

COURT CASES ABOUT PRIVILEGED COMMUNICATION FOR CARING
PROFESSIONALS AND THEIR CLIENTS: 1956-2014

by

JONNA LYNN OWENS-LEE

DAVID DAGLEY, COMMITTEE CHAIR
ANN GODFREY
C. JOHN TARTER
STEPHEN TOMLINSON
PHILIP WESTBROOK

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ABSTRACT

The purpose of the study was to review court cases about privilege and confidentiality for caring professionals and their clients, in an effort to understand the extent of privilege for school counselors and confidentiality for their students. The research questions guiding the study focused on the issues, outcomes, and trends in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956-2014 to inform the development of privilege and confidentiality for school counselors and school children. The courts cases were obtained from Westlaw™ Reporter System, 1956-2014, under the category of caring professionals. This was a document-based, qualitative study, approached from a historical perspective. The documents that were studied in this qualitative research are court cases. The court cases followed the Statksy and Wernet's (1995) format to help analysis for issues, outcomes, and trends in the opinions rendered by the courts.

Results of the study, suggest that many of the cases represent the courts attempt to balance the demands of the Fifth Amendment, Sixth Amendment, State Statutes, and the United States Supreme Court *Jaffee v. Redmond* (1996) legal precedent. The issues, decisional outcomes, and trends for caring professionals' court cases established that courts recognize the important of privileged communication and confidentiality among caring professionals, as well as the fact the courts did not overstep the privilege entrusted to those caring professionals and to mental health records, and narrow guidelines directed state's privilege statutes. State's privilege statutes shared little standardization across states. Licensed psychotherapists and school psychologists share the same level of privilege as the law provides for the attorney-client

privilege. The results from the study emphasized society's value of mental health record privacy and psychologist-patient privilege. Other caring professionals have reached society's value of privilege in communication as social workers and school psychologists. Licensures have elevated the counseling profession. Even though other caring professionals run parallel to school counselors in issues with students, school counselors have not been accorded privilege. The future holds a place for school counselors to evaluate the certification of counseling in education to autonomy through licensure, then reaching privilege in communication and confidentiality.

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CHAPTER I:
INTRODUCTION

David and Marilyn Philips were one of New York City's Catholic refugee minorities. Under the seal of confession they told Father Anthony Kohlmann, a Roman Catholic priest, about stealing jewelry. Father Kohlmann required the couple to return the stolen jewelry to the rightful person to receive reconciliation (Sampson, 1813). Reconciliation is a sacrament of the Catholic Church, in which one confesses to a crime and promises not to do it again. Reconciliation is given from God, the church, and the community (Carmella, 2007). The authorities learned of Colman's involvement from the owner of the stolen property, and that he had received restitution due to the priest's intervention. The priest was called as a witness to the theft; however, he declined to provide information about the restitution and the persons involved (Inclendon, 2016). When the case was sent to the grand jury, Father Kohlmann was subpoenaed, but again respectfully rejected answering any questions. The priest stated:

But if called upon to testify in quality as a minister of a sacrament, in which my God himself has enjoined on me a perpetual and inviolable secrecy, I must declare to this honorable Court, that I cannot, I must not, answer any questions that have a bearing upon the restitution in question; and that it would be my duty to prefer instantaneous death or any temporal misfortunes, rather than disclose the name of the penitent in question. (Sampson, 1813, pp. 9-10)

With the aid of an immigrant attorney, Kohlmann demonstrated that requiring a priest under the administration of the sacraments of the penance to testify would violate a provision in the New York Constitution granting religious liberty, as well as the First Amendment of the United States Constitution (Walsh, 2005).

The events from the last paragraph came from an important landmark case, *People v. Philips* (1813). Because there was no evidence against the defendants, the Philips, they were acquitted. *Philips* (1813) was an equality ruling reported by the Supreme Court reporters as a case to recognize evidentiary privilege beyond what was already recognized for lawyers and their clients.

The court's decision was penned by Mayor DeWitt Clinton, in New York City's Court of General Sessions. The court held that the constitutional provisions guaranteeing free exercise of religion would not force a Catholic priest to testify about information learned in the confessional. This created a legacy in American jurisprudence and which continues to appear in controversial case law in the form of priest-penitent privilege (Walsh, 2005). From the priest's position and the Catholic Church, the court acknowledged there are several exceptions to the general rule that everyone who is called to testify must reveal all he knows. The priest-penitent privilege in communication is an exception to that rule that has stood for over 200 years. In *Philips*, the high court recognized that a priest or other religious minister could not be compelled to reveal a penitent's confidential communication given during spiritual counseling without infringing upon the priest's rights. This case "won a victory for religious, racial, and cultural equality for themselves and for all mankind" (Walsh, 2005, p. 1041). With *Philips*, privilege in communications for the priest or parson was added to the privilege given to attorneys and their clients. As Volz and Ellis (2009) stated, "Nearly five hundred years of judicial decision-making has created evidentiary privileges where the courts are willing to forego the disclosure of evidence in the interest of promoting socially valuable relationships" (p. 2).

Privilege or privilege in communication is extended to certain professionals, to know that the communication between them and those entrusted with their care are private. Black's Law Dictionary (1910) defines privileged communication as follows:

Conversation that takes place within the context of a protected relationship, such as that between an attorney and client, a husband and wife, a priest and penitent, a doctor and patient, and, in some states, a school counselor and a student. (p. 942)

Privilege is given to the professional for the benefit of the client. The benefit for the client is the privilege, granted by state and federal statute, allowing an exclusion of the client's conversations from being used as evidence in a court of law. This exclusion often makes privileged communication controversial due to the client being able to legally leave relevant facts out of court proceedings. Privilege affects the truth-seeking procedures of the law. Scheutzow and Gillis (1993) makes the cases that The United States Supreme Court has consistently reproved courts to be careful in molding benefits. As part of the judicial process, privilege is the recognition of a person's right to not give testimony on all the matters of the evidence. The reason for the privilege is for the client to speak frankly and honestly to the professional with the assurance of being protected and private.

Confidentiality is the assurance the professional holding the private information can share with another party only on a need-to-know basis. The American School Counseling Association's (ASCA) (2016) ethical standards states that confidentiality is to promote the independence of students and use the most fitting and smallest intruding procedure to break confidentiality, if such action is needed. As an ethical term, the duty of confidentiality is important and should be absolutely binding. Breaching confidentiality, a breaking of the promise to keep information confidential, may be required by ethical codes for counselors, when a client

references harm to themselves or to others, or when required by court order. Confidentiality is reinforced in society because society views it as important.

Embedded in the American legal system, privilege, a legal term, and confidentiality, an ethical term, both critically hold their place of importance in society. The general purpose for privileged communication is for the client to see a professional counselor where absolute protection is provided. Privileges are complex. Lambert (2007) concluded courts see few advantages of extending privilege because of their unprecedented denial of truth finding statements in their efforts of searching for truth. Privilege exists for the client not to testify and society to view those relationships as a “privilege” to ensure complete truthfulness. Furthermore, privileged communication is deeply rooted in America’s jurisprudence, in state and federal common law, because society values the foundational privacy in certain relationships. These established privileged relationships include attorney-client privilege, priest-penitent privilege, doctor-patient privilege, and psychotherapist-client privilege. However, privilege appears to be limited for a school counselor and student. Based upon the literature, school counselors are given limited privilege with exceptions, with only the state of Oregon granting full privilege for school counselors (alaskaschoolcounselor.org). School counselors are clearly members of the caring professions, but apparently do not fully share in the gift of privilege, nor can they always promise confidentiality to the students they counsel.

Statement of the Problem

School counselors have an ethical responsibility and sometimes legal duty to protect a student’s privacy. There is a need to protect confidential information received through a counseling relationship with a student, viewed as their client. Usually for a school counselor, emphasis is placed on not sharing a student’s confidential information unless the student gives

consent or there is a clear and imminent danger to the student and/or to other people. The American School Counselor's Association (ASCA) established the primacy of confidentiality as critical to the counselor's role, because counselor advisors act to the greatest advantage of the client and take measures to shield their privacy. While counselors appear to be members of the caring professions, they apparently do not fully share in the privilege of their communications to the same extent as similar professions. This research endeavors to explore that problem (Sheeley & Herlihy, 1987).

Significance of the Problem

If school counselors reveal a student's confidential information, thus causing the student potential damage, then school counselors can be liable for breaking confidences in a court of law. This outcome has a negative effect on the professional status of school counselors. Stone (2003) makes his reason that school counselors know how great the harm can be to themselves and their profession if, by chance, they are known for breaking confidences and calling student's parents or guardians.

Frequently confronted with the need to balance the student's rights with the rights of others, counselors are often placed in precarious positions. If a school counselor fails to act accordingly, he or she may be legally responsible for a student's life. Current critical issues, both ethical and legal concerns, are worth studying the obvious point that even though school counselors are covered with immunity, it is only a moment in time when a student's life is placed at the foot of a professional school counselor. Confidentiality is limited, Stone (2012) placed emphasis on the judicial system. They have been hesitant to extend privilege to students in the school setting due to the ages of the students, parental rights, schools not being a therapeutic setting, and the function of the natural environment of the school day. The changing landscape in

schools requires that school counselors are accorded the same privilege in their communications as for other caring professionals. It is important to understand why school counselors are not accorded this privilege.

Purpose of the Study

The purpose of this study is to review court cases about privilege and confidentiality for caring professionals and their clients, in an effort to understand the extent of privilege for school counselors and confidentiality for their students. School counselors are clearly members of the caring professions. The code of ethics from their own professional association identifies them as such, and places a duty upon them to extend the promise of confidentiality to their clients, the school children they serve. However, the review of literature acknowledges that school counselors have not been accorded privilege in their communications by the courts, and school counselors cannot turn to their clients and promise confidentiality in the communication that occurs between them. This study seeks to understand why the courts have accorded privilege to other categories of caring professionals and confidentiality to their clients, but not to school counselors and school children.

Research Questions

The following questions guided this study:

1. What are the issues in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?
2. What are the outcomes in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?
3. What are the trends in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?

4. How do the issues, outcomes, and trends in court cases about privilege and confidentiality for caring professionals and their clients from 1956 to 2014 inform the development of privilege and confidentiality for school counselors and school children?

Positionality

Positionality describes where the research originated in order to control factors so the research is ethically sound. This specific research task is to examine court cases of caring professionals to determine and understand why other caring professionals have been awarded privilege and confidentiality to their clients and school counselors have not. Through self-reflection, the researcher will monitor one's values and beliefs through an ongoing process to critique their positionality. The researcher takes a reflective approach by acknowledging and disclosing one's position. Through reflexivity, the researcher makes known through self-assessment one's views and position. Reflexivity is when the researcher, through self-conscious scrutiny, analyzes the data to seek to understand the problem.

For educational research, as one works rigorously through the research process as an active school counselor, the researcher must be aware of influences of interpretation of the research findings. All values of the researcher influence the research process. In this position, however, I feel my ethics and values make me trustworthy and honest. Through self-reflection, the researcher will acknowledge one's background in school counseling. Personal experience influences positionality. The researcher remains neutral by reflective thinking on one's position in the counseling field. To control biases, the researcher continually engages in thinking about one's thinking. The researcher is a part of the social work of the research. The researcher must remain objective to remain truthful and not to influence the interpretation of the findings. The research's description of the context is factual not as one perceives the facts. The researcher

continually discloses one's values to oneself so the researcher can be aware, as well as, become more aware of one's profession, thus seeking to be value free even though it is difficult. It was understood that my positionality affects my research, the challenge lay in being objective, willing to question assumptions, and being honest and accurate on the research.

The researcher's positionality is one of pragmatism. A pragmatic approach adheres to the researcher taking a practical view in researching the findings. A practical effort will allow the researcher to acknowledge if the research process is workable in practice. The research will be of value to the counseling profession, not only the researcher. Being a current practicing school counselor the position seeks to answer what school counselors are lacking with being awarded privilege in communication and confidentiality. From the research, trends and issues were established through the research results. The research results also gave outcomes to assess and understand what is needed for school counselors to be given privilege and confidentiality for their clients from the courts. One questions where it is balancing educational training with mental health training? School counselors may be required to navigate through continuous professional development or college courses. More professional development with supervision may have to be completed for school counselors to be awarded privilege and confidentiality for their clients.

A pragmatic will compromise between theoretical ideals and those ideas which are practical. In a pragmatic position, one applies logic and reasoning, with goal-based theories. It is accepting the honest results of the research while hopefully gaining significant incremental steps of improvement for the counseling field. It is accepting the practical ideas of the research theory and practice and determining the research's results from the descriptive outcomes as well as

rejecting the impractical aspects of the research findings. It is known as the practice of doing what works best seeking deductive reasoning.

However, my strong professional ties secure me as a school counselor to do my best possible job. Reflecting ethically, legally, and morally will still allow me to question one's need for privilege when the law questions school counselors for holding the responsibility of a child's life. While historical and current research might position me favoring school counselors, I am acutely aware of my position. I feel objective to the issue of privilege. I have an understanding of the need for privilege; however, I also have learned of knowledge of the limitations, issues, and negatives of professionals awarded privilege. Feeling strongly this way, however, I would state I would go back to college to increase the mental health side of training and credentialing to have privilege for our students. Current professional development practices may be ineffective with helping school counselors gain privilege in communication. Therefore, I must be reflective and work through a subjective position.

I am both an insider and an outsider. I am an insider to the counseling profession. However, I am an outsider, as a caring professional, not being able to extend privilege and complete confidentiality to the school children. Burkard, Gillen, Martinez, and Skytte (2012) pointed out less than 10 states have thorough assessment frameworks to viably look at comprehensive counseling programs (CSCP). I feel the outsider's advantage gains more toward the research as a practicing school counselor seeking to understand why caring professionals, such as school counselors, have not been afforded privilege. As an insider, I have prior knowledge of the school counseling group seeking to find research to support privilege for the caring professionals, school counselors; however, as an insider, the researcher will be able to seek and speak of more meaningful insight through trends, issues, and outcomes from the case

laws. Another positive is for more thick description in research will be shown by having prior knowledge of the counseling field. Nevertheless, the disadvantages would be the researcher may be socially and culturally advantaged. The researcher may unknowingly be biased or too familiar with the school counselor culture. This has the potential to hinder questioning the research. Questioning research is valuable for the research to be respected the data collection must be brought to a completion.

One area concerning me most about my positionality is the fact as a practicing school counselor I have taken pride in doing excellent work; being a strong and present advocate for children of all ages; and being ethically, legally, and morally acute. However, I know I can be subjective because of the different layering of connotations in my understanding. This is my 25th year of education. I could retire and be a flight attendant where one only listens to someone's issues and concerns for a two-hour flight and then does not have to worry about their statements leading to taking someone's life. The fact that I understand the law and the reasons privilege has been given to other caring professionals, I know I can position myself as an outsider being fluid and open minded through the researcher process. Hence, useful research will emerge. Maintaining the distance between myself and the emotional, philosophical, and political stance I can remain objective. By the research being objective, this can bring clarity to the research study instead of bringing invalidity. In this manner, it will raise questions for me to remain neutral in the research process. It is critical to remember and reflect on the place school counselors and school children occupy, the school building, through the context of the school institution. As well as to remain neutral to the challenges of the political arena within the school setting concerning administrators and other school personnel in authority. The findings will be interpretive and slanting toward partiality; however, the research results will yield trends, issues

and reveal patterns from the case brief theory that will concretely establish validity. Being true to the content and ethical to the study is important to me. I have a responsibility to myself, others, the research questions, students, the counseling profession, and to the field of education.

Assumptions

The study was grounded in the following assumptions:

1. It was assumed that court cases formed in the Westlaw™ Key Number System followed 311H: Privileged Communication and Confidentiality; 311HV: Counselors and Mental Health Professions; 311HV k311: Professionals in General; 311HV k312: Psychotherapist; 311HV k313: Physicians- Psychiatrists; 311HV k314: Psychologist; 311HV k316: Social Workers; 311HV k318: Sexual Assault Counselors; 311HV k319: Substance Abuse; 311HV k320: Mental Health Records; 311HV k322: Persons Entitled to Assert Privilege; 311HV k323: Waiver of Privilege; 311HV k325: Waiver of Objections; 311HV k328: Presumptions and Burden of Proof; and 311HV k332: In Camera Review are court cases about privilege communications and confidentiality for caring professionals.

2. It was assumed that all decisions in the court cases studied from Westlaw™ Key Number System followed 311H: Privileged Communication and Confidentiality; 311HV: Counselors and Mental Health Professions; 311HV k311: Professionals in General; 311HV k312: Psychotherapist; 311HV k313: Physicians: Psychiatrists; 311HV k314: Psychologist; 311HV k316: Social Workers; 311HV k318: Sexual Assault Counselors; 311HV k319: Substance Abuse; 311HV k320: Mental Health Records; 311HV k322: Persons Entitled to Assert Privilege; 311HV k323: Waiver of Privilege; 311HV k325: Waiver of Objections; 311HV k328: Presumptions and Burden of Proof; and 311HV k332: In Camera Review cases are identified as cases about “caring professionals” and their client’s privileged communication.

3. It was assumed that all cases to be studied were reported in full in the reporter of the West Publishing System.

4. It was assumed that all cases analyzed pertained to the topic of privileged communication for members of the caring professions.

5. It was assumed that the analyses of the cases studied yielded principles that may inform the development of privilege and confidentiality for school counselors and school children.

Limitations

This study was conducted under the following limitations:

1. The cases represented litigation pertaining to First Amendment issues regarding caring professionals and client cases from 1953 to 2014 in K-16 public educational institutions.

2. The study was limited to cases about privilege accorded to caring professionals in their communication and the confidentiality that is, in turn, accorded the caring professionals in the state and federal courts.

3. The study was limited to cases categorized by West Publishing Company's Digest System as 311H: Privileged Communication and Confidentiality; 311HV: Counselors and Mental Health Professions and those identified by Westlaw™ as Key Number: 311HV k311: Professionals in General; 311HV k312: Psychotherapists; 311HV k313: Physicians: Psychiatrists; 311HV k314: Psychologists; 311HV k316: Social Workers; 311HV k318: Sexual Assault Counselors; 311HV k319: Substance Abuse; 311HV k320: Mental Health Records; 311HV k322: Persons Entitled to Assert Privilege; 311HV k323: Waiver of Privilege; 311HV k325: Waiver of Objections; 311HV k328: Presumptions and Burden of Proof; and 311HV k332: In Camera Review with key word search-school, in its computer-based search tool, Westlaw™.

