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THE NEW YORK PROPOSED CODE OF EVIDENCE: ARTICLE V

*Michael M. Martin**

Article V of the New York Proposed Code of Evidence sets forth the rules of evidentiary privilege. Unlike other articles of the Proposed Code, it differs significantly from its federal counterpart.¹

Article V of the Federal Rules of Evidence consists of only rule 501, which provides that, unless otherwise required by the constitution or federal statute, privileges in federal courts are governed by "the principles of the common law as they may be interpreted . . . in the light of reason and experience."² Rule 501

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¹ The Federal Rules of Evidence as drafted by the Advisory Committee and prescribed by the United States Supreme Court contained detailed provisions regarding privileges. PROPOSED FED. R. EVID. 501-513, *reprinted in* 56 F.R.D. 183 (1972). Those provisions, however, became the focus of substantial controversy and resistance in Congress. *See generally* 2 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 501[01] (1981) [hereinafter cited as WEINSTEIN'S EVIDENCE]. Some thought elimination of the doctor-patient privilege and its replacement by a psychotherapist privilege too radical. *Id.* ¶ 504[01], at 504-12 & n.4; *see* PROPOSED FED. R. EVID. 504; notes 76-82 and accompanying text *infra*. Others were concerned in those days of Watergate about the official information privilege. 2 WEINSTEIN'S EVIDENCE 509-3 to 509-4. And many expressed doubts about applying federal privilege rules to the diversity cases in federal courts, which are of course based on state law. *E.g.*, H.R. REP. NO. 650, 93d Cong., 2d Sess. 8-9 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082-83 [hereinafter cited as HOUSE REPORT NO. 650]. It was apparent that no accord could be reached concerning the controversial privilege rules. *See, e.g.*, SEN. REP. NO. 1277, 93d Cong., 2d Sess. 4 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7053. Rather than attempt a redrafting of the proposals to express its views on the policies involved in the various privileges, Congress adopted a single rule to cover the subject. FED. R. EVID. 501.

² Rule 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings,

further provides, however, that questions of privilege in civil cases as to which state law supplies the rule of decision will be governed by state law.³ Thus, an examination of Article V of the New York Proposed Code is useful not only because of its significance in state cases, but also because of its relevance to federal diversity cases.

AN OVERVIEW OF ARTICLE V

The privileges sections are the most broadly applicable of the Proposed Code's provisions. They apply "at all stages of all [judicial] actions, cases, and proceedings,"⁴ as well as in all other proceedings in which "testimony can be compelled to be given."⁵ Thus, the privileges apply to pretrial hearings and to legislative, administrative, and arbitration hearings, as well as to trials.⁶

with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State Law.

FED. R. EVID. 501.

A recent illustration of the application of this provision is *Trammel v. United States*, 445 U.S. 40 (1980), in which the Supreme Court held that the spousal privilege in a criminal case belongs only to the witness-spouse and not to the party-spouse. *Id.* at 47-53. The decision marked a departure from the prior rule, which had vested the privilege in either spouse. *Hawkins v. United States*, 358 U.S. 74 (1958). Although the *Hawkins* Court had rejected a Government challenge to the privilege and a suggestion that it be modified in much the same way as was later adopted in *Trammel*, the *Trammel* Court noted that support for the general privilege had steadily eroded since *Hawkins*. 445 U.S. at 48-50. Furthermore, the rationale for the privilege articulated in *Hawkins*, the state's reluctance to encourage testimony that would alienate the spouse "or further inflame domestic differences," 358 U.S. at 79, was "unpersuasive" according to the *Trammel* Court. "When one spouse is willing to testify against the other in a criminal proceeding — whatever the motivation — their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." 445 U.S. at 52. In *Trammel* the Court circumvented 28 U.S.C. § 2076 (1976), which requires new privilege rules prescribed by the Court to be approved by Congress. The Court said its result was a federal common-law development, and not the prescription of a new privilege, so it was not within the "Court's statutory rule making authority" which is limited by § 2076. 445 U.S. at 47 n.8 (emphasis in original).

³ The Advisory Committee had concluded that *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and its progeny did not mandate this result. Proposed FED. R. EVID. 501, Advisory Comm. Note (relying on *Hanna v. Plumer*, 380 U.S. 460 (1965)).

⁴ N.Y. PROPOSED CODE EVID. § 101(e) [hereinafter cited as PROPOSED CODE]. See also *id.* §§ 101(c), 501(b).

⁵ PROPOSED CODE, *supra* note 4, § 501(b)(i). The Proposed Code does not purport to prescribe the scope of privileges granted outside of it. See *id.* § 501(b).

⁶ *Id.* § 501(b)(i). This provision was included in article V because § 101, the provision setting forth the general applicability of the Proposed Code, refers only to judicial

The Proposed Code neither creates any new privileges nor totally eliminates any existing ones. Rather, it restates—with some modifications in language, and less often, in substance—the privileges currently provided for in New York's Civil Practice Law and Rules (CPLR): the privilege for confidential spousal communications;⁷ the attorney-client privilege;⁸ the social worker-client privilege;⁹ and doctor, nurse, dentist, and psychologist-patient¹⁰ privileges. The only privilege in the CPLR which has not been restated in the Proposed Code is the self-incrimination privilege,¹¹ as a firmly established constitutional privilege it need not be codified.¹² In addition, the Proposed Code incorporates several privileges developed by the courts: the privileges against disclosure of political votes,¹³ trade secrets,¹⁴ secrets of state and official information,¹⁵ and informants' identity.¹⁶ Notably, adoption of the Proposed Code would preclude courts from creating new privileges,¹⁷ although a court will be

proceedings rather than to all situations in which testimony can be compelled. The consultants feared that the assurance of a privilege in only judicial proceedings would be an insufficient "inducement to free communication" if disclosure could be required in administrative, legislative, or other types of hearings. *Id.* § 501, Commentary.

The current attorney-client privilege contains a broad applicability provision similar to that of the Proposed Code. Compare N.Y. CIV. PRAC. LAW § 4503(a) (McKinney 1963) (CPLR) with PROPOSED CODE, *supra* note 4, § 501(b). The CPLR provision was added as a response to the decision in *Lanza v. New York State Joint Legis. Comm.*, 3 N.Y.2d 92, 99, 143 N.E.2d 772, 776, 164 N.Y.S.2d 9, 14, *cert. denied*, 355 U.S. 856 (1957).

⁷ N.Y. CIV. PRAC. LAW § 4502(b) (McKinney 1963). See notes 111-23 and accompanying text *infra*.

⁸ N.Y. CIV. PRAC. LAW § 4503 (McKinney 1963). See text accompanying notes 37-66 *infra*.

⁹ N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1980-1981). See notes 105-10 and accompanying text *infra*.

¹⁰ N.Y. CIV. PRAC. LAW §§ 4504, 4507 (McKinney Supp. 1980-1981). See notes 67-104 and accompanying text *infra*.

¹¹ N.Y. CIV. PRAC. LAW § 4501 (McKinney 1963).

¹² See U.S. CONST. amend. V; N.Y. CONST. art. I, § 6. See generally *In re Gault*, 387 U.S. 1 (1966); *Malloy v. Hogan*, 378 U.S. 1 (1964); *People ex rel. Taylor v. Forbes*, 143 N.Y. 219, 228 (1894).

¹³ See notes 132-33 and accompanying text *infra*.

¹⁴ See notes 134 & 138-50 and accompanying text *infra*.

¹⁵ See notes 135 & 141-44 and accompanying text *infra*.

¹⁶ See notes 136 & 154-69 and accompanying text *infra*.

¹⁷ PROPOSED CODE, *supra* note 4, § 501(a). The Proposed Code precludes the judiciary from creating new privileges because "most privileges reflect the kind of accommodation of important competing interests that should be left to the [legislature]." *Id.*, Commentary. Recognition of privileges with constitutional bases could, of course, continue. See *In re A & M*, 61 App. Div. 2d 426, 429-35, 403 N.Y.S.2d 375, 378-81 (4th Dep't 1978)

able to protect the confidentiality of particular statements or documents.¹⁸

Section 501 of the Proposed Code incorporates by reference, but does not otherwise affect, privileges granted by the constitutions or laws of the United States or the State of New York.¹⁹ Thus, for example, the self-incrimination²⁰ and journalist²¹ privileges and the confidentiality of grand jury proceedings²² would be unchanged by the Proposed Code.²³

(parent-child privilege); *People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S.2d 309 (Sup. Ct. Westchester County 1979) (same).

¹⁸ PROPOSED CODE, *supra* note 4, § 501(a). The Commentary notes that confidentiality is sometimes ordered as a condition of disclosure or in relation to an affidavit exchanged as part of a plea bargaining procedure. *Id.*, Commentary.

¹⁹ *Id.* § 501(a).

²⁰ U.S. CONST. amend. V; N.Y. CONST. art. I, § 6.

²¹ New York Civil Rights Law § 79-h(b) provides an exemption from liability for contempt of court in favor of professional journalists and newscasters:

Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court, the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which he is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to him.

N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney Supp. 1981-1982). See *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *In re WBAI-FM v. Proskin*, 42 App. Div. 2d 5, 344 N.Y.S.2d 393 (3d Dep't 1973).

²² N.Y. CRIM. PROC. LAW § 190.25(4) (McKinney Supp. 1980-1981) prohibits any grand juror, district attorney, clerk, public servant, stenographer, or interpreter from disclosing the nature or substance of any grand jury testimony, decision or result, except in the lawful discharge of duties or upon written order of the court. See also J. PRINCE, RICHARDSON ON EVIDENCE, § 408, at 400 (10th ed. 1973) [hereinafter cited as RICHARDSON].

²³ The protections against disclosure in pre-trial discovery proceedings afforded to an attorney's work product, N.Y. CIV. PRAC. LAW § 3101(c) (McKinney 1970), and to material prepared for litigation, *id.* § 3101(d), are also unchanged by the Proposed Code.

The Code, in section 502, protects from disclosure reports or returns required by federal or state laws,²⁴ if the law requiring the report or return to be made accords it confidentiality.²⁵ Thus, for example, a required accident report, which the state where it was made treats as confidential in order to protect against self-incrimination and to encourage full disclosure, will be treated as privileged in New York.²⁶

The traditional view in this country toward privileges has been that they are justified because, and only to the extent that, they encourage communications considered important by the society.²⁷ Because privileges also keep relevant information from the trier of fact, courts have tended to interpret the privileges narrowly.²⁸

²⁴ PROPOSED CODE, *supra* note 4, § 502 provides:

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by the laws of the United States or of any state to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this section in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

Examples of statutes which require reports or returns and which provide privileges against disclosure (including prohibitions against disclosure by the official recipient) include N.Y. AGRIC. & MKTS. LAW § 233 (McKinney 1972) and N.Y. PUB. HEALTH LAW § 2221 (McKinney 1977). Statutes containing this kind of provision enjoy the protection of § 501(a) of the Proposed Code. PROPOSED CODE, *supra* note 4, § 502, Commentary.

