conflict in the way it has structured the enumerated list of mental health service providers. By enumerating a list of specific licensed professionals, the Draft rejects a functional approach to determine who qualifies as a mental health service provider. The Draft states that a "mental health service provider" "is specifically intended to apply to" the enumerated list of professionals. On the other hand, the Draft includes within the privilege a person "reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition." 534(a)(2). NJAMHAA argues that this makes the definition of mental health service provider ambiguous.

Proposed Response: We propose to revise the definition of mental health service provider to include "a person authorized or reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition, and is specifically intended to include [apply to]" the enumerated list of professionals. (additional language underlined; deleted language in brackets). Substituting "include" for "apply to" would eliminate any ambiguity.

We would also clarify in our report that a person who mistakenly, but reasonably, believes a person is "authorized" to treat a mental or emotional condition, need not subjectively believe the person is one of the enumerated professionals. It is sufficient that the person reasonably believed his or her provider was authorized.

(b.) Two faculty members of the Fairleigh Dickinson University School of Nursing suggest the Draft explicitly include licensed practical nurses, registered nurses and nurse practitioners within the scope of mental health service provider.

Proposed Response: No change. Practical nurses, registered nurses and nurse practitioners are already covered by 534(a)(2)(vii), which includes nurses, "consistent with the definition under N.J.S.A. 45:11-23." That statute includes "licensed practical nurse[s]," and "registered professional nurse[s]." N.J.S.A. 45:11-23(b). It also includes "[a]dvance practice nurse[s]", N.J.S.A. 45:11-23(c), which include "nurse practitioners," N.J.A.C. 13:37-7.1. The report will explain that these various nursing professionals are covered by the general reference to N.J.S.A. 45:11-23.

(c.) The Boards propose that the Draft expressly include midwives and physician assistants.

Midwives are regulated by the Board of Medical Examiners. N.J.S.A. 45:10-1. They "attend[] a woman in childbirth as a midwife," but must call a physician if there are any "abnormal signs or symptoms." N.J.S.A. 45:10-8. Certain midwives who are also certified nurses may prescribe drugs so long as they are working with a "collaborative physician." N.J.S.A. 45:10-18. Before entering into practice, they must "enter into an affiliation with a physician who is licensed in New Jersey." N.J.A.C. 13:35-2A.6. By regulation, they are permitted to practice "maternity care and well woman care." N.J.A.C. 13:35-2A.5.

Physician assistants are also regulated by the Board of Medical Examiners, and work under the direct supervision of a physician. N.J.S.A. 45:9-27.15; 45:9-27.18. The list of procedures they may perform is regulated and limited by statute. N.J.S.A. 45:9-27.16. A physician assistant "shall be conclusively presumed to be the agent of the physician under whose supervision the physician assistant is performing." N.J.S.A. 45:9-27.17(c).

Proposed Response: Include midwives and physician assistants. They may not be authorized to engage in the direct diagnosis or treatment of mental or emotional conditions. Nonetheless, a patient may consult with such professionals about such conditions, and the professionals may engage in preliminary assessments, leading to a referral to another professional. Those communications should be covered.

(d.) NJAMHAA recommends that the Draft include certified compulsive gambling counselors within the definition of mental health service provider.

Proposed Response: No change. Gambling counselors are not State licensed providers of mental health services.

(e.) NJAMHAA and other groups are concerned that the draft only includes social work interns, and does not include interns from other professions.

Proposed Response: Modify the Draft. The intent was to include any interns authorized by the respective licensing laws to provide mental health services. The Draft expressly mentions interns in the context of 534(a)(2)(v), pertaining to social workers, but it encompasses psychological interns in 534(a)(2)(i) by reference to the statutory provisions authorizing certain unlicensed interns to practice. Where the existing privilege refers only to a licensed professional, see, e.g., N.J.R.E. 505, N.J.R.E. 518, it is necessary to expressly expand coverage to other unlicensed persons permitted to practice in the field. However, in the case of physicians and psychiatrists, the existing privilege does not refer to "licensed" physicians, but instead to persons "authorized or reasonably believed by the patient to be authorized to practice medicine," which implicitly includes graduate interns, residents and fellows.

