2009 - 2011 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

January 19, 2011

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendment to N.J.R.E. 411, Liability Insurance (Timing of Initial Attorney Contact)

During the 2007-2009 term, the Supreme Court Committee on the Rules of Evidence ("Committee") organized a subcommittee to consider amending N.J.R.E. 504, Lawyer-Client Privilege, to include any evidence regarding the timing of a client's initial contact with an attorney as within the privilege. Anecdotal experiences relayed by committee members presented the scenario that in personal injury cases, plaintiffs were frequently asked by defense counsel when they first consulted with an attorney about the injury, more specifically whether they consulted an attorney before they consulted a doctor. The implication clearly being that the plaintiff had not suffered a significant injury as a result of the accident so as to independently cause him or her to seek medical attention. In verbal threshold litigation, the inference became arguably more important, i.e., that plaintiff had not suffered a "permanent injury." Last term, the subcommittee that studied the issue split evenly, half recommending that N.J.R.E. 504 should be amended to prohibit such inquiries and half opposing such an amendment. Accordingly, the subcommittee made no recommendation to the full Committee and the Committee held the matter for consideration in this term.

Having undergone significant reorganization prior to this term, the Committee again preliminarily discussed the proposal. Further consideration and study of the issue was delegated to the Privileges Subcommittee, chaired by Judge Mitchel Ostrer. This subcommittee concluded that the issue could best be addressed through a change to a rule dealing with relevancy, rather than through a change to N.J.R.E. 504. See Subcommittee Report (attached as Appendix A). In summary, the subcommittee thought that evidence as to the timing of attorney contact should be discouraged, but not absolutely banned. Accordingly, a majority of the subcommittee recommended adding a new subsection (b) to the current N.J.R.E. 411, Liability Insurance. The recommended subsection (b) provides that evidence in a personal injury case as to the timing of attorney contact should only be admitted if its probative value substantially outweighs its prejudice.

After a spirited debate, the Committee voted 12 to 7 to adopt the recommendation of the subcommittee. The majority of the Committee was persuaded that this type evidence should generally be excluded in a personal injury case, because it is usually irrelevant and prejudicial. It was noted that very little decisional law existed on the subject; reported and unreported cases dealing with the issue did not expressly address the relevancy of such evidence.

Most recently, in the unpublished case of Twal v. Hinds, A-4296-06T1 (App. Div. July 18, 2008), the Appellate Division found no reversible error when the trial judge limited cross-examination on the fact that the plaintiff consulted with an attorney, before consulting with a doctor. The Appellate Division agreed with the trial court's stated

reason for the exclusion; i.e., "'[t]here is absolutely [nothing] wrong about going to a lawyer and there's absolutely no reasonable fair inference that this jury should be making based upon somebody going to a lawyer, period." (slip op. at 8).

Similarly, in Gilmartin v. Weinreb, 324 N.J. Super. 367, 387 n. 4 (App. Div. 1999), the Appellate Division, in a medical malpractice case, directed that on retrial the plaintiff should not be questioned regarding the fact that she consulted an attorney within hours of her husband's death. The court remarked: "In the absence of unusual circumstances, this line of questioning should not be permitted on retrial since the potential for undue prejudice is substantial." Ibid.

In contrast, in Thomas v. Toys R. Us, Inc., 282 N.J. Super. 569, 583 (App. Div. 1995), the Appellate Division found no reversible error where the defense attorney had questioned plaintiff on when she had hired an attorney. The court said: "We find no error here. It was certainly not a focal point of the case, and had some bearing on plaintiffs' motivations and credibility." Id. at 583.

Those favoring passage of the proposed amendment were concerned about the lack of uniformity among the trial bench which, to some degree, was evidenced by the cited cases and by anecdotal discussions among committee members. The majority of the Committee was also influenced by the experience of its members whose practices included personal injury claims on behalf of plaintiffs. They reported that trial court rulings on the admissibility of such evidence were extremely inconsistent. Those favoring passage believed the proposed rule would bring some consistency to the area and give much needed guidance to trial judges and lawyers alike.

However, those favoring passage acknowledged that, in certain limited circumstances, the relevance of such evidence might outweigh any potential for prejudice. Thus, the Committee adopted the standard fashioned by the subcommittee—that is, the evidence is inadmissible in a personal injury case, unless its probative value substantially outweighs its prejudice. This standard tips the balance against admission, except in the unusual case. Essentially, this standard is the reverse of the standard found in N.J.R.E. 403, which provides that relevant evidence is inadmissible if its prejudice substantially outweighs its probative value.

Therefore, for all the reasons stated above, a majority of the Committee recommends that the Supreme Court adopt the proposed amendment to N.J.R.E. 411.

A minority of the Committee vigorously opposed adoption of N.J.R.E. 411(b) for a variety of reasons. A number of members opposed the amendment on the grounds that evidence of when a plaintiff consulted an attorney should never be admitted into evidence in a personal injury case. These members believe that the right to consult an attorney is so important that no negative implication should ever be drawn from a person's contact with an attorney. The members pointed out that in criminal cases evidence that a defendant consulted an attorney is inadmissible as infringing on the right to counsel. See Marshall v. Hendricks, 307 F. 3d 36 (3d Cir. 2002), cert. denied,

538 U.S. 911, 123 S.Ct. 1492, 155 L. Ed. 2d 234 (2003); United States ex rel. Macon v. Yeager, 476 F. 2d 613 (3d Cir.), cert. denied sub nom Yeager v. Macon, 414 U.S. 855, 94 S.Ct. 154, 38 L. Ed. 2d 104 (1973).

Other members opposed the amendment believing that no special burden should be placed on the admission of evidence regarding the timing of attorney contact. Rather, in their opinion, admission of this type of evidence should be governed by the same standards regarding relevancy and prejudice as any other evidence. They believe that trial courts should continue to make these rulings on a case-by-case basis.

Lastly, some members of the minority expressed concerns that adoption of the proposed rule was premised upon anecdotal evidence against a backdrop of little decisional law. Under the circumstances, adoption of a proposed rule that essentially reversed the analytical paradigm of N.J.R.E. 403 was unjustified and unwise in their opinion.

Rule 411 Liability Insurance and Attorney Contact

(a) Evidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct. Subject to Rule 403, this rule does not require the exclusion of evidence against liability when offered for another purpose, such as proof of agency, control, bias, or prejudice of a witness.

(b) Evidence of the timing of a person's consultation with an attorney is not admissible to show the invalidity of a claim for personal injury in a civil action, unless the court determines that the probative value of admitting the evidence substantially outweighs the risk of undue prejudice.

B. Proposed Amendment to N.J.R.E. 102, Purpose and Construction

The Civil Union Law, L. 2006, c. 103, and the Domestic Partnership Act, L. 2003, c. 246, extend the legal protections of marriage to other types of familial relationships. N.J.S.A. 37:1-32; N.J.S.A. 26:8A-2. As part of the Civil Union Law, N.J.S.A. 37:1-33 provides:

> Whenever in any law, rule, regulation, judicial or administrative proceeding or otherwise, reference is made to "marriage," "husband," "wife," "spouse," "family," "immediate family," "dependent," "next of kin," "widow," "widower," "widowed" or another word which in a specific context denotes a marital or spousal relationship, the same shall include a civil union pursuant to the provisions of this act.

To comply with this statute, and to take into account the existence of civil unions and domestic partnerships, the Committee recommends that the Supreme Court amend N.J.R.E. 102, Purpose and Construction, to add subsection (b). This recommendation is consistent with R. 1:1-2(b), Construction and Relaxation, which the Supreme Court adopted on July 16, 2009, so that the Rules of Court will be interpreted to include civil unions and domestic partnerships.

Rule 102. Purpose and Construction

(a) These rules shall be construed to secure fairness in administration and elimination of unjustified expense and delay. The adoption of these rules shall not bar the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

(b) As used in these rules, references to “marriage,” “husband,” “wife,” “spouse,” “family,” “immediate family,” dependent,” “next of kin,” “widow,” “widower,” “widowed,” or another that in a specific context denotes a marital or spousal relationship shall include a civil union, as established by N.J.S.A. 37:1-28 to -36, and a registered domestic partnership, as established by N.J.S.A. 26:8A-1 to -13, and the persons in those relationships.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Adopting a New Jersey Equivalent to F.R.E. 502, Attorney-Client Privilege and Work Product; Limitations on Waiver

The Committee considered whether it should adopt a New Jersey rule of evidence equivalent to F.R.E. 502, Attorney-Client Privilege and Work Product; Limitations on Waiver. This federal rule was adopted in 2008 to address concerns with the proliferation of electronic discovery and to resolve a conflict that had developed in the federal circuits on the consequences of an inadvertent disclosure of documents in discovery. The Committee forwarded this question to its Privileges Subcommittee, which drafted a comprehensive report recommending that no New Jersey rule was necessary (subcommittee report attached as Appendix B).

The Committee adopted the recommendation of its subcommittee for the reasons stated therein. It also noted that the subcommittee had conducted an informal survey of judges and practitioners in the State to determine whether the lack of an evidence rule similar to F.R.E. 502 created practical problems during discovery. No one surveyed thought that there was such a problem.

III. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendment to N.J.R.E. 704, Opinion on Ultimate Issue

In the 2007-2009 term, the Committee held for consideration the issue of whether N.J.R.E. 704 should be amended to add subsection (b), as was added to F.R.E. 704 in 1984 (additions underlined):

> (a) Except as provided in subsection (b), [t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The current Committee discussed the proposed rule amendment at its June 30, 2010 meeting, but determined to delay any decision until the Supreme Court decided State v. Rosales, 202 N.J. 549 (2010), which opinion was pending at the time. The Supreme Court's opinion was released less than a month later, but the Committee never returned to the subject. The Committee will hold this matter for consideration in the next term.

IV. OTHER RECOMMENDATIONS

The Committee considered whether the various mental health privileges found in the evidence rules should be reconciled into one overarching mental health privilege. The Committee noted that currently the extent of the privilege that applies to a communication between a patient and a mental health provider largely depends upon the license or professional credentials of the provider. For instance, the rules provide for different and sometimes inconsistent privileges for communications between a patient and a psychologist, N.J.R.E. 505, a physician, N.J.R.E. 506, a marriage counselor, N.J.R.E. 510, a cleric, N.J.R.E. 511, a victim counselor, N.J.R.E. 517 and a social worker, N.J.R.E. 518.

The Committee assigned study of this subject to its Privileges Subcommittee. As a preliminary matter, the subcommittee considered whether the Supreme Court had the authority to amend privileges through the rule-making process. All the privileges found in Article V of the Evidence Rules were initially adopted as statutes by the Legislature. The subcommittee concluded that the Court shares power with the Legislature to adopt or amend evidentiary privileges, but recognized that it is ultimately for the Court to determine the extent of its own power. See the subcommittee's report attached as Appendix C.

After a thorough analysis of all New Jersey's current mental health provider privileges, the subcommittee's comprehensive report stated: "In the subcommittee's view, when matched against the utilitarian and privacy policy goals, there is little apparent justification for treating a patient's communications with one mental health professional differently from communications with a different mental health professional." The subcommittee therefore recommended that the Committee undertake a review of New Jersey's mental health privileges to determine whether to recommend a unified health provider privilege. The subcommittee anticipated that the Committee would "confer with professional societies and patient groups, to gain their input about existing privileges and any proposed revisions." In light of the large scope of such a review, the subcommittee recommended that the Committee seek authorization from the Court for this project.

The Committee voted unanimously to adopt the subcommittee's report. Accordingly, the Committee seeks authorization from the Supreme Court to embark on a comprehensive study of New Jersey's mental health provider privileges with the goal of determining whether New Jersey should adopt a unified privilege. The Committee anticipates holding hearings on the issue to hear from various stakeholders, including organizations representing professional mental health providers and patient advocacy groups.

IV. CONCLUSION

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

Respectfully submitted,

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APPENDIX A

To: The Supreme Court Rules of Evidence Committee
From: The Privileges Subcommittee
Date: 10/14/10

Re: Recommendation on the admissibility in a personal injury claim on when a plaintiff contacted an attorney

An issue that comes up in many personal injury trials deals with when a plaintiff contacted an attorney. Specifically, the defense seeks to have an inference drawn that if an injured party contacts an attorney before seeing a doctor, there must be something nefarious at work.

This issue was referred to the Subcommittee on Privileges because of a thought that the timing of an attorney-client contact could be considered just as privileged as the substance of any communication which is specifically privileged under Rule of Evidence 504, Lawyer-Client Privilege.

The Privileges Subcommittee decided not to address this as a privilege matter, but rather in the context of the relevancy rules, 401 to 411.

A majority of the Subcommittee voted to recommend an addition to Rule 411, which already provides a specific bar as to whether or not a defendant had liability insurance. The specific proposal is that Rule 411 be added to as follows: (added language in bold type)

RULE 411. LIABILITY INSURANCE **AND ATTORNEY CONTACTS**

a. Evidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct. Subject to Rule 403, this rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, control, bias or prejudice of a witness.
b. Evidence of the timing of a person's consultation with an attorney is not admissible to show the invalidity of a claim for personal injury in a civil action, unless the court determines that the probative value of admitting the evidence substantially outweighs the risk of unfair prejudice.

The majority recommendation would allow the timing of the attorney contact to be produced in discovery. However, if the defense desired to use such material at trial, it must be brought to the court's attention for a finding under the test in the suggested rule.

A minority of the committee believes there is no need for a new rule. The minority view is that evidence rulings on the issue of the timing of a client contact with an attorney can be made by trial judges on a case by case basis using the familiar standards pertaining to relevancy and prejudice.

There are three New Jersey cases that discuss this issue. The most definitive and recent case from the Appellate Division is from July 18, 2008. It is the unpublished case of Twal v. Hinds, A-4296-06T1. There, the defense attorney sought to use a doctor's initial patient questionnaire to show that plaintiff consulted with an attorney before obtaining medical treatment. "The trial judge concluded, 'There is absolutely nothing wrong about going to a lawyer and there is absolutely no reasonable fair inference that this jury should be making based upon somebody going to a lawyer.' We agree." Id. p.8. That statement was by appellate Judges Lihotz and King.

In the second most recent case, Gilmartin v. Weinreb, 324 N.J. Super. 367, 387, ftnt. 4 (App. Div. 1999), the Appellate Division stated, "During cross examination of Annette by counsel for Old Bridge and the Weinsteins, it was established that Annette had retained counsel within a few hours after Brian's death. In the absence of unusual circumstances, this line of questioning should not be permitted on retrial since the potential for undue prejudice is substantial."

In the case that tips the other way, Thomas v. Toys R Us, Inc., 282 N.J. Super. 569, 583 (App. Div. 1995), the trial court permitted limited questioning on when the plaintiff hired her attorney. The Appellate Division did not reverse. It said, "We find no error here. It was certainly not a focal point of the case, and had some bearing on plaintiff's motivations and credibility." Id. at 583.

This issue does not appear to have been addressed head-on in any state. It certainly has never been established that the timing of an attorney-client contact is specifically part of the attorney-client privilege.

APPENDIX B

MEMORANDUM

TO: **Supreme Court Rules of Evidence Committee**

FROM: **Privileges Subcommittee**

DATE: **November 4, 2010**

RE: **Report on Proposal to Add a Rule to the New Jersey Rules of Evidence to Correspond to Federal Rule of Evidence 502**

OUTLINE OF CONTENTS

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I. Introduction

On July 13, 2010, the Privileges Subcommittee was charged to review whether a provision similar to Fed. R. Evid. 502 should be added to the New Jersey Rules of Evidence. Fed. R. Evid. 502 relates to the inadvertent disclosure of information protected by the attorney-

client privilege or work product doctrine. The rule was adopted by Congress in September 2008 to respond to the massive proliferation of electronic discovery. The rationale is that a party should not be deemed to have waived the attorney-client privilege or work product doctrine due to, for instance, the accidental disclosure of a single privileged email in a massive document production.

The Privileges Subcommittee met on August 17, 2010 and October 5, 2010 to review this charge. The Subcommittee also reviewed current case law and related commentary. Based on this review, and for the reasons below, the Privileges Subcommittee does not recommend the adoption of a companion provision to Fed. R. Evid. 502 at this time.

II. Federal Rule of Evidence 502

Fed. R. Evid. 502 was adopted by Congress in September 2008. The rule provides as follows:

> Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver
>
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.--When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.
>
> (b) Inadvertent disclosure.--When made in a Federal proceeding or

to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding.--When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order.--A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement.--An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule.--Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions.--In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

> (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.
>
> Fed. R. Evid. 502.

In its comments on the proposed rule, the Senate Committee on the Judiciary noted that an "efficient and cost-effective discovery process is important to preserving the integrity of our legal system." See Report of Senate Committee on the Judiciary, S.Rep. No. 264 (2008). The Senate Judiciary Committee further noted that the "costs of discovery have increased dramatically in recent years as the proliferation of email and other forms of electronic record-keeping have multiplied the number of documents litigants must review to protect privileged material." Id. The Senate Judiciary Committee noted:

> Outdated law affecting inadvertent disclosure coupled with the stark increase in discovery materials has led to dramatic litigation cost increases.
>
> Currently, the inadvertent production of even a single privileged document puts the producing party at significant risk. If a privileged document is disclosed, a court may find that the waiver applies not only to that specific document and case but to all other documents and cases concerning the same subject matter. Furthermore, the privilege can be waived even if the party took reasonable steps to avoid disclosing it.
>
> The increased use of email and other electronic media in today's business environment have exacerbated the problems with the current doctrine on waiver. Electronic information is even more voluminous and dispersed than traditional record-keeping methods, greatly increasing the time needed to review and separate privileged from non-privileged material. As the time spent reviewing documents has increased, so too has the amount of money litigants on all sides must spend to protect against the potential waiver of privilege.
>
> Report of the Senate Committee on the Judiciary, S.Rep. No. 264 (2008).

Thus, as indicated in the Advisory Committee Note and the Report of the Senate Committee on

the Judiciary, the purpose of Fed. R. Evid. 502 is to cure the inability of the current federal law of waiver to respond to the massive proliferation of discovery, particularly in the area of electronic discovery.

III. Review of Federal Rule of Evidence 502(a)

Part (a) of Fed. R. Evid. 502 addresses intentional disclosures. Under Part (a), if an intentional disclosure is made, the waiver will extend to an undisclosed communication in a federal or state proceeding if the disclosed and undisclosed communications "concern the same subject matter" and "ought in fairness be considered together." Fed. R. Evid. 502(a).[1]

The Appellate Division addressed this situation in In re Grand Jury Subpoena Issued to Galasso, 389 N.J. Super. 281 (App. Div. 2006). There, an attorney represented the principals of a social club where illegal gambling activity had allegedly been conducted. Id. at 289. A Morris County grand jury subpoenaed him to testify and produce documents in connection with an investigation of the club. Id. The attorney moved to quash the subpoena on the basis that his testimony would disclose attorney-client communications. The Law Division denied his motion based on a certification submitted ex parte by the chief assistant prosecutor.

