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THE MENTAL HEALTH PROVIDER PRIVILEGE IN THE WAKE OF *JAFFE V. REDMOND*

ROBERT H. ARONSON*

I. Introduction

Many of the revisions to article V of the Uniform Rules of Evidence¹ involved stylistic, nonsubstantive changes.² In particular, all language was made gender neutral. The most substantial revision was to Rule 503, formerly titled "Physician and Psychotherapist-Patient Privilege." This revision broadened the scope of the privilege to include a general "mental health provider" privilege,³ in accord with the trend in the states and the U.S. Supreme Court's decision in *Jaffee v. Redmond*.⁴ In *Jaffee*, the Court recognized for the first time a federal psychotherapist-patient privilege and extended the privilege to confidential communications with a licensed social worker in the course of psychotherapy.⁵ In addition, most of the states have adopted some form of a "licensed social worker" privilege.⁶ This privilege usually is not a subpart of the psychotherapist or physician privilege.⁷ Since the states do not uniformly define the type of provider whom the privilege covers, Uniform Rule 503 provides flexible definitions and a general mental health provider privilege in order to subsume the range of privileges offered by the states.⁸ In addition to expanding the privilege itself, Rule 503 was amended to provide five additional exclusions to the privilege.⁹

Although several other privileges were considered as amendments, no new privileges were added to article V.¹⁰ One such privilege that was discussed is the parent-child privilege.¹¹ Although there has been an effort to seek recognition of a parent-child privilege, it was not incorporated into article V due to consistent

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1. Unless otherwise indicated, all textual references and citations to the "Uniform Rules" or "Uniform Rules of Evidence" refer to the Uniform Rules of Evidence as last revised in 1999.

2. UNIF. R. EVID. art. 5. All drafts and the final act incorporating the revisions are available at the National Conference of Commissioners on Uniform State Laws Web page: http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

3. UNIF. R. EVID. 503.

4. 518 U.S. 1 (1996).

5. *Id.* at 15.

6. UNIF. R. EVID. 503 reporter's notes, at 97-98; see also *Jaffee*, 518 U.S. at 16-17 nn.16 & 17.

7. UNIF. R. EVID. 503 reporter's notes, at 99.

8. UNIF. R. EVID. 503(a)(2), (4), (5).

9. UNIF. R. EVID. 503(d)(4)-(8).

10. UNIF. R. EVID. 501 reporter's notes, at 86.

11. *Id.*

rejection of the privilege at both the federal and state level.¹² The eight U.S. Courts of Appeals that have been presented with the issue have explicitly declined to recognize the parent-child privilege,¹³ and the remaining U.S. Courts of Appeals, while not expressly rejecting the privilege, have chosen not to recognize it.¹⁴ Moreover, in the state courts, approximately one-third of the states have been presented with the issue and similarly have refused to recognize the privilege.¹⁵ Only four states recognize some form of the privilege. Idaho and Minnesota statutorily recognize the privilege,¹⁶ while New York is the only state to recognize the privilege judicially, although it has been applied narrowly.¹⁷ Lastly, Massachusetts, although not recognizing a full-fledged parent-child testimonial privilege, does not permit a minor child to testify against a parent in a criminal proceeding.¹⁸ Even in these states, however, the privilege, as applied, is relatively weak. Consequently, with such lack of enthusiasm for the privilege in the states and federal courts, the privilege was not adopted in the revisions to the Uniform Rules of Evidence.

There has been a strong sentiment at the federal level to include a privilege for confidential communications between a sexual-assault counselor and a victim.¹⁹ However, in light of the Supreme Court's recognition of a psychotherapist-patient

12. See UNIF. R. EVID. 501 reporter's notes, at 86-87.

13. UNIF. R. EVID. 501 reporter's notes, at 87 (citing *In re Erato*, 2 F.3d 11 (2d Cir. 1993); *In re Grand Jury Proceedings* (John Doe), 842 F.2d 244 (10th Cir. 1988); *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985); *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985); *In re Grand Jury Subpoena* (Santarelli), 740 F.2d 816 (11th Cir. 1984) (per curiam); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); *In re Grand Jury Proceedings* (Starr), 647 F.2d 511 (5th Cir. 1981) (per curiam); *United States v. Penn.*, 647 F.2d 876 (9th Cir. 1980) (en banc)).

14. UNIF. R. EVID. 501 reporter's notes, at 87.

15. *Id.* (citing *Arizona, Stewart v. Superior Court*, 163 Ariz. 227 (Ariz. Ct. App. 1989); *California, In re Terry W.*, 130 Cal. Rptr. 913 (Cal. Ct. App. 1976); *Florida, Marshall v. Anderson*, 459 So. 2d 384 (Fla. Dist. Ct. App. 1984); *Illinois, People v. Sanders*, 457 N.E.2d 1241 (Ill. 1983); *Indiana, Gibbs v. State*, 426 N.E.2d 1150 (Ind. Ct. App. 1981); *Cisna v. State*, 352 N.E.2d 793 (Ind. Ct. App. 1976); *Iowa, State v. Gilroy*, 313 N.W.2d 513 (Iowa 1981); *Maine, State v. Willoughby*, 532 A.2d 1020, 1022 (Me. 1987); *State v. Delong*, 456 A.2d 877 (Me. 1983); *Massachusetts, Three Juveniles v. Commonwealth*, 455 N.E.2d 1203 (Mass. 1983); *Michigan, State v. Amos*, 414 N.W.2d 147 (Mich. Ct. App. 1987) (per curiam); *Mississippi, Cabello v. State*, 471 So. 2d 332 (Miss. 1985); *Missouri, State v. Bruce*, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983); *New Jersey, In re Gail D.*, 525 A.2d 337 (N.J. Super. Ct. App. Div. 1987); *Oregon, State ex rel. Juvenile Dept. v. Gibson*, 718 P.2d 759 (Or. Ct. App. 1986); *Rhode Island, In re Frances J.*, 456 A.2d 1174 (R.I. 1983); *Texas, de Leon v. State*, 684 S.W.2d 778 (Tex. App. 1984); *Vermont, In re Inquest Proceedings*, 676 A.2d 790 (Vt. 1996); *Washington, State v. Maxon*, 110 Wash. 2d 564 (Wash. 1988)).

16. UNIF. R. EVID. 501 reporter's notes, at 88 (citing IDAHO CODE § 9-203(7) (1990 & Supp. 1995); MINN. STAT. § 595.02(1)(j) (1988 & Supp. 1996)).

17. UNIF. R. EVID. 501 reporter's notes, at 87-88 (citing *In re Mark G.*, 410 N.Y.S.2d 464 (N.Y. App. Div. 1978); *In re A. & M.*, 403 N.Y.S.2d 375 (N.Y. App. Div. 1978); *In re Ryan*, 474 N.Y.S.2d 931 (N.Y. Fam. Ct. 1984); *People v. Fitzgerald*, 422 N.Y.S.2d 309 (Westchester County Ct. 1979)).

18. UNIF. R. EVID. 501 reporter's notes, at 88 (citing MASS. GEN. LAWS ch. 233, § 20 (1986 & Supp. 1996)).

19. *Id.*

privilege that includes licensed social workers,²⁰ a sexual-assault counselor-victim privilege is subsumed more appropriately under Uniform Rule 503, which has been amended to include a "mental health worker" privilege.²¹ The remaining miscellaneous privileges that have developed are either not well recognized or insufficiently supported. Thus, since privileges by their very nature obstruct the revelation of probative evidence,²² these additional privileges were not incorporated into article V.

The lawyer-client privilege, Uniform Rule of Evidence 502(a)(5), is substantially unchanged. However, the definition of "representative of the lawyer" was revised to include not only an actual employee of the lawyer, but also one "reasonably believed by the client to be employed."²³ Typically, communications between a client and a person the client reasonably believes to be a lawyer are protected.²⁴ In addition, communications between a client and representatives (e.g., secretaries, paralegals, or law clerks) of the lawyer are also protected as part of the privilege.²⁵ Under the Uniform Rule 502(a)(5) definition, the client retains the benefit of protection for communications intended to be confidential where the client reasonably, but mistakenly, believes a representative to be employed by the attorney.²⁶ The test is "partially subjective."²⁷ Nonetheless "there must be some reasonable basis for the belief."²⁸

Under Rule 505, the religious privilege, the communicant holds the privilege, and the cleric may only assert the privilege on behalf of the communicant.²⁹ The drafters gave some consideration to extending the privilege to the cleric, such that both the cleric and the communicant would be holders of the privilege.³⁰ Although

20. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

21. UNIF. R. EVID. 501 reporter's notes, at 89-90; *see also* *United States v. Lowe*, 948 F. Supp. 97, 99 (D. Mass. 1999) (extending the psychotherapist-patient privilege to rape crisis counselors who were neither licensed psychotherapists nor social workers but were under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist, or psychotherapist).