The Revised Draft expressly refers to the statutory provision that allows certain unlicensed persons to engage in marriage and family therapy. N.J.S.A. 45:8B-6. These include interns, N.J.S.A. 45:8B-6(a)(3), as well as persons practicing within a governmental entity or certain community non-profit agencies, and certain persons who are licensed in other states and engaged in limited practice in New Jersey. The Revised Draft also refers to similar provisions of the professional counselor statute that allows certain unlicensed persons, including interns, to engage in counseling. N.J.S.A. 45:8B-48(b), (c), and (d).

(f.) The Dean of the Rutgers School of Pharmacy proposes that pharmacists be included in the list of mental health service providers.

Proposed Response: We have solicited the views of the Attorney General and the Division of Consumer Affairs on behalf of the New Jersey Board of Pharmacy. However, we are, at this stage, persuaded that pharmacists should be included.

The role of community pharmacists in mental health has expanded recently, and a specialty sub-group exists for Psychiatric and Neurologic Pharmacists. See Patrick R. Finley, et al., Evaluating the Impact of Pharmacists in Mental Health: A Systematic Review, 23 Pharmacotherapy 12 (2003) ("For over 30 years, clinical pharmacists have contributed to these care models in capacities ranging from educator to consultant to provider."). Our initial research reveals that an apparent minority of states have adopted a form of a pharmacist-patient privilege. Georgia has a pharmacist-client privilege, see Ga. Code § 24-9-40 (2014). Indiana protects prescriptions, drug

orders, records, and patient information. See Ind. Code §25-26-13-15(a) (2014). Ohio protects "communication between a patient and a pharmacist in furtherance of the physician-patient relation." Ohio Rev. Code. § 2317.02 (2014); see also Cal. Evid. Code § 912 comment d (2014) (same). On the other hand, most states have been "reluctant to recognize" a pharmacist-patient privilege. Sharon R. Schawbel, Comment, Are You Taking Any Prescription Medication?: A Case Comment on Weld v. CVS Pharmacy, Inc., 35 New Eng. L. Rev. 909, 962-63 nn.425-27 (2001).

(g.) NJAMHAA argues that the definition of mental health service provider is too narrow. It proposes broadening the definition to include the words "screening," "assessment" and "evaluation" of a mental or emotional condition; rather than just "diagnosis or treatment."

Proposed Response: Modify the Draft. We agree that there is a lack of congruence in the Draft between 534(a)(1)(i) and (iii) — which refer to "consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment" — and 534(a)(2) — which refers only to "diagnosis or treatment." We have included a definition of "diagnosis or treatment," which incorporates the longer list of tasks, and utilize the shorter form "diagnosis or treatment" elsewhere in the Draft rule.

5. 534(a)(2)(vi) (Alcohol and Drug Counselors)

DMHAS proposes that the Draft include reference to 42 C.F.R. § 2.11. Drug and alcohol programming that is supported with federal funds is regulated by 42 U.S.C.A. § 290dd-2. Apparently, DMHAS suggests adding "drug and alcohol programs that meet the requirements of 42 CFR part 2" to the definition of an alcohol and drug counselor.

The Alcohol and Drug Counselor Examiners Committee proposes that the Draft codify the federal regime that provides specific safeguards to protect the confidentiality of information obtained in drug and alcohol programs. 42 U.S.C.A. § 290dd-2(b)(2)(C) provides that information may be disclosed by an "appropriate order of a court of competent jurisdiction granted after showing good cause therefor."

