

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AFTER *JAFFEE V. REDMOND*: WHERE DO WE GO FROM HERE?

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I. INTRODUCTION

In *Jaffee v. Redmond*,¹ the United States Supreme Court recognized a psychotherapist-patient privilege in federal common law. The Court, however, failed to define the parameters of the privilege and left the refinement of the common-law definition for the lower federal courts² to make on a case-by-case basis. A forward look may help guide that process to a consistent set of rules.

Both the Court and Congress can be criticized for their approaches to federal privilege law. Congress can be faulted for abdicating responsibility for privilege law because it categorically refused to codify privilege law when it enacted the *Federal Rules of Evidence*. Privilege law is peculiarly suited for statutory treatment; it embodies policy choices and details of application that are best addressed by the legislature. Unlike Congress, most states define privileges almost entirely through statutes. Moreover, the Court can also be faulted for capitulating to Congress and then later adopting new privileges in the federal common law, rather than originally deferring complete responsibility to Congress. That critique, however, is not the subject of this Article. Instead, this Article takes the federal structure as a given: Congress has not acted, and the Court has recognized the psychotherapist-patient privilege as a federal common-law privilege. This Article addresses questions that must be answered to determine the parameters of the privilege.

Privileges are fragile sources of protection. If information is fully privileged, it receives absolute protection from disclosure. In the law of privilege, important individual and social interests compete with the desire to

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

2. *See id.* at 18 (remarking "it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'" (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981))).

discern the truth of a case by assembling all the testimony and documents that bear on the facts. Therefore, courts often construe privileges narrowly.

Given the competing interests and the nature of privilege protection, the federal courts must strike the proper balance as they develop the common-law psychotherapist-patient privilege. Not all courts have done so. Some courts have applied the privilege where a counseling relationship did not warrant such protection. Other courts have given the privilege too little effect. This Article addresses the issues courts will encounter as they develop the psychotherapist-patient privilege. After reviewing existing approaches, this Article suggests the course courts should follow as they construe the federal common-law privilege.

II. SOURCES OF GUIDANCE

When the Court promulgated rules of evidence, culminating in 1975 with the statutory adoption of the *Federal Rules of Evidence*, the Court also proposed rules to govern the federal law of privilege. While retaining most of the other proposed rules of evidence with some modifications, Congress deleted the proposed rules pertaining to privilege. Instead, Congress adopted a single rule addressing privilege.³ Rule 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in 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, 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.⁴

Thus, under Rule 501, the law of privilege is governed by federal common law in combination with state law.⁵ *Jaffee* represents an important step in the development of the federal common law of privilege. It establishes a strong

3. See generally *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1454, 1463-70 (1985) [hereinafter *Developments*] (summarizing history of adoption of federal rule).

4. FED. R. EVID. 501.

5. See generally *Developments*, *supra* note 3; Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781 (1994).

privilege for therapeutic relationships. The lower courts, however, are left to define the federal psychotherapist-patient privilege. In doing so, they should turn to several sources for guidance: the *Jaffee* decision itself, the proposed but rejected *Federal Rules of Evidence*, federal statutes that define privilege-like protection for other types of information, state privilege law, and the codes of professional conduct governing therapists.

A. *Jaffee v. Redmond*

The Court's decision in *Jaffee* demonstrates the intention to establish a strong psychotherapist-patient privilege. Courts facing the task of defining the privilege should therefore interpret the privilege as providing substantial protection in those instances in which the privilege applies.

Jaffee emphasized the role of trust in psychotherapy. Noting that effective psychotherapy requires an "atmosphere of confidence and trust" and that the problems discussed with the therapist are often sensitive, the Court concluded that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."⁶ Because therapy relies not only on disclosure of factual information, but also on revelations that expose emotions, fears, and fantasies, the psychotherapist-patient relationship surpasses even the attorney-client relationship in its need for protection.

The Court also stressed the societal benefit derived from effective psychotherapy. The Court placed mental health on equal footing with physical health, characterizing each as "a public good of transcendent importance."⁷ The Court further underscored the strength of the privilege by extending the traditional protection to therapy provided by a licensed social worker.

In addition, the Court rejected the balancing approach adopted by the court of appeals. The Seventh Circuit in *Jaffee* recognized the psychotherapist-patient privilege but applied a balancing test to determine its effect. The Seventh Circuit held that the privilege 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."⁸ The

6. *Jaffee*, 518 U.S. at 10.

7. *Id.* at 11.

8. *Jaffee v. Redmond*, 51 F.3d 1346, 1357 (7th Cir. 1995); see also *In re Doe*, 964 F.2d 1325, 1329 (2d Cir. 1992) (holding that "the privilege amounts only to a requirement that a court give consideration to a witness's privacy interests as an important factor to be weighed in the balance in considering the admissibility of psychiatric histories or diagnoses"). In *Jaffee*, the court of appeals nonetheless held that the communications in the case were privileged because the evidentiary need for

Supreme Court emphasized the need for predictability and commented that the balancing approach would "eviscerate the effectiveness of the privilege."⁹ The Court concluded that the privilege's protection would be too uncertain if each case could be subjected to balancing the interest in privacy against the need for the evidence.¹⁰ In sum, the Court established a strong privilege. The Court signaled this in both the statement of underlying rationale and the resolution of questions of application addressed in *Jaffee*. That signal should guide the lower federal courts as they construe the parameters of the privilege.

B. Proposed Rules

The Court's own proposed but rejected Rule 504 should guide development of the common law.¹¹ As proposed, the rule provided:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or person who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.¹²

Although the Proposed Rule should help guide the courts, *Jaffee* signals unequivocally that the Proposed Rule is not a blueprint for federal common-law development. In *Jaffee*, even as it recognized the existence of the privilege, the Court parted ways with the Proposed Rule's definition of the privilege. Although the Proposed Rule extended the privilege only to psychiatrists and psychologists, *Jaffee* extended the privilege to social workers as well. This extension of the privilege beyond that originally proposed in Rule 504 demonstrates the limited persuasive force of the Proposed Rule.¹³

the communications was not great and the privacy interests were substantial. See 51 F.3d at 1357-58.

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

10. See *id.* at 18.

11. See generally *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976) ("Guidance in this continuing task is provided by consideration of the rationale and specific language of the detailed rules of privileges as promulgated by the Supreme Court.").

12. FED. R. EVID. 504(b) (proposed Nov. 20, 1972).

13. Cf. *Trammel v. United States*, 445 U.S. 40 (1980) (revealing complete willingness to depart from proposed rules of privilege). In *Trammel*, the Court defined the protection against adverse spousal testimony more narrowly than Proposed Rule 504 and recognized in dicta the privilege protecting confidential marital communications, which had been omitted from the proposed rule. See

C. Other Federal Statutes

Although Congress declined to comprehensively address issues of privilege in the *Federal Rules of Evidence*, it has enacted statutes that attach privilege-like protection to specific records or relationships.¹⁴ Such statutes may inform the development of the common-law privilege. Although they do not serve as models for common-law approaches, these statutes may provide insight into congressional choices, and some provisions may be incorporated into the common law.¹⁵ More importantly, the existing statutes should encourage the Court to minimize its reliance on common law as the source of privilege protection. The statutes demonstrate that Congress addresses matters of privilege when it has the will. The statutory provisions' complexity bolsters the argument that some privileges should be defined only by statute. A consideration of federal legislation may therefore lead courts to deflect some claims of privilege, waiting for an expression of congressional judgment.

D. State Law

Courts should also look to state law for guidance as they develop the federal privilege. In *Jaffee*, the Court concluded that "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege."¹⁶ It also stressed the relationship between federal and state privilege protection, noting that "any State's promise of confidentiality would have little value if the patient were aware that the

id. at 51.

14. See, e.g., IRS Restructuring & Reform Act of 1998, Pub. L. No. 105-206, § 3411, 112 Stat. 750 (establishing privilege for tax advice to taxpayers from qualified nonlawyers); 38 U.S.C. § 7332 (1994) (establishing privilege for certain information obtained when processing veteran benefit claims regarding AIDS, substance abuse, and sickle cell anemia); 42 U.S.C. § 290dd-2 (1994) (establishing privilege for confidential information communicated in course of federal substance abuse programs); 42 U.S.C. § 300b-3 (1994) (conditioning receipt of federal research grant on assurance that confidentiality of tests, records, diagnosis, and counseling of patient is maintained unless patient consents to disclosure or patient identity is redacted); *In re August 1993 Regular Grand Jury*, 854 F. Supp. 1380 (S.D. Ind. 1994) (applying 42 U.S.C. § 290dd-2). See generally Richard C. Turkington, *Medical Record Confidentiality Law, Scientific Research, and Data Collection in the Information Age*, 25 J. L., MED. & ETHICS 113 (1997).

15. See, e.g., Michael B. Bressman & Fernando R. Laguarda, *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 CREIGHTON L. REV. 319, 341-46 (1997) (arguing that federal courts should consider congressional assessment reflected in Violence Against Women Act in deciding whether to extend privilege protection to counselor-battered woman relationships).

16. *Jaffe v. Redmond*, 518 U.S. 1, 13 (1995).

privilege would not be honored in a federal court.”¹⁷ Thus, although state interpretations of the privilege do not bind the federal courts, they may inform federal common law concerning the appropriate parameters of privilege protection. In particular, the federal courts should look to those state courts that give strong effect to their psychotherapist-patient privileges.

At least one commentator criticized *Jaffee* on the ground that the Court was influenced too much by state law.¹⁸ The Court’s expression of comity, however, should not be exaggerated. *Jaffee* does not reflect unthinking capitulation to state statutory law. Instead, *Jaffee*’s consideration of state law was appropriate, and the federal courts should continue to consider various state law approaches to determine the contours of the psychotherapist-patient privilege.

The precise relationship between state law privileges and federal litigation has been a matter of dispute.¹⁹ A full consideration of this dispute is beyond the scope of this Article. Rule 501 clearly provides that when state substantive law governs, state privilege law applies as well. The dispute arises when federal substantive law governs at least some aspects of the case. Even in some cases governed by federal substantive law and, hence, federal privilege law, a cogent argument can be made that federal courts should enforce the privilege protection afforded under state privilege law.²⁰ Some courts have accepted arguments based on state law and have applied state privileges in federal actions as a matter of comity, concluding that the beneficial impact of state privilege law would be undesirably attenuated if the privileged information could be discovered in federal litigation.²¹

The prevailing approach, however, is that Rule 501 requires the federal courts to develop a uniform and freestanding federal common law of privilege.²² Under this approach, the federal rule cannot reasonably

17. *Id.*

18. See *The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 287-97 (1996) (criticizing *Jaffee* Court’s “deferral to state legislatures for guidance” and predicting that federal courts will look to state law to define federal privilege, producing through process “motley” and unpredictable privilege).

19. See *Developments, supra* note 3, at 1464. See generally *Dudley, supra* note 5 (defining and discussing reasons for when federal or state law is appropriate source to influence *Federal Rules of Evidence* and their application).

20. See *Dudley, supra* note 5, at 1788.

21. See, e.g., *Brem v. DeCarlo*, Lyon, Hearn & Pazourek, P.A., 162 F.R.D. 94 (D. Md. 1995); *Komlosi v. New York State Office of Mental Retardation & Dev. Disabilities*, No. 88 Civ. 1792 (JFK), 1992 WL 77544 (S.D.N.Y. Apr. 3, 1992); *Mewborn v. Heckler*, 101 F.R.D. 691 (D.D.C. 1984); *Apicella v. McNeil Lab., Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); see also, e.g., *Doe v. St. Joseph’s Hosp.*, Civ. A. No. F 83-201, 1987 WL 15462 (N.D. Ind. Apr. 18, 1987) (applying state statute but finding records not privileged).

22. See, e.g., *United States v. Gillock*, 445 U.S. 360, 370, 373 (1980) (rejecting arguments based

incorporate the varied provisions of different states' privileges if such constructions fail to serve federal policies. A number of decisions reflect this view.²³ Most importantly, *Jaffee* establishes a freestanding psychotherapist-patient privilege under federal common law. Therefore, this Article considers state law as a source of guidance to the federal courts as they define the contours of the federal privilege established in *Jaffee*.

When federal courts turn to state privilege law for guidance in interpreting the federal psychotherapist-patient privilege, they should consider that, in many states, the corresponding privilege is bolstered by other protective laws. Many states have statutes that protect the privacy of medical records.²⁴ In addition, many states recognize physician-patient or other privileges that may supplement the psychotherapist-patient privilege. Using those principles, the federal courts will then be asked to extend the full panoply of protections through a broad psychotherapist-patient privilege. Although the federal courts cannot expect to achieve protection equal to that provided by the many varied protections offered by the states, the federal courts may discover instances when an expansive reading of the federal privilege is appropriate to achieve the protection offered by the state scheme.

on comity and separation of powers that state law privilege should apply in federal proceeding); *see also, e.g.*, MICHAEL H. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL § 501.1 (4th ed. 1996) (describing policy and rationale behind Rule 501).

23. *See, e.g.*, *Wm. T. Thompson, Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982) (holding that federal law favoring admissibility rather than state law privilege governed); *Curtis v. McHenry*, 172 F.R.D. 162, 163-64 (W.D. Pa. 1997) (rejecting argument that state privilege for police reports would "automatically apply in a federal question case in federal court," and defining court's task as determining "if a similar privilege has been created by enough states so that it can fairly be characterized as a 'principle of common law' 'in the light of reason and experience'"); *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 558 (S.D.N.Y. 1996) (rejecting argument that state peer review privilege applied and stating that "the goal of the exercise is the informed determination of a single, uniform federal law of evidentiary privileges"). According to the *Johnson* court, "state privilege law is not to be ignored" but enters the equation merely to inform the determination of federal common law; "[o]nly by forging independent rules of privilege after taking into account the policy determinations of all of the states can the federal courts develop a uniform federal law of privilege." *Id.* at 559; *see also Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 226-27 (D. Mass. 1997) (summarizing authority and concluding that federal privilege law applies when federal court is hearing both federal and state claims).

24. *See* ARK. R. EVID. 503 (stating that "patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records"); TEX. R. CIV. EVID. 510(b)(2) ("Records of identity, diagnosis, evaluation, or treatment of patient/client which are created or maintained by a professional are confidential and shall not be disclosed."); *Commonwealth v. Eck*, 605 A.2d 1248, 1252-53 (Pa. Super. Ct. 1992) (applying Pennsylvania's psychotherapist-patient privilege to records created in course of confidential relationship); *see also* WILLIAM H. ROACH, JR., THE ASPEN HEALTH LAW CENTER, MEDICAL RECORDS AND THE LAW, 279-98 app. (2d ed. 1994) (listing state statutes governing medical records).

E. Professional Codes

In defining the parameters of the privilege, courts should consider any relevant professional codes of ethics. But they should realize that these codes have limited value as a source of specific guidance. Not only may codes vary from state to state, but each mental health profession is guided by at least one separate ethical code.²⁵ Nevertheless, the professional codes governing mental health professionals include two provisions that warrant the courts' attention. First, each professional code imposes an ethical obligation of confidentiality in at least some circumstances.²⁶ The American Psychiatric Association recognizes an obligation to maintain confidentiality in addition to the obligation its members bear as physicians.²⁷ The American Psychological Association and two professional social work societies promulgated codes recognizing the obligation of confidentiality.²⁸ Moreover, each of the codes includes special provisions exhorting the professionals to maintain confidentiality when conducting research or presenting a patient's case to a professional group.²⁹

Second, the codes direct the mental health professional to inform the patient of the limits of confidentiality. The American Psychiatric Association code directs the psychiatrist to caution the patient of the "connotations of waiving the privilege" and to advise the client of the lack of confidentiality when the consultation occurs in unprivileged circumstances.³⁰ Psychologists are instructed that where appropriate they should "discuss with [clients] . . . the relevant limitations on confidentiality."³¹ Similarly, social workers have an ethical obligation to "discuss with clients . . . the nature of confidentiality

25. See LELAND C. SWENSON, *PSYCHOLOGY AND LAW FOR THE HELPING PROFESSIONS* 59 (2d ed. 1997).

26. See AMERICAN PSYCHIATRIC ASS'N, *PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY* § 4 (1981) [hereinafter AMERICAN PSYCHIATRIC ASS'N PRINCIPLES]. In the cases of *In re Subpoena No. 22*, 709 A.2d 385, 391-92 (Pa. Super. Ct. 1998), and *Rost v. State Board of Psychology*, 659 A.2d 626, 629 (Pa. Commw. Ct. 1995), the courts discuss the relationship between the legal concept of privilege and the professional obligation of confidentiality.

27. See AMERICAN PSYCHIATRIC ASS'N PRINCIPLES, *supra* note 26, § 4.

28. See AMERICAN PSYCHOLOGICAL ASS'N, *ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT* § 5 (1992) (visited Oct. 13, 1998) <<http://www.apa.org/ethics/code.html>> [hereinafter ETHICAL PRINCIPLES OF PSYCHOLOGISTS]; NATIONAL ASS'N OF SOCIAL WORKERS, *CODE OF ETHICS Standard 1.07* (visited Oct. 13, 1998) <<http://www.naswdc.org/code.htm>>; CLINICAL SOCIAL WORK FEDERATION, *CODE OF ETHICS Principle III* (1997) (visited Oct. 13, 1998) <<http://www.cswf.org/clinical.html>>.

29. See AMERICAN PSYCHIATRIC ASS'N PRINCIPLES, *supra* note 26, § 4; ETHICAL PRINCIPLES OF PSYCHOLOGISTS, *supra* note 28, Standard 5.08; NATIONAL ASS'N OF SOCIAL WORKERS, *supra* note 28, Standard 1.07; CLINICAL SOCIAL WORK FEDERATION, *supra* note 28, Principle III(d).

30. AMERICAN PSYCHIATRIC ASS'N PRINCIPLES, *supra* note 26, § 4.

31. ETHICAL PRINCIPLES OF PSYCHOLOGISTS, *supra* note 28, Standard 5.01.

and limitations of clients' right to confidentiality."³²

When asked to address the professional standards for attorneys, the Court has been reluctant to defer to rules of professional conduct.³³ Consequently, the Court is not likely to defer to professional standards when the question involves the confidentiality of information within a psychotherapist-patient relationship. Those standards are both more diverse and more removed from the judiciary's experience than the rules of professional conduct for attorneys. Courts, however, should at least review the codes and consider possible applications to the psychotherapist-patient privilege.³⁴

The professional codes provide key information for courts. The codes suggest that mental health professionals are likely to maximize the benefit of the psychotherapist-patient privilege, combining awareness of the privilege with their professional obligation of confidentiality to enhance the trust and open communication component of therapy. The codes also convey the importance of defining the privilege quickly and clearly, since the professionals cannot fulfill their obligation to inform their patients of the extent of confidentiality in the relationship unless the parameters of the privilege are well-defined.

III. SELECTED PROBLEMS OF DEFINITION: SCOPE ISSUES

A. Relationships Covered

In *Jaffee*, the Court departed from the Proposed Rule's definition of the relationships covered by the privilege. Rule 504 extended the privilege to therapy conducted by licensed or certified psychologists and persons "authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction."³⁵ In *Jaffee*, the Court not only held that the privilege extended to "confidential communications made to licensed psychiatrists and psychologists," but also

32. NATIONAL ASS'N SOCIAL WORKERS, *supra* note 28, Standard 1.07(e).

33. *See, e.g., Patterson v. Illinois*, 487 U.S. 285, 301-02 (1988). In *Patterson*, the dissenters argued that "[t]he Court should not condone unethical forms of trial preparation by prosecutors." *Id.* at 301 (Stevens, J., dissenting). The majority found that privately interviewing a represented defendant did not violate the Sixth Amendment. Justice Stevens unsuccessfully argued that the prosecutor's actions breached the professional ethics established in the ABA's Code of Professional Conduct and that the Sixth Amendment threshold should be equally demanding.

34. For example, in *Jaffee*, the Court cited the professional codes to establish the proposition that an ethical therapist must disclose to the patient limits on confidentiality. *See Jaffee v. Redmond*, 518 U.S. 1, 12-13 & nn.11-12 (1996).

35. FED. R. EVID. 504(a)(2) (proposed Nov. 20, 1972).

held that “the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy.”³⁶ Constrained by the questions raised by the case, the Court could not define these categories of professionals for purposes of clarifying the federal common-law privilege. Therefore, one of the challenges of interpreting the privilege will be determining which psychotherapeutic relationships are covered.³⁷

1. Medically Trained Therapists

Even if the Court committed itself to a psychotherapist-patient privilege based on the blueprint of Proposed Rule 504, questions would arise concerning the relationships encompassed by the privilege. The scope of the psychotherapist-patient privilege is not self-evident, even in its core area of application. Specifically, the term “psychiatrist” invites argument over whether it encompasses only medical doctors with a certification in psychiatry or a broader range of physicians. As noted above, Proposed Rule 504 used broad language. As drafted, the Proposed Rule purported to protect communications with any medical doctor, provided that the doctor was engaged in diagnosing or treating a mental or emotional condition. At some point in their practices, most physicians address mental or emotional conditions, thus falling within the scope of the Proposed Rule.

In *Jaffee*, however, the Court stated only that “a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists.”³⁸ Because the question was not raised in *Jaffee*, it is unclear whether the Court intended to restrict the privilege to only those medical doctors licensed in psychiatry. That issue must be addressed in future cases.