22. *See* *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (holding that privileges undermine the basic principle that the public "has a right to every man's evidence," such that they "must be strictly construed"); *Trammel v. United States*, 445 U.S. 40, 50-51 (1980); *Herbert v. Lando*, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored."); *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

23. UNIF. R. EVID. 502(a)(5).

24. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 72 cmt. e, at 552 (1998); 8 JOHN HENRY WIGMORE, EVIDENCE § 2302 (John T. McNaughton ed., 1961).

25. *See, e.g., United States v. Kovel*, 296 F.2d 918, 920-21 (2d Cir. 1961); *In re* *Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F. Supp. 1148, 1157 (N.D. Ill. 1987) (collecting cases); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. f (1998).

26. UNIF. R. EVID. 502 reporter's notes, at 93.

27. *Id.*

28. *Id.*

29. UNIF. R. EVID. 505.

30. UNIF. R. EVID. 505 reporter's notes, at 112.

almost every state recognizes some form of religious privilege,³¹ only a small minority make the cleric the holder of the privilege.³² Thus, Rule 505 was not revised to allow the cleric to be the holder of the privilege.

Rule 510 was revised to incorporate both voluntary and involuntary waiver of a privilege into one comprehensive rule.³³ As revised, subdivision (a) defines voluntary disclosure, the substance of which remains unchanged. Subdivision (b) now defines involuntary disclosure and former Rule 511 was deleted. Again, the substance of involuntary disclosure remains unchanged. The rule does not deal with "inadvertent disclosure," however, because the courts already have adopted various approaches to determine whether inadvertent disclosure constitutes waiver of a privilege. Most states apply an "objective analysis" in which the inadvertent disclosure unquestionably results in waiver since the "confidentiality" of the document has been breached.³⁴ Conversely, a few states employ a "subjective"

31. UNIF. R. EVID. 505 reporter's notes, at 110-12.

32. UNIF. R. EVID. 505 reporter's notes, at 111-12. The Reporter's Note to Rule 505 states: [I]n the following states the statutes confer the privilege solely upon the cleric: GEORGIA, *Ga. Code Ann. § 24-9-22* (Michie Supp. 1992); ILLINOIS, *Ill. Ann. Stat. Ch. 110, § 8-803* (Smith-Hurd 1984); INDIANA, *Ind. Code Ann. § 34-1-14-5* (Burns Supp. 1992); MARYLAND, *Md. Cts. & Jud. Proc. Code Ann. § 9-111* (1984), interpreted in *McLain, 5 Maryland Practice, Maryland Evidence State and Federal 506.1* (1984), to the effect that the language in the statute, "A minister . . . may not be compelled," vests the privilege in the cleric, rather than the communicant, by relying on the Illinois decision in *People v. Pecora, 107 Ill. App. 2d 286, 246 N.E.2d 865, 873* (1969) and the Fourth Circuit decision in *Seidman v. Fishburn-Hudgins Educ. Found., Inc., 724 F.2d [413,] 413-416* (4th Cir. 1984); MICHIGAN, *Mich. Stat. Ann. § 28.945(2)* [M.C.L.A. § 767.5a(2)] (*Law. Co-op Supp. 1992*); NEW JERSEY, *N.J. R. Evid. 37, N.J. Stat. Ann. 2A:84A-29*, construed in *State v. Szemple, 263 N.J. Super. 98, 622 A.2d 248* (1993) to confer the privilege solely upon the cleric; VERMONT, *Vt. Stat. Ann. Tit. 12, § 1607* (1973); and WYOMING, *Wyo. Stat. § 1-12-101* (1991). On the other hand, in the following two states, in which the statutes do not expressly refer to the communicant, they have been construed to confer the privilege solely upon the cleric: MISSOURI, *Mo. Ann. Stat. § 491.060* (*Vernon Supp. 1992*), construed in *Eckmann v. Board of Educ. Of Hawthorne School District No. 17, 106 F.R.D. 70, 72-73* (E.D. Mo. 1985) to confer the privilege solely upon the cleric; and VIRGINIA, *Va. Code Ann. § 8.01-400* (Michie 1992) and *Va. Code Ann. § 19.271.3* (Michie 1992) construed in *Seidman v. Fishburn-Hudgins Educ. Found., Inc., 724 F.2d 413, 415-416* (4th Cir. 1984), to confer the privilege solely upon the cleric.

Finally, in the following states, the privilege is conferred on both the cleric and the communicant: *Alabama, Ala. Code § 12-21-166* (1986); *California, Cal. Evid. Code, §§ 1030-34* (West 1966); and *Puerto Rico, P.R. R. Evid. 28*.

See further *State v. Szemple, 263 N.J. Super. 98, 622 A.2d 248* (1993), containing an excellent summary of the status of the law concerning the holder of the religious privilege in the several states.

Id.

33. UNIF. R. EVID. 510.

34. UNIF. R. EVID. 510 reporter's notes, at 117-18 (citing *Alabama, Bassett v. Newton, 658 So. 2d 398* (Ala. 1995); *Alaska, Lowery v. State, 762 P.2d 457* (Alaska 1988); *Houston v. State, 602 P.2d 784* (Alaska 1979); *Arizona, State v. Cuffie, 828 P.2d 773* (Ariz. 1992); *Arkansas, Firestone Tire & Rubber Co. v. Little, 639 S.W.2d 726* (Ark. 1982); *California, Aerojet-Gen. Corp. v. Transp. Indem. Ins., 22 Cal. Rptr. 2d 862* (Cal. Ct. App. 1993); *Kanter v. Superior Court, 253 Cal. Rptr. 810* (Cal. Ct. App. 1988); *Colorado, Lanari v. People, 827 P.2d 495* (Colo. 1992); *Idaho, Farr v. Mischler, 923 P.2d 446* (Idaho

analysis in which inadvertent disclosure never results in true waiver since there was no "intent" to do so.³⁵ And twelve states utilize some form of a balancing analysis.³⁶ Most commonly, courts consider the following five factors to determine whether the privilege has been waived by a party: "(1) the reasonableness of the precautions taken to prevent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness."³⁷

1992); Iowa, *State v. Randle*, 484 N.W.2d 220 (Iowa 1992); Kentucky, *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985); Maine, *Northup v. State*, 272 A.2d 747 (Me. 1971); Minnesota, *State v. Schneider*, 402 N.W.2d 779 (Minn. 1987); Mississippi, *Alexander v. State*, 358 So. 2d 379 (Miss. 1979); Nevada, *Wardleigh v. Second Jud. Dist.*, 891 P.2d 1180 (Nev. 1995); Ohio, *State v. McDermott*, 607 N.E.2d 1164 (Ohio Ct. App. 1992); Oklahoma, *Driskell v. State*, 1983 OK CR 22, 659 P.2d 343; *Herbert v. Chi., Rock I. & Pac. R.R. Co.*, 1975 OK 160, 544 P.2d 898; Rhode Island, *State v. Von Bulow*, 475 A.2d 995 (R.I. 1984); South Carolina, *Marshall v. Marshall*, 320 S.E.2d 44 (S.C. Ct. App. 1984); Virginia, *Clagett v. Commonwealth*, 472 S.E.2d 263 (Va. 1996); West Virginia, *State ex rel. McCormick v. Zakaib*, 430 S.E.2d 316 (W. Va. 1993); Marano v. Holland, 366 S.E.2d 117 (W. Va. 1988)).