The Appellate Division granted the attorney's interlocutory appeal and affirmed the Law Division. The Appellate Division observed that a grand jury is permitted wide latitude in conducting investigations. Galasso, 389 N.J. Super. at 295. The Appellate Division further noted that where an attorney is required to testify before a grand jury, the attorney should appear and assert the privilege in response to specific questions. Id. at 297 (citing In re Grand Jury Subpoenas Duces Tecum Served by the Sussex County Grand Jury, 241 N.J. Super. 18, 34 (App. Div. 1989)). The Appellate Division ruled that a record needed to be established as to the

[1] The same rule applies to disclosed and undisclosed information (as opposed to communications).

questions asked before the grand jury and whether the attorney objected to such questions on the basis of the attorney-client privilege. The Appellate Division observed that waiver of the privilege occurs "if the holder of the privilege discloses 'a confidential communication for a purpose outside the scope of the privilege,'" and, "once the holder discloses privileged communications, he has waived the privilege with respect to related privileged information pertaining to the same subject matter." Galasso, 389 N.J. Super. at 298 (citing Sicpa N. Am., Inc. v. Donaldson Enters., 179 N.J. Super. 56, 62 (Law Div. 1981); Weingarten v. Weingarten, 234 N.J. Super. 318, 326 (App. Div. 1989)). Once a record was developed, the trial judge was directed to determine the existence and impact of any waiver based on the specific questions asked. Galasso, 389 N.J. Super. at 298-99.

Based on Galasso and the cases cited therein, it is clear that the rule contained in Fed. R. Evid. 502(a) is already part of New Jersey case law. Fed. R. Evid. 502(a) states that an intentional waiver of the attorney-client privilege only acts to waive the privilege as to an undisclosed communication or piece of information if such undisclosed communication or information concerns the same subject matter and "ought in fairness" be considered together with the disclosed communication or information. Similarly, under Galasso, an intentional disclosure operates as a waiver of an undisclosed communication or information involving the same subject matter. Galasso, 389 N.J. Super. at 298; Weingarten, 234 N.J. Super. at 326. Therefore, the Privileges Subcommittee does not believe that the adoption of a rule similar to Fed. R. Evid. 502(a) would add anything to the law as it already exists in New Jersey.

IV. Review of Federal Rule of Evidence 502(b)

Part (b) of Fed. R. Evid. 502 addresses the question of what happens when an inadvertent disclosure occurs. As is apparent from the Advisory Committee Note to the new Rule, part (b) is the main response to growing concerns relating to the proliferation of electronic discovery. Under part (b), an inadvertent disclosure of privileged information will **not** operate as a waiver if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including, if applicable, Fed. R. Civ. P. 26(b)(5)(B).[2]

Courts in New Jersey and elsewhere have identified three approaches to the issue of an inadvertent disclosure of privileged information. See Trilogy Communications, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 445-446 (Law Div. 1994); Kinsella v. NYT Television, 370 N.J. Super. 311, 317-318 (App. Div. 2004); Advisory Committee Note to Fed. R. Evid. 502(b) (citing Hopson v. City of Baltimore, 232 F.R.D. 228 (D.Md. 2005)). Under the first approach, any disclosure of privileged information, even if inadvertent, operates as a waiver of the privilege. Under the second approach, an inadvertent disclosure of privileged information can constitute a waiver if the attorney did not take reasonable precautions to prevent the disclosure. Finally, under the third approach, an inadvertent disclosure, even if negligent, does not constitute

[2] Fed. R. Civ. P. 26(b)(5)(B) provides, "If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved." Similarly, R. 4:10-2(e)(2) provides, "If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable efforts to retrieve it. The producing party must preserve the information until the claim is resolved."

a waiver. Rather, under the third approach, a waiver of privileged information occurs only if the disclosure was intentional.

As will be discussed more fully below, Fed. R. Evid. 502(b) adopts the second approach above. Under part (b), an inadvertent disclosure of privileged information can constitute a waiver if the attorney did not take reasonable precautions to prevent the disclosure. Meanwhile, New Jersey case law remains limited on the issue of inadvertent disclosure. The case law that does exist appears to favor the third approach, i.e. that an inadvertent disclosure of privileged information will not constitute a waiver of the privilege, even if it the result of negligence, as an intentional disclosure is required for a waiver to exist. As noted, however, New Jersey courts have **not** formally adopted the third approach. This was made clear in the Supreme Court's recent decision in Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010). There, the Supreme Court mentioned the second and third approaches, but declined to adopt either one.

This memorandum will now examine the case law on inadvertent disclosures in more detail.

V. Federal Case Law Interpreting Federal Rule of Evidence 502

Only a handful of reported federal cases have addressed Fed. R. Evid. 502. One of the first decisions is an opinion by Magistrate Judge Schneider in Peterson v. Bernardi, 262 F.R.D. 424 (D.N.J. 2009). There, a former prisoner sued the Burlington County Prosecutor after DNA evidence exonerated him of murder and rape. Id. at 426-27. During discovery, the prisoner moved to compel the return of documents that he believed were protected by the attorney-client privilege, work product doctrine, and cleric penitent privilege. Id. at 427. The prisoner argued that the documents should be returned because he took reasonable steps to preclude their disclosure.

Magistrate Judge Schneider held that plaintiff waived the attorney-client privilege and work product doctrine as to most of the documents that plaintiff sought to recover.[3] The Court applied the following analysis.

> When deciding whether inadvertently produced documents should be returned a two-step analysis must be done. First, it must be determined if the documents in question are privileged. It is axiomatic that FRE 502 does not apply unless privileged or otherwise protected documents are produced. [Heriot v. Byrne, 257 F.R.D. 645, 655 (N.D. Ill. 2009).] Second, if privileged documents were inadvertently produced then the three elements of FRE 502(b) must be satisfied (1) the disclosure must be inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent the disclosure, and; (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed.R.Civ.P. 26(b)(5)(B). The disclosing party has the burden to prove that the elements of FRE 502(b) have been met. Heriot, supra, at 658-59; Relion, Inc. v. Hydra Fuel Cell Corporation, C.A., No. CV06-607-HU, 2008 WL 5122828, at *3 (D.Or. Dec.4, 2008).
>
> Peterson, 262 F.R.D. at 427.

Magistrate Judge Schneider noted that Fed. R. Evid. 502 "does not change applicable case law which places the burden of proving that a privilege exists on the party asserting the privilege." Peterson, 262 F.R.D. at 427 (quoting Louisiana Mun. Police Employees Retirement System v. Sealed Air Corp. ("Sealed Air"), 253 F.R.D. 300, 305-06 (D.N.J. 2008)).

In his analysis, Magistrate Judge Schneider determined that the documents at issue were not privileged. Peterson, 262 F.R.D. at 427-430. The mere assertion that a communication was between the attorney and client was not enough to establish that the privilege applied. Id. at 428 (noting that simply attaching a privilege log listing blanket objections was not sufficient to establish that the attorney client privilege applied (citing NE Technologies, Inc. v. Evolving

[3] Magistrate Judge Schneider ordered that one set of documents should be returned, namely a series of documents prepared by students at the Innocence Project who had assisted in plaintiff's release.

Systems, Inc., C.A. No. 06-6061 (MLC), 2008 WL 4277668, at *5 (D.N.J. 2008)). Moreover, plaintiff did not produce evidence that the documents claimed to be work product were actually prepared in anticipation of litigation. Peterson, 262 F.R.D. at 427-430 (citing In re Gabapentin Patent Litigation, 214 F.R.D. 178, 183 (D.N.J.2003); Sealed Air, 253 F.R.D. at 306-07).

Not only did Magistrate Judge Schneider find that the documents were not protected by the attorney-client privilege or work product doctrine, but he further held that if the documents were privileged, plaintiff did not take reasonable steps to preserve them, thus resulting in a waiver under Fed. R. Evid. 502. In this regard, the Court noted as follows:

> Even if plaintiff established that the documents in question were privileged, plaintiff's motion would still be denied except as to one category of documents. Plaintiff, not defendants, has the burden of proving that his documents were inadvertently produced. Heriot, supra, at 658-59; [Ciba-Geigy v. Sandoz, Ltd., 916 F.Supp. 404, 412 (D.N.J. 1995)]. FRE 502(b) opts for a middle ground approach to determine if an inadvertent disclosure operates as a waiver. See Explanatory Note to FRE 502(b) (revised November 28, 2007). This is essentially the same approach used in Ciba-Geigy, which has been applied in New Jersey. See Maldonado v. New Jersey ex. rel. Administrative Office of the Courts-Probation Division, 225 F.R.D. 120, 128-29 (D.N.J.2004); Jame Fine Chemicals, Inc. v. Hi-Tech Pharmacal Co., Inc., C.A. No. 00-3545 (AET), 2006 WL 2403941, at *2 (D.N.J. Aug.18, 2006). See also [Preferred Care Partners Holding Corp. v. Humana, Inc., No. 08-20424-CIV, 2009 WL 982449, at *4 (S.D. Fla. April 9, 2009)] (the intermediate approach and the Rule 502(b) analysis are substantially similar). Under the Ciba-Geigy approach at least five factors are analyzed to determine if a waiver occurred (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay and measures taken to rectify the disclosure, and; (5) whether the overriding interests of justice would or would not be served by relieving the party of its error. Ciba-Geigy, 916 F.Supp. at 411.
>
> Peterson, 262 F.R.D. at 428-29 (footnote omitted).