4. The research was conducted by an educator; the study was not legal research, but qualitative research using published court cases as the data source.

Definition of Terms

The legal terms used in this study are defined as follows:

Absolute: “Unconditional; complete and perfect in itself, without relation to, or dependence on, other things or persons, as an absolute right” (Black, 1988, p. 3).

Anglo-Saxon Law: “The body of royal decrees and customary laws developed by the Germanic peoples who dominated England from the 5th century to 1066” (Black, 1999, p. 86).

Appeal: “Resort to a superior court to review the decision of an inferior court or administrative agency” (Black, 1979, p. 88).

Balancing Test: “A constitutional doctrine in which the courts weigh the rights of the individual guaranteed by the Constitution with the rights of a state to protect its citizens from the invasion of their rights; used in cases involving freedom of speech and equal protection” (Black, 1988, p.74).

Breach: “The breaking or violating of a law, right, contract, obligation, engagement, or duty, either by commission or omission” (Black, 1988, p. 98).

Canon: “A law, rule, or ordinance in general, and of the church in particular” (Black, 1988, p. 107).

Canon Law: “A body of Roman ecclesiastical jurisprudence compiled in the twelfth, thirteenth, and fourteenth centuries from the opinions of the ancient Latin Fathers, the decrees of General Councils, and the decrual epistles and bills of the Holy See. The Canon Law contained two principle parts--the decrees or ecclesiastical constitutes made by the popes and cardinals;

and the decrials or canonical epistles written by the Pope, or by the Pope and cardinals, at the suit of one or more persons” (Black, 1988, p. 107).

Caring Professional: Caring professionals include the following categories through the key word search of school, in Westlaw™: “311H Privileged Communication and Confidentiality; 331 HV Counselors and Mental Health Professions; 311 professionals in general, therapists in general; 312 psychotherapists; 313 physicians, psychiatrists; 314 psychologists; 316 social workers; 318 sexual assault counselors; 319 substance abuse; 320 mental health; 322 persons entitled to assert privilege; 323 waiver of privilege; 328 presumptions and burden of proof; and 332 In Camera review” (Westlaw™). A caring professional can also be described as a member of the caring professionals.

Case Law: “The aggregate of reported cases as forming a body of jurisprudence, or the law of particular subject as evidenced or formed by the adjudged cases, in distinction to statutes, regulations, and other sources of law” (Black, 1988, p. 112).

Certification: “Eligibility for initial certification in school counseling shall include at least baccalaureate-level professional educator certification in a teaching field or a GPA of not less than 3.0 on all courses in the Alabama State Board of Education approved master’s degree school counseling program” (American School Counseling Association, 2017, p. 1).

Certiorari: “A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein” (Black, 1979, p. 88).

Civil Case: “The body of law which every particular nation, commonwealth, or city has established peculiarly for itself; more properly called municipal law, to distinguish it from the

“law of nature”, and from international law. Laws concerned with civil or private rights and remedies, as contrasted with criminal laws.” (Black, 1988, p.127).

Codification: “The process of collecting and arranging systematically, usually by subject, the laws of a state or country” (Hartman, Mersky, & Tate, 2007, p.540).

Common Law: “The origin of the Anglo-American legal systems. English common law was largely customary law and unwritten, until discovered, applied, and reported by the courts of law. In theory, the common law courts did not create law but rather discovered it in the customs and habits of the English people. The strength of the judicial system in preparliamentary days is one reason for the continued emphasis on case law in common law systems. In a narrow sense, common law is the phrase still used to distinguish case law from statutory law” (Hartman et al., 2007, p. 540).

Compulsory: “Involuntary, forced, coerced by legal process or by force of statute” (Black, 1988, p. 151).

Confidential: “Entrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret; done in confidence” (Black, 1988, p. 156).

Confidential Relation: “A fiduciary relation. In these and like cases, the law, in order to prevent undue advantage from the unlimited confidence or sense of duty which the relationship naturally creates, requires the utmost degree of good faith in all transactions between the parties” (Black, 1988, p. 157).

Criminal Law: “The substantial criminal law is that law which for the purpose of preventing harm to society (a) declares what conduct is criminal, and (b) prescribes the

punishment to impose for such conduct. It includes the definition of specific offenses and general principles of liability” (Black, 1988, p. 198).

Declaratory Relief: “A judicial ruling that determines the legal rights and duties of the parties” (Hartman et al., 2007, p. 541).

Disclosure: “The term means the making known to any person in any manner whatever a return or return information” (Black, 1988, p. 373).

Dissent: “The term is most commonly used to denote the explicit disagreement of one or more judges of a court with the decision passed by the majority upon a case before them” (Black, 1979, p. 424).

Due Process of Law: “A term found in the Fifth and Fourteenth Amendments of the U.S. Constitution and also in the constitutions of many states. Its exact meaning varies from one situation to another and from one era to the next, but basically it is concerned with the guarantee of every person’s enjoyment of his or her right (the right to a fair hearing in any legal dispute)” (Hartman et al., 2007, p. 541).

Duty to Act: “Obligation to take some action to prevent harm to another and for failure of which there may or may not be liability in tort depending upon the circumstances and the relationship of the parties to each other” (Black, 1988, p. 264).

Ecclesiastical Courts: “A generic name for certain courts having congruence mainly of spiritual matters. A system of courts in England, held by authority of the sovereign, and having jurisdiction over matters of the established church” (Black, 1988, p. 268).

Ecclesiastical Law: “The body of jurisprudence administered by the ecclesiastical courts of England; derived in large measure, from the canon and civil law” (Black, 1988, p. 268).

Establishment Clause: “A provision in the First Amendment that prohibits the state and federal governments from passing laws that support or prefer a particular religion or religious affiliation or that require the belief or disbelief in a religion” (Hartman et al., 2007, p. 541).

Evidence: “Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention” (Black, 1988, p. 446).

Evidentiary: “Having the quality of evidence, constituting evidence, evidencing” (Black, 1988, p. 288).

Federal Cases: “The courts of the United States (as distinguished from state, county, or city courts) as created either by Art. III of the United States Constitution, or by Congress” (Black, 1988, p. 314).

Federal Ruling Decisions: “Reporter which publishes federal court decisions which construe or apply the Federal Rules of Civil, criminal, and Appellate Procedure, as well as Federal Rules of Evidence” (Black, 198, p. 316).

Federal Rules of Evidence: “Rules which govern the admissibility of evidence at trials in the Federal Courts and before United States magistrates” (Black, 1988, p. 316).

Fiduciary: “A person having duty, created by his undertaking to act primarily for another’s benefit in matters connected with such undertaking” (Black, 1988, p. 320).

Fiduciary Duty: “The duty of most good faith, trust, confident and candor owed by a fiduciary to the beneficiary, a duty to act with the right degree of honesty and loyalty toward another person and in the best interest of the other person” (Black, 1999, p. 523).

Fiduciary Relation: “One founded on trust or confidence reposed by one person in the integrity and fidelity of another. A ‘fiduciary relation’ arises whenever confidence is reposed on one side, and domination and influence result on the others; the relation can be legal, social, domestic, or merely personal” (Black, 1988, p. 321).

Fiduciary Relationship: “A special relationship recognized by the law as one of trust and confidence between two parties” (Simone & Fulero, 2005, p. 155).

Forum: “A place where free speech can be determined based on the nature of the environment where the speech actually occurs” (Essex, 2006, p. 138).

Holding: “The legal principle to be drawn from the opinion (decision) of the court” (Black, 1988, p. 373).

Imminent Danger: “In relation to homicide in setting defense, this term means immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others for the protection of the law” (Black, 1988, p. 382).

Immunity: “Exemption, a form serving in an office, or performing duties which the law generally requires other citizens to perform. Special privilege” (Black, 1988, p. 382).

In camera review: “In chambers, in private. A cause is said to be heard in camera either with the hearing is had before the judge in its private room or when spectators are excluded from the courtroom” (Black, 1919, p. 600).

Infringement: “A breaking into; a trespass or encroachment upon; a violation of a law, regulation, contract, or right” (Black, 1988, p. 399).

Interlocutory Injunction: “[Injunction] issued at any time during the pendency of the litigation for the short-term purpose of preventing irreparable injury to the petitioner prior to the

time that the court will be in a position to either grant or deny permanent relief on the merits” (Black, 1979, p. 705).

Irreparable injury: “‘Irreparable injury’ justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money” (Black, 1979, p. 707).

Joint Action: “An action brought by two or more as plaintiffs, or against two or more as defendants” (Black, 1988, p. 433).

Judiciary: “Pertaining to relating to the courts of justice; to the judicial department of government, or to the administrator of justice” (Black, 1988, p. 442).

Jurisprudence: “The philosophy of law, or the science which treats the principle of positive law and legal relations” (Black, 1988, p. 444).

Law French: “The corrupted form of the Norman French language that arose in England in the centuries after William the Conqueror invaded England in 1066 and that was used for several centuries as the primary language of the English legal system” (Black, 1999, p. 891).

LexisNexis®: “ A database providing the full text of court decisions, statutes, administrative materials, ALR annotations, law review articles, reporter services, Supreme Court briefs and other items” (Hartman et al., 2007, p. 543)

Liability: “The condition of being responsible either for damages resulting from an injurious act or from discharging an obligation or debt” (Hartman et al., 2007, p. 543).

Libel: “Written defamation of a person’s character, compare with slander” (Hartman et al., 2007, p. 543).

Licensed Professional Counselor (LPC): “A person licensed to render professional counseling services in private practice for a fee: (American Counseling Association, 2009, p. 1).

Limited Public Forum: “Exists when agencies open an otherwise nonpublic forum, such as a school, to certain speakers or for certain topics” (Dowling-Sendor, 2004, p. 46).

Litigation: “A lawsuit. Legal action, inclusively all proceedings therein” (Black, 1988, p. 480).

Negligence: “The failure to exercise due care” (Hartman et al., 2007, p.544).

Nonpublic Forum: “The agency can control who engages in expression as well as the topics that are discussed as long as restrictions are viewpoints neutral and reasonable in light of the forum’s purpose” (Dowling-Sendor, 2004, p. 46).

Precedent: “An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law” (Black, 1979, p. 1059).

Privacy: “The right that determines the nonintervention of secret surveillance and the protection of an individual's information” (Black, 1988, p. 626).

Privilege: “Those statements made by certain persons within a protected relationship such as husband-wife, attorney-client, priest-penitent, and the like which the law protects from being forced to make on the witness stand at the option of the witness, clergy, penitent, spouse. The extent of privilege is governed by state statutes. Federal Evidence Rule 501” (Black, 1988, p. 626).

Privilege: “The legal right of the client to prevent disclosure of information revealed in the psychologist-client relationship to other” (Jacob & Powers, 2009, p. 308).

Procure: “To initiate a proceeding; to cause a thing to be done; to instigate; to continue, bring about, effect, or cause” (Black, 1988, p. 631).

Procedure: “The mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the procedures, the court is administer, the machinery, as distinguished from its product” (Black, 1988, p. 629).

Progeny: “A group of successors; especially a line of opinions succeeding a leading case” (Black, 1999, p. 1227).

Public Forum: “Agency may impose reasonable regulations on the time, place, and manner of expression, but it can regulate a speech’s content only if necessary to serve a compelling public interest” (Dowling-Sendor, 2004, p. 46).

Rules of Evidence: “Rules of court which govern the admissibility of evidence in trials and hearings” (Black, 1988, p. 693).

Ruling: “A judicial or administrative interpretation of a provision of a statute, order, regulation, or ordinance”. (Black, 1988, p. 693).

Statutory Laws: “The body of laws created by acts of the legislature in contrast to law generated by judicial opinions and administrative bodies” (Black, 1988, p. 734).

Suicide: “Suicide is when people direct violence at themselves with the intent to end their lives, and they die as a result of their actions” (Center for Disease and Preventions, 2015, Suicide Fact Sheet).

Supreme Court: “An appellate court existing in most of the states. In the federal court system, and in most states, it is the highest appellate court or court of last resort” (Black, 1988, p. 751).

Tort: “A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages” (Black, 1988, p. 774).

Viewpoint Discrimination: “Schools as agents of state government may not penalize students for expressing certain types of speech based on hostility to the expressed speech” (Essex, 2006, p. 139).

Waiver: “The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one is in possession of any right” (Black, 1988, p. 875).

Organization of the Study

Chapter I focuses on the definitions and differences between confidentiality and privileged communication. Also emphasis of the chapter is on court case, *People v. Philips* (1813). Chapter II contains the literature review. Chapter III contains the methodology and analysis of research through the study of caring professionals and their clients’ privilege by employing a qualitative case law context research methodology. Chapter IV includes the court case briefs, production of data from the case briefs, and analysis of data. Chapter V includes the summary, conclusions, and recommendations for further study.

CHAPTER II:
REVIEW OF THE LITERATURE

Introduction

“For everything there is a season, and a time for every matter under heaven . . . a time to keep silent, and a time to speak” (Ecclesiastes 3:17). Echoing around the world individuals have stated that their private affairs should stay confidential. This statement is made concerning privileged communication between clergy-penitent, attorney-client, counselor-client, and psychotherapist-client as well as between school counselors and students. Societal laws affirm privilege is essential if individuals are disclosing sensitive and confidential information. In general, before an individual expresses their feelings or thoughts, a level of trust must be gained. For counseling to be truly significant to both parties in courts, civil and criminal, the parties must be convinced that what is said in private will continue to stay private. This research study undertakes the development of influential case laws demonstrating the advancement of privileged communication through the development of mental health professions such as psychologists, psychotherapists, social workers, and substance abuse counselors. The research specifically addresses what is it about privilege and confidentiality for helping professionals and their clients that school counselors and their students’ lack?

According to O’Donohue and Ferguson (2003), confidentiality arises in the context of a relationship in which information is shared and that under legal rules of evidence privilege is an exemption. This research emphasizes in order to be advocates for clients, educators need to understand the strength and scope of privileged communication from a legal and ethical

standpoint. From former research studies, such as The Education Trust (2016), when students are facing challenging situations, it is essential for school counselors to lead the moment. Due to hidden crises among students, school counselors have a perception that other caring professionals may not have. The United States Department of Education Office of Civil Rights (2013-2014) stated there are over 17% of the United States' school children having chronic absenteeism. Chronic absenteeism is defined as a student missing over 15 days of school which places them at a high risk of failing a grade. The reasons for chronic absenteeism vary from sickness, family poverty, safety, and difficult family circumstances to transportation issues (U.S. Department of Education, 2013-2014). Because this statistic is one in seven students, school counselors must do an intake on students by identifying students' needs and targeting their needs as well as talking with administrators to not use out of school suspension for absenteeism (Haycock, 2016). For that reason, school counselors are to provide the highest level of care for students by addressing their needs and changing their school's practices to accommodate students' current needs and issues. Through professional development and changes in school practices to meet students' needs, school counselors must continually implement new ideas from research based programs and strategies that focus on the convoluted issues affecting students today. Children with difficult problems are causing more students to be placed in and out of foster care programs or thirty day programs for parents who just need a break, constituting bad parenting. Therefore, confidential communication between school counselors and students is even more vital to student success.

The American School Counselor's Association (ASCA) (2012) National Model emphasizes school counseling programs must provide an integral component of academic, career, and personal/social curriculum and assistance for students. The ASCA also addressed two

additional recommendations for the school counselor's daily activities to include: providing counseling to students who are tardy or absent; providing counseling to students who have disciplinary problems; and providing counseling to students as to appropriate school dress. Since 2005, the ASCA has added two additional appropriate responsibilities for school counselors. One responsibility is to advocate for students at multipurpose team planning meetings to meet individual students' needs and also to analyze disaggregated data.

There is a definite need to understand privileged communication because each state has its own interpretation of privilege status. Each state's State Department of Education places value on professional school counselors being directly responsible for protecting confidential communication in schools. However, to have knowledge of the depth of privilege within the United States jurisprudence system, the development of privilege should be addressed.

In 1828, the New York legislature passed the religious confession privilege act, following the *Phillips* case in 1813. Then, by 1904, 25 states had adopted statutes concerning privilege (McMahon, 2014, p. 104). From 1955 to 1963, a new wave pushed more states to establish the statute and other states to broaden their definition of their privilege statute. Following the wars, rumors of wars, and the turmoil from the Holocaust, by 1968, only 6 states remained without statute (p. 104). Even today, landmark court cases such as *Parent of Minor Child v. George J Charlet* (2013) refer to the *People v. Phillips* (1813) case concerning privileged communication (*Parent of Minor Child v. George J. Charlet*, 2013). *The Parents of Minor Child* (2013) referenced the *Phillips* case by asking if a Roman Catholic Priest should ever disclose the secrets of a sacramental confession. The struggle between church and state has been and is a high-stakes battle in Western civilization. Thomas Jefferson's metaphor of "a wall of separation" was found in the 1947 Supreme Court case *Emerson v. Board of Education* as the first significant

Establishment Clause decision. However, Bentele, Sager, Soule, and Adler (2014) indicated the church and state interaction in the United States influences religious life, and Jefferson's wall has been moved over because church and state have never fully separated. Additionally, with unclear ethical decisions concerning privileged communication; the fluidity of a changing society; and the changes in legal awareness there is an urgent need for reexamination of the ethical and legal issues throughout the history of professional counselors' lives (Huey & Remley, 1988). The purpose of this research, from a helping field perspective, includes a narrative of psychotherapist-client privileged communication to the future holdings of privilege and confidentiality with school counselors and students.

Using relevant legal cases, this study focuses on a case ruling and events leading to the succeeding case ruling essential for school counselors because legislation attempts to hold educators accountable. The past origin of privilege communication evolving from England's common law, as it will be shown, is defined by a historical story of countries, events, and people who are socially constructed (Lambie & Williamson, 2004). Vastly important is encapsulating and analyzing the practicing ethical litigation in the area of mental health practitioners as psychotherapist-client privileged communication and school counselors. These mental health professions have succeeded in gaining privilege for their clients for the jurisprudence entitles them to legal privilege. In the educational arena, the decision making process of counselors is critical, along with knowing the ethical standards and legal areas counselors must keep abreast on. The challenge for school counselors is to maintain the balance between the student's rights and confidentiality with the parents, who hold their child's best interests.