²⁵ PROPOSED CODE, *supra* note 4, § 502.

²⁶ *Id.*, Commentary.

²⁷ Dean Wigmore theorized that four fundamental conditions must exist in order to justify granting a privilege against disclosure:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relations by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.

8 J. WIGMORE, EVIDENCE § 2285, at 527 (rev. ed. J. McNaughton 1961). This view opposed expanding privileges to include additional classes of persons, RICHARDSON, *supra* note 22, § 409, at 403, and endorses the curtailment of existing privileges. See 8 J. WIGMORE, *supra*, § 2286, at 536.

²⁸ See, e.g., United States v. Nixon, 418 U.S. 683, 709 (1974); *Prink v. Rockefeller Center, Inc.*, 48 N.Y.2d 309, 317, 398 N.E.2d 517, 522, 422 N.Y.S.2d 911, 916 (1979).

Increasingly, commentators and courts have questioned the traditional restrictive view of privileges.²⁹ A theory of privileges has emerged that focuses on their symbolic value³⁰ as means by which society protects basic individual interests in privacy and dignity.³¹ Although the traditional instrumental approach is still very influential, this newer approach provides the theoretical underpinning for some of the Proposed Code's provisions. Thus, privacy and dignity considerations prompted a change in the common law rule which permitted an eavesdropper to testify to otherwise privileged information;³² under section 501 such testimony would be barred.³³ Similarly, the Proposed Code explicitly gives the right to claim or waive a privilege for communications between a professional and her client or patient to the client or patient, rather than to the professional.³⁴ Finally, this newer,

²⁹ See, e.g., *Prink v. Rockefeller Center, Inc.*, 48 N.Y.2d 309, 322, 398 N.E.2d 517, 524, 422 N.Y.S.2d 911, 919 (1979) (Fuchsberg, J., dissenting in part); C. McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 77 (2d ed. E. Cleary ed. 1972); Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Courts Today*, 31 TUL. L. REV. 101 (1956).

³⁰ For example, few would argue that patients seeking treatment of physical conditions would stop confiding in their doctors in the absence of such a privilege. See notes 83-86 and accompanying text *infra*. Rather, it is the symbolic value of such communications which society seeks to protect. See 8 J. WIGMORE, *supra* note 27, § 2380a, at 829-30. Similarly, it is unlikely that husbands would stop confiding in their wives if there were no testimonial privilege. See *id.* § 2332, at 642-43. See notes 114-15 & 121-23 and accompanying text *infra*.

³¹ *Cary v. White*, 59 N.Y. 336, 339 (1874); *Erlich v. Erlich*, 278 App. Div. 244, 104 N.Y.S.2d 531 (1st Dep't 1951); *Sparer v. Travelers' Ins. Co.*, 185 App. Div. 861, 173 N.Y.S. 673 (1st Dep't 1919).

³² See C. McCORMICK, *supra* note 29, § 75, at 154; *Lanza v. New York State Joint Legislative Comm.*, 3 N.Y.2d 92, 143 N.E.2d 772, 164 N.Y.S.2d 9, *cert. denied*, 355 U.S. 856 (1957).

³³ PROPOSED CODE, *supra* note 4, § 501(b)(ii) & Commentary. At present, the only statutory provision explicitly barring eavesdropper testimony is in the attorney-client privilege. N.Y. CIV. PRAC. LAW § 4503 (McKinney Supp. 1980-1981). A question exists regarding the applicability of Proposed Code § 501(b)(ii) to the spousal privilege contained in § 505(b). It is not clear whether, under § 505, the communication between spouses is itself privileged, in which case § 501(b)(ii) would bar the testimony of an eavesdropper to that communication, or whether the spouses are incompetent to be examined regarding confidential communications, in which case § 501(b)(ii) would not appear to be applicable. Arguably, to the extent that the bar against eavesdropper testimony is essential to promote society's concerns with dignity and privacy, the bar should be applied even if the spousal provision in § 505(b) is subsequently interpreted merely as a rule of competence.

³⁴ PROPOSED CODE, *supra* note 4, §§ 503(c), 504(c), 506(c), 511(c). Under current New York law, the physician-patient and social worker-client privileges can, under cer-

less restrictive view is manifested in the provisions which require only that the client or patient "reasonably believe" the professional is authorized to practice³⁵ and which permit the authorization to be from any state or nation.³⁶

I. ATTORNEY-CLIENT PRIVILEGES

Section 503 of the New York Proposed Code of Evidence provides that confidential communications between lawyer and client in the course of seeking or rendering professional legal services may not be disclosed over the client's objection, unless the communication is subject to one of six enumerated exceptions.³⁷

Section 503(a) states that "[a] communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."³⁸ This definition does not significantly alter the meaning of "confidential communication" from that applied under current law.³⁹

The Proposed Code makes no attempt to resolve the issue of which employees of a corporate client may make privileged

tain circumstances, be claimed or waived by the professional. N.Y. CIV. PRAC. LAW §§ 4504, 4508 (McKinney Supp. 1980-1981). See 5 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 4504.09, at 45-203 to 45-205 (1974) [hereinafter cited as CIVIL PRACTICE].

³⁵ PROPOSED CODE, *supra* note 4, §§ 503(a)(2), 504(a)(2), 506(a)(1), 511(a)(2). See RICHARDSON, *supra* note 22, § 412, at 406.

³⁶ PROPOSED CODE, *supra* note 4, §§ 503(a)(2), 504(a)(2)-(5).

³⁷ *Id.* § 503(d) provides six exceptions which will permit the disclosure of otherwise privileged communications: (1) furtherance of crime or fraud; (2) breach of duty by a lawyer; (3) joint clients; (4) law guardians in child protection proceedings; (5) public officer or agency; and (6) transfer of property interest by deceased client. Both § 503 of the Proposed Code and N.Y. CIV. PRAC. LAW § 4503 (McKinney Supp. 1980-1981) provide that confidential communications between an attorney and client are privileged unless the privilege is waived by the client. Unlike the Proposed Code, the CPLR establishes no exceptions to this general rule except in an action involving the construction, probate, or validity of a will. *Id.* § 4503(b). The other exceptions have developed as a judicial gloss on the statute.

³⁸ PROPOSED CODE, *supra* note 4, § 503(a).

³⁹ See *id.*, Commentary, which states that § 503(a) is in accord with New York case law (citing *Kent Jewelry Corp. v. Kiefer*, 202 Misc. 778, 113 N.Y.S.2d 12 (Sup. Ct. New York County 1952)). See also *People v. Roach*, 215 N.Y. 592, 602, 190 N.E. 618, 623-24 (1915); *Doheny v. Lacy*, 168 N.Y. 213, 223-24, 61 N.E. 255, 258 (1901); *Lelong v. Siebrecht*, 196 App. Div. 74, 187 N.Y.S. 150 (2d Dep't 1921); RICHARDSON, *supra* note 22, §§ 413-14, at 408-09.

confidential communications to the corporation's attorney; the question has been left for case-law development.⁴⁰ The Supreme Court's recent decision in *Upjohn Co. v. United States*⁴¹ may provide some guidance in this area, however. In *Upjohn*, the Court rejected the "control group" test,⁴² which restricted the privilege to communications between the attorney and employees who hold decision-making positions as to the matters for which the attorney's advice was sought.⁴³ Without precisely defining the scope of the privilege, the Court stated that uninhibited communications from a larger class of employees than was embraced under the control group test would be necessary so the

⁴⁰ The consultants chose to leave this issue unresolved in hopes of avoiding the criticism directed against the drafters of the Federal Rules when they attempted to define the scope of the corporate privilege in the Proposed Federal Rules of Evidence. PROPOSED CODE, *supra* note 4, § 503, Commentary. The first draft of proposed federal rule 503 conformed to the then recent trend in the federal courts of applying the attorney-client privilege only to communications between the attorney and those in the "control group" of the corporation. See *Natta v. Hoga*, 392 F.2d 686, 692 (10th Cir. 1968); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 35 (D. Md. 1974); *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 85 (E.D. Pa. 1969); *Garrison v. General Motors Corp.*, 213 F. Supp. 515, 518 (S.D. Cal. 1963); *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 89 (D. Del. 1962); *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa.), *pet. for mandamus and prohibition denied sub nom.*, *General Elec. Co. v. Kirkpatrick*, 312 F.2d 942 (3d Cir. 1962), *cert. denied*, 392 U.S. 943 (1963). Thus, the draft of federal rule 503 accorded the privilege to communications between a representative of a client and a lawyer and defined a client's representative as "one having authority to obtain legal services and to act on advice rendered pursuant thereto, on behalf of the client." PROPOSED FED. R. EVID. 503, *reprinted in* 56 F.R.D. 183 (1972). At the time the final proposed rule was drafted, however, the control-group test was under attack as being unresponsive to the realities of corporate life, for failing to insure predictability, and for impairing the values the privilege was designed to protect. See 2 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 503(b)[04], at 503-46. In 1970, the Seventh Circuit rejected the control group test and held that the privilege would attach if the employee made the communication at the direction of his corporate superiors and if the subject matter of the communication involved the employee's performance of his employment. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd*, 400 U.S. 955 (1971) (4-4). 2 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 503(b)[04], at 503-47. Realizing that it would be impossible to draft a rule satisfactory to a majority of the Justices, the Advisory Committee amended the rule by eliminating the definition of "representative of the client." It did not remove the phrase from the body of the general rule of privileges, however, and thus construction of the term rests with the courts.

⁴¹ 449 U.S. 383 (1981).

⁴² *Id.* at 397. See generally *Feld, Supreme Court in Upjohn Protects Attorney-Client Privilege; Upholds the Work-Product Doctrine*, 54 J. TAX 210 (1981); *Stern, Attorney-Client Privilege: Supreme Court Repudiates the Control Group Test*, 67 A.B.A. J. 1142 (1981); *Comment, The Corporate Attorney-Client Privilege: Alternatives to the Control Group Test*, 12 TEX. TECH. L. REV. 459 (1981).

⁴³ For cases employing the "control group" test, see note 40 *supra*.

attorney could give sound advice and proper representation to a corporate client.⁴⁴

Section 503(b) specifies the communications to which the privilege applies, by referring to the parties involved. This provision effects no change in the present law, but it does clarify the applicability of the privilege to situations in which multiple parties have separate attorneys representing them in a matter of common interest.⁴⁵ The Proposed Code explicitly extends the privilege to communications between any of the clients and any of the attorneys in those situations, implicitly recognizing the "community of interest" theory upon which some courts had previously relied in applying the privilege.⁴⁶

The Proposed Code provides that the attorney-client privilege belongs to the client or his representative, even though it may be claimed on the client's behalf by the client's present lawyer or the lawyer at the time of the communication.⁴⁷ If no person entitled to claim the privilege is present to do so, the court may exercise its discretion to protect the client's interest and prevent disclosure.⁴⁸

While the Proposed Code does not change current law as to exceptions for communications in furtherance of a crime,⁴⁹ or

⁴⁴ 449 U.S. at 393. Chief Justice Burger, concurring, suggested that the communication should be privileged when:

an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

Id. at 403.