Thus, Magistrate Judge Schneider held that federal law in New Jersey already applies the test

adopted in Fed. R. Evid. 502 regarding waiver.

Applying the Ciba-Geigy test, the Court found that plaintiff did not establish that the disclosures were inadvertent. As to the first prong, plaintiff only stated that he engaged in a privilege review for each production. However, plaintiff did not state when the review occurred, how much time was taken in each review, or other basic details of the review process. Peterson, 262 F.R.D. at 428-29. The Court further rejected plaintiff's argument that privileged documents had been identified during the privilege review but, mistakenly, not separated. Id. The Court found that other factors weighed in favor of waiver, including the fact that the documents, which were clearly between attorney and client, warranted special scrutiny, as well as the fact that 135 accidently disclosed documents was not an insignificant number of documents. Id. at 429. Although plaintiff took steps relatively quickly to notify opposing counsel of the error, this fact did not override plaintiff's lack of diligence in preventing the disclosures. On the whole, therefore, the Court found that plaintiff waived the attorney-client privilege and work product doctrine with respect to the disclosed documents, except for a narrow subset of documents that had been prepared by students working for the Innocence Project. Id. at 429-430.

In Callan v. Christian Audigier, Inc., 263 F.R.D. 564 (C.D. Cal. 2009), defendants requested that plaintiff return 34 allegedly privileged documents. Plaintiff responded by stating that there were numerous documents produced by defendants in the litigation and that it was impossible to locate the documents that defendants referenced. Defendants moved for the return of the documents under a "claw-back" provision that had been included by the Magistrate Judge in a prior protective order in the case. The "claw-back" provision stated as follows:

> The inadvertent production of any discovery material by any party shall be without prejudice to any subsequent claim by the producing party that such discovery material is privileged or attorney-work product and shall not be deemed a waiver of any

> such privilege or protection. If, after discovery materials are disclosed, a producing party notifies all receiving parties of a claim that materials are protected by the attorney-client privilege or work-product doctrine or any other applicable privilege or protection, the receiving party shall not make any use of the contested material and shall return to the producing party all copies thereof presently in its possession. Nothing in this provision shall be construed to prevent or restrict any party's right to object to the propriety of any other's assertion that materials are properly protected by the attorney-client privilege or work-product doctrine, or any other applicable privilege, or protection.
>
> Callan, 263 F.R.D. at 565.

In ruling on the motion, the Magistrate Judge held that defendants did not meet their burden of showing that that the documents that were inadvertently disclosed were actually privileged. Id. at 567. The documents were not identified on a privilege log, nor did defendants' counsel identify which privileges applied. In her analysis, the Magistrate Judge noted that Fed. R. Evid. 502 addresses the issue of inadvertent disclosure of information protected by the attorney-client privilege or the work product doctrine. The Court further observed that the Fed. R. Civ. P. 26(b)(5)(b) addresses the manner in which parties should handle information that has been inadvertently produced. Fed. R. Civ. P. 26(b)(5)(b) provides:

> If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.
>
> Fed. R. Civ. P. 26(b)(5)(b).

Since defendants did not meet their burden of showing that the documents at issue were

privileged, the Court did not reach the question of whether a privilege had been waived.

In Kandel v. Brother Int'l Corp., 683 F. Supp. 2d 1076 (C.D. Cal. 2010), a class action involving toner cartridges, plaintiffs moved for an order requiring the return of 28 documents that were allegedly protected by the attorney-client privilege or work product doctrine. The Court held that the documents were protected by the attorney client privilege and work product doctrine, and further, that the documents were inadvertently disclosed, therefore requiring their return to plaintiffs. Id. at 1081-1086. The Court noted that defendants had produced 10,400 documents in discovery consisting of 67,678 pages of documents. Id. at 1086. Many of the documents were in Japanese. Id. Defendants retained a third-party contractor to assist with the document review. Id. The contractor failed to properly apply certain search protocols, thus resulting in the disclosure of documents protected by the attorney-client privilege and work product doctrine. Once aware of the disclosure, defendants sent a letter to plaintiffs regarding the disclosure and identified the documents at issue by Bates-stamp number. Id. at 1085. The Court found that these facts were sufficient to establish that the disclosure was inadvertent under Fed. R. Evid. 502, Fed. R. Civ. P. 26(b)(5)(b), and a prior protective order in the case.

In Edelen v. Campbell Soup Co., 265 F.R.D. 676 (N.D. Ga. 2010), a Title VII employment discrimination case, defendants sought the return of four pages of documents consisting of communications between in-house counsel and the human resources department. Id. at 682. The Magistrate Judge held that the documents were protected by the attorney-client privilege. Id. The Magistrate Judge further held that the documents were inadvertently disclosed because three levels of attorneys had reviewed 2000 documents, and only 4 privileged documents were disclosed. Id. at 682, 698. On appeal of the Magistrate Judge's ruling, the District Court affirmed the Magistrate Judge's conclusions.

In Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc., 266 F.R.D. 1 (D.D.C. 2010), an ERISA action, defendants argued that plaintiffs, two union pension plans, could not assert the work product doctrine based on the fact that two unpaid consultants attended meetings of the trustees of the plans and received documents from the meetings. Id. at 3-7. The Court determined that the work product doctrine was not lost based on the presence of the outside consultants. Id. at 6-9. Furthermore, the Court rejected defendants' argument that the disclosure of certain subject matter in non-privileged documents required the disclosure of the same subject matter in privileged documents. Id. at 6-9. The Court observed that this is not the proper analysis under Fed. R. Evid. 502. Instead, under Fed. R. Evid. 502, it is the disclosure of subject matter in a privileged document that may require the disclosure of similar subject matter in other privileged documents, but only if the documents involve the same subject matter and "ought in fairness be considered together." Trustees, 266 F.R.D. at 10-11 (quoting Fed. R. Evid. 502(a)(2), (3)).

To summarize, the federal cases interpreting Fed. R. Evid. 502 make clear that a two-step process is involved to determine whether the attorney-client privilege or work product doctrine has been waived. First, a court must determine whether, in fact, the attorney-client privilege or work product doctrine applies. Second, the court must determine whether the disclosure was actually inadvertent, and whether the producing party acted reasonably and diligently in attempting to recover the document.

VI. New Jersey Case Law Regarding Waiver

There is not a significant amount of case law in New Jersey addressing when a waiver of the attorney-client privilege or work product doctrine occurs when privileged information is inadvertently disclosed. The case law that does exist, however, appears to favor the third

approach in which an inadvertent disclosure through mere negligence does not waive the privilege.

In Trilogy Communications, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 445 (Law Div. 1994), the Law Division considered whether a document produced in discovery was inadvertently disclosed and thus inadmissible at trial. The document was an unsigned draft letter from counsel for Excom to counsel for Trilogy. Id.at 443. The letter was alleged to be confidential and was prepared in draft for submission to Excom's General Counsel before being sent to counsel for Trilogy. Id. The document was one of over 5,500 pages of documents produced in discovery. At trial, Excom objected to the admission of the document at trial because it was a privilege draft letter from retained counsel to the general counsel for the client. It was sent for information and approval before being sent to Trilogy. Moreover, there was no evidence in the record that the document was ever received by Excom's general counsel, ever transmitted to Trilogy's general counsel, or authorized by Excom for disclosure. Id.

The Law Division held that the document was confidential under N.J.S.A. 2A:84A-20 (attorney-client privilege) and N.J.R.E. 504. The Law Division reported that there were no New Jersey decisions addressing "whether or not the inadvertent production of a confidential attorney-client communication constitutes a waiver of the privilege." Trilogy, 279 N.J. Super. at 443-44. In the absence of case law, the Law Division considered State v. J.G., 261 N.J. Super. 409 (App. Div.), certif. denied 133 N.J. 436 (1993), in which the Appellate Division held that the inadvertent disclosure of a confidential Family Service file did not constitute a waiver of the victim-counselor privilege. Trilogy, 279 N.J. Super. at 444. Furthermore, the Appellate Division in J.G. questioned in dicta "whether our courts would adopt the strict approach and conclude that the privilege is automatically waived by reason of an inadvertent disclosure."

Trilogy, 279 N.J. Super. at 445 (quoting J.G., 261 N.J. Super. at 420-21).

In addition to J.G., the Law Division in Trilogy noted "three distinct lines of authority on this issue." As explained by the Law Division, the first approach holds that the privilege is destroyed by any involuntary disclosure including a mistaken one. Trilogy, 279 N.J. Super. at 444 (citing, inter alia, F.D.I.C. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479 (E.D. Va. 1991); 8 Wigmore on Evidence § 2292 (McNaughton rev. 1961)). The Law Division rejected this approach "as it fails to take into account that the privilege is that of the client and must therefore be waived by the client." Trilogy, 279 N.J. Super. at 445. The Law Division further noted that "[w]aiver does not occur unless a known right is intentionally and deliberately relinquished." id. at 445 (citing West Jersey Title and Guar. Co. v. Industrial Trust Co., 27 N.J. 144, 152 (1958)).

