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PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501

I. INTRODUCTION

Federal Rule of Evidence 501 establishes a general privilege for confidential communications in federal criminal proceedings.¹ Rule 501 evidences Congress' acknowledgment of "the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials 'governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.'"²

Congress chose to adopt Rule 501, a general privilege, rather than nine specific privilege rules defined in the Supreme Court's Proposed Federal Rules of Evidence 502 to 510.³ Congress enacted a general,

¹ FED. R. EVID. 501. Rule 501 provides:

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

Id.

In civil actions that involve "an element of a claim or defense as to which State law supplies the rule of decision," state privilege law applies because no overriding federal interest exists to outweigh enforcing state policy. Rule 501, however, mandates the application of federal, rather than state, privilege law in criminal and non-diversity civil cases brought in federal court because courts are enforcing federal law in these cases. Congress based Rule 501 on the rationale that federal law should not supersede state law in a substantive area such as privileges without a compelling reason. *United States v. Gillock*, 445 U.S. 360, 369 (1980) (citing H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 7-8 (1974)). See also S. REP. NO. 1277, 93d Cong., 2d Sess. 11-13 (1974).

This Comment will discuss the application of Federal Rule of Evidence 501 only to criminal cases.

² *Trammel v. United States*, 445 U.S. 40, 47 (1980) (application of Rule 501 to husband-wife privilege).

³ H.R. DOC. NO. 46, 93d Cong., 1st Sess. 9-19 (1973). The Court's Proposed Federal Rules of Evidence included privileges for required reports privileged by statute, PROPOSED FED. R. EVID. 502, 56 F.R.D. 183, 234-35 (1972); attorney-client communications, PROPOSED FED. R. EVID. 503, 56 F.R.D. at 235-37; psychotherapist-patient communications, PROPOSED FED. R. EVID. 504, 56 F.R.D. at 240-41; husband-wife communications, PROPOSED FED. R.

rather than a specific, rule to protect federal courts from the limitations of the detailed privileges of the Proposed Rules and to allow the courts to develop rules of privilege in accordance with the circumstances of each case.⁴ Because Congress did not disapprove of the Supreme Court's proposed rules concerning privileges, several federal courts have used Proposed Rules 502 to 510 to establish individual privileges that are not unanimously recognized by federal courts.⁵

Not all federal courts recognize the psychotherapist-patient privilege⁶ articulated in Proposed Rule 504.⁷ Courts that fail to acknowledge

EVID. 505, 56 F.R.D. at 244-45; clergy-worshipper communications, PROPOSED FED. R. EVID. 506, 56 F.R.D. at 247; political votes, PROPOSED FED. R. EVID. 507, 56 F.R.D. at 249; trade secrets, PROPOSED FED. R. EVID. 508, 56 F.R.D. at 249-50; secrets of state and other official information, PROPOSED FED. R. EVID. 509, 56 F.R.D. at 251-52; and identities of informers, PROPOSED FED. R. EVID. 510, 56 F.R.D. at 255-56.

⁴ See *United States v. Gillock*, 445 U.S. at 367 (discussing S. REP. NO. 1277, 93d Cong., 2d Sess. 13 (1974)). Justice Gray, concurring in *In re Pebsworth*, 705 F.2d 261 (7th Cir. 1983), recently stated that "[t]he intention of Congress in enacting Rule 501 was that 'recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.'" *Id.* at 264-65 (Gray, J., concurring) (quoting S. REP. NO. 1277, 93d Cong., 2d Sess. 13 (1974)).

⁵ See, e.g., *Trammel*, 445 U.S. at 47 (Court used Proposed Rule 505 to establish husband-wife privilege); *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983) (court used Proposed Rule 504 to recognize psychotherapist-patient privilege); *Flora v. Hamilton*, 81 F.R.D. 576, 579 (M.D.N.C. 1978) (court used Proposed Rule 504 to recognize psychotherapist-patient privilege).

⁶ *In re Zuniga*, 714 F.2d at 638. In *Zuniga*, the Sixth Circuit recently discussed the psychotherapist-patient privilege's "mixed reception" in the federal courts. See, e.g., *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983) (indicating psychotherapist-patient privilege does not exist); *United States v. Meagher*, 531 F.2d 752 (5th Cir.) (rejecting psychotherapist-patient privilege), *cert. denied*, 429 U.S. 853 (1976); *Ramer v. United States*, 411 F.2d 30 (9th Cir.) (assuming psychotherapist-patient privilege exists), *cert. denied*, 396 U.S. 965 (1969); *United States v. Witt*, 542 F. Supp. 696 (S.D.N.Y.) (refusing to recognize psychotherapist-patient privilege), *aff'd*, 697 F.2d 301 (2d Cir. 1982); *United States v. Layton*, 90 F.R.D. 520 (N.D. Cal. 1981) (psychotherapist-patient privilege did not exist at common law and therefore not at federal law); *United States v. Brown*, 479 F. Supp. 1247 (D. Md. 1979) (no general federal psychotherapist-patient privilege exists); *Flora v. Hamilton*, 81 F.R.D. 576 (M.D.N.C. 1978) (recognizing psychotherapist-patient privilege with certain exceptions).

⁷ PROPOSED FED. R. EVID. 504, 56 F.R.D. 183, 240-41 (1972). Proposed Rule 504 states:

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

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

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the

a psychotherapist-patient privilege do not distinguish the psychotherapist-patient privilege from a physician-patient privilege.⁸ These courts posit that because a physician-patient privilege did not exist at common law, the recognition of a psychotherapist-patient privilege under Federal Rule of Evidence 501 would be inconsistent with "the principles of the common law."⁹

Courts that do recognize a psychotherapist-patient privilege, however, have followed Proposed Rule 504 and developed standards for the scope of the privilege under Rule 501.¹⁰ These courts argue that "the light of reason and experience" language of Rule 501 establishes a psychotherapist-patient privilege.¹¹ Most important, the unique nature of the psychotherapist-patient relationship, recognized by both the House and Senate Judiciary Committees,¹² mandates a recognition of the privilege by all federal courts.

purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Id.

⁸ *United States v. Lindstrom*, 698 F.2d 1154, 1167 (11th Cir. 1983); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976) (citing *United States v. Harper*, 450 F.2d 1032, 1035 (5th Cir. 1971)); *Ramer v. United States*, 411 F.2d 30, 39 (9th Cir. 1969). See 8 J. WIGMORE, EVIDENCE § 2380 (McNaughton rev. 1961).

⁹ See *supra* note 8 and cases cited therein; see also FED. R. EVID. 501.

¹⁰ *In re Zuniga*, 714 F.2d at 636-39; *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1038-40 (D. Hawaii 1979); *Flora v. Hamilton*, 81 F.R.D. at 578; *Lora v. Board of Educ.*, 74 F.R.D. 565, 584-87 (E.D.N.Y. 1977). The court in *Lora v. Board of Education* stressed that "[a]lthough Rule 504, along with other specific privilege rules, was rejected by Congress in favor of the more general Rule 501, it still provides a useful standard from which analysis can proceed." 74 F.R.D. at 584.

¹¹ *In re Zuniga*, 714 F.2d 632, 639 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983); *Lora v. Board of Educ.*, 74 F.R.D. 565, 578 (E.D.N.Y. 1977).

¹² S. REP. NO. 1277, 93d Cong., 2d Sess. 13 (1974); H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 7-8 (1974).

The several courts that recognize the vitality of a psychotherapist-patient privilege reason that the privilege is not absolute. Rather, a court must balance the interests in protecting the desired information with the interests in disclosing the requested material.¹³ In addition, the courts acknowledge several exceptions to the psychotherapist-patient privilege.¹⁴

The Supreme Court has not decided whether a psychotherapist-patient privilege exists under Rule 501.¹⁵ The Court should acknowledge that the unique nature of the psychotherapist-patient relationship mandates the existence of the privilege under Federal Rule of Evidence 501. The Court then should explicate the scope of the psychotherapist-patient privilege by balancing the interests protected by the privileged communications with the interests advanced by disclosure of the requested information. Finally, the Court should provide an analysis of exceptions to the psychotherapist-patient privilege.