⁴⁵ Courts have been divided on the question of the availability of the attorney-client privilege for communications made by one party to his co-party's lawyer. *Compare In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381, 386, 389 (S.D.N.Y. 1975) with *Styx Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 339 (S.D.N.Y. 1969), and *Leonia Amusement Co. v. Loew's, Inc.*, 13 F.R.D. 438, 441 (S.D.N.Y. 1953) (dictum).

⁴⁶ See PROPOSED CODE, *supra* note 4, § 503(b)(3).

⁴⁷ *Id.* § 503(c).

⁴⁸ *Id.* Allowing the judge to invoke the privilege on behalf of an absent party comports with the trend toward applying privileges in the interests of privacy and confidentiality, see note 29-31 and accompanying text *supra*, rather than the traditional Wigmorean "instrumental" approach. See note 27 and accompanying text *supra*.

⁴⁹ PROPOSED CODE, *supra* note 4, § 503(d)(1). The Proposed Code restates existing

relevant to a breach of duty by the lawyer,⁵⁰ it does incorporate other significant changes from current law in the exceptions subdivision of section 503. For example, while the traditional rule has been that the attorney-client privilege does not apply when joint clients of one attorney later sue each other,⁵¹ the Proposed Code lifts the privilege in such actions only when the lawyer has specifically advised the joint clients that their joint consultation constitutes a waiver.⁵² The theory of the traditional rule is that as joint clients, client A could not have intended to keep a secret from client B.⁵³ In reality, as the Proposed Code recognizes, it seems more likely that when client A spoke to the lawyer in client B's absence, client A did not expect anyone, including B, to be able to compel disclosure over A's objection.⁵⁴

Section 503(d)(4) of the Proposed Code creates a new exception to the attorney-client privilege: statements to a lawyer acting as a law guardian in child protective proceedings⁵⁵ are not privileged.⁵⁶ This provision is analogous to the current exceptions in the CPLR to the physician⁵⁷ and social worker privi-

law by denying a privilege for communications in "furtherance of crime or fraud." *Id.* § 503(d)(1). See *People ex rel. Vogelstein v. Warden of the County Jail*, 150 Misc. 714, 719-20, 270 N.Y.S. 362, 369-70 (Sup. Ct. New York County), *aff'd*, 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dep't 1934); *Fontana v. Fontana*, 194 Misc. 1042, 87 N.Y.S.2d 903 (Fam. Ct. Richmond County 1949); CIVIL PRACTICE, *supra* note 34, ¶ 4503.13, at 45-134.

⁵⁰ As published, § 503(d)(2) of the Proposed Code would change existing law, see *In re Metrik*, 19 App. Div. 2d 34, 36, 240 N.Y.S.2d 443, 444-45 (1st Dep't 1963); *Glines v. Baird's Estate*, 16 App. Div. 2d 743, 227 N.Y.S.2d 71 (4th Dep't 1962), but this is merely the result of a drafting error that will be corrected prior to submission of the Proposed Code to the New York State Legislature. See PROPOSED CODE, *supra* note 4, § 503(d)(2), Commentary.

⁵¹ See *Shafer v. Utica Mut. Ins. Co.*, 248 App. Div. 279, 287, 289 N.Y.S. 577, 559 (4th Dep't 1936); *Myers v. Brick*, 146 App. Div. 197, 201, 130 N.Y.S. 910, 913 (4th Dep't 1911); *Holmes v. Bloomingdale*, 72 App. Div. 627, 76 N.Y.S. 182, 184-85 (3d Dep't 1902). See generally CIVIL PRACTICE, *supra* note 34, ¶ 4503.07, at 45-122.

⁵² PROPOSED CODE, *supra* note 4, § 503(d)(3), Commentary. The exception should also be applicable to clients with common interests who have engaged separate lawyers. See *id.* § 503(b)(3). By requiring a lawyer to inform joint clients of the exception in order for it to become operative, the Proposed Code avoids the incongruity noted by Judge Weinstein and Professor Berger in PROPOSED FED. R. EVID. §§ 503(b)(3) and 503(d)(5). See WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 503(b)[06], at 503-61.

⁵³ CIVIL PRACTICE, *supra* note 34, ¶ 4503.07, at 45-122 to 45-125.

⁵⁴ PROPOSED CODE, *supra* note 4, § 503(d)(3), Commentary.

⁵⁵ See N.Y. FAM. CT. ACT (29A) § 242 (McKinney 1975) ("law guardian" refers to an attorney admitted to practice law . . . and designated under this part to represent minors . . . [under] this act").

⁵⁶ PROPOSED CODE, *supra* note 4, § 503(d)(4).

⁵⁷ N.Y. CIV. PRAC. LAW § 4504(b) (McKinney Supp. 1981-1982).

leges,⁵⁸ which deny those privileges if the patient or client is under sixteen years of age and the information indicates that the child has been the victim of a crime.⁵⁹

Another new exception concerns communications between government lawyers and their officer or agency clients. This exception, in section 503(d)(5), disallows the privilege unless disclosure will hurt the public interest by "seriously impair[ing]" the functioning of the agency or officer in a pending matter.⁶⁰ This section must be read in conjunction with the privilege for official information set forth in section 509(b).⁶¹ Section 509 provides that communications to and between public employees are privileged only if the necessity for confidentiality outweighs the need for disclosure.⁶² The premise underlying the official information privilege seems to be that public business should be public knowledge unless this interest in the free flow of information is outweighed by the need for confidentiality.⁶³ Without the exception, however, a question would arise whether to treat communications to government lawyers as official information under section 509, where the presumption is in favor of disclosure, or as attorney-client communications under section 503, where the presumption is in favor of confidentiality. The exception resolves the matter by indicating that ordinarily communications between public officers or agencies and their lawyers will be treated as official information under section 509. When, however, the communication concerns a pending investigation and disclosure would "seriously impair" the government's ability to

⁵⁸ N.Y. CIV. PRAC. LAW § 4508(3) (McKinney Supp. 1981-1982).

⁵⁹ See also N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney Supp. 1981-1982).

⁶⁰ PROPOSED CODE, *supra* note 4, § 503(d)(5); see *id.*, Commentary.

⁶¹ See notes 62-63 and accompanying text *infra*.

⁶² An example of a situation in which the need for confidentiality outweighed the need for disclosure arose with respect to the records of the McKay Commission's investigation of the Atica uprising. See *Fischer v. Citizens Comm.*, 72 Misc. 2d 595, 339 N.Y.S.2d 853 (Sup. Ct. Wyoming County 1973). The court determined that confidentiality had to be ensured if executive department investigations were to be carried out successfully. *Id.* at 601, 339 N.Y.S.2d at 859. See also *Langert v. Tenney*, 5 App. Div. 2d 586, 173 N.Y.S.2d 665 (1st Dep't 1958).

⁶³ The public interest in disclosure rests on two foundations. The first is the interest in the fair administration of justice and resolution of disputes, which requires a properly limited governmental privilege lest the public confidence in the courts' ability to promote this goal will be weakened. The second is society's interest in inhibiting future governmental abuses by exposing past wrongful acts. See Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 143 (1976).

vindicate the public's interest, the communication will be protected under the attorney-client privilege.

The final exception in section 503(d) denies the privilege after the client is deceased to communications relevant to property transfers by the client.⁶⁴ The exception presumes that the deceased would favor expedient disposition of the estate over preserving the confidentiality of communications made to his attorney.⁶⁵ This exception goes somewhat beyond the comparable provisions of the CPLR: they are limited to actions involving wills and they preclude disclosure of confidential communications that would "tend to disgrace the memory of the decedent."⁶⁶

II. PATIENT'S PRIVILEGES

While the patient's privileges embodied in the Proposed Code⁶⁷ appear at first blush to differ significantly from existing rules, the differences are primarily in form. Very few patient's privilege cases will be decided differently under the Proposed Code, should it be enacted, than they would have been under the CPLR.

The CPLR grants two statutory privileges to patients. The first⁶⁸ prohibits disclosure of information acquired while "attending a patient in a professional capacity."⁶⁹ This privilege in-

⁶⁴ PROPOSED CODE, *supra* note 4, § 503(d)(6). The consultants, who drafted the Code, stated that the "client's presumable lack of interest in preserving confidences at the cost of frustrating his intentions regarding the disposition of his property" justifies denying the privilege. *Id.*, Commentary.

⁶⁵ *Id.*

⁶⁶ N.Y. CIV. PRAC. LAW § 4503(b) (McKinney 1963).

⁶⁷ PROPOSED CODE, *supra* note 4, § 504. Section 504(a)(1) defines a patient as "a person who consults or is examined or interviewed by a psychotherapist, physician, dentist, or nurse." *Id.* § 504(a)(1).

⁶⁸ N.Y. CIV. PRAC. LAW § 4504(a) (McKinney Supp. 1980-1981). Section 4504(a) provides in pertinent part:

Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

Id.

⁶⁹ *Id.* Privileged information includes information received from the patient, from others who are with him at the time of the treatment, or information derived from observation and examination of the patient. *Edington v. Mutual Life Ins. Co.*, 67 N.Y. 185, 194 (1876); CIVIL PRACTICE, *supra* note 34, § 4504.08, at 45-194. The information must be

cludes communications with doctors, nurses, and dentists.⁷⁰ The second protects confidential communications between psychologist and "client" in the same manner as attorney-client communications.⁷¹ Both the medical and psychological privileges are subject to numerous statutory and judge-made exceptions.⁷² The most significant of the current exceptions—those requiring disclosure of information obtained during an examination under court order⁷³ and requiring disclosure when the patient puts his condition in issue⁷⁴—are retained in the Code.⁷⁵

The Proposed Code also contains a doctor-patient privilege and a privilege for psychotherapist-patient communications. Unlike the CPLR, however, the Code draws the distinction not on

essential to the doctor for purposes of professional treatment or diagnosis, RICHARDSON, *supra* note 22, § 433, at 425, and extends to information acquired as a necessary incident of his treatment of a patient for an unrelated condition as well. *Nelson v. Village of Oneida*, 156 N.Y. 219, 50 N.E. 802 (1898). Any knowledge or facts which can be plainly seen or readily obtained by a layman are not encompassed within the privilege. Thus, the physician may testify as to dates of visits, fees paid, and dates of operations. RICHARDSON, *supra* note 22, § 432, at 424; CIVIL PRACTICE, *supra* note 34, ¶ 4504.03, at 45-193.

⁷⁰ See PROPOSED CODE, *supra* note 4, § 504(a)(6).