Proposed Response: No change. The commenters do not distinguish between an evidentiary privilege, and a statute declaring certain information confidential. Various federal and state laws establish that certain communications and medical information are confidential. These same laws often empower courts to override the confidentiality for good cause. On the other hand, an evidentiary privilege would protect the communications from disclosure, unless the exceptions in the evidence rule are satisfied.

6. 534(a)(3) (definition of "patient")

The Board of Marriage and Family Therapy Examiners proposes that the Draft expressly include communications with a patient's extended family and family unit. "[T]he Board notes that the definition of confidential communications seems to suggest that a 'patient' is only an individual." The Board argues that in family therapy, the patient "is often the family unit or extended family, rather than a single individual."

Proposed Response: No change. The Draft provides that a "patient" may claim the privilege. In the case of family or group therapy, there are multiple patients. The marriage counselor privilege, N.J.R.E. 510, does not assign a privilege to a family or family unit. Rather, it refers to the "person or persons in therapy."

7. 534(c) (waiver)

DMHAS proposes modification of 534(c) to clarify that "an authorized relative rather than any members of the patient's family is able to authorize disclosure." DMHAS also proposes that the Draft clarify who "can authorize a mental health service provider to disclose privileged information."

Proposes Response: Modify the Draft. We propose to amend 534(c) to state, "The privilege under this rule may be claimed by the patient and, as authorized [applicable], members of the patient's family, the patient's guardian or conservator, or the personal representative of a deceased patient." (additional language underlined; deleted language in brackets).

8. Exceptions

(a.) 534(e)(4) ("relevant to an issue in a proceeding as to the validity of a will")

NJPA interprets the Draft to widen the types of documents and communications that can be disclosed in a will contest. NJPA argues that Draft would allow disclosure if the communication pertains to "any issue in a proceeding regarding the validity of a will, rather than previously limiting the language to the validity of a specific document as to its validity as a will." The NJPA argues the Draft may allow for disclosure regarding a testators' personal feelings about relatives.

Proposed Response: Modify the Draft to incorporate without change the existing language in the patient-physician privilege, N.J.R.E. 506(c), and psychologist-patient privilege, N.J.R.E. 505, that is "upon an issue as to the validity of a document as a will of the" patient. The intent was not to broaden the exception for communications related to the testamentary capacity of a deceased patient.

(b.) 534(e)(6) (court-ordered examination)

NJPA is concerned that this exception would "reverse the default privilege of psychologists not to break confidentiality nor privilege, except if ordered to do so by the court." The court-ordered examination exception, per the Interim Report, would apply both to court-ordered evaluations as well as those compelled in discovery. Interim Report at 18. NJPA asserts that the privilege could be pierced "whenever there is a subpoena by some party in a case according to court rule."

Proposed Response: No change. We concluded that the NJPA has misread the exception. The phrase in the exception, "compelled pursuant to Court Rule," refers to a mental health examination compelled by the Court Rule; it does not refer generally to any discovery under the Court Rules. This exception applies when a party in a civil action requests a physical or mental examination of a person, R. 4:19, or a court orders an evaluation to take place in a family or criminal matter, N.J.S.A. 2C:4-5; R. 5:3-3. In that situation, the report is not confidential as to the proceeding in which it was obtained. The court may order that it is confidential with respect to other proceedings, but that is not an automatic, and a party must request such an order. 534(e)(6).

(c.) 534(e)(7) (patient's condition is relevant to an element of a claim or defense)

NJPA opposes this exception on the grounds that it weakens the psychologist privilege by adopting the "weaker physician privilege."

Proposed Response: No change. The Subcommittee recognized that it modeled its Draft after the physician-patient privilege.

(d.) 534(e)(8) (if the court finds that a privilege holder has "caused the mental health service provider to testify in any proceeding to any matter of which the mental health service provider gained knowledge through the communication")

DMHAS believes this exception is not "completely clear." The Interim Report notes that the exception "incorporates the exception currently found in the physician-patient privilege. N.J.R.E. 506(g). The provision essentially creates an exception where the patient has waived the privilege by causing the provider to testify as to his or her knowledge gained through the confidential communications. Interim Report at 19. DMHAS suggests modifying the exception to state, "If the court finds that any person holding the privilege has waived the privilege by placing his condition at issue, the mental health [service] provider may testify in any proceeding regarding knowledge gained through the confidential communication."