35. UNIF. R. EVID. 510 reporter's notes, at 119 (citing Delaware, *Moyer v. Moyer*, 602 A.2d 68 (Del. 1992); Indiana, *Hazlewood v. State*, 609 N.E.2d 10 (Ind. 1993); *Kindred v. State*, 524 N.E.2d 279 (Ind. 1988); Michigan, *Sterling v. Keidan*, 412 N.W.2d 255 (Mich. Ct. App. 1987); New Jersey, *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 652 A.2d 1273 (N.J. Super. Ct. Law Div. 1994)).

36. UNIF. R. EVID. 510 reporter's notes, at 119-20. The Reporter's Notes to Rule 510 indicate:

[T]here appear to be nine states that employ a balancing analysis in determining whether there is a waiver of the privilege through an inadvertent disclosure. See ILLINOIS, *Dalen v. Ozite Corporation*, 230 Ill. App. 3rd 18, 594 N.E.2d 1365 (1992). See also, *People v. Knuckles*, 165 Ill.2d 125, 650 N.E.2d 974, 209 Ill.Dec. 1 (1995); MONTANA, *Pacificorp v. Department of Revenue of the State of Montana*, 254 Mont. 387, 838 P.2d 914 (1992); NEBRASKA, *League v. Vanice*, 374 N.W.2d 849 (1985); NEW MEXICO, *Hartman v. El Paso Natural Gas Co.*, 763 P.2d 1144 (1988); NEW YORK, *Manufacturers and traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999 (Sup. Ct. App. Div. 1987); NORTH DAKOTA, *Farm Credit Bank of St. Paul v. Heuther*, 454 N.W.2d 710 (N.D. 1990); OREGON, *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 O4. [sic] 336, 838 P.2d 1069 (1992); UTAH, *Gold Standard, Inc. v. American Barrick Resources Corporation*, 805 P.2d 164 (Utah 1991); WASHINGTON, *State v. Balkin*, 48 Wash. App. 1, 737 P.2d 1035 (Wash. App. 1987).

See also, KANSAS, which has applied a "balance of interests" test in determining whether a qualified privilege of so-called "self-critical analysis" has been waived. See *Kansas, Gas & Elec. v. Eye*, 214 Kan. 419, 789 P.2d 1161 (1990). In MARYLAND, a balancing test is applied in determining a right of access to records of internal police investigations that are confidential. See *Blades v. Woods*, 107 Md. App. 178, 667 A.2d 917 (1995). In TEXAS, a balancing test is also applied by weighing the (1) circumstances confirming an involuntary disclosure; (2) precautionary measures taken; (3) delay in rectifying the error; (4) extent of any inadvertent disclosure; and (5) scope of discovery. Inadvertent production is distinguishable from involuntary production and will constitute a waiver. *Granada Corp. v. Honorable First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992).

Id. (parenthetical explanations omitted).

37. UNIF. R. EVID. 510 reporter's notes, at 117 (citing *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 132 F.R.D. 204 (N.D. Ill. 1990); *Bud Antle, Inc. v. Grow Tech, Inc.*, 131 F.R.D. 179 (N.D. Cal. 1990)). For a comprehensive analysis of inadvertent disclosure, see REAGAN WM. SIMPSON, *CIVIL DISCOVERY AND DEPOSITIONS* § 3.41 (2d ed. 1994).

In addition, Uniform Rule of Evidence 612 may be implicated in the waiver issue with respect to whether supplying an expert with attorney work-product information to assist in the development of theories of the case constitutes a waiver of the attorney-client and work-product privileges under Rule 612.³⁸ Specifically, Rule 612 allows an opposing party to review written materials used to refresh the recollection of a witness.³⁹ The question remains whether furnishing written materials to an expert might sufficiently influence the expert's testimony to implicate Rule 612 and thus waive the privilege or attorney work-product.⁴⁰ These issues continue to evolve through judicial decisions. For this reason, inadvertent disclosure was not dealt with in the revision of Uniform Rule 510.

II. *The Mental Health Provider Privilege*

As a general maxim of the common law of evidence, recognition of testimonial privileges frustrates the time-honored principle requiring full disclosure of all relevant evidence. As stated by the United States Supreme Court, "[T]he public . . . has a right to every man's evidence."⁴¹ Therefore, new privileges have been established reluctantly, and the scope of existing privileges has been no broader than necessary to effectuate the bases for the privilege. The original Uniform Rules recognized a physician and psychotherapist privilege.⁴² In considering the definition and scope of the privilege, the drafters of the new Uniform Rules looked to a number of developments since the establishment of the original exception, such as the United States Supreme Court's decision in *Jaffee*, subsequent developments in the federal courts, and developments in the various states. Uniform Rule 503, the mental health provider privilege, was drafted in light of those developments.

A. *The Jaffee v. Redmond Decision*

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law *as they may be interpreted by the courts of the United States in light of reason and experience.*"⁴³ Hence, the Court in *Jaffee* concluded that Federal Rule 501 "did not freeze the law governing the privileges," and that exceptions may be established where justifiable public and private ends, in light of the court's reason and experience, outweigh the need for probative evidence.⁴⁴

Thus, the Supreme Court recognized a federal common law privilege for confidential communications between a psychotherapist and a patient. The *Jaffee* decision demonstrated the Court's intent to provide substantial protection to

38. See UNIF. R. EVID. 612.

39. *Id.*

40. UNIF. R. EVID. 510 reporter's notes, at 121; see also Reagan Wm. Simpson et al., *Recent Developments in Civil Procedure and Evidence*, 32 TORT & INS. L.J. 249 (1997).

41. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (citations omitted); see also *supra* note 22.

42. UNIF. R. EVID. 503 (revised 1999), 13A U.L.A. pt. 1B, at 260-61 (2000).

43. FED. R. EVID. 501 (emphasis added).

44. *Jaffee*, 518 U.S. at 9 (citing *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

therapeutic relationships by establishing a strong psychotherapist-patient privilege. Persuaded that the important private and public ends that would result from the recognition of a federal psychotherapist privilege outweighed the time-honored principle that all probative evidence should be disclosed, the Court held that the privilege applied to confidential communications made to licensed psychotherapists in the course of diagnosis or treatment.⁴⁵ Although the Court left the contours of the privilege undefined, it did extend the privilege to a licensed social worker in *Jaffee*, noting that those who seek out social workers are often poorer than those who are able to afford a psychiatrist or psychologist.⁴⁶

In the light of "reason and experience," the *Jaffee* Court underscored the unique nature of the relationship between a patient and psychotherapist.⁴⁷ Because a patient must disclose his or her innermost fears and fantasies for effective therapy, this relationship is distinguishable from even the physician-patient or attorney-client relationships, which do not necessarily require such intimate detail for effective counsel.⁴⁸ Disclosure of such information would surely chill therapeutic relations and prevent members of the community from receiving adequate counseling.⁴⁹ As noted by the *Jaffee* Court, the Federal Rules Advisory Committee stated in the notes to its proposed rules of evidence to Congress that "there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment."⁵⁰ Thus, the Court determined that protection of confidential communications with psychotherapists "serves important private interests."⁵¹ Furthermore, the Court emphasized that not every patient can afford to consult with a psychiatrist or psychologist⁵² and extended the privilege to confidential communications made to social workers (who traditionally serve lower income clients) in the course of psychotherapy.⁵³

In addition to the nature of the psychotherapeutic relationship itself, the Court was persuaded by several other factors supporting creation of the privilege. Most importantly, a privilege must serve a valuable public end to be valid. As such, the Court stated that "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."⁵⁴ Furthermore, the Court explained that declining to recognize the privilege would not have a substantial evidentiary impact. According to the Court, "If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled Without a privilege, much of the desirable evidence to which

45. *Id.* at 15.

46. *Id.* at 15-16.

47. *Id.* at 10.

48. *See id.*

49. *Id.*

50. *Id.* at 10-11; *see also Federal Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 242 (1973) (advisory committee notes).

51. *Id.* at 11.

52. *Jaffee*, 518 U.S. at 16.

53. *Id.* at 16.