⁷¹ N.Y. CIV. PRAC. LAW § 4507 (McKinney Supp. 1980-1981). Section 4507 provides in relevant part: "The confidential . . . communications between a psychologist . . . and his client are placed on the same bases as those provided by law between attorney and client. . . . *Id.*"

⁷² *E.g.*, *Perry v. Fiumano*, 61 App. Div. 2d 512, 403 N.Y.S.2d 332 (4th Dep't 1978); *Jansons v. Jansons*, 45 Misc. 2d 795, 257 N.Y.S.2d 703 (Sup. Ct. Queens County 1965); *Matter of Allen*, 24 Misc. 2d 763, 204 N.Y.S.2d 876 (Sup. Ct. New York County 1960); N.Y. CIV. PRAC. LAW § 4504(b) (McKinney Supp. 1980-1981); *id.* § 4504(c); N.Y. CRIM. PROC. LAW § 60.55 (McKinney Supp. 1980-1981); N.Y. MENTAL HYG. LAW § 33.13 (McKinney 1978); N.Y. PUB. HEALTH LAW § 3373 (McKinney 1977); N.Y. SOC. SERV. LAW § 384-b(3)(h) (McKinney Supp. 1980-81). See generally RICHARDSON, *supra* note 22, §§ 442, 444, at 434-37.

⁷³ See *People ex rel. Chitty v. Fitzgerald*, 40 Misc. 2d 966, 244 N.Y.S.2d 441 (Sup. Ct. Kings County 1963); *Milano v. State*, 44 Misc. 2d 290, 253 N.Y.S.2d 662 (Ct. Cl. 1964). An examination made under court order involves an arms-length relationship between the doctor and patient in which treatment is not the prime concern. Thus, disclosure of a communication made during the examination is not likely to threaten the type of voluntary therapeutic relationship the privilege is designed to protect. PROPOSED CODE, *supra* note 4, § 504, Commentary.

⁷⁴ See, *e.g.*, *People v. Al-Kanani*, 33 N.Y.2d 260, 307 N.E.2d 43, 351 N.Y.S.2d 969 (1973), *cert. denied*, 417 U.S. 916 (1974); *Koump v. Smith*, 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969); *Florida v. Axelson*, 80 Misc. 2d 419, 363 N.Y.S.2d 200 (Sup. Ct. New York County 1974). The exception to the privilege when the party puts his condition in issue is designed to protect against "unfairness to opposing parties" and the abuse which could result if a party could "inject his condition into the litigation" and yet claim the privilege. PROPOSED CODE, *supra* note 4, § 504(d)(3), Commentary.

⁷⁵ PROPOSED CODE, *supra* note 4, § 504(d)(2), (3).

the basis of the professional being consulted, but rather on the basis of the condition for which the consultation was sought.⁷⁶ This choice may be traced in large part to lessons learned from the experience with the proposed federal rule of evidence 504.⁷⁷ The rationale underlying the federal proposal, which would have eliminated the doctor-patient privilege but accorded a privilege to communications with psychotherapists,⁷⁸ was the traditional instrumental notion that privileges should be granted only when necessary to encourage desirable communications.⁷⁹ Both common sense and the absence of a doctor-patient privilege in almost one-third of the states⁸⁰ suggested to the federal Advisory Committee that communications essential for diagnosis or treatment of physical conditions are not deterred by the lack of a privilege.⁸¹ On the other hand, the assurance of confidentiality was deemed to be essential for effective communications with a psychotherapist, since without such assurance those in need would be less likely to seek this professional service.⁸²

The drafters of New York's Proposed Code agreed with their federal counterparts on the desirability of the psychotherapist privilege. Regarding the traditional doctor-patient privilege,

⁷⁶ Compare *id.* § 504(b)(1) with *id.* § 504(b)(2). See notes 84-86 & 96-101 and accompanying text *infra*.

⁷⁷ PROPOSED FED. R. EVID. § 504 (1969).

⁷⁸ *Id.*

⁷⁹ *Id.*, Advisory Comm. Notes. See notes 27-28 and accompanying text *supra*; Berger, Commentary: *The Privileges Article in the New York Code of Evidence*, 47 BROOKLYN L. REV. 1405 (1981).

⁸⁰ See Wigmore, *supra* note 27, § 2380, at 818-827 n.5.

⁸¹ The federal advisors found no necessity for a privilege for communications relating only to diagnosis and treatment of physical conditions. Regardless of the logic of the advisory committee's position, their decision provoked a chorus of opposition to proposed rule 504 from organized interest groups. These groups claimed among other things that elimination of the privilege would hinder the physician's ability to assist a patient who would be inhibited from freely discussing medical problems; that the distinction between psychotherapists and other healing practitioners is artificial in light of the interrelationship of mental and physical symptoms; and that elimination of the privilege would adversely affect less affluent patients who often use general practitioners as surrogate psychotherapists. 2 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 504[2], at 504-11, 504-12. In addition, there was protest from others who felt, even if they could not articulate why, that the proposed rule simply omitted "something important." See *id.* at 504-12.

⁸² PROPOSED FED. R. EVID. § 504, Advisory Comm. Note. See *Yaron v. Yaron*, 83 Misc. 2d 276, 278, 372 N.Y.S.2d 518, 519-20 (Sup. Ct. New York County 1975). The testimonial privilege does not, however, necessarily absolve the psychiatrist of a duty to warn either victims or authorities of threatened harm. See *Tarasoff v. Regents of the Univ. of Calif.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

however, they recognized that although communications necessary for medical treatment might not be deterred by the lack of a privilege, the traditional privilege served another societal interest, protecting individual dignity and privacy.⁸³

The problem for the consultants was to draft a provision that was not overly broad⁸⁴ and that would neither become riddled with judge-made exceptions nor become susceptible to use as an instrument of fraud. The solution adopted was two-fold: first, section 504(b)(1) extends a privilege for *all* communications with a psychotherapist, in recognition of the importance of confidentiality in the treatment of mental and emotional disorders;⁸⁵ second, because confidentiality is not required to induce communication in treating physical conditions, section 504(b)(2) shields from disclosure only those communications which would tend to subject a patient to "embarrassment, humiliation, or disgrace."⁸⁶ Information protected under the latter provision would include, for example, disclosure of venereal disease or, in some instances, abortion.

⁸³ See PROPOSED CODE, *supra* note 4, § 504, Commentary; notes 66-69 & 82 and accompanying text *supra*. Upon reflection, it appears that the deficiencies of the present doctor-patient privilege under the CPLR spring from its being broader than necessary to accomplish its instrumental purpose of encouraging communications and its symbolic purpose of protecting privacy. To the extent that this is true, the rule has invited statutory and judicial exceptions. See note 72 *supra*.

⁸⁴ Originally, the physician-patient privilege was liberally construed. See *Edington v. Mutual Life Ins. Co.*, 67 N.Y. 185 (1876); *CIVIL PRACTICE*, *supra* note 34, ¶ 4504.02, at 45-179 to 45-180. As a result, parties attempted to use it to obstruct rather than enhance the administration of justice. *C. McCORMICK*, *supra* note 29, at 228. Consequently, judicial exceptions were developed to attempt to curtail the fraudulent activity. *CIVIL PRACTICE*, *supra* note 34, ¶ 4504.

⁸⁵ PROPOSED CODE, *supra* note 4, § 504(b)(1). Section 504(b)(1) provides:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made in the course of and for the purpose of diagnosing, treating, or conducting scientific research on his mental or emotional condition, among the patient, the psychotherapist, and persons, including members of the patient's family, participating in the diagnosis or treatment under the direction of the psychotherapist.

Id.

⁸⁶ *Id.* § 504(b)(2). This formulation protects the patient's legitimate interest in privacy, while generally affording the courts access to needed evidence. *Id.*, Commentary; 8 J. WIGMORE, *supra* note 27, § 2380(a), at 82(a). *Cf. Lefkowitz v. Women's Pavilion, Inc.*, 66 Misc. 2d 743, 745, 321 N.Y.S.2d 963, 965 (Sup. Ct. New York County 1971) (in an investigation of alleged fraudulent practices by abortion referral agencies by the Attorney General, court did not require agencies to comply with the request for names of individual clients and participating doctors).

The differing theoretical bases for the two patient's privileges also affect the periods during which the privileges may be claimed. The privilege for statements regarding mental or emotional conditions may be claimed even after the patient's death; but since a deceased patient can no longer suffer "embarrassment, humiliation, or disgrace," the privilege for communications concerning physical conditions ceases at his death.⁸⁷

In addition to the limitation concerning the scope of privileged communications regarding physical conditions, the Code departs in three significant ways from current law: (1) there is no exception for communications regarding the patient's intention to commit a crime or fraud; (2) there is only a very limited exception to the privilege in involuntary commitment proceedings; and (3) the conditions for termination of the privilege upon the death of the patient have been modified.

First, the Proposed Code protects communications to a psychotherapist that indicate an intention to commit a crime or fraud.⁸⁸ This is in marked contrast to the current psychologist privilege⁸⁹ and the current⁹⁰ and proposed attorney-client privileges.⁹¹ The underlying assumptions of the distinction made by the Proposed Code are that a person disclosing criminal plans to an attorney is attempting to gain the assistance of someone capable of concealing or furthering the criminal plans — a situation society will not tolerate⁹² — but, disclosure of criminal plans to a health care professional is usually a conscious or unconscious plea for help in relieving an emotional disfunction, made to a person who can provide professional assistance and who is ordinarily unable to assist the criminal purpose.⁹³ To the

⁸⁷ PROPOSED CODE, *supra* note 4, § 504(b)(2). Although the deceased client of a psychotherapist cannot himself suffer any "embarrassment, humiliation or disgrace," the decision not to terminate the psychotherapist privilege upon the patient's death, *id.* § 504(c), is a sound one. Clearly, when a patient's communications to the psychotherapist concern members of his family, the failure to guard against disclosure, even after death, might discourage the patient from seeking necessary treatment. *But see* notes 98-104 and accompanying text *infra*.

⁸⁸ *See* PROPOSED CODE, *supra* note 4, § 504(d), Commentary.

⁸⁹ N.Y. CIV. PRAC. LAW § 4507 (McKinney Supp. 1980-1981), which is modeled after the attorney-client privilege in § 4503, provides that a communication to a psychotherapist evidencing an intent to commit a crime is not protected.

⁹⁰ N.Y. CIV. PRAC. LAW § 4503(a) (McKinney Supp. 1980-1981).

⁹¹ PROPOSED CODE, *supra* note 4, § 503(d)(1).

⁹² *Id.*, Commentary.

⁹³ *See* 2 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 504[05], at 504-24 to 504-25. It has

extent that society seeks to encourage verbal resolution of problems before they become problems of conduct, it must be willing to keep these communications confidential.