Proposed Response: No change. DMHAS's proposed language would create uncertainty. The Draft adopts, virtually verbatim, the existing text of N.J.R.E. 506(g).

(e.) 534(e)(9) (crime-tort exception)

NJPA is concerned that this exception extends the piercing of privilege beyond crimes to torts. It also notes that the exception would weaken the marital communications privilege and discourage parties from seeking emotional support in times of crisis. "The proposed rule could pierce the psychologist privilege in marital cases, (in addition to others), resulting in such testimony being allowed in Tevis claims." See Tevis v. Tevis, 79 N.J. 422 (1979).

On the other hand, the Hunterdon County Prosecutor endorsed the expansion of the exception to include torts.

Proposed Response: Modify the Draft. We agree that an exception for "torts" could be broadly construed. We therefore will include an exception only for "communications in the course of mental health services sought or obtained in aid of the commission of a crime or a fraud." The "crime-or-fraud" exception applies to the lawyer-client privilege, and to the psychologist-patient privilege, which mirrors the lawyer-client privilege.

We also propose to add a provision to avoid any conflict with the marital communications privilege. "This exception is subject to the protections found in N.J.R.E. 501 and N.J.R.E. 509, and is not intended to modify or limit them." We recognize that these privileges may be amended in light of State v. Terry, 218 N.J. 224 (2014). In that case, the Court endorsed an amendment to the marital communications privilege to add a crime-fraud exception. Under the Court's proposal, the marital communications privilege would not shield communications relating to "an ongoing or future crime or fraud in which the spouses were joint participants at the time of the communication," Id. at 24, but "a confession made in confidence to an innocent spouse would remain confidential." Ibid.

(f.) 534(e)(10) ("conduct likely to result in death or serious bodily injury")

DMHAS and the NJPA believe that this exception is too broad. They argue it lacks an imminence requirement, and expands the exception in the existing Social Worker Privilege, N.J.R.E. 518, which refers to communications that, if not disclosed, would "present[] a clear and present danger to the health or safety of an individual." The commenters advocate changing the exception to include an "imminent harm" requirement, rather than the "likely to result in death or serious bodily injury" standard in the Draft. 534(e)(10).

The Acting Union County Prosecutor is concerned that the Draft would narrow the exception under existing law, because the Draft requires a threat of "death or serious bodily injury" and the Social Worker Privilege requires only "danger to health or safety."

Proposed Response: We have determined to delete this exception. It has no analog in existing privileges, other than in the Social Worker privilege, although it is included in the California Evidence Code § 1024 (stating there is no privilege "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger"); and Uniform Rules of Evidence 503(d)(5) (stating "[t]here is no privilege . . . for a communication . . . in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual").

(g.) 534(e)(11) (mandatory reporting exception) (renumbered 534(e)(10) with deletion "likely to result in death or serious bodily injury" exception)

NJPA opposes this privilege exception because it is unclear whether "psychologists are protected from testifying" when they release information pursuant to mandatory reporting laws.

Proposed Response: We propose to revise the Draft to provide that the exception only pertains to communications by the professional to the third-party, pursuant to the duty to report, and not to the communications between the patient and the provider that may have triggered the report; and then only if the statute does not specifically provide that the information shall not be disclosed.

In State v. Snell, 314 N.J. Super. 331, 338-39 (App. Div. 1998), the court examined the apparent conflict between the duty to report child abuse under N.J.S.A. 9:6-8.10, and the psychologist-patient privilege, N.J.R.E. 505. The court held that the psychologist-privilege must yield to the duty to report, as it related to communications to DYFS, but "[t]he privilege remain[ed] otherwise intact" as it pertained to testimony by the psychologist regarding the communication that prompted the report. Supra, 314 N.J. Super. at 338.