54. *Id.* at 11.

litigants such as petitioners seek access . . . is unlikely to come into being."⁵⁵ Moreover, all fifty states and the District of Columbia had enacted some form of the psychotherapist-patient privilege.⁵⁶ Thus, according to the Court, "[T]he existence of a consensus among the States indicates that 'reason and experience' support the recognition of the privilege."⁵⁷

In addition, recognition at the federal level would further protect a privilege provided at the state level by preventing litigants from removing to federal court for a more beneficial evidentiary standard.⁵⁸ Also, the psychotherapist-patient privilege was among those recommended to Congress in its proposed privilege rules.⁵⁹ The Court concluded that "a psychotherapist-patient privilege will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"⁶⁰ Based on these beneficial public and private ends, the Court held "that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."⁶¹

By extending the privilege to licensed social workers for purposes of equality, the Court broadly democratized the federal psychotherapist-patient privilege. In addition, the Court provided predictability and certainty to the privilege by rejecting the Seventh Circuit's balancing approach.⁶² According to the Court, allowing the availability of the privilege to be contingent upon a judge's *in camera* determination of necessity would defeat the purpose of the privilege.⁶³ Ultimately, however, although the Court created this privilege, it left the definition of its substance to the lower federal courts on a case-by-case basis.

B. Federal Decisions Developing the Privilege After Jaffee

Because the *Jaffee* Court did not delineate the contours of the psychotherapist-patient privilege, it has been left to the lower federal courts to further define the privilege.⁶⁴ One obvious area of uncertainty is who will be considered a "psychotherapist" for purposes of the privilege. The courts have also considered the type of communications that should be protected and the exceptions that should be recognized. The most litigated issue in defining the privilege involves waiver.

55. *Id.* at 11-12.

56. See *id.* at 12 n.11 (collecting state statutes recognizing some form of psychotherapist privilege at the time of *Jaffee*).

57. *Id.* at 13.

58. See *id.*

59. *Id.* at 14.

60. *Id.* at 15 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

61. *Id.*

62. *Id.* at 17-18. The Seventh Circuit qualified the privilege, stating that it would not apply if "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." *Jaffee v. Redmond*, 51 F.3d 1346, 1357 (7th Cir. 1995).

63. *Jaffee*, 518 U.S. at 17.

64. See generally Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1 (2000).

Courts are split regarding when a party's mental or emotional condition is "in issue" such that the privilege would be waived where the party attempts to recover damages for mental or emotional distress.

C. Who Is Covered and What Communications Are Protected by the Privilege?

1. Providers Covered by the Privilege

In general, courts have applied the privilege quite broadly with respect to the type of provider covered by the privilege and whether a communication is protected. Some courts have read *Jaffee* to permit the privilege to be extended to nonlicensed providers of psychotherapy. In *United States v. Lowe*,⁶⁵ the court extended the federal privilege to communications with rape crisis counselors. Although the counselors were required to be neither licensed psychotherapists nor social workers, the court found that the policies expressed in *Jaffee* supported a federal privilege for the communications.⁶⁶ Similarly, in *Greet v. Zagrocki*,⁶⁷ the court applied the privilege to records from the police department's Employee Assistance Program (EAP), where the counselors were peer counselors with no significant training or therapeutic expertise.⁶⁸

More recently, in *Oleszko v. State Compensation Insurance Fund*,⁶⁹ the Ninth Circuit extended the privilege to unlicensed EAP counselors. The court stated:

The reasons for recognizing a privilege for treatment by psychiatrists or social workers apply equally to EAPs. EAPs, like social workers, play an important role in increasing access to mental health treatment. Growing numbers of EAPs help employees who would otherwise go untreated to get assistance. The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging more people to seek treatment. EAPs also assist those who could not otherwise afford psychotherapy by providing and/or helping to obtain financial assistance.

....

EAPs work to address serious national problems, from substance abuse and depression to workplace and domestic violence. Given the importance of the public and private interests EAPs serve, the necessity of confidentiality in order for EAPs to function effectively, and the importance of protecting this gateway to mental health treatment by licensed psychiatrists, psychologists, and social workers, we hold that the psychotherapist-patient privilege recognized in *Jaffee v. Redmond* extends to communications with EAP personnel.⁷⁰

65. 948 F. Supp. 97 (D. Mass. 1996).

66. *Id.* at 99.

67. No. 96-2300, 1996 WL 724933, at *2 (E.D. Pa. Dec. 16, 1996).

68. See Anne Bowen Poulin, *The Psychotherapist-Patient Privilege After Jaffee v. Redmond: Where Do We Go from Here?*, 76 WASH. U. L.Q. 1341, 1355 (1998).

69. 243 F.3d 1154 (9th Cir. 2001).

70. *Id.* at 1157-59 (citation omitted).

In *Finley v. Johnson Oil Co.*,⁷¹ the court held, where the plaintiff was not seeking emotional distress damages, "that the federal common law privilege relating to disclosure of mental health communications between a patient and a physician does apply" to a general practitioner's notes regarding depression.⁷² The court reviewed the content of the disputed medical records, observing that the records contained communications between a patient and a general practitioner that occasionally mentioned "depression," but mostly dealt with other medical problems, such as "hip pain."⁷³ There were no clinical evaluations of depression or notes of therapeutic counseling.⁷⁴ Nonetheless, the court concluded that "[a]lthough these items are not strictly notes taken by a psychotherapist, *Jaffee* indicates that the scope of the federal mental health privilege is quite broad" and applied the privilege to the medical records.⁷⁵

In contrast, the court in *United States v. Schwensow*⁷⁶ engaged in a thorough analysis of *Jaffee* and the policies behind it and did not extend the privilege to cover communications with two Alcoholics Anonymous (AA) hotline volunteers. In *Schwensow*, the defendant went to an Alcoholics Anonymous office to receive assistance in locating and calling a detoxification center.⁷⁷ The AA telephone hotline operators assisted him in this task, since Schwensow was clearly in a deteriorated state. They encouraged him to follow through with his plan to enter treatment, drove him to the detoxification center, and agreed to hold his duffel bag at the AA office.⁷⁸ The court determined that the AA workers were not qualified to receive confidential communications because neither volunteer was a licensed psychiatrist, psychologist, social worker, or any other kind of counselor.⁷⁹ Furthermore, the volunteers did not purport to offer counseling services.⁸⁰ The court stated that the AA workers "did not identify themselves as therapists or counselors, nor did they confer with Schwensow in a fashion that resembled a psychotherapy session."⁸¹

Another case, *Speaker v. County of San Bernardino*,⁸² considered whether the privilege extended to either a Marriage, Family and Child Counselor (MFCC) or a "psychological assistant," but avoided deciding the case on that issue. In *Speaker*, a law enforcement official attended two counseling sessions with a licensed MFCC

71. 199 F.R.D. 301 (S.D. Ind. 2001).

72. *Id.* at 304.

73. *Id.* at 303.

74. *Id.*

75. *Id.*; see also *EEOC v. St. Michael Hosp. of Fransiscan Sisters*, No. 96-C-1428, 1997 U.S. Dist. LEXIS 11847 (E.D. Wis. Aug. 8, 1997) (holding that the plaintiff's marriage counseling records fell within the psychotherapist-patient privilege).

76. 151 F.3d 650 (7th Cir. 1998).

77. *Id.* at 652.

78. *Id.*

79. *Id.* at 657.

80. *Id.*

81. *Id.*

82. 82 F. Supp. 2d 1105 (C.D. Cal. 2000).

after he shot and killed a suspect.⁸³ The county required officers to attend counseling sessions after such incidents and arranged the appointments, but the officers were told the sessions were confidential.⁸⁴ A MFCC is licensed to counsel marital and family relations, not post-traumatic stress. The court noted that the facts in *Jaffee* were somewhat similar to those presented and further emphasized that the *Jaffee* Court stressed the importance of law enforcement officers receiving effective counseling after such traumatic incidents.⁸⁵

Although the *Jaffee* Court considered it appropriate to extend the privilege to social workers, the district court in *Speaker* declined to consider whether it would extend the privilege to a MFCC or a "psychological assistant" under the supervision of a licensed psychiatrist.⁸⁶ Instead, the court held that because the defendant reasonably believed, although mistakenly, that the therapist he consulted was a licensed psychologist, the privilege still applied.⁸⁷ In coming to this conclusion, the court relied on a similar analysis applied to the attorney-client privilege.⁸⁸ The court noted that, in addition to case law that supports application of the attorney-client privilege in cases where the client reasonably believes his communications are with a licensed attorney, several treatises have supported this position for both the attorney-client and psychotherapist-client privilege.⁸⁹ The court stated that commentators urge "that a 'quasi-therapist'/patient privilege should exist where the patient reasonably, but mistakenly, thought that she or he was being treated by a psychotherapist. . . . [Commentators] further note that 'the reasonable belief standard . . . is the same as the one provided for 'quasi-lawyers' . . . and will undoubtedly be similarly construed."⁹⁰

2. Communications Covered by the Privilege

For the privilege to apply, the communication must be both confidential and in the course of diagnosis or treatment. In *Schwensow*, the court held that the statements made to the AA volunteers were not made for the purposes of obtaining treatment.⁹¹ Schwensow did not seek help from the AA volunteers in coping with his alcoholism.⁹² He had already decided to enter a detoxification center and only went to the AA office to use the phone.⁹³ The AA workers did assist Schwensow in looking up the phone number, but the court found that these interactions "did not

83. *Id.* at 1107.