II. THE EXISTENCE OF THE PRIVILEGE UNDER RULE 501

A. THE RATIONALE FOR THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Dean Wigmore developed four postulates to determine the validity of a privilege. Wigmore's four tests are: (1) Does the communication in the usual circumstances of the given professional relation originate in a confidence that it will not be disclosed? (2) Is the inviolability of that confidence essential to the achievement of the purpose of the relationship? (3) Is the relation one that should be fostered? and (4) Is the expected injury to the relation, through the fear of later disclosure, greater than the expected benefit to justice in obtaining the testimony?¹⁶ The psychotherapist-patient privilege satisfies all four criteria. First, confidence and trust are the bases of the psychotherapist-patient relationship. Patients intend that their communications with the psychotherapist will

¹³ *In re Zuniga*, 714 F.2d at 639-40; *Flora*, 81 F.R.D. at 578-79; *Lora*, 74 F.R.D. at 576-84.

¹⁴ *In re Zuniga*, 714 F.2d at 640-41; *In re Pebsworth*, 705 F.2d 261, 262-64 (7th Cir. 1983); *Meagher*, 531 F.2d at 753 (court rejected *physician*-patient privilege, but discussed exceptions to psychotherapist-patient privilege under Proposed Rule 504); *Harper*, 450 F.2d at 1035 (court discussed exceptions to Mississippi statute that Mississippi courts have recognized); *Ramer*, 411 F.2d at 39. See PROPOSED FED. R. EVID. 504, 56 F.R.D. at 241. See *infra* notes 117-44 and accompanying text.

¹⁵ The Supreme Court recently denied certiorari to the appellants in *In re Zuniga* and refused to rule whether or not the privilege exists. *Zuniga v. United States*, 104 S. Ct. 426 (1983).

¹⁶ 8 J. WIGMORE, EVIDENCE § 2286, at 527 (McNaughton rev. 1961). The privilege must satisfy all criteria to be valid. *Id.* In his treatise on evidence, Professor Wigmore does not discuss how he developed these four postulates for determining the existence of a privilege. See *id.* at § 2286.

remain secret.¹⁷ Psychotherapy is grounded upon "confidential personal revelations about matters which the patient is and should be normally reluctant to discuss. . . . [The communications] always originate in a confidence that they will not be divulged."¹⁸

Second, the "inviolability" of the confidence between the psychotherapist and patient is the keystone of the relationship and of successful treatment for the patient.¹⁹ The requirement of confidentiality between a psychotherapist and a patient inheres in the psychotherapist's ability to cure the patient: "His capacity . . . is completely dependent upon [the patient's] willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication."²⁰

Third, the psychotherapist-patient relationship should be nurtured because individuals benefit from treatment of their mental disabilities.²¹ Non-privileged psychotherapist-patient communications result in irreparable injury to mentally ill persons.²² Patients who fear that their psy-

¹⁷ *In re Zuniga*, 714 F.2d at 638; *Lora*, 74 F.R.D. at 575. See Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184-85 (1960).

¹⁸ Slovenko, *supra* note 17, at 184-85.

¹⁹ *Id.* at 185-92.

²⁰ *In re Zuniga*, 714 F.2d at 638 (quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960), quoted in PROPOSED FED. R. EVID. 504 advisory committee note, 56 F.R.D. at 242). The Advisory Committee's Notes to Proposed Rule 504 also state:

The relationship [between a psychotherapist and patient] may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

PROPOSED FED. R. EVID. 504 advisory committee note, 56 F.R.D. 183, 242 (1972) (quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960)).

²¹ See Slovenko, *supra* note 17, at 192-93.

²² *In re Zuniga*, 714 F.2d at 639; *Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1052. The court in *Hawaii Psychiatric Society* emphasized that "[t]he failure of an individual to seek care or to receive adequate care may result in serious and irreversible harm to that individual." *Id.*

In *Zuniga*, for example, the Federal Bureau of Investigation (FBI) had tried to interview several patients of Dr. Zuniga about their treatments. Several of these patients suffered "serious relapses" as a result of the FBI investigations. Brief for Appellant at 10, *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983). In their brief, the appellants described the injuries to Zuniga's patients that resulted from the FBI's investigations of these individuals:

One patient who had been suicidal in the past but was in a state of "remission" renewed his statements that he would take his own life. Other patients contacted the doctor in a very distraught frame of mind and demanded immediate consultation to alleviate their fears. . . . Many feared that their psychiatrist who they rely upon to survive their particular torment, would no longer be available. . . . Tape recordings exist in which the patients describe how they were treated by the F.B.I. who appeared at their homes, unannounced and began questioning the patients about the nature of the treatment received from Dr. Zuniga. All the patients were shocked and alarmed upon realizing that the F.B.I. was aware that they were obtaining psychiatric treatment. . . . Ironically,

chotherapist will disclose confidential information to third parties are inhibited in their revelations to their doctor and deterred from seeking treatment for their ills.²³ Afflicted persons would continue to suffer from their malaise and would be prevented from seeking cures that would allow them to function as healthy individuals.²⁴

In addition to the patients' interest in obtaining effective treatment through privileged communications with their psychotherapists, society also has a strong interest in protecting the psychotherapist-patient relationship. The public benefits in two ways from "encouraging the psychologically handicapped to seek and fully cooperate in psychotherapeutic counseling."²⁵ The community obviously benefits from the successful treatment of mentally ill persons who pose a possible danger to society.²⁶ Furthermore, mentally fit individuals have greater capacities for economic, emotional, and political productivity than mentally disabled persons.²⁷

Wigmore's fourth test is satisfied as well; the expected injury to the patient and to society from fear of disclosure of information is usually greater than the expected benefit from obtaining the information.²⁸ In each case, however, a court must balance the injury against the benefit in each case.²⁹ As one commentator has emphasized:

A great deal of time is required before a psychiatrist is able to obtain the necessary confidence of his patient, and if there were any suspicion of revelation in the courtroom or anywhere else, the psychiatrist would not have the benefit of the statement either for treatment of his patient or for use in court. The denial of the privilege begets the worst of both worlds.³⁰

several patients['] problems revolve around the fear of being harassed and persecuted by the government and/or F.B.I.

Id.

²³ Slovenko, *supra* note 17, at 192-93.

²⁴ See *In re Zuniga*, 714 F.2d at 639; *Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1038; *Flora*, 81 F.R.D. at 579; *Lora*, 74 F.R.D. at 571.

²⁵ *In re Zuniga*, 714 F.2d at 639.

²⁶ *Id.*

²⁷ *Id.* The *Zuniga* court reasoned:

The inability to obtain effective psychiatric treatment may preclude the enjoyment and exercise of many fundamental freedoms, particularly those protected by the First Amendment. "Mental illness may prevent one from understanding religious and political ideas, or interfere with the ability to communicate ideas. Some level of mental health is necessary to be able to form belief and value systems and to engage in rational thought."

Id. (quoting Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 27 (1980)). The Sixth Circuit concluded that "[t]he interest of the patient in exercising his rights is also society's interest, for society benefits from its members['] active enjoyment of their freedom." 714 F.2d at 639.

²⁸ See *In re Zuniga*, 714 F.2d at 639.

²⁹ See *id.* at 639-40; *Lora*, 74 F.R.D. at 576-77; Slovenko, *supra* note 17, at 193-94; see also *infra* notes 84-116 and accompanying text.

³⁰ Slovenko, *supra* note 17, at 193-94. Slovenko adds that "justice may indeed be served

The Advisory Committee on the Proposed Rules and at least two commentators agree that the psychotherapist-patient privilege satisfies Wigmore's requirements.³¹ Moreover, the Senate Judiciary Committee's report on Rule 501 specifically noted that Congress did not reject the psychotherapist-patient privilege:

[I]n approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.³²

Wigmore's four postulates provide a more than adequate rationale for the existence of the psychotherapist-patient privilege. The basis for the privilege, however, rests in the common law.

B. THE BASIS OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Rule 501 instructs courts to use the principles of the common law to develop privileges.³³ Although the common law did not recognize a

by closing the psychiatrist's mouth. Treatment is directed primarily toward the feelings and attitudes which are unacceptable to the patient and others. . . . [The production of these feelings and attitudes] is necessary in treating the illness but devastating if revealed to ordinary scrutiny." *Id.* at 194.

³¹ The Advisory Committee cited Slovenko's analysis and stated that "Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied." 56 F.R.D. 183, 242 (1972). Professor Slovenko stated that "Wigmore, in his caustic criticism of the medical privilege, did not consider psychotherapy. His four tests of legitimate privilege, however, are here fulfilled. . . ." Slovenko, *supra* note 17, at 184.