Under the second approach identified in Trilogy, "documents may lose their privileged status if the disclosing party did not take reasonable steps to insure and maintain their confidentiality." Trilogy, 279 N.J. Super. at 445 (citing In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984)). The second approach "is grounded in the notion that even though inadvertent disclosures are, by definition, unintentional acts, they may occur under circumstances of such extreme or gross negligence as to warrant the disclosure to be intentional, and thus a waiver." Trilogy, 279 N.J. Super. at 445.

The Law Division next identified a third approach in which "mere inadvertent production of a privileged document by the attorney does not waive the client's privilege." Trilogy, 279 N.J. Super. at 445-446. The Law Division considered this approach to be the "better reasoned rule" because New Jersey "has long recognized the important public policy reasons favoring the confidentiality of attorney-client communications." Trilogy, 279 N.J. Super. at 446 (citing In re

Advisory Opinion No. 544 of New Jersey Supreme Court Advisory Comm. on Prof'l Ethics, 103 N.J. 399 (1986)). The Law Division stated that "[t]o hold that the inadvertent production of a privileged document is a waiver of the lawyer-client privilege would render nugatory this state's strong public policy favoring the confidentiality of lawyer-client communications embodied in statute, rules of evidence, rules of professional ethics, and case law." Trilogy, 279 N.J. Super. at 446-47.

In Nat'l Util. Serv., Inc. v. Sunshine Biscuits, Inc., 301 N.J. Super. 610 (App. Div. 1997), defendant disclosed a three-page pre-litigation memorandum prepared by in-house counsel for defendant to defendant's Controller. Id. at 613. The memorandum discussed "the basis for plaintiff's claims against defendant under the contract" and made "'recommendations' for corporate action, investigation of the work actually done by plaintiff and consideration of a 'buyout' of the contract." Id. at 613. When defendant realized that the documents were disclosed in its discovery production, defendant requested the immediate return of the memorandum. Id. Plaintiff moved for an order permitting it to retain the memorandum and use it in litigation. The Law Division held that the memorandum was excluded from the attorney client privilege on the basis of the crime-fraud exception and that plaintiff could use the memorandum in litigation. Id. at 613.

On leave granted, the Appellate Division reversed the Law Division and held that the memorandum was neither discoverable nor subject to use by plaintiff. Id. at 613. Judge Stern, writing for the Appellate Division, held that that "because the Barbieri memorandum was written as part of the duties of in-house counsel who was retained to provide professional legal advice to the corporation, and the memorandum was prepared in furtherance thereof, it is subject to the attorney-client privilege unless an exception applies." Id. at 613 (citing, inter alia, United Jersey

Bank v. Wolosoff, 196 N.J. Super. 553, 560-63 (App. Div. 1984)). In addition, the Appellate Division determined that the crime-fraud exception did not apply. Id. at 618-19. In a footnote, the Appellate Division noted that the "parties agree that the inadvertent disclosure during discovery does not constitute a waiver by the client of its privilege." Sunshine Biscuits, 301 N.J. Super. at 614, n. 2 (citing State v. Sugar, 84 N.J. 1, 13 (1980); Trilogy, 279 N.J. Super. at 447-48; N.J.S.A. 2A:84A-30; N.J.R.E. 531).

In Schillaci v. First Fid. Bank, 311 N.J. Super. 396, 407-408 (App. Div. 1998), plaintiff appealed the Law Division's refusal to admit an attorney-client memorandum into evidence at trial where the memorandum was produced during discovery. Plaintiff argued that since the memorandum was produced during discovery, it should have been admissible at trial. Id. at 408. The Appellate Division rejected plaintiff's argument, holding that "neither the record submitted to us nor plaintiff's brief discloses sufficient facts to show whether or not the release of the memorandum during discovery was knowing and intentional rather than inadvertent." Id. at 408 (citing N.J.R.E. 530; J.G., 261 N.J. Super. at 419-21; Trilogy, 279 N.J. Super. at 445. The Appellate Division remanded for further proceedings to determine whether the disclosure was inadvertent.

In State v. Blacknall, 335 N.J. Super. 52, 56 (Law Div. 2000), a criminal defendant made statements to an investigator from the Bail Unit of the Criminal Case Management Division of the State Judiciary while the investigator was performing an interview to determine if the defendant was eligible for representation by the Public Defender. During the course of the interview, the defendant, who was charged with aggravated assault and endangering the welfare of a child, made an admission to the investigator regarding his touching of the victim. Id. at 54. The investigator then advised an Assistant Prosecutor of the statement. Id. at 54. The Law

Division held that the statement was protected by the attorney-client privilege, and further, that the privilege was not waived. Id. at 54-59. The Law Division quoted Trilogy for the proposition that "[i]nadvertent disclosure through mere negligence or misfortune should not be deemed to abrogate the lawyer-client privilege." Blacknall, 335 N.J. Super. at 59 (quoting Trilogy).

In Adler v. Shelton, 343 N.J. Super. 511, 531 (Law Div. 2001), a home construction defect case, defendants moved for the production of a draft expert report and invoices from the expert where such items had been accidentally sent by the expert to plaintiffs' general contractor (a non-party in the litigation) instead of plaintiffs' attorney. The Law Division observed that if the documents were considered work product, the disclosure would be inadvertent and the work product doctrine would not have been waived. Adler, 343 N.J. Super. at 519 (citing Trilogy). However, the Law Division did not approach the waiver issue because it determined that the work product doctrine did not apply to the documents. Adler, 343 N.J. Super. at 531.

In Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 550 (App. Div. 2003), a breach of contract case, the Appellate Division considered, among other things, whether a letter inadvertently produced in discovery could be used at trial. Id. at 531. At issue was whether the letter was protected work product. Id. at 550-51. The Appellate Division held that the document was not work product. In passing, the Appellate Division noted that it has previously questioned whether a "privilege is destroyed by any involuntary disclosure, including a mistaken one". Id. at 550-51 (citing Trilogy, 279 N.J. Super. at 443; J.G., 261 N.J. Super. at 419-20).

In Kinsella v. NYT Television, 370 N.J. Super. 311 (App. Div. 2004), plaintiff sued NYT Television and The New York Times Company (collectively, "NYT") after NYT videotaped him in the emergency room for a television show. In a prior opinion, the Appellate Division ruled that the videotaping was newsgathering and thus protected by the newsperson's privilege. Id. at

313. The Appellate Division further ruled that if NYT intended to use any part of the videotape or any outtakes that were not part of the broadcast at trial, NYT would need to produce such footage prior to trial. Subsequent to the prior decision, NYT decided to use parts of the videotape at trial to show that plaintiff consented to the videotaping. Id. at 314. Thus, four videocassettes were produced to plaintiff. However, the copies provided to plaintiff included not just footage of plaintiff, but of other patients in the emergency room. Id. When NYT's counsel realized that additional footage had been produced, he asked that the footage be returned, but plaintiff refused. Id. at 315. NYT moved for a protective order requiring the return of the footage of other patients, which the Law Division denied. On appeal, the Appellate Division held that the footage of other patients had to be returned, and furthermore, that NYT did not waive the newsperson's privilege by the disclosure of footage containing other patients. Id. at 316-319.

As in Trilogy, the Appellate Division noted the three approaches to the issue of waiver of a privilege, namely the "strict" or "traditional" approach (in which the inadvertent disclosure of privileged information results in a waiver); the "subjective intent" approach (in which an inadvertent disclosure never results in a waiver unless the party protected by the privilege intended to waive it); or the "middle" or "balancing of factors" test (in which a balancing test is used to determine whether an inadvertent disclosure may be found to constitute a waiver, citing Ciba-Geigy, supra, 916 F.Supp. at 411). The Appellate Division further noted that the Law Division in Trilogy had adopted the second approach. Kinsella, 370 N.J. Super. at 317. Upon review of these approaches, the Appellate Division declined to adopt any approach, instead holding that no finding of a waiver was warranted where the inadvertence was due to the error of counsel, not the media organization, and furthermore, there was no justifiable reliance by

plaintiff on the disclosure. Id. at 318.

Recently, in Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010), the Supreme Court considered whether pre-suit emails that plaintiff sent to her attorney while using plaintiff's personal, password-protected web-based email account on a company-issued laptop were protected from disclosure. In discovery, the employer discovered the emails during a forensic review of plaintiff's computer. Plaintiff's counsel demanded that the emails be returned to plaintiff. Id. at 307. Counsel for the employer produced the documents but contended that the company had a right to review them. The Law Division held that plaintiff waived any privilege with respect to the documents, but the Appellate Division reversed, finding that counsel for the company violated R.P.C. 4.4(b) by reading and using privileged documents. Id. at 308. The Supreme Court held that the attorney-client privilege applied to the documents. Id. at 323. In addition, plaintiff did not waive the attorney client privilege. The Supreme Court noted:

> A person waives the privilege if she, "without coercion and with knowledge of [her] right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." N.J.R.E. 530 (codifying N.J.S.A. 2A:84A-29). Because consent is not applicable here, we look to whether Stengart either knowingly disclosed the information contained in the e-mails or failed to "take reasonable steps to insure and maintain their confidentiality." Trilogy Commc'ns, supra, 279 N.J. Super. at 445-48, 652 A.2d 1273.
>
> As discussed previously, Stengart took reasonable steps to keep discussions with her attorney confidential: she elected not to use the company e-mail system and relied on a personal, password-protected, web-based account instead. She also did not save the password on her laptop or share it in some other way with Loving Care.
>
> As to whether Stengart knowingly disclosed the e-mails, she certified that she is unsophisticated in the use of computers and did not know that Loving Care could read communications sent on her Yahoo account. Use of a company laptop alone does not establish that knowledge. Nor does the Policy fill in that gap. Under the

> circumstances, we do not find either a knowing or reckless waiver.
>
> Stengart, 201 N.J. at 323-324.