The question of which physicians are included within the privilege has been a topic of long debate. In 1952, one commentator argued that the privilege should cover all medical doctors when they perform psychotherapy.³⁹ Critics of that position, however, contend that it accords too much expertise to general practitioners who possess little or no training in

36. *Jaffee*, 518 U.S. at 15.

37. This Article does not discuss the “reasonable belief” cases, where a patient mistakenly believes that the therapist falls within a privileged category. See generally 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5527 (1989). Such cases raise interesting questions concerning the complex relationship between state and federal law and how a patient might arrive at a reasonable but mistaken belief affecting privilege.

38. *Jaffee*, 518 U.S. at 15.

39. See Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U. L. REV. 384 (1952).

psychotherapy. Moreover, courts would have the difficult task of separating the aspects of the doctor's practice in which psychotherapy plays a role from those aspects in which it does not.⁴⁰

State courts interpreting state privileges have tackled the question of which aspects of medical practice fall within the psychotherapist-patient privilege. Some have settled on a middle position. In *Wiles v. Wiles*,⁴¹ the Supreme Court of Georgia considered whether a medical doctor who treated patients for psychiatric problems fell within the statutory term "psychiatrist." The state statute did not define the meaning of the term.⁴² The court examined the interpretation of the term in other states, noting that some statutes contained more specific language.⁴³ The court interpreted "psychiatrist" in the Georgia statute to mean "a person licensed to practice medicine, or reasonably believed by the patient so to be, who devotes a substantial portion of his or her time engaged in the diagnosis and treatment of a mental or emotional condition, including alcohol or drug addiction."⁴⁴

The Georgia approach strikes an appropriate balance. It recognizes that the division between areas of specialized medical practice is not always clear and that physicians often have expertise outside their certified areas of practice.⁴⁵ The federal privilege should likewise extend to communications to a licensed medical doctor only if the communications occurred in the course of psychotherapy and a substantial portion of the physician's practice is devoted to treating psychiatric, mental, or emotional problems. A physician specializing in those areas regularly calls on psychiatric training and is likely competent to provide psychotherapy. In providing psychotherapy, the physician must rely on an exchange of communications with the patient that requires the protection of the privilege. This professional relationship warrants the protection of the strong psychotherapist-patient privilege established in *Jaffee*.

40. See generally Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1960); CALIFORNIA L. REVISION COMM'N, TENTATIVE RECOMMENDATION AND STUDY OF UNIFORM RULES OF EVIDENCE, ART. V PRIVILEGES, *A Privilege Not Covered by the Uniform Rules—Psychotherapist-Patient Privilege*, 416, 431 (1964) (explaining difficulty in determining when privilege applies to physicians not specializing in psychotherapy and concluding that denial of privilege to such physicians will not hinder their professional activities).

41. 448 S.E.2d 681 (Ga. 1994).

42. See *id.* at 682-83 (construing GA. CODE ANN. § 24-9-21(5)).

43. See *id.* at 683 n.4.

44. *Id.* at 684.

45. See *id.* at 683-84.

2. *Social Workers*

Proposed Rule 504 adopted a safe course when it extended the psychotherapist-patient privilege only to medical doctors and licensed psychologists.⁴⁶ All fifty states license psychologists and require fairly uniform credentials. When the Court extended the privilege to social workers in *Jaffee*, it relegated to common-law development the assessment of a wide range of counseling relationships to determine whether they warrant privilege protection.

In *Jaffee*, the therapist was a counselor who had received a master's degree in social work in 1969, had accumulated twelve thousand hours of various types of psychotherapy and had helped supervise doctoral candidates from "several psychology programs."⁴⁷ She was licensed under an Illinois statute that required at least a master's degree, passage of a state examination, and completion of three thousand hours of "supervised clinical experience."⁴⁸ Nonetheless, upon review, the Court did not dwell on either her specific qualifications or the Illinois requirements. Instead, the Court cited the role of social workers in providing psychotherapy to less advantaged segments of society and the states' consensus in "explicitly extend[ing] a testimonial privilege to licensed social workers."⁴⁹ The Court also noted the shift to more extensive regulation of the social work practice since the promulgation of the proposed federal rules.⁵⁰ The majority therefore held that the rationale for the privilege required protection for communications made during psychotherapy with social workers as well as with psychiatrists and psychologists.⁵¹

As Justice Scalia pointed out in his dissent, however, the Court glossed over the range of professional credentials and roles that qualify a social worker for the state privilege. Professional requirements to obtain licensing as a social worker vary from state to state.⁵² Many states license and extend an evidentiary privilege to social workers who have little or no training beyond a bachelor's degree in social work.⁵³ Because the federal government

46. The Advisory Committee noted, "The requirement that the psychologist be in fact licensed, and not merely believed to be so, is believed to be justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories." FED. R. EVID. 504 advisory committee's note (proposed Nov. 20, 1972).

47. *Jaffee v. Redmond*, 51 F.3d 1346, 1350 n.3 (7th Cir. 1995).

48. *Id.* (construing 225 ILL. COMP. STAT. ANN. 20/9 (West 1994)).

49. *Jaffee v. Redmond*, 518 U.S. 1, 16-17 (1996).

50. *See id.* at 16 n.16.

51. *See id.* at 15-18.

52. *See id.* at 33-34 (Scalia, J., dissenting).

53. *See* 225 ILL. COMP. STAT. ANN. 20/9A (West Supp. 1998) (requiring social worker to have

does not independently license counselors, the reach of the privilege must be determined either by state licensing choices or by independent federal common-law standards of professional training. The federal courts should not tie the federal privilege to the state licensing or state privilege laws because state licensing statutes vary tremendously.⁵⁴ Moreover, the structure of state licensing schemes is driven by the states' interest in comprehensively regulating the profession. That interest extends to the full range of those who have social work training and not just to those whose training qualifies them as professional therapists. Many state statutes provide different licenses or

minimum of undergraduate degree in social work from accredited school, three years supervised professional experience and passage of state certification examination); IND. CODE ANN. § 25-23.6-5-1 (West Supp. 1998) (requiring for state certificate as social worker, minimum of bachelor's degree in social work from accredited school and either two years supervised social work experience or master's degree in social work and passage of state certification examination); IOWA CODE ANN. § 154C.3 (West 1997) (requiring minimum of bachelor's degree in social work from accredited school and passage of state examination); KAN. STAT. ANN. § 65-6306 (1992 & Supp. 1997) (requiring baccalaureate degree in social work from recognized and approved undergraduate program and passage of state exam to become licensed as "baccalaureate social worker"); MD. CODE ANN., HEALTH OCC. § 19-302 (1994 & Supp. 1997) (requiring for social work associate, baccalaureate degree from accredited college or university in program accredited by Council of Social Work Education); MASS. GEN. LAWS ANN. ch 112, § 131 (West 1997) (requiring for license as social worker, either baccalaureate degree in social work from accredited school, or baccalaureate degree from accredited school and equivalent of two years experience in social work setting); MICH. COMP. LAWS ANN. § 339.1605 (West 1992) (requiring, as condition for registration as social worker, baccalaureate degree and two years of social work experience as deemed acceptable to the state board); MINN STAT. ANN. § 148B.21 (West 1998) (requiring, as condition for social worker, baccalaureate degree from accredited program of social work, passage of state examination, and two years supervised experience); MISS. CODE ANN. § 75-53-13 (1997) (requiring for license as social worker, baccalaureate degree in social work from accredited school and passage of state examination); NEB. REV. STAT. § 71-1,319 (1997) (requiring for certification as social worker, baccalaureate or master's degree from "approved educational program" in social work); NEV. REV. STAT. ANN. § 641.B.22 (Michie 1997) (requiring for license in social work, "baccalaureate degree . . . in a related field, completion of 3000 hours of social work, and passage of an examination"); N.M. STAT. ANN. §§ 61-31-3, 61-31-9 (Michie 1978) (requiring for title of "baccalaureate social worker," bachelor's degree in accredited social work program and passage of written examination); OHIO REV. CODE ANN. § 4757.28 (West Supp. 1998) (requiring for license as social worker, baccalaureate degree from accredited school in social work, or closely-related program that is approved by state, and passage of state examination); S.D. CODIFIED LAWS § 36-26-15 (Michie 1997) (requiring for license as social worker, baccalaureate degree in social work or equivalent program from accredited school, two years experience in social work capacity and passage of state examination); TEX. HUM. RES. CODE ANN. § 50.016 (West 1997) (recognizing baccalaureate in social work from accredited school as minimum evidence of qualification for licensing decision); W. VA. CODE § 30-30-5(d) (1998) (requiring for social worker license, baccalaureate degree in social work from accredited program and passage of state examination, with exemption from B.A. requirement if continually employed for four years under licensed social worker and performed 36 hours of accredited social work study); WIS. STAT. ANN. § 457.08(1) (West 1998) (requiring for license as social worker, bachelor's degree from accredited school and passage of state exam); WYO. STAT. ANN. § 33-38-106(b) (Michie 1997) (requiring for certification as social worker, baccalaureate degree in social work from accredited program school, passage of state examination and designated clinical supervisor).

54. See *supra* note 53.

designations depending on the extent of the professional's training or experience. Because of this range of designations or licenses for social workers, the state privilege statutes vary in the credentials required for the protection of the social worker-client privilege and the extent of protection it provides.⁵⁵

Therefore, rather than adhering to the lines drawn by the states, the federal courts should exercise independent judgment when developing the federal common-law standard to gauge psychotherapists. Courts must determine whether the privilege applies only to therapists who have substantial training, including significant postgraduate education in therapeutic techniques, or whether the privilege should apply to social workers and other therapists with no more than basic undergraduate training who claim to provide therapeutic counseling.

Professional standards may assist courts in determining the scope of the privilege. The Clinical Social Work Federation's ("CSWF's") *Code of Ethics* exhorts social workers not to "encourage the unsupervised private practice of social work by those who fail to meet accepted standards of training and experience." CSWF's *Code of Ethics* defines the accepted credentials as

a master's degree in social work from a school of social work accredited by the Council on Social Work Education, or a doctoral degree in social work, that included a sequence of clinically oriented course work and supervised clinical field placement, plus at least 2 years or its part-time equivalent of post-master's or doctoral full-time supervision in direct-service clinical experience in a clinical setting.⁵⁶

Accordingly, courts should apply the privilege only to communications made during therapy guided by a professional who has the expertise to provide such therapy; only in that setting do the confidences clearly serve the goals of the privilege.

In determining the scope of the privilege, courts should not attempt to make ad hoc assessments of the competence of individual therapists to practice their trade. Not only would that task unduly burden courts, it would also undermine the predictability of the application of the privilege. Instead, courts should rely on accredited training programs to define the skill level of therapists covered under the privilege. Therefore, to serve the goals of the privilege, courts should adhere to the division recognized within the social work profession between professionals with graduate degrees and advanced

55. See *Jaffee*, 518 U.S. at 33-34.

56. CLINICAL SOCIAL WORK FEDERATION, *supra* note 28, Principle III(f) n.1.

training and others without such formal training.

3. *Other Types of Counselors*

In addition to determining who qualifies as a psychiatrist or psychologist and which social workers fall within the privilege, the federal courts will be asked to extend the privilege to other counseling relationships. Many state statutes extend privilege protection to other types of counselors. Most likely, the beneficiaries of these state privileges will seek similar protections in federal court. Indeed, some federal courts already have encountered arguments that the privilege recognized in *Jaffee* should apply to other relationships, such as those involving counselors with comprehensive training.

Some courts have rather casually extended the privilege to such relationships. For example, in *United States v. Lowe*,⁵⁷ the court concluded that the federal privilege applied to communications with a rape crisis counselor. The communications were protected under the state statute although the counselors were neither licensed psychotherapists nor social workers. With little discussion, the court held that the "policies expressed in *Jaffee*" supported a federal privilege for the communications.⁵⁸ Under the state law scheme considered in *Lowe*, one could become a counselor after only thirty-five hours of training.⁵⁹ Although the ease with which the court determined that a privilege existed may have resulted from the court's determination that the client had waived the privilege, the court should have addressed whether the particular counselors had an appropriate claim to protected relationships. Similarly, in *Greet v. Zagrocki*,⁶⁰ the court held that the privilege applied to records from the police department's Employee Assistance Program without any discussion by the court of the types of counselors who provided the therapy. In fact, in *Greet* the counselors in the program were peer counselors with no consistent level of training or claim to therapeutic expertise.⁶¹

In contrast, in *United States v. Schwensow*,⁶² the court adopted a more responsible approach and refused to extend the privilege to nonprofessionals. In *Schwensow*, the defendant argued that the privilege protected his

57. 948 F. Supp. 97 (D. Mass. 1996).

58. *Id.* at 99 (noting, however, that client can waive privilege).

59. *See id.* at 99.

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

61. *See* Telephone Interview with Employee of Philadelphia Police Department's Employee Assistant Program (August 1, 1997).

62. 942 F. Supp. 402, 408 (E.D. Wis. 1996).

statements to two hotline volunteers at an Alcoholics Anonymous office. The court, however, disagreed and refused to extend the privilege. It reasoned that the volunteers lacked the credentials to be counselors, the defendant did not approach them for counseling, and the communications in question could not be characterized as psychotherapy.⁶³ The court remarked that when the counselors encouraged the defendant to seek help, “theirs was support of a general, human nature, as opposed to something akin to advice a counselor would give to a patient.”⁶⁴

Even prior to *Jaffee*, courts sometimes grappled with the privilege status of different relationships. In *Ziemann v. Burlington County Bridge Commission*,⁶⁵ the magistrate was asked to extend a federal common-law privilege to communications to a marriage counselor. The court viewed the privacy interests in the relationship as identical to those protected by the psychotherapist-patient privilege.⁶⁶ Therefore, although not willing to independently recognize a marriage counselor privilege, the court held that communications with licensed marriage counselors would fall within the psychotherapist-patient privilege.⁶⁷

Furthermore, the status of communications made to other types of counselors deserves thoughtful evaluation. Given the strength of the privilege’s protection, courts should carefully distinguish between privileged and unprivileged relationships, guided by the rationale underlying *Jaffee*. The *Jaffee* Court concluded that therapeutic communications would be chilled if not privileged. The Court also noted that the therapeutic process provided sufficient benefit to both the client and society to warrant the loss in evidence that a privilege would entail.⁶⁸ In reaching those conclusions, the *Jaffee* Court was influenced by a number of factors. Most importantly, patients greatly benefit from psychotherapeutic counseling guided by a trained professional. The Court also stressed both the desirability of equalizing protection along economic lines and the importance of comity with state privilege law. Similar considerations should guide the common-law development of the privilege.

63. *See id.* at 407.

64. *Id.* The court also noted several other reasons for not applying the privilege: the defendant did not perceive the counselors to be psychotherapists; the counselors had no role in diagnosing or delivering treatment to defendant; and the defendant’s communication to the counselors did not relate to diagnosis or treatment. *See id.* at 407-08.

65. 155 F.R.D. 497 (D.N.J. 1994).

66. *See id.* at 506.

67. *See id.* (qualifying privilege by stating only confidential communications would be protected).

68. *See Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996).

First, and most importantly, *Jaffee* only contemplates a privilege for psychotherapeutic counseling. Therefore, if the counselor lacks sufficient training to provide psychotherapy, the privilege should not attach. By assuming that counseling delivered by those with limited or no training is equivalent to counseling delivered by professionals who have satisfied the training requirements of their field, one undervalues the educational benefit and theoretical foundation of the psychology and social work fields. In their article advocating the extension of the federal privilege to battered women's counselors, Michael Bressman and Fernando Laguarda argue that "[c]ounselors may be psychiatrists or psychotherapists, social workers, clergy, attorneys, or volunteers with significant life experience."⁶⁹ Their position, however, is too expansive. These groups should not be treated as interchangeable. For example, it would be irresponsible to assume that an attorney who is not offering legal advice, but rather is offering therapeutic counseling to a battered woman, has the training and skills comparable to a psychiatrist, psychologist, or master's level social worker. Likewise, courts should not assume that such lay counseling provides a benefit to the client and to society equivalent to that of professional counseling and sufficient to justify imposing a global privilege. To extend the psychotherapist-patient privilege to relationships in which the "professional" has such a limited claim to expertise is inconsistent with the Court's emphasis on the value of psychotherapy guided by a trained professional.

In arriving at its holding in *Jaffee*, the Court emphasized advances made in the social work profession since the promulgation of the proposed *Federal Rules of Evidence*.⁷⁰ The Court noted that states have increased their regulation of the profession and that an increasing number of states have extended a statutory privilege to social work counseling.⁷¹ Courts should also consider the extent and impact of self-regulation within the profession. Unlike many of the counseling groups that have received state privilege protection, psychiatrists, psychologists, and social workers have established bodies that accredit schools to educate the members of the profession. They have also adopted codes of conduct for members of the profession and maintain active professional organizations.⁷² The accreditation process assures a consistent level of training in therapeutic methods, making it more

69. Bressman & Laguarda, *supra* note 15, at 342; see also Anna Y. Joo, Note, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 266 (1995) (arguing that privilege should extend to sexual assault counselors regardless of their lack of professional training).

70. See 518 U.S. at 15-17.

71. See *id.* at 16-17.

72. See DEAN L. HUMMEL ET AL., LAW AND ETHICS IN COUNSELING 46-48 (1985).

likely that the professionals who graduate from these programs will advance the individual and societal goals of psychotherapy.⁷³

Social workers have also joined psychiatrists and psychologists in adopting a professional code with an obligation of confidentiality.⁷⁴ The ethical codes influence the therapeutic setting, restricting the therapist from revealing client confidences and thus imbuing the relationship with an assurance of confidentiality. Moreover, if the law does not privilege the client's communications and a court orders the therapist to reveal conversations with the patient, the professional's legal and ethical obligations may conflict. Thus, the therapist must choose between resisting a court order to reveal and violating an ethical obligation not to reveal the communications.⁷⁵

By contrast, the nonprofessional counselors who have obtained statutory privilege protection in a number of states typically possess far less training and are not subject to codes of conduct. The common bond among the nonprofessional counselors is merely the setting in which they counsel and a modicum of training. They do not constitute cohesive quasi-professional groups and consequently have not promulgated regulations to guide their counseling practice. Therefore, their sensitivity to the need for confidentiality, their ethical obligations, and their training to provide beneficial therapy are all of a lower order than those of professional therapists.

Second, the *Jaffee* Court sought to avoid distinctions that would privilege the communications of those who could afford more expensive psychotherapy, such as that with a psychiatrist or psychologist, while providing no shield for the communications of those engaged in more

73. For example, the accreditation standards for social work programs (at both the bachelor's and master's level) detail the subjects to be treated in the curriculum. See generally COMMISSION ON ACCREDITATION, COUNCIL ON SOCIAL WORK EDUC., HANDBOOK OF ACCREDITATION STANDARDS AND PROCEDURES (4th ed. 1994). One purpose of master's programs is to produce graduates "who can analyze, intervene, and evaluate in ways that are highly differentiated, discriminating, and self-critical." *Id.* at 137, § M5.7. The master's level curriculum must include "content on . . . human behavior and the social environment . . . social work practice, and field practicum." *Id.* at 138, § M61. It must further include "content about theories and knowledge of the human bio-psycho-social development" and "an understanding of the interactions among human biological, social, psychological, and cultural systems as they affect and are affected by human behavior," and students "must be taught to evaluate theory . . . and apply theory to client situations." *Id.* at 140-141, § M6.9.

74. See NATIONAL ASS'N SOCIAL WORKERS, *supra* note 28, Standard 2.02; CLINICAL SOCIAL WORK FEDERATION, *supra* note 28, Principle III; AMERICAN PSYCHIATRIC ASSN'S PRINCIPLES, *supra* note 26, § 4; ETHICAL PRINCIPLES OF PSYCHOLOGISTS, *supra* note 28, Standard 5.

75. See Amici Curiae Brief for the National Association of Social Workers, The Illinois Chapter of the National Association of Social Workers, The National Federation of Societies for Clinical Social Work, The Illinois Society for Clinical Social Work, and The American Board of Examiners in Clinical Social Work at *3, *Jaffee v. Redmond*, 518 U.S. 1 (1996) (No. 95-266).

affordable therapy with a social worker.⁷⁶ Extrapolating from this aspect of *Jaffee*, some argue that the privilege should extend to nonprofessional counselors because they provide an important source of counseling to poor clients.⁷⁷ Courts should receive this argument with caution. The decision in *Jaffee* that the privilege should protect communications with social workers does not rest solely on the likelihood that less advantaged clients will be counseled by social workers, but, as explored above, rests on the professional training of the therapist. A strong privilege can be justified only if the counseling promises to provide the therapeutic benefit on which the privilege rests. If courts extend protection to a range of nonprofessional counselors, they are likely to weaken the protection. Courts should not dilute the privilege merely to accommodate the circumstances into which society forces patients of limited means. By restricting the privilege to appropriate counseling relationships, courts may encourage governments to provide appropriately trained therapists where counseling is needed.

Third, the *Jaffee* Court expressed concern with comity, hoping to maintain some balance between state and federal privilege. But *Jaffee* did not signal an intention to allow the states to dictate the federal common law.⁷⁸ The development of a privilege through the common-law process greatly differs from the statutory development of privileges that typifies state law. Unlike a statutory privilege, courts cannot tailor federal psychotherapist-patient privilege to reflect particular counseling contexts and the variation in competence among those who provide counseling. It is a one-size-fits-all privilege. Therefore, if the federal privilege is extended to a crisis counselor with thirty-five hours of training or an abuse counselor whose training lies in her own life experience, the communications to those counselors will receive the same degree of protection as a patient's communications to a psychologist or psychiatrist who guides a course of therapy over an extended period of time. As the range of relationships covered by the privilege expands, the challenge in defining appropriate protection increases as well.

