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April 10, 2015

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

**RE: New Rule N.J.R.E. 534
Mental Health Service Provider–Patient Privilege**

Dear Judge Grant:

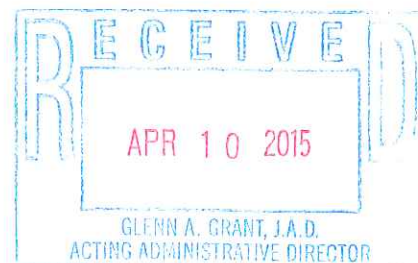
The New Jersey Association for Justice is an organization of over 2,400 attorneys, most of whom represent plaintiffs in personal injury cases. Our members are regularly involved in the civil justice system including the discovery and litigation of claims. As a result, we are intimately familiar and deeply concerned with the New Jersey Rules of Evidence.

NJAJ has reviewed the report of the 2013-2015 Supreme Court Committee on the Rules of Evidence. We agree with the recommendation of the Committee that the Supreme Court adopt draft N.J.R.E. 534, Mental Health Service Provider – Patient Privilege.

The Committee notes that the current Rules of Evidence provide for “different and sometimes inconsistent privileges” for communications with mental health service providers such as:

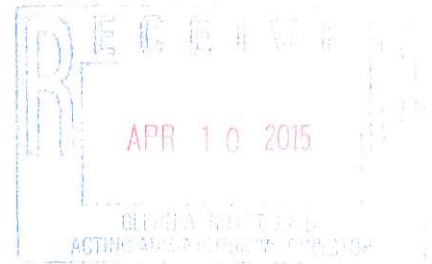
1. A psychologist, Rule 505;
2. A physician, Rule 506;
3. A marriage counselor, Rule 510;
4. A cleric, Rule 511;
5. A victim counselor, Rule 517; and
6. A social worker, Rule 518.

In addition, there are statutory privileges for psychoanalysts, alcohol and drug counselors, and professional counselors.



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The Committee notes that the current Rules create a “hierarchy of privileges” which often depend “on the license or professional credentials of the provider.” This “disparate treatment” is not consistent with the two policy goals governing communication with mental health service providers:

1. The “utilitarian justification” that encourages the use of mental health services; and
2. The “privacy justification” that protects the confidentiality of the patient’s medical records.

Thus, the Committee has drafted N.J.R.E. 534 which creates a new unified “Mental Health Service Provider – Patient Privilege.” The new Rule would prohibit the disclosure of any confidential communications between a patient and the following mental health service providers:

1. Psychologists;
2. Physicians including psychiatrists;
3. Marriage and family counselors;
4. Victim counselors;
5. Social workers;
6. Alcohol and drug counselors;
7. Nurses;
8. Professional counselors;
9. Psychoanalysts;
10. Midwives;
11. Physician assistants; and
12. Pharmacists.

The proposed unified privilege has some exceptions and does not apply to the following proceedings:

1. To commit the patient;
2. To establish competence;
3. To recover damages on account of criminal conduct;
4. To determine the validity of a will;
5. To claim testate or intestate succession;



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6. To determine the physical, mental or emotional condition of the patient in the course of any investigation or examination ordered by the court or compelled by a court rule in discovery;

7. To determine the condition of the patient in a claim or defense of an insurance contract;

8. To cause the provider to testify about knowledge gained through the communication;

9. To aid in the commission of a crime or fraud;

10. To bring a claim against the provider; and

11. To carry a firearm.

In 2012 and 2014, the Committee published Notices to the Bar and sent letters to organizations that “might have an interest in the subject of a unified mental health services provider program.” The Committee received responses from a variety of sources including government agencies, academic institutions and professional organizations.

Most of the commentators favored the adoption of “some type of unified privilege” to protect the medical interests of patients in obtaining mental health services (the “utilitarian justification”) and in protecting their privacy (the “privacy justification”). In contrast, NJAJ is interested in protecting the legal rights of those patients who submit claims for compensation for personal injuries, including mental and emotional distress that requires mental health services (the “legal justification”).

The basic purpose of the Rules of Evidence is to provide a uniform procedure for the discovery of evidence prior to trial and for the presentation of evidence at trial. The Rules include guidelines to determine whether the evidence is competent, relevant and credible.

NJAJ agrees with other commentators that the current Rules with respect to confidential communications are “uncertain” and “unpredictable” since there are different rules for different providers. As trial lawyers, we recognize that these deficiencies interfere with the proper discovery and presentation of evidence.

NJAJ believes that the civil justice system would benefit in the Supreme Court adopts a unified Mental Health Service Provider privilege that extends to all providers. The draft NJRE 534 would provide certainty and predictability



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whenever an attorney attempts to obtain medical records through discovery prior to trial or attempts to introduce medical evidence at trial. We support the adoption of N.J.R.E. 534.

Sincerely,

Thomas Comer, Esq.
President

cc: Daniel E. Rosner, Esq.
Michael G. Donahue, III, Esq.
Gerald H. Baker, Esq.
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