The second major change effected by the Proposed Code is to provide that the patient privilege may be claimed in involuntary commitment proceedings.⁹⁴ The exceptions under section 504(d)(1) and (2) apply only to certain examinations required under the New York Mental Hygiene Law⁹⁵ and examinations ordered by the court.⁹⁶ Thus, examinations by the patient's own therapist will be privileged in involuntary commitment proceedings. When a patient has made communications with an expectation of confidentiality, paternalistic notions should not be used to justify breaching the trust invested in the therapist.⁹⁷

been suggested, however, that because a psychiatrist cannot be certain of his client's future actions, a statutory duty should be imposed upon the doctor to disclose to authorities information obtained from the client concerning future crimes. Note, *Psychiatrist Patient Privilege — A Need for the Retention of the Future Crime Exceptions*, 52 IOWA L. REV. 1170, 1182-86 (1967). The California Evidence Code includes such an exception. CAL. EVID. CODE § 1018 (West 1966). See also *Tarasoff v. Regents of the Univ. of Calif.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (court held that psychotherapist had a duty to warn the intended victim whom his patient had expressed an intention to kill).

⁹⁴ PROPOSED CODE, *supra* note 4, § 504(d)(1), Commentary, explains:

To allow a psychotherapist to testify at [a commitment] proceeding regarding communications from the patient would be a serious breach of the confidence the patient has placed in the therapist. The possibility of interference with the patient's freedom that is posed by such proceedings calls for scrupulous safeguarding of his interests. No matter how benevolently motivated, all who seek confinement of the patient should be treated as adversaries with interests antagonistic to his.

⁹⁵ PROPOSED CODE, *supra* note 4, § 504(d)(1). Section 504(d)(1) "does not include a general exception for hospitalization proceedings." *Id.*, Commentary. See N.Y. MENTAL HYG. LAW, § 23.07 (McKinney 1976).

⁹⁶ PROPOSED CODE, *supra* note 4, § 504(d)(2). Section 504(d)(2) is consistent with current New York law which accepts "at least implicitly that no privilege will attach to results of an examination ordered by the court." *Id.*, Commentary (citing *People ex rel. Chitty v. Fitzgerald*, 40 Misc. 2d 966, 244 N.Y.S.2d 441 (Sup. Ct. Kings County 1963); *Milano v. State*, 44 Misc. 2d 290, 253 N.Y.S.2d 662 (Ct. Cl. 1964)). The privilege does apply to communications made to a psychiatrist appointed by the court to assist defense counsel in evaluating the case. PROPOSED CODE, *supra* note 4, § 504(d)(2), Commentary. See CAL. EVID. CODE, § 1017 (West Supp. 1980).

⁹⁷ See note 92 and accompanying text *supra*. The New York consultants' position is not uniformly accepted. The federal advisors balanced the needs and interests of the patient and the public differently in a commitment proceeding, and concluded that confidentiality need not be maintained. Since proposed federal rule 504 authorized disclosure "[o]nly when the psychotherapist determines that hospitalization is needed, control over disclosure [would be] placed largely in the hands of a person in whom the patient

The final major change and clarification accomplished by section 504 of the Proposed Code is the provision extinguishing the privilege after the death of the patient when "any party relies upon the [patient's] condition as an element of a claim or defense."⁹⁸ This provision appears to differ from CPLR 4504(c) in two respects. First, the current provision generally permits waiver only by representatives of the decedent and parties claiming under him.⁹⁹ Under proposed section 504(d)(3), the privilege is waived if *any* party relies upon the subject of the communication. Second, the limitation in the current statute precluding waiver if the content of the communication would "tend to disgrace the memory of the decedent"¹⁰⁰ is omitted from the Proposed Code. Reading section 504(d)(3) in conjunction with section 504(b) suggests that the only communications likely to be protected against disclosure after the patient's death are statements to his psychotherapist offered to impeach the patient's hearsay declarations in cases in which the patient's mental condition is not in issue.¹⁰¹ This result is very close to that reached by the New York Court of Appeals in *Prink v. Rockefeller Center, Inc.*,¹⁰² a wrongful death action brought after the plaintiff's decedent fell from the window of an office building. The plaintiff claimed negligence in the architectural design of the building and in its maintenance; the defendants asserted that the decedent had been acutely depressed, implying that he had committed suicide.¹⁰³ In their attempt to prove that

has already manifested confidence. Hence, damage to the relationship [would be] unlikely." PROPOSED FED. R. EVID., § 504(d)(1) (1969), Advisory Comm. notes. See also Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175, 186-87 (1962).

⁹⁸ PROPOSED CODE, *supra* note 4, § 504(d)(3). "After the patient's death the need for relevant evidence outweighs the small likelihood that patients would be deterred from speaking freely by the possibility of post-death disclosure." *Id.*, Commentary. See note 87 and accompanying text *supra*.

⁹⁹ N.Y. CIV. PRAC. LAW § 4504(c) (McKinney Supp. 1980-1981).

¹⁰⁰ *Id.* Because of the subjective nature of the determination, this CPLR provision is difficult to apply. Adding to the difficulty, the provision affords the trial judge no discretion; he must exclude any matter which meets the definition even if the exclusion completely frustrates the interests of justice. N.Y.S. Judicial Conference, Nineteenth Annual Report app. D., at A50-51 (1973); CIVIL PRACTICE, *supra* note 34, ¶ 4504.20, at 45-229 to 45-230.

¹⁰¹ PROPOSED CODE, *supra* note 4, § 806, Commentary.

¹⁰² 48 N.Y.2d 309, 398 N.E.2d 517, 422 N.Y.S.2d 911 (1979).

¹⁰³ *Id.* at 313, 398 N.E.2d at 519, 422 N.Y.S.2d at 913.

the death resulted from a suicide and not from their negligence, the defendants sought disclosure of the decedent's conversations with his wife and his psychiatrist. The court held that the plaintiff could be required to disclose the conversations between the decedent and his psychiatrist, on the ground that she had placed the decedent's mental condition in issue by bringing a wrongful death action in which suicide was a substantial possibility.¹⁰⁴ The result under the Proposed Code would be the same, although accomplished more directly.

III. SOCIAL WORKER-CLIENT PRIVILEGE

Recognizing, apparently, that social workers often function as "the poor man's psychiatrist,"¹⁰⁵ the consultants drafted the social worker-client privilege to track the provisions of the patient-psychotherapist privilege.¹⁰⁶ Specifically, this has meant a change from the CPLR provision that "a certified social worker . . . shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act."¹⁰⁷ Proposed section 511(c) denies the social worker this discretion, and accords privileged status to communications in contemplation of a crime or harmful act.¹⁰⁸ Once again, the judgment was made that actual harm will be less frequent if people are encouraged to *talk out*, rather than *act out*, contemplated criminal activity.¹⁰⁹ Of course, the existence of a testimo-

¹⁰⁴ *Id.* at 317, 398 N.E.2d at 522, 422 N.Y.S.2d at 916. Prior to *Prink*, the New York rule was that the privilege was waived only when the party claiming it had affirmatively put his condition in issue, not when the condition was raised by the opposing party. *Koump v. Smith*, 25 N.Y.2d 287, 294-95, 300, 250 N.E.2d 857, 861, 864, 303 N.Y.S.2d 858, 864-65, 869 (1969); CIVIL PRACTICE, *supra* note 34, ¶ 3121.01, at 31-389; *Id.* ¶ 4504.15, at 45-220 to 45-223.

¹⁰⁵ See PROPOSED CODE, *supra* note 4, § 511, Commentary.

¹⁰⁶ Compare PROPOSED CODE, *supra* note 4, § 511, with *id.* § 504. The current statutory provision, N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1980-1981), is ambiguous as to whether the privilege is discretionary with the social worker. The general statement of the privilege reads that the social worker "shall not be required to disclose" the confidential communication. *Id.* This suggests that the privilege is to be claimed or waived by the social worker. See generally 5 CIVIL PRACTICE, *supra* note 34, ¶ 4503.01, at 45-253. The Proposed Code eliminates the ambiguity by making it clear that the privilege is waived only by the client. PROPOSED CODE, *supra* note 4, § 511.

¹⁰⁷ N.Y. CIV. PRAC. LAW § 4508(2) (McKinney Supp. 1980-1981) (emphasis added).

¹⁰⁸ PROPOSED CODE, *supra* note 4, § 511(c).

¹⁰⁹ See notes 77-82 and accompanying text *supra*. See generally Commentary, *Under-privileged Communications: Extension of the Psychotherapist-Patient Privilege*

nial provision does not automatically absolve the social worker of a duty to warn authorities or intended victims of the threat of harm—that question has been left for case-law resolution.¹¹⁰

IV. SPOUSAL PRIVILEGES

Current New York law contains two types of spousal privileges: (1) two rules of testimonial incompetence, one statutory and one common law; and (2) a statutory rule of privilege for confidential marital communications. CPLR 4502(a) provides that one spouse is incompetent “to testify against the other in an action founded on adultery.”¹¹¹ A similar judge-made rule holds a spouse incompetent “to testify to non-access during wedlock, if the testimony would render a child illegitimate.”¹¹² Both of these incompetency provisions will be abrogated with the adoption of the Proposed Code.¹¹³

The privilege for confidential marital communications in CPLR 4502(b) is intended to give some protection to the marriage relationship.¹¹⁴ It therefore applies only to communications which would not have been made but for the confidence of that

to *Patients of Psychiatric Social Workers*, 62 CAL. L. REV. 1050 (1973).

¹¹⁰ See *Tarasoff v. Regents of the Univ. of Calif.*, 17 Cal. 3d 425, 442, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976).

¹¹¹ N.Y. CIV. PRAC. LAW § 4502(a) (McKinney 1963). The CPLR also provides three exceptions to the rule: the spouse may testify to “prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense.” *Id.* This provision, which by its terms is a rule of competence rather than a privilege, was designed to make divorces difficult to obtain, in furtherance of the policy of preserving marriages. See *Report of the N.Y. Joint Leg. Comm. on Matrimonial and Family Laws*, 113-16 (1957). In light of the recent liberalization of the New York divorce law, see N.Y. DOM. REL. LAW § 170 (McKinney 1977), § 4502 is an anachronism. CIVIL PRACTICE, *supra* note 34, ¶ 4502.02, at 45-61 to 45-62. See PROPOSED CODE, *supra* note 4, § 505, Commentary.

¹¹² *Chamberlain v. People*, 23 N.Y. 85 (1861). The non-access rule was originally rooted in principles of “decency” and “morality” and the public policy against “bastardizing” a child. See *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777); RICHARDSON, *supra* note 27, § 446, at 439; CIVIL PRACTICE, *supra* note 34, ¶ 4502.09, at 45-69 to 45-70. Application of this rule has been restricted by the Family Court Act, which allows non-access testimony to be given in support and filiation proceedings. N.Y. FAM. CT. ACT (29A) §§ 436, 531 (McKinney 1975).

¹¹³ When § 505 is read in conjunction with § 601, the general competency provision of the Proposed Code, the testimonial privilege based upon the marriage relationship will be eliminated. PROPOSED CODE, *supra* note 4, § 505, Commentary. See Lewin, *Article VI of the New York Proposed Code of Evidence*, 47 BROOKLYN L. REV. 1303 (1981).