The patchwork of state privilege and confidentiality statutes demonstrates the difficulty of determining the appropriate reach of protection. For example, the Pennsylvania legislature established absolute privileges for communications to sexual assault counselors⁷⁹ and to domestic abuse counselors.⁸⁰ In defining these two privileges, however, the legislature

76. See 518 U.S. at 15-16.

77. See Bressman & Laguarda, *supra* note 15, at 342.

78. See generally *Jaffee*, 518 U.S. at 12-13.

79. See, e.g., 42 PA. CONS. STAT. ANN. § 5945.1 (West 1997).

80. See 23 PA. CONS. STAT. ANN. § 6116 (West 1997).

provided that the abuse counselor privilege terminates on the death of the abuse victim,⁸¹ but the sexual assault counselor privilege does not. In contrast to the privileges for communications with sexual assault counselors and domestic abuse counselors, the Pennsylvania psychotherapist-patient privilege⁸² is not absolute and does not apply in certain cases.⁸³ A federal common-law privilege cannot accommodate these sorts of variations in state law. Therefore, although the federal courts should consider state law in determining the parameters of the federal privilege, the desire for comity should not persuade courts that the federal privilege must shield all counseling relationships protected under state law.

4. *Supervised Personnel*

Under certain circumstances, the protection of the psychotherapist-patient privilege should extend to communications involving less trained personnel when they are supervised by highly trained therapists. Certainly, the privilege should extend to secretaries and such essential support personnel to whom the client may communicate sensitive information as the client seeks treatment.⁸⁴ In addition, the privilege should attach when therapy is conducted under supervision as part of a professional training program, but not when a nonprofessional conducts the therapy. Just as the attorney-client privilege shields communications to nonattorneys acting for the attorney, the psychotherapist-patient privilege should shield communications to those assisting the professionally trained psychotherapist.⁸⁵ The Proposed Rule provided that a communication would be confidential despite disclosure to third persons "participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family."⁸⁶ Most states extend similar protection to communications to those appropriately

81. *See id.*

82. *See* 42 PA. CONS. STAT. ANN. § 5944 (West 1997).

83. *See, e.g., In re Adoption of Embick*, 506 A.2d 455 (Pa. Super. Ct. 1986) (involving action to terminate parental rights); *see also, e.g., MINN. STAT. ANN. § 595.02(g)* (West 1997) (providing almost absolute privilege for nurses, psychologists, and social workers engaged in assessment or treatment but directing court to apply privilege for sexual assault counselors subject to balancing test).

84. If the client communicates the information without seeking psychotherapeutic help, however, the privilege should not apply. *See, e.g., Cavin v. State*, 855 S.W.2d 285, 288-89 (Ark. 1993) (statements to licensed psychiatric technician nurse working as emergency operator at mental health facility and to registered nurse at same facility were not privileged because patient not shown to be seeking treatment and did not ask for help).

85. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 503.07(1) (Joseph M. McLaughlin ed., 2d ed. 1997); *see also United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979) (extending privilege to investigator working for attorney).

86. FED. R. EVID. 504(a)(3) (proposed Nov. 20, 1972).

involved in the therapy.⁸⁷

Training in psychiatry, clinical psychology, and social work includes practice experience supervised by professionals as an essential component of the curriculum designed to teach psychotherapeutic techniques. There is no reason to exclude such psychotherapy sessions from the privilege's coverage. The goal of the communication, as well as the basic professional setting, is not markedly different merely because a student is involved. In addition, indigent clients may be more likely to receive therapy in settings where a highly credentialed professional supervises therapists who are earning their professional licenses. If the line is strictly drawn at licensed practitioners who hold a postgraduate degree and the requisite hours of supervised training, then the value of the privilege for the less fortunate might be diminished.⁸⁸

In contrast, when therapy is provided by one whose professional credentials do not independently warrant application of the privilege, the party asserting the privilege should have the burden of demonstrating sufficient supervision by a qualified professional so that the therapist can be regarded as an extension of the professional. In the case of *In re C.P.*,⁸⁹ the Supreme Court of Indiana appropriately rejected the argument that communications to a social worker fell under the physician-patient privilege because the social worker was supervised by a psychiatrist and was therefore "adjunct personnel" to the psychiatrist. The social worker consulted with the patient, diagnosed the patient, and prepared the treatment plan. The psychiatrist never saw the patient and only reviewed the plan in a brief consultation with the social worker, thereafter consulting with the therapist once or twice a year.⁹⁰ Acknowledging that the privilege would extend to those who assist physicians, the court concluded that the level of supervision in that case was insufficient.⁹¹ The court quoted Judge Weinstein:

If, for example, the psychiatrist works closely with a social worker

87. See, e.g., *Lovett v. Superior Court*, 250 Cal. Rptr. 25, 28-29 (Cal. Ct. App. 1988) (holding that participants in group therapy were present to further interests of treatment, and therefore privilege was not waived); *Cabrera v. Cabrera*, 580 A.2d 1227, 1233-34 (Conn. App. Ct. 1990) (holding that presence of family member at therapy session did not waive privilege).

88. See *State v. Gotfrey*, 598 P.2d 1325, 1329 (Utah 1979) (Stewart, J., concurring in part and dissenting in part). Justice Stewart criticized the majority for interpreting the psychologist-patient privilege not to extend to an unlicensed psychologist acting under the supervision of a licensed psychologist. He argued that its effect "is to make an invidious discrimination in the quality of psychological services available to a person who can afford to consult a private practitioner and the quality of service which lesser advantaged persons may receive when seeking the same services from a government sponsored institution." *Id.* at 1329.

89. 563 N.E.2d 1275 (Ind. 1990).

90. See *id.* at 1275.

91. See *id.* at 1278-79.

who takes part of a patient's history it should not matter whether the psychotherapist is present since the patient should treat the social worker with the same trust. Similarly, if a paraprofessional is working under *close* supervision and control of a professional he should be covered. In contrast, paraprofessionals who are left virtually unsupervised . . . are probably not considered by the patient as psychotherapists and they should not be included in the privilege.⁹²

The privilege should not apply, however, when the course of therapy is carried out by a nonprofessional who is not conducting the therapy as part of a supervised training program, whether or not the nonprofessional is supervised by a professional. For example, in *United States v. Lowe*, even though the state required that the rape crisis counselor be "under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist or psychotherapist,"⁹³ the court should not have extended the privilege to the untrained counselor.⁹⁴ The nonprofessional lacks the pedagogical foundation to give breadth and depth to the therapeutic process. Counseling guided by a nonprofessional, like sexual assault counseling, is likely focused on a single, narrow issue. This type of counseling does not warrant the protection of the common-law privilege. Without professional training, one cannot readily distinguish the interaction between the counselor and the counselee from a conversation with a concerned friend or family member. The tools available to the counselor functioning with such limited training do not as a matter of law provide such a great individual and societal benefit to warrant foreclosing access to the communications. Admittedly, the legislature may decide to provide protection to relationships that provide targeted counseling delivered by nonprofessionals if the legislature evaluates the structure within which such counseling is provided and deems it worthy of a privilege. But the legislature should not provide such protection under the psychotherapist-patient privilege.

B. Types of Information

Questions concerning the scope of the psychotherapist-patient privilege will inevitably arise. Proposed Rule 504 defined a privilege that attached to "confidential communications, made for the purposes of diagnosis or

92. *Id.* at 1278 (emphasis omitted) (quoting 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 504(5) (1989)).

93. 948 F. Supp. 97, 99 (D. Mass 1996).

94. *But see id.* at 99.

treatment of his mental or emotional condition.”⁹⁵ This definition describes the core area of the privilege, agreed upon by all jurisdictions and is also at the heart of *Jaffee*. The federal privilege is designed to foster and protect confidential communications made in a psychotherapeutic relationship.

Although the privilege clearly shields communications made for treatment, a question may arise whether the privilege extends to communications made for purposes of diagnosis. The goals of the privilege are best served by a predictable approach that protects communications made for either diagnosis or treatment. Both the Proposed Rule and most state statutes defining the privilege extend protection to statements made for diagnosis as well as treatment. The common-law privilege should similarly protect communications even when the goal of the exchange is diagnosis rather than treatment. In *Williams v. District of Columbia*,⁹⁶ the plaintiff sued the city and police office in connection with the death of her son and sought records of the police officer’s sessions with a psychiatrist from the Police and Fire Clinic. Despite its factual similarity to *Jaffee*, the plaintiff argued that her case was distinguishable because the sessions did not represent treatment but were for the nontreatment purpose of assessing whether the officer should return to active duty; she contended the sessions were therefore not privileged.⁹⁷ The court determined that the privilege attached to nontreatment counseling, concluding that the key question was whether the confidentiality of the sessions was compromised by the counselor’s required report to the authorities.⁹⁸ The court held that no confidentiality was waived by the police officer because the psychiatrist did not release information other than a yes or no recommendation for the officer to return to active duty.⁹⁹

The *Williams* court assumed that the privilege shields diagnosis as well as treatment. The court could have evaluated whether the nature of the sessions with the psychiatrist called the purposes of the privilege into play even though they did not entail true psychotherapy. Had the court explored whether the freedom to communicate freely in a diagnostic session is significant to the public and private interests underlying *Jaffee*, it likely would have concluded that open communication enhances the accuracy of the diagnosis. Moreover, the court would have concluded that the public and private interest in an accurate assessment of the police officer’s mental state

95. FED. R. EVID. 504(b) (proposed Nov. 20, 1972).

96. No. CIV.A.96-0200-LFO, 1997 WL 224921 (D.D.C. Apr. 25, 1997).

97. *See id.* at *2.

98. *See id.*

99. *See id.*

warranted enforcing the protection of the privilege.¹⁰⁰

If the therapist is engaged in some activity other than treatment or diagnosis, the privilege should not apply. In *Jaffee*, Justice Scalia posited that extending the privilege to social workers would burden courts with the difficult task of distinguishing communications made in psychotherapy from those made while the social worker was engaged in administration or community organizing.¹⁰¹ Justice Scalia, however, overstated the problem. Courts routinely decide whether a client approached a lawyer for legal advice or for an unprivileged matter, such as business advice.¹⁰² Further, the distinction between therapeutic and nontherapeutic contacts, such as counseling for assistance in housing problems or interaction within a community group working on a particular project, seems far easier to make.

When a party invokes the privilege to shield information outside the core area of diagnosis and treatment, the court must determine whether the information was intended to be confidential and is so integral to the therapeutic relationship that its disclosure would undermine the goals of the privilege. In *Siegfried v. City of Easton*,¹⁰³ the court held that the privilege did not shield a police officer's communications to a psychologist during the course of a prejob interview. The court pointed out that the officer knew when he met with the psychologist that the psychologist would report to the department and, therefore, could not have expected confidentiality.¹⁰⁴

Usually, information outside the relationship is unrelated to the purpose of the privilege. For example, the privilege does not apply to a patient's statement to a third party not acting for the psychotherapist. In *Pfeifer v. State Farm Insurance Co.*,¹⁰⁵ the defendant argued that the privilege applied to his personal journal. Although the journal was kept at his psychiatrist's request,

100. One can argue that an officer who is aware that the session will culminate in a job-related recommendation might not be fully candid and, therefore, that the privilege's goal of fostering open communication would not be served. Such an ad hoc assessment of the role of the privilege in relation to a particular therapist-patient interaction would produce unpredictable and possibly inconsistent applications of the privilege. To avoid this undesirable effect, courts should look broadly at whether the privilege should cover diagnosis and eschew ad hoc assessment of the privilege's impact in the particular setting.

101. See *Jaffee v. Redmond*, 518 U.S. 1, 30 (1996) (Scalia, J., dissenting).

102. See 3 WEINSTEIN & BERGER, *supra* note 85, § 503.06(c). Although attorneys may give their clients advice on a broad spectrum of topics, only the distribution of legal expertise is privileged. Thus, courts facing assertions of the privilege must sort through lawyer-client communications and privilege only those communications that are "predominantly legal" in nature. See *id.*; see also *Super Tire Eng'g v. Bandag Inc.*, 562 F. Supp. 439, 441-42 (E.D. Pa. 1983) (assessing discovery request, court granted privilege to documents used to "gain or provide legal assistance" and allowed discovery of those which were merely business-related communications from lawyer).

103. 146 F.R.D. 98, 101-02 (E.D. Pa. 1992).

104. See *id.* at 101.

105. No. CIV.A.96-1895, 1997 WL 276085, at *1 (E.D. La. May 22, 1997).

it was merely a vehicle of introspection not written as a means of communication with his psychiatrist.¹⁰⁶ Disclosure of the journal would not expose confidential communications or compromise the therapeutic relationship, and the court easily concluded that the privilege did not apply.¹⁰⁷

1. Patient-Identifying Information

Courts have struggled over whether patient-identifying information falls within the scope of the privilege. In some cases, the party seeking information requests only the identity of the psychotherapist's patient, possibly with some additional information, such as the dates or frequency of the patient's appointments. When a request for disclosure does not involve the details of communications to the psychotherapist, the information falls outside the core area of the psychotherapist-patient privilege. Nevertheless, given the chilling effect such disclosure may have on psychotherapy, courts should extend some protection to this information.

In 1960, Professor Ralph Slovenko wrote that "a person in psychotherapy, by and large, visits his psychiatrist with the same secrecy that a man goes to a bawdy house."¹⁰⁸ Although a few courts disagree with Professor Slovenko and have argued that no stigma attaches to receiving psychotherapy,¹⁰⁹ there is ample evidence to the contrary.¹¹⁰ Therefore, patient-identifying

106. *See id.*

107. *See id.*

108. Slovenko, *supra* note 40, at 188 n.46.

109. *See, e.g.,* *Flora v. Hamilton*, 81 F.R.D. 576, 579 (M.D.N.C. 1978) (finding no stigma attaches to those receiving psychological treatment); *Reid v. Moore-McCormack Lines, Inc.*, 49 F.R.D. 91, 93-94 (S.D.N.Y. 1970) (holding that revealing decedent's psychotherapy treatment would not tarnish his memory because society finds no disgrace in mental illness).

110. *See Wisconsin Psychiatric Serv. Ltd. v. Commissioner*, 76 T.C. 839, 845 (1981) (noting that "some people still view psychiatric patients as somehow 'tainted' by their visits to appropriate medical specialists"); *Scull v. Superior Court*, 254 Cal. Rptr. 24, 26, 29 (Cal. Ct. App. 1988) (holding that protection of patient identity is essential because society stigmatizes those seeking psychiatric assistance and without the privilege, those in need will be discouraged from seeking it); *McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754, 758-59 (Iowa 1993) (holding that disclosure of mental health records would violate patient's right to privacy under state constitution in part "because in some circles a social stigma still attaches to anyone who merely seeks the help of [mental health] professionals"); *Frederick R.C. v. Helene C.*, 582 N.Y.S.2d 926, 928 (N.Y. Sup. Ct. 1992) (protecting identity of patient because "society tends to place a stigma upon mental disease"); *Weisbeck v. Hess*, 524 N.W.2d 363, 365 (S.D. 1994) (holding that if patient identity is not protected, invasion of patient privacy is even greater due to "the stigma that society often attaches to mental illness" (citing *Scull*, 254 Cal. Rptr. at 26)); Ellen S. Soffin, Note, *The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 DUKE L.J. 1217, 1227-29 (arguing for patient-identity privilege to protect patients from "powerful social stigma . . . associated with psychiatric treatment" and noting that such stigma can severely damage careers and reputations of public figures).

information should be protected. As expressed in *Jaffee*, the goal of the psychotherapist-patient privilege is to encourage interaction in therapy that will benefit both the individual and society. If, however, the patient knows that her mere participation in psychotherapy may be disclosed, she may forego therapy altogether.¹¹¹ A strong privilege would extend to this information.

The federal courts that applied the psychotherapist-patient privilege before it was recognized by the Supreme Court took the position that the privilege does not shield patient-identifying information.¹¹² In the case of *In re Zuniga*,¹¹³ the Sixth Circuit established the now prevailing approach of the federal courts. In *Zuniga*, the court considered whether the psychotherapist-patient privilege existed and, if so, whether it shielded the identity of the patients of two psychiatrists under investigation for insurance fraud. In addition to the identity of the patients, the grand jury sought the dates of their appointments and the length of each treatment session.¹¹⁴ The court held that the privilege did not cover the information sought by the grand jury. Although the court acknowledged the harm threatened by such disclosure, it considered society's interest in the evidence to be paramount.¹¹⁵

111. The possibility that the threat of disclosure may influence treatment decisions was previously recognized by the Supreme Court. *See Whalen v. Roe*, 429 U.S. 589, 600 (1977) (holding New York's drug-reporting statute constitutional despite threat of disclosure).

112. *See, e.g., United States v. Moore*, 970 F.2d 48 (5th Cir. 1992) (holding that even if court recognized privilege, it would not apply to patient-identifying information requested to determine psychiatrist's tax liability); *United States v. Lowe*, 948 F. Supp. 97, 101 (D. Mass. 1996) (holding date of contact as well as length and mode of communication was not privileged); *In re Doe*, 97 F.R.D. 640, 645-46 (S.D.N.Y. 1982) (ordering discovery of records indicating patient identity and other nonprivileged information).

113. 714 F.2d 632 (6th Cir. 1983).

114. *See id.* at 640. The court stated as an alternate basis for its ruling that the patients had waived the privilege to the information by providing the information to Blue Cross/Blue Shield. *See id.*

115. The court stated:

It may be true that some persons would be hesitant to engage the services of a psychiatrist if confronted with the prospect that the mere fact of their treatment might become known. This consideration is not insubstantial. However, as indicated, the interest of society in obtaining all evidence relevant to the enforcement of its laws commands a high priority.

In weighing these competing interests, the Court is constrained to conclude that, under the facts of this case, the balance tips in favor of disclosure.

Id.

The *Zuniga* court may have been influenced by the context of the case. The grand jury investigation targeted the psychiatrists, not the patient. Thus, *Zuniga* appears to be one of the cases in which a possibly dishonest therapist seeks to employ the privilege to frustrate a government investigation.

The majority of federal courts that have since considered the question have cited and followed *Zuniga*. *See, e.g., United States v. Moore*, 970 F.2d 48 (5th Cir. 1992) (declining to recognize psychiatrist-patient privilege in tax case, and citing *Zuniga* for proposition that privilege would not shelter patient identifying information sought by Internal Revenue Service); *In re August*, 1993

In assessing the privileged status of patient-identifying information, the federal courts analogize to the rules governing attorney-client privilege, which, as a general rule, does not shield the identity of the attorney's client.¹¹⁶ In drawing analogies between the two rules, however, the federal courts ignore the differences in the rationale for the rules and the reasons for exceptions to the rules.

The rationale for the attorney-client privilege is that it fosters an open flow of communication as the client seeks legal advice from the attorney.¹¹⁷ Revealing the identity of the client does not normally disrupt the flow of confidential communications between the attorney and the client or reveal the content of those communications. Consulting a lawyer normally generates no social stigma or other negative social impact for the client. All the federal circuits, however, recognize the exceptional cases where the mere act of identifying the client would harm the interests protected by the privilege. In those cases, the courts protect the identity of the client.¹¹⁸ For instance, if the publication of a client's identity would disclose a confidential motive for seeking legal advice, the privilege's function of encouraging frank discourse with legal counsel is preserved only by requiring the protection of identity. The purpose of the privilege is therefore served in some situations by including identity within the scope of its coverage.¹¹⁹

Regular Grand Jury (Clinic Subpoena), 854 F. Supp. 1375 (S.D. Ind. 1993) (citing *Zuniga* and holding that harm threatened by disclosure of patient-identifying information did not warrant privilege protection); *In re Grand Jury Subpoenas Duces Tecum* Dated Jan. 30, 1986, 638 F. Supp. 794 (D. Me. 1986) (rejecting psychiatrist's claim of privilege and enforcing grand jury subpoena seeking patient-identifying information in medicaid fraud investigation).

116. See 3 WEINSTEIN & BERGER, *supra* note 85, § 503.12(4)(a).

117. See *id.* § 503.3.

118. See generally Soffin, *supra* note 110, at 1240-43 (describing exceptions to attorney-client privilege). See, e.g., *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). In *Baird*, several clients sought legal advice over concerns that they may have underpaid taxes. To protect the clients in case of a future audit, the attorney anonymously mailed a lump-sum check to the IRS. The privilege was then successfully asserted against an IRS subpoena requesting that the attorney reveal his client's identities. The court found that revealing the identities would reveal the contents of confidential attorney-client conversations, namely, the motive for seeking legal advice and the nature of the legal dilemma. See *id.* at 630. Denying this protection would construct a disincentive for consulting legal counsel in similar situations.