With emphasis on privileged communication, what known characteristics of privileged communication do caring professionals have that are different from school counselors? The

caring professions as psychotherapists, school nurses, school psychologists, and social workers, all working within the school setting, have been afforded privilege communication in many states. From this, a historical development of privileged communication is warranted to expose significant characteristics, practices, and procedures in the judicial area of privilege. The development of privileged communication first extended to priest-penitent, then to attorney-client, and to psychotherapist-client privilege. The priest-penitent privilege launched a strong influential future for privilege in areas defined as having a special relationship.

Justice System Fundamental Core

Trust is the most fundamental core of our judicial system. The justice system firmly stands on the principle that no individual has the privilege to withhold any proof of evidence from a court of law. Within the system of law, truth in a court proceeding is found by a judgment based on weighing the factual truths which a man speaks. The conflict arises with the longstanding basic principle that no person should withhold factual evidence. Society's declaration of the importance of stating evidence containing confidential information ought to be made without the threat of being court ordered at a later time (Koggel, Furlong, & Levin, 2003). America's legal procedures of jurisprudence were founded on courts finding the truth in federal and state cases with limited exemptions from communication being privileged. Few privileges are recognized by the courts because all evidence is expected when attempting to establish the truth. In the counseling field, building a trusting relationship is primary. The American Association for Counseling and Development's ethical standards (AACD, 1988) advocates that the counseling information be kept confidential due to being a professional person having an ethical obligation. Until 1975, common law was legally established with the fundamental principle that no one may withhold evidence from a court--with the exception of privilege. The

exception of privilege allows necessary information, privileged relationships, to be withheld from the public in court as a general rule. Courts use great caution when instituting privileges because a privilege limits getting to the substantive truth, establishing a formal legal truth.

Glosoff, Herlihy, and Spence (2000), declared that communication rules do have truth-seeking rationale as does privilege. It must be stressed that privileged communication is intended to maintain confidentiality in special relationships. Privileged means private laws which exempt such private relationships from society's general rule of seeking truth through the judicial system. Koggel et al. (2003) made the case that courts, as well as state statutes, continue to be hesitant in establishing privileges due to the historical foundation of the courts system of seeking the truth and where courts establish privilege through Rules of Evidence. Contrary to the rules of evidence through the judicial system, the public expects all evidence to be reported in a truthful way where justice can be found in the suit. When such privilege is established by a court's decision, the privileged relationship has greater value placed on those protected by the privilege. Both state and federal courts recognize privileged relationships. States establish their own parameters for specific privileges (Glosoff, Herlihy, Herlihy, & Spence, 1997). Privileged relationships are known as lawyer-client, priest-penitent, and spousal privilege.

Ethical Obligations

In professional relationships, privileges are ethical obligations to maintain confidentiality with clients or patients. The terms *privilege* and *confidentiality* are often used interchangeably. However, they are not the same legal concepts. Privileged communication is a complex area of law. Professional school counselors need a distinct understanding of the differences between case laws, statutory laws, and state and federal laws (Glosoff et al., 2000). Privilege, a legal term, is communication disclosed in a confidential relationship that society values as important. Courts

prohibit and protect the disclosure of the confidential information in these relationships. Within the current judicial environment, Foell (2016) affirmed that privilege communication acts as a protector where private conversations are viewed as being on steroids. Being a more restricted constraint than confidentiality, Knapp and Vandecreek (1983), acknowledged in the judicial setting that privileged communication concentrates on evidence that can be admissible. Founded in the Supreme Court of Canada, the United States Supreme Court affirming to the criteria uses Wigmore's test to determine if a privilege exists. The following are criteria of the Wigmore test:

1. The communication must originate in a confidence that the conversations will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
3. The relationship must be one which, in the opinion of the community, ought to be sedulously fostered.
4. The injury that the relationship would incur by disclosure of communications must be greater than the benefit thereby gained for the correct disposal of litigation. (Palys & Lowman, 2002, pp. 6-7)

Privileged communications in special relationships must have certain criteria to be grounded in the principle of privileges. Privileged communication excludes facts that are told in these protected relationships and cannot be used in court as evidence. Privileged communications are laws protecting the client from having to reveal confidential conversations. The law is an alive, interpretive text where rulings have established statute laws and common laws. Laws set parameters to guide and govern society. Judiciary legislatures pass down laws to governing bodies as statute laws or laws established from a history of a culture's customs, such as precedent case laws.

There are exceptions to the laws allowing for admissibility; therefore, they can and do interfere with the truth-seeking process. These relationships provide protection for different reasons: the clergy-client privilege protects the religion, the doctor-patient privilege protects the

patient's health records, and the psychotherapist-client privilege protects test results and the mental health diagnosis. State laws govern the laws of privileged communication, but the states have different interpretations of rules defining privileged communication. Confidentiality is imperative to maintain these special relationships. Therefore, counselors should have an awareness of a client's confidential needs as well as the laws and rulings establishing a client's records and their drug and alcohol abuse. In states with no statutory privilege, common law applies the balancing test of reason and experience to court cases declaring privilege. In 1975, Rule 501 of the Federal Rules of Evidence detailed privilege in general as follows:

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. (Green, Nesson, & Murray, 1999, Article 5-Privileges)

This ruling referred state and federal courts to precedent statutes for privileged communication between psychotherapists and patients, and, likewise, attorneys and clients.

The United States Congress adopted the Rule 501 concerning privileges in general as a single rule. This specific rule was established for federal courts to not have detailed limitations concerning privilege as well as to aid the courts in decisions within each individual court case by developing rules of privilege (Bernstein, 1984). Legislature established the Rule 501, to be known as the ruler of privilege. Rule 501 mandated in federal court cases that state law privilege apply. From the court case *Erie Railroad Co. v. Tompkins* (1938), the privilege shall mandate common law principles for courts to apply to decode and clarify the law to make judicious sense of human reasoning.

Privileged Communication

Privileged communication developed out of England's common law, evidentiary privilege, developed from fundamental human rights. Historically rooted in American history, privilege has been established through the Anglo-centric common law legal system (Walsh, 2005). When such a privilege is established by a court's decision, established privileges are regulated by the powers of the court. The privileged relationships have a greater value placed on those protected by the privilege. Central to the purpose, England's privilege does not extend to Roman Catholic confessionals. The privileges attorneys have are not entitled to all Clergy (The Werner Company, 1906). Therefore, disclosing communication is confined to cases involving support, advocate, and attorney (Deacon, 1881). Privilege, being the solid foundation of protection of confidentiality, can be established by judicial decision, common law, or statutory law.

From within New York's minor Court of General Sessions, *Phillips* (1813) was not governed by a statute law however it raised a constitutional governance. The case's foundation was a common law. In addition, the human rights impact of *Phillips* (1813) was controversial to a majority of the population; similar to the civil right movement of lawyering today. During an unsuccessful effort at submitting the priest-penitent privilege into the Code of Evidence under the Louisiana State Legislation, codification in the United States propelled by New York codifiers, incorporated the clergy-penitent privilege into New York State revised statutes. In a court of law, however, privilege affects whether confidential information from a client is subject to compelled disclosure as well as the confidential information being disclosed in other settings. The rationale behind the recognition of priest-penitent privilege was that federal courts realized a social and moral need to preserve certain confidential relationships (Sippel, 1994).

Clergy-Penitent Privilege

The jurisprudence of the clergy-penitent privilege is the first evidentiary privilege dating back as early as 1215. In the priest-penitent privilege, viewed as most sacred, the church and state in England existed jointly through the Roman Catholic Canon Law. Within England's common law, clergy-penitent privilege was an absolute. Following the Reformation, the clergy-penitent privilege was terminated as part of English common law; however, it did develop in the United States (Incedon, 2016).

In the United States, the priest-penitent privilege grew in national support after the end of the Civil War in 1865. One revolutionary case was *Totten v. United States* in 1861. This suit, which questioned a government's contract stated by President Lincoln for secret service to gain information and report the facts to the president, was deemed confidential. The principle of the 19th century, concerning evidentiary rule, grew from the *Phillips* (New York) 1828 codification in the 20th century through John Henry Wigmore's influential writings (Walsh, 2005). Wigmore, an academic writer, published a treatise on the law of evidence, specifically evidentiary privileges. This work, shaped the clergy privilege as becoming a starting point for America's judicial decisions. For since *Phillips*, the clergy privilege had never been enforced in a court of law.

As a constitutional victory, *Phillips* (1813) was the founding principle for religious freedom and equality. By the early 20th century, the priest-penitent privilege was commonly viewed by its codification and had secured a constitutional base in judicial law as well as a legislative common-law legal rulings. The United States Supreme Court judicial system is based on both parties contesting all issues in a court of law and the common law ruling established for courts to consider both the victim and defendant's evidence. History also revealed that American

common law, extending from England's common law and evidentiary privilege, developed from fundamental human rights. This began the historical roots of post-colonial codification in establishing doctrines in place of Anglo-American jurisdictions.

Early American Courts, however, did not recognize the clergy-penitent privilege until the influential case of *People v. Phillips* in 1813. There a New York court recognized that the Catholic priest was not forced to testify as to a confession of theft by the plaintiff. The courts declared the priest's rights to freely practice his religion. However, 4 years later, in 1817, the New York courts, in *People v. Smith*, aborted the upholding of the priest-penitent privilege for a Protestant minister, stating that the minister did not hold to the standards of confession (Finkelman, 2003). The clergy-penitent privilege is one of the common law rules to take footing in the United States; however, finding a middle ground has been a legal battle for jurisdictions throughout the country. Walsh (2002) declared that the human rights impact of *Phillips* was controversial to a majority of the population. One assembly involved the Irish-Catholic refugees. The *Phillips* case law defendants were Irish-Catholic refugees who settled in New York City. They were freed from revealing privileged communication in spiritual counseling. Therefore a pressing social interest is not challenged by the government unless the special interest overshadows religious freedom.

England's Law

Under England's law, clergy had a choice between obeying the calling of the ministry and obeying an order of the court. In England in the 1800s under Lordship, Mr. Justice Hill, from the court case *Regina v. Hay* (1860), Reverend Kelly was called as a witness. Reverend Kelly did not want to tell the whole truth in his statement due to being a Catholic priest and his obligation to the seal of confession. A challenge to the orthodox view under England's canon law of

privileged confession, the sacraments of Ecclesiastical law, known as canon law 889, states: “The sacramental seal is inviolable, and hence the confessor shall be most careful not to betray the penitent by any work or sign or in any other way for any reason whatsoever” (Augustine & Augustine Bachofen, 1921, p. 300). On logical grounds, the secrecy in the confession was not considered a new standard of the church while the seal continued to be a strict secure standard in the Roman Catholic Church, even today. Since the 15th century, though not a legal standard, the seal is inviolable.

It was the Second Vatican Council which addressed two new standards concerning confession. In 1976, the custom of retribution under the Sacrament of Penance entered the United States as a common law standard (Tiemann & Bush, 1983). Pope Paul VI, in 1973, translated the rite’s text and the use became standard by the national bishops. However, misinterpretation occurred and brought change and decline to confession. Then in 1974, the Holy Father deemed it necessary to affirm the sacrament. Circulating into the United States, the canon law 937, 938 and 1340 was broadcast in the United States by a major revision of the confession in 1982. The recognition of the canon law of England established the seal of confession in the rules of the people. In the United States, the church and the state enjoyed a very close connection during this time period. The United States encompassed England’s common law 2000 year old heritage, with the Roman Catholic Church, setting the precedence of the seal of confession. Equally important, as the dominant church of the nation, the Roman Catholic Church, the seal of confession was not viewed as immunity for the priest. The seal of confession was established as a sacrament for the Church of England.

This spiritual discipline, developed from the law of the Church of England, became the law of absolute secrecy. Before the Reformation, England’s Ecclesiastical courts were governed

by bishops where canon law and common law were both intricately involved in court cases regarding the seal of the confession. In 1315, Edward II created the Statute I, the right of confession, known as *Articuli Cleri*. After the Reformation, Attorney General, Sir Edward Cokes reaffirmed the statute of the privilege of confession adding the confession did not apply in the case of treason. It established the privilege of confession under England's parliamentary law and advanced to the time period of the sixteen hundreds. The Anglican Church established a duty of the seal of confessions in the canons of 1603. The canons of 1603 identified English civil courts as recognizing the privilege of confession.

The privilege of confession was then viewed as withdrawn from the English civil courts during the 17th century from English clergy to only voluntary, not compulsory. Unknown for the reason of withdrawal, one conclusion may be the Puritan rule for not divulging secrecies to royal tribunals. Privileged relationships emerged in England concerning the Confessions of the Catholic Church. However, during the English Reformation, and before appearing in the United States, the privilege disappeared. Lange (1987) related that privilege continued to exist as common law. Viewing this as a broad privilege, courts allow an objective test to determine the purpose of the document. Loss of confidentiality, waiving of privilege, and inadvertent disclosure of private communication are all ways privilege can be lost. The common interest privilege--such as a defendant, agent or principal, or companies in the same group--involves disclosure of privileged documents to a third party.

England's Legal Professional Privilege

England's legal professional privilege is as one stated legal advice privilege concerned for the client's communication to the attorney and the communication of the attorney's advice to the client. The legal ruling as the logic of privilege is for both to have equal protection. The

Court of Appeals, *Balabel v. Air India* (1988) stated privilege not only is restricted to legal advice of the lawyer but also to documents passed to each other concerning the privileged communication to each other. England's advice privilege is more than just privilege advice in an actual communication, it is also communication of information such as documents. This ruling of documents was established so that one party may not override the other party's investigation.

The United States jurisdiction differs from England and Wales's law on privilege. It is the component of litigation privilege which provides protection from disclosure by third parties. This requirement states litigation privilege relates to documents that were created and stated by a person at the time when litigation was undecided (Pike, 2006). Interestingly, England is generous in the attorney-client relationship, with a joint retainer. Deciding a joint retainer exists where multiple parties retain a single lawyer, or firm of lawyers, to advise all on the same subject matter.

Litigation privilege, established in 1875, was created due to lacking a clear justification and understanding of how the context of England's laws were earlier. Today, English civil litigation is different from the past, as well as, from the United States. England's procedural law does not have a depth of intrusive discovery. Plus it allows for limited and narrow depositions, and even less written interrogation. Therefore, the privilege is less needed. The English litigation movement is for litigation to be more cooperative and less adversarial. Both parties provide documents months ahead giving all statements by witnesses and experts to each other. England's type of litigation is more legal proceedings rules of order where there is not absolute protection for privilege.

First Amendment of the United States

The First Amendment of the Constitution states the word religion one time, and the word religious in Article VI.3. As can be seen, Article VI.3 details prohibiting a religious test stating “no religious test shall ever be required as a qualification to any office or public trust under the United States” (Constitution of the United States). Most importantly, privilege is stated in state statutes and in judicial reviews. States do not define clergy in constitutions because that would establish religious meetings in the government’s definition and negate free exercise of religion. (Tiemann & Bush, 1983).

The clergy-penitent privilege does not completely align with First Amendment rights. The First Amendment’s Establishment Clause is violated by undue preference of religion and by challenging the concepts of religious liberty and tolerance upon which the First Amendment’s Establishment Clause was erected. The First Amendment to the Constitution of the United States declares in part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech” (p. 1). One pivotal principle, known as the Establishment clause, excludes governing bodies from being involved in religious activity.

“The first clause seeks to promote freedom from religion by a principle of ‘separation,’ while the second clause seeks to promote freedom for religion by a principle of ‘accommodation,’” stated Valente (1994, p. 86). This contradiction, which neither supports nor rejects religious practices, has resulted in several landmark legal cases.

The courts attempt to clarify the precepts by establishing that The First Amendment’s Establishment Clause is violated by excessive preference of religion. As well as the clause challenging the concepts of religious liberty and tolerance upon which the First Amendment’s

Establishment Clause was birthed. The Free Exercise Clause establishes that one can freely practice one's religion without government interference.

The two clauses seem to be at odds with one another concerning the judiciary ruling where a priest is governed by the Seal of Confession, which is held as a sacred doctrine in the Catholic Church. In *Reynolds v. United States* (1878), the court ruled that a member of the Church of Jesus Christ of Latter Day Saints (LDS) did not receive an exemption from the anti-polygamy law. An essential component of the court's ruling is that religious doctrine did not circumvent the law of the land. The ruling indicated the sanctity of marriage based on society's foundation of monogamy, even though Reynolds stated he had a duty to the LDS church to practice polygamy. Later, in 1963, the courts affirmed there must be a compelling interest to justify any infringement of someone's free exercise rights. An example of excessive infringement is the well-known case of *Sherber v. Verner* (1963), where the plaintiff could not be denied government benefits for not being able to work on her Saturday Sabbath. This showed infringement of her religious practices by forcing her to choose to work and receive government benefits or to choose her religion.

The Supreme Court established through the Bill of Rights, in 1791, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (p. 1). The principle underlying the Fourth Amendment's protections stops government agents from searching us or our property without probable cause for a crime. Amendments also protect students' freedom, regarding their private lives, from interference by public schools and the government. There is a need for different ethical standards for student populations based on age and the vulnerability of the student population in health and safety matters. The right of privacy is based on the premise that a man's personal life is private and

should be protected from unwarranted intrusion. One aspect of privacy is for individuals to feel that certain relationships--such as with a physician, lawyer, or priest--are private. However, there are exceptions to the right to privacy, which follow no applicable exception established. One precedential case worth noting is the landmark *Branzburg v. Hayes* 2 (1972) (Hartman et al., 2007). The Supreme Court of the United States held that free speech or free press provisions had no privilege covering from the First Amendment of the Constitution. This case stated that a journalist had no compelling evidence to refuse to identify a source who had been called to testify before a grand jury (Robinson, 2016).

Attorney-Client Privilege

The evolution of privilege established guidelines from the priest-penitent privileges. Progress was made from England and carried over to the United States. By the 1500s, privilege began to be expressed through the attorney-client privilege. During the early development of the attorney-client privilege, privilege was awarded to the attorney, viewed as the keeper of the secrets of the client. As the privilege established, influence concentrated to the client for the client's secrets that were not to be disclosed. Attorney-client confidential information is rarely disclosed because of an attorney's ethical practice. The law protects an attorney's communication with a client in what is known as attorney-client privilege, which is upheld in a court of law for obtaining and bestowing confidential legal advice. In a non-judicial context, the attorney-client privilege prevents "privileged" information from being disclosed. Privileged communication began in its infancy in England through court law cases to the present documented development in the United States, especially with the attorney-client privilege.