In a footnote, the Supreme Court observed that it did not need to determine which standard applied to the issue of a waiver of privilege, i.e. whether the test was whether Stengart "knowingly disclosed the information contained in the e-mails" or failed to "take reasonable steps to insure and maintain their confidentiality." Id. at 324, n. 5 (citing, inter alia, Kinsella and Trilogy). The Court remanded for a determination as to appropriate sanctions.

To summarize, there has been no formal test adopted by the New Jersey Supreme Court or the Appellate Division governing the waiver of the attorney-client privilege or work product doctrine. Trilogy has been cited most often in cases in which the issue of waiver is raised. Under Trilogy, the "mere inadvertent production of a privileged document by the attorney does not waive the client's privilege." Trilogy, 279 N.J. Super. at 445-446.

VII. Action By Other States

Other states have not been quick to adopt companion provisions to Fed. R. Evid. 502. Tex. R. Civ. P. 193.3 provides a procedure for the return of documents that are inadvertently disclosed. As indicated below, New Jersey has already adopted such a procedure. New Hampshire has adopted Rule 511 to its Rules of Evidence, which provides, "A claim of privilege is not defeated by a disclosure that was compelled erroneously or by a disclosure that was made inadvertently during the course of discovery." Tennessee has adopted Rule 502 to its Rules of Evidence, which provides:

> Inadvertent disclosure of privileged information or work product does not operate as a waiver [if]
>
> (1) the disclosure is inadvertent,
>
> (2) the holder of the privilege or work-product protection took

reasonable steps to prevent disclosure, and

(3) the holder promptly took reasonable steps to rectify the error.

Tenn. R. Evid. 502.

Thus, not all states have adopted the language of Fed. R. Evid. 502, and of the states that have amended their Rules of Evidence, not all such states have incorporated the entirety of Fed. R. 502.

VIII. Recommendation of the Privileges Subcommittee

For various reasons, the Privileges Subcommittee does not recommend that a rule similar to Fed. R. Evid. 502 be added to the New Jersey Rules of Evidence at this time.

First, there is a lack of extensive New Jersey authority that directly addresses this question. This is clear from the Stengart decision. There, the Supreme Court identified two different approaches to the issue of whether an inadvertent disclosure results in a waiver, namely the second approach embodied in Fed. R. Evid. 502(b) and the third approach applied in Trilogy. Stengart, 201 N.J. at 324, n. 5 (citing Kinsella and Trilogy).[4] However, the Supreme Court expressly declined to choose a particular approach. Stengart, 201 N.J. at 324, n. 5. Accordingly, the Privileges Subcommittee does not believe it would be appropriate to adopt a particular rule at this time where the Supreme Court had the opportunity to do so in Stengart but declined.

Second, the Privileges Subcommittee is guided by Kinsella. There, the Appellate Division observed that in Trilogy, the Law Division did not adopted the approach taken in Ciba-Geigy. Ciba-Geigy is the case that was applied by the District Court of New Jersey in the recent Peterson case that addressed Fed. R. Evid. 502. In Peterson, the District Court specifically

[4] As already noted, Kinsella identified three approaches. Kinsella, 370 N.J. Super. at 317. Kinsella noted the first (or "strict") approach in addition to the second and third approaches. Under the first approach, any disclosure of privileged information, even if inadvertent, operates as a waiver of the privilege.

observed that Fed. R. Evid. 502 requires the same analysis that federal courts in New Jersey were already applying under Ciba-Geigy. Thus, if the Rules of Evidence Committee were to adopt Fed. R. Evid. 502, it would, in effect, be making Ciba-Geigy the law in the New Jersey, even though Trilogy declined to adopt the Ciba-Geigy approach.

Third, the case law interpreting the new provisions of Fed. R. Evid. 502 remains still limited. Therefore, it remains unclear how the federal courts will necessarily interpret and apply the rule. It is also unclear how far the federal courts will go in interpreting whether a waiver has occurred. The District of New Jersey has already held a waiver to apply under Fed. R. Evid. 502. It is not entirely clear whether the same result would obtain under the New Jersey cases in light of New Jersey's strong policy favoring privileges.

Finally, the Privileges Subcommittee believes that case law should develop under other New Jersey provisions and rules before a new rule is adopted. For example, in Stengart, the Supreme Court noted that R.P.C. 4.4(b) operates as an ethical limitation on any attorney who seeks to use information that is protected by the attorney-client privilege. Stengart further provides guidance as to what an attorney should do in such a situation:

> To be clear, the Firm did not hack into plaintiff's personal account or maliciously seek out attorney-client documents in a clandestine way. Nor did it rummage through an employee's personal files out of idle curiosity. Instead, it legitimately attempted to preserve evidence to defend a civil lawsuit. Its error was in not setting aside the arguably privileged messages once it realized they were attorney-client communications, and failing either to notify its adversary or seek court permission before reading further. There is nothing in the record before us to suggest any bad faith on the Firm's part in reading the Policy as it did. Nonetheless, the Firm should have promptly notified opposing counsel when it discovered the nature of the e-mails.
>
> Stengart, 201 N.J. at 326.

Moreover, R. 4:10-2(e)(2) provides:

> Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable efforts to retrieve it. The producing party must preserve the information until the claim is resolved.
>
> R. 4:10-2(e)(2).

The Privileges Subcommittee believes that further case law should develop under these rules for purposes of determining whether an amendment to the New Jersey Rules of Evidence is necessary. At this time, there are no reported decisions addressing R. 4:10-2(e)(2).

For all of these reasons, the Privileges Subcommittee does not recommend the adoption of a companion provision to Fed. R. Evid. 502 at this time.

***

APPENDIX C

MEMORANDUM

To: Committee on Evidence

From: Subcommittee on Privileges

Re: Comprehensive Mental-Health-Provider Privilege

Date: November 1, 2010

In New Jersey, as in many states, the extent to which a patient's communications with a mental health professional is privileged depends on the license or educational degree of the mental health professional consulted. New Jersey has adopted separate and distinct privileges governing communications with psychologists, N.J.R.E. 505; psychiatrists, N.J.R.E. 506; social workers, N.J.R.E. 518; victim counselors, N.J.R.E. 517; and marriage counselors, N.J.R.E. 510. The subcommittee recommends that the full Committee seek the Supreme Court's express authorization to study and perhaps propose a comprehensive revision of the various and disparate privileges governing such communications. This memorandum will summarize current law to highlight differences among these privileges (although a comprehensive analysis of existing privileges is beyond the scope of this memorandum). The memorandum will then discuss practical problems and policy issues raised by the State's approach, and review support for a single comprehensive mental health provider's privilege.

Current Law.

New Jersey has adopted a variety of privileges governing communications with mental health professionals. Whether a particular privilege applies to a communication depends principally upon the license or professional credentials of the mental health professional, but also the nature of the communication. Whether the particular privilege actually shields the

communication from disclosure also depends on the exceptions to the privilege expressly adopted in the particular Rule, as well as judicially engrafted exceptions.

New Jersey's law on mental health privileges has created something of a hierarchy of privileges. Communications with psychologists are afforded greater protection than communications with psychiatrists. State v. McBride, 213 N.J. Super. 255, 270 (App. Div. 1986), certif. denied, 107 N.J. 118 (1987) ("the psychologist-patient privilege affords even greater confidentiality than the physician-patient privilege"). However, in some respects, the psychologist-patient privilege may be less far-reaching than the psychiatrist-patient privilege, as discussed below. In other respects, however, "the marriage and family therapist privilege . . . may be somewhat broader than the psychologist-patient privilege." Kinsella v. Kinsella, 150 N.J. 276, 298, n. 1 (1997). Also broad is the victim counselor privilege. The court in State v. J.G., 261 N.J. Super. 409, 419 (App. Div.), certif. denied, 133 N.J. 436 (1993) called the privilege "absolute." Weakest among the mental health privileges is the social worker privilege.

The psychologist-patient privilege governs "confidential relations and communications" between a patient and a "licensed practicing psychologist." N.J.R.E. 505. However, practicing psychologists certified by the Department of Education may provide psychological services to school children without becoming a "licensed practicing psychologist." N.J.S.A. 45:14B-6(g). Consequently, the privilege apparently would not cover communications with such a psychologist. Also, the privilege would not cover other trained psychologists who may serve patients without becoming licensed. See N.J.S.A. 45:14B-6(c) (psychological interns); -6(d) (out-of-state psychologist practicing limited hours in New Jersey); -6(e) (practicing psychologist with temporary permit to practice). Also, the privilege would apparently not cover a person whom the patient reasonably believed was a "licensed practicing psychologist," but was not.

The patient-psychologist privilege is defined by simply equating it with the attorney-client privilege. "The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client . . . ." N.J.R.E. 505. However, "the public policy behind the psychologist-patient privilege is in some respects even more compelling" than the policy behind the attorney-client privilege. Kinsella v. Kinsella, 150 N.J. 276, 330 (1997).

The Rule provides few explicit exceptions. The privilege does not apply to: commitment or guardianship actions where the client's condition is an issue; actions where the client seeks damages based on criminal conduct; actions involving the validity of a client's will; or issues involving testate or intestate succession from a deceased client. N.J.R.E. 505. It is unclear whether the psychologist-patient privilege bars a participant in a group therapy session with a psychologist from disclosing otherwise confidential communications by a fellow participant. Kinsella v. Kinsella, supra, 150 N.J. at 304.

