

NOTICE TO THE BAR

UPDATE ON SEPTEMBER 2, 2015 JUDICIAL CONFERENCE – PROPOSED AMENDMENTS TO PTI RULES WITHDRAWN; CONFERENCE TO FOCUS ON PROPOSED NJRE 534 (MENTAL HEALTH SERVICE PROVIDER PRIVILEGE)

This Notice modifies the August 7, 2015 Notice to the Bar that was captioned “September 2, 2015 Judicial Conference on Proposed New Rule of Evidence 534 (Mental Health Service Provider Privilege); and Proposed Amendments to Court Rule 3:28 (Pretrial Intervention).” Specifically, the proposed amendments to Court Rule 3:28 (Pretrial Intervention) as contained in that earlier notice are hereby withdrawn from consideration at the September 2 Judicial Conference.

The September 2 Judicial Conference thus will focus only on proposed new Rule of Evidence 534 (Mental Health Service Provider Privilege). That proposed new rule was published with the earlier notice but also is published here for ease of reference.

The basis for withdrawing the proposed PTI rule amendments from Judicial Conference consideration is the August 10, 2015, enactment of L. 2015, c. 98, revising several statutes, including N.J.S.A. 2C:43-12, which governs the Pretrial Intervention (PTI) Program. This enactment was effective immediately. More specifically, L. 2015, c. 98, revises N.J.S.A. 2C:43-12 by: (1) creating a presumption against admission into PTI for certain cases that involve domestic violence; (2) requiring the prosecutor and the court to give due consideration to the crime victim’s position as to whether the defendant should be admitted into the program; and (3) allowing certain defendants into PTI only upon entry of a guilty plea. These new statutory provisions conflict with several of the proposed PTI rule amendments that were scheduled to be discussed at the Judicial Conference. In light of these conflicts, the Chief Justice on behalf of the Supreme Court determined to withdraw the proposed rule amendments from consideration at the Judicial Conference and to instead refer the matter back to the Criminal Practice Committee to address the statutory amendments and the resulting conflicts with the proposed rule amendments.

However, as noted above, the September 2 Judicial Conference will proceed as scheduled, focusing exclusively on proposed new N.J.R.E. 534, which would create a unified mental health service provider privilege. That proposed new Rule of Evidence along with a summary were included with the August 7 Notice to the Bar. As indicated in the previous notice, the Judicial Conference session will be held at the New Jersey Law Center, One Constitution Square, off Ryders Lane in New Brunswick and will begin at 5:30 p.m. Anyone who wishes to speak at this session should notify the Acting Administrative Director of the Courts by Friday, August 28, 2015, at the address set forth below. The request to speak must identify the individual who seeks to speak and

whether the speaker will be representing an organization. Please note that the limit on each speaker's presentation is five minutes. The address to mail such request is:

Hon. Glenn A. Grant, Acting Administrative Director
Attention: Judicial Conference 2015
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Requests to speak at the Judicial Conference also may be made by e-mail to the following address: Comments.mailbox@judiciary.state.nj.us.



Glenn A. Grant, J.A.D.
Acting Administrative Director

Dated: August 14, 2015

Summary of Proposed N.J.R.E. 534

Proposed N.J.R.E. 534 creates a unified mental health service provider privilege. This privilege is intended to replace the different and occasionally inconsistent privileges that currently exist for communications between patients and various mental health service providers. The privilege applies to confidential communications between a mental health service provider and a patient during the course of treatment of, or related to, the patient's mental or emotional health condition. The proposed rule applies to confidential communications made to the following mental health service providers: (1) psychologists; (2) physicians, including psychiatrists; (3) marriage and family therapists; (4) social workers, including social work interns and certified school social workers; (5) alcohol and drug counselors; (6) nurses; (7) professional counselors, associate counselors or rehabilitation counselors; (8) psychoanalysts; (9) midwives; (10) physician assistants; and (11) pharmacists. The proposed rule, however, specifically excludes communications made between those service providers and victims of violent crimes. Those communications are instead evaluated under the "Victim Counselor Privilege" contained in N.J.R.E. 517.

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) 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);

(v) 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);

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

(vii) 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);

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

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

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

(ix) 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.

(1) The privilege under this rule may be claimed by the patient, the patient's guardian or conservator, the personal representative of a deceased patient, or if authorized by the patient, a member or members of the patient's family. 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) (1) Violent Crime Victim.

Any confidential communication between any of the mental health service providers listed in this rule and a victim of violent crime, as defined in N.J.S.A. 2A:84A-

22.14c, shall be evaluated under the provisions of the "Victim Counselor Privilege" contained in N.J.R.E. 517, and not under the provisions set forth herein. Nothing in this act shall be construed to dilute or alter the scope of the Victim Counselor Privilege.

(2) 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.