84. *Id.*

85. *Id.* at 1108.

86. *Id.* at 1112.

87. *Id.* at 1115.

88. *Id.*

89. *Id.* at 1113-14.

90. *Id.* at 1114 (citing CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5527 (1980)).

91. *United States v. Schwensow*, 151 F.3d 650, 657 (7th Cir. 1998).

92. *Id.*

93. *Id.* at 657-58.

relate to diagnosis, treatment or counseling of Schwensow for purposes of attempting to treat his alcoholism."⁹⁴

With respect to confidentiality, in *Kamper v. Gray*,⁹⁵ the court held that communications were not covered by the psychotherapist-patient privilege where the police department mandated that officers receive counseling after a shooting, and the officer knew that the counselor would report findings to the police department.⁹⁶ However, in *Speaker*, where the police department mandated that an officer involved in a shooting receive counseling, the court held that the mandatory nature of the counseling did not render the communication nonconfidential.⁹⁷ Unlike the officers in *Kamper*, *Speaker* was told that his communications would remain confidential and the police department did not receive a copy of the counselor's report.⁹⁸ Thus, the conversation clearly remained confidential even though the counseling was mandated by the police department.⁹⁹ The court relied on the underlying public policy interests in the *Jaffee* decision, noting that the *Jaffee* Court emphasized that access to confidential counseling services for police officers who have been involved in traumatic events is an important public purpose.¹⁰⁰ Similarly, in *Williams v. District of Columbia*,¹⁰¹ communications made during mandatory counseling sessions were held to have remained confidential because the psychotherapist made only a "yes or no" recommendation to the police department and did not reveal the substance of the communications.¹⁰²

D. What Exceptions to the Privilege Have Been Delineated?

1. Crime or Fraud

In 1999, the First Circuit, in *In re Grand Jury Proceedings* (Gregory P. Violette),¹⁰³ held that the psychotherapist-patient privilege is subject to a "crime-fraud" exception similar to the exception provided under the attorney-client and physician-patient privileges.¹⁰⁴ Violette, the subject of a federal grand jury investigation focused on bank fraud and related crimes, allegedly made false statements to financial institutions and fraudulently induced payments from disability insurance companies.¹⁰⁵ Two licensed psychiatrists were subpoenaed to testify against Violette in connection with his fraudulent activities. The psychiatrists

94. *Id.* at 658.

95. 182 F.R.D. 597 (E.D. Mo. 1998).

96. *Id.* at 598-99.

97. *Speaker v. County of San Bernardino*, 82 F. Supp. 2d 1105, 1107 (C.D. Cal. 2000).

98. *Id.*

99. *Id.*

100. *Id.*

101. No. 96-0200-LFO, 1997 U.S. Dist. LEXIS 23711, at *5-*7 (D.D.C. April 25, 1997).

102. *Id.* at *5-*7.

103. 183 F.3d 71 (1st Cir. 1999).

104. See Recent Cases, *First Circuit Recognizes Crime-Fraud Exception to the Psychotherapist-Patient Privilege*, 113 HARV. L. REV. 1539 (2000).

105. *In re Grand Jury Proceedings*, 183 F.3d at 72.

claimed the psychotherapist-patient privilege on behalf of Violette;¹⁰⁶ however, the district court held that the communications were not privileged because the statements were not made in the course of diagnosis or treatment and the crime-fraud exception applied.¹⁰⁷ The First Circuit affirmed the district court's decision that the crime-fraud exception applied and thus the communications were not privileged.¹⁰⁸

In recognizing the exception, the First Circuit noted that the Supreme Court envisioned exceptions to the privilege.¹⁰⁹ The court analyzed the purpose of the crime-fraud exception in the context of the attorney-client privilege and determined that where the crime-fraud exception applies, the need for probative evidence outweighs the protection of certain communications.¹¹⁰ The court explained that the *Jaffee* Court "justified the psychotherapist-patient privilege in terms parallel to those used for the attorney-client privilege," since both exist to foster confidence and trust required for effective counsel.¹¹¹ Thus, the mental health benefits of protecting communications made for the purpose of committing a crime or fraud are outweighed by the need to ascertain the truth.¹¹² According to the court, providing for this exception would not chill legitimate communications, while declining to recognize the exception would lead to grave abuse of the privilege.¹¹³

2. *Dangerous Patient*

Another exception was considered in *United States v. Glass*,¹¹⁴ a criminal prosecution for knowingly and willfully threatening to kill the President of the United States. Basing its decision on the rationale expressed in *Jaffee*, the Tenth Circuit delineated a test for determining whether a "dangerous patient" exception to the psychotherapist-patient privilege applies to certain communications. The court held that the exception did not apply in the instant case where the court was unable to determine (1) the seriousness of the threat when it was uttered, and (2) whether disclosure of the threat was the only means of averting harm to the President when the disclosure was made.¹¹⁵ In *Glass*, the defendant voluntarily admitted himself to a mental health unit for treatment of his ongoing mental illness after he made a threat against the President.¹¹⁶ The treating psychotherapist nonetheless released the defendant from the hospital contingent upon him continuing to live with his father. Ten days after his release, however, the hospital discovered that the defendant was missing from his father's house, and a nurse contacted local law

106. *Id.* at 73.

107. *Id.* at 73-74.

108. *Id.* at 74.

109. *Id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)).

110. *Id.* at 75-76.

111. *Id.* at 76 (citation omitted).

112. *Id.*

113. *Id.* at 77.

114. 133 F.3d 1356 (10th Cir. 1998).

115. *Id.* at 1358-60.

116. *Id.* at 1357.

enforcement. Ultimately, because the defendant had made threats against the President, the Secret Service requested the records of the treating psychotherapist.¹¹⁷

Although the defendant claimed the records were protected by the psychotherapist-patient privilege, the government argued that because the defendant posed a danger to the President, the agents had a duty to warn the President and therefore the privilege must yield.¹¹⁸ The government primarily relied upon footnote 19 in *Jaffee*, which states:

Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.¹¹⁹

The court in *Glass*, however, concluded that based on the sparse record, it could not discern "how ten days after communicating with his psychotherapist, Mr. Glass' statement was transformed into a serious threat of harm which could only be averted by disclosure."¹²⁰ Thus, the court remanded the case to the district court to determine (1) the seriousness of the threat when uttered, and (2) whether disclosure of the records was the only means of averting harm.¹²¹ In essence, the court accepted the existence of a "dangerous patient" exception to the psychotherapist-patient privilege on the basis of footnote 19 in *Jaffee*.¹²² On remand, the district court held the statements were "properly admissible as an exception to the psychotherapist-patient privilege."¹²³

The Sixth Circuit, in *United States v. Hayes*,¹²⁴ declined to follow the analysis in *Glass* where the defendant expressed his desire, during several counseling sessions, to murder his supervisor at the United States Postal Service and gave detailed information on the manner in which he planned to commit the crime. The court stated: "Given that the 'dangerous patient' exception crafted by the Tenth Circuit in *Glass* is linked to the standard of care exercised by the psychotherapist, we respectfully decline to follow that court's treatment of the privilege."¹²⁵ The so-called "dangerous patient" exception finds support in the "duty to warn" standard enunciated in *Tarasoff v. Regents of the University of California*.¹²⁶ However, the Sixth Circuit was not persuaded that disclosure under the "duty to warn" standard was applicable to the psychotherapist-patient privilege:

117. *Id.*

118. *Id.*

119. *Id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)).