On the other hand, the current physician-patient privilege states that "there is no privilege . . . as to information which the physician or the patient is required to report to a public official, unless the statute requiring the report or record specifically provides that the information shall not be disclosed." N.J.R.E. 506(e). This exception is comparable to California Evidence Code § 1026 (stating "[t]here is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information

required to be recorded in a public office, if such report or record id open to public inspection"); and Uniform Rules of Evidence 503(d)(8) (stating "[t]here is no privilege . . . for a communication . . . that is subject to a duty to disclose under [statutory law]").

A duty to report also arises from N.J.S.A. 2A:62A-16(b), which shields from civil liability certain licensed mental health service providers if they have complied with a prescribed duty to warn. The provision covers persons licensed to practice "psychology, psychiatry, medicine, nursing, clinical social work or marriage counseling." N.J.S.A. 2A:62A-16(a). The statute imposes a duty to warn under the following circumstances:

> (1) The patient has communicated to that practitioner a threat of imminent, serious physical violence against a readily identifiable individual or against himself and the circumstances are such that a reasonable professional in the practitioner's area of expertise would believe the patient intended to carry out the threat; or
>
> (2) The circumstances are such that a reasonable professional in the practitioner's area of expertise would believe the patient intended to carry out an act of imminent, serious physical violence against a readily identifiable individual or against himself.
>
> [N.J.S.A. 2A:62A-16(b).]

The duty may discharged by performing any of the following acts:

> (1) Arranging for the patient to be admitted voluntarily to a psychiatric unit of a general hospital, a short-term care facility, a special psychiatric hospital or a psychiatric facility, under the provisions of P.L.1987, c.116 (C.30:4-27.1 et seq.);
>
> (2) Initiating procedures for involuntary commitment to treatment of the patient to an outpatient treatment provider, a short-term care facility, a special psychiatric hospital or a psychiatric facility, under the provisions of P.L.1987, c.116 (C.30:4-27.1 et seq.);

> (3) Advising a local law enforcement authority of the patient's threat and the identity of the intended victim;
>
> (4) Warning the intended victim of the threat, or, in the case of an intended victim who is under the age of 18, warning the parent or guardian of the intended victim; or
>
> (5) If the patient is under the age of 18 and threatens to commit suicide or bodily injury upon himself, warning the parent or guardian of the patient.
>
> [N.J.S.A. 2A:62A-16(c).]

The proposed compromise would remove a potential disincentive to report by continuing to protect the communications between the provider and patient. The revised Draft would make it clear that a statement to a third-party would not enjoy an evidentiary privilege, unless another statutory provision made it confidential. Also, by referring generally to a duty to report, the revised Draft would avoid the necessity of defining the nature of the threat that may trigger a communication within an exception to the privilege.

(h.) 534(f)(1)[23] (court may compel disclosure where "the patient has expressly or implicitly waived the privilege or authorized disclosure")

NJPA believes that this provision "weakens the marriage counselor privilege" because that privilege is exempt from waiver "except where the therapist is a party to a suit."

Proposed Response: No change. Aside from our proposed carve-out of communications protected by N.J.R.E. 501 and N.J.R.E. 509, the Subcommittee believes that communications with marriage counselor should be subject to waiver.

9. Including Victim Counselors in the draft

The Center for Violence Against Women and Children and the New Jersey Coalition for Battered Women oppose the inclusion of victim counselors in the Draft. The Coalition argues that victim counselors do not treat mental or emotional health conditions, and therefore should not be covered by the privilege governing professionals who do. The commenters argue that weakening the privilege would deter victims from seeking help.

Proposed Response: The Full Committee may wish to revisit its prior vote to incorporate victim counselors within the Draft.

[23] Erroneously listed in the draft as 534(e)(1).