Professor McCormick, a scholar on evidence, also has supported the psychotherapist-patient privilege:

On account of the special therapeutic need for assurance to the patient of protection against disclosures it is cogently argued . . . that even in states not having the physician-patient privilege generally, a privilege should be recognized, by statute or decision, for confidential disclosures to psychiatrists, qualified psychologists trained in the treatment of mental disorders, and (in the court's discretion) general practitioners consulted for diagnosis or treatment of mental disease. . . . "A privilege of [sic] those receiving psychotherapy is necessary if the psychiatric profession is to fulfill its medical responsibility to its patients."

C. MCCORMICK, EVIDENCE § 99, at 213 n.9 (E. Cleary 2d ed. 1972) (citations omitted) (quoting Slovenko, *supra* note 17, at 199). See also Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 Nw. U.L. REV. 384 (1952).

³² S. REP. NO. 1277, 93d Cong., 2d Sess. 13 (1974). For example, Congress' failure to adopt Proposed Rule 503, the attorney-client privilege, did not indicate a disapproval of the recognition of the attorney-client privilege. See *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976). Also, Congress did not intend for courts to discontinue the clergy-worshipper privilege when Congress did not promulgate Proposed Rule 506. See PROPOSED FED. R. EVID. 506, 56 F.R.D. at 247.

³³ See FED. R. EVID. 501 ("privilege [law] . . . shall be governed by the principles of the common law as they may be interpreted by the courts . . . in the light of reason and experience"); see also *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955).

physician-patient privilege, "[the common law] had indicated a disposition to recognize a psychotherapist-patient privilege . . . when legislatures began moving into the field."³⁴

Several federal courts have acknowledged the common law origins of the psychotherapist-patient privilege.³⁵ In *Lora v. Board of Education*, the District Court for the Eastern District of New York emphasized that the common law had condoned the recognition of a psychotherapist-patient privilege even though it had not recognized a general physician-patient privilege.³⁶ The court stated that because Rule 501 instructed courts to determine privileges in accordance with the common law, Rule 501 controlled the psychotherapist-patient privilege.³⁷ The court used Proposed Rule 504 as a standard for analyzing the psychotherapist-patient privilege³⁸ and explained at length why "it is desirable as a matter of social policy to protect psychotherapist-patient confidences by an evidentiary privilege"³⁹

In *In re Zuniga*, the Court of Appeals for the Sixth Circuit also extensively analyzed the ambit of Rule 501 and ruled that it "[c]learly . . . [gives] the Court the authority to recognize a psychiatrist-patient privilege."⁴⁰ The court then discussed the "compelling considerations" of the psychotherapist-patient relationship that dictate a psychotherapist-patient privilege.⁴¹ The Sixth Circuit concluded that the interests promoted by a psychotherapist-patient privilege "in general, outweigh the need for evidence in the administration of criminal justice";⁴² the privilege exists, therefore, pursuant to Rule 501.⁴³

The widespread recognition of the psychotherapist-patient privilege by the states further supports recognition of the privilege under

³⁴ PROPOSED FED. R. EVID. 504 advisory committee note, 56 F.R.D. 183, 242 (1972) (citing Note, *supra* note 31). See *Lora*, 74 F.R.D. at 575; see, e.g., *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955) (holding admission of testimony of mental hospital physician who had treated defendant while committed pending competence to stand trial violated statute creating privilege as to facts learned by physician in treating patient).

³⁵ See, e.g., *In re Zuniga*, 714 F.2d at 639; *Flora*, 81 F.R.D. at 578; *Lora*, 74 F.R.D. at 578; *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1045-46 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

³⁶ 74 F.R.D. 565, 575 (E.D.N.Y. 1977).

³⁷ *Id.* at 578.

³⁸ *Id.* at 578, 584. In *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1045-46 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977), this same court also had analyzed the psychotherapist-patient privilege within the framework of Proposed Rule 504.

³⁹ 74 F.R.D. at 574.

⁴⁰ 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983).

⁴¹ *Id.* at 638-39. See *supra* notes 17-32 and accompanying text.

⁴² 714 F.2d at 639.

⁴³ *Id.* The Seventh Circuit, in *In re Pebsworth*, 705 F.2d 261, 262 (7th Cir. 1983), also held that Rule 501 controlled the recognition of a psychotherapist-patient privilege. For a discussion of *In re Pebsworth*, see *infra* notes 123-25 and accompanying text.

Rule 501 by the federal courts. At present, forty-one states have statutes that authorize the psychotherapist-patient privilege.⁴⁴ The Supreme Court has ruled that "the privilege law as developed in the states is [not] irrelevant. This Court has taken note of state privilege laws in determining whether to retain them in the federal system."⁴⁵

Several federal courts have followed the Supreme Court's instruction and used the states' psychotherapist-patient privilege statutes to illustrate the need for and efficacy of the privilege under Rule 501.⁴⁶ When the Sixth Circuit affirmed the privilege under Rule 501, for example, it acknowledged the overwhelming number of states that have adopted psychotherapist-patient privilege statutes.⁴⁷ In *Lora*, the District Court for the Eastern District of New York also considered the states' position on the privilege and examined New York law for guidance.⁴⁸ The court acknowledged that the State of New York's psychotherapist-patient privilege statute also supported the establishment of a federal evidentiary psychotherapist-patient privilege.⁴⁹

⁴⁴ See ALA. CODE § 34-26-2 (1975 & Supp. 1983); ALASKA R. CT. § 504 (1980); ARIZ. REV. STAT. ANN. § 32-2085 (1976); ARK. STAT. ANN. § 28-1001 (1979); CAL. EVID. CODE §§ 1010-28 (West 1966 & Supp. 1984); COLO. REV. STAT. § 13-90-107(g) (1973 & Supp. 1981); CONN. GEN. STAT. ANN. § 52-146(c)-(j) (West Supp. 1983); DEL. UNIF. R. EVID. 503 (1980); D.C. CODE ANN. § 14-307 (1981); FLA. STAT. ANN. § 90-503 (West 1979); GA. CODE ANN. § 38-418 (1981 & Supp. 1982); HAWAII REV. STAT. § 33-626 (1980); IDAHO CODE § 54-2314 (1979); ILL. REV. STAT. ch. 91-1/2, §§ 801-817 (Supp. 1983); IND. CODE ANN. § 25-33-1-17 (Burns 1982 & Supp. 1983); KY. REV. STAT. § 421.215 (1972); LA. REV. STAT. ANN. § 13:3734 (West Supp. 1983); ME. REV. STAT. ANN. tit. 22, § 4015 (1964 & Supp. 1983); MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1980 & Supp. 1983); MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1974 & Supp. 1983); MICH. COMP. LAWS ANN. § 330.1750 (West 1980); MINN. STAT. ANN. § 595.02 (West 1947 & Supp. 1984); MISS. CODE ANN. § 73-31-29 (1972 & Supp. 1983); MO. ANN. STAT. § 337.055 (Vernon Supp. 1984); MONT. CODE ANN. § 26-1-807 (1983); NEB. REV. STAT. § 27-504 (1979); NEV. REV. STAT. §§ 49.215-.245 (1980); N.H. REV. STAT. ANN. § 330-A:19 (1966); N.J. STAT. ANN. § 45:14B-28 (West 1983); N.M. R. EVID. 504 (1983); N.Y. CIV. PRAC. LAW § 4507 (McKinney Supp. 1983); N.C. GEN. STAT. § 8-53.3 (1981 & Supp. 1983); N.D. R. EVID. 503 (Supp. 1983); OKLA. STAT. ANN. tit. 12, § 2503 (West 1980 & Supp. 1983); OR. REV. STAT. § 40.230 (1981); TENN. CODE ANN. § 24-1-207 (1980); UTAH CODE ANN. § 58-25-8 (Supp. 1983); VT. STAT. ANN. tit. 12, § 1612 (Supp. 1983); VA. CODE § 8.01-400.2 (Supp. 1983); WASH. REV. CODE ANN. § 18.83-110 (1978); WIS. STAT. ANN. § 905.04 (West 1975 & Supp. 1983); WYO. STAT. § 33-27-103 (1977).

⁴⁵ *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980) (involving evidentiary privilege for state legislators in federal prosecutions).

⁴⁶ See *In re Zuniga*, 714 F.2d at 638-39; see also *Taylor*, 222 F.2d at 401; *Lora*, 74 F.R.D. at 576.

⁴⁷ *In re Zuniga*, 714 F.2d at 638-39.

⁴⁸ 74 F.R.D. at 576.

⁴⁹ *Id.* The *Lora* court stated that because

"a strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy" . . . [i]f the state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.

Id. (quoting *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976)).