119. See John R. Przepyszny, Survey Project, *Asserting the Attorney-Client Privilege: Client Identity, Fee Information, Whereabouts, and Documents*, 3 GEO. J. LEGAL ETHICS 113 (1989) (examining situations where enforcing purpose of attorney-client privilege requires protection of client identity); Stephen A. Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, IOWA L. REV. 811, 820-824 (1981) (same); see also *United States v. Liebman*, 742 F.2d 807, 810 (3d Cir. 1984) (holding client identity privileged because revealing identity "when combined with the substance of the communication . . . that is already known" would reveal "all there is to know about a confidential [attorney-client] communication" and eviscerate privilege); *NLRB v. Harvey*, 349 F.2d 900, 904-05 (4th Cir. 1965) (holding that client identity is privileged when content of privileged communication has already been revealed and identifying client would therefore completely disclose

In contrast to seeking legal advice, seeking psychotherapy continues to stigmatize the patient, despite persistent efforts to better educate the public on the nature of mental and emotional illnesses.¹²⁰ When the *Jaffee* Court established the psychotherapist-patient privilege, it sought to foster open interaction in psychotherapy,¹²¹ acknowledging that therapy provides a significant benefit to society as well as to the individual patients. If revealing a patient's identity discourages other prospective patients from seeking psychotherapy, the goal of the privilege will be frustrated. Moreover, some courts allow disclosure of information well beyond just the patient's identity. For example, in the case of *In re Doe*,¹²² the court held that because "[t]he function of a psychotherapist-patient privilege is to protect the intensely personal communications individuals make in the course of therapy," the privilege would not extend to files that contained "only general medical histories, descriptions of the patients' sleep habits and problems and surveys of various factors (e.g., 'stressful life circumstances') affecting the patients' ability to sleep."¹²³ Instead of allowing such broad disclosures, the federal courts should construe the privilege to cover patient-identifying information as well as the contents of communications within the therapeutic relationship.

A number of state courts recognize the chilling effect of disclosing even the identity of a psychotherapist's patients and therefore interpret "confidential communication" to include patient identity. In some cases, courts appear to give absolute privilege protection to patient-identifying information. In *Weisbeck v. Hess*,¹²⁴ the plaintiff, an aggrieved husband, sued his ex-wife's former therapist for breach of fiduciary duty, fraud, and seduction. The plaintiff sought the therapist's patient files to investigate whether the therapist had engaged in similar relationships with other female

confidential attorney-client discussions); *D'Alessio v. Gilberg*, 617 N.Y.S.2d 484, 486 (N.Y. Sup. Ct. 1994) (holding that court could not compel attorney to reveal name of client who contacted him regarding involvement in hit-and-run accident).

120. See Bruce J. Winnick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudential View*, 50 U. MIAMI L. REV. 249, 259 (1996) ("Although there have been many efforts to destigmatize mental illness, sadly such stigma continues.").

121. See *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) ("Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.").

122. 97 F.R.D. 640 (S.D.N.Y. 1982).

123. *Id.* at 645; see also *Commonwealth v. Kobrin*, 479 N.E.2d 674, 681 (Mass. 1985) (allowing access to records "documenting the times and lengths of patient appointments, fees, patient diagnoses, treatment plans and recommendations, and somatic therapies"); Richard G. Taranto, *The Psychiatrist-Patient Privilege and Third-Party Payers: Commonwealth v. Kobrin*, 14 L. MED. & HEALTH CARE 25 (1986).

124. 524 N.W.2d 363 (S.D. 1994).

patients, but the South Dakota court refused disclosure.¹²⁵ Likewise, in *Smith v. Superior Court*,¹²⁶ the court refused to allow access to the names of the psychologist-husband's patients in a divorce action. The court drew an analogy to cases enforcing the physician-patient privilege to prevent disclosure of patient identity when to do so would reveal the medical problem for which the patient sought treatment. Addressing the mental health context, the court remarked:

When a patient seeks out the counsel of a psychotherapist, he wants privacy and sanctuary from the world and its pressures. The patient desires in this place of safety an opportunity to be as open and candid as possible to enable the psychotherapist the maximum opportunity to help him with his problems. The patient's purpose would be inhibited and frustrated if his psychotherapist could be compelled to give up his identity without his consent. Public knowledge of treatment by a psychotherapist reveals the existence and, in a general sense, the nature of the malady.¹²⁷

Although the courts in *Weisbeck* and *Smith* may have been swayed by the parties' ability to obtain the evidence they needed without access to the allegedly privileged information, neither court expressly balanced the need for the evidence against the role of the privilege. Both framed the protection as absolute.

The better approach is to use a balancing test and, if warranted, order disclosure of patient-identifying information. The majority of courts employ a balancing test to determine whether to compel disclosure of patient-identifying information.¹²⁸ In cases applying *Smith*, the California courts require disclosure of patient identity despite a claim of privilege if "the government seeks to promote a compelling interest and . . . there is no less intrusive means of accomplishing its purpose."¹²⁹ For example, in the *County of Alameda v. Superior Court*,¹³⁰ the court upheld a disclosure order because the plaintiff could not otherwise acquire information critical to her suit against the county. In the underlying suit, the plaintiff, a mental patient,

125. See *id.* at 366. But see Molly E. Slaughter, Note, *Misuse of the Psychotherapist-Patient Privilege in Weisbeck v. Hess: A Step Backward in the Prohibition of Sexual Exploitation of a Patient by a Psychotherapist*, 41 S.D. L. REV. 574 (1996) (arguing that Supreme Court of South Dakota "failed to account for the seriousness of the misconduct and overestimated the protection provided by the psychotherapist-patient privilege").

126. 173 Cal. Rptr. 145 (Cal. Ct. App. 1981).

127. *Id.* at 148.

128. See, e.g., *Wisconsin Psychiatric Serv. v. Commissioner*, 76 T.C. 839, 845-46 (1981).

129. *Scull v. Superior Court*, 254 Cal. Rptr. 24, 27 (Cal. Ct. App. 1988).

130. 239 Cal. Rptr. 400 (Cal. Ct. App. 1987).

alleged that the county was liable because she was raped by a fellow patient while in the county hospital. The county invoked the privilege to prevent discovery of the identity of the male patient found with plaintiff at the time of the alleged rape.¹³¹ The court concluded that the plaintiff could not corroborate her allegations against the county without the information she sought.¹³² Therefore, given the need for and importance of the evidence, limited disclosure was appropriate. Similarly, in *Hospital Corp. of America v. Superior Court*,¹³³ the Arizona court required disclosure despite the privilege because the juvenile defendant in a delinquency proceeding had no other means of obtaining information critical to his defense. In *Frederick R.C. v. Helene C.*,¹³⁴ the New York court decided against disclosure after applying a balancing test to determine that the plaintiff in a divorce action had not overcome the privilege interest of the patients of her husband's psychologist. Given the evidence already available to the plaintiff, the court concluded that "the injury that would result to the relation which the privilege seeks to foster and protect would be greater than the benefit it would gain from the 'correct disposition of the litigation.'"¹³⁵ The court therefore refused to order disclosure of information relating to the identity of the patients.¹³⁶

A balancing test allows the court to determine whether disclosure would cause the harm addressed by the privilege or whether the goals of the privilege can be served without frustrating litigation fairness. Given the competing interests in disclosure and privacy, courts often seek a middle ground that serves both sets of interests.¹³⁷ Under a balancing approach, the court can factor in the parties' intransigence and the availability of a solution that provides the essential information with the least loss of privacy.

In addition, the court may determine that the interests protected by the privilege are only marginally implicated in a given discovery request. For example, some health care providers have advanced the privilege to block plaintiffs' access to data concerning other patients who may have experienced similar treatment.¹³⁸ Under those circumstances, the court is

131. *See id.* at 401.

132. *See id.* at 403, 406.

133. 755 P.2d 1198, 1200-02 (Ariz. Ct. App. 1988).

134. 582 N.Y.S.2d 926, 928-29 (N.Y. Sup. Ct. 1992).

135. *Id.* at 929.

136. *See id.*

137. In *Frederick R.C.*, the court noted that the parties had not offered any "alternative or compromise" solution. *Id.* In *Smith*, the court reported that the trial court "urged the parties to work between themselves and find a compromise that would both preserve the patients' anonymity and secure for the wife more detailed information regarding petitioner's income." *Smith v. Superior Court*, 173 Cal. Rptr. 145, 146 (1981).

138. *See, e.g., N.O. v. Callahan*, 110 F.R.D. 637, 643-46 (D. Mass. 1986) (defendant mental

likely to grant access to the information both because the data can be provided with little loss of patient privacy by redacting the records and because the court may be skeptical about the motive of the defendant who asserted the privilege.¹³⁹

Similarly, in some divorce cases, a psychotherapist-spouse has advanced the privilege to defeat an effort to use patient information to determine income.¹⁴⁰ Again, the interest in advancing the privilege appears to be self-protection by the psychotherapist rather than patient privacy. In such cases, the balance tips in favor of discovery, and the court should attempt to provide the necessary information without undermining the purpose of the privilege.

Similar issues arise in criminal investigations where the privilege has been asserted to frustrate government efforts to investigate fraud or other wrongdoing by mental health providers.¹⁴¹ Courts can best resolve these cases by employing a balancing test rather than taking the absolute position that the privilege does not apply to patient-identifying information. In these cases, the balance of interest is likely to prompt courts to circumvent the privilege. Courts reason that the patient is rarely involved in the dispute; instead, the privilege is asserted by the alleged wrongdoer in an obvious attempt to frustrate the litigation or investigation. Moreover, the government has a strong countervailing interest in pursuing the investigation. Thus, in *Zuniga*, rather than adopting an absolute position, the court should have ordered production under a balancing approach because the information

health facility asserted evidentiary privileges relating to privacy and release of personal data to prevent disclosure of nonparty patient records); *Parkson v. Central DuPage Hosp., Inc.*, 435 N.E.2d 140, 141-42 (Ill. Ct. App. 1982) (defendant hospital in medical malpractice case asserted privilege for nonparty patients to prevent discovery of records of those treated with particular drug).

139. See *Terre Haute Reg'l Hosp., Inc. v. Trueblood*, 600 N.E.2d 1358, 1362 (Ind. 1992) (allowing discovery of nonparty medical records in face of physician-patient privilege claim because redaction of records provided adequate protection). But see *Parkson*, 435 N.E.2d 140. In *Parkson*, the Illinois court enforced the state's physician-patient privilege to bar access to records of other patients who had received the same medication that the plaintiffs alleged caused their injury. The court rejected the plaintiffs' argument in support of the trial court's order allowing the hospital to strike patients' names and identifying numbers from the records, expressing fear that the requested files would still contain information that would identify the patient. See *id.* at 144. *Parkson* represents an overly strict enforcement of the privilege, threatening the ends of justice while shielding information unnecessarily.

140. See *Smith*, 173 Cal. Rptr. 145; *Frederick R.C.*, 582 N.Y.S.2d 926.

141. See *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992) (asserting privilege in response to IRS subpoena requesting patient identity and amount each owed); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983) (asserting privilege to prevent discovery of patient identity and appointment information in insurance fraud investigation); *In re August*, 1993 Regular Grand Jury (Clinic Subpoena), 854 F. Supp. 1375 (S.D. Ind. 1993) (asserting privilege during grand jury investigation of medical clinic's billing practices); *In re Grand Jury Subpoenas Duces Tecum* Dated Jan. 30, 1986, 638 F. Supp. 794 (D. Me. 1986) (asserting privilege in medicaid fraud investigation); *In re Doe*, 97 F.R.D. 640 (S.D.N.Y. 1982) (asserting privilege during government investigation of medical corporation suspected of issuing illegal prescriptions).

concerning patient appointments was critical to the determination of whether the therapist submitted falsified bills. *In re Doe*¹⁴² illustrates a better approach. In *Doe*, the court concluded that the patients' files were crucial to the government's investigation of the psychiatrist's alleged drug selling and ordered disclosure of the files with patient names redacted.¹⁴³

Just as it should protect disclosure of the patient's identity, the privilege should also shelter the information that an identified person is a psychotherapy patient and is undergoing therapy or treatment for a particular reason or illness. The rationale is identical. To disclose the fact of treatment would stigmatize the patient. In *City of Alhambra v. Superior Court*,¹⁴⁴ the court refused to order disclosure of treatment information, concluding that "to divulge the fact of psychiatric treatment" would "divulge more about the nature of the condition for which he sought treatment" than was required under the California Evidence Code.¹⁴⁵ Therefore, subject to the same balancing test, the privilege should normally prevent discovery of whether a party has received psychotherapy for a particular purpose.¹⁴⁶

2. Treatment Information Without Identifying Data

A variant of the problem of patient identity is the request for treatment information divorced from identity. For example, if a plaintiff needs information concerning those treated with the same medications, the treatment information can be disclosed without associating it with the patient's name. The treating professions have considered this problem over time because of the professional need to share information with large groups for educational purposes. Consequently, the ethical codes express the professions' sense of a fair balance. If a professional disperses research information, the ethical codes require the professional to adequately disguise all patient-identifying information.¹⁴⁷ This compromise accommodates both

142. 97 F.R.D. 640 (S.D.N.Y. 1982).

143. *See id.* at 643-44.

144. 168 Cal. Rptr. 49 (Cal. Ct. App. 1980).

145. *Id.* at 52.

146. *But see infra* text accompanying notes 160-87 (discussing circumstances in which patient's posture in litigation results in waiver of privilege).

147. The American Psychiatric Association's *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* states, "Clinical and other materials used in teaching and writing must be adequately disguised in order to preserve the anonymity of the individuals involved." *See* AMERICAN PSYCHIATRIC ASS'N PRINCIPLES, *supra* note 26, § 4. Similarly, the American Psychological Association's *Ethical Principles of Psychologists* states, "Psychologists do not disclose in their writings, lectures, or other public media, confidential, personally identifiable information concerning their patients . . . unless the person . . . has consented in writing or unless there is other ethical or legal authorization for doing so." *See* ETHICAL PRINCIPLES OF PSYCHOLOGISTS, *supra* note

the professional need for research data and patient concerns regarding privacy. Analyzing this problem in *Lora v. Board of Education*,¹⁴⁸ Judge Weinstein concluded that the plaintiffs could get anonymous records of school students through discovery in their suit against the Board of Education. Judge Weinstein noted the medical profession's practice of sharing case histories in a manner designed to maintain patient confidentiality but permit sharing of educational data.¹⁴⁹ He suggested a number of precautions to protect the patient's interest:

In addition to requiring that all identifying data be redacted and the files coded, the court may order that the information they contain be used solely for the purpose of the pending litigation; strict confidentiality may be enforced under penalty of contempt; the number of copies to be made of the documents may be rigidly regulated; files submitted to the court may be ordered sealed; and all material may be required to be returned to the defendants immediately upon conclusion of this suit.¹⁵⁰

Courts should be able to enforce such requests of information separated from the patient's identity, requiring that the records be redacted to protect the identity of the patient.¹⁵¹

IV. EXCEPTIONS

In *Jaffee*, the Court declined to define the parameters of the newly recognized privilege or address any of the possible exceptions to the protection.¹⁵² Proposed Rule 504 provided three exceptions to the psychotherapist-patient privilege: in proceedings for hospitalization, in

28, Standard 5.08(a).

148. 74 F.R.D. 565 (E.D.N.Y. 1977).

149. *See id.* at 569.

150. *See id.* at 582-83; *see also* *Wei v. Bodner*, 127 F.R.D. 91, 97-98 (D.N.J. 1989) (applying *Lora's* approach to records allegedly shielded by physician-patient privilege and ordering disclosure of redacted records); *N.O. v. Callahan*, 110 F.R.D. 637, 646-47 (D. Mass. 1986) (applying approach outlined in *Lora* to medical records privileged under state law and ordering disclosure of redacted records); *In re Doe*, 97 F.R.D. 640, 645 (S.D.N.Y. 1982) (ordering disclosure of redacted records); *State ex rel. Lester E. Cox Med. Ctr. v. Keet*, 678 S.W.2d 813, 815 (Mo. 1984) (ordering disclosure of redacted records).

151. For example, in *State v. McGriff*, 672 N.E.2d 1074, 1075-76 (Ohio Ct. App. 1996), the court, applying the state's physician-patient privilege, permitted disclosure of patient records in prosecuting a doctor but required that the patients' names and addresses be redacted.

152. *See* 518 U.S. 1 (1996). The Court remarked, "it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'" *Id.* at 18 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981)).

examinations conducted pursuant to court order, and in litigation if the patient's mental condition is an element of the patient's claim or defense.¹⁵³ Courts will likely recognize these three exceptions as part of the federal common law. The most troublesome exception to apply, the patient-litigant exception, is discussed below.

Litigants may advocate recognition of yet other exceptions. Although the Court explicitly rejected the balancing test under which the privilege would give way when outweighed by greater public interests, there are likely circumstances under *Jaffee* in which courts must balance interests to determine the extent of protection derived from the privilege. Specifically, courts may turn to a balancing test to define the exceptions to the privilege.

Prior to *Jaffee*, some courts used a balancing test to determine whether to recognize an exception to the privilege. For example, in *United States v. Burtrum*,¹⁵⁴ the defendant asked the court to recognize the psychotherapist-patient privilege and exclude testimony by his psychotherapist. The court refused to recognize a privilege in criminal child sexual abuse cases, reasoning that the interests weighing on the side of access to information in such cases compelled the admission of the evidence.¹⁵⁵

The specific position taken in *Burtrum* is inconsistent with the strong psychotherapist-patient privilege established in *Jaffee*. *Burtrum* represents an unfortunate decision to set aside the privilege because the court viewed the prosecution for sexual abuse of children as so significant that it would not enforce the privilege and make the attendant evidentiary sacrifice. That decision is risky. Courts can easily sacrifice privilege protection when the stakes are high, but to do so overlooks the societal benefit of granting abusers or other offenders protected access to psychotherapy. Nevertheless, *Burtrum* illustrates the use of balancing to determine an exception to the privilege.

Similarly, in *United States v. Hansen*,¹⁵⁶ the court applied a balancing test despite *Jaffee*'s rejection of balancing. In *Hansen*, the court concluded that the defendant's need for evidence outweighed the benefit of the privilege.¹⁵⁷ The patient was dead and the defendant, charged with his murder, claimed self-defense.¹⁵⁸ The court concluded that the victim's "mental and emotional condition" was "central" to the defense and the interest in shielding the information was slight because the victim was deceased.¹⁵⁹

153. See FED. R. EVID. 504(d)(3) (proposed Nov. 20, 1972).

154. 17 F.3d 1299 (10th Cir. 1994).

155. See *id.* at 1302.

156. 955 F. Supp. 1225 (D. Mont. 1997).

157. See *id.* at 1226.

158. See *id.* at 1225-26.

159. *Id.* at 1226. The court also noted that its resolution of the issue was "consistent with the

This Article does not address the range of exceptions and situations that may prompt courts to balance the purposes of the psychotherapist-patient privilege against other interests. Instead, this Article examines only the contours of the patient-litigant exception.

A. Patient-Litigant Exception

The patient-litigant exception included in Proposed Rule 504 represents the prevailing rule in the states¹⁶⁰ and has been recognized as part of the federal common-law psychotherapist-patient privilege.¹⁶¹ The consensus is that "[t]o allow a [party] to hide . . . behind a claim of privilege when that

approach taken by the states, most of which allow for disclosure of privileged information under the facts presented here." *Id.*

Questions of posthumous application of privilege raise difficult questions. *See, e.g., In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997) (declining to enforce attorney-client privilege after death of client), *rev'd*, 118 S. Ct. 208 (1998) (holding attorney-client privilege extends beyond death); *In re Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998) (holding that statutory psychotherapist-patient privilege was overcome by need for information concerning patient's murder). These questions are beyond the scope of this Article.

Hansen should not be read as signaling that criminal defendants can readily circumvent the psychotherapist-patient privilege. Criminal defendants have tried various avenues to gain access to privileged information. *See generally* Alfred Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173 (1980); Peter Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial,"* 14 U. MICH. J.L. REFORM 371 (1981); Robert Weisberg, Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privilege*, 30 STAN. L. REV. 935 (1978). In *United States v. Haworth*, 168 F.R.D. 660 (D.N.M. 1996), the defendants argued that the confrontation clause overcame the psychotherapist-patient privilege and that they were therefore constitutionally entitled to discover the records of a government witness's psychotherapist. The court easily rejected the argument, citing precedent establishing that while the right to confrontation may permit the defendant to employ information on cross-examination, it does not translate into a discovery right. *See id.* at 661-62.

160. The patient-litigant exception withstood constitutional challenge in *Caesar v. Mountanos*, 542 F.2d 1064, 1067-68, 1070 (9th Cir. 1976), and *In re Lifschutz*, 467 P.2d 557 (Cal. 1970).

161. *See, e.g., Rankin v. Liberty Mut. Ins. Co.*, No. 94-1850, 1995 WL 131390 (1st Cir. Mar. 27, 1995) (holding that plaintiff placed her mental state in issue when she alleged permanent psychological disability and named her therapist as potential expert witness); *Vasconcellos v. Cybex Int'l, Inc.*, 962 F. Supp. 701, 708-09 (D. Md. 1997) (holding that sexual harassment claim seeking recovery for severe emotional distress and intentional infliction of emotional distress placed plaintiff's mental state in issue, therefore permitting discovery of psychiatric records, but quashing subpoena that was too broad); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130-31 (E.D. Pa. 1997) (recognizing patient-litigant exception, and holding that plaintiff placed her mental state at issue by filing ADA claim against her former employer for failing to accommodate her mental disability); *Arzola v. Reigosa*, 534 So. 2d 883 (Fla. Ct. App. 1988) (holding that under Florida law plaintiff fell within patient-litigant exception because he sought damages for postaccident mental anguish); *Doolittle v. Ruffo*, No. 88-CV-1175, 1997 WL 151799, at *2-*3 (N.D.N.Y. Mar. 31, 1997) (finding that plaintiff waived privilege by claiming severe emotional distress and placing her mental state in issue); B. Joseph Wadsworth, Case Note, *Evidence—Recognition of a Federal Psychotherapist-Patient Privilege: Jaffee v. Remond*, 32 LAND & WATER L. REV. 873 (1997) (advocating exceptions to federal psychotherapist-patient privilege).

condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice.”¹⁶² Consequently, if the patient places her mental state sufficiently in issue by raising a claim or defense that rests on proof of the mental state, the patient-litigant exception provides the adverse party with access to the otherwise privileged information.