The psychiatrist-patient privilege is covered by the physician-patient privilege. N.J.R.E. 506. This privilege covers communications to a licensed physician as well as a person whom the patient "reasonably believed . . . to be authorized to practice medicine." N.J.R.E. 506(a). The privilege also covers communications made to intermediaries between the patient and physicians, that is, "persons to whom disclosure was made because reasonably necessary for the transmission of the communication . . . ." N.J.R.E. 506(b).

The privilege covers "confidential communications," as defined, but only if "the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment

therefore." N.J.R.E. 506(b). The privilege is subject to the same express exceptions applicable to the psychologist-patient privilege dealing with commitment and guardianship actions; damages based on criminal conduct; validity of a will; and testate or intestate succession. N.J.R.E. 506(c). But, the privilege is also subject to an express exception for actions where the patient's condition "is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient" under a contract with the patient or insurance for the patient. N.J.R.E. 506(d).

By contrast, even where a person's psychological condition is put in issue, a court must apply a three-part test to determine whether the patient has waived the psychologist-patient privilege. The party seeking disclosure must demonstrate a legitimate need for the evidence; the evidence must be relevant and material to the issues before the court; and it must appear that the information cannot be secured from any less intrusive source. Kinsella v. Kinsella, supra, 150 N.J. at 299 (psychologist-patient); In re Kozlov, 79 N.J. 232, 243-44 (1979) (attorney-client). However, there is authority for piercing the psychologist-patient privilege. See also State v. L.J.P., 270 N.J. Super. 429 (App. Div. 1994) (reversing trial court's refusal to pierce alleged aggravated sexual assault victim's psychologist-patient privilege); State v. McBride, supra, 213 N.J. Super. at 271 (holding it was error for trial court to refuse to review psychologist-patient records in camera, thereby allowing "victim's uncorroborated tale of the events in question to stand unrebutted").

The "marriage counselor privilege" renders confidential any communication between a "marriage and family therapist" and a "person or persons in therapy." N.J.R.E. 510. The Practicing Marriage Counseling Act authorizes other professionals, such as social workers, psychologists, physicians, attorneys, clergy and guidance counselors, to conduct marriage and

family therapy. N.J.S.A. 45:8B-8. Consequently, such persons enjoy the protection of the marriage counselor privilege, although they are not specifically licensed as marriage counselors. Wichansky v. Wichansky, 126 N.J. Super. 156, 159 (Ch. Div. 1973) (finding that the marriage counselor privilege applied to a communications to a licensed practicing psychologist providing marriage counseling).

The privilege covers all communications, whether or not intended to be confidential. Id. at 160. Moreover, the statutory privilege does not include any express exceptions, nor is it subject to waiver. "This privilege shall not be subject to waiver, except where the marriage and family therapist is a party defendant to a civil, criminal or disciplinary action arising from the therapy, in which case, the waiver shall be limited to that action." N.J.R.E. 510. See also Wichansky v. Wichansky, supra, 126 N.J. Super. at 160 (noting the prohibition against waiver). Notwithstanding its broad language, one court has pierced the privilege where the need for the information significantly outweighed the need for confidentiality. In M. v. K., 186 N.J. Super. 363 (Ch. Div. 1982), the trial judge concluded that enforcement of the privilege violated the constitutional rights of a child in a custody dispute.

The victim counselor privilege is an "absolute privilege" as noted above. The privilege covers "any confidential communication." N.J.R.E. 517(c). The operative language states that the victim counselor "has a privilege not to be examined as a witness in a civil or criminal proceeding with regard to any confidential communication." Ibid. Although this language does not render the communications themselves inadmissible – but simply shields the counselor from questioning – the legislative findings make it clear that the drafters intended to accord confidentiality to "all victims of violence who require counseling. . . " N.J.R.E. 517(a).

A "victim counselor" means any person who works for an agency assisting victims and their families, receives forty hours of training, is supervised by a center's supervisor, and "has a primary function of rendering advice, counseling or assisting victims of acts of violence." N.J.R.E. 517(b). Thus, a victim counselor need have significantly less training that the other mental health professional covered by other privileges. Moreover, a rape victim who confides in a victim counselor under the rule would be protected by the "absolute privilege" under N.J.R.E. 517, while a rape victim who confides instead in a licensed practicing psychologist would not, if the psychologist does not also qualify as a victim counselor. For example, if counseling victims of violent crime is not "a primary function" of the psychologist, or if the psychologist does not work for a victim counseling center, then the psychologist would not qualify as a victim counselor.

A "victim" means a person who consults such a counselor concerning a "mental, physical or emotional condition caused by an act of violence." Ibid. However, the court in State v. J.G., supra, held that the privilege extends to communications made by a child-victim's mother, characterizing her as a victim of the crime. 261 N.J. Super. at 418.

One interesting aspect of the rule is that a person claiming the rule may need to establish as a threshold matter that he or she is a victim. In a criminal case where a defendant may conceivably seek discovery of statements by an alleged victim, the victim's "victimhood" may be disputed. Of course, there are many cases where the victimization is undisputed, and the issue is the identity of the victimizer. The law is unclear as to what kind of showing is necessary to qualify a person as a victim. In State v. J.G., the court did not address the issue; it applied the victim-counselor privilege to communications made to counselors after defendant was arrested and confessed that he had sexually assaulted his children.

Even though the J.G. court characterized the victim counselor privilege as "absolute," the court recognized that it may be overridden for compelling reasons. "We hold that in the absence of compelling circumstances, communications between a crime victim and a counselor consulted for treatment are absolutely immune from disclosure." Id. at 419. The privilege must also yield to a defendant's constitutional right to confrontation. "We acknowledge that there are situations in which the defendant's constitutional rights are paramount and override the State's policy of protecting records and documents from disclosure." Ibid. (citing Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) and Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974)).

The weakest of the legislated mental health privileges appears to be the social worker privilege, which provides that a licensed or certified social worker "shall not be required to disclose" confidential information from a social work client unless at least one of five preconditions is met. N.J.R.E. 518. The five prerequisites to disclosure are: (1) "disclosure is required by other State law"; (2) failure to disclose would clearly and presently endanger another's health or safety; (3) the social worker is a party to litigation; (4) the client is a defendant in a criminal proceeding and the client's rights to present a defense would be violated; or (5) the patient waives the privilege. Ibid. By its terms, the social worker privilege differs markedly from the privilege afforded communications between patients and psychologists. The social worker privilege generally allows disclosure if "required by other State law." For example, it would appear that by its terms, the social worker privilege must bow to "other State law" embodied in a criminal defendant's right to discovery under Rule 3:13-3.

Lastly, the Legislature has provided no testimonial privilege to mental health providers who do not meet the professional requirements in the statutory privileges. Thus, as discussed

above, certain psychologists are not covered by the psychologist-patient privilege. There also is no statutory privilege for communications to a counselor who has a masters degree not in social work but in counseling, unless the counselor provides marriage counseling, N.J.R.E. 510, or is also a qualified victim counselor. N.J.R.E. 518. The Rules of Evidence do not grant an evidentiary privilege to certified psychoanalysts – who must have received a master's degree and received a graduate certificate in psychoanalysis from a free-standing psychoanalytic institute. N.J.S.A. 45:14BB-6. Nurse practitioners also fall outside the statutory privileges. However, a nurse who practices under the supervision of a physician would apparently enjoy the physician's privilege. See State v. Philips, 213 N.J. Super. 534, 543, n. 5 (App. Div. 1986) (applying patient physician privilege to communications with a physician's nurse, stating, "Any applicable privilege should also protect confidential statements made to a treating nurse, acting either as an agent under the supervision of a doctor or in her professional capacity.") Conceivably, based on an agency rationale, communications to a mental health professional may be subject to the privilege applicable to a supervising professional. See, e.g., State v. Davis, 116 N.J. 341, 361 (1989) (communications to attorney's investigator protected by attorney-client privilege based on agency principles).

Discussion.

In the subcommittee's view, New Jersey's current array of privileges for mental health providers creates practical problems for courts, providers and patients. It is also difficult to square the unifying policy that underlies all the privileges – to promote treatment and protect privacy – with the disparate treatment inherent in the privileges themselves.

As a practical matter, the various privileges add a level of complexity to any court's analysis of a claim of privilege over a mental health communication. One hypothetical case may

highlight the problem. A defendant is charged with a sexual assault against a troubled teenager. The defendant presents evidence to the court that the teenager, who had a reputation for lying and false claims, had been treated for various mental health conditions at a psychiatric hospital. Moreover, the defendant claims that the teenager originally alleged that someone other than defendant had assaulted her. The court grants a motion for in camera review of mental health records. However, to complete its analysis the court must first determine the professional status of each treater. A second production is made identifying the licensing and educational background of treaters. The court then finds records of communications with a psychiatrist, a psychologist, social workers, and mental health assistants. The court must then subject the alleged victim's communications to disparate analysis based upon the different rules and principles. The task is complex and may lead to inconsistent results.