Although several federal courts have established that Rule 501 mandates a psychotherapist-patient privilege,⁵⁰ other courts have held that Rule 501 is inapplicable to the psychotherapist-patient relationship.⁵¹ These courts reason that because Rule 501 requires "reference to the common law," and no equivalent physician-patient privilege existed at common law, a psychotherapist-patient privilege does not exist under Rule 501.⁵² The Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits have stated that the psychotherapist-patient relationship is indistinguishable from the physician-patient relationship.⁵³ Because the common law did not acknowledge a physician-patient privilege, the courts recognize "no such privilege in federal criminal trials today."⁵⁴

The psychotherapist-patient relationship, however, is readily distinguishable from the physician-patient relationship.⁵⁵ The existence and

⁵⁰ See *In re Zuniga*, 714 F.2d 632 (6th Cir.), cert. denied, 104 S. Ct. 426 (1983); *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028 (D. Hawaii 1979); *Flora v. Hamilton*, 81 F.R.D. 576 (M.D.N.C. 1978); *Lora v. Board of Educ.*, 74 F.R.D. 565 (E.D.N.Y. 1977). The court in *Hawaii Psychiatric Society* explicitly stated that "[t]here is no history of judicial, legislative or public acceptance of government access to confidential communications between a psychiatrist and his patient. To the contrary, courts, legislators and commentators have long agreed on the need to protect those communications from disclosure." 481 F. Supp. at 1048-49.

⁵¹ See *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983); *United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976); *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971); *United States v. Layton*, 90 F.R.D. 520 (N.D. Cal. 1981).

⁵² See *supra* note 51 and cases cited therein. In *Lindstrom*, the Eleventh Circuit equated the psychotherapist-patient relationship with the relationship between physicians and their patients and stated that "[t]here is no federal statute creating such a privilege." 698 F.2d at 1167 n.9. The court did not consider the language or legislative intent of Rule 501.

In *Layton*, the District Court for the Northern District of California also held that "the psychotherapist-patient privilege is inapplicable . . . [I]n federal courts privileges are defined by reference to the common law." 90 F.R.D. at 525. The court in *Layton*, however, incorrectly stated that "[t]he federal courts have universally recognized that no such privilege existed at common law and that [it] therefore does not exist in federal courts." *Id.* (citations omitted). See *supra* notes 35-49 and accompanying text.

⁵³ See *Lindstrom*, 698 F.2d at 1167 n.9 (Eleventh Circuit held that lower court had committed reversible error by denying mail fraud defendants access to psychiatric material concerning the government's witness because "[a]t common law there was no physician-patient privilege. There is no federal statute creating such a privilege. Therefore, testimony concerning the doctor-patient relationship is admissible in Federal Court."); *Meagher*, 531 F.2d at 753 (Fifth Circuit held admissible bank robbery defendant's letters to psychiatrist because no physician-patient privilege is recognized in federal criminal trials); *Harper*, 450 F.2d at 1035 (Fifth Circuit held admissible testimony of two psychiatrists that defendant was sane at time he unlawfully manufactured methadone because "[a]t common law there was no physician-patient privilege. . . . And we know of no federal statute creating such a privilege") (citations omitted); *Ramer*, 411 F.2d at 39 (Ninth Circuit held that defendant on trial for escape from federal penitentiary could not claim that communications between himself and psychiatrist were privileged because "[t]he common law did not recognize as privileged the communications between physician and patient").

⁵⁴ *Meagher*, 531 F.2d at 753. See *Lindstrom*, 698 F.2d at 1167 n.9; *Harper*, 450 F.2d at 1035; *Ramer*, 411 F.2d at 39.

⁵⁵ *In re Zuniga*, 714 F.2d at 638; *Taylor*, 222 F.2d at 401. See PROPOSED FED. R. EVID. 504

success of the psychotherapist-patient relationship depend upon the confidentiality of therapy sessions and diagnoses.⁵⁶ In contrast, a patient with physical ailments will, in most instances, consult a physician irrespective of whether the doctor insures the confidentiality of the consultation.⁵⁷ The clear purpose of meeting with a physician is to remedy an ill, usually of physiological origin, that might become more debilitating and painful if left untreated.⁵⁸

Persons with mental and emotional problems, however, hope that they can uncover the source of their problems by revealing their private personalities; successful treatment results from the patient's "letting down [his] defenses."⁵⁹ In psychotherapy, patients often act without regard to social conventions and differently from the way they conduct themselves in daily life.⁶⁰ Patients' fears that their unconventional actions might be disclosed are forceful deterrents against seeking treatment.⁶¹ Also, patients' apprehension of societal ridicule of their mental problems may cause them to avoid consultations with psychotherapists about their ailments.⁶²

advisory committee note, 56 F.R.D. 183, 242 (1972); M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 272 (1952); Slovenko, *supra* note 17, at 184-85.

⁵⁶ See *supra* note 55 and authorities cited therein.

⁵⁷ *Taylor*, 222 F.2d at 401.

⁵⁸ M. GUTTMACHER & H. WEIHOFEN, *supra* note 55, at 272. See also Slovenko, *supra* note 17, at 185.

⁵⁹ Slovenko, *supra* note 17, at 185. See *In re Zuniga*, 714 F.2d at 638; *Taylor*, 222 F.2d at 401. The court in *Taylor* distinguished a patient's relationship with a physician from his relationship with a psychotherapist:

Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand."

Taylor, 222 F.2d at 401 (quoting M. GUTTMACHER & H. WEIHOFEN, *supra* note 55, at 272).

⁶⁰ Slovenko, *supra* note 17, at 185. Slovenko illustrates that patients' actions in psychotherapy are different from their everyday conduct: "[A] minister in psychotherapy reveals aggressive attributes; a patient at the end of each session leaves without saying goodbye; a lady of society regularly greets her psychiatrist with the rebuke, 'Haven't you lost weight yet, you fat little fool?'; a preacher's wife talks about fecal matter." *Id.*

⁶¹ Slovenko warns that because a patient's actions in psychotherapy are often different from his or her actions in daily life, "[r]evelation by the psychiatrist of the patient's inner self would be disastrous to the patient's reputation and standing in the community." Slovenko, *supra* note 17, at 185.

⁶² *Wisconsin Psychiatric Servs. v. Commissioner*, 76 T.C. 839 (1981). In *Wisconsin Psychiatric Services*, the court admonished:

Even in our modern society, the decision to go to a psychiatrist is a personal and often difficult choice for a patient to make. We believe that there should be no social stigma attached to seeking the assistance of a psychiatrist, and in fact that there should

The Courts of Appeals for the District of Columbia and the Sixth Circuits have emphasized the unique nature of the psychotherapist-patient relationship.⁶³ The District Court for the Eastern District of New York also has expounded on the distinctiveness of the relationship and has emphasized that "the pragmatic, empirical objections to the rationale of the general physician-patient privilege are not applicable to this specialized relationship [between psychotherapists and patients]."⁶⁴

Although the principles of the common law provide a basis for the psychotherapist-patient privilege, some courts and commentators reason that a constitutional right of privacy is a better foundation for the psychotherapist-patient privilege.⁶⁵ Proponents of a constitutional base for the privilege argue that the psychotherapist-patient privilege fulfills the two strands of the constitutional right to privacy embodied in the "penumbras" of the ninth amendment: the individual's interest in avoiding disclosure of personal matters, and the interest in an individual's independence in making important personal decisions.⁶⁶ The advocates of a constitutional psychotherapist-patient privilege suggest that the constitutional right of privacy is a more secure foundation for a psychotherapist-patient privilege than Federal Rule of Evidence 501 because neither legislatures nor courts can remove a constitutionally protected right.⁶⁷ Congress, however, can withdraw a statute such as

be great respect for individuals who can recognize that they may have problems and who have the courage to seek help. Nonetheless, we would be shortsighted if we did not recognize that some people still view psychiatric patients as somehow "tainted" by their visits to appropriate medical specialists. Unfortunately, public knowledge of a patient's psychiatric care could have a detrimental impact on such patient's business and/or personal affairs and might even hinder the progress made in therapy by such patient.