The exception must be construed cautiously. If applied overbroadly to psychotherapeutic communications, the exception may discourage parties who have undergone therapy from seeking any emotional or mental damages for fear of exposing their entire therapeutic file to the opposing party.¹⁶³ Therefore, courts must carefully determine when the patient’s mental or emotional condition is raised in a way that justifies opening the party’s mental health records to scrutiny from the opposing party.

Courts face three major issues in determining the scope of this exception: (1) which claims and defenses place the mental state in issue sufficiently to fall within the exception; (2) whether the exception extends to cases in which the other party raises a claim or defense that puts the patient’s mental state in issue; and (3) whether the patient-litigant exception represents a total waiver of the privilege or whether the breadth of the waiver should be restricted.

1. Claims Falling Within the Exception

Some allegations clearly place the pleading party’s mental and emotional state in issue in a way that waives the privilege. For example, in *Butler v. Burroughs Wellcome, Inc.*,¹⁶⁴ the plaintiff alleged a violation of her rights under the American with Disabilities Act, claiming that her employer had failed to reasonably accommodate her psychiatric disorder. The court granted the defendant’s discovery request, reasoning that the defendant required access to the plaintiff’s mental health records to determine whether she “was generally foreclosed from similar employment,” what would represent a reasonable accommodation to her condition, and whether her difficulties

162. *Premack v. J.C.J. Ogar, Inc.*, 148 F.R.D. 140, 145 (E.D. Pa. 1993). *But see* *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 229-30 (D. Mass. 1997) (adopting narrow view of the exception, and concluding that it applies only when patient uses privileged communication as sword, relying on it to establish her claim).

163. *See Lifschutz*, 467 P.2d at 570; *Davis v. Superior Court*, 9 Cal. Rptr. 2d 331, 335 (Cal. Ct. App. 1992) (stating that “the scope of such waiver must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by fear of exposure of private activities”). One can also argue that if the exception is based on the pleadings rather than on actual reliance on communications to the psychotherapist, the privilege’s protection will be so uncertain that its effectiveness will be undermined.

164. 920 F. Supp. 90 (E.D.N.C. 1996).

flowed from her psychiatric condition.¹⁶⁵ By placing her mental condition at the heart of the case, the plaintiff waived her privilege.¹⁶⁶ Similarly, a plaintiff waives her psychotherapist-patient privilege if she claims damages for embarrassment, mental distress, and suffering as a result of sexual harassment and introduces evidence that she suffers permanent psychiatric disability caused by problems in the workplace and by other factors.¹⁶⁷

In other cases, the application of the exception is less clear. The federal courts have not articulated a test to determine when the patient-litigant exception applies. Further, they are split over what damage allegations sufficiently place mental state in issue in order to fall within the patient-litigant exception.¹⁶⁸ Some courts apply the exception broadly. For example, in *Dixon v. City of Lawton*,¹⁶⁹ an administratrix sued the city and several police officers, claiming that they violated the civil rights of her deceased son when they fatally shot him. The trial court permitted the defendants to introduce records from a mental health center reflecting a visit from the decedent one month before the fatal incident.¹⁷⁰ Without deciding whether to recognize the psychotherapist-patient privilege, the court concluded that the decedent's mental health records were properly admitted under the patient-litigant exception.¹⁷¹ The court held that by seeking damages for "mental

165. See *id.* at 92; see also *Patterson v. Chicago Ass'n for Retarded Children, Inc.*, No. 96C4713, 1997 WL 323575 (N.D. Ill. June 6, 1997) (plaintiff alleging mental disability under ADA waived privilege); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127 (E.D. Pa. 1997) (plaintiff suing under ADA alleged employer failed to make reasonable accommodations for her clinical depression and, therefore, waived psychotherapist-patient privilege).

166. See *Butler*, 920 F. Supp. at 92. The court's language in *Butler* was overly broad, stating that ADA plaintiffs "waive all privileges and privacy interests related to their claim by virtue of filing the complaint." *Id.* Although the facts of the case warranted the waiver, courts should evaluate each ADA claim with care and should not normally grant blanket access to records. Rather, courts should exercise control to ensure that the plaintiff is not subjected to invasion of privacy beyond that warranted by the particulars of the case.

167. See *Ziemann v. Burlington County Bridge Comm'n*, 155 F.R.D. 497 (D.N.J. 1994); see also *Rankin v. Liberty Mut. Ins. Co.*, No. 94-1850, 1995 WL 131390 (1st Cir. Mar. 27, 1995) (plaintiff waived privilege by alleging that Title VII racial harassment and other violations resulted in permanent psychological disability); *Vann v. Lone Star Steakhouse & Saloon, Inc.*, 967 F. Supp. 346 (C.D. Ill. 1997) (plaintiff waived privilege by placing her mental state in issue and naming her psychotherapist as expert to be called as witness in case); *Doolittle v. Ruffo*, No. 88-CV-1175, 1997 WL 151799 (N.D.N.Y. Mar. 31, 1997) (plaintiff placed her mental state in issue by alleging that defendants caused severe emotional distress and debilitating depression that required doctor's care); *Topol v. Trustees of Univ. of Pa.*, 160 F.R.D. 476 (E.D. Pa. 1995) (sexual harassment plaintiff placed mental state in issue by alleging that relationship had made her "depressed, anxious, and fearful" and seeking damages for mental and emotional suffering).

168. See generally *EEOC v. Danka Indus., Inc.*, 990 F. Supp. 1138, 1142 (E.D. Mo. 1997) (discussing different views of when exception applies).

169. 898 F.2d 1443 (10th Cir. 1990).

170. See *id.* at 1450.

171. See *id.*

pain and suffering of the decedent prior to his death," the plaintiff put the decedent's mental health in issue at least to the extent that it warranted revealing his one-day admission to the facility and his communications that were pertinent to the issues before the court.¹⁷²

Dixon applied the exception too broadly. A general allegation of mental pain and suffering prior to death should not forfeit the protection of the privilege and permit intrusion into mental health records. The general allegation does not implicate the issue of mental health sufficiently to warrant invading the protected area.

*Price v. County of San Diego*¹⁷³ also construed the exception broadly and held that the plaintiff had waived the privilege by seeking damages for loss of consortium. In *Price*, the plaintiff sued for damages occasioned by the death of her husband as a result of hogtying by the police. The plaintiff argued that she had not placed her mental state in issue merely by pleading loss of consortium, reasoning that she had not claimed damages for "extraordinary emotional distress or psychological damages."¹⁷⁴ The court relied both on the patient-litigant exception and on a balancing test under which the privilege was deemed waived if "the relevance outweigh[ed] the privacy interest."¹⁷⁵ The court viewed loss of consortium as placing in issue the "mental or emotional state of the relationship (i.e. the state of affection or dislike, happiness or unhappiness)."¹⁷⁶ Like *Dixon*, *Price* places too great a burden on privacy as the price of pursuing a claim for loss of consortium. When a loss of consortium claim seeks recovery for deprivation of a tangible component of the relationship, such as loss of services, probing the mental state of the plaintiff is unnecessary for effective disposition of the action.¹⁷⁷ Claiming loss of consortium should not automatically effectuate a broad

172. *Id.* at 1450-51; *see also* Gould v. Durkin, No. CIV.A.96-CV-6249, 1997 WL 256950 (E.D. Pa. May 15, 1997); Wimberly Resorts Property, Inc. v. Pfeuffer, 691 S.W.2d 27 (Tex. Ct. App. 1985) (holding that under Texas law allegation of emotional trauma brought case within exception).

173. 165 F.R.D. 614 (S.D. Cal. 1996).

174. *Id.* at 622.

175. *Id.*

176. *Id.* In addition, the court was swayed by the allegation that several denials by the plaintiff during her deposition were contradicted by communications reflected in her psychological records. *See id.* at 622. The magistrate had conducted an in camera review of the documents and determined that they were "certainly relevant." *Id.* at 623.

177. Loss of consortium focuses on the effect of an injury on a relationship, and not on the anguish which it personally may bring. *See* Newan v. Exxon Corp., 722 F. Supp. 1146, 1149 (D. Del. 1989) (stressing that loss of consortium and infliction of emotional distress are distinct claims). The claim may place mental state at issue, depending on which portion of the relationship was spoiled due to the injury. When a plaintiff seeks recompense for intangibles such as loss of comfort, aid, solace, or support, the mental state of the plaintiff and the spouse may become relevant. When compensation is sought for loss of tangible services such as housework or repairs, no mental inquiry is necessary. *See* Millington v. Southeastern Elevator Co., 239 N.E.2d 897, 901 (N.Y. 1968).

waiver of the privilege and release of the plaintiff's mental health records. Instead, courts should specifically examine the nature of the allegations and determine waivers accordingly.

The exception recognized in Proposed Rule 504 operated only when the patient relied upon a mental or emotional condition as an element of a claim or defense and did not call for such a broad construction. In *R.K. v. Ramirez*,¹⁷⁸ the Supreme Court of Texas considered similar language and concluded that the standard for the exception should not be mere relevance. The court held that the exception would apply under Texas law when the condition "relates in a significant way" to the claim or defense.¹⁷⁹ The court suggested that the appropriate question is normally whether the jury "must make a factual determination concerning the condition itself."¹⁸⁰ This limitation appropriately restricts the exception to those cases in which the mental health information is sufficiently central to the case to require disclosure of confidential information.

Other courts have also resisted a broad construction of the exception. For example, in *Roberts v. Superior Court*,¹⁸¹ the court rejected arguments that the plaintiff's mental condition was in issue because she alleged that the defendant's negligence rendered her "sick, sore, lame and disabled." The court remarked:

We must of course recognize that any physical injury is likely to have a "mental component" in the form of the pain suffered by the injured person, at least insofar as he is conscious of the physical injury. Presumably, the perception of pain from a particular injury will vary among individuals. Thus, in every lawsuit involving personal injuries, a mental component may be said to be at issue, in that limited sense at least. However, to allow discovery of past psychiatric treatment merely to ascertain whether the patient's past condition may have decreased his tolerance to pain or whether the patient may have discussed with his psychotherapist complaints similar to those to be litigated, would defeat the purpose of the privilege . . .¹⁸²

In *Midkiff v. Shaver*,¹⁸³ the court noted that a party does not put her mental condition at issue by seeking recovery of ordinary mental anguish,

178. 887 S.W.2d 836 (Tex. 1994).

179. *Id.* at 842-43.

180. *Id.* at 843.

181. 508 P.2d 309 (Cal. 1973).

182. *Id.* at 314.

183. 788 S.W.2d 399 (Tex. Ct. App. 1990).

which it defined as “the emotional distress that typically accompanies the tortious act.”¹⁸⁴

Similarly, some courts considering claims like loss of consortium have not regarded such claims as bringing the case within the patient-litigant exception. For example, in *Thiele v. Ortiz*,¹⁸⁵ the Illinois court rejected the argument that the plaintiffs’ claim for loss of their son’s society under the Wrongful Death Act placed their son’s mental state in issue. The defendant argued that because the plaintiffs introduced testimony on “companionship, love and affection,” he was therefore entitled to introduce evidence of psychological evaluations that the plaintiffs’ son received several years before his death at eighteen years of age.¹⁸⁶ The court emphasized both the importance of confidentiality and the consequent care required in applying the exception and concluded that only a claim or defense that specifically makes mental well-being an issue would fall within the exception.¹⁸⁷

2. Allegations by the Adverse Party

The court should not normally apply the exception to the privilege merely because the opposing party advances allegations that make the patient’s mental state relevant.¹⁸⁸ The exception rests not only on notions of fairness but also on concepts of waiver. The patient who places her mental state in issue is deemed to have waived the protection of the privilege. An opposing party, however, cannot waive the privilege for the patient. Therefore, courts should exercise caution when applying the patient-litigant exception unless the patient places the issue in litigation. For example, in a custody case, the

184. *Id.* at 402; *see also* *Davis v. Superior Court*, 9 Cal. Rptr. 2d 331, 335-36 (Cal. Ct. App. 1992) (holding that plaintiff does not waive privilege by seeking damages for pain and suffering); *Wilson v. Bonner*, 303 S.E.2d 134, 142 (Ga. Ct. App. 1983) (holding that plaintiff did not put emotional condition in issue by pleading emotional distress in malicious prosecution suit); *D.C. v. S.A.*, 687 N.E.2d 1032, 1041 (Ill. 1997) (holding that plaintiff does not place mental state in issue by suing for negligence); *Webb v. Quincy City Lines, Inc.*, 219 N.E.2d 167 (Ill. App. Ct. 1966) (holding that claim for pain and suffering did not place plaintiff’s mental condition in issue and waive statutory privilege shielding her psychiatric records); *Gaynier v. Johnson*, 673 S.W.2d 899, 906 (Tex. Ct. App. 1984) (holding plaintiff did not place mental condition in issue by pleading fraud and trickery).

185. 520 N.E.2d 881 (Ill. App. Ct. 1988); *see also* *Lewkow v. Gracie Square Hosp.*, 452 N.Y.S.2d 290 (N.Y. Sup. Ct. 1982) (holding that loss of services claim did not place emotional condition in issue), *aff’d*, 506 N.Y.S.2d 242 (N.Y. App. Div. 1986).

186. *Thiele*, 520 N.E.2d at 887.

187. *See id.* at 888.

188. *See In re Matthew R.*, 688 A.2d 955 (Md. Ct. Spec. App. 1997) (holding that mother’s denial of state’s allegation of mental or emotional unfitness did not place case within patient-litigant exception); *see also* *Chung v. Legacy Corp.*, 548 N.W.2d 147, 150 (Iowa 1996) (patient-litigant exception to physician-patient privilege applies only if condition is element of claim or defense of party claiming privilege).

court should not compel disclosure of privileged records merely because the nonpatient spouse alleges a mental condition that bears on the fitness of the patient spouse to have custody.¹⁸⁹

Some jurisdictions adopt a broader exception. For example, in Texas, the exception applies "in any proceeding in which any party relies upon the [physical, mental or emotional] condition as part of the party's claim or defense."¹⁹⁰ This approach allows the adverse party to bring the case within the patient-litigant exception and thereby gain access to privileged mental health information. To give the adverse party control of the privilege in this manner undervalues it. Unless control is vested in the patient, the privilege's protection will be illusory.

The federal courts should adopt the more restrictive version of the patient-litigant exception as reflected in Proposed Rule 504, which generally applies the exception only if the patient puts her own mental state in issue. This position reflects the grounding of the exception in waiver theory and accords control to the patient during the patient's lifetime.

When a patient's mental state is in controversy, but the patient has done nothing to waive the privilege, the adverse party should have access to the necessary evidence without breaching the privilege. To address the discovery and proof problems the privilege poses for the adverse party, courts may order the patient to undergo a mental examination for litigation purposes, similar to the procedure provided by Rule 35 of the *Federal Rules of Civil Procedure*.¹⁹¹ In *Price*, the court asserted that disclosure of psychological

189. See, e.g., *Simek v. Superior Court*, 172 Cal. Rptr. 564, 569 (Cal. Ct. App. 1981) (holding that husband's request for visitation rights did not place his mental state in issue); *Peisach v. Antuna*, 539 So. 2d 544, 546 (Fla. Dist. Ct. App. 1989) (stating that "allegations that the custodial parent is mentally unstable are not sufficient to place the custodial parent's mental health at issue and overcome the privilege"); *Griggs v. Griggs*, 707 S.W.2d 488, 490-91 (Mo. Ct. App. 1986) (holding that husband did not waive privilege when he sought custody of his children when statute permitted mental state to be condition considered in awarding custody, or by alleging wife was unstable). But see *Schouw v. Schouw*, 593 So. 2d 1200 (Fla. Dist. Ct. App. 1992) (refusing to order disclosure of husband's records, but suggesting that disclosure might be appropriate if wife had substantiated her allegations of psychological unfitness and that husband's present condition would affect his ability to take care of his children).

190. TEX. R. CIV. EVID. 510(d)(5); see *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994) (discussing expanded Texas exception); *Batson v. Rainey*, 762 S.W.2d 717, 720 (Tex. Ct. App. 1988) (applying Texas rule and concluding that exception applied because employer alleged employee was terminated because of history of drug and alcohol dependence).

191. Rule 35 provides in pertinent part:

When the mental or physical condition . . . of a party or of a person in the custody or under the legal control of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties

records is "exceedingly less burdensome than a Rule 35(a) examination."¹⁹² A patient who concludes that the examination is more burdensome than disclosure of privileged information can waive the protection of the psychotherapist-patient privilege and thereby avoid the examination. Others, however, may prefer the court-ordered examination.

Although a Rule 35 order imposes an immediate burden of examination, it may represent less intrusion into the privacy interests shielded by the privilege. A court-ordered examination, in which the party undergoing evaluation understands that the communications are not confidential and that the examination has a targeted purpose related to the litigation, does not threaten the public and private interests of the psychotherapist-patient privilege, as recognized in *Jaffee* as the foundation of the psychotherapist-patient privilege. Communications during court-ordered examinations are routinely excepted from the privilege's protection.¹⁹³ The exchange in such an examination stands in contrast to ordinary psychotherapy, which is influenced by the shield of confidentiality and generates communications and records reflecting the unguarded candor fostered by that shield. Therefore, the use of court-ordered examinations may provide an avenue to psychological information without compromising the interests advanced in *Jaffee* for the privilege.¹⁹⁴

The need for disclosure increases in cases proceeding after the death of the patient because court-ordered examinations are not an option. Proposed Rule 504 permitted the opposing party to place the case within the patient-litigant exception if the patient had died. Taking this position, the *Dixon* court concluded that the exception would apply equally if the defendant placed the decedent's mental state in issue because the patient was deceased.¹⁹⁵ Rather than resting on a waiver theory, this aspect of the exception appears to be need based. While the patient cannot logically waive the privilege by dying, the opposing party's need for the information

FED. R. CIV. P. 35(a). See generally JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.12 (2d ed. 1993) (discussing use of Rule 35 examinations). Courts, however, do not read Rule 35 uniformly. Some are extremely reluctant to order Rule 35 examinations, while others do so more readily. See generally *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216 (S.D.N.Y. 1994) (summarizing decisions applying Rule 35). A full consideration of Rule 35 is beyond the scope of this Article.

192. *Price v. County of San Diego*, 165 F.R.D. 614, 623 (S.D. Cal. 1996).

193. See 3 WEINSTEIN & BERGER, *supra* note 85, § 504.07(6).

194. See also *Southern Bluegrass Mental Health & Mental Retardation Bd., Inc. v. Angelucci*, 609 S.W.2d 931 (Ky. Ct. App. 1980) (refusing to override defendant's claim of privilege, in part, because state had access to results of several court-ordered exams).

195. See FED. R. EVID. 504(d)(3) (proposed Nov. 20, 1972). Prior to death, the exception only applies when the patient places her mental state in issue. After the patient's death, relevant mental health information may be discoverable when any party places the patient's mental state in issue. See *id.*

contained in the records is greater. Although *Jaffee's* rejection of balancing raises questions concerning the viability of this approach, it seems the proper way to address the postmortem interests of the patient and the litigant.¹⁹⁶

Alternatively, the court could allow the party standing in the patient's shoes to control the waiver decision. If the privilege is treated as surviving the patient's death, postmortem control of the privilege lies with the administrator of the patient's estate.¹⁹⁷ Therefore, if the claims advanced by the privilege holder do not bring the case within the patient-litigant exception, the adverse party could not access the information. While this approach may often be appropriate, courts should recognize the ongoing interest in maintaining the privilege must yield to weightier interests in some cases.

3. *The Scope of the Exception*

Even when the patient-litigant exception applies, the court should not order wholesale disclosure of patient records. In many cases the records will be extensive and will contain extraneous material. Courts should therefore implement measures to minimize invasion of the area of privacy protected by the privilege.¹⁹⁸

Some courts have succeeded in providing this protection. For example, in *Vasconcellos v. Cybex International, Inc.*,¹⁹⁹ the court held that the defendant's request for documents was overbroad and held that the defendant

196. In *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998), the Court rejected the argument that the attorney-client privilege could be overcome by the need for information once the client died. Both the purpose for the privilege and its common-law roots support posthumous application. Posthumous protection by the psychotherapist-patient privilege is on weaker footing, as evidenced by the provision in Proposed Rule 504(d)(3) for easier access to privileged material under the patient-litigant exception if the patient is deceased.

197. See, e.g., *Rittenhouse v. Superior Court*, 1 Cal. Rptr. 2d 595 (Cal. Ct. App. 1991).

198. See, e.g., *Kerman v. City of New York*, No. 96 CIV.7865 (LMM), 1997 WL 666261 (S.D.N.Y. Oct. 24, 1997) (ordering disclosure of records, but imposing protective order to preserve plaintiff's privacy as much as possible); *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216, 223 (S.D.N.Y. 1994) (holding that, although defendants were entitled to question plaintiffs' therapists about personal histories, inquiry was strictly "limited to whether, and to what extent, the alleged harassment caused plaintiffs to suffer emotional harm"); *Bond v. District Court*, 682 P.2d 33, 38-41 (Colo. 1984) (after finding waiver, instructing trial court to balance benefit of disclosure against prejudicial impact before issuing discovery order); *Yoho v. Lindsley*, 248 So. 2d 187, 191 (Fla. Dist. Ct. App. 1971) (noting that scope of patient-litigant waiver should be carefully tailored to protect privacy interests); *Scott v. Flynt*, 704 So. 2d 998, 1007 (Miss. 1996) (rejecting argument that plaintiff was required to execute unconditional waiver of physician-patient privilege and imposing on court an obligation to protect against unwarranted disclosure). But see *Topol v. Trustees of Univ. of Pa.*, 160 F.R.D. 476, 477 (E.D. Pa. 1995) (stating only that "plaintiff waived any applicable psychotherapist-patient privilege").