¹¹⁴ PROPOSED CODE, *supra* note 4, § 505(b), Commentary.

relationship.¹¹⁵ Section 505 of the Proposed Code retains this privilege without any significant change from the CPLR.¹¹⁶

As drafted, the marital privilege under section 505 would seem to dictate a result contrary to the decision reached in *Prink v. Rockefeller Center, Inc.*,¹¹⁷ which was discussed in connection with patient's privileges. By a four-to-three margin, the New York Court of Appeals held in *Prink* that communications between the plaintiff and her deceased husband regarding his emotional state and his visits to a psychiatrist were not privileged.¹¹⁸ The majority treated the privilege as having been waived by the commencement of the wrongful death action. It supported this conclusion by balancing the limited utility of the privilege in encouraging spousal communications against the potential unfairness to adversaries when the evidence is withheld.¹¹⁹

Dissenting in part, Chief Judge Cooke¹²⁰ articulated the rationale against withdrawing the privilege: the legislative judgment embodied in the statute "expresses the long-standing social policy that the injury to domestic harmony and marital privacy occasioned by the unrestricted search for relevant information is too great to endure."¹²¹ As the Chief Judge noted, the Legisla-

¹¹⁵ As in N.Y. CIV. PRAC. LAW § 4502(b) (McKinney 1963), the marital communications privilege of § 505 of the Proposed Code applies both to civil and criminal proceedings; the consultants rejected the idea of limiting the privilege to criminal cases. PROPOSED CODE, *supra* note 4, § 505(b), Commentary. Traditionally, the privilege has been, and continues in the Proposed Code to be, considered essential to the preservation of the marital relationship. *Id.* (citing *Mercer v. State*, 40 Fla. 216, 226, 24 So. 154, 157 (1893)). In addition, the consultants noted that the constitutional right of privacy may mandate the privilege. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 151 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965)). See note 123 and accompanying text *infra*.

¹¹⁶ N.Y. CIV. PRAC. LAW § 4502(b) (McKinney 1963).

¹¹⁷ 48 N.Y.2d 309, 398 N.E.2d 517, 422 N.Y.S.2d 911 (1979).

¹¹⁸ *Id.* at 316, 398 N.E.2d at 521, 422 N.Y.S.2d at 915.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 318 (Cooke, C.J., dissenting in part).

¹²¹ *Id.* at 320-21 (Cooke, C.J., dissenting in part). The Cooke analysis was approved by Tuoky, *CPLR 4502(b): Spousal Privilege Waived by Commencement of Wrongful Death Action*, 54 ST. JOHN'S L. REV. 409 (1980). The author was particularly disturbed by the court's substitution of its judgment for that of the legislature in determining that "the better policy" was to hold that the spousal privilege had been waived by commencement of the lawsuit. *Id.* at 413. Although the author did not dispute the authority of the legislature to provide for waiver under such circumstances, it was reasoned that since the legislature had not imposed any restrictions upon when the privilege could be invoked, it was not proper for the court to do so through judicial reinterpretation of the policies underlying the privilege. *Id.* at 413-15. Because it was prepared prior to the *Prink* deci-

ture had already considered the value of the privilege and the potential unfairness to opposing litigants and had struck the balance in favor of the privilege.¹²²

Section 505 of the Proposed Code, consistently with the argument of the dissenters in *Prink*, acknowledges that "continued support rather than abandonment of interspousal privilege is endorsed by the psychological and sociological human need for someone in whom to confide and the growing recognition of the constitutional right of privacy."¹²³

V. PRIVILEGE FOR COMMUNICATIONS TO CLERGY

The privilege for communications to members of the clergy set forth in section 506¹²⁴ virtually restates current law.¹²⁵ The only change is a broadening of the availability of the privilege to cases in which the court finds that the communicant "reasonably believed" that the confidant was a member of the clergy.¹²⁶ For a communication to be "confidential" under the Proposed Code, it must be "made privately and not intended for further disclosure *except to other persons present in furtherance of the purpose of the communication.*"¹²⁷ Thus, the presence of a lay parish worker assisting the clergyman during the communication will

sion, the Commentary to § 505 is silent on the impact of the new law enunciated in *Prink*. It is arguable that the reenactment of the spousal privilege without any specific indication that the privilege can be asserted only defensively could be viewed as legislative repudiation of the *Prink* holding.

¹²² 48 N.Y.2d at 321, 398 N.E.2d at 524, 422 N.Y.S.2d at 918.

¹²³ *Id.* at 322, 398 N.E.2d at 525, 422 N.Y.S.2d at 919.

¹²⁴ PROPOSED CODE, *supra* note 4, § 506. Section 506 defines "member of the clergy" as "a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him." *Id.* The Commentary to this section indicates that the reference to the three major religious groups was designed to exclude members of "fringe cults." *Id.*, Commentary. On the other hand, the definition, by including a reference to "similar functionar[ies]" is designed to be broad enough to include anyone who may legitimately claim the designation "clergyman." The difficult question of who will qualify in the final analysis as a "member of the clergy" has been left for the courts to consider. The issue is one that has constitutional overtones, since a denial of the privilege for communications to ministers of any group might be "considered an unconstitutional curtailment of freedom of religion." *Id.*

¹²⁵ See N.Y. CIV. PRAC. LAW § 4505 (McKinney Supp. 1980-1981).

¹²⁶ PROPOSED CODE, *supra* note 4, § 506(a)(1). Whether the claimant of the privilege had a "reasonable" belief that the confidant was a "member of the clergy" is a preliminary question of fact for the judge's determination. See *id.* § 104(a).

¹²⁷ *Id.* § 506(a)(2) (emphasis added).

not cause the privilege to be lost.¹²⁸

Section 506 continues to protect communications even if they were not required to be made by the tenets of the religion.¹²⁹ So long as the communication is made to a member of the clergy acting in his professional capacity as a spiritual advisor, the communication will be privileged.¹³⁰ Thus, the privilege may apply to communications made during some marital and other personal counseling, as well as to penitential communications.¹³¹

VI. POLITICAL VOTE

Section 507 of the Proposed Code is a restatement of existing law, that a person has a privilege to refuse to disclose his vote in a political election, unless he voted illegally.¹³² As the Commentary to the Proposed Code notes, the privilege is justified as "an essential concomitant of the secret ballot."¹³³

VII. TRADE SECRETS, OFFICIAL INFORMATION, AND IDENTITY OF INFORMER

Section 508 dealing with trade secrets,¹³⁴ section 509 dealing with official information,¹³⁵ and section 510 dealing with inform-

¹²⁸ *Id.* See 2 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 506[03], at 506-12.

¹²⁹ PROPOSED CODE, *supra* note 4, § 506. See *Kruglikov v. Kruglikov*, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (Sup. Ct. Queens County 1961), *appeal dismissed*, 16 App. Div. 2d 735, 226 N.Y.S.2d 931 (4th Dep't 1962); RICHARDSON, *supra* note 22, § 425, at 418. The purpose of extending the privilege to non-required communications is to encourage communications to members of the clergy in their role as counselors. PROPOSED CODE, *supra* note 4, § 506, Commentary. See *id.* § 504; *id.* § 511.

¹³⁰ PROPOSED CODE, *supra* note 4, § 506(b).

¹³¹ *Id.*, Commentary.

¹³² *Id.* § 507 provides: "Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally."

¹³³ *Id.* § 507, Commentary. See N.Y. CONST. art. 2, § 7; N.Y. ELEC. LAW §§ 7-202, 8-300 (McKinney 1978).

¹³⁴ PROPOSED CODE, *supra* note 4, § 508 provides:

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

See notes 138-40 and accompanying text *infra*.

¹³⁵ PROPOSED CODE, *supra* note 4, § 509. Section 509(b) provides in pertinent part: "When [official] information is claimed to be privileged by the government, the court

ant's identity¹³⁶ set forth privileges which, unlike those previously discussed, are not absolute but qualified. Accordingly, in determining the availability of these privileges, the court must in each case weigh the necessity for disclosure against the need for confidentiality.¹³⁷ Thus, trade secrets¹³⁸ are protected from disclosure unless nondisclosure would tend to conceal fraud or work injustice.¹³⁹ If disclosure is ordered — as, for example, when the plaintiff needs to know the composition of a product that has caused his injury — the court may take appropriate steps to limit the disclosure, such as taking testimony *in camera* or placing those present under oath not to make further disclosure.¹⁴⁰

The official information privilege in section 509,¹⁴¹ which essentially restates the common law,¹⁴² also requires a balancing of interests. Here the test is whether the "necessity for preserving the confidentiality of the information . . . outweighs the necessity for disclosure in the interests of justice."¹⁴³ This section also provides that when the court upholds a claim of privilege,

shall determine whether there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." *Id.* See notes 141-52 and accompanying text *infra*.

¹³⁶ See notes 154-69 and accompanying text *infra*.

¹³⁷ PROPOSED CODE, *supra* note 4, §§ 508, 509(b), 510(b)(2)(3).

¹³⁸ The Proposed Code does not define "trade secrets." See generally 2 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 508[03], at 508-9 ("both policy and logic suggest a broad concept [of trade secrets] including all business data which gives a better competitive position and whose value is substantially enhanced by secrecy.").

¹³⁹ PROPOSED CODE, *supra* note 4, § 508. See generally 8 J. WIGMORE, *supra* note 27, § 2212, at 155-59.

¹⁴⁰ PROPOSED CODE, *supra* note 4, § 508.

¹⁴¹ *Id.* § 509. Subdivision (a) provides for recognition of federally-created governmental privileges which under the United States Constitution must be given recognition in state courts. *Id.* § 509(a). The provision is superfluous because under the federal supremacy clause federal privileges must prevail over the Proposed Code. U.S. CONST. art. VI. See Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE WEST. RES. L. REV. 747, 771-83 (1975).

¹⁴² See *People v. Keating*, 286 App. Div. 150, 141 N.Y.S.2d 562 (1st Dep't 1955) (counsel for private anti-crime committee held in contempt of court for refusing to divulge information; privilege unavailable since counsel was not acting in the capacity of a public official); *Fischer v. Citizens Comm.*, 72 Misc. 2d 595, 339 N.Y.S.2d 853 (Sup. Ct. Wyoming County) (records and files of the New York State Commission on Attica held privileged), *aff'd*, 42 App. Div. 2d 692 (1973).