Id. at 845-46. See also *Slovenko*, *supra* note 17, at 188 ("even those who are well-informed on other matters, consider a person's treatment by a psychiatrist as evidence of his 'queerness' or even insanity. . . . A person may hesitate to visit a psychiatrist out of fear that he will be set apart from his fellow men") (citation omitted). But see *Flora v. Hamilton*, 81 F.R.D. 576, 579 (M.D.N.C. 1978) ("By and large, people are today satisfied that . . . there is no more disgrace in being mentally ill than there is in suffering a heart ailment, poliomyelitis, or cancer") (quoting *Reid v. Moore-McCormack Lines*, 49 F.R.D. 91, 94 (S.D.N.Y. 1970) (quoting *Killip v. Rochester Gen. Hosp.*, 1 Misc. 2d 349, 351, 146 N.Y.S.2d 164, 167 (Sup. Ct. 1955))).

⁶³ See *In re Zuniga*, 714 F.2d at 638; *Taylor*, 222 F.2d at 401.

⁶⁴ *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1043 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977). See *Lora*, 74 F.R.D. at 575.

⁶⁵ See, e.g., *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *United States v. Layton*, 90 F.R.D. 520 (N.D. Cal. 1981); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028 (D. Hawaii 1979); *Lora v. Board of Educ.*, 74 F.R.D. 565 (E.D.N.Y. 1977); see also *Smith*, *supra* note 27.

⁶⁶ See, e.g., *Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1037 (citing *Whalen v. Roe*, 429 U.S. 589, 598-600 & n.24 (1977)). In the context of the psychotherapist-patient relationship, patients should have sole discretion as to whether persons other than the psychotherapist know of the patient's mental state and relationship with the psychotherapist. See *Roe v. Wade*, 410 U.S. 113, 209 (1973) (Douglas, J., concurring) ("penumbras" of ninth amendment provide for "right of privacy").

⁶⁷ See *Smith*, *supra* note 27, at 45.

Rule 501 that creates an individual entitlement.⁶⁸

Although the arguments rationalizing a constitutional right of privacy as the basis for the psychotherapist-patient privilege are valid, Federal Rule of Evidence 501 provides a firmer foundation for the privilege. Two problems inhere in the argument that the right of privacy is the basis for the privilege. First, the Supreme Court has stated that "[t]he concept of a constitutional right of privacy remains largely undefined."⁶⁹ Second, the psychotherapist-patient privilege does not exist merely because of a per se "right of privacy"; rather, the privilege is necessary because privacy is the prerequisite to effective treatment of a patient. The psychotherapist-patient privilege protects communications between psychotherapists and their patients; without the privilege, the patients would suffer direct injury from disclosure of the confidential information.⁷⁰ The "irreparable injury" to the patient results because confidentiality and trust between the psychotherapist and the patient are each a *sine qua non* to treatment of the patient.⁷¹

The principles of the common law, the statutory establishment of the privilege by most states, and the extensive benefits to the patient and to society from the privilege, therefore, dictate a psychotherapist-patient privilege under Federal Rule of Evidence 501. The Supreme Court should affirmatively establish the privilege under Rule 501. Such a ruling by the Court would settle the debate among the federal courts over the existence of the psychotherapist-patient privilege. In addition to recognizing the psychotherapist-patient privilege under Rule 501, the Supreme Court should define the scope of the privilege.

III. THE SCOPE OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER RULE 501

A. THE FLEXIBILITY OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Courts should determine the scope of the psychotherapist-patient

⁶⁸ *Id.*

⁶⁹ Whalen v. Roe, 429 U.S. 589, 598 n.24 (1977). Also, the Report of the Senate Committee on the Judiciary on Rule 501 stated that the psychotherapist-patient privilege was one of nine rules "defin[ing] specific *nonconstitutional* privileges which the Federal courts must recognize . . ." S. REP. NO. 1277, 93d Cong., 2d Sess. 11 (1974) (emphasis supplied). See also J.P. v. DeSanti, 653 F.2d 1080, 1087-90 (6th Cir. 1981) ("The Constitution does not explicitly mention a right of privacy. Nor has the Supreme Court recognized the existence of a general right to privacy. . . . [W]e conclude that the Constitution does not encompass a general right to nondisclosure of private information").

⁷⁰ See *supra* notes 21-24 and accompanying text. Of course, nothing prohibits the patients from disclosing the facts and outcomes of their treatments to others. See, e.g., Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (the "liberty" protected by the due process clause of the fourteenth amendment includes "a right of personal privacy, or a guarantee of certain areas or zones of privacy").

⁷¹ See *supra* notes 19-20 and accompanying text.

privilege through a balancing of the interests guarded by protecting the desired information with the interests supported by disclosing the information.⁷² Rules of privilege are "sometimes mistakenly characterized as conferring 'absolute' or 'unqualified' immunity [upon the persons claiming the privilege]."⁷³ Rather, the rules of privilege are flexible; in each case, courts must balance competing interests to determine "as a matter of social and legal policy" whether the evidentiary privilege should extend to the specific communications requested for discovery.⁷⁴

The Federal Rules of Evidence promote the "fundamental and comprehensive need in our adversary system to develop all relevant facts before the trier [of fact] . . . 'to the end that truth may be ascertained.'"⁷⁵ The Supreme Court has emphasized that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."⁷⁶ For each case, therefore, a court must weigh the benefits that accrue to the patient and to society from keeping all evidence of communications between the psychotherapist and the patient confidential against society's interest in gathering all information relevant to enforcement of its laws.⁷⁷ A party's reason for wanting the communication disclosed and the party's proposed use of the communication at trial also determine whether a communication is privileged.⁷⁸

In a federal criminal trial, for example, a defendant might want to use communications between a psychotherapist and a patient who is also an opposing witness to impeach the witness.⁷⁹ The defendant's "in-

⁷² See, e.g., *In re Zuniga*, 714 F.2d at 639-42; *Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1037-45; *Flora*, 81 F.R.D. at 579; *Lora*, 74 F.R.D. at 576-78.

⁷³ *Lora*, 74 F.R.D. at 577.

⁷⁴ *Id.*

⁷⁵ *Id.* at 578 (quoting FED. R. EVID. 102). Rule 102, Purpose and Construction of the Federal Rules of Evidence, provides:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

FED. R. EVID. 102.

⁷⁶ *United States v. Nixon*, 418 U.S. 683, 709 (1974).

⁷⁷ See, e.g., *In re Zuniga*, 714 F.2d 632, 640 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983). In *In re Zuniga*, the court weighed the fact that some persons would refrain from seeing a psychiatrist because the record of their treatment might become known against society's important interest in ascertaining all facts relevant to the trial. *Id.* at 640. See *infra* notes 85-95 and accompanying text.

⁷⁸ See *United States v. Brown*, 479 F. Supp. 1247, 1253 (D. Md. 1979).

⁷⁹ See, e.g., *United States v. Society of Indep. Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981); *United States v. Brown*, 479 F. Supp. 1247 (D. Md. 1979). In *Society of Independent Gasoline Marketers*, the Fourth Circuit explicated a process to determine whether it should disclose to the defense a report about the mental health of a chief government witness. The court stated:

terest in receiving a fair trial—including the opportunity to conduct a full cross-examination and to impeach [the witness—must be weighed against] . . . the need to spare [the witness] . . . from harassment, annoyance or humiliation.”⁸⁰

In another case, the defendant in a criminal trial may claim an absolute privilege to communications that arose from a psychotherapist-patient relationship.⁸¹ The defendant may be either a patient claiming that the privilege protects the information disclosed to the psychotherapist,⁸² or a psychotherapist claiming that the patient's privilege protects the patient's records from disclosure.⁸³

In all instances, courts should develop reasonable alternatives to conferring an absolute privilege or unilaterally granting full disclosure of the information. Courts should limit disclosure to information that is necessary to the proceeding and disclose only to qualified individuals under strict controls of confidentiality. Disclosure made in this manner

“If the report contains only material impeaching the witness, disclosure is required only when there is a reasonable likelihood of affecting the trier of the fact. Whether there is such a likelihood depends upon a number of factors such as the importance of the witness to the government's case, the extent to which the witness has already been impeached, and the significance of the new impeaching material on the witness' credibility.”

624 F.2d at 469 (quoting *United States v. Figurski*, 545 F.2d 389, 391-92 (4th Cir. 1976)).

⁸⁰ *Brown*, 479 F. Supp. at 1254. In *Brown*, the defendant appealed a conviction on charges of giving false testimony before a grand jury. Although the court allowed defense counsel to question the key government witness about some aspects of her mental and emotional state, the court stressed that the witness was “entitled to some protection of her personal records . . . and to protection against undue harassment and humiliation.” *Id.* at 1258.

On the other hand, the court in *United States v. Lindstrom* stated that a “desire to spare a witness embarrassment which disclosure of medical records might entail is insufficient justification for withholding such records from criminal defendants on trial for their liberty.” 698 F.2d 1154, 1167 (11th Cir. 1983).