199. 962 F. Supp. 701 (D. Md. 1997).

could bring a new, more narrowly-tailored subpoena.²⁰⁰ The court stated that the defendant must show cause why the privileged information represented the only possible means to obtain relevant information.²⁰¹ In *R.K. v. Ramirez*,²⁰² the court ordered disclosure but vacated the trial court's order as too broad. The court emphasized the trial court's responsibility for protecting the patient's interests even when disclosure is appropriate and advised the trial court to redact or delete irrelevant portions of the records.²⁰³ In *Cleveland v. International Paper*,²⁰⁴ the court explicitly restricted the defendant's access to confidential information. The court allowed the defendant to inquire about medical treatment the plaintiff sought as a result of the alleged discrimination, her medical condition during her employment by the defendant, and prior medical history only insofar as it related to showing that her condition did not result from her employment.²⁰⁵ By carefully detailing and circumscribing disclosure under the patient-litigant exception, courts can maintain the fairness of the litigation process without undermining the psychotherapist-patient privilege.

V. LOSS OF PROTECTION THROUGH WAIVER OR OTHER ACTION

A 1960 publication intended to guide psychiatrists on matters of confidentiality and privilege stated:

A waiver implies that the patient has a full knowledge of the content of his medical-psychiatric record, that he recalls all of the transactions of the treatment and at the time of waiver he is aware of the consequences of full disclosure. Waiver also implies that the patient is competent to make it.²⁰⁶

This publication overstates the requirement of formality for waiver. Although in cases of voluntary disclosure the party affirmatively relinquishes the privilege, the protection may equally be lost through disclosure that is

200. *See id.* at 709.

201. *See id.*

202. 887 S.W.2d 836 (Tex. 1994).

203. *See id.* at 844. Moreover, the court stated, "We stress that the highly personal nature of this information places a heavy responsibility on the trial court to prevent any disclosure that is broader than necessary." *Id.*

204. No. 96-CV-1068 (RSP-DNH), 1997 WL 309408 (N.D.N.Y. 1997).

205. *See id.* at *3; *see also* *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216, 223 (S.D.N.Y. 1994).

206. COMMITTEE ON PSYCHIATRY & LAW, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 45, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 99 (1960).

inconsistent with confidentiality. Through this avenue a party may lose the protection of the privilege unwittingly. Additionally, the party cannot control precisely the scope of the waiver; disclosure for a limited purpose may effect a broad waiver of the privilege.

In addition to defining the contours of the psychotherapist-patient privilege, courts must determine what constitutes a waiver of the privilege. Some jurisdictions will not recognize a waiver unless the party takes a clear and intentional step to effect the waiver.²⁰⁷

The proposed *Federal Rules of Evidence* included a general rule governing waiver of privileges. Proposed Rule 511 provided, "A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter of communication."²⁰⁸ The rule rests on the rationale that disclosure destroys confidentiality and therefore eliminates the purpose of the privilege.²⁰⁹

In *United States v. Wimberly*,²¹⁰ the court stated the prevailing standard for waiver as "the voluntary and intentional relinquishment of a known right."²¹¹ Consistent with this standard, the clearest waiver is the patient's voluntary election to reveal privileged information. But other acts of

207. See, e.g., *State ex rel. Gozenbach v. Eberwein*, 655 S.W.2d 794, 796 (Mo. Ct. App. 1983) (finding no waiver of physician-patient privilege absent showing of unequivocal and decisive acts which demonstrate clear intention to waive privilege).

Conversely, federal courts have not enforced such a strict barrier to waiver of the attorney-client privilege. Even the inadvertent act of the attorney disclosing otherwise privileged material can defeat a claim of privilege. See, e.g., *Harmony Gold U.S.A. v. FASA Corp.*, 169 F.R.D. 113, 116-18 (N.D. Ill. 1996) (holding that inadvertent disclosure of privileged material waived attorney-client privilege because privacy was irretrievably surrendered); *Davidson Pipe Co. v. Laventhol & Horwath*, 120 F.R.D. 455 (S.D.N.Y. 1988) (holding that intent to waive privilege is evidenced by act of disclosure, even if that act was inadvertent). Although some aspects of the law governing attorney-client privilege might transfer to the law of psychotherapist-patient privilege, some aspects fit poorly.

208. FED. R. EVID. 511 (proposed Nov. 20, 1972).

209. See FED. R. EVID. 511 advisory committee's note (proposed Nov. 20, 1972). See also *Farrow v. Allen*, 608 N.Y.S.2d 1 (N.Y. App. Div. 1993), where the court held:

It follows therefore that, even if the information was intended to remain confidential when it was communicated, once a patient puts the information into the hands of a third party who is completely unconnected to his or her treatment and who is not subject to any privilege, it can no longer be considered a confidence and the privilege must be deemed to have been waived as to that information.

Id. at 3 (citations omitted).

210. 60 F.3d 281 (7th Cir. 1995).

211. *Id.* at 285 (citation omitted); see also *State ex rel. Hayter v. Griffin*, 785 S.W.2d 590, 594 (Mo. Ct. App. 1990) (finding no waiver because patient's acts "were not so clearly unequivocal and decisive as to demonstrate a purpose to abandon the privilege"); *State ex rel. Gozenbach v. Eberwein*, 655 S.W.2d 794, 796 (Mo. Ct. App. 1983) (requiring "clear unequivocal and decisive act").

voluntary disclosure may also waive the protection. For example, in *Mann v. University of Cincinnati*,²¹² prior to litigation the plaintiff sent one page of her psychotherapist's record to the defendant university accompanied by a letter notifying the university of her reasons for withdrawal.²¹³ The court held that, although the plaintiff had not waived her privilege as to other information contained in her record, this voluntary disclosure waived the privilege as to that particular page.²¹⁴ In *Hosey v. Presbyterian Church (U.S.A.)*,²¹⁵ the court, applying Kansas law, held that the deceased patient waived the statutory privilege extended to patients of mental health treatment facilities when he shared with the governing body of the Presbyterian Church both the fact that he had been treated and details of the diagnosis he received from the clinic.²¹⁶

Some courts, however, find a waiver of the privilege too quickly. If courts find waivers too readily they are likely to diminish the effectiveness of the privilege. The salutary impact of the privilege rests on the patient's expectation that the communications will remain confidential unless the patient takes steps to permit disclosure. Waiver rules that wrest control from the patient will threaten to undermine the goal expressed in *Jaffee* of fostering an atmosphere of trust and open communication in therapeutic sessions.²¹⁷ Therefore, courts should approach waiver arguments with caution, particularly those that too greatly diminish the protection of the privilege.

A. Voluntary Partial Disclosure

Even partial disclosure may waive the privilege. If the patient fails to assert the privilege and discloses some privileged information, the disclosure may act as a broad waiver, permitting the court to compel further disclosure. The rule embodied in Proposed Rule 511 addresses those concerns.²¹⁸

Some courts, however, attach broad implications to partial disclosure. For example, in *Mitchell v. Sturm, Ruger & Co.*,²¹⁹ the plaintiffs voluntarily provided the defendant with a report from one treating psychologist dealing

212. 824 F. Supp. 1190, 1192 (S.D. Ohio 1993).

213. *See id.* at 1205.

214. *See id.*

215. 160 F.R.D. 161, 164-65 (D. Kan. 1995).

216. *See id.*; *see also* *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992) (finding that under Michigan law, patient waived physician-patient privilege by voluntarily producing treating physician's records).

217. *See supra* Part II.A.

218. *See supra* notes 208-09 and accompanying text.

219. 842 F. Supp. 158 (E.D. Pa. 1994).

with the shooting that precipitated the litigation but asserted the privilege as to communications with other psychologists.²²⁰ Perhaps wary of the attempt to pick and choose which privileged material to disclose, the court held that by providing the favorable report the plaintiffs waived the psychologist-patient privilege.²²¹ The waiver extended to all communications on that subject, even those with other psychologists.²²² In *United States v. Snelenberger*,²²³ the court held that the patient waived his psychotherapist-patient privilege by telling third parties of his intention to commit a crime, even though he did not disclose his communications to the therapist or matters concerning his therapy.²²⁴ Based on that waiver, the court permitted the therapist to testify concerning the patient's communications to her.²²⁵ Although *Mitchell* represents a fair decision in light of the partial disclosure made with advice of counsel, *Snelenberger* attaches far too sweeping consequences to a limited disclosure.

Not all courts give partial disclosure such broad effect. In *Bognar v. Zayre Corp.*,²²⁶ the court rejected the argument that under Ohio law the production of one privileged document, which was provided to defendant's insurer and introduced at trial, represented a complete waiver.²²⁷ Similarly, in *Farrow v. Allen*,²²⁸ the court held that the patient effected only a partial waiver when she authorized her psychiatrist to send a letter to a third party revealing certain matters she had communicated during treatment.²²⁹ The letter waived

220. *See id.* at 159.

221. *See id.*

222. *See id.*; *see also* *Whitbeck v. Vital Signs, Inc.*, 163 F.R.D. 398, 400 (D.D.C. 1995) (holding that by providing favorable portions of her medical records, plaintiff waived medical privilege as to all her records); *Jones v. Superior Court*, 174 Cal. Rptr. 148, 155-56 (Cal. Ct. App. 1981) (considering alleged waiver of physician-patient privilege, noting that "the scope of waiver is not limited to what the patient intends," and concluding that, although waiver should extend to communications with other physicians on same subject, waiver did not extend "to all communications with any physician at any time"); *Carson v. Fine*, 867 P.2d 610, 615 (Wash. 1994) ("[W]aiver of [physician-patient] privilege as to one of plaintiff's physicians also constitutes a waiver as to other physicians who attended the plaintiff with regard to the disability or ailment at issue."). *But cf.* *Mann v. University of Cincinnati*, 824 F. Supp. 1190 (S.D. Ohio 1993) (holding that waiver of one page of psychotherapist record did not constitute waiver of entire record).

223. 24 F.3d 799 (6th Cir. 1994).

224. *See id.* at 802.

225. *See id.* The court also suggested that the testimony would be allowed under an exception for communication of a threat. *See id.*

226. 702 F. Supp. 151 (N.D. Ohio 1988).

227. *See id.* at 154; *see also* *Schaffer v. Spicer*, 215 N.W.2d 134, 138 (S.D. 1974) (rejecting argument that patient waived physician-patient privilege when she testified that she had consulted physician and that he had diagnosed her problems but did not testify concerning nature of or treatment for illness or recount any communications with physician).

228. 608 N.Y.S.2d 1 (N.Y. App. Div. 1993).

229. *See id.* at 4.

the privilege as to the information it contained but did not effect a general waiver of the privilege.²³⁰ In *Simpson v. Braider*,²³¹ the defendant did not waive the physician-patient privilege by providing limited information concerning their son's treatment.²³² In *State v. Ermatinger*,²³³ the Missouri court refused to find a waiver where, during his deposition, the victim of an alleged deviate sexual assault provided the name of his treating psychiatrist and answered a question concerning whether the doctor had prescribed any medication. The court concluded that the victim "did not clearly indicate that his purpose was to abandon the physician-patient privilege."²³⁴ Consequently, the Missouri requirement of a "clear unequivocal and decisive act showing such purpose" was not met.²³⁵ These cases illustrate an appropriately protective position.

In addition, disclosure should not act as a waiver when made in a confidential setting. For example, in *Ex Parte Rudder*,²³⁶ the court upheld a claim of psychiatrist-patient privilege even though the patient provided records to the Board of Medical Examiners to assist in their investigation of the psychiatrist. The court held that this disclosure did not waive the patient's privilege because the disclosure to the Board was itself confidential.²³⁷

A difficult question can arise in criminal cases when the victim of a crime grants the prosecutor access to privileged records. The defendant may ask the court to construe the victim's action as a waiver that allows the defendant access to the information.²³⁸ In *Reynolds v. State*,²³⁹ the court carefully assessed the consequences of the victim's disclosure to the prosecution. First,

230. *See id.*

231. 104 F.R.D. 512 (D.D.C. 1985); *see also* *Roberts v. Superior Court*, 508 P.2d 309 (Cal. 1973) (en banc) (disclosing existence or purpose of psychotherapist-patient relationship did not waive privilege).

232. The defendant's lawyer provided information concerning his mental health in sentencing in an unrelated case. *See Simpson*, 104 F.R.D. at 522. In addition, in response to interrogatories, the defendant provided names of his therapists and a general description of the reason he sought therapy. *See id.* at 523.

233. 752 S.W.2d 344 (Mo. Ct. App. 1988).

234. *Id.* at 350.

235. *Id.*

236. 507 So. 2d 411 (Ala. 1987).

237. *See id.* at 413; *see also* *McMaster v. Iowa Bd. of Psychology Exam'r*, 509 N.W.2d 754 (Iowa 1993) (discussing Iowa statute that establishes right of examiners to access privileged records for disciplinary hearings); *Commonwealth v. Askew*, 666 A.2d 1062 (Pa. Super. Ct. 1995) (finding no waiver of sexual assault counselor privilege where statute required counselor to provide information to police and to physician who performed medical tests on minor victim).

238. *See, e.g., Reynolds v. State*, 633 A.2d 455 (Md. Ct. Spec. App. 1993) (patient executed limited waiver allowing prosecutor to review mental health records); *Askew*, 666 A.2d at 1062 (patient allowed psychologist to reveal child abuse allegation to police and physician).

239. 633 A.2d 455 (Md. Ct. Spec. App. 1993).

the court held that the disclosure did not effect a broad waiver.²⁴⁰ It stated that it will recognize a limited waiver "if there is a reasonable basis for the particular limitation."²⁴¹ The court emphasized the confidential relationship between the victim and the prosecutor and refused to attach a similar limitation to the victim's waiver of her privilege at trial.²⁴² Once the victim allowed the prosecution to introduce some of her mental health records at trial, however, the court held that she waived the privilege entirely. The defendant could then inspect and introduce any other records.²⁴³

Some courts do not accept the notion of a limited waiver in this context. In *State v. Gonzales*,²⁴⁴ the court rejected the prosecution's argument that the victim could disclose her mental health records to the state without effecting a waiver of her privilege.²⁴⁵ The court reasoned that because the relationship with the prosecutor is not privileged, the disclosure of the records breached confidentiality and waived the privilege.²⁴⁶

Reynolds reflects a fair balance between the rights of the accused and the victim. The victim should not lose the protection of the privilege merely because she has made allegations of criminal wrongdoing and is expected to testify against the accused. The prosecution, however, should be permitted to review relevant mental health records. The information contained in those records may help the prosecutor reach an appropriate decision about both the merits of the charges against the accused and the victim's credibility. The accused derives some protection from the prosecutor's constitutional²⁴⁷ and ethical obligation²⁴⁸ to disclose exculpatory information. Since exculpatory information includes evidence that would impeach the prosecution's witness,²⁴⁹ if the prosecutor's review of the victim's mental health records

240. *See id.* at 462.

241. *Id.*; *see also* *Avery v. State*, 292 A.2d 728, 740-41 (Md. Ct. Spec. App. 1972) (holding that complainant did not automatically waive privilege by virtue of cooperating with authorities).

242. *See Reynolds*, 633 A.2d at 462.

243. *See id.*

244. 912 P.2d 297 (N.M. Ct. App. 1996).

245. *See id.* at 300.

246. *See id.*

247. The prosecutor has a duty to disclose to the defendant any exculpatory and material information; failure to produce such evidence violates defendant's due process rights. *See United States v. Bagley*, 473 U.S. 667 (1985); *Moore v. Illinois*, 408 U.S. 786, 794 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

248. Rule 3.8(d) of the American Bar Association's *Model Rules of Professional Conduct* provides that a prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." MODEL RULES OF PROFESSIONAL CONDUCT Rule 38(d) (1994).

249. *See Bagley*, 473 U.S. at 676 (holding that prosecutor's constitutional duty to disclose exculpatory evidence includes impeachment evidence).

reveals any information that tends to undermine the victim's credibility, the prosecutor must disclose it to the defense.

In addition, as the *Reynolds* court recognized, the defendant may be entitled to in camera inspection of the victim's records. Such review should be unavailable if the victim stands on her privilege and denies the prosecutor access to her records. But the court should grant the defendant's request for in camera review if the victim has effected a partial waiver to permit prosecutorial review.

B. Inadvertent or Unconsented Disclosure

Parties sometimes argue that the privilege is lost by inadvertent or unconsented disclosure. A patient may discover that a system of information storage or reporting that gives access to personnel not identified closely enough with the psychotherapist may defeat the privilege.²⁵⁰ The basis of the argument against enforcing the protection of privilege in such cases is that the context suggests that the patient did not intend to keep the communications confidential and, therefore, lost the privilege's protection.

Clearly, the attorney-client privilege must be guarded with care. A key difference between inadvertent disclosure by an attorney and inadvertent disclosure by a therapist or record-holder is that the attorney functions as an agent of the client. Therefore, the attorney has the authority to waive the client's privilege.²⁵¹ In contrast, in the case of inadvertent disclosure, the therapist and holders of mental health records act without authority when they reveal the patient's privileged information. They have no authority to waive the privilege.²⁵² Nevertheless, a therapist's disclosure of a client's

250. See, e.g., *State ex rel. Benoit v. Randall*, 431 S.W.2d 107 (Mo. 1968) (en banc). The Supreme Court has suggested that sharing information in the normal course of business eliminates an individual's privacy interest in that information. In *United States v. Miller*, 425 U.S. 435 (1976), the Court held that the Fourth Amendment did not govern the production of bank records pursuant to a subpoena because the documents obtained by the subpoena "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.* at 442.

Although *Miller* raised issues distinct from questions of privilege, the Court's decision nevertheless illustrates the importance the Court may attach to the sharing of information with third parties, even in a setting where some confidentiality could be expected. The Court should not transplant this reasoning into privilege disputes, or conclude that no privilege protects otherwise confidential information when the patient, voluntarily or not, participates in a system that contemplates that the support personnel and not merely the therapist will have access to the patient's records.

251. Although the privilege belongs to the client only, the attorney can waive the privilege when acting under the client's authority. See 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2325 (McNaughten rev. 1961). The authority to waive is implied when the attorney makes admissions or disclosures or performs other acts in the course of litigation. See *id.*

252. See, e.g., *Tucson Med. Ctr., Inc. v. Rowles*, 520 P.2d 518, 523 (Ariz. Ct. App. 1974) (holding that only patient or physician, and not hospital, can waive privilege); *Parkson v. Central DuPage*

privileged information can eliminate the privilege not only as to the item disclosed but also as to other related material.²⁵³

Psychotherapists have opportunities to inadvertently reveal privileged matter that may compromise the patient's privilege.²⁵⁴ When confidential information communicated within psychotherapy is memorialized in a record, a risk arises that unprivileged eyes could view the record.²⁵⁵ Although the nature of the psychotherapeutic setting varies, some settings create opportunities for unconsented disclosure. If the psychotherapy is provided in a small practice and records are maintained merely for the professional working with the patient, unconsented disclosure is unlikely. When psychotherapy is provided in a larger institutional setting, such as a hospital or agency, however, more employees are likely to handle the records. This setting increases the risk of inadvertent disclosure. Some may argue that such exposure constitutes a waiver. Similarly, a therapist who includes extraneous but otherwise privileged information in documents filed with the insurance company or responds to a discovery request without asserting the patient's privilege may thereby defeat the patient's later claim of privilege. Therefore, psychotherapists must implement safety precautions designed to avoid inadvertent waiver.²⁵⁶

Even with precautions in place, however, some unconsented disclosure of privileged information will occur. Therefore, courts must define when inadvertent disclosure of privileged information constitutes a waiver. In *State ex rel. Benoit v. Randall*,²⁵⁷ the Missouri court considered the argument that hospital records were not shielded by the physician-patient privilege. The

Hosp., 435 N.E.2d 140, 144 (Ill. App. Ct. 1982) (same).

253. See, e.g., *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995) (holding that inadvertent waiver effectuates waiver for "all other such communications on the same subject" (citations omitted)).

254. The special but pervasive problem of whether filing the required forms for insurance coverage affects a waiver is discussed separately below. See *supra* Part V.C.

255. See, e.g., *Estate of Behringer v. Medical Ctr. at Princeton*, 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991) (considering suit in which deceased physician's estate sued medical center for harm to physician when medical center failed to maintain confidentiality of doctor's medical records); see also FED. R. EVID. 504(a)(3) (proposed Nov. 20, 1972).

256. When privileged attorney-client communications are inadvertently disclosed during discovery, some courts conduct their waiver analysis by balancing the adequacy of the implemented safeguards with the scope of the discovery request. See *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 443-45 (S.D.N.Y. 1995) (finding that attorney's inadvertent disclosure did not waive privilege because scope of discovery was extensive and precautions taken by attorney were reasonable). Rhode Island's Confidentiality of Health Care Information Act reflects a possible approach to encourage precautions. This act requires third parties who receive confidential health care information to establish specified minimum security procedures. See R.I. GEN. LAWS § 5-37.3-4(c) (1997).