The attorney-client privilege historically follows England's common law. In 1962, *United States v. United Shoe Machinery Corporation* established an exception to the privilege which fell

under the ruling of the Federal Rules of Evidence (Rule 501). The court stated that “the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis.” (Federal Rules of Evidence, p. 3).

To emphasize America’s jurisprudence, the pledge of secrecy for the attorney-client privilege, early policy focus was on concealing the truth rather than uncovering the complete truth. Justice Holmes stated an opinion to the courts in *Towne v. Eisner* (1918) concerning protection of expression of words, “A word is not crystal transparent and unchanging, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it was used” (*Towne v. Eisner*, 245 US 418, 1918).

Attorney-client privilege has an exception (i.e., when the client, in consultation with the attorney, divulges plans to commit a crime). Privilege exists only in jurisdictions with statutes covering the professions stated in the statute. Absolute privilege includes statements made in legislative or judicial settings such as trials and administrative hearings. Some professionals are considered not privileged when, in fact, they are. When professionals have been accorded privilege by statute, there are still extenuating circumstances where privilege by statute does not apply. For example, when a patient waives his privilege right, he loses his right to the privilege. With absolute privilege being extremely difficult and with the discrete possibility that one must disclose, one’s efforts must minimize the risk of disclosing any more than what is absolutely necessary. In the United States privileged communication is expressed through the attorney-client privilege. For attorney-client privilege to be confidential under the court standard of *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 389 (D.D.C. 1978), the communication from the client to the attorney is learned from inside the context of the attorney-client relationship (Epstein, 2007).

The Supreme Court ruling of *Swidler & Berlin and James Hamilton v. United States* (1998) established that the lawyer-client privilege is enforceable--even after the client's death--where the privileged conversation survives the client. Courts use a balancing test to determine the application and scope of constitutionally enshrined rights (Auburn, 2000).

Another notable exception to the attorney-client privilege is known as the crime fraud exemption. This applies when the client knowingly seeks legal counsel to continue to further a future crime or fraud. In *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) the courts ruled communication made during a time of crime, fraud or tort to an attorney within a corporate group are not protected by the attorney-client privilege (Epstein, 2007). Wherefore, the misuse of advice from the attorney destroys the goal of courts establishing proper justice. However, *In re Grand Jury Proceedings (Doe)*, 102 F.3d 748, (4th Cir. 1996) the crime/fraud exception of privilege was appealed to disclose attorney-client communication when the client used the lawyers to falsify or to conceal their action (Epstein, 2007) Importance is placed on when the communication occurred. Even when the attorney is unaware of the client's crime, the crime fraud exemption still applies. If legal counseling is sought to commit a future or ongoing fraud, the privilege is not lost; however, if legal counsel is sought to address a crime the client formerly committed, then the communication is privileged. The United States Court of Appeals, District of Columbia Circuit, *In re: Sealed Case* (2000) stated the question of intent is "Did the client consult the lawyer or use the material for the purpose of committing a crime or fraud?" (Findlaw, 2016, p. 2).

Rules of Evidence

In 1972, the Rules of Evidence proposed, during a House of Representatives hearing, the establishment of the privilege rule in other relationships outside the courtroom. Congress enacted

the Federal Rules of Evidence for a standard of evidentiary evidence in federal courts. Although in state courts, the Rules of Evidence provides for three items: respect to witnesses' competence, certain presumptions, and privileges (Dudley, 1993-1994). Privilege's rules encompass the confidential information between citizens and the arrangements citizens make in many different contexts (e.g., those that may never reach a courtroom versus evidential rules, and those reaching the courtroom) (Koggel et al., 2003). One landmark case, the US Supreme Court ruling of *Brady v. Maryland* (1963), instituted that the prosecution may not withhold evidence, especially criminal evidence, from the defendant. During the *Brady* case, the prosecution had withheld a written statement from the defendant stating his confession. The Maryland Court of Appeals stated the conviction and ordered a separate trial on the question of the degree of punishment. The court ruled that evidence could not be withheld because it is a violation of due process where the evidence is exculpatory or favorable to the defendant in a criminal trial (*Brady v. Maryland*, 373 US 83 [1963]).

***Jaffee v. Redmond* (1996): Landmark Court Case**

In congruence, the court case created the *Brady Disclosure*, where the prosecutor must present evidence that would aid in proving innocence or would aid in reducing the defendant's sentence--especially considering the psychotherapist-patient privilege. Launching precedence was the Supreme Court case *Jaffee v. Redmond* (1996). This decision launched the need for high levels of protection between patients in psychotherapy and their psychotherapists, codified in the Federal Rules of Evidence, which many states have adopted. This protection is analogous to lawyer-client communication. This historical understanding of the new privilege established in *Jaffee* significantly affirmed by the US Supreme Court, established an absolute confidentiality for patients of psychotherapy and psychoanalytic psychotherapists. The privilege applies to

patients receiving psychoanalytic psychotherapy from other therapists such as psychologists, psychiatrists, and social workers. The *Jaffee v. Redmond* case makes a distinct decision between the Court's views of a patient receiving health care services versus a patient receiving psychotherapy.

The *Jaffee v. Redmond* case established a "balancing test" where a judge may decide, on a case-by-case basis, whether the evidence at hand offsets the client's interest in retaining the privileged information for psychoanalysis focused on mental disorders associated with early childhood experiences that remain deeply rooted in memory. Such memories, often not conscious, require medical treatment to unravel these experiences. The patient's participation in psychoanalytic treatment is Freud's method of free association, dating back to the 1900s. The fundamental rule, the hallmark of psychoanalysis, is where the client participates in free association, an unusual mode of communication with a psychotherapist. The goal is to analyze, by free association, the patient's every thought, where the patient speaks perceptibly every provoked thought--regardless of whether it is well spoken, well related, or relevant. The use of free association is to establish a set of mental connections to unveil every thought without the client feeling a threat of having to reveal their thought processes (Busch, 1994).

Professional-Client Privilege

Professional-client privilege may be established in state codes. Such laws establish a legal right for a client's confidential information in a psychologist-patient relationship not to be disclosed. State and federal courts recognize lawyer-client privilege, priest-penitent privilege, and spousal privilege. In professional relationships, privilege has an ethical obligation to maintain confidentiality with clients or patients. In this ethical obligation, the terms *privilege* and *confidentiality* are often interchangeable; however, the terms are distinctly different concepts.

Psychotherapist-Patient Privilege

Prior to the late 1990s, the term *psychotherapist* meant a psychiatrist or a licensed doctoral-level psychologist. Psychotherapist-patient privilege, recognized by federal case law, is a privilege determined by case law. The first US case from the Circuit Court of Cook County, *Binder v. Ruvell* (1952), established the psychotherapist-patient privilege. Mosher and Berman (2015) claimed that, in 1974, President Gerald Ford signed into law the psychotherapist-patient privilege, where the lower federal courts considered the privilege. The United States Court (1996) ruling of the *Jaffee v. Redmond* case was the establishment of a federal psychotherapist-patient privilege. It was there that the Supreme Court required the psychotherapist-patient privilege to have standards matching those between clergy and penitent--such as trust and confidentiality.

One exemption to the psychotherapist-patient privilege is when the patient states something deemed really serious, the psychotherapist is obligated to tell the authorities. In *People v. Vincent Moreno* (2005), the courts stated that the psychologist had forewarned the patient of the limits of confidentiality. The court ruling affirmed the school psychologist's statement that her professional obligation required her to disclose confidential information indicating that the patient might hurt themselves or others.

Social Workers-Client Privilege

Vastly important in encapsulating and analyzing the practice of ethical litigation is the area of mental health practitioners such as social workers-client privileged communication. Confidentiality issues of social worker's clients include litigation issues ranging from child custody to criminal investigations where students are victims or perpetrators. With these legal challenges, social workers receive subpoenas. The National Association of Social Workers

defines subpoena as: “a mandate to provide evidence or testimony--but it is not a final ruling or order by a court on the legal requirement to provide information or admissibility of the evidence” (p. 1). Social workers act in the role of the custodian for the students, their records, and as a non-party witness. Under court order, social workers follow the NASW Code of Ethics that give limited or the least amount of information in order to not fully disclose confidential information.

Under the *Jaffee* (1996) decision, social workers are recognized as having privileged communication. This core ruling keeps private psychotherapy records from social workers’ confidential communication, as potential evidence, from being disclosed in the courtroom. *Jaffee* reinforces that it is society’s interest to secure that confidentiality of the psychotherapist-patient-privilege to protect any communication disclosure (Morgan, 2005). Additionally, some state judges observe the disclosed psychotherapy records in private, *in camera review*, before the judge decides on admissibility of the evidence. An exemption of psychotherapist-client privilege is where litigation continues as courts search for clarity on the dangerous patient exceptions held by the Supreme Court. If the patient makes a serious threat to harm himself or others then disclosure of confidential information by the therapist is mandatory. Confusion about the exception has come about by the *Tarasoff* (1976) case concerning duty to warn. In the court case, *Jaffee V. Redmond* (1996), a clinical social worker rejected disclosing a client’s confidential communication. *Jaffee*’s ruling created special protection for mental health records under a federal legal doctrine, the Federal Rules of Evidence, under psychotherapist-patient privilege. Reamer (2007) claimed social worker’s responsibility to protect clients is reinforced by the legal rights of privileged communication to clients.

Qualification for Privilege

Privileges are established by common law or by statutory law (Jacobs & Powers, 2009). Protection to prevent disclosure of confidential information is a legal right for clients because, as in a psychologist-patient relationship, the psychologist can be held civilly liable for breaching a patient's confidentiality. Thus, a licensed professional's credentials can be lost if courts rule against said professional in a case involving impermissible breach of confidentiality (O'Donohue & Ferguson, 2003).

Privilege statutes tend to be intricately complex; whereas, from state to state, there is little uniformity. One trend is that privilege laws are moving more in the direction of professionals schooled in law, professional collaboration, and adhering to codes of conduct. Each privilege rule has exceptions within each state standard. Glossoff et al. (2000) indicated that most exceptions fall into seven broad categories. The first exception is when a client's mental condition is questioned, as in a case claiming mental disability in a civil proceeding for disability benefits or, in a criminal case, evaluating a client's sanity. The second is when the patient has brought suit against a psychologist for malpractice, or when the patient's failure to pay indicates a dispute. The third exception is in a court-ordered psychological evaluation. In some states, however there are differences to this exception. The fourth exception is when the patient's condition poses a danger to themselves or to others. The fifth exception is involuntary hospitalization--with a patient posing harm to themselves or others. The sixth exception is known or suspected child abuse or neglect. In all 50 states, both federal and state laws mandate reporting abused or neglected children. The seventh exception is when a client's competency is in question.

Waiver

Exceptions are specific guidelines that detail situations in which the privilege does not apply. It is not surprising that courts have addressed privilege ruling of exceptions. A waiver involves the clients having an exception to compelling testimony where neither the attorney nor the client can disclose information to the courts. The client, as the holder of the privilege, can waive the privilege; therefore, the privilege will be inapplicable in certain situations. This gives the attorney permission to disclose the protected information. The protected person may also give up their privilege as an inadvertent surrender (King, 2009-2010). In federal or state courts, Federal Ruling 502 addresses an inadvertent disclosure as: the disclosure is not viewed as a waiver when the disclosure was inadvertently given; where to prevent the disclosure of information the hold of the privilege took reasonable steps to protect the waiver; and where prompt and reasonable steps taken by the holder of the privilege were rectified (Federal Rule of Evidence 502(b), p. 1, www.law.cornell.edu). Those who can waive the rights of confidential information are the client, parents of a student, legally appointed guardian, or administrator/executor. Another exception involves members of the clergy required to report child abuse or neglect. Stated in Alabama Code § 26-14-3(a) and (f) and defined in Alabama Rules of Evidence 505, clergy, as well as school personnel, are required to report by direct communication and written documentation any known or suspected child abuse or neglect.

In England & Wales, *Three Rivers District Council v. The Governor and Company of the Bank of England (No 5) (2003) EWCA Civ 474 and No 10 (2004) UKHL 48* was a critical case concerning litigation between the Bank of England and the creditors. Privilege may be waived by privileged material placed before the court, material losing confidentiality, and by implied waiver.

By way of example, in the United States case of *J.N. v. Bellingham School District No. 501* (1994), a court ruled that, when a student's information is shared with other parties, as for an Individualized Education Plan (IEP) or for teacher recommendation, the information is no longer privileged as held under the psychologist-patient privilege. One student being seen by the school psychologist had records viewed as privileged communication between the school psychologist and the student. However, the plaintiff had sexually assaulted another student. The victim's family filed suit, stating that the school psychologist had prior knowledge the student who had committed assault posed a threat to other students. The school refused to release the record; however, the parents waived their consent of the recovery. The court held that the psychologist-patient privilege does not stand where the conversational information was not intended to be confidential.

Similarly, in the Court of Appeals of Wisconsin, in the case *State of Wisconsin v. Denis* (2004), which involved sexual assault of a child by the child's grandfather, the child's mother had discussed the assault with the grandmother, a third party. The court ruled that the mother had waived the rights of privileged confidential information from the child's counseling sessions when she disclosed an essential part of the counselor-patient privilege to the third party. Likewise, the attorney-client privilege has an exception when the client consulting the attorney has conveyed plans to commit a crime.

Breach of Confidentiality

Understanding legal restraints and requirements is important in cases of breach of confidentiality. Remley and Huey (2002) expressed, "Legal standards represent the minimum behavior society will tolerate of a professional" (p. 1). If divulgence of privileged communication occurs without consent of the client, under state law, the psychologist can be

held civilly liable for breaching said client's confidentiality. The psychologist licensure or certification to practice can be revoked if impermissible breach of confidentiality is established or if the psychologist neglects to give the client the confidentiality limits. For example, *McDuff v. Tamborlane* (1999) found a school psychologist in violation of professional-client privilege established in a civil suit. The Supreme Court of Connecticut ruled that the school psychologist violated confidentiality when she reported information that the student's mother had told the psychologist in confidence. In the malpractice suit filed against the school psychologist, the judge ruled that there was no imminent risk to the student, to others, or to school property that would justify breach of confidentiality. The client's previous involvement in a criminal act did not call for the school counselor to tell the vice-principal and have the student arrested (Jacob & Powers, 2009). *McDuff v. Tamborlane*, No. 540767 cited the Connecticut General Statutes 52-146(a) (3) disclosure is closed: "Except in a very limited number of situations, such as child abuse or molestation, disclosures of past criminal or harmful activity generally must remain confidential" (p. 3).

Equally, if a school psychologist discloses privileged communication without consent from the client, the school psychologist risks a malpractice suit or loss of credentials. Confidentiality does not ensure complete nondisclosure through in cases such as child abuse. In these cases and those concerned with clients believed to be in imminent danger, they must be reported. The case of *Tarasoff v. The Regents of the University of California* (1976) is a defining case involving counselors' duty to warn potential victims that they may be in danger. In this case, the defendant attended the same university as the victim, where he had casually exchanged a New Year's kiss with the victim. Even though there was no existing relationship, the defendant grew in possessive love, and told his psychiatrist he planned to kill the other student after she

returned from vacation. The state pursued a criminal case against the defendant, Poddar, because he murdered Tatiana Tarasoff and told his therapist of his intentions. The victim's parents filed a wrongful death civil suit against the University Regents, the psychotherapist, and the campus police. Davis and Ritchie (1993) specified, "Interestingly, it seems that notifying police is not sufficient action to protect the counselor from a lawsuit if the client's threat is carried out" (p. 5). The courts awarded immunity to the police. Additionally, the courts stated that therapists do not have to render a perfect performance"; however, the therapist needs to "exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of that professional specialty under similar circumstances" (*Tarasoff v. The Regents of the University of California*). This case propelled the responsibility from duty to warn to duty to protect and spread rapidly across America (Lake, 1994).

The court case was reinstated in 1996 as *Tarasoff II*. The *Tarasoff I* (1974) ruling cited a failure to warn from the therapists and from the campus police, while the *Tarasoff II* ruling cited only the therapists. Simone and Fulero (2005) indicated, *Tarasoff II* (1976) established new territory by stating the psychologist was responsible even though there was no existing relationship with the victim. This case ruling turned from a duty to warn to a ruling of a duty to protect. To a greater extent, duty to warn may also apply to school counselors and school psychologists because they are not widely recognized by law as are psychiatrists, attorneys, and doctors. The psychologist's duty to warn covers fiduciary relationships, identifiable victims, prediction of danger, foreseeability, reasonable care, and duty to protect (Alabama Code § 34-17A-23).

One end of the spectrum of confidentiality is mandatory reporting. This is disclosure of confidential information for the purpose of protecting oneself or others from harm. Known as

breach of duty of confidentiality it is a professional school counselor's absolute duty to report confidential information concerning imminent danger of a student. Another breach of the duty of confidentiality is a court ordered subpoena. This is where one must cooperate with authorities to disclose confidential information and different from where the patient/client gives permission for the conversation to be told, allowing the breach of confidentiality.

When a therapist, or professional equal to a psychotherapist, determines a client poses danger of committing violence against others, their obligation is to protect the intended victims. This duty to warn even covers the foreseeability of a client's actions to hurt someone. Woods and Steadman (1983-1984) stated that therapists are not to interrogate clients; however, they are to take great effort to identify and protect the victims. In addition, counselors must not purposely act as informants or, in a malicious way, side with school officials. Nevertheless, counselors may not yet have a working knowledge of ethical codes (Moyer, Sullivan, & Growcock, 2012). For this reason, educators are mandatory reporters of child abuse and/or neglect, and under Alabama law, there is no civil or criminal liability for honest, good-faith reporting (Code of Alabama § 26-14-3, 1975).