⁸¹ See, e.g., *In re Zuniga*, 714 F.2d 632 (6th Cir.), cert. denied, 104 S. Ct. 426 (1983); *In re Pebsworth*, 705 F.2d 261 (7th Cir. 1983); *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955); *United States v. Layton*, 90 F.R.D. 520 (N.D. Cal. 1981).

⁸² See *Taylor*, 222 F.2d 398 (defendant convicted of robbery, housebreaking, and grand larceny claimed that admission of testimony of mental hospital physician who had treated him was in violation of psychotherapist-patient privilege); *Layton*, 90 F.R.D. 520 (defendant prosecuted on four criminal counts arising from death of United States Congressman claimed that psychotherapist-patient privilege protected from discovery tapes made of conversation between himself and psychiatrist). In *Taylor*, the court ruled that the lower court had violated the patient-defendant's psychotherapist-patient privilege by admitting the testimony of the mental hospital physician. 222 F.2d at 398. In *Layton*, the district court held that the defendant could protect the taped conversations between himself and his psychotherapist from discovery. 90 F.R.D. at 520.

⁸³ See *In re Zuniga*, 714 F.2d 632 (psychotherapists under investigation for Blue Cross-Blue Shield fraud refused to submit patient records to grand jury on grounds of privilege); *In re Pebsworth*, 705 F.2d 261 (psychotherapist under investigation for criminal misconduct for medical insurance fraud claimed psychotherapist-patient privilege protected records from discovery); see also PROPOSED FED. R. EVID. 504(c), 56 F.R.D. 183, 241. Because the psychotherapist presumably acts as the patient's representative and in the patient's best interests, the psychotherapist may claim the privilege on behalf of the patient.

will ensure the narrowest possible psychological harm to the patient. At the same time, such disclosure will allow the government and the defense to develop all facts relevant to the criminal proceeding at issue.

B. USE OF A BALANCING ANALYSIS TO DETERMINE THE SCOPE OF
THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER RULE
501

Courts can achieve the proper balance among the competing interests and determine the amount and type of information that should be disclosed through consideration of the following questions:

First, is the identification of the individuals required for effective use of the data? Second, is the invasion of privacy and risk of psychological harm being limited to the narrowest possible extent? Third, will the data be supplied only to qualified personnel under strict controls over confidentiality? Fourth, is the data necessary or simply desirable?⁸⁴

An examination of federal courts' decisions on psychotherapist-patient disclosures proves useful in understanding these postulates. In *In re Zuniga*, the defendants were two psychotherapists who had refused to respond to grand jury subpoenas for patient records in a Blue Cross-Blue Shield fraud investigation.⁸⁵ The district court had limited the subpoenas to the identities of the patients and the dates and lengths of their treatments.⁸⁶ On appeal to the Court of Appeals for the Sixth Circuit, the psychotherapists invoked the psychotherapist-patient privilege under Rule 501 in refusing to turn over the redacted patient records.⁸⁷ The Sixth Circuit recognized the psychotherapist-patient privilege and emphasized that the district court had already prohibited disclosure of the diagnostic files of the patients.⁸⁸ The court stated that although the psychotherapist-patient privilege protected the progress notes from discovery, "the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege" because the "assurance to the patient that his innermost thoughts may be revealed without fear of disclosure" is not negated by

⁸⁴ *Lora v. Board of Educ.*, 74 F.R.D. 565, 579 (E.D.N.Y. 1977). The court in *Lora* did not explain how it developed these four questions. The court's analysis, however, provides a formal framework for the balancing methods used by other federal courts to determine the scope of the psychotherapist-patient privilege. See *infra* notes 85-116 and accompanying text.

⁸⁵ 714 F.2d at 634. Privileges established under the Federal Rules of Evidence apply to all federal grand jury proceedings, as well as to federal criminal and civil proceedings. See FED. R. EVID. 1101(b)(2).

⁸⁶ 714 F.2d at 640. Originally, the government also had requested patient files and progress notes. The district court judge, however, limited the production to the patients' names and facts and times of the treatments because the patient files and progress notes were not essential for the grand jury to make a complete investigation. *Id.* at 634-35.

⁸⁷ *Id.* at 636.

⁸⁸ *Id.* at 634-35, 639.

"mere disclosure of the patient's identity."⁸⁹ The court, however, stressed that a court does have the discretion to protect the identities of patients in cases that necessitate such protection.⁹⁰

The Sixth Circuit in *Zuniga* analyzed all four postulates to determine the quantity and composition of information that the defendants had to disclose to the grand jury. First, the court decided that all of the information requested was not necessary for effective use of the data.⁹¹ The Sixth Circuit emphasized that the grand jury needed only the redacted records of the identities, evidence, and times of treatments to fulfill the needs of the insurance fraud investigation; the court, therefore, limited the grand jury to the information that would give it "effective use of the data."⁹² Second, the court limited disclosure to the identities, facts, and times of treatment of the patients to minimize both invasions of the patients' privacy and risks of psychological harm to the patients.⁹³ Third, only the grand jury would review the files, with a careful watch over secrecy.⁹⁴ Fourth, the grand jury needed the identities of the patients and evidence of their treatments to carry out a proper investigation of the psychotherapists.⁹⁵

In *In re Pebsworth*, the Court of Appeals for the Seventh Circuit engaged in a similar analysis.⁹⁶ *Pebsworth*, like *Zuniga*, involved a psychotherapist under investigation for possible criminal misconduct in defrauding medical insurance companies.⁹⁷ The psychotherapist had opposed a grand jury request for the names, evidence of treatments, and diagnoses of some of the doctor's patients on the grounds that production of the materials would violate the psychotherapist-patient privi-

⁸⁹ *Id.* at 640.

⁹⁰ *Id.* at 640 n.7. In *Lora*, for example, the court protected the identities of the patients from disclosure, but ruled that their records were not privileged. 74 F.R.D. at 586-87. *Lora* involved a civil rights action against the Board of Education of the City of New York for racially motivated placements of students in the city's emotionally disturbed education program. The court ruled that the plaintiffs' need for clinical and other data did not encompass the identity of the subject students. 74 F.R.D. at 565. The court reasoned that "[m]ost persons protest not the mere disclosure of private embarrassing or damaging information, but rather the concomitant disclosure of identifying data." 74 F.R.D. at 580 (citations omitted).

⁹¹ 714 F.2d at 640.

⁹² *Id.* See *supra* note 84 and accompanying text.

⁹³ 714 F.2d at 640.

⁹⁴ *Id.*

⁹⁵ *Id.* The grand jury was investigating whether or not the patients for whom the doctors claimed Blue Cross reimbursements had, in fact, visited the doctors for treatment. *Id.* at 634.

⁹⁶ 705 F.2d 261 (7th Cir. 1983). The Seventh Circuit assumed *arguendo* the existence of a psychotherapist-patient privilege for the purpose of determining whether the patients had waived their privilege by explicitly authorizing disclosure of their psychotherapy records to Blue Cross-Blue Shield as part of the insurance reimbursement process. *Id.* at 262. See *infra* notes 123-25 and accompanying text.

⁹⁷ *Id.* at 262.

lege.⁹⁸ The court stated that the requested documents were "administrative rather than substantive in nature, and the success of a criminal investigation into the abuse of the psychotherapeutic care system [was] . . . at stake."⁹⁹ The court explained that it might have decided differently if the requested information involved substantive psychological analyses of the patient, rather than the insignificant material under subpoena.¹⁰⁰ The court further emphasized that its decision did not put patients

to the unconscionable Hobson's choice of either receiving no treatment or receiving treatment only at the cost of making public their illness . . . [because] the grand jury, related investigative bodies, and, if an indictment is returned, the trial court, will take scrupulous measures to ensure that there occurs no unnecessary disclosure of patients' names or diagnoses.¹⁰¹

In *In re Pebsworth*, the Seventh Circuit found that each of the balancing criteria was fulfilled. The court determined that the data disclosed was necessary to the success of the investigation.¹⁰² Because the documents were "administrative rather than substantive," potential harm to the patients was limited as much as possible.¹⁰³ Also, the court emphasized that the personnel who would have access to the information would preserve the confidence of the patients' identities and files.¹⁰⁴

In *United States v. Brown*, the defendant moved for a new trial following a conviction for giving false testimony before a grand jury.¹⁰⁵ The defense wanted to question the key prosecution witness about her mental and emotional history and requested the trial court to subpoena her mental hospital records.¹⁰⁶ The witness claimed that the psychotherapist-patient privilege prohibited the defense from acquiring these files.¹⁰⁷

The District Court for the District of Maryland in *Brown* took "scrupulous measures" to insure that the subpoenaed mental hospital records concerning the government's chief witness were not disclosed frivolously during any of the pretrial hearings or at trial.¹⁰⁸ The court held in camera hearings and sealed the transcripts of the proceedings.¹⁰⁹ The court, the witness, and the witness' attorney reviewed the hospital

⁹⁸ *Id.*

⁹⁹ *Id.* at 263.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 264.