257. 431 S.W.2d 107 (Mo. 1968).

court noted, "Hospital insurance, with its attendant waiver forms, is common. Hospital records are seen and copied by staff members and employees. The element of strict secrecy cannot be present under these circumstances."²⁵⁸ Nevertheless, the court concluded that it would apply the privilege rule to hospital records.²⁵⁹

Courts should take the position that information retains its privileged status even though it is recorded where workers who maintain records or process reimbursement claims will have access to it. A privilege has little value if modern recordkeeping deprives it of utility.

C. Disclosure Required for Third Party Payment

The interaction of insurance coverage or other third party payment for psychotherapy and evidentiary concepts of waiver raises concern. When a patient seeks insurance coverage for therapy, the patient and therapist must share some information with the insurance company.²⁶⁰ The patient must either submit a claim or authorize the therapist to submit a claim. A party later seeking records of the treatment may argue that the disclosure to the insurance company represents a waiver of the privilege.²⁶¹ If this argument prevails, the privilege becomes insignificant in all but the exceptional cases in which the patient is not eligible for or does not seek insurance coverage.²⁶²

Dr. Jerome Beigler discussed the privacy concerns raised by insurance coverage for psychotherapy and the battles therapists have fought to preserve privacy while seeking insurance for psychotherapy.²⁶³ Concerns for privacy arose when patients were insured through an employer and confidential information leaked through personnel offices back to the patient and others in the workplace. In some cases, information in employment files reflecting psychotherapy negatively affected advancement or future employment

258. *Id.* at 109.

259. *See id.*

260. *See* SWENSON, *supra* note 25, at 70. Insurance companies usually require practitioners to supply "demographic information, a diagnosis, a treatment plan, and evidence that services were provided." *Id.* Some insurance carriers and most health maintenance organizations also require information pertaining to symptoms and the effects of the client's disorder on employment and family relationships. *See id.*

261. *See, e.g., In re Pebsworth*, 705 F.2d 261, 262-63 (7th Cir. 1983) (finding waiver when patient filed insurance claim, noting that "reasonable patient would no doubt be aware that routine processing of reimbursement claims would require these records to be brought into the hands of numerous anonymous employees").

262. Some patients will even bypass insurance to avoid the consequent breach of confidentiality. *See* Jerome S. Beigler, *Privacy and Confidentiality*, in *LAW AND ETHICS IN THE PRACTICE OF PSYCHIATRY* 69, 70 (Charles K. Hofling ed., 1981).

263. *See id.* at 70-77.

opportunities due to prejudice against those with a history of mental illness.²⁶⁴ Insurance companies compound the problem by requesting detailed information from patient files, which sometimes goes beyond legitimate insurance needs.²⁶⁵ Beigler suggests, among other responses, apprising the patient of the information submitted to the insurance company and, if the request for information is too invasive, resisting.²⁶⁶

Despite some victories in the reimbursement context, mental health professionals risk losing ground in their efforts to protect their clients' privacy in legal actions. Some courts regard the delivery of information to the insurance company as waiving the psychotherapist-patient privilege.²⁶⁷ In some cases, the waiver appears restricted to the information transmitted to the insurance carrier. In the cases defining the pre-*Jaffee* federal approach, *In re Pebsworth* and *In re Zuniga*, the courts only addressed whether the privilege shielded patient-identifying information. Thus, the information sought had already been submitted to the insurance company in its entirety.²⁶⁸ In the case of *In re Grand Jury Subpoena Duces Tecum Dated Jan. 30, 1986*,²⁶⁹ the court recognized a waiver but noted that whether documents fell within the waiver required reference to particular documents; the court would not recognize a general waiver.²⁷⁰

In other cases, however, courts construe waiver broadly. For example, in *Gould v. Durkin*,²⁷¹ the court held that the patient waived her privilege when she agreed to a reimbursement process in which the therapist submitted records, including her diagnosis, to the insurance carrier. As the court pointed out, she "was aware that her records, including her diagnosis, would fall into the hands of numerous employees of [the insurance company]."²⁷² Based on this waiver, the court ordered both the psychotherapist and the insurance company to produce all records regarding the patient's mental condition or psychiatric treatment provided to her.²⁷³ Thus, the waiver extended beyond the information submitted to the insurance company and exposed the

264. See *id.* at 70.

265. See *id.* at 71.

266. See *id.* at 77.

267. See, e.g., *In re Pebsworth*, 705 F.2d 261 (7th Cir. 1982); *Gould v. Durkin*, 96-CV-6249, 1997 WL 256950 (E.D. Pa. May 15, 1997); *Jones v. Prudential Ins. Co. of America*, 388 A.2d 476 (D.C. 1978).

268. See *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983); *In re Pebsworth*, 705 F.2d 261 (7th Cir. 1983).

269. 638 F. Supp. 794 (D. Me. 1986).

270. See *id.* at 798-99.

271. 96-CV-6249, 1997 WL 256950 (E.D. Pa. May 15, 1997).

272. *Id.* at *4.

273. See *id.*

therapist's records as well.

The position that submitting mental health treatment records for insurance reimbursement constitutes a waiver rests on notions of confidentiality. Proposed Rule 504(a)(3) stated:

A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.²⁷⁴

Some courts view the communication of any information to any party outside the privileged relationship as contrary to notions of confidentiality. The better approach is to view the patient's consent to submit for reimbursement as a limited waiver permitting use of the information for reimbursement only.²⁷⁵ To equate the disclosure made for insurance with disclosure to any other unrelated third party gives the privilege too little force. Mental health treatment is frequently covered by insurance. To activate that coverage, the patient or therapist must submit documentation to the insurance company verifying the treatment and any other information the company requires. To treat that submission as a waiver will render the privilege ineffective in all psychotherapeutic relationships except those paid for privately. If, as *Jaffee* assumes, the threat of disclosure deters patients from acting openly in therapy, a rule that translates every insurance claim into a waiver of the privilege will deter those in need of therapy but unable to pay for it out of pocket from seeking therapy. Such a rule negates the important individual and societal goals served by psychotherapy.

274. FED. R. EVID. 504(a)(3) (proposed Nov. 20, 1972).

275. See, e.g., *In re Search Warrant for 2045 Franklin*, 709 P.2d 597, 601 (Colo. Ct. App. 1985) (receipt of Medicaid implicitly waives physician-patient privilege "to the extent necessary for the state to verify the services billed by the provider"); *Parkson v. Central DuPage Hosp.*, 435 N.E.2d 140 (Ill. App. Ct. 1982) (holding that patients' authorizations to release medical information to agencies concerned with third party payment was only limited waiver and did not permit disclosure to others); *State ex rel. Gozenbach v. Eberwein*, 655 S.W.2d 794 (Mo. Ct. App. 1983) (holding that patient's actions represented waiver only to extent necessary to obtain treatment and payment for expenses); see also, e.g., LA. CODE EVID. ANN. art. 510 (West 1998) (providing that communications are confidential even when transmitted to obtain indemnification); N.Y. C.P.L.R. § 4507 (McKinney 1998) (providing that authorization of disclosure for purpose of obtaining insurance benefits does not constitute waiver).

In *Pebsworth*, Judge Gray, in his concurring opinion, argued against a broad waiver rule:

It seems to me that the traditional waiver doctrines are inappropriate in the context of present-day medical insurance. Such insurance plans have gained national prevalence and exist to encourage the creation of doctor-patient relationships where necessary to protect a person's physical and mental well-being. Moreover, they are designed to lessen the considerable financial burdens that, in the absence of insurance, would force many people to gamble with their health. Since the doctor-patient privilege exists to encourage such relationships and protect them when they are made, policies behind health insurance and the privilege go hand in hand.²⁷⁶

In *Pebsworth*, the majority, however, discounted the negative impact of the waiver doctrine, concluding that patients already contemplated an intrusion on the privacy of their treatment through the process of reimbursement.²⁷⁷

Although courts should not treat submission of information for insurance coverage as a general waiver of the privilege, they should treat such submissions as a limited waiver that defeats a claim of privilege in litigation between the insurance company and the patient.²⁷⁸ By filing an insurance claim or authorizing the health care provider to seek reimbursement, the patient agrees to permit the insurance company access to the limited information necessary for reimbursement purposes. If the insurance company questions patients' eligibility for coverage, it should be permitted to use the otherwise privileged information in its possession.

For example, in *Principal Mutual Life Insurance Co. v. Eady*,²⁷⁹ the hospital provided treatment to Eady and then sought reimbursement from the

276. *In re Pebsworth*, 705 F.2d 261, 264 (7th Cir. 1983) (Gray, J., concurring); see also *Gozenbach*, 655 S.W.2d at 796 (expressing concern that if patient waived physician-patient privilege by submitting records to insurer, patients would be discouraged from seeking appropriate medical care, contrary to policy of privilege).

277. *Pebsworth*, 705 F.2d at 264; see also *In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983) (following *Pebsworth* and finding patients waived privilege by disclosing information to third-party insurance provider).

278. An analogous waiver is generally invoked by life insurance companies to access medical records of an insured who allegedly gave inaccurate answers to medical questions to obtain life insurance coverage. Courts enforce such waivers to allow the insurance company to use otherwise privileged information to defend against suits to recover the insurance proceeds. See, e.g., *Leach v. Millers Life Ins. Co.*, 400 F.2d 179 (5th Cir. 1968) (construing Mississippi law); *Jones v. Prudential Ins. Co. of America*, 388 A.2d 476 (D.C. 1978); *Hammer v. Investors Life Ins. Co.*, 473 N.W.2d 884 (Minn. Ct. App. 1991); *Woelfling v. Great-West Life Assurance Co.*, 285 N.E.2d 61 (Ohio Ct. App. 1972).

279. 889 F. Supp. 1067 (N.D. Ill. 1995).

insurance company under a policy that covered employees of Eady's Scale. The insurance company asked the hospital to provide any medical records regarding Eady's treatment to substantiate treatment for which the hospital sought reimbursement. Eady signed an authorization form, permitting the hospital to give his records to the insurance company. The hospital provided the records to the insurance company, and the insurance company determined that Eady was not employed by Eady's Scale. Therefore, it denied coverage.²⁸⁰ The court concluded that in his authorization Eady had waived his privilege as to the records submitted to the insurance company.²⁸¹

In *Eady*, the court had no reason to consider the extent of the waiver and did not address whether the authorization to provide records to the insurance company represented a comprehensive waiver of the plaintiff's privilege. Had the court addressed this question, it should have found a limited waiver, restricted to use of the records by the insurance company to determine the propriety of reimbursement. In *Henry v. Lewis*,²⁸² the court rejected the argument that the disclosure form authorizing release of "any information which may be necessary to determine benefits payable" constituted a general waiver of the physician-patient privilege and, appropriately, viewed the form as effecting only a limited waiver.²⁸³

When the patient gives a limited waiver, a question may arise concerning whether specific information is encompassed within the waiver. In *Principal Mutual*, it was unclear whether the hospital submitted only the records necessary for reimbursement evaluation and therefore came within the waiver.²⁸⁴ The company requested "any medical records regarding Eady's treatment."²⁸⁵ If the hospital responded with records not necessary for reimbursement, such as notes of therapeutic sessions, it exceeded the waiver and the extraneous information should retain its privileged status.²⁸⁶

Courts should regard the consent to disclosure of privileged records for insurance purposes as restricted and enforce it cautiously. The health care provider lacks authority to waive the privilege and, therefore, should not be permitted effectively to expand the patient's waiver by including extraneous records in the material provided to the insurance company.

280. *See id.* at 1069-70.

281. *See id.* at 1072.

282. 478 N.Y.S.2d 263 (N.Y. Sup. Ct. 1984).

283. *Id.* at 268.

284. *See Principal Mutual Life Ins. Co. v. Eady*, 889 F. Supp. 1067 (N.D. Ill. 1995).

285. *Id.* at 1070.

286. *See id.* at 1072.

VI. FORCING THE PRIVILEGE: PROCEDURAL ISSUES

A. *Standing to Assert the Privilege*

Effective protection turns in part on recognition that persons or entities other than the patient must be given standing to assert the psychotherapist-patient privilege. Courts should not simply dismiss claims on grounds of lack of standing. Instead, they should address the substantive issues raised by the assertion of the privilege.

The basic standing rule applied in federal²⁸⁷ and state²⁸⁸ courts is that, in addition to the patient, the patient's representative or the therapist may assert the privilege, but the authority to waive belongs only to the patient or the patient's legal representative. The Proposed Rule would have codified this rule, providing that the patient or one of several representatives could claim the privilege and that the psychotherapist may claim the privilege but only on behalf of the patient.²⁸⁹ This approach acknowledges that sometimes the patient is not competent to assert the privilege and recognizes that the patient does not always control possession and knowledge of the privileged information. Therefore, it identifies a limited class of those who may claim the privilege for the patient.

The law is less uniform, however, on whether the privilege can be asserted by any person or entity other than the patient, the patient's legal representative, or the psychotherapist. A number of state and federal courts reject claims of psychotherapist-patient privilege because the party asserting the privilege lacked standing to raise it. For example, in the case of *In re August, 1993 Regular Grand Jury (Clinic Subpoena)*,²⁹⁰ the court rejected the hospital's motion to quash a subpoena for mental health records in its possession. The court pointed to the language of Proposed Rule 504 and the Indiana privilege statute, stating that the hospital "simply cannot claim the privilege on behalf of patients treated by psychotherapists at the hospital merely because it is the custodian of the records."²⁹¹

287. See, e.g., *United States v. Hansen*, 955 F. Supp. 1225 (D. Mont. 1997) (holding that psychotherapist has standing to assert privilege on behalf of deceased patient).

288. See, e.g., *Sarphie v. Rowe*, 618 So. 2d 905, 907 (La. Ct. App. 1993) (holding that psychotherapist may assert privilege on behalf of patient).

289. See FED. R. EVID. 504(a)(3)(c) (proposed Nov. 20, 1972).

290. 854 F. Supp. 1380 (S.D. Ind. 1994).

291. *Id.* at 1392. In a companion case, the court entertained a claim of psychotherapist-patient privilege advanced by a corporation. The court neither explained why the corporation had standing nor described the corporation's business or relationship to the records and patients. See *In re August, 1993 Regular Grand Jury (Medical Corporation Subpoena II)*, 854 F. Supp. 1392 (S.D. Ind. 1993). The challenged grand jury subpoena, however, sought "records in connection with submission of claims for

Similarly, in the case of *In re Grand Jury No. 91-1*,²⁹² a mental health center asserted a deceased patient's privilege to resist a subpoena for his mental health records.²⁹³ The court held that the Center "cannot effectively resist this subpoena until one competent to claim the privilege does, in fact claim it."²⁹⁴ Relying on the language of the Proposed Rule, the court concluded that only the patient or the patient's personal representative could claim the privilege, even though it was unclear whether a representative had been designated.²⁹⁵ The court stated that if no representative stepped forward to claim the privilege, the motion to quash the subpoena would be denied.²⁹⁶

The approach reflected in these decisions is too narrow. Unless standing is granted to a broader class of entities, a party may circumvent the privilege when he locates privileged information in the possession of an entity without standing. The accessibility of privileged material through this route will undermine the privilege. To effectuate the federal psychotherapist-patient privilege, courts must adopt an inclusive rule of standing.

At the time the proposed rules were under consideration, the drafters may well have envisioned psychotherapy as treatment delivered primarily in private practices where the therapist maintained the only records. In that setting, the privilege is adequately protected by recognizing standing only in the patient, the patient's legal representative, and the therapist. In the more than twenty years since that time, however, the setting of mental health services delivery has changed; the definition of standing to raise the privilege should change accordingly. The role of institutions in the delivery of mental health services, the involvement of a wider range of professionals and support staff in the delivery of services, and the institutional maintenance of mental health records has greatly expanded. The modern structure of health care institutions mandates a broader concept of standing to assert the privilege.

Not all therapists maintain a private practice in which they control their patients' records. Many therapists provide care in institutional settings where a patient may receive therapy from a variety of professionals working within the institution.²⁹⁷ The therapist may depart, leaving patient records in the

reimbursement that were filed with" insurance carriers. *Id.* at 1395. One can infer that the corporation was itself the service provider and, in the eyes of the court, occupied the position of therapist in asserting the privilege.

292. 795 F. Supp. 1057 (D. Colo. 1992).

293. *See id.* at 1058.

294. *Id.* at 1059.

295. *See id.*

296. *See id.*

297. *See, e.g.,* Southern Bluegrass Mental Health & Mental Retardation Bd., Inc. v. Angelucci,

custody of the parent institution.²⁹⁸ When a patient receives therapy in an institutional setting, the institution plays a paramount role in maintaining the confidentiality of the records. Because of this structure, records or information shielded by the psychotherapist-patient privilege are far more likely to be held or seen by someone other than the parties to the privilege than are privileged legal documents.

Courts should recognize this change in the practice of psychotherapy and permit a broader class of parties to assert the privilege for the patient.²⁹⁹ Once a party advances the privilege, the court may then determine whether the information falls within some exception or look to the patient or the patient's representative to waive the privilege.

In some cases, courts have entertained claims of privilege without considering standing. For example, in *Pebsworth*, both Blue Cross/Blue Shield and the therapist asserted the privilege,³⁰⁰ and the court did not comment on the standing of the insurance company. In *Lora*, the court entertained the claim of privilege asserted by the Board of Education on behalf of students whose records might be selected randomly.³⁰¹ The plaintiffs sought records to establish a pattern of discrimination in the Board's assignment of students to special schools for students identified as socially or emotionally maladjusted. Due to the methodological importance of random selection, the *Lora* court could not seek waivers from the students without eliminating the evidentiary use of the records. The court therefore evaluated the claim of privilege, held that it did not foreclose the discovery, and ordered disclosure of the records subject to appropriate protective orders.

Some states recognize the role of entities outside the privileged relationship in enforcing other privileges and have therefore held that recordholders have standing.³⁰² In *Southern Bluegrass Mental Health v. Angelucci*,³⁰³ the Kentucky court held that a corporation that provided mental health services had standing to raise a client's psychiatrist-patient privilege.

609 S.W.2d 931, 932 (Ky. Ct. App. 1980) (describing treatment as including "individual-group therapy which included interviews with staff psychiatrists, psychologists and staff social workers").

298. See, e.g., *Mitchell v. Sturm, Ruger & Co.*, 842 F. Supp. 158, 159 (E.D. Pa. 1994) (patient treated by several professionals).

299. See generally Ralph W. Tarr, Note, *Protecting the Privacy of the Absent Patient*: Rudnick v. Superior Court, 27 HASTINGS L.J. 99 (1975) (advocating expanded standing for physician-patient privilege).

300. See *In re Pebsworth*, 705 F.2d 261 (7th Cir. 1983).

301. See *Lora v. Board of Educ.*, 74 F.R.D. 565 (E.D.N.Y. 1977).

302. See, e.g., *Parkson v. Central DuPage Hosp.*, 435 N.E.2d 140 (Ill. App. Ct. 1982) (holding that hospital had standing to assert physician-patient privilege).

303. 609 S.W.2d 931 (Ky. Ct. App. 1980).

In *Shaw v. Metzger*,³⁰⁴ the Delaware court held that a medical center had standing to assert the physician-patient privilege. The court commented, "To deny the hospital the right to assert the privilege of patients unaware of the effort to pierce the privilege would render the protection of the privilege ineffective."³⁰⁵ The courts of several other states have agreed with the holding in *Shaw*.³⁰⁶ In the case of *In re Grand Jury Investigation of Onondaga County*,³⁰⁷ the court noted that courts must permit hospitals to assert the privilege to protect patients, who have not waived the privilege.³⁰⁸ Some courts have also held that a recordholder has an obligation to assert a privilege.³⁰⁹

At the very least, the federal courts should permit recordholders to raise the psychotherapist-patient privilege. If the patient is not a party in the case, the recordholder may be the only entity in a position to protect the patient's interest in privacy. Rulings summarily dismissing recordholders' claims of privilege for lack of standing create a breach in the protection of the privilege, threatening to undermine its goals of fostering communication.

Other situations may call for more creative approaches. The standing question is more difficult when the entity raising the privilege is not even the

304. No. 77C-DE-101, 1982 WL 172853 (Del. Super. Ct. Nov. 22, 1982).

305. *Id.* at *2; *see also* *Monsanto Co. v. Aetna Cas. & Surety Co.*, No. 88C-JA-118, 1992 WL 182320 (Del. Super. Ct. May 26, 1992) (following *Shaw* and holding that employer had standing to assert privilege to resist disclosure of records of employees who had been examined by company physicians).

306. *See, e.g.*, *Tucson Med. Ctr., Inc. v. Rowles*, 520 P.2d 518, 523 (Ariz. Ct. App. 1974) (holding that, despite absence of statutory language, privilege covered hospital records and, therefore, could be asserted by hospital when neither physician nor patient is party to proceedings); *Parkson*, 435 N.E.2d 140 (holding that hospital "was mandated to assert the physician-patient privilege to insure that the patients' records would be protected in accordance with the intentions of our statute"); *In re Grand Jury Investigation*, 450 N.E.2d 678 (N.Y. 1983) (holding that hospital was permitted to assert privilege on behalf of patient who was suspected of homicide); *Boddy v. Parker*, 358 N.Y.S.2d 218 (N.Y. App. Div. 1974) (holding that hospital was not permitted to disclose privileged information without patient's consent); *In re June 1979 Allegheny County Investigating Grand Jury*, 415 A.2d 73 (Pa. 1980) (holding hospital had standing to assert privilege because hospital owes patient duty to limit access to records unless patient consents to disclosure).