Another area of concern is a school counselor's duty to protect a student's confidentiality. However, the following court case shows the anxiety between the school counselor's ethical duty to keep information confidential or to inform the parents of a concern learned from a student's confidential communication. In the court case *M.N v. Board of Education of Borough of Dumont* (1999) plaintiff M. N. filed a petition seeking a declarative ruling for a school counselor not telling the parents of a student's conversations about suicide. The student committed suicide after being questioned about stealing money. The Office of Administrative Law made a summary decision and dismissal. E. N., a 16-year-old student, told his friend, N. H., "that he would rather

throw himself in front of the train than face the shame” (*M.N v. Board of Education of Borough of Dumont*, 1999, p. 1). After E. N.’s death it was brought to attention the high school guidance counselor had confidential conversations with E. N. about suicide, even giving cards with numbers to suicide hotlines. However, the school counselor never reported to the school officials or to the student’s parents concern of suicide. Summary judgments in courts run parallel to summary judgments in administrative proceedings. The courts gave a declarative ruling for this matter involving the public’s interest, not only to E. N.’s parents but also to society. The petitioner’s claim was the parents were never given the opportunity to provide E.N. with appropriate mental health counselling. The school counselor’s omission was improper, even if the school counselor was protecting the student’s confidential information. The ruling stated, “Although there is no recognized guidance counselor-student privilege, where a privilege does exist, the breach of confidentiality is permitted when done in the best interest of the student” (*M.N. v. Board of Education of Borough of Dumont*, 1999, p. 6). This issue was filed with New Jersey’s Commission of the Department of Education.

State Statutes of Privilege and Communication

Many states have statutes addressing and defining privilege language. However, judges interpret the language of privilege differently in each state. As governmental agencies, all states govern differently and have different definitions for school counselors having privilege. Some states have awarded privilege to school counselors and have included them in the broad category of caring professionals. In this area of focus, the literature has been difficult to conclude what states have awarded statue of privilege in communication for practicing school counselors. Also, judges are reluctant to extend privilege to school counselors because of the defining principles of counseling, the age of the client and the school setting in particular. Stone’s position is that states

define their state statutes considering privilege as “unconditional privilege; privilege with exceptions; counselors are mentioned in statute with regard to confidentiality and privilege but the language does not specifically state school counselors; and are mute on privilege for counselors” (alaskaschoolcounselor.org., 2016, p. 1). This article specified the states having statutes of confidentiality and privilege for students in schools. The following research was found: full privilege for school employee-student privilege was Oregon, unconditional privilege where students can waive their privilege in open court. North Dakota, North Carolina, and states that awarded privilege with exceptions as evidence of child abuse or neglect were Idaho, Indiana, Kentucky, Maine, Ohio, and South Dakota. North Carolina privilege stated under other statutory privileges as rarely emerging in criminal proceedings and the courts can override the privilege to have proper justice established (Farb, 2016). Therefore, there is a real need for school counselors to know their state laws covering privilege in communication and confidentiality. Also, school counselors must have a greater understanding of their state’s ethical standards, as well as, navigating through ACA ethical standards.

State confidentiality statutes (1998) indicated 19 states providing communication protection for school counselor professionals who provide counseling to students of domestic violence and to sexual assault victims. Among the states included in the state confidentiality for privileged relationship were Mississippi, Kentucky, and Ohio. Confidentiality rules have been an area where state legislatures allow school boards to make their own rulings. Therefore, school boards have implemented procedures on suicide, sexual activity, smoking, sneaking out of the house, and 14 year olds having an abortion, as well as, pregnancy. However, guidelines can be somewhat vague. To bring focus to the problem, Wulff, St. George, and Besthorn (2011) stated “the principle of confidentiality is one of those ideas that appears to be so sacrosanct as to be

beyond purposeful and serious questioning” (p. 199). School counselors must testify concerning a students’ confidential information when they are subpoenaed by court. In states who have given privilege to students, school counselors are not permitted to testify of a student’s confidential information. Professional privilege is distinguished by the relationship of trust where the communication is protected. Privilege is an established procedure. States have given privilege to school counselors in varying degrees. However, a student’s welfare always trumps the privilege and confidentiality of school counselors. Qualified privilege protects school counselors in sharing need-to-know information to bring optimal care for students.

Currently in Virginia, another example of a lawsuit of negligence toward a school counselor exists. The case involves a wrongful death lawsuit of the parents suing a school counselor. The school counselor talked to an 18-year-old student about his intentions of committing suicide; however, the school counselor did not talk to the parents of the child. The school counselor’s attorney argued the communication with the student did not meet the requirements to notify the parents nor did the communication meet the conditions to complete a suicide screening form (Balingit, 2016). In the profession of school counseling, there is a faint line between perceptions of appropriate conversations with parents on a need-to-know basis and professional conversations to not disclose information of the student. Alabama’s Rules of Evidence, Rule 503 A states that for a licensed professional counselor-client, privilege includes exceptions. These exceptions include clients who need to be hospitalized for mental health illness, court ordered mental health examination, client’s mental health is an issue of the defense, the counselor-client breach in relationship, and civil cases involving counseling as the victim (11-d exceptions).

Black’s Law Dictionary (1910) defines waiver as “the renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or the opportunity to take advantage

of some defect, irregularity, or wrong” (p. 1216). To better serve society, courts waive school guidance counselors’ confidential communication when communication declares clear and imminent danger, and when the client gives a waiver to testify. Other waivers of information include an administrator giving express consent of a deceased client, the client voluntarily testifies, and the court in camera decides the communication is not covered under the counselor-client privileges. Also, a waiver is in place when a lawsuit is brought against the school and or personnel within the school after a judge’s in-camera review.

Ohio has recognized judicially created privileges. Under ORC 2317.02 privilege communications is stated “as a school guidance counselor who holds a valid educator’s license from the state board of education” (p. 514). Ohio recognizes different scopes of the privilege statute. It is perceived the legislature on privilege is balanced by the competing interest. Privileges are defined in categories of professional and nonprofessional privilege. Because of societies recognition of private communication, professional privilege grew from professional counselling relationships. Non-professional privilege provides secrecy and protects autonomy as with the established husband-wife privileged communication. Non-professional privilege also includes the privilege of self-incrimination offered under the Fifth Amendment of the United States constitution.

As an evidentiary exception, privilege protects relationships that would not be effective without it, known as the Utilitarian theory. Another rationale is the privacy theory endorsing certain relationships as deserving privacy, as well as, the rationale of the power theory. As the bedrock of society, privilege has come from political influences. The power theory is grounded on wealthy clients having the legislative power to influence the professional privilege of counselors.

Kentucky has awarded privilege to counselors, which also included certified school counselors. Exceptions to Kentucky's general rule of privilege included if the judge views the information communicated as being relevant to the case's issues or if there is no other means to obtain the substantial communicational information, as well as, the need of information is greater than the privilege. As in the state of Indiana a school counselor is not immune from disclosing confidential information including evidence of child abuse or neglect. However, Alabama has remained mute on privilege.

The climate of public opinion is changing especially with the doctor-client privilege. By degrees, society has changed the influence from communicable diseases thus changing the value of confidentiality. Codified into law, disclosure of confidential information between a doctor-client privileges depends on the nature of the information from the conversation. The breach of confidentiality, found in the ethics of the doctor-client privilege, is the doctor's responsibility when the right of the public good on a "need-to-know" basis is greater than the private good of the client. Another overriding exception of doctor-client privilege is a client involved in a lawsuit or an insurance claim. The opinions of society brings in a political agenda with doctors in a positive position to inform the public. The process of statutory law requires doctors' reports to inform the public of significant diseases or the doctor can be liable. Doctors must use situational judgment. Doctor-client privilege has been regarded as sacred to establish the utmost confidence. Confidence must also be established with school counselors because school counselors' primary ethical duty is confidentiality with their students. When privilege is applied to school counselors and students, students are given privilege from state statutes to only be useful in court proceedings.

School Counselors

The profession of counseling requires a considerable understating of the integrated areas of informed decision making; legal and ethical rulings from the American counseling Association (ACA) organization; and professional development. These areas will help school counselors keep abreast of meanings of current trends and student populations in order to advocate professionally to the school counseling profession. Counselors must continually add to their working knowledge of the codes of ethics and legal quandaries of counseling. It is relevant for school counselors to understand privilege and confidentiality of school children as their clients. One's experiences are one's perspective of reality and there are common ethical dilemmas that relate specifically to a school counselor's ethical and legal decision making. As a school counselor, the reality is that daily they walk into the school building with ethical and legal situations awaiting them. School counselors in their professional development learn how to formulate their own personal model of decision making. School counselors learn to understand different roles and issues involved with students and their privilege and confidentiality. Professional credentialing and advocacy would lessen today's social commentary and political rhetoric toward the school counseling profession. Educators and politics focus on college to career readiness programs for school counselors to implement. But still the underlying elements cause school counselors to be concerned with school children's' emotional and mental well-being in order to help students overcome barriers effecting their learning.

School counselors' professional judgments are often questioned. The risk-taking behaviors students attempt place counselors in a decision making mode of interpreting their legal obligations, ethical standards, and their own personal values and beliefs. Moyer and Sullivan (2008) conducted a survey of 204 middle school and high school counselors questioning if a

students' risk-taking behavior varies in intensity, frequency, and duration warranted calling and notifying student's parents. The results from the study indicated counselors would breach confidentiality when student's risk taking behaviors increase in all three areas- intensity, frequency, and lasting for a longer duration. Therefore, it is important for school counselors to keep notes to show a student's progression in self-harm because of their fluid behaviors. Also, the documentation can be used in case of being questioned on their judgment.

As in the court case *M. N. v. Board of Education of Borough of Dumont* (1999), attention was on the school counselor. The school counselor and the student, who committed suicide, had several conversations concerning the student's suicide ideation. Also, the school counselor had provided the student, the client, with suicide brochures and the suicide hot line numbers to call (*M. N. vs. Bd. of Ed. Of the Borough of Dumont, New Jersey, 1999*). The courts concluded the school counselor had a duty to inform the parents that the student had contemplated suicide. The courts ruled the omission was improper for the breach of confidentiality is permitted when done in the best interest of the student.

There are many school counselors professing to be effective counselors; however, they are exhausted by the increase of students needing their help. School counselors are also exhausted by the search for help for their students' emotional and mental health. School counselors have understandably looked ahead to the increasing number of students' emotional and mental issues with serious concerns. In light of these concerns, learning the development of privilege communication will give school counselors ubiquitous influence. It is both interesting and troublesome that school counselors have not been awarded privilege, where other professions have been given the privilege such as social workers and drug and alcohol counselors. The rule of confidentiality is critical.

School counselors are looking for real encouragement on how to handle decisions about a student's confidential information. Also, relevant is for school counselors to be prepared to make the right choice concerning a student's privilege and confidentiality. The development of privileged communication offers school counselors a rare glimpse into the actual effects legal rulings and ethical standards have on school counselors. Privileged communication should come as no surprise to school counselors because a student's confidential information, a student's secrets, is a difficult problem for school counselors to define and to decide what to reveal.

In a national survey of teachers concerning their perception of school counselors, teachers responded 3.07 on a 4-point scale that school counselors should work individually with a student in a therapeutic setting (Reiner, Colber, & Perusse, 2009). In concurrence, with the profession of school counselors' identity evolving, consideration should be given to the tremendous privileges afforded to attorneys, priests, and psychotherapists. Research stated with heightened awareness of mental health needs in students K-12 and the low percentage of students receiving mental health services, this affirms the need for the profession of school counselors to change to embrace meeting the needs of students. School counselors have multifaceted roles and one of their priorities is to meet student's mental health needs that warrants changing the field (Dekruyf, Auger, & Trice-Black, 2013). Thus, a recent survey by Rodeiro, Emery, and Bell (2012) stated general non-academic factors have been linked to academic achievement. These non-academic factors include emotional intelligence, motivation, educational aspirations, and attitudes toward school. When students have environmental barriers superseding the academic performance, their non-academic factors are completely buried under the weight of a student's worry and fear from stress, non-relationships, food, sleep, and laughter.

Research indicated counselors need to embrace the professional identity of both an educational leader and a mental health professional. The counseling profession does not have to steer from counseling students but can develop a pathway to strengthen skills by changing counselors to address student's mental health needs. The researchers suggest counselor training through professional preparation by internships, ongoing clinical supervision training, and supported focused groups on counseling work. Research by Disease Control and Prevention (2013) indicated 1 in 5 children struggle with a mental health diagnosis each year.

School Settings

The first part of the literature review focused on privilege and communication and the laws that govern them, now the application is on the school setting and the decision making occurring in the educational arena. Hoy and Miskel (2008) described an administrator's work of building trust with faculty and staff as pivotal to a school's success. Administrators may encounter confidential situations for only brief moments in comparison to other situations in the school building on any given day; however, knowing the legal repercussions of privilege and confidentiality is essential. In the high-stakes culture of education, school counselors aid administrators in recognizing sensitive circumstances concerning confidentiality. Promoting a caring school environment requires principals to be reflective practitioners where the need for confidentiality is an ethical care and where decisions are made with careful forethought. Hoy and Miskel (2008) addressed the point that school administrators should become familiar with the context of conversations within the school setting. The conversation's context is important, with trust being fundamental to foster openness. In school settings, privileged conversations often follow the direction from teachers to school counselors to students--or, likewise, from student to school counselors to administrators.

The work of administrators involves addressing brief encounters of diverse issues that can involve a variation of individuals and groups. Hoy and Miskel (2008) pointed out that administrators must be politically astute, since politics composes a large segment of school life. Huey (1992) described ethical principles as always developing, addressing ethical conditions, and moving toward new and developing political modification. Children, like adults, have privacy rights, and the nature of helping means the counseling relationship establishes an atmosphere of confidence and trust.

Thus ethical practices can be targeted through knowledge of landmark cases, which result from legal cases establishing a precedent that substantially changes the law's interpretation of a case or establishes a new case law on a prevailing issue. These landmark cases represent pivotal issues that impact school counselors on a professional level--such as confidentiality involving mandatory reporting and school records. An example is the American School Counseling Association's (ASCA) ethical standards revision from 1984 to 2016. The Delegate Assembly elected to change practices because of cultural changes evolving in society as well as reinforcing the standards as "counselors act in the best interests of the clients and take measures to safeguard confidentiality" (ACA, Section B.3).

In 1960 in the case of *Bogust v. Iverson*, which involved neglect of an 18 year old who committed suicide, the counselor was sued for having information of the student's suicide ideation and for not notifying the child's parents. The courts did not rule the counselor guilty of neglect; however, court cases involving suicide did put *all* certified school personnel on notice to participate in suicidal ideation professional development. More recently, the case of *Eisel v. Board of Education of Montgomery County* (1991) set forth school counselors' legal duty to students. It stated that school counselors have a special relationship with students and owe a duty

to prevent suicide, thus establishing a negligence component for the first time. Prior to this case, courts had stated that school counselors did not owe a legal duty. However, The Maryland Court of Appeals affirmed that educators, as school counselors, are legally standing in for parents--*in loco parentis*--and provide special care to protect students from harm. In this case, the father brought action against the school counselor and the Board of Education. The court ruled that the counselor had foreseeability in the daughter's suicide. This was a breach of the counselor's duty to warn the parents. The courts ruled that the school had implemented an effective Youth Suicide Prevention School Program Act, thus stopping short of awarding suit against the counselor. This case, involving a 13 year old telling a friend, probably would not have gone to court if the counselor had notified the parents of the suicide ideation.

Momentous in case law to professional school counselors, *Wyke v. Polk County School Board* (1997) was the first case of a school district being found liable for negligence in a student's suicide (Portner, 1995). The student had attempted suicide on two different occasions at school. School officials were found guilty because they first failed to hold the student in custody; second, failed to provide or secure counseling services for the student; and third, failed to notify the student's parents. In *Wyke*, the Eleventh Circuit Court of Appeals found both the evidence and the law supported the school board being liable for the student's death. The *Wyke* case operated under Florida laws. These are ruled under a system of comparative negligence, where courts compare the fault attributable to both the plaintiff and the defendant, thus producing a division of damages incurred. Under Florida law, the court ordered that student supervision is a duty of school administration. Stone (2012) affirmed in the busy days of school counselors there is the assumption to drop everything and run to the crisis by being in the moment. It is those moments where school counselors are confronted with confidentiality.

One case concerning a school counselor involved the courts determining a counselor could keep her position even though the counselor went against her principal's judgment to tell the student's parents she was pregnant. In New Hampshire Supreme Court Appeal, Farmington School District (*New Hampshire State Board of Education v. McKaig* (2015), the courts ruled the school counselor could not be terminated from her job for helping a minor student seek an abortion. The counselor had a legal right to help the student bypass the law to protect the confidential conversation with the student and the student's constitutional rights, after the counselor asked the student and she refused telling her parents. The student stated she was fearful her family would do something to her and to her older boyfriend who was 19 years old. The student was 15 years old, in 2012, when she came to the counselor for guidance and support concerning being pregnant. The counselor informed the principal and they did not agree with each other on the way the student wanted to handle the circumstances. The counselor helped the student learn of "seeking judicial assistance to permit her to make the decision regarding termination of her pregnancy without notifying her parents" (seacoastonline.com, 2016, p. 1).

The courts reprimanded the school counselor because of her violation of breaking confidentiality to the attorney. The counselor's obligation was to the student's confidentiality, as mandated by the American School Counselor's Association (ASCA). The counselor bypassed the parents due to the student's fear of her family's reaction. The state board concluded the teacher was not disobeying the principal's directive due to the fact the principal never told the school counselor to stop advising the student. The courts also ruled the school counselor did not breach confidentiality for giving limited information about the student (Marsh, 2016). The principal only directed the student to see the school nurse. The trial court ruled the teacher was not insubordinate to the principal, and reinstated her position. The courts did not hold the teacher

responsible for the school counselor did not commit misconduct. “The decision represents another example of the phenomenon of casting normal legal principles aside when courts are confronted with cases that implicate the hot button issue of abortion” (Appeal of Farmington School District, 2015, p. 27).

Student’s risk-taking behaviors within the school environment have different meanings to different people. Therefore, school counselors must assess their understanding of appropriate legal issues. Lawsuits have become common practice because parents are less intimidated by the law and are more knowledgeable of their legal rights. School counselors must be more ethically and legally alert to respond to issues concerning legal challenges. Hermann (2002) stressed school counselors are often vulnerable to legal cases; therefore, they must gain knowledge from professional development to be informed of current legal issues. Professional development allows for school counselors to have structured time to collaborate with other colleagues in the counseling profession.

General Societal Rationale for Privilege in Communication

Communication, as a natural process, means to share information with one another. Communication also brings people together to share in confidential settings. As a value to society, communication brings people together to build trust in their relationships as with family, friends, colleagues, and professionals. A society is described as an organization of persons engaged in an activity. Throughout an individual’s day-to-day social life, language is the way to the heart of conversations, and society values individuals in private conversations. Society also values the purpose of certain conversations in established relationships. Laws exist within society so that people in society can feel safe and protected, as well as so individuals can

function efficiently and effectively there are laws for fair treatment within society. Therefore, society has established privileged communication.