120. *Id.* at 1359.

121. *Id.* at 1360.

122. *See generally* Nelken, *supra* note 64, at 33-38.

123. *Id.* at 35.

124. 227 F.3d 578 (6th Cir. 2000).

125. *Id.* at 584.

126. 551 P.2d 334 (Cal. 1976).

We see only a marginal connection, if any at all, between a psychotherapist's action in notifying a third party (for his own safety) of a patient's threat to kill or injure him and a court's refusal to permit the therapist to testify about such threat (in the interest of protecting the psychotherapist-patient relationship) in a later prosecution of the patient for making it."¹²⁷

Thus, the court ultimately concluded that unless a therapist warns that he will testify against his patient, there is no constructive waiver. Second, the court reasoned that the exception would not serve the public-ends rationale in *Jaffee* because it would chill communications.¹²⁸ A patient consulting a psychotherapist might fear that disclosing information would cause the therapist to decide the patient was "dangerous" and disclose the confidential information to authorities. Third, the majority of the states do not provide for such an exception, nor did the proposed Federal Rules of Evidence.¹²⁹ Thus, the Sixth Circuit characterized footnote 19 in *Jaffee* as "an aside" made by Justice Stevens indicating "that the federal psychotherapist/patient privilege will not operate to impede a psychotherapist's compliance with the professional duty to protect identifiable third parties from serious threats of harm."¹³⁰ Thus, based on "reason and experience," the court held that the "dangerous patient" exception would not be recognized.

Federal district courts in two states have considered whether the privilege violates a defendant's Sixth Amendment constitutional rights under the Confrontation and Compulsory Process Clauses.¹³¹ In *United States v. Haworth*,¹³² the court held that the records of psychotherapists who had examined a witness for the prosecution were privileged, in accord with *Jaffee*, and that the psychotherapists could be cross-examined, but their records would not be disclosed.¹³³ In *United States v. Doyle*,¹³⁴ a sentencing proceeding in which the government sought an upward departure for the extreme psychological trauma suffered by the victim, the court rejected the defendant's claim that his Sixth Amendment right to compulsory process outweighed the psychotherapist privilege. The court analogized the privilege to the attorney-client privilege and refused to conduct an in camera review of the treating

127. *Hayes*, 227 F.3d at 583-84.

128. *Id.* at 585.

129. *Id.*

130. *Id.* at 585. See generally George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33 (1999); Catherine Olander, *No "Dangerous Patient" Exception to Federal Psychotherapist-Patient Testimonial Privilege — United States v. Hayes*, 26 AM. J.L. & MED. 484 (2000).

131. U.S. CONST. amend. VI. One state case, *People v. Hammon*, 938 P.2d 986, 993 (Cal. 1997), has also considered a Sixth Amendment Confrontation Clause argument with respect to the psychotherapist privilege, and held that the Sixth Amendment does not confer "a right to discover privileged psychiatric information before trial."

132. 168 F.R.D. 660 (D.N.M. 1996).

133. *Id.*; see also Nelken, *supra* note 64, at 39.

134. 1 F. Supp. 2d 1187 (D. Or. 1998).

psychologist's and social worker's records to determine whether the protected communication was helpful to the defendant.¹³⁵

E. Under What Conditions Is There a Waiver of the Privilege?

In *Jaffee*, the Supreme Court indicated that a patient may waive the psychotherapist-patient privilege.¹³⁶ The majority of the cases interpreting *Jaffee* deal with this aspect of the decision, and in particular, the patient-litigant exception.¹³⁷ Essentially, two lines of cases have emerged. Many courts have defined the patient-litigant exception to the psychotherapist-patient privilege broadly.¹³⁸ Under this interpretation, "the exception applies whenever a party alleges emotional distress damages, regardless of whether the party plans to offer expert testimony about her mental state at trial or has made a claim for more than incidental damages for emotional distress."¹³⁹ A case representative of this view is *Sarko v. Penn-Del Directory Co.*,¹⁴⁰ an employment discrimination case under the Americans with Disabilities Act (ADA). The *Sarko* court "held that the plaintiff had placed her communications with her psychotherapist 'directly in issue' by claiming that her clinical depression rendered her a 'qualified individual with a disability' within the meaning of the ADA."¹⁴¹ Consequently, she would have to release "all records" of communications with her therapist relevant not only to her claim of emotional injury, but also to her general emotional condition during her period of employment with the defendant.¹⁴²

Similarly, in *Vann v. Lone Star Steakhouse & Saloon of Springfield, Inc.*,¹⁴³ a sexual harassment case under Title VII, the plaintiff claimed she had suffered emotional injury due to her employer's inappropriate conduct. Consequently, the *Vann* court held that by seeking to admit expert testimony from her therapist on the issue of emotional injury, the plaintiff had placed her emotional condition in issue and would be required to produce all relevant records of her therapist.¹⁴⁴ The exception was applied even more broadly in *Lanning v. Southeastern Pennsylvania Transportation Authority*.¹⁴⁵ In *Lanning*, the court compelled production of the plaintiffs' psychiatric records because the plaintiffs sought emotional injury damages, even though the plaintiffs stipulated that they would not offer expert testimony on the issue, would not seek damages for treatment of their emotional injury, and were not alleging an independent tort action for emotional distress.¹⁴⁶

135. *Id.*; see also Nelken, *supra* note 64, at 39-40.

136. *Jaffee v. Redmond*, 518 U.S. 1, 15 n.14 (1996).

137. See generally Nelken, *supra* note 64, at 20-30.

138. *Id.* at 21.

139. *Id.*

140. 170 F.R.D. 127 (E.D. Pa. 1997).

141. *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 621 (S.D. Cal. 1999) (explaining *Sarko*).

142. *Id.*

143. 967 F. Supp. 346 (C.D. Ill. 1997).

144. *Id.* at 349-50.

145. Nos. 97-593, 97-1161, 1997 U.S. Dist. LEXIS 14510 (E.D. Pa. Sept. 17, 1997).

146. *Id.* at *3.

Other courts, however, have applied the exception more narrowly "in light of similar exceptions to the attorney-client privilege," finding waiver only where the *privileged communication* is put in issue by the patient-litigant.¹⁴⁷ Thus, in *Vanderbilt v. Town of Chilmark*,¹⁴⁸ the court held that the privilege is waived only where the patient either calls his or her therapist as a witness, or introduces in evidence the substance of any therapist-patient communication.¹⁴⁹ On this point, the court in *Jackson v. Chubb Corp.*,¹⁵⁰ which adopted a less broad interpretation of the patient-litigant exception, stated, "[W]here a plaintiff merely alleges 'garden-variety' emotional distress and neither alleges a separate tort for the distress, any specific psychiatric injury or disorder, or unusually severe distress, that plaintiff has not placed his/her mental condition at issue to justify a waiver of the psychotherapist patient-privilege."¹⁵¹

III. Revised Uniform Rule of Evidence 503

In 1999, Uniform Rule 503, formerly the "Physician and Psychotherapist Privilege," was revised to reflect changes in the law of evidence at the federal and state levels. The revised rule, which offers a general mental health provider privilege¹⁵² and provides five additional exceptions to the privilege,¹⁵³ was shaped by the four sources of law analyzed above. First, the U.S. Supreme Court's recognition of a strong psychotherapist-patient privilege in *Jaffee* supported extending the scope of the privilege beyond communications with psychiatrists and psychologists to communications with other licensed providers of psychotherapy. Second, most states recognize a "licensed social worker" privilege independent of a psychotherapist privilege, thus further supporting the broader scope.¹⁵⁴ In

147. Nelken, *supra* note 64, at 21.

148. 174 F.R.D. 225 (D. Mass. 1997).

149. *Id.* at 230.

150. 193 F.R.D. 216 (D.N.J. 2000).

151. *Id.* at 225 n.8; *see also* Fritch v. City of Chula Vista, 187 F.R.D. 614 (S.D. Cal. 1999) (comprehensively analyzing both lines of cases addressing waiver in light of the rationale for the psychotherapist-patient privilege under *Jaffee*).

152. *See* UNIF. R. EVID. 503(a).