307. 450 N.E.2d 678 (N.Y. 1983).

308. *See id.* at 680; *see also* *Division of Med. Quality v. Gherardini*, 156 Cal. Rptr. 55 (Cal. Ct. App. 1979) (holding that hospital could assert privilege on behalf of patient who had not been notified of request for records).

309. *See, e.g.*, *Hospital Corp. of America v. Superior Court*, 755 P.2d 1198, 1200 (Ariz. Ct. App. 1988) ("[W]hen neither the patient nor the physician are parties to a proceeding in which discovery of hospital records containing privileged information is sought, the hospital must assert the privilege."); *Commonwealth v. Fuller*, 667 N.E.2d 847, 851-52 (Mass. 1996) (holding rape crisis center was obligated to assert privilege); *Moore v. St. John's Episcopal Hosp.*, 452 N.Y.S.2d 669, 670 (N.Y. App. Div. 1982) (holding that hospital could not divulge patient records without express waiver of privilege by patient); *King v. O'Connor*, 426 N.Y.S.2d 415, 417 (N.Y. Sup. Ct. 1980) (enforcing physician-patient privilege asserted by hospital and remarking "a hospital may not disclose the names and addresses" of patients).

recordholder. Even then, however, the court should ordinarily scrutinize the claim of privilege. The party raising the privilege may be alerting the court to a legitimate concern. For example, in *Greet v. Zagrocki*,³¹⁰ the court commented on the lack of standing but identified a route around the problem. The city's law department asserted the psychotherapist-patient privilege for a police officer named as a codefendant with the city in a civil rights action.³¹¹ The court noted that the city could not claim the privilege on behalf of the officer but that the court could raise the privilege on behalf of an absent patient.³¹² The officer, who had not entered an appearance, was absent, so, while denying standing to the city, the court nevertheless entertained the claim of privilege.³¹³

Two cases illustrate situations in which a court may have overlooked a legitimate claim of privilege and disserved the goals of the privilege by disposing of the case on grounds of standing. In *State v. Moody*,³¹⁴ the state asserted the privilege on behalf of the complainant in a criminal case. The complainant alleged that the defendant, who was her stepfather at the time of trial, had sexually abused her.³¹⁵ She had participated in counseling sessions with a clinical psychologist both individually and in a family group that sometimes included the defendant.³¹⁶ At trial, the defendant sought to call the psychologist to testify to the complainant's statements concerning whether she had been abused.³¹⁷ The trial court ruled that the sessions at which the defendant was not present were privileged, but the Supreme Judicial Court of Maine disagreed.³¹⁸ The court stressed that neither the complainant, her father, her mother, nor her psychologist asserted the privilege and held that the state's assertion was improper.³¹⁹ The court failed to recognize that in the particular circumstances of the case no competent party had the appropriate relationship to raise the complainant's psychotherapist-patient privilege. The complainant herself was only fourteen years old at the time of trial. The complainant's mother had married the defendant after the complainant had leveled her allegation of abuse at him. The psychologist neglected the obligation to assert the privilege. In light of the complainant's immature age,

310. No. CIV. A. 96-2300, 1996 WL 724933 (E.D. Pa. Dec. 16, 1996).

311. *See id.* at *1.

312. *See id.* at *2.

313. *See id.*

314. 486 A.2d 122 (Me. 1984).

315. *See id.* at 123.

316. *See id.*

317. *See id.*

318. *See id.*

319. *See id.* at 124.

her mother's conflict of interest, and the psychologist's unexplained failure to assert the privilege, the court should have either entertained the state's assertion of the complainant's privilege or remanded to have the court appoint a guardian ad litem for the complainant to evaluate whether she should invoke the privilege.

Similarly, in *Goldstein v. St. Paul Fire & Marine Insurance Co.*,³²⁰ the court took too narrow a view of standing. In *Goldstein*, the estate of a former resident of the nursing home sued the nursing home's insurer, claiming that the nursing home inadequately supervised a patient known to suffer from Alzheimer's disease.³²¹ The patient assaulted the decedent and caused injuries that ultimately resulted in her death.³²² Following the death, the executor sought discovery of the medical records related to the resident who committed the assault.³²³ Although the state had a legislatively-created health care provider-patient privilege, the court concluded that the insurance company lacked standing to raise the privilege. Therefore, the court did not seriously entertain the arguments in favor of the privilege or, alternatively, consider protective measures.³²⁴ As in *Moody*, it appears that the patient was incompetent to assert the privilege on his own behalf and that, unless standing were extended to the insurance company, his interests would be sacrificed.³²⁵

A number of courts refuse to accord standing to a party invoking the privilege when the circumstances signal that the assertion of privilege is designed to serve a purpose that does not benefit the patient.³²⁶ Courts should adopt an inclusive approach, which will better serve the purposes of the

320. 665 So. 2d 1267 (La. Ct. App. 1995).

321. *See id.* at 1268.

322. *See id.*

323. *See id.* at 1268-69.

324. *See id.* at 1270.

325. The court noted that the resident had "not voiced any objections to the subpoena served on him," but did not mention whether there was a guardian who was informed of the proceedings and could determine whether to assert the privilege. *Id.* at 1270.

326. *See, e.g.,* *Goodwin v. State*, 573 N.E.2d 895 (Ind. Ct. App. 1991) (holding that criminal defendant lacked standing to assert psychologist-patient privilege on behalf of prosecution witness); *In re Adoption of Diane*, 508 N.E.2d 837 (Mass. 1987) (holding that mother resisting adoption of child was not permitted to raise psychotherapist-patient privilege on behalf of child); *Samson v. Saginaw Prof'l Bldg., Inc.*, 224 N.W.2d 843 (Mich. 1975) (holding that landlord being sued for failing to exercise reasonable care to protect other tenants from mental patients undergoing treatment in building lacked standing to raise patients' privilege); *People v. Lobaito*, 351 N.W.2d 233 (Mich. Ct. App. 1984) (holding that defendant not permitted to assert psychologist-patient privilege to exclude testimony of son's psychologist); *Eoff v. Hal & Charlie Peterson Found.*, 811 S.W.2d 187 (Tex. Ct. App. 1991) (holding that plaintiff lacked standing to assert privilege on behalf of witness); *State v. Echols*, 449 N.W.2d 320 (Wisc. Ct. App. 1989) (holding that criminal defendant lacked standing to assert psychologist-patient privilege on behalf of prosecution witness).

privilege, protecting against misuse of the privilege in ways other than by adopting a narrow definition of standing. Even when the party asserting the privilege has no apparent legitimate claim to standing, the court should assess the claim of privilege rather than summarily rejecting it for lack of standing. If the court fears that the assertion of privilege is improperly motivated, the court should inquire further rather than simply dismissing the assertion as having been made by an improper party. In some cases, appropriate inquiry should lead the court to appoint a legal representative for a patient who is not competent to assert or waive the privilege.

Even when asserting the privilege threatens the government's interest in protecting the patient from injury, courts should recognize broad standing and protect against abuse of the privilege by defining an appropriate exception. Although the privilege should not bar governmental investigation of allegations that the recordholder committed crimes against the patient, it may protect some information despite the existence of such an investigation.³²⁷ In the case of *In re Grand Jury Proceedings [Doe]*,³²⁸ the court explained its refusal to allow a hospital which was under investigation for possible crimes against patients to assert the patients' physician-patient or social worker-client privilege.³²⁹ The court stated:

A pragmatic limitation upon [the rule permitting someone other than the patient to assert the privilege on the patient's behalf], which has been given effect in our State, is that a person or entity subject to proceedings for having committed crimes against an individual should not be permitted to assert the victim's physician-patient privilege as a bar to production of relevant medical records.³³⁰

Courts should recognize such an exception but should construe it narrowly. If the patient is not the victim of the suspected wrongdoing, the court should recognize standing to raise the privilege, even when skeptical

327. See, e.g., *In re Grand Jury Subpoena Duces Tecum* Dated Dec. 14, 1984, 513 N.Y.S.2d 359, 363-64 (N.Y. 1987) (recognizing that Medicaid investigators are entitled to review privileged information relevant to investigation, but protecting privileged information unnecessary to the investigation).

328. 437 N.E.2d 1118 (N.Y. 1982).

329. See *id.* at 1120.

330. *Id.* at 1120; see also *People v. Doe*, 410 N.Y.S.2d 233 (N.Y. Sup. Ct. 1978) (prohibiting nursing home under investigation in connection with suspected mistreatment of patients from invoking physician-patient privilege of victims); *State v. McGriff*, 672 N.E.2d 1074 (Ohio Ct. App. 1996) (prohibiting defendant physician from invoking physician-patient privilege to bar prosecution access to relevant patient records). But see *People v. Bickham*, 431 N.E.2d 365 (Ill. 1982) (permitting physician to assert patients' physician-patient privilege, since state had not claimed that investigation targeted doctor's illegal conduct).

about the reason for the assertion of privilege. The *Lora* court noted that, given the widespread perception that the Board selected students on a discriminatory basis, "it is highly unlikely that the fifty students to be randomly selected from this group would acquiesce in the assertion of a privilege by the very individuals alleged to have fostered such system-wide bias,"³³¹ and concluded the presumption of authority contained in proposed Rule 504(c) is rebutted.³³² Nevertheless, the court entertained the claim of privilege advanced by the Board and enforced safeguards to protect the interests of the students.³³³ *Lora* represents an appropriate approach.

The court should bypass the claim of privilege only if it is clearly established that the party asserting the privilege does not speak for the patient. For example, in *State v. Chenette*,³³⁴ the Vermont court held that the defendant physician could not rely on his patients' physician-patient privilege to exclude evidence in his prosecution for filing false claims.³³⁵ The court remarked, "While the [physician] has the power to invoke the privilege, it is based on the presumption that he speaks for the patient. Once it is clear that he does not speak for the patient, his power to invoke the privilege ceases."³³⁶ In *Chenette*, the physician invoked the privilege long after the recordholder delivered the records to the state, and, by the time the case came before the court, the state had obtained waivers from all the patients.³³⁷ The belated assertion of privilege could have no significance in light of the patients' waivers. As a general matter, however, the court should not rely on a lack of standing but should advance the privilege's purpose of protecting the patient and rely on exceptions to the rule itself to prevent the privilege from being converted into a shield for an abusive medical provider.³³⁸

331. *Lora v. Board of Educ.*, 74 F.R.D. 565, 586 (E.D.N.Y. 1977).

332. *See id.*

333. *See id.* at 587.

334. 560 A.2d 365 (Vt. 1989).

335. *See id.* at 372-73.

336. *Id.* at 373; *see also* *United States v. Lowe*, 948 F. Supp. 97, 100-01 (D. Mass. 1996) (rejecting counseling center's assertion of client's privilege because client had executed written waiver).

337. *See State v. Chenette*, 560 A.2d 265, 372 (Vt. 1989).

338. *See supra* text accompanying notes 141-46. Difficulties often arise when relying on standing arguments to avoid having a therapist who is under investigation rely on the patients' privilege to stymie the government. *See Commonwealth v. Kobrin*, 479 N.E.2d 674 (Mass. 1985). In *Kobrin*, 27 of the therapist's patients signed written forms invoking their psychiatrist-patient privilege. *See id.* at 676. The court, therefore, was forced to look to other avenues to circumvent the privilege barrier. *See id.* at 680-81.

B. *The Use of In Camera Review*

In addition to sculpting the contours of the psychotherapist-patient privilege, courts must also define the procedures for evaluating claims of privilege. Before enforcing a claim of privilege, courts will look to the patient to establish that a psychotherapist-patient relationship existed and that there is reason to believe the information sought falls within the privilege. But one troublesome aspect of many privilege cases is the courts' willingness to review the allegedly privileged information in camera before ruling. Careless administration of the privilege undermines its effectiveness. Given the personal nature of the protected information, even disclosure to the court or the threat of such disclosure may discourage open and frank communication.³³⁹

In *United States v. Zolin*,³⁴⁰ the Supreme Court considered the role of in camera review of allegedly privileged information. The Court cited two rules that arguably restrict the use of in camera review of such information.³⁴¹ The Court concluded that the crime-fraud exception to the attorney-client privilege would be eviscerated if in camera review were categorically forbidden.³⁴² The evidence that the attorney's services were obtained in furtherance of a crime or fraud will often lie only in the allegedly privileged material. Therefore, the Court held that in camera review would sometimes be appropriate and outlined the procedure trial courts should employ to assess the applicability of the crime-fraud exception.³⁴³ Acknowledging the harmful effects of in camera review, the Court refused to allow in camera review until the party challenging the claim of privilege made a threshold showing that there is a factual basis for a good faith belief that in camera review may reveal evidence that the crime-fraud exception applies.³⁴⁴

Zolin by no means suggests that a court's in camera review of allegedly privileged material should be routine. The court should not resort to in

339. The likelihood of negative impact is greater because the therapist often has an ethical duty to inform the client of the limits on the protection of the privacy of the relationship. See *supra* notes 30-32 and accompanying text.

340. 491 U.S. 554 (1989).

341. Rule 104(a) states, "In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges." *Id.* at 565 (citing FED. R. EVID. 104(a)). Rule 1101(c) provides, "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." *Id.* (citing FED. R. EVID. 1101(c)).

342. See *id.* at 568.

343. See *id.* at 573-74.

344. See generally Rachel A. Hurtzel, Note, *Evidence: The Crime Fraud Exception to Attorney-Client Privilege—United States v. Zolin*, 15 U. DAYTON L. REV. 365 (1990) (examining effect of *Zolin* on attorney-client privilege).

camera review unless information essential to the ruling can be found only in the allegedly privileged records and the party seeking access makes a threshold showing. In administering the psychotherapist-patient privilege, courts will sometimes encounter a plausible argument that in camera review would advance the inquiry.³⁴⁵ Generally, however, the review is appropriate only after an initial showing that an exception applies. Unlike the crime-fraud exception to the attorney-client privilege, the standard exceptions to the psychotherapist-patient privilege derive from the context rather than the content of the communications. Without examining the records, the court can assess whether communications are being offered in a proceeding for hospitalization, whether they occurred in a court-ordered examination, or whether the patient-litigant exception may apply. Once the court knows that an exception applies, it may employ in camera review to identify the relevant parts of the records, denying access to the irrelevant portions, and maintaining as much protection of the patient's privacy as possible. Thus, in camera review plays a legitimate role in assessing the appropriate extent of disclosure, but only after the privilege has first been overcome.

Cases reveal that courts overuse in camera review in evaluating claims of psychotherapist-patient privilege. In a number of cases applying the privilege, courts appear to use in camera review of records primarily to determine whether the records were relevant or important enough to be disclosed, and in doing so, have inspected allegedly privileged documents before determining that they were not privileged.³⁴⁶

Moreover, knowing the contents of the privileged documents may sway the court in other matters in the proceeding, and some courts' rulings appear influenced by the contents of the records reviewed in camera. For example, in *D.C. v. S.A.*,³⁴⁷ the plaintiff raised the privilege in a personal injury case,

345. For example, if courts recognize an exception for protective disclosure when the therapeutic communications reveal that the patient presents a threat to a third party, the court may need to consider the content of the communication to determine whether disclosure was necessary. *See, e.g.*, *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998). In *Glass*, the court recognized the psychotherapist-patient privilege could be overcome by a threat of harm but held that the district court had not considered sufficient information in concluding that the privilege was overcome. *See id.* at 1359-60. The court remanded for consideration of whether the seriousness of the threat communicated to the therapist and the circumstances of the case warranted disclosure. *See id.* at 1360. *See generally* WRIGHT & GRAHAM, *supra* note 37, § 5549 (discussing protective disclosures).

346. *See, e.g.*, *United States v. Haworth*, 168 F.R.D. 660 (D.N.M. 1996); *Price v. San Diego*, 165 F.R.D. 614 (S.D. Cal. 1996); *D.C. v. S.A.*, 670 N.E.2d 1136 (Ill. App. Ct. 1996); *see also, e.g.*, *State v. Moody*, 486 A.2d 122 (Me. 1984) (court used voir dire at trial to determine whether testimony was privileged, giving both parties full access to allegedly privileged conversations; court then ruled knowing that psychologist testified in voir dire that complainant failed to confirm allegations in private therapy sessions).

347. 670 N.E.2d 1136.

while the defendant argued patient-litigant exception. The trial court then reviewed the records in camera and stated that, while some were privileged, "there are things there that . . . relate pretty directly to [the] accident."³⁴⁸ In a ruling later affirmed on appeal,³⁴⁹ the trial court held that the plaintiff had placed his mental state in issue by pleading negligence and ordered the records disclosed. If the privileged communications are inconsistent with the patient's deposition or trial testimony, the court may be reluctant to enforce the privilege. Even if the statements were made outside a fact-oriented setting and may represent subjective statements suitable to therapy but not to the courtroom, the court may feel that to enforce the privilege would permit the patient to subvert the truth-seeking process. In *Price v. City of San Diego*,³⁵⁰ the defendant argued that the plaintiff's mental health records would reveal that she had not been truthful and, after conducting an in camera review, the magistrate ordered disclosure of the records, remarking that they were relevant to the issue of the patient's credibility.³⁵¹

Inquiry directed to assessing the relevance of privileged records is no longer appropriate after *Jaffee*. Courts must adjust and respect the claim of privilege when arriving at a ruling. Review of allegedly privileged records is inappropriate until the privilege has been overcome, except in the small number of cases in which the court needs to review the records to resolve their status and does so in accordance with the procedures described in *Zolin*.

VII. CONCLUSION

The Supreme Court recognized the psychotherapist-patient privilege in *Jaffee*, and, therefore, the federal courts must undertake the task of defining the scope and application of the privilege. As a common-law privilege, the psychotherapist-patient privilege will necessarily take shape case by case, but courts must execute the task of defining the privilege as expeditiously as possible to permit professionals in counseling relationships to ascertain the

348. *Id.* at 1138.

349. The intermediate appellate court first reversed the trial court, holding that the plaintiff did not place his mental state in issue. *See id.* at 1140. The Supreme Court of Illinois agreed, but reversed on the ground that "fundamental fairness commands that the privilege yield." *D.C. v. S.A.*, 687 N.E.2d 1032, 1040-41 (Ill. 1997).

350. 165 F.R.D. 614 (S.D. Cal. 1996).

351. *See id.* at 623; *see also* *State v. Moody*, 486 A.2d 122 (Me. 1984) (trial court permitted attorneys to conduct voir dire of psychologist and appellate court concluded that since no party with standing had asserted privilege, privileged communications inconsistent with complainant's allegations were admissible). *But see* *Webb v. Quincy City Lines, Inc.*, 219 N.E.2d 165, 167 (Ill. App. Ct. 1966) (rejecting defendant's argument, based in part on contents of privileged records, that not to find waiver is to "exclude evidence indicating a malingering and exaggerating plaintiff without corresponding public benefits").

extent to which the law shields the communications and other information that they receive.

The first question raised by *Jaffee* is which counselors are covered by the privilege. This Article advocates that the privilege extends only to fully credentialed counselors such as psychiatrists, psychologists, and master's level social workers. *Jaffee* should not be read as opening the door to a privilege for all counseling relationships. The purposes of the privilege is to foster counseling that benefits both the client and society, and it is best served if the counselor providing therapy has advanced professional training. In addition, fully credentialed counselors are bound by professional codes requiring confidentiality and are inculcated with a sense of professionalism. Courts should not assume that anyone claiming the title "counselor" offers a therapeutic benefit to the client. Moreover, courts should not embark on a course that would require individual assessment of the competence of each individual counselor or even each class of counselors. Instead, courts should extend the psychotherapist-patient privilege only to the therapists who most clearly serve its purpose and leave the question of whether communications to other types of counselors are privileged for the legislature.

Second, courts should extend the privilege not only to communications between the patient and therapist for therapy or diagnosis but also to patient-identifying information. Any disclosure that a patient has received psychotherapy threatens the interest in fostering such treatment. When patient-identifying information is sought, courts should balance the need for disclosure against the threat to the interests protected by the privilege. In doing so, courts should consider the use of protective measures that accommodate the need for the information while shielding the patient's privacy.

Third, courts should adopt a conservative approach toward waiver of the privilege. To advance the protected interests, courts should apply the patient-litigant exception narrowly, holding that the patient has placed mental state in issue only when clear from the patient's pleadings. Further, courts should reject the argument that situations such as recordkeeping by providers or the exchange of records for third party payment, inherent to modern systems of providing mental health care, defeat the privilege.

Fourth, courts should adopt a broad definition of standing. Courts should recognize that confidential information is often held by an entity other than the patient or therapist and that a restrictive concept of standing would undermine the effect of the privilege.

Fifth, courts must follow protective procedures for evaluating claims of psychotherapist-patient privilege. Too often, in assessing claims of psychotherapist-patient privilege, courts fail to observe the procedures

required for allegedly privileged material, engaging in casual and unwarranted in camera review of the contested material. Courts should accord information shielded by the psychotherapist-patient privilege the protection extended to other privileged information and employ in camera review only when both necessary and warranted.

If the courts adopt these suggestions, they will both effectuate the goals of *Jaffee* and avoid prolonging the uncertainty that attends ad hoc development of privilege law. The suggested approach focuses the psychotherapist-patient privilege on the relationships in which its protection is most justified and gives the privilege full force in those counseling relationships.