Privilege strengthens individual freedoms. Professional secrets in civil law began from the foundation of common law. Privilege as a societal value also strengthens the honesty of the judicial system. Society values the client being able to truthfully speak to someone, as part of the evidence of the justice system, and as a part of the legal procedures. Privileged in communication is an exception to all parties having access to all information. This makes privileged in communication controversial because it eliminates all the relevant evidence in a court of law. There are two parties involved in communication, and the law prohibits the other party, the recipient of the information, from disclosing communication between protected relationships. Therefore, one can assume the right of privilege is that professionals do not disclose client's privileged communication. Privileges have been provided by society and these privileges are viewed as important by being recognized by state statutes and by case law. Legislature for structuring statutes comes not only from the need for client's privacy but also to reduce the threat of others. The advantage of privilege is to protect the communication of an important relationship between both parties. Communication can be both, oral or written.

Schools' ethical value to society is the duty school administrators have to supervise students. Plaintiffs can find fault in schools under federal due process claims, as with negligence and wrongful death claims. Schools can be found at fault where schools fail to act as a person of reason under a similar condition (Singer Cataro, 2000). Society's public beliefs are embedded in the laws and policies of American school systems. School systems are under public scrutiny of students' moral and ethical behaviors. The school within America is a mirror image of the morals and behaviors of our society. Schools have the challenge of meeting the demands through the

Fourth Amendment of the United States Constitution, addressing student's rights of unreasonable searches, and the Fifth Amendment of the United States Constitution, addressing due process for students and for educators.

The Fourteenth Amendment to the United States Constitution provides protection of life, liberty, or property. To be affected constitutionally, both procedural due process and substantive due process must have happened to be constitutional. Procedural due process involves specific actions to be carried out by school administration. Substantive due process must be fair, reasonable, and protecting of a person's life, liberty, and property. As a rule of evidence, privilege communication is where a witness is ensured of not having to disclose some matters of proof; however, others view it as an obstruction to the truth. One of the societal values is stated in the general requirements for a privilege. The requirement for privilege is that society's interest is greater than keeping the victim's information secret (Ingram, 2015). With strong justice, courts uphold the privilege when society's value of the client's protection and the importance of the confidential relationship is higher than the need for evidence.

Legislature has given privilege in communication to professionals over time. Relationships are protected for various reasons. Clergy-client promotes religion where clients can disclose their personal values, moral issues, and circumstances from life's situations. The psychotherapist or physician-client privilege promotes patients disclosing all information in private for treatment or diagnosis. The doctor-client privilege is for patients to receive the best possible health care for their treatment or diagnosis. Attorney-client privilege is for the client to receive candid legal advice and effective representation by providing frank communications to the attorney. State laws govern privilege communication. Within Federal Courts, as laws are

redefined because new circumstances emerge, then new privileges are being added, such as social worker-client privilege.

Privilege protects the relationship of the attorney and the client. It is the lawyer's responsibility to decide what is under the seal of secrecy and what shall be presented as evidence. It is the lawyer's right to protect the client, to protect the documents, and the duty of confidentiality bound by professional secrecy. The lawyer-client privilege is very high and is absolute. The courts determining where the privilege holds may be limited, for judges want to grant final and accurate decisions. Thus, the privilege may give very vague value to society. As a social theory, privilege is a special right to a group of people. Privilege is rooted in society's value of the need for confidentiality and trust.

Waivers give the other party no responsibility to limit the privilege communication in a court of law. With each state having its own definition of privilege communication, exceptions to privilege protect the public and override the privacy of the client. Patients can waive privilege and courts can waive privileges. One example of a waiver for privilege is mandatory reporting, the protection of vulnerable persons. However, because of mandatory exceptions, society questions the definition of confidentiality. The jurisprudence balances enforcing the laws of the land and society's goals. One integral component of society's goals is to trust others. Trust found between family members, clergy, and other professionals is an essential component of society. Because members of society have the goal of trust, society developed protected communications, these privileged communications bring exemptions to the professional's communication.

The attorney-client privilege exceptions prohibit disclosure of private information to be made public in a court of law. The attorney-client exemptions include the crime-fraud exception and the burden of proof for the crime-fraud exception (Razzaq, 2008). The attorney-client

privilege does not apply if a third party is present or if is brought into the private communications. Exceptions of social workers-client privilege in judicial proceedings include the client receiving counseling for emotional problems due to a workplace accident in a lawsuit bringing damages and if a social worker has had a lawsuit against them brought from the client. Other exceptions involve if the client threatens to commit suicide or threatens to harm self, others, or the society. An exemption focused from the school setting include exemptions for minors who are subject to custody battles and minors involved in abuse or neglect (Reamer, 2007).

The doctor-client privilege exemptions come from communication being disclosed if defendants' rights exceed a patient's right for privacy in communication within a fair trial. The therapist-client privilege can be waived in order for the court to hear necessary and sufficient information. Examples of exceptions of a therapist-client relationship include disclosure ordered by the courts when clients bring a complaint against the counselor and when clients are claiming psychological damage in a lawsuit, as well as, civil proceeding. Others exemptions include child abuse and clients being a danger to themselves or to others. Psychotherapist-client privilege is governed by a professional code of ethics. The psychotherapist code of ethics gives specific guidelines as there is a professional obligation for confidentiality and secondly, the client must be informed of limited confidentiality.

The utilitarian school of thought views the utility of a privilege. This approach concurrently looks at the relationship the privilege is protecting and the relationship that society values as important. This view questions does the relationship depend on the confidential information to be restricted and not to be disclosed. One critical element is that the client would not seek help and fully participate in the relationship withholding truths and facts. The utilitarian

approach favors the psychotherapist-client privilege. It views that clients must develop confidentiality with physicians in order to tell truthful facts, for if patients feel they cannot disclose confidential information, they may not seek medical attention or withhold medical information to receive effective treatment.

ASCA (2010) has different ways school counselors interpret the ethical standards, just as ethical codes from other professionals. The ethical codes state that disclosure to administration should be done but does not tell specific guidelines for notifying authority. The codes also state to honor the student's confidentiality. However, the ethical code gives no procedures to follow to notify school administration of disruptive or potentially damaging behaviors when school counselors are confronted with critical decisions to make. However, school counselors must be mindful of the state law, policies, and procedures they can do or they are prohibited to do while offering students an excellent education.

As a federal right, mistreatment of school children has been included in federal courts under the clause school shall be liable for children's injured (Singer Cataro, 2000). The Fourteenth Amendment of the Constitution and section 1983 of Chapter 42 of the United States Codes for actions to be carried out in a court of law, both must be met, for schools to be found liable. Section 1983 is different from negligence, it is state-created danger. Under Section 1983, plaintiffs must demonstrate the four elements to allege state created danger. The four elements include a relationship with the school, harm to the student that was foreseeable and direct, the school's willful disregard for student's safety, and the authority of the school created opportunity for the injury that would not have otherwise come about (Dragan, 2013). Another exception under Section 1983 is municipal liability known as the deliberate indifference theory. This theory

is where the defendant is held responsible for what school administrators knew could likely happen and they could have prevented or reduced the degree of the incident.

With students committing suicide and school administrators or school counselors having knowledge of statements from students such as “Maybe I’d be better off dead,” Singer Cataro (2000) stated, “this is very near to the ‘shock of conscious’ standard already entrenched in examining a special relationship” (p. 28). Moyer, and Sullivan (2008) indicated limited cases have been conducted to examine a counselor’s position on voluntarily sharing information with parents when parents did not ask for assistance from the school counselor. Counselors keep information confidential unless there is present, clear and imminent danger to a student.

Privileges are defined by laws and give individual’s strength. There is an established need for candor. The benefit is for the individual, not for society. ASCA, as well as ACA, have political influence with the legislature. This is necessary to continue the development and maintenance of high standards for those involved in the counseling profession. As school counselors, it is together with professional organizations that they can make a difference. As with psychotherapist, when school counselors compromise on the loss of confidentiality in the counseling relationship, the counseling relationship is impaired.

Collaboration

In order to be advocates for clients, educators are in need of collaborating with other professionals concerning confidential information. Collaboration with other colleagues gives school counselors confidence of making ethical decisions needed in meeting the urgent challenges of making daily decisions about helping students succeed in school. As stated in the Jason Flatt curriculum, all professional school personnel are mandated to participate in the curriculum, for “there is a burden that is lifted or transferred when the counselors or other

professionals take over” (jasonfoundation.com, Professional Development Series, 2017, Chapter 4 Video). This describes the high emotional decision making used when school counselors are confronted with student suicide ideation. Those in leadership must know policies and carefully examine the implications of school policies, and know the state and federal policies, and laws. Additionally, administrators must consider existing policy and have a working relationship of professional school counselors’ legal and professional roles. They must also know the fluid nature of boundaries and responsibilities concerning privilege and confidentiality. While these policies may seem harmless enough, careless execution from administrators and professional school counselors may result in lawsuits.

An administrator dealing with the competing interests of the school faculty, students, and school community in relation to confidentiality would not expect those decisions ultimately to be examined by the courts. Yet, administrators not having knowledge of circumstances pertaining to the legal aspects of maintaining confidentiality would jeopardize society. Therefore, some decisions require consideration to determine which is greater: one’s obligation to respect a student’s or client’s confidential communication or one’s obligation to society, other students, parents, and community. Decisions on privileged communication concerning psychotherapist and social workers have, however, resulted in litigation. Educating school administrators is vital to understanding and protecting student confidentiality. Professional school counselors must be aware of the ethical boundaries of confidentiality.

The ASCA (2010) ethical codes state that professional school counselors need to recognize the powerful ally that can be found with school faculty who are working to aid students in distress. Professional school counselors work with other school staff, involving a teamwork approach with other members of the school community. In order to meet the student’s

needs, professional school counselors must determine when it is necessary to reveal students' confidentiality on a need to know basis in order to help students. Dagley and Dagley (2015) recounted the Legislature of Louisiana §406.9 enacted the Parents' Bill of Rights for Parents of Public School Children. Specific to this research, the rights were for parents to inspect their child's school records, including all of the following: (a) academic records, (b) medical or health records, and (c) records of mental health counseling (SB312 Act 699 - Louisiana State Legislature, p. 1, www.legis.la.gov). Dagley and Dagley (2015) stated: "It also afforded parents the right to be notified when their children receive medical attention, may be the victims or perpetrators of crimes, are interviewed by the police at school, and when they are taken from school without parental permission"(p. 232).

Now is the time for school counselors with the highest levels of suicidal ideation, cutting as non-suicidal, and cyberbullying to activate their own qualitative research studies. School counselors are both practitioners and observers every day and can effectively make discoveries to bring about change. These are all reasons school counselors must focus research on confidentiality. Students have a much larger spectrum of social media influencing them. The use of social media brings risks associated with the use of it as Arntfield (2005) stated, "intrinsic rewards that were not tied directly to winning as much as they were to fantasies of power, celebrity, sexuality, and elevated social status that came with participating, win or lose" (p. 382). In society today with students saturated with social media, this is the way students think. These areas not only influence suicidal ideation but also increase suicidal ideation. Cyberbullying allows the bully to intimidate their victims through social media, text messages, Snapchat, and emails. Social media allows cyberbullying to have a longer shelf life than an average face to face bully because the message can be revisited over and over to keep the hurt and pain immediately

in the forefront of a student's thought process. This may cause a dramatic change in a student's emotional levels. For it is not only the story at hand that counselors have to decipher but also the back story of a student's situation and the front story of the student's situation. This is why confidentiality is of significant importance as well as it is a significant challenge.

Confidentiality

The American School Counselors Association (2016) addressed confidentiality as “an ethical duty for school counselors to protect students' confidential communication that students share in counseling” (p. 9). Students share in confidence with school counselors, and have the expectation that their conversation will not leave the room. The counselors' obligation is to understand how their reputation can be tarnished by counselors and teachers sharing a student's private confidential information. In the research of school counseling, often the words of privilege and confidentiality are interchanged; however, these are two separate definitions and concepts. Confidentiality, an ethical term, and privilege, is an empowering legal term. However, confidentiality has the greatest potential to be viewed as a catalyst for developing trust in a therapeutic relationship. Thus, when counseling minors, confidentiality can be a complex legal entwined situation. With confidentiality being an ethical standard, school counselors can find themselves in precarious positions of violating regulations or policy when breaking confidentiality. Therefore, it is essential for school counselors to have an understanding of their ethical standards and the school district's policy because states are always revamping to meet the needs of our school children.

Evolution of Counseling

Within the counseling relationship, guidance and counseling have evolved from the 1900s vocational guidance counseling to current issues related to personal, social, academic, and

career goals of students today. Georgiana (2015) identified the five most frequent problems faced in school settings today: family problems, school problems such as inadaptability to the school setting, problems of sentimental nature, identity and self-knowledge problems, and disciplinary problems derived from school rules and procedures.

School counseling services began in the 1950's due to the National Defense Education Act of 1958. The Soviet Union's scientific and technological advancement, shown through the launching of Sputnik, propelled school counselors into a role of identifying "college bound" students, with emphasis on math and science. In the 1960's, nonetheless, Carl Rogers' book, *On Becoming a Person* (1961), catapulted the role of the counseling relationship. Rogers, known for personal counseling theory, placed the responsibility on the client by using psychotherapeutic procedures and treatment influence. Therefore, listening to clients and seeing school counselors move from crisis to crisis, the counselor's role was viewed as reactive (Stanciak, 1995).

The counselor educational programs seem to have a need for practicing school counselors to work with school counselors within schools to provide real-world experiences. Overlooking student's emotional and mental problems can have critical consequences for students, parents, and educators. Therefore, the development of a new kind of restructuring of a counseling educational program can allow and empower practicing school counselors to actively participate in responsible action research. This is very important because the research activities will help promote school counselors own personal growth and development. As stated by Hayes, Dagley and Horne (1996), "From such a perspective, experience is not just the best teacher, it is the only teacher" (p. 381).

Review Our Ethical Obligations as Counselors

To advance one's professional learning, school counselors should subscribe to the code of ethics applied by the Ethical Standards of School Counselors (American School Counselor Association, 1998) and the Code of Ethics (American Counseling Association, 1995) to situations they often face (Remley & Huey, 2002). The structure of the standards of the American Counseling Association (ACA) is broad and was created to cover counseling in all settings within the counseling field. The ACA standards are not detailed topics specific to the behavior of counselors such as counseling minor students, conferring with parents, and employment within the school environment (Remley & Huey, 2002). However, the American School Counselors Association (ASCA) created standards unique to challenges in the school setting.

Counselors must be concerned about the future of counseling from the perspective of privileged communication as a steppingstone to knowledge of one's legal obligations. As asserted by Deck and Cecil (1990), professional associations should lead in the future of school counseling with recognition of the issues counselors' daily face. School counselors must assume their legal, ethical, and moral responsibilities to their profession. The historical origin of privilege communication evolving from England's common law, as it has been shown, is defined by a historical story of countries, events, and people who are socially constructed (Lambie & Williamson, 2004). Vastly important is encapsulating and analyzing the ethical litigation among mental health practitioners as psychotherapist-client privileged communication and school counselors.

In the educational arena, the decision-making process of counselors is critical concerning decision making for mental health needs psychotherapists and psychologists deal with daily. One

emerging trend school counselors deal with concerns the duty of care for student's academic standards. In the court case *Sain v. Cedar Rapids Community School District* (2001), a full tuition basketball scholarship was taken from a student whose English class did not meet the standards of the National College Athletic Associations (NCAA). The student's school counselor failed to clear the nontraditional English class through the NCAA. The student was misinformed by the school counselor and sued for negligence misrepresentation. The counselor, viewed in an advisory role, must seek continuous training to inform students of relevant information, for the profession of education is becoming as a business supplying competent information of educational services (Smith, 2002).

Governmental immunity protects school counselors from lawsuits. Educators are protected for doing their job unless their actions are excessive in force for disciplining students; or their negligence to bring bodily harm. Academic advising of false information, could also be considered negligence. In the Court case *Scott v. Savers Property and Casualty Insurance Company, Wausau Underwrites Insurance Company, and Stevens Point Area Public School District* (2003), the school counselors failed to be knowledgeable in NCAA rulings. This case concerned a student losing a 4-year scholarship due to the school counselor's negligence on a broadcast communications course and NCAA approved course list. The Justice stated, "A doctrine of governmental immunity that has caused such injustice and inequality, in the case and others, cannot, and I predict, will not, stand much longer" (p. 2). Noticeably, a school counselor's role of academic advisor is sensitive to court cases as students lose scholarship money to college with this being an era of college and career readiness. Along with knowing credentials for college entrance, as a duty of care, counselors must continually keep abreast of ethical standards and legal areas.

The challenging responsibility is to balance the student's right to confidentiality and the professional school counselor's ability to work with the student, while working with the parents, who have the best interest in the well-being of their children. Clark Flatt was the father of Jason Flatt, the 16-year-old young man who committed suicide. Mr. Flatt is the founder of the Jason Flatt Act. All states are implementing the Flatt Act into their professional personnel training. In the video program, Mr. Flatt stated, "Young people are our future, help us protect them" (jasonfoundation.com, Professional Development Series, 2017, Chapter 1 Video). It is a school counselor's responsibility to develop relationships with students to have an understanding of what they are going through and give student's guidance on how to work through it.

Potential Application

As advocates of students, school counselors must remain focused on keeping students' confidential information secret. Because the counseling relationship is specifically based on trust, when school children feel their privacy has been jeopardized then they close up and do not share. Also school counselors must stay solution oriented in that they are always looking for ways to aid students with their chronic problems and issues. As stated by the American School Counseling Association (1998), the school counselors' responsibility is to the student by having "a primary obligation to the counselee who is to be treated with respect as a unique individual" (p. A.1.1). Trends in school counseling have shifted. With the help of The Education Trust and the American School Counselors Association (ASCA) national model, school counselors are establishing different models. The Education Trust focuses on all students being able to receive high academic achievement. The ASCA National Model, adopted in 2003, provided a framework for the ASCA National Standards for a student's academic success, career exploration, job readiness, and personal/social development of students.