¹⁰² *Id.* at 263.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 264.

¹⁰⁵ 479 F. Supp. 1247 (D. Md. 1979).

¹⁰⁶ *Id.* at 1251.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1253-54.

¹⁰⁹ *Id.* at 1251.

records.¹¹⁰ The court then decided that the psychiatric records contained nothing relating to the charges against the defendant, the government's prosecution of the defendant, or to the defendant's relationship with the witness.¹¹¹ Because the records were not "sufficiently relevant or material to any issues, including those of credibility and reliability," the defense could not examine the records or use them at trial.¹¹²

The court in *Brown* also fulfilled all of the balancing criteria. The court decided that the psychiatric records were not "necessary" for determination of any of the issues at trial.¹¹³ By prohibiting disclosure of all of the requested information, the court did not have to consider how much information was necessary for "effective use of the data."¹¹⁴ The court limited the "invasion of privacy and risk of psychological harm to the narrowest possible extent" by holding in camera hearings and by sealing the transcripts of the proceedings.¹¹⁵ Also, only the court, the witness, and the witness' attorney examined the psychiatric records.¹¹⁶

The four-part balancing analysis allows courts to evaluate the interests of the parties to a proceeding and provides courts with a framework for deciding how much and what type of the requested information a party may discover. In addition to considering the balancing criteria that define the scope of the psychotherapist-patient privilege in each case, a court must examine three specific exceptions to the privilege.

C. EXCEPTIONS TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

The necessary balancing of interests circumscribes the scope of the psychotherapist-patient privilege. In addition, limits on the purview of the privilege arise from established exceptions to the privilege.

Three exceptions to the psychotherapist-patient privilege are relevant to a discussion of the use of the privilege in criminal proceedings: communications that the patient made with the expectation that they would be disclosed to third parties; communications made pursuant to a

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1251-52.

¹¹² *Id.* at 1251. The court emphasized that

the defendant does not have the unrestricted right to cross-examine adverse witnesses on any matter desired[.] . . . the cross-examination must be shown to be relevant. The determination of relevancy is within the discretion of the trial court.

. . . .
[S]ome topics may be of such minimal relevance that the trial court would be justified either in totally prohibiting cross-examination about them or in allowing only limited questioning.

Id. at 1253 (citations omitted).

¹¹³ *Id.* at 1251-52.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1251.

¹¹⁶ *Id.*

judge-ordered mental examination of the patient; and communications concerning a mental condition that the patient raises in court as an element of the patient's defense.¹¹⁷ Only in these three instances is "the need for disclosure . . . sufficiently great to justify the risk of possible impairment of the [psychotherapist-patient] relationship."¹¹⁸ Proposed Federal Rule of Evidence 504 elucidates all of the three exceptions.¹¹⁹

Proposed Rule 504(a)(3) states that "[a] communication is 'confidential' if *not intended* to be disclosed to third persons other than those present to further the interest of the patient in the consultation, . . . or persons reasonably necessary for the transmission of the communication"¹²⁰ The psychotherapist-patient privilege protects the patient's discretion to decide whether or not information about the patient's mental state may be disclosed to persons other than the patient's psychotherapist. If patients choose to tell others about their emotional condition and therapy, therefore, patients do not intend the specific information to be privileged.¹²¹ Also, the patient waives the privilege if the patient makes a communication with the knowledge that it will be disclosed to persons other than the psychotherapist and individuals intimately associated with the patient's treatment.¹²²

In *In re Pebsworth*, the Seventh Circuit addressed whether the pa-

¹¹⁷ See PROPOSED FED. R. EVID. 504(a)(3), 504(d), 56 F.R.D. at 241, 243-44. See, e.g., *In re Zuniga*, 714 F.2d at 640-41 ("intent" waiver); *In re Pebsworth*, 705 F.2d at 263-64 ("intent" waiver); *Meagher*, 531 F.2d at 753 (defendant raising own mental state as element of defense); *Harper*, 450 F.2d at 1034 (court-ordered examination); *Ramer*, 411 F.2d at 39-41 (court-ordered examination); *Layton*, 90 F.R.D. at 522 (defendant raising own mental state as element of defense); *Flora*, 81 F.R.D. at 579-80 (party raising own mental state as element of claim); *Lora*, 74 F.R.D. at 585-86 ("intent" waiver).

Proposed Rule 504(d)(1), the exception for hospitalization proceedings, does not apply in criminal cases because the exception is relevant only in civil court proceedings to hospitalize the patient for mental illness. See *supra* note 7.

¹¹⁸ PROPOSED FED. R. EVID. 504 advisory committee note, 56 F.R.D. at 244. Some commentators posit that other exceptions to the privilege exist, including exceptions for "future crime and dangerousness," "criminal defense," "child abuse," and "death of the holder of the privilege." See Smith, *supra* note 27, at 53-59. Courts generally have not recognized these exceptions, and Proposed Rule 504 did not include them. Professor Weinstein, however, considers valid only the three exceptions stated in Proposed Rule 504. 2 J. WEINSTEIN, EVIDENCE ¶ 504[05], at 504-24-25, 504-25 n.9 (1982). Weinstein emphasizes that "[a] furtherance of crime or fraud exception was rejected as unnecessary and harmful," *id.* at 504-28, because

as a class, patients willing to express to psychiatrists their intentions to commit crime are not ordinarily likely to carry out that intention. Instead, they are making a plea for help. The very making of these pleas affords the psychiatrist his unique opportunity to work with patients in an attempt to resolve their problems. Such resolution would be impeded if patients were unable to speak freely for fear of possible disclosure at a later date in a legal proceeding.

Id. at 504-24-25 (citations omitted).

¹¹⁹ PROPOSED FED. R. EVID. 504, 56 F.R.D. at 243-44.

¹²⁰ PROPOSED FED. R. EVID. 504(a)(3), 56 F.R.D. at 241 (emphasis supplied).

¹²¹ See *Lora*, 74 F.R.D. at 585.

¹²² See *In re Zuniga*, 714 F.2d at 640.

tient's authorization of disclosure of his treatment to Blue Cross-Blue Shield constituted a waiver of the psychotherapist-patient privilege with regard to the limited information requested by the government.¹²³ The court ruled that the patients had knowingly and intentionally relinquished any privilege to the billing and administrative records by assenting to publicize the records through the Blue Cross-Blue Shield reimbursement claims procedure.¹²⁴ The court, however, acknowledged that

[w]hile we might well have decided differently if the information sought under the subpoena involved detailed psychological profiles of patients or substantive accounts of therapy sessions, it cannot be said that the subsequent disclosure of such fragmentary data as is involved here as part of the insurance company's legal duties in assisting a federal criminal investigation would be beyond the contemplation of the patients' waiver.¹²⁵

The Sixth Circuit in *In re Zuniga* adopted the Seventh Circuit's "intent"-waiver analysis and ruled that even if the identities, evidence, and times of treatments of patients were within the ambit of the psychotherapist-patient privilege, the patients had waived the privilege to the extent of their disclosure of such information on their insurance forms.¹²⁶ In *Zuniga*, as in *In re Pebsworth*, the patients had already disclosed their identities to Blue Cross-Blue Shield.¹²⁷

In addition to the "intent" exception to the psychotherapist-patient privilege, the privilege does not extend to communications made in the course of a judge-ordered examination of the mental or emotional condition of the patient.¹²⁸ The Advisory Committee's Note to Proposed Rule 504 explained that

[i]n a court ordered examination, the relationship is likely to be an arm's

¹²³ 705 F.2d 261, 262 (7th Cir. 1983).

¹²⁴ *Id.* In a concurring opinion, however, Judge Gray did not agree that the patients' disclosure of their records to Blue Cross-Blue Shield constituted a waiver of the psychotherapist-patient privilege:

It seems to me that the traditional waiver doctrines are inappropriate in the context of present-day medical insurance

Thorough reliance upon the confidential relationship with the doctor is particularly important to a psychiatric patient, because of the very nature of the problem that brings the two together. Such a patient may, with reluctance, recognize the practical necessity for disclosure of his identity and perhaps other information to the insurance carrier. But it by no means follows that because of this he may be deemed to have consented to become involved in a criminal investigation.