153. *See* UNIF. R. EVID. 503(d).

154. UNIF. R. EVID. 503 reporter's notes, at 97-98. The Reporter's Notes provide:

The following states have separate statutes creating a so-called "licensed social worker" privilege: ARIZONA, *Ariz. Rev. Stat. Ann.* § 32-3283 (1996); ARKANSAS, *Ark. Code Ann.* § 14-46-107 (1995); CALIFORNIA, *Cal. Evid. Code* §§ 1010, 1012, 1014 (1996); COLORADO, *Colo. Rev. Stat.* § 13-90-107 (1987); CONNECTICUT, *Conn. Gen. Stat.* § 52-146q (1994); DELAWARE, *24 Del. Code Ann. tit. 24*, § 3913 (1995); DISTRICT OF COLUMBIA, *D.C. Code* § 14-307 (1995); FLORIDA, *Fla. Stat.* § 90.503 (1996); GEORGIA, *Ga. Code Ann.* § 24-9-21 (1996); HAWAII, *HRS* § 505.5 (1996); IDAHO, *Idaho Code* § 54-3213 (1996); ILLINOIS, *Ill. Comp. Stat.*, ch. 225, § 20/16 (1996); INDIANA, *Burns Ind. Code Ann.* § 25-23. 6-6-1 (1996); IOWA, *Iowa Code* § 622.10 (1996); KANSAS, *Kan. Stat. Ann.* § 65-6315 (1995); KENTUCKY, *Ky. Rule Evid.* 507 (1996); LOUISIANA, *La. Code Evid. Art.* 510 (1996); MAINE, *Me. Rev. Stat. Ann. tit. 32*, § 7005 (1988); MARYLAND, *Md. Cts. & Jud. Proc. Code Ann.* § 9-121 (1996); MASSACHUSETTS, *Mass. Gen. Laws* § 112:135A, 135B (1994); MICHIGAN, *Mich. Comp. Stat. Ann.* § 18.425(1610) (1996); MINNESOTA,

addition, the exceptions added to Rule 503 also model state trends in recognizing exceptions to the privilege. Third, the federal courts have refined the privilege established in *Jaffee* in light of the rationales for the privilege enunciated by the Supreme Court in that case.

Finally, the proposed Federal Rules of Evidence, which are often considered a persuasive source of the common law, also included a psychotherapist privilege.¹⁵⁵ Although proposed Federal Rule 504(b)¹⁵⁶ limited the definition of "psychotherapist" only to psychiatrists and psychologists,¹⁵⁷ the Court in *Jaffee* pointed out that this limitation "[did] not counsel against recognition of a privilege for social workers practicing psychotherapy" because the realm of social work and psychotherapy has changed significantly since 1972 when the rules were proposed.¹⁵⁸ Thus, the revised Uniform Rule 503 offers a broader scope of persons and communications protected by the privilege by providing a flexible approach to defining a provider of psychotherapy.

The revisions to Uniform Rule 503 reflect the view that although a licensed social worker privilege was necessary, it was not essential to create a separate rule for the privilege.¹⁵⁹ Instead, the revisions incorporate a licensed social worker privilege into the general mental health provider privilege.¹⁶⁰ In most states, the licensed social worker privilege is created by a separate statute from that defining the psychotherapist privilege.¹⁶¹ The social worker privilege provided by the states often broadly defines "social work" as the counseling of clients to "enhance or restore their capacity for physical, social and economic functioning."¹⁶² Further-

Minn. Stat. § 595.02 (1996); MISSISSIPPI, Miss. Code Ann. § 73-53-29 (1996); MISSOURI, Mo. Ann. Stat. § 337.636 (Supp. 1996); MONTANA, Mont. Code Ann. § 37-22-401; NEBRASKA, Neb. Rev. Stat. Ann. § 71-1.335 (1996); NEVADA, Nev. Rev. Stat. Ann. §§ 49.215, 49.252, 49.235, and 49.254 (1995); NEW HAMPSHIRE, N.H. Rev. Stat. Ann. § 330-A:19 (1996); NEW JERSEY, N.J. Stat. Ann. § 45:15BB-13 (1996); NEW MEXICO, N.M. Stat. Ann. § 61-31-24 (1996); NEW YORK, N.Y. Civ. Prac. Law § 4508 (1996); NORTH CAROLINA, N.C. Gen. Stat. § 8-53.7 (1996); OHIO, Ohio Rev. Code Ann. § 2317.02 (1996); OKLAHOMA, 59 Okla. Stat., tit. 59, § 1261.6 (1995); OREGON, Ore. Rev. Stat. § 40.250 (1996); OEC § 504-4; RHODE ISLAND, R.I. Gen. Laws §§ 5-37.3-3, 5-37.3-4 (1996); SOUTH CAROLINA, S.C. Code Ann. § 19-11-95 (1995); SOUTH DAKOTA, S.D. Codified Laws § 36-26-30 (1996); TENNESSEE, Tenn. Code Ann. § 63-11-213 and § 33-10-(301-304); TEXAS, Tex. Rule Civ. Evid. 510 (1998); UTAH, Utah Rule Evid. 506 (1996); VERMONT, Vt. Rule Evid. 503 (1996); VIRGINIA, Va. Code Ann. § 8.01-400.2 (1996); WASHINGTON, Wash. Rev. Code § 18.19.180 (1996); WEST VIRGINIA, W. Va. Code § 30-30-12 (1996); WISCONSIN, Wis. Stat. § 905.04 (1996); and WYOMING, Wyo. Stat. § 33-38-109 (Supp. 1995).

Id.

155. *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 240 (1973) (Proposed Rule 504).

156. *Id.* at 241.

157. *Id.* at 240 (Rule 504(a)(2)).

158. *Jaffee v. Redmond*, 518 U.S. 1, 16 n.16 (1996).

159. UNIF. R. EVID. 503 reporter's notes, at 99.

160. UNIF. R. EVID. 503.

161. UNIF. R. EVID. 503 reporter's notes, at 99.

162. *Id.* (citing 59 OKLA. STAT. §§ 1250.1(2), 1261.6 (1995)).

more, the privilege applies to "any information acquired from persons consulting the licensed social worker in his or her professional capacity."¹⁶³ Rather than employ a similarly expansive privilege, however, the revised rule provides a narrower scope, extending the privilege only to communications relating to "treatment of a mental or emotional condition, including alcohol or drug addiction."¹⁶⁴

The revised rule offers three definitions of a provider of psychotherapy, with whom communications would be protected by the privilege: "mental health provider,"¹⁶⁵ "physician,"¹⁶⁶ and "psychotherapist."¹⁶⁷ The physician and psychotherapist definitions remain unchanged from the original Uniform Rule. The mental health provider definition was added to provide for a general licensed social worker-type privilege. The revisions provide flexibility by bracketing the language relating to the provider of psychotherapy, allowing a state to choose whether to adopt a psychotherapist-patient privilege, a physician-patient privilege, a mental health provider privilege, or some combination thereof.

In addition to expanding the scope of the privilege, the revised rule adds five exceptions to Rule 503. The states recognize a combination of over twenty-three exceptions to the psychotherapist-patient privilege.¹⁶⁸ The exceptions set forth in the revised rule are generic and broad enough to subsume more specific exceptions.¹⁶⁹ For instance, "previously numbered subdivision (d)(4) dealing with communications relevant to divorce, custody or paternity proceedings" was deleted since it would be covered under subdivision (d)(3) — the condition "in issue" exception.¹⁷⁰ If the patient's mental or emotional condition is not "in issue" in such proceedings, there would appear to be no justification for an exception to the privilege.

Subdivision (d)(4), a crime-fraud exception, was added to comport with the crime-fraud exceptions present in other privileges, and was drawn from Uniform Rule 502(d)(1), the crime-fraud exception for the lawyer-client privilege.¹⁷¹ Subdivision (d)(5) applies to communications that indicate that the patient intends "to kill or seriously injure" a person.¹⁷² This provides a "dangerous patient" exception, which stems from the "duty to warn" standard enunciated in *Tarasoff*.¹⁷³ Lastly, subdivisions (d)(6), (7), and (8) create exceptions to the privilege where the competency of, or breach of duty by, the physician, psychotherapist, or mental

163. *Id.* (citing 59 OKLA. STAT. §§ 1250.1(2), 1261.6 (1995)) (emphasis added).