Many states have initiated the comprehensive and systematic school counseling program recommended by the ASCA. However, one issue is that school counselors must divide their day into meeting the management of the program. The comprehensive model is specific about a school counselor's use of time, use of calendars, both weekly and monthly, and use of data to effect change. School counselors have not viewed themselves as "managers" over their time, days, and data of their services (ASCA, 2003). However, this precisely grounds and guides school counselors to be more accountable to close the achievement gap between all students, especially low income students. For a master's degree professional, the school counselors' duty is to meet the needs of the students by having an accountability mind set. Students who individually come, or are referred to the school counselor, are often the students who have the most urgent need from environmental barriers. A trusting, caring relationship allows students to communicate about their private issues. Counseling strategies such as mindfulness and social/emotional learning tools can be taught to students. School counselors must ensure high quality education is taught to every student no matter where they come from and who they are. Students must have a chance to thrive, for all students deserve an equal chance to succeed. The counseling profession must affirm to students by offering them the resources they need to be successful. Therefore, school counselors must be assertive advocates to help students reduce their environmental barriers to keep academics strong for students to pursue their dreams and aspirations after high school (Education Trust, 2009).

Summary

Professional school counselors must meet the rigorous demands of their profession. With knowledge gained from legal issues to professional research, they can maintain the highest standards of integrity, leadership, and professionalism. Research by Dekruyf et al. (2013)

reinforced school counseling is at a time when the school counselor's role as an educational leader and a mental health professional, should join. The future is not for school counselors to be replaced by mental health professionals only for the concern of students' mental, emotional, and social health factors. School counselors must proactively know school policies, seek consultation, and stay abreast of changes in ethical standards, legal rulings, and professional responsibilities to make critical ethical decisions. Dahir and Stone (2009) quantified school having school counseling programs gives strength that the human affective element has not been left behind in education. The school counseling program's strength is confidentiality of student's speech conversations to the school counselor. However, student confidentiality requires school counselors to make ethical decisions daily and this can create a challenge for school counselors. Therefore, counselors must have a collaborative relationship with other professionals such as social workers and school psychologists. Federal constitutional and statutory limitations are enmeshed in privileges and protections for students, thus channeling movement toward psychotherapists and professional school counselors (Friedlander, 2013).

Privileged communication began in its infancy in England through court law cases to the present documented development in the United States, especially with the priest-penitent privilege. From legal case laws, this research is especially relevant and will help professional school counselors. The end result is for school administrators to have knowledge of the development of privilege and confidentiality that will help to avoid litigation with families concerning confidential information given to them in the school setting. The case law research process was formed to reveal the natural content being examined by discovering the documented trends through identification of psychotherapist-client privilege (Yin, 2006). Due to the guidance of unclear ethical decisions concerning privilege and confidentiality, the fluidity of a changing

society, and the changes in legal awareness, there is an urgent need for reexamination of the ethical and legal issues of professional counselors' lives. Eventually, collaboration between confidentiality and privileged communication for school counselors and their students may spur legislatures to ensure the student's private conversations are not disclosed, unless for an exception.

CHAPTER III:
METHODOLOGY AND PROCEDURES

Introduction

This study is a document-based, qualitative study, approached from a historical perspective. It uses court cases on a common topic as a source of data. Court cases from the West Reporter System allowed the researcher, in a sense, to interview the person who wrote the decision, to ask questions about why the decision came out the way it did, then reduce interview notes to data that could be treated qualitatively.

Research Questions

The following research questions guided this study:

1. What are the issues in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?
2. What are the outcomes in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?
3. What are the trends in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?
4. How do the issues, outcomes, and trends in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014 inform the development of privilege and confidentiality for school counselors and school children?

Data Collection Methods

The researcher used resources from The University of Alabama Library database including *Westlaw*TM and *LexisNexis*®, the University of Alabama Bounds Law Library, and resources held at the Morgan County Law Library in Decatur, Alabama. Data were also collected from the Louis Salmon Library at the University of Alabama in Huntsville and the Sterne Library at the University of Alabama in Birmingham. These resources first provided a list of relevant court cases, then they provided a copy of each case in the list.

This qualitative research sought court cases about privilege granted to members of the caring professions in their communications, and the confidentiality their clients could expect in those communications. The researcher used the proprietary database *Westlaw*TM to identify and chronologically sort cases in the West Reporter System, dating from 1956 to 2014. The cases used in this study include all those located by using, in the West key number system, the following descriptors: 311H: Privileged Communications and Confidentiality; 311HV: Counselors and mental health professionals; 311HV k311: Professionals in General; 311HV k312: Psychotherapists; 311HV k313: Physicians: Psychiatrists; 311HV k314: Psychologists; 311HV k316: Social Workers; 311HV k318: Sexual Assault Counselors; 311HV k319: Substance Abuse; 311HV k320: Mental Health Records; 311HV k322: Persons Entitled to Assert Privilege; 311HV k323: Waiver of Privilege; 311HV k325: Waiver of Objections; 311HV k328: Presumptions and Burden of Proof; and 311HV k332: In Camera Review.

Case Brief Method

Case brief methodology is a research method designed to provide an “invaluable and deep understanding” where the researcher uses an analytic summary of opinions to highlight cases (Yin, 2012, p. 4). This design allows the “pattern matching of a series or sequence of

events as the main analytical tactic” (p. 47). The preceding law case, the court case, and the subsequent court cases set after the court ruling each give a comprehensive understanding of the court cases from the provided notes on the court’s opinion. After researching and reading each of the court cases, the researcher will have an understanding of the formalized legal procedures of a court case. After reading the initial court case, the researcher describes the detailed facts of the court case and examines each court case’s issues and outcomes of the court ruling. The researcher’s focus is on building issues and outcomes from the analysis of the data driven by the research questions. Purposefully, the researcher does not have to continue reading the entire case every time because the case brief notes will offer a holistic approach by studying real life contexts of court cases of law (Statsky & Wernet, 1995). Yin (2012) stressed that the researcher, during the data collection stage, should perform as a “detective,” continuously evaluating the adequacy and meaning of evidence as it is collected (p. 175).

The case brief method of studying case law identifies a court’s ruling as well as identifies the future value of the judicial decisions in establishing a precedent for others to follow. Yin (2013) concluded that conducting a relevant exploratory reappraisal of a case allows the researcher to gain a real-world perspective. The purpose of a case brief is to take an individual court case ruling and establish a comprehensive summary of the issues concerning privileged communication to build categories and subcategories of issues and outcomes. A case brief consists of facts, issues at hand, holdings or the rulings by the courts, and reasoning for the holding, called the rationale (Makdisi & Makdisi, 2009, p. 1). Tellis (1997) specified a case study does not just represent a sample of cases, for a specific confidence comes from “selecting cases must be done so as to maximize what can be learned in the period of time available for the study” (p. 1). Facilitating the study, case briefs will be used to analyze and restructure the

researcher's thinking. This involves qualitatively coding the data from the court's ruling only on one decision from the case law; however, the researcher must establish the key issue of privileged communication and confidentiality to "be sure to distinguish the issues from the arguments made by the parties" (Makdisi & Makdisi, 2009, p. 2).

Yin (2003) argued that a case study design forms an explanation through a coherent way of collecting data, analyzing data, and a continuous interpretation of data (pp. 19-21). May and Pope (1995) stated, "Some pieces of qualitative research consist of a case study carried out in considerable detail in order to produce a naturalistic account of everyday life" (p. 111). With an understanding of the details, issues emerged across categories of caring professionals. The categorization not only emerged issues within the specific identified types of professionals predicting similar results. Issues also came to light across categories of the types of professionals producing similar results or contrasting results. For this reason, data examined inductively follows researching one court case at a time to establish themes or trends of the court cases concerning privileged communication.

Case Briefing Format

To facilitate the researcher in the analysis of developing a case description, Statsky and Wernet (1995) suggest the use of a formal case briefing format to narrow the focus for examining pertinent information. From the Statsky and Wernet (1995) framework of case briefing, the researcher used the format as an investigating process, to review each court case concerning privileged communication. The framework for the formal brief format for each case briefing follows:

1. Citation: "Identifying information that will enable you to find a law, or material about the law, in a law library" (p. 450).

2. Key Facts: “A fact in an opinion is a key fact when a hold of the court would have been different if that fact had been different or had not been in the opinion” (p. 74).
3. Issues: “A question of law (legal issue, legal question) is a question about how one or more rules of law apply to the facts” (p. 95).
4. Holdings: “A conclusion of law reached by a court in an opinion is called a holding” (p. 73).
5. Reasoning: “The court’s reasoning is its explanation for reaching a particular holding for a particular issue in the opinion” (p. 112).
6. Disposition: “The disposition is whatever must happen in the litigation as a result of the holdings that the court made in the opinion” (p. 128).

Statsky and Wernet (1995) explained these central elements are used to aid in clarifying the immerging information when briefing a case. At the heart of this research study, this practice allowed the researcher to see the meaning of the opinion rendered. It also provided the researcher with a set of issues and outcomes of the opinion. The researcher assembled tables to assist in clustering issues and outcomes. For the purpose of this study, this allowed the researcher to refer to the precise elements without having to reread the case (Statsky & Wernet, 1995, p. 39). To aid in organization of the study, the researcher had multiple interactions with the case brief to help create tables to assemble, summarize, and organize the data.

Data Analysis

One critical evaluation of qualitative research is the analysis of data. Seale stated, “Is there adequate discussion of how themes, concepts and categories were derived from the data?” (1999, p. 190). However, the question demands how the researcher has examined for the “real

meaning or any possible ambiguities?” (Seale, 1999, p. 190). There must be multiple interactions with the text for it is these repeated crossing points with the text that create meaning.

Creswell (2007) outlined how qualitative research is the process where the researcher reaches assumptions by observing through a narrow theoretical lens. Specifically, the research addresses the research problem by studying and “inquiring into the meaning individuals or groups ascribe to a social or human problem” (Creswell, 2007, p. 37). The methodological strategies will have relevancy for the researcher’s procedures of analysis and interpretation of court case briefs. The research questioning inquiry through “the collection of data in a natural setting sensitive to the people and places under study” (p. 37), begins with a description of each court case, where each case brief is sensitive to both people, situations, and issues addressed by judicial rulings. Creswell (2007) indicated data analysis and the methodology coded data into detailed descriptions and emerging themes into categories will aid in interpreting the data for a larger meaning (p. 1).

Additionally, this research study followed Creswell’s (2007) multiple case approach by categorizing and collecting data in the same format of each court case in order to provide a detailed, sequential, logical analysis of each case law. This is important to the researcher where each case follows the identical pattern in collecting the data in several categories: title, year, issue, holding, reasoning, and disposition. With each case first being thoroughly examined independently, the case was organized by the primary legal issue. Stake (2006) advocated the same type of analysis where cases are first studied separately to gain knowledge and understanding from the view of caring professionals and their client’s privileged communication. Secondly, Berg advocated to draw meaningful data from each case in order to finalize, disaggregate, and formulate data into an analysis of thematic content of issues, outcomes, and

trends. Hatch (2002) indicated the researcher must utilize the structure of data analysis, which aims to organize, cross-examine data to unfold patterns and relationships, or to generate trends so the results of the findings can be communicated to others (p. 148).

Unit of Analysis

The unit of analysis used in case law data is a major strength of research driving the data through a narrow lens. The researcher inductively examined the qualitative data, one court case at a time, addressing issues and categories of issues, to “tell a story that unfolds over time” (Creswell, 2007, p. 40). The researcher concentrated on sorting through the concentrated law cases regarding the privilege in communications enjoyed by caring professionals and the promise of confidentiality for their clients. To aide in answering the research question, the researcher analyzed the nature of the privilege and the confidential characteristics of privilege and confidential information. The researcher was able to make generalizations from the categories of coded data resulting in an effort to answer the research questions. The challenge of this research study came from examining through a holistic approach the totality of court cases and creating a “timeline” of the development of caring professionals’ privilege and confidentiality for their clients. Creswell (2007) advocated a holistic approach as a useful form of analysis. From Creswell’s data analysis spiral method, the data are generated, organized, and interpreted then are coded and classified. This formulation helps support the interpretation and the unlocking of emerging principles; such as, constructing categories and sub-categories.

Likeminded to Creswell, Bengtsson (2016) stated, “All categories must be rooted in the data from which they arise” (p. 12). The researcher developed an Excel spreadsheet with the pertinent data as a concrete data source for themes to emerge as the data was being organized, along with each court case’s dispositional issue. In addition, the spreadsheet aided in the guiding

principles, and the progression of the development of privilege and confidentiality and the clarifying principles within legal proceedings.

Coding Qualitative Data

Once the court cases were finalized, the researcher searched for an understanding of the context and key phrases of the experiences in the case law, through the use of organizing and categorizing codes. Coding allowed the researcher to analyze the case law and form a system to organize the case law data. The system of coding assisted in documenting key issues and outcomes between trends. By identifying the sequence between key data gathered from the research, the researcher coded the qualitative data through an integrated method. From an integrated method approach, a framework of initial codes automatically developed. Therefore, a predetermined coding system begins the method due to all the case law falling under the key coding of caring professionals and their client's privileged communication. The standard of rigor of the study developed through perseverance and determination of following the study through as coding evolved and recurred as the court cases were reviewed line by line. "Great care must be taken to avoid forcing data into these categories because a code exists for them," according to Bradley, Curry, and Devers (2007, p. 1761).

Research Design

A qualitative research design approach details "purposefully selected" case law as the unit of analysis to bring clarity and focus to caring professionals and their client's privileged communication case law (Creswell, 2014, p. 189). As a form of analysis, data reduction will be used to create categories and subcategories focusing on isolated issues and outcomes detecting frequency of trends in case law. This supports channeling and strengthening outcomes and results in school counselors and students' confidentiality and potential privilege. The scope of

this research is the catalyst of the developmental progression of issues, outcomes, trends, and principles. From studying the cases' rulings, to organizing trends into categories of coding issues and outcomes, and to discerning principles from the researcher's interpretation will evolve the focus of this study. Bengtsson (2015) stated characteristics the researcher must consider in the planning process of the research includes the following:

The aim is to establish boundaries; the sample and unit of analysis (where the researcher's) enquiry the data first is directed toward its entirety, then decided by individual case; the choosing of the data collection method and the choice of analysis method; and the practical implications where the researcher organizes the data to give relevant outcomes from the study. (pp. 9-10)

Creswell (2013) indicated one interpretive framework used in qualitative studies is the "social justice theories, known as advocacy/participatory theories seeking to bring about change or address social justice issues in our societies" (p. 23). As a qualitative strategy, enquiring about everyday life experiences through using archival approaches, the researcher learns "by what has been produced or left by others in times past" results in the content analysis of the case law (Wolcott, 1999, p. 58). The qualitative approach of phenomenology is where the researcher gains a systemic perspective of narrowing case law by isolating emerging trends. The researcher then focuses on the phenomena from the case law while aligning them with the study's research questions. Creswell (2014) stated, "Qualitative research is especially useful when the researcher does not know the important variables to examine" (p. 50).

Qualitative Content Analysis Method

Keeping with the nature of qualitative research, qualitative content analysis is a systematic approach where the researcher analyzes the text using a system of categories. The research will use an inductive approach to support an understanding of this complex social phenomenon. Creswell (2009) as well indicated through the process of inductive analysis, the

researcher's codes emerge to build categories and trends from the data where codes will develop from codes the research expected, codes viewed as a surprise or unexpected, and codes that seem unusual to the research however are of importance (pp. 198-199). This is also one of qualitative research validity strategies to assess the researcher's soundness. Creswell described inductive analysis as a "bottom up" approach where themes will be developed as the qualitative data is being gathered and organized (2014). Characteristics of this guided theory analysis include a systematic "openness" and "complexity" where the research methodology is strictly controlled and follows a step-by step process in analyzing the materials (Kohlbacher, 2002). As the research process progresses, one focal approach of qualitative content analysis is the application of deductive analysis where categories unfold as "categories in the center of analysis" develop (Mayring, 2000). The concentrated idea gives explicit coding for each deductive category determined by the researcher where the text is coded exactly into categories of issues, outcomes, and trends.

By identifying specific categories and themes across all related court cases, the researcher uses both inductive and deductive reasoning. Inductive reasoning is used to locate the meaning of topics from the data to analyze. The researcher also uses deductive reasoning, where the researcher locates meaningful subjects or topics. The researcher has to be unwaveringly mindful of moving from the existing topic to test the hypothesis or research questions to create a clear and coherent picture (Berg, 2001). "Because qualitative research seeks to capture emergent concepts and is not overly predetermined in coverage, the potential for original or creative thoughts or suggestions is high", stated Ritchie and Lewis (2003, p. 43). By using a continuous integrated approach, both inductive and deductive reasoning, the collection of data focuses on

the development of emergent themes. This allows the researcher to see the complexity of themes developed over time, as well as, highlights unique themes within case law.

In this research, the counselors will advance their understanding through the use of a content analysis method by providing an in-depth analysis of a sequential timeframe. Krippendorff (2004) defined content analysis as “a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use” (p. 18). This is a tool that provides a practical and informative plan of action. It also establishes boundaries from the valid inferences of themes and categories. By dissecting the content, there will be no question about validity or ethics from the researcher’s role in the study. As a precaution, Statsky and Wernet (1995) emphasized the deterrent of “crane analysis” where the researcher extracts a statement by lifting it out of the case brief opinions without keeping the statement in the context of the case (p. 147). Building from a chronological case law perspective, it is imperative for the researcher to build the sequential court data base by examining inductively one court case brief at a time. This allows the researcher to be led into the complexity of themes and categories of codes from the court cases. Investigating the codes aids in the deductive examination of understanding the multifaceted themes and areas developed within the timeframe of privileged communication.

Key to qualitative analysis, is the critical challenge of the researcher’s use of constant self-reflection using a skeptical eye concerning the developing results from the data (p. 152). When the collected data unfolds trends through the use of flexibility, as stated by Elliott and Ladislav (2005) as a requirement of qualitative data analysis, the researcher controls their biases, values, and their background. Through this qualitative based research, the data collection will be analyzing and categorizing relevant data as a way of coding the facts. As reported by Zhang &

Wildemuth (2009), the researcher can draw conclusions from the coded data and from the categories of the coded data, and the researcher can then present his findings (p. 5). Applying the same type of data coding method, Berg (2001) recognized a reorganization research strategy, an open coding process in the analysis process. Here codes are used to archive the data from the case law briefs and reanalyze the law case briefs so that the researcher can reorganize the newly derived data.