¹⁴³ PROPOSED CODE, *supra* note 4, § 509(b). See, e.g., *United States v. Reynolds*, 345 U.S. 1, 12 (1953); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); 2 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 509[10], at 509-70 to 509-71.

thereby depriving a party of material evidence, remedies such as striking the testimony of a witness or dismissing the action may be in order, "as justice requires."¹⁴⁴

Section 509 raises questions as to its relation to New York State's Freedom of Information Law (FOIL).¹⁴⁵ FOIL provides for public access to legislative and agency records with the exception of those "specifically exempted from disclosure by state or federal statute."¹⁴⁶ The New York Court of Appeals, in *Cirale v. 80 Pine Street Corp.*,¹⁴⁷ held that FOIL did not "abolish" the common law official information privilege.¹⁴⁸ Subsequently, FOIL was amended¹⁴⁹ and a later interpretation of the relationship between the privilege and FOIL by the Court of Appeals in *Doolan v. BOCES*¹⁵⁰ indicated that FOIL, both as originally enacted and as amended, was at least intended to be a significant limitation on the common law official information privilege.¹⁵¹

The Commentary accompanying the Proposed Code suggests that material privileged under section 509 would come within the FOIL exception for materials specifically exempted by statute, and would thus be immune from compelled disclosure under FOIL.¹⁵² While it is questionable whether such a broad reading of FOIL's "specifically exempted" language was intended,¹⁵³ it is clear that such an interpretation would allow

¹⁴⁴ PROPOSED CODE, *supra* note 4, § 509(c).

¹⁴⁵ N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1980-1981).

¹⁴⁶ *Id.* § 87(2)(a).

¹⁴⁷ 35 N.Y.2d 113, 316 N.E.2d 301, 359 N.Y.S.2d 1 (1974).

¹⁴⁸ *Id.* at 117 n.1, 316 N.E.2d at 303 n.1, 359 N.Y.S.2d at 4 n.1.

¹⁴⁹ 1977 N.Y. LAWS, ch. 933 (repealing and replacing 1974 N.Y. LAWS ch. 578) (current version at N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1980-1981)).

¹⁵⁰ 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979).

¹⁵¹ *Id.* at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 931. The court stated that "[t]he public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law official interest privilege cannot protect from disclosure materials which that law requires to be disclosed. . . . Nothing said in *Cirale v. 80 Pine St. Corp.* was intended to suggest otherwise." *Id.* (citations omitted).

¹⁵² PROPOSED CODE, *supra* note 4, § 509, Commentary.

¹⁵³ The compatibility of FOIL with § 509 depends upon the meaning of the term "specifically" in the context of FOIL's exception for materials "specifically exempted" by statute. See N.Y. PUB. OFF. LAW § 87(2)(a) (McKinney Supp. 1980-1981). It is arguable that the term places a substantive restriction on the scope of the exception, in that the materials exempted by statute must be "specifically" defined. See Barker, *Cadification of Government Privileges in New York: Official Information and Identity of Informers*, 44 ALB. L. REV. 279, 285 (1980). Alternatively, the term could refer to the mere fact that an exemption is statutorily created. This is the position taken by the consultants. See PROPOSED CODE, *supra* note 4, § 509, Commentary. In view of the courts' willingness to

substantially more assertions of confidentiality under FOIL than are presently possible. This ambiguity ought to be resolved prior to adoption of the Proposed Code.

The identity of the informer provision of section 510 is the third privilege rule to which a balancing test must be applied. The general provision of this rule affords the state a privilege to protect the identity of a person who has furnished information in the investigation or prosecution of a crime.¹⁵⁴ Section 510(b) then enumerates three situations in which the privilege is inapplicable and the identity of an informer in a criminal matter must be disclosed. First, the subsection creates an absolute rule of disclosure when the informer appears as a prosecution witness, or when the informer or the authorities have already disclosed his identity to the accused, his associates, or, in the artful words of the statute, to "those who would have cause to resent the communication."¹⁵⁵

Determining the applicability of the informer privilege in the two other situations in which disclosure may be ordered turns on the purposes for which the testimony is sought. In a pretrial suppression hearing, when the court is dissatisfied with the corroboration of the informer's information or doubts the existence or reliability of the informer, section 510(b)(3) authorizes the judge to require disclosure of the informer's identity.¹⁵⁶ Disclosure in this case ordinarily is not made to the defendant, but will be *in camera*, in the presence of the prosecutor and his witnesses.¹⁵⁷ This procedure, which protects the informer against

apply the exception even when the exempted material constitutes a general category, *see, e.g., Fitzpatrick v. County of Nassau*, 83 Misc. 2d 884, 372 N.Y.S.2d 939 (Sup. Ct. Nassau County 1975) (exemptions for lawyer's work product, material prepared for litigation and privileged material deemed "specific" enough to fall within FOIL's exception), *aff'd*, 53 App. Div. 2d 628, 385 N.Y.S.2d 510 (1976), the view expressed in the commentary appears to be the more reasonable one.

¹⁵⁴ PROPOSED CODE, *supra* note 4, § 510. The identity of a person who had aided in a legislative or administrative investigation is treated as a matter of official information governed by § 509. *Id.* § 509, Commentary.

¹⁵⁵ *Id.* § 510(b)(1). The language was taken verbatim from PROPOSED FED. R. EVID. 510(b) (1969). PROPOSED CODE, *supra* note 4, § 510(b)(1), Commentary.

¹⁵⁶ PROPOSED CODE, *supra* note 4, § 510(b)(3).

¹⁵⁷ *Id.* When sufficient indication of probable cause exists apart from the informer's tip, disclosure of the informer's identity is not necessary and these proceedings need not be instigated. This does not preclude, however, the use of the unidentified informer's information at trial. *People v. Cerrato*, 24 N.Y.2d 1, 246 N.E.2d 501, 298 N.Y.S.2d 688 (dictum), *cert. denied*, 397 U.S. 940 (1969).

retaliation and the prosecutor against interference in on-going and future investigations, follows the procedure fashioned by the New York Court of Appeals in *People v. Darden*.¹⁵⁸

Different considerations may prevail at the time of trial. The Proposed Code recognizes the accused's constitutional right to know the informer's identity¹⁵⁹ if it appears that the informer may be able to give testimony "necessary to a fair determination of guilt or innocence."¹⁶⁰ Therefore, when the defendant can show a factual basis for his belief that the informer's testimony can help him, he may move for disclosure; the prosecution will then be given an opportunity to show whether the informer can in fact supply the exculpatory testimony the defendant seeks.¹⁶¹ The prosecution's showing will ordinarily be by affidavit, with neither party nor counsel present, but when affidavits prove insufficient, the court may direct that testimony be taken.¹⁶² The Proposed Code suggests that in this event also defendant and his counsel cannot participate in person. Finally, if the judge determines that the informer probably can provide the necessary testimony, and if the prosecutor fails to produce the informer, the charges shall be dismissed on motion of the defendant.¹⁶³

The above provisions represent several departures from the current law. Under the Proposed Code, the prosecution has the burden of showing whether the informer can supply the testimony sought by the defendant, but according to *People v. Jenkins*¹⁶⁴ the defendant bears the burden of demonstrating that the informant can help him.¹⁶⁵ Secondly, the Proposed Code's

¹⁵⁸ 34 N.Y.2d 177, 181, 313 N.E.2d 49, 52, 356 N.Y.S.2d 582, 585-86 (1974).

¹⁵⁹ See *Roviaro v. United States*, 353 U.S. 53 (1957).

¹⁶⁰ PROPOSED CODE, *supra* note 4, § 510(b)(2).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* See text and accompanying notes 164-69 *infra*.

¹⁶⁴ 41 N.Y.2d 307, 360 N.E.2d 1288, 392 N.Y.S.2d 587 (1977).

¹⁶⁵ *Id.* at 309, 360 N.E.2d at 1289, 392 N.Y.S.2d at 588. In *Jenkins*, the informer disappeared after the prosecutor had relinquished control over her. The court reasoned that rather than immediately penalizing the prosecution for something beyond its control, the interests of justice would be better served by first requiring the defendant to demonstrate affirmatively that "the proposed testimony of the informant would tend to be exculpatory or would create a reasonable doubt as to the reliability of the prosecution's case either through direct examination or impeachment." *Id.* at 310-11, 360 N.E.2d at 1290, 392 N.Y.S.2d at 589. Only after this was demonstrated would the prosecution be forced to choose between producing the informer and suffering a dismissal of the charges. *Id.* at 310, 360 N.E.2d at 1290, 392 N.Y.S.2d at 589. *Accord*, *People v. Maneiro*,

exclusion of the defendant and his counsel from personal participation when the court hears the testimony on the need for the informer's production runs contrary to the statement of the New York Court of Appeals in *People v. Goggins*,¹⁶⁶ which held that such a determination should "not be resolved in an *ex parte* proceeding."¹⁶⁷ Finally, the dismissal provision of the Proposed Code, which incorporates only a "fairness test,"¹⁶⁸ differs from the *Jenkins* holding that when the informant is not reasonably available, the defendant in seeking dismissal must show that the informant's testimony would exculpate him or at least produce a reasonable doubt as to his guilt.¹⁶⁹

VIII. GENERAL PROVISIONS

Sections 512-514 set out general rules applicable to all the privileges granted by Article V of the Proposed Code. These provisions are not necessarily intended to govern privileges derived from sources other than the Code;¹⁷⁰ different policies behind the non-Code privileges may make the general provisions inappropriate to them.

Section 512 governs waiver of privilege by voluntary disclosure. It continues existing law¹⁷¹ by providing that the holder of

49 N.Y.2d 769, 426 N.Y.S.2d 471, 403 N.E.2d 176 (1980); *People v. Canales*, 75 App. Div. 2d 875, 427 N.Y.S.2d 879 (2d Dep't 1980); *People v. Taylor*, 98 Misc. 2d 163, 413 N.Y.S.2d 571 (Sup. Ct. New York County 1979). The *Jenkins* court noted that even when the prosecutor knew or should have known that the informer's testimony would be material to the defense, and had intentionally procured the informer's absence or exerted inadequate efforts to locate him, the defendant cannot secure a dismissal until he has proved that the informer's testimony would tend to be exculpatory or to produce a reasonable doubt as to guilt. 41 N.Y.2d at 312, 360 N.E.2d at 1291, 392 N.Y.S.2d at 590. The court was silent as to who has the burden of proving the prosecutor's lack of due diligence in producing the informer.

¹⁶⁶ 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied*, 419 U.S. 1012 (1974).

¹⁶⁷ *Id.* at 168, 313 N.E.2d at 44, 356 N.Y.S.2d at 575.

¹⁶⁸ *See* PROPOSED CODE, *supra* note 4, § 510(b)(2).

¹⁶⁹ 41 N.Y.2d at 312, 360 N.E.2d at 1291, 392 N.Y.S.2d at 590. *See* PROPOSED CODE, *supra* note 4, § 510(b), Commentary. *See generally* *Barker*, *supra* note 153, at 289.

¹⁷⁰ *See, e.g.*, N.Y. CIV. PRAC. LAW § 3101(c) (McKinney 1970) (work product of attorney not available); *id.* § 3101(d) (expert's opinion not obtainable); *id.* § 4501 (competent witness not required to incriminate himself); N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney Supp. 1980-1981) (persons employed with the news media cannot be held in contempt for refusing to disclose information gathered in their professional capacity).