164. UNIF. R. EVID. 503(b).

165. UNIF. R. EVID. 503(a)(2).

166. UNIF. R. EVID. 503(a)(4).

167. UNIF. R. EVID. 503(a)(5).

168. UNIF. R. EVID. 503 reporter's notes, at 100.

169. *Id.*

170. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, DRAFT FOR APPROVAL: PROPOSED AMENDMENTS TO THE UNIFORM RULES OF EVIDENCE: WITH PREFATORY NOTE AND REPORTER'S NOTES, R. 503 reporter's notes, at 102 (1999), available at <http://www.upenn.edu/bll/ulc/ure/evidam99.pdf>.

171. UNIF. R. EVID. 503 reporter's notes, at 101.

172. UNIF. R. EVID. 503 reporter's notes, at 103.

173. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); see also Harris, *supra* note 130, at 45-48.

health provider is placed in issue.¹⁷⁴ A majority of states also recognize exceptions similar to (d)(6) and (7) for physicians, psychotherapists, social workers, and other health care providers.¹⁷⁵

174. UNIF. R. EVID. 503 reporter's notes, at 101-06.

175. *See id.* (collecting statutes); *see also, e.g.*, CAL. EVID. CODE §§ 996, 1016 (West 1995) (applying respectively to the physician-patient and psychotherapist-patient privileges, and providing no privilege as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by the patient, any party claiming through or under the patient, any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party, or the plaintiff in an action brought under section 376 or 377 of the Code of Civil Procedure for damages for the injury of death of the patient); COLO. REV. STAT. § 13-90-107(d)(I) (2000) (physician-patient privilege does not apply to "any cause of action arising out of or connected with physician's or nurse's care or treatment"); MASS. GEN. LAWS ch. 233, § 20B(f) (2000) (no psychotherapist-patient privilege "[i]n any proceeding brought by a patient against the psychotherapist, and in any malpractice, criminal or license revocation proceeding, in which disclosure is necessary or relevant to the claim or defense of the psychotherapist"); MICH. COMP. LAWS § 600.2157 (2000) (no privilege under the physician-patient privilege when the patient brings a malpractice action against the physician); 76 OKLA. STAT. ANN. § 19(B) (West Supp. 2001) ("[I]n cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed the physical or mental condition of that person in issue by the commencement of any action, proceeding, or suit for damages . . . that person shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider . . . or any knowledge obtained by such physician or health care provider by personal examination of any such patient . . . [if it is] material and relevant to an issue therein, according to existing rules of evidence."); ALA. R. EVID. 503(d)(4) ("There is no privilege under this rule as to an issue of breach of duty by the psychotherapist to the patient or by the patient to the psychotherapist."); HAW. R. EVID. 505.5(d)(3) ("There is no privilege under this rule . . . [a]s to a communication relevant to an issue of breach of duty by the victim counselor or victim counseling program to the victim."); IDAHO R. EVID. 518 (providing, in the case of the licensed social worker-client privilege, that "the client waives the privilege by bringing charges against the licensee"); S.C. CODE ANN. § 19-11-95 (Law. Co-op. 2000) (providing that a licensed social worker, or nurse "may reveal . . . confidences reasonably necessary to establish or collect his fee or to defend himself or his employees against an accusation of wrongful conduct"); TEX. R. EVID. 509(e)(1) (no physician-patient privilege when the proceedings are brought by a patient against the physician, including malpractice proceedings, and any license revocation proceeding in which the patient is a complaining witness); *King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992) (interpreting ARK. R. EVID. 503(d)(3), which provides that "there is no privilege . . . as to medical records or communications relevant to an issue of the physical, mental or emotional condition in which he relies upon the condition as an element of his claim or defense"); *Stigliano v. Connaught Lab., Inc.*, 658 A.2d 715 (N.J. 1995) (broadly interpreting the exception to the physician-patient privilege of N.J. R. EVID. 506 and N.J. STAT. ANN. § 2A:84A-22.4 (West 1994) to apply the waiver not only to the subject of the litigation, but in regard to all of the physician's knowledge concerning the patient's physical condition inquired about). *But see State v. L.J.P., Sr.*, 637 A.2d 532 (N.J. Super. Ct. App. Div. 1994) (giving greater scope and protection to the psychologist-patient privilege of N.J. R. EVID. 505 and N.J. STAT. ANN. § 45:14B-28 (West 1994) by requiring a showing of legitimate need for the shielded evidence, its materiality to a trial issue, and its unavailability from less intrusive sources); *Humble v. Dobson*, No. 95-CA-12, 1996 WL 629535 (Ohio Ct. App. Nov. 1, 1996) (holding a patient waives the physician-patient privilege under a statutory medical malpractice exception as to communications related causally to physical or mental injuries that are relevant to issues in the medical claim, action for wrongful death, civil action, or other authorized claim); *Moses v. McWilliams*, 549 A.2d 950 (Pa. Super. Ct. 1988) (waiver of physician-patient privilege when patient puts physical condition in issue by voluntarily instituting a medical malpractice action); *Christensen v. Munsen*, 867 P.2d 626 (Wash. 1994) (holding that, pursuant to REV. CODE WASH. § 5.60.060(4)(b) (1989), the physician-patient privilege is deemed waived ninety days after

IV. Conclusion

Most of the existing evidentiary privileges are well settled and in need of only minor refinement. While suggestions for the establishment of new privileges have surfaced, they have not gained sufficient support to warrant inclusion in the Uniform Rules of Evidence. However, the United States Supreme Court's establishment of the psychiatrist-patient privilege under Federal Rule of Evidence 501 in light of "reason and experience" has spurred substantial analysis and modification of that privilege in state and federal courts.

The drafters of the Uniform Rules considered these developments in revising the physician and psychotherapist-patient privilege. The revised mental health provider privilege broadly applies to "a person authorized, in any State or country, or reasonably believed by the patient to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs."¹⁷⁶ The privilege would thus include licensed social workers under the rationale of *Jaffee*,¹⁷⁷ and most likely unlicensed EAP counselors who, under the rationale of *Oleszko*,¹⁷⁸ would be "authorized" to "engage in the diagnosis or treatment of a mental or emotional condition."¹⁷⁹

Exceptions to the privilege include:¹⁸⁰ communications relevant to the patient's

the filing of a medical malpractice action); *Carson v. Fine*, 867 P.2d 610 (Wash. 1994) (same).

176. UNIF. R. EVID. 503(a)(2).

177. See *supra* notes 4-6 and accompanying text.

178. See *supra* notes 69-70 and accompanying text.

179. UNIF. R. EVID. 503(a)(2).

180. Uniform Rule 503(d) provides in full:

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

(1) relevant to an issue in proceedings to hospitalize the patient for mental illness, if the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider], in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

(2) made in the course of a court-ordered investigation or examination of the [physical,] mental[,] or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

(3) relevant to an issue of the [physical,] mental[,] or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense;

(4) if the services of the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider] were sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew, or reasonably should have known, was a crime or fraud or mental or physical injury to the patient or another individual;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual;

(6) relevant to an issue in a proceeding challenging the competency of the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider];

mental or emotional condition that the patient "relies upon . . . as an element of the patient's claim or defense;"¹⁸¹ communications made to a mental health provider for the purposes of committing or planning to commit a crime or fraud;¹⁸² communications "in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual;"¹⁸³ or communications relevant in a proceeding to challenge the competency of,¹⁸⁴ or address a breach of duty by,¹⁸⁵ the mental health provider.

The Drafting Committee to Revise the Uniform Rules of Evidence hopes that the new mental health provider privilege, along with its exceptions, is responsive both to the rationales enunciated in *Jaffee*, and to state and federal developments.

(7) relevant to a breach of duty by the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider]; or

(8) that is subject to a duty to disclose under [statutory law].

UNIF. R. EVID. 503(d) (bracketed language in original).

181. UNIF. R. EVID. 503(d)(3).

182. UNIF. R. EVID. 503(d)(4).

183. UNIF. R. EVID. 503(d)(5).

184. UNIF. R. EVID. 503(d)(6).

185. UNIF. R. EVID. 503(d)(7).