Id. at 264 (Gray, J., concurring).

¹²⁵ *Id.* at 263.

¹²⁶ 714 F.2d at 640. The court stated that "the Seventh Circuit's waiver analysis is sound and fully applicable to the case at bar and this Court adopts that analysis." *Id.* at 641.

¹²⁷ *Id.* at 640.

¹²⁸ See, e.g., *United States v. Harper*, 450 F.2d 1032, 1035 (5th Cir. 1971); *Ramer v. United States*, 411 F.2d 30, 39-40 (9th Cir. 1969); *Taylor v. United States*, 222 F.2d 398, 402 (D.C. Cir. 1955); see also PROPOSED FED. R. EVID. 504(d)(2), 56 F.R.D. at 244.

length one . . . [A]n exception [for a court-ordered examination] is necessary for the effective utilization of this important and growing procedure. The exception . . . deals with a court ordered examination rather than with a court appointed psychotherapist. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered.¹²⁹

In *Ramer v. United States*, the Court of Appeals for the Ninth Circuit amplified the Committee's view.¹³⁰ In *Ramer*, the defendant raised an insanity defense to a charge of escape from confinement at a federal penitentiary.¹³¹ The court ordered a psychotherapist to examine the defendant and to testify about this examination at trial.¹³² The Ninth Circuit held that an "[e]xamination for testimonial purposes only has nothing to do with treatment. A doctor who makes such an examination is not 'attending a patient'. There is no confidential relation between them."¹³³ The court concluded that because the doctor had made a routine examination to ascertain the mental competence of the defendant, the doctor had given no "treatment" to the patient; no privilege, therefore, applied.¹³⁴

In *United States v. Harper*, the Court of Appeals for the Fifth Circuit also stated that any psychotherapist-patient privilege does not protect communications arising out of a court-ordered examination to determine whether the defendant is competent to stand trial.¹³⁵ The court declared that any privilege applies only to communications made to a psychotherapist by a patient "under his charge or by one seeking professional advice."¹³⁶

The third exception to the psychotherapist-patient privilege arises

¹²⁹ 56 F.R.D. at 244. The Committee also stated that

[t]he rule thus conforms with the provisions of 18 U.S.C. § 4244 that no statement made by the accused in the course of an examination into competency to stand trial is admissible on the issue of guilt and of 42 U.S.C. § 3420 that a physician conducting an examination in a drug addiction commitment proceeding is a competent and compellable witness.

Id. An examination by a "court appointed psychotherapist" constitutes an exception to the privilege because the court appoints the psychotherapist solely to examine the individual for the purpose of having the psychiatrist testify at trial about the condition of the patient, not to help cure a mentally ill individual. See *Taylor v. United States*, 222 F.2d 398, 402 (D.C. Cir. 1955).

¹³⁰ 411 F.2d 30, 39-40 (9th Cir. 1969).

¹³¹ *Id.* at 31.

¹³² *Id.*

¹³³ *Id.* at 39-40 (quoting *Taylor v. United States*, 222 F.2d 398, 402 (D.C. Cir. 1955)).

¹³⁴ *Id.* at 40.

¹³⁵ 450 F.2d 1032, 1035 (5th Cir. 1971). In *Harper*, the district court had convicted the defendant for the unlawful manufacture of methadone. The district court had ordered two psychotherapists to examine Harper after his arrest to determine his competency to stand trial. On appeal, Harper claimed that the testimony of the two doctors was protected by the psychotherapist-patient privilege. *Id.* at 1034-35.

¹³⁶ *Id.* at 1035.

when defendants raise their mental or emotional condition as an element of their defense.¹³⁷ Patients who voluntarily assert an insanity defense make their mental state the material issue of the proceedings. The government should have an opportunity equal to that of the defendant to present evidence relating to the issue of the defendant's mental condition. Prohibiting the government from obtaining communications that are relevant to the main issue at trial, the mental or emotional state of the defendant, would contravene the primary purpose of the Federal Rules of Evidence: the complete development of all relevant facts in litigation so that truth will be discovered.¹³⁸

For example, in *United States v. Meagher*, the defendant raised an insanity defense to his indictment for a bank robbery.¹³⁹ The Fifth Circuit acknowledged that even if a psychotherapist-patient privilege existed under Rule 501, an express exception to the privilege applied to "situations in which the patient relies upon his mental condition as an element of his defense; i.e., whenever the defendant raises an insanity defense."¹⁴⁰

The Court of Appeals for the Ninth Circuit in *Caesar v. Mountanos* also stated that patients implicitly waive their psychotherapist-patient privilege when they bring their mental conditions into issue.¹⁴¹ In *Caesar*, the court explained that

[t]he [party] has placed her mental and emotional condition in issue. By raising this issue she herself has breached the confidential relationship and made her emotional problems known to the public. Having so acted, the patient and her psychiatrist should not now be permitted to rely upon an absolute privilege which would preclude a proper determination of the truth of the [party]-patient's allegations.¹⁴²

Courts, therefore, should follow the guidelines of Proposed Rule 504 in fashioning exceptions under Rule 501. These exceptions, when combined with a balancing of all of the interests at stake in determining the scope of the psychotherapist-patient privilege, allow courts to tailor the privilege to each particular case. Such an approach will fulfill the goal of Rule 501 that "recognition of a privilege based on a confidential

¹³⁷ See, e.g., *Caesar v. Mountanos*, 542 F.2d 1064, 1070 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976). See also PROPOSED FED. R. EVID. 504(d)(3), 56 F.R.D. at 241, 244.

¹³⁸ See FED. R. EVID. 102; PROPOSED FED. R. EVID. 504(d)(3) advisory committee note, 56 F.R.D. at 244; *supra* notes 75-76 and accompanying text. The Advisory Committee on the Proposed Rules stated: "By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses." 56 F.R.D. at 244.

¹³⁹ 531 F.2d 752, 753 (5th Cir. 1976).

¹⁴⁰ *Id.* at 753.

¹⁴¹ 542 F.2d 1064, 1069 (9th Cir. 1976).

¹⁴² *Id.* at 1070.

relationship . . . should be determined on a case-by-case basis."¹⁴³ This method of analysis for the psychotherapist-patient privilege also will fulfill the purposes of the Federal Rules of Evidence to discover all relevant facts necessary for the trier of fact to ascertain truth in federal litigation.¹⁴⁴

IV. CONCLUSION

Federal Rule of Evidence 501 allows federal courts to establish a psychotherapist-patient privilege under the principles of the common law. The privilege promotes the psychotherapist-patient relationship and fosters the successful treatment of mentally unstable individuals by preserving the two foundations of the psychotherapist-patient relationship: the patient's trust in the psychotherapist, and the patient's confidence that no third parties will have access to communications and diagnoses unless the patient intends the third parties to have such access. By ensuring that communications arising from the psychotherapist-patient relationship will remain confidential, the privilege encourages mentally ill persons to seek treatment and to cure their ills. Society also benefits from the privilege because more of its members will seek treatment for mental problems; thus, these individuals will have a greater chance to become mentally healthy and productive.

Courts must balance the benefits that accrue from the psychotherapist-patient privilege with a party's interest in developing all relevant facts in litigation. Specific exceptions to the psychotherapist-patient privilege limit the scope of the privilege: "intent"-waiver, court-ordered examination, and the patient-defendant who raises a mental or emotional state as an issue of the patient's defense. For each case, courts must allow disclosure only of material information that is necessary for discovery of all evidence relevant to the criminal proceeding to minimize the harm to the patient and to the psychotherapist-patient relationship.

The Supreme Court should settle the debate over the existence of the privilege and define the general scope of the psychotherapist-patient privilege as a guide for analyzing the privilege under Rule 501. The Court should decisively affirm the position of several federal courts, state legislatures, commentators, and the Judicial Conference Advisory Committee to the Federal Rules of Evidence that the unique nature of the

¹⁴³ S. REP. NO. 1277, 93d Cong., 2d Sess. 13 (1974). *See supra* text accompanying note 32.

¹⁴⁴ *See* FED. R. EVID. 102; *supra* notes 75-76 and accompanying text.

psychotherapist-patient relationship mandates a psychotherapist-patient privilege under Federal Rule of Evidence 501.

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