¹⁷¹ *See* *People v. Bloom*, 193 N.Y. 1, 85 N.E. 824 (1908); *McKinney v. Grand St. P.P. & F.R. Co.*, 104 N.Y. 352, 10 N.E. 544 (1877). *See generally* *J. Wigmore*, *supra* note

a privilege waives it if he "voluntarily discloses or consents to disclosure of any significant part of the privileged communication or matter."¹⁷² Thus, if a client voluntarily tells another person the contents of a communication the client had with his lawyer,¹⁷³ or if the prosecutor chooses to identify publicly an informer,¹⁷⁴ the privileges are waived. Existing law regarding waiver is changed, however, in two respects. The privilege is preserved when the voluntary disclosure is made subject to an express limitation as to its use.¹⁷⁵ For example, a party may make a limited disclosure of privileged information in the course of settlement negotiations in order to expedite them, and yet retain the privilege for all other purposes.¹⁷⁶ The second change revokes the judge-made rule which deems a disclosure on cross-examination to have been involuntary and therefore ineffective as a waiver.¹⁷⁷ Under section 513, involuntary disclosure occurs only when the privilege holder was not given an opportunity to assert his privilege before the disclosure,¹⁷⁸ or when disclosure has been "compelled erroneously" over a claim of privilege.¹⁷⁹ Thus, a holder being cross-examined who wishes to retain a privilege for a confidential matter must affirmatively claim the privilege or suffer its loss.¹⁸⁰

27, § 2327, at 634.

¹⁷² PROPOSED CODE, *supra* note 4, § 512.

¹⁷³ See *People v. Farmer*, 194 N.Y. 251, 87 N.E. 457 (1909).

¹⁷⁴ PROPOSED CODE, *supra* note 4, § 510(b)(1).

¹⁷⁵ *Id.* § 512.

¹⁷⁶ See *International Business Mach. Corp. v. Sperry Rand Corp.*, 44 F.R.D. 10 (D. Del. 1968). A privilege-holder may not invoke the selective waiver provision with impunity. If the frequency of the limited waivers, or the breadth of the disclosure made, negates the holder's intention to maintain confidentiality, the court should disregard the expressed limitation and treat the privilege as waived for all purposes. *Cf. Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1161-62 (D.S.C. 1974) (client's voluntary disclosure of some privileged documents without limitation results in waiver of all privileged communications between the same attorney and client with regard to the same subject matter).

¹⁷⁷ See *Hughes v. Kackas*, 3 App. Div. 2d 402, 161 N.Y.S.2d 541 (3d Dep't 1957); *Kaufman v. Rosenshine*, 97 App. Div. 514, 90 N.Y.S. 205 (1st Dep't 1904).

¹⁷⁸ PROPOSED CODE, *supra* note 4, § 513 ("A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege. . . ."). The Commentary explains that subdivision (2) "becomes operative when the holder of the privilege . . . is not present to assert it . . . and a person entitled to claim the privilege on the holder's behalf fails to do so." *Id.*, Commentary.

¹⁷⁹ *Id.* § 513.

¹⁸⁰ This requirement is made explicit in the commentary, PROPOSED CODE, *supra* note 4, § 512, Commentary, but this may also be inferred from the Code itself. Section

The final section of the article, section 514, makes a substantial change in current law.¹⁸¹ This section provides that no comment may be made upon nor inference drawn from a claim of privilege.¹⁸² The reasoning behind this section is that if comment and inference were allowed, the purposes served by extending the privileges in the first place would be undermined.¹⁸³ An adverse comment or inference, like disclosure, would tend to discourage the original communication or impair the privilege-holder's privacy.¹⁸⁴

It is important to note — since the section as drafted does not make the point clear — that section 514 applies only to the privileges granted by Article V. Thus, the section does not alter the comment and inference rules applicable, for example, to the self-incrimination privilege. Under the United States Constitution¹⁸⁵ and the New York Criminal Procedure Law (CPL),¹⁸⁶ a

513 specifically defines those circumstances in which disclosure will be deemed involuntary, and hence, when a privilege will be deemed not to have been waived. During cross-examination the holder of the privilege obviously has an opportunity to claim it, so failure to do so will automatically result in waiver unless he has been erroneously compelled by the court to disclose the privileged information. *Id.* § 513.

¹⁸¹ *Id.* § 514. Existing New York case-law allows comment upon and inference from the claim of any privilege in a civil case. *Marine Midland Bank v. Russo*, 50 N.Y.2d 31, 405 N.E.2d 205, 427 N.Y.S.2d 961 (1980) (self-incrimination); *Bradley v. O'Hare*, 2 App. Div. 2d 436, 156 N.Y.S.2d 533 (1st Dep't 1956) (self-incrimination); *Deutschmann v. Third Ave. R.R.*, 87 App. Div. 503, 84 N.Y.S. 887 (1st Dep't 1903) (physician-patient). Comment upon and inference from a defendant's assertion of his privilege against self-incrimination in a criminal case is precluded by statute. N.Y. CRIM. PROC. LAW §§ 60.15(2), 300.10(2) (McKinney 1981 & McKinney 1971). See notes 154-55 and accompanying text *supra*. Otherwise, comment upon and inference from a claim of privilege are permissible in a criminal case. See RICHARDSON, *supra* note 22, § 457, at 447-48.

¹⁸² PROPOSED CODE, *supra* note 4, § 514(a) provides in part: "The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel. No inference may be drawn therefrom."

¹⁸³ Under current law, the judicial rationale for not prohibiting comment upon and inference from a claim of an Article V-type privilege stems not so much from policy considerations as from an interpretation of legislative intent. In *Deutschmann v. Third Ave. R.R.*, 87 App. Div. 503, 84 N.Y.S. 887 (1st Dep't 1903), the court approved comment upon the claim of doctor-patient privilege, reasoning that because the legislature had specifically prohibited comment only in respect of the self-incrimination privilege claims in criminal cases, the legislature must have intended for comment otherwise to be permitted. *Id.* at 514, 84 N.Y.S. at 895. It might be noted that most of the situations in which comment and inference have been permitted are ones in which no privilege would be allowed under the Proposed Code. Compare, e.g., *Deutschmann*, *supra* with PROPOSED CODE, *supra* note 4, § 504(d)(3).

¹⁸⁴ See 2 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 513[02], at 513-14.

¹⁸⁵ U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself. . .").

criminal defendant's claim of the self-incrimination privilege may not be the subject of comment or inference,¹⁸⁷ but assertion of the privilege by any other witness in a criminal case or by any witness in a civil case may be.¹⁸⁸

The Article V privileges and the self-incrimination privilege require different treatment with respect to comment and inference in light of the different policies each privilege is designed to serve. The policy of the self-incrimination privilege is to protect a criminal defendant from being compelled to give testimony that might tend to show that he had committed a crime.¹⁸⁹ If adverse comment and inference on the criminal defendant's claim of privilege were not barred, they would produce the same result as compelled testimony, thereby negating the defendant's fifth amendment right not to incriminate himself.¹⁹⁰ If, however, the person claiming the privilege in a criminal case is a witness other than the defendant, adverse comment upon the claim of privilege in that case will not impair the witness' self-incrimination right because the witness is not at risk of conviction thereby.¹⁹¹ If the person claiming the privilege is a party or non-party witness in a civil case, the policy informing the privilege will not be impaired by adverse comment or inference in that

¹⁸⁶ N.Y. CRIM. PROC. LAW §§ 60.15(2), 300.10(2) (McKinney 1981 & McKinney 1971).

¹⁸⁷ See *Griffin v. California*, 380 U.S. 609 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *People v. Hetenyi*, 304 N.Y. 80, 106 N.E.2d 20 (1952); *People v. Leavitt*, 301 N.Y. 113, 92 N.E.2d 915 (1950); *In re Cohen*, 9 App. Div. 2d 436, 195 N.Y.S.2d 990 (2d Dep't), *aff'd*, 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658 (1959), *aff'd*, 366 U.S. 117 (1961); *People v. Maimone*, 9 App. Div. 2d 780, 193 N.Y.S.2d 90 (2d Dep't 1959).

¹⁸⁸ See note 182 *supra*.

¹⁸⁹ See *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

¹⁹⁰ See *Griffin v. California*, 380 U.S. 609, 614 (1965).

¹⁹¹ See *C. McCORMICK*, *supra* note 29, § 120, at 255. It may be reasonable, nevertheless, to bar comment and inference in this situation as well, on the grounds that comment about the witness' claim may put undue pressure on the defendant to take the stand or that any adverse inference against the defendant is not justified as a matter of relevancy. In *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959), the Second Circuit endorsed a general prohibition against inference from or comment upon a witness' assertion of a privilege against self-incrimination even when the inferences were very persuasive. The Supreme Court later ruled that inference from or comment upon a witness' assertion of the self-incrimination privilege is reversible error only where the government makes a conscious and flagrant attempt to build its case upon such inferences or where the witness' refusal to testify adds critical weight to the prosecution's case in a form not subject to cross-examination. *Namet v. United States*, 373 U.S. 179 (1963). In *United States v. Aiken*, 373 F.2d 294 (2d Cir. 1967), the Second Circuit modified its position to conform to the Supreme Court's mandate.

case because no conviction can result. Therefore, relevant comments and inferences in civil cases are permitted.¹⁹²

On the other hand, the underlying purposes of the Article V communications privileges (at least those of section 503 (attorney-client), section 504 (patients' privileges), section 505 (husband-wife), section 506 (clergy-penitent) and section 511 (social worker-client)) are to encourage the communications and to protect privacy. No matter the status of the witness or the type of case in which the privilege is claimed, adverse comments and inferences will retard the furtherance of those goals. Thus, if people speaking in confidence expect that juries will be allowed and even encouraged to speculate on the contents of their conversations, they will be dissuaded from making the communications in the first instance. In any event, if comment and inference are permitted, the resulting jury speculation will be a legally sanctioned invasion of privacy.¹⁹³ Accordingly, section 514 bars all adverse comments upon and inferences from a claim of an Article V privilege.

CONCLUSION

The privileges article of the New York Proposed Code of Evidence is a conservative, rather than a reformist, codification. It largely restates traditional New York law, and thus tends to follow Wigmorean principles. Some tentative steps have been taken toward recognizing the interests of privacy and dignity, but these steps reflect developments already forged by the courts and legislature. One might argue that excessive deference has been paid to corporate and governmental interests at the expense of those of individuals (in sections 508 and 509, respectively), and even that traditional privileges, such as attorney-client, ought to be qualified rather than absolute, if privacy rather than instrumental interests are paramount. The consultants apparently believed that the time was not yet ripe for shifting the theoretical bases supporting the privileges. It will be interesting to see whether they correctly judged the temper of the legislature.

¹⁹² *Marine Midland Bank v. Russo*, 50 N.Y.2d 31, 42, 405 N.E.2d 205, 211, 427 N.Y.S.2d 961, 967 (1980).

¹⁹³ *Cf. Griffin v. California*, 380 U.S. 609, 614-15 (1965) (distinguishing between inferences a jury might make on its own and those encouraged by the court.)