A case from New York highlights the potential results of privileges based on credential. In People v. Wilkins, 480 N.E.2d 373 (N.Y. 1985), the New York Court of Appeals reversed a homicide conviction because a psychologist who treated defendant to determine if he was suicidal, was permitted to testify that the defendant admitted that his wounds were self-inflicted. That statement contradicted defendant's claim that the victim had stabbed him and that he killed the victim in self-defense. The Court held that if the victim confided in a psychiatrist, the testimony would have been admissible; but because he spoke to a psychologist, it was not. The Court was at a loss to justify the Legislature's distinction, but was bound by it. Id. at 377.

The subcommittee finds it difficult to reconcile the disparate treatment of mental health privileges with the public policy said to support those privileges. The mental health privileges are said to satisfy two public policy goals. First, they are supposed to promote the public's use of mental health services. The so-called utilitiarian argument is that absent protection of

confidential communications, people would be less willing to seek out treatment and it is in the public interest that people seek needed mental health treatment.

Some critics question whether, as an empirical matter, anything more than a small minority of patients would really avoid treatment because of the lack of a privilege. See, e.g., "Development in the Law – Privileged Communication: IV. Medical and Counseling Privileges," 98 Harv. L. Rev. 1530, 1531, 1542-43 (1985) (hereinafter "Development in the Law") (questioning the empirical support for the so-called utilitarian justification for a psychotherapist privilege). The utilitarian argument has also been subject to judicial skepticism. See Jaffee v. Redmond, 518 U.S. 1, 22-22, 116 S.Ct. 1923, 1934, 135 L. Ed.2d 337, 352-353 (1996) (Scalia, J., dissenting) (questioning empirical basis for concluding that without psychotherapist privilege, persons would be deterred from seeking counseling). However, the mental health privileges are also said to promote personal privacy. In other words, regardless of whether the privilege is necessary to assure resort to treatment, the privilege is important to protect a patient's privacy.

The two policy goals are reflected in legislative findings. See, e.g., N.J.R.E. 517(a) (stating that "[c]ounseling of . . . victims [of violence] is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission."). They are also recognized in the case law. See, e.g., Kinsella v. Kinsella, supra, 150 N.J. at 330 ("[T]he psychologist-patient privilege serves the functional purpose of enabling a relationship that ultimately redounds to the good of all parties and the public. The psychologist-patient privilege further serves to protect an individual's privacy interest in communications that will frequently be even more personal than those between attorney and client.").

One New Jersey court, struggling to explain why communications with psychologists are worthy of greater protection than communications with physicians, presented a policy rationale that overlooks the status of psychiatrists as physicians who may perform psychotherapy in treatment of mental illness.

> [W]e can readily conceive of a reasonable basis to distinguish between a physician treating a disease and a psychologist endeavoring to cure an emotional or mental problem. . . . . The nature of psychotherapy might well justify a greater degree of confidentiality and protection than is generally afforded medical treatment of a physical condition. The nature of the psychotherapeutic process is such that full disclosure to the therapist of the patient's most intimate emotions, fears and fantasies is required. The patient rightfully expects that his personal revelations will not generally be subject to public scrutiny or exposure. We recognize that "[m]any physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a [psychologist] must have his patient's confidence or he cannot help him."
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> [Arena v. Saphier, 201 N.J. Super. 79, 86 (App. Div. 1985) (citation omitted].

In the subcommittee's view, when matched against the utilitarian and privacy policy goals, there is little apparent justification for treating a patient's communications with one mental health professional differently from communications with a different mental health professional. For example, it is difficult to defend affording disclosures about sexual identity to a clinical social worker less protection than the same disclosures to a psychiatrist; and to afford those disclosures to a psychiatrist less protection than the same disclosures to a psychologist. It also is difficult to defend affording less protection to disclosures about suicidal ideation made to a psychiatrist, than disclosures about tidiness in the household made to a marriage counselor.

The differential treatment arguably may have a disparate impact on persons of lesser means. A person who resorts to a community mental health clinic, as opposed to a private

psychiatrist or psychologist, may be more likely to receive treatment from a social worker, or a person possessing a masters in counseling. Thus, the hierarchy of mental health privileges may disadvantage persons of limited financial means. Justice Stevens, writing for the majority in Jaffee v. Redmond, supra, observed, "Today, social workers provide a significant amount of mental health treatment. . . . . Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals." 518 U.S. at 15-16, 116 S.Ct. at 1931, 135 L. Ed.2d at 348. See also R. Auerbach, "Comment: New York's Immediate Need for a Psychotherapist-Patient Privilege Encompassing Psychiatrists, Psychologists, and Social Workers," 69 Alb. L. Rev. 889, 908 (2006) (hereinafter "Comment: New York's Immediate Need") (noting that social workers providing mental health services outnumbered psychologists and psychiatrists combined, and questioning why low income people who must resort to a low cost clinic staffed by social workers should receive less protection over their communications than upper-class persons treated by psychiatrists).

A consolidated mental health privilege has found favor among some jurisdictions and commentators. In establishing a testimonial privilege for psychotherapists, and then extending it to social workers, the majority in Jaffee v. Redmond, supra, agreed that if one accepts the policy goals of the privilege, then the psychotherapist privilege should not discriminate on the basis of whether the mental health professional holds a M.D., a Ph.D. in Psychology, or a M.S.W. or Ph.D. in Social Work. "We therefore agree with the Court of Appeals that 'drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.'" 518 U.S. at 17, 116 S.Ct. at 1932, 135 L. Ed.2d at 349 (citation omitted).

Some commentators agree that there is little basis to draw distinctions between the various reputable mental health professions in affording evidentiary privileges. See, e.g., "Comment: New York's Immediate Need," 69 Alb. L. Rev. at 906-912 (advocating a comprehensive psychotherapist privilege encompassing communications to psychiatrists, psychologists, and social workers); "Note: A Uniform Testimonial Privilege for Mental Health Professionals," 51 Ohio St. L. J. 741, 742, 746 (1990) (endorsing a "single, qualified privilege that covers all mental health professionals" and criticizing "the patchwork development of privilege law" in the mental health field); "Development in the Law," 98 Harv. L. Rev. at 1549 ("The legal system's current distinction between psychotherapists and other professions who provide similar counseling services is similarly artificial."). Another commentator suggests a hybrid approach, that accords a uniform privilege over communications based on both the credentials and function of the provider of mental health services. C. Dubbelday, "Comment: The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," 34 Emory L. J. 777 (1985) (proposing that a privilege should extend equally to communications to licensed mental health professionals, whether psychologists or psychiatrists, and to such identified unlicensed mental health counselors performing similar functions, such as rape counselors).

The consolidated approach has been endorsed by the National Conference of Commissioners of Uniform State Laws, which has adopted a uniform privilege for communications to mental health providers. The approach is a "functional" one, too. The commissioners believed that covering all communications to social workers, for example, could extend too far if the social worker was not engaged in treatment of mental or emotional conditions. See Comment to Rule 503, Uniform Rules of Evidence Act, (1999).

Consolidated privileges have also been adopted in many states. See "Comment: New York's Immediate Need," 60 Alb. L. Rev. at 902-03 (identifying numerous states that "place psychiatrists, psychologists, and social workers within a single statute" and others that include psychiatrists and psychologists in the same privilege, but exclude social workers). For example, California has adopted a single privilege governing confidential communications with a "psychotherapist," which is then defined to include various providers of mental health treatment or counseling. Cal. Evid. Code § 1010.

Under California's privilege, in some respects it is enough to fall within a particular professional or licensing category in order to qualify as a psychotherapist. Included are licensed psychologists, school psychologists, and licensed marriage and family therapists. Cal. Evid. Code § 1010(b), (d), and (e). On the other hand, other mental health providers must prove both licensing or participation in a profession and specialization in mental health treatment. Included are medical doctors specializing in psychiatry, social workers engaged in applied psychotherapy, registered nurses with a master's degree in psychiatric-mental health nursing, and advanced practice registered nurses certified as clinical nurse specialists who participate in expert clinical practice in the specialty of psychiatric-mental health nursing. Cal. Evid. Code § 1010(a), (c), (k), and (l). Also included within psychotherapists are assistants or interns supervised by persons already covered by the privilege. They include registered psychological assistants, registered marriage and family therapist interns, registered associate clinical social workers, certain persons exempt from the psychology licensing law, psychological interns, and psychological trainees. Cal. Evid. Code § 1010(f), (g), (h), (i), and (j). Finally, "psychotherapist" includes a person "a person rendering mental health treatment or counseling services as authorized" by California law. Cal. Evid. Code § 1010(m).

These various psychotherapists are on an even plane under the evidentiary privilege, which declares:

> Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:(a) The holder of the privilege. (b) A person who is authorized to claim the privilege by the holder of the privilege. (c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.
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> [Cal. Evid. Code § 1014].

California establishes a patient-litigant exception similar to the exception that applies in New Jersey to the patient-physician privilege. Cal. Evid. Code § 1012.

In sum, there is significant support and precedent for a unified privilege covering communications between patients and psychotherapists and other persons providing mental health services.

Conclusion.

The subcommittee believes that the Evidence Committee should undertake a comprehensive review of New Jersey's mental health privileges, to determine whether to recommend a unified mental health provider's privilege. The review would consider whether disparate treatment of mental health patients' communications is justified, and if so, under what circumstances. It would consider whether statutory or court-made exceptions to some of the existing privileges should be included in a unified rule. In performing this review, the Committee would presumably confer with professional societies and patient groups, to gain their input about existing privileges and any proposed revisions. Unquestionably, this review would

likely spark some controversy. It would also be a major endeavor. Consequently, before embarking on such a task, the subcommittee recommends that the full Committee seek authorization from the Supreme Court for this effort.