In order to answer the research questions, the researcher must treat the court cases as interviews where the outcomes are highlighted. This is another integral component of qualitative content analysis. Additionally, using the court cases as interviews, enables the researcher to utilize the use of categorization to code and help frame the court cases into an understandable converging set of themes. The rules of law that sealed the court's decision in each court case will be examined with emphasis on each case law's outcome. It is this continuous reasoning, starting with the rulings and the deposition of the case established by the court's decision, through which the researcher gains a perspective of caring professionals and their client's privileged communication.

Grounded Theory Developing and Supporting Codes

The grounded theory approach benefits the researcher by developing a set of codes. Case law is reviewed by the researcher reading the case in *Westlaw*TM, where details and major key concepts become apparent, thus codes emerge by induction. At that time, comparisons of codes emerge to sharpen the researcher's understanding between case law and different concepts developed. Consequently, the researcher seeks out reoccurring concepts that are different from the original concepts. This produces themes where the researcher can review, revisit, and

develop categories and subcategories of the issues and outcomes gathered by producing a listing of characteristics coding from the case law.

Bradley et al. (2007) stated, “The comparison can assess whether certain concepts, relationships among concepts, or positive/negative perspectives are more apparent or are experienced differently in one group than in another” (p. 1762). Grounded theory materializes from the researcher’s continuous reflection to reveal concepts, recurring concepts, and new concepts. In addition, the strategy guides the researcher to make known outcomes and trends within the case law of caring professionals and their client.

One of the advantages of qualitative research is it is rich in text and explanatory in the nature of the text study where the research is seeking to confirm hypotheses about the phenomena. Qualitative research is conducted when a broad assumption needs to be narrowly explored “through a rigorous data collection” (Kornhaber, de Jong, & McLean, 2015). One strength of qualitative research is that it has the ability to reveal complexities of themes, where the researcher decodes themes by “collating, nesting, separating codes” (Miller & Hammond, 2015). Denzin and Lincoln (2011) described qualitative research as having “no theory or paradigm that is distinctively its own” (p. 6). As well, Denzin and Lincoln stated, “Nor does qualitative research have a distinct set of methods or practices that are entirely its own” (p. 6). Therefore qualitative research inherently uses a multi-method approach defined by a distinct set of means to add depth, richness, and complexity to the validity of the research (p. 5).

Case Study Research

One of the methodological frameworks of this research is case study research (CSR). Rowley (2002) stated case study research is an empirical inquiry giving the researcher “the ability to undertake an investigation into a phenomenon in its context” (p. 18). This research

method involves using case law to inductively, as well as deductively, produce an analytical generalization of the development of privilege and confidentiality. In addition, this research method is an encompassing theoretical framework that aids in discovering the development of caring professionals' privileged communication impacting school counselors within the education field. Rowley (2002) stated,

The most challenging aspect of the application of case study research in this context is to lift the investigation from a descriptive account of 'what happens' to a piece of research that can lay claim to being a worthwhile, if modest, addition to knowledge. (p. 16)

This is a descriptive form of research used as a tool for the "preliminary, exploratory stage of a research project" (p. 16). Another method of research used in the development of privileged communication is the investigative method, where the researcher interacts through an inductive process with case law through a detection context for factual and reliable court law cases (Park & Park, 2016). Nonetheless, case study research offers a systematic, analytical approach to gather the collection of data material.

As integral components of qualitative content analysis, Kohlbacher (2002) included integration of context, the integration of different materials or evidence, and the integration of quantitative steps of analysis (5.2.3-5.2.5). The integration of context is first developed as the text of the content is understood through interpretation and analysis of the data. Next, the integration of different evidence and the context of the text were observed by the researcher. Lazar focused on the "how" and "why" of the law case studied must be used, with the research questions answering "how" and "why." As a framework of themes developed from the data, the data should reflect a "chain of evidence" through cross examination (Rowley, 2002, p. 23). The principles of case study analysis include using all relevant evidence, considering all major

interpretations and rival interpretations, answering the most significant aspect of the research, and drawing on the researcher's prior knowledge of the subject while avoiding biases (p. 24).

Case study, as a research strategy, is broadly being used across social sciences and especially in law because it “focuses on contemporary events” (Yin, 2003, p. 5). Yin (1984) stated a case study, as an empirical inquiry, allows the researcher to “investigate a contemporary phenomenon within its real-life context” where the “boundaries between phenomenon and context are not clearly evident” (p. 23). For this qualitative research, case law contained in the United States regarding caring professionals' privileged communication was analyzed for trends from the opinions rendered by the courts. According to Lofland, Snow, Anderson, and Lofland (2006), archival records, written material such as case law transcripts, are sources of rich data and can significantly deepen field studies (p. 89). To answer the research questions effectively, qualitative research studies must meet rigorous standards. Creswell (2007) advocated a holistic approach as a useful form of analysis.

Cross Case Analysis

The research of caring professionals and their client's privilege covers a small span of time with nearly 50 court cases. The cross case analysis is an effective method the researcher uses to conduct an in-depth study of the development of privileged communication. Miles and Huberman (1999) noted first, cross case analysis enhanced generalizability and secondly, gives it an in-depth understanding and explanation (p. 173). Cross case analysis considers the cases as a whole in its entirety where the researcher looks for cause and effect within each individual case. Examining the study to form a more generalization of each of the cases, the researcher looks for similarities and associations across cases. Yin (1984) advocated a replication strategy as a theoretical framework where the researcher studies one individual case, and then the following

cases are explored to locate patterns. For this research purpose, the case work was recognized as “crisscrossed” reflection where the collected case briefs were observed and interpreted by one issue at a time and then interpreted against other case briefs (Stake, 2005, p. 450). Qualitative research is sometimes viewed as a casual explanation of events. Stake (2005) specified that more frequently its events have multiple sequence and have several contextual meanings more than usual (p. 450). Once the researcher assessed the primary case data, the categories were observed to note patterns between issues to build a logical chain of evidence. This aimed to direct the researcher’s focus to the multiple sequences of cases and the contextual data as a significant characteristic and description of documented case law.

Miles and Huberman (1999) emphasized that “meta-matrixes are master charts assembling descriptive cases communicated in a standard format” (pp. 182-183). Identifying the purposeful content and progression of the meta-matrix permits the researcher to move from one single case to a cross case analysis by observing and determining cases sharing similar characteristics or cases having opposing arguments. While displaying cross-cases through a descriptive table, one can draw conclusions by making contrasts, comparisons, and partitioning trends. Specifically the *Westlaw*TM sorts cases from the United States Judicial System by topics and identifies these topics by a key number. For the purpose of the research study, all cases categorized by the *Westlaw*TM as relating to privileged communication were evaluated for variability in the court’s ruling decisions. Case studies categorized from the *Westlaw*TM were used to create a brief summary of each court case, both state and federal, court rulings. The full text of the identified court case concerning privileged communication was retrieved from the *LexisNexis*[®] online law database. Embedded in the full text were references to other related or cited cases, in agreement or in opposition of the current case. Also, these references assisted the

researcher in finding similar categories of coding or new codes to benefit the chronological development of case law study concerning caring professionals and their client's privileged communication. During data collection, documentation of the full text of the court case allows for detailed and substantive knowledge and understanding of each individual court case ruling as well as to examine opposing opposition of the court ruling. Court cases are listed by a chronological listing by the year the court case ruling was decided and by the level that decided the ruling of the court case.

Summary

This chapter describes the methodology for this study, aimed at understanding the issues, outcomes, and trends in case law about privilege in communications given to members of the caring professions, including school counselors, and the guarantee of confidentiality that they may give to their clients. A paradox exists in the literature, where school counselors are included among those professions identified ethically as the caring professions, but have generally not been accorded privilege in their communications with their clients--school children. This research study deploys qualitative, document-based research, using court cases about privilege and confidentiality for the caring professions, from 1956-2014, as the source of data. After briefing selected cases, the case briefs were then reduced to data for qualitative analysis.

CHAPTER IV:
DATA AND ANALYSIS

Introduction

This chapter includes a detailed description of 35 court cases concerning privileged communication and confidentiality for caring professionals. The data collection, following the standard format for case brief analysis by Statsky and Wernet (1995), addresses the key facts, issues, holdings, and disposition of each court case. The cases are listed from key numbers described by West Law® Caring Professionals in categories described in the definitions of this research as “Caring Professionals.” Each case brief includes the case citation; key facts; issues; the holdings of the court; the reasoning behind the court’s decision; and the final disposition of the case.

Case Briefs

311 Professionals in General

Citation: *Poole v. Hawkeye Area Community Action Program, Inc.*, 666 N.W.2d 560 (Iowa 2003).

Key Facts: Latonya Poole and Richard Mallard, the plaintiff-parents of three children, sued the owner and manager of their rental house. The suit was brought on behalf of their three children, Xzavier, Quvondrick, and Victor Mallard, for the alleged damages of exposure to lead in the rental house. They brought suit against Mercy Facility, Inc., and Hawkeye Area Community Action Program, Inc., an Iowa City home owner and manager. The Poole-Mallard family alleged that the family was exposed to high levels of lead for the three months they had

been living in the home. The suit was for breach of contract and breach of implied warranty of habitability for both compensation and punitive damages. The case was heard through a bench trial without a jury from March 27 until April 7, 2000. On August 14, 2001, the Supreme Court of Iowa ruled in favor of the landlord and manager and against the plaintiffs-parents, the Poole-Mallard family, on all claims due to substantial evidence. The substantial evidence was that the younger children had high lead levels in their bones. The probability of the high lead levels came before the children had reached the age of three, and the tenant-children were older than 3 years when they lived in the rental property housing. Tenant's older children's school records were admitted in court due to questions of the possibility of a genetic cause for the younger children's symptoms of high lead poisoning. The older children already had evidence of concern due to their school performance. The plaintiffs' argument, due to the 16-month trial delay, was that the case should have been reversed and remanded. They stated that the delay of the trial caused the court's inability to recall evidence of the complex toxic-lead court case. The court admitted the school records as evidence. The tenants, the Poole-Mallard family, appealed.

Issues: Did the courts err in whether the privilege statute prohibited mental health therapists from disclosing the older children's confidential school records and psychological records?

Holdings: No, the therapist-patient privilege prohibits disclosure of confidential communication. However, the therapist-patient privilege did not apply to the older children's school records and psychological records. The records were only prepared for the purpose of sharing information with outside professionals and were not viewed as being confidential.

Reasoning: The Supreme Court of Iowa reasoned the records were prepared to share information with others outside the therapist professional relationship and were not to be held

confidential. The privilege, state of confidential communication, did not apply to the older children's confidential school records. The trial court's 16-month delay did not warrant a review where the Supreme Court decides how far to use the lower court's judgment or a new trial. The older children's school records were admissible in court; and the judgment was supported by substantial evidence. Privilege to medical, health care, school guidance counselors, and mental health professional records are included in Iowa's Code, Section 622.10 (2001). Also, Iowa's Code, Section 22.7(1) (2017) includes confidential school records. School records were prepared to share information with others, specifically the school. The court believed the clinical psychologist, Dr. Moore, and the patient's communication were not intended to be confidential. The Department of Social Services scheduled the psychological testing and interview with Dr. Moore for the purpose of making recommendations concerning the parents' custody of their daughter. The school record issue was that the younger children exhibited the same experiences as the older children with similar behaviors and experienced educational frustration. The clinical psychologist said the same thing the Grant Wood Area Education Agency reported on the psychological test and reports. School records also included the school professional and individualized education program provided under federal law. Due to a 16 month delay, after the case was submitted, the plaintiff filed a complaint.

Privilege for academic information is not covered under state laws. Iowa Code, Section § 622.10 (5) (2001) from the Supreme Court of Iowa claimed for counselors, mental health professionals, and physicians not to disclose privilege information in trial testimony. Iowa's Court Rules Code § 22.7, stated school records have to be kept confidential unless ordered by the courts. This ruling came from Iowa's Freedom of Information Act. In this court case, the Supreme Court of Iowa applied sections Court Rules Code § 622.10 (5) and section Code § 22.7

did not allow the school records of the victim's sibling to be brought into the court case. However, under section Code § 22.7 (1) the court ordered a subpoena to allow the jury to observe the records for relevancy and material. Therefore, the Supreme Court upheld the lower court's ruling of allowing the school records admissible.

The plaintiffs asked for the ruling to be reversed and sent back to the lower court. Then, the courts established under Iowa Court Rules Code § 22.10 (1), that all trial courts report to the Supreme Court monthly. If and when matters taken under advisement were past 60 days, the Court asked for the lower court to submit an explanation for the delay and an expected date of decision. The Supreme Court Iowa (*State v. Kaster*, 469 N.W.2d 671 (1991)) purposed this ruling was designed to provide accountability for cases still under advisement. The Freedom of Information Act gives a person access to federal records unless the records are protected by a privilege.

With the case being about lead poisoning this required a factual and relevant showing of evidence. The school records of the siblings must be observed due to the court subpoena (New York Supreme Court, *Anderson v. Seigle* , 175 Misc.2d 609 (N.Y.Supp.1998)). Iowa's Rule of Evidence 401 establishes the courts have access to records that may have facts of the reason the defendant's actions were the consequence to the facts as being evidence shown (Court of Appeals of Iowa, *State v. Rodrigues*, 636 N.W.2d 234 (2001)). The courts admitted the school records and did not abuse the court's discretion. The courts claimed the parents should have realized the records were not projected to be confidential records (*State ex rel. Leas in Interest of O'Neal*, 303 N.W.2d 414 (Iowa 1981)).

An expert gave testimony that the younger children's symptoms may be due to younger children's genetics not the time exposed to the lead. Dr. Moore's evaluation of the student was

for the sole purpose of the Department of Social Service's evaluation for the parent to regain custody of their daughter. *Howard v. Des Moines Register & Tribune Co.*, 83 N.W.2d 289 (1979), Iowa Supreme Court, concerns open records covered under the Freedom of Information Act.

Iowa's State Freedom of Information Act excludes school records from disclosure unless school records are court ordered. The subpoena was a sufficient court order allowing the court the opportunity to obtain relevant material from the school records. The Supreme Court concluded that the court admitting the school records did not abuse its discretion. The Freedom of Information Act excludes school records from being disclosed unless they are under a subpoena or order by the court. School records of the older children were admissible due to possible genetic cause of the younger children's symptoms and due to the older children's performance in school. The Supreme Court reviewed the older children's school records for abuse of the trial court's admission of the school records. The Supreme Court held that the 16-month delay between the trial and the ruling was not a reason for a new trial. The subpoena was adequate to court order the school records to access relevant material.

Disposition: The Supreme Court reviewed the evidence of the district court from the bench trial and was favorable to the trial court's decision. They would review the evidence for abuse of the trial court's admission of the school records from the older children. Looking for the lower court's sound discretion of decision-making skills is used if the records do not support the trial court's determination of the facts. The findings of facts from the bench trial are confirmed if there is substantial evidence for support.

Citation: *Ramsey v. State*, 56 P.3d 675 (Alaska 2002).

Key Facts: On February 19, 1997, at Bethel High School in Bethel, Alaska, the defendant, Evan Ramsey, entered the high school building with a .12 gauge shotgun. The shotgun was hidden under his jacket as he walked to the student commons area. Joshua Palacios, a fellow high school student, was seated but he turned around and stood up. Ramsey shot him in the stomach. Two students sitting beside Palacios, S. M. and R. L., were also hit with the pellets from the gun. Palacios was on the floor.

The art teacher, Reyne Athanas, heard the shots and entered the hallway. She saw Ramsey shooting at the ceiling. She and Robert Morris, another high school teacher, attempted to talk to Ramsey and convince him to put the gun down. Ramsey aimed the shotgun at the two teachers; however, he did not shoot. Ramsey walked away and headed toward the main office, where the school administrator's offices were located. The school principal, Robert Edwards, was walking through the building, looking for Ramsey, because he had heard Ramsey had a shotgun in the building. As Edwards returned to the office, he found Ramsey. Ramsey pointed the gun at Edwards. Edwards turned to run back into the office. Ramsey shot the principal in his back and shoulder. The principal died from the gunshot wounds.

Bethel police arrived. Ramsey fired in the police officers' direction one time. There was a gunfire exchange between Ramsey and the police officers. After a few minutes, Ramsey gave up and was taken into custody. At trial, the State's theory was that Ramsey was seeking revenge on Palacios and Edwards. The State gave testimony that Palacios and Ramsey had got into a fight two years prior in 1995. The state's evidence was also a letter found in Ramsey's bedroom concerning Edwards, the school principal, as one of his intended victims. At trial, Ramsey's

defense was that he was suicidal and had no intention to commit first-degree murder or first-degree attempted murder.

At the jail, if the defendant had admitted to being suicidal, the nurse would have alerted other officers to guard the defendant. The defendant could be found guilty on the attempted murder charge only if there was intent to kill the student, who was a bystander at the time the fellow high school student was killed. Alaska's statute for first-degree murder states that the defendant is guilty of murder if the defendant's intentional acts are to cause death to another person or to take the steps to cause death of a person. Alaska law also provides for separate convictions of the defendant for each victim killed or assaulted. Additionally, the defendant could be found guilty of intent to cause harm to the bystander. This Act faces a charge of second-degree assault. At a second interview, conducted at the medical center, Nurse Ford sat at a desk with officers in the room for safety reasons. Ramsey again denied having suicidal thoughts--even for the past year.

The Alaska Court of Appeals, on October 11, 2002, convicted the defendant, Evan Ramsey, on two counts of murder in the first degree, one count of attempted murder in the first degree, and 15 counts of assault in the third degree. Ramsey was sentenced to 2,010 years in prison. The defendant appealed his conviction and his sentencing on the composite term of 2,010. He appealed his sentence on the argument that the sentence was excessive. The court affirmed part and reversed part. The defendant appealed the court's decision.

Issues: Did the court err in excluding Ramsey's statements made to the nurse that he was not suicidal, since the psychotherapist-patient privilege applied?

Holdings: No, the statements made to the nurse were for discovery--to learn whether the defendant was suicidal or not.

Reasoning: Court of Appeals of Alaska asserted the reasonable expectation of confidential communication is dependent upon the person who has been consulting--such as a psychotherapist, lawyer, or clergyman. The parties must believe that confidential communication is to remain private, and the privacy of the privileged communication must be reasonable. The purpose of an intake nurse's private conversation was to determine if Ramsey was feeling suicidal or was at risk of having suicidal ideations. The nurse would have alerted other police officers if Ramsey had been suicidal to minimize the risk for Ramsey. The privileged communications were heard by other people, as police officers, in the correction facility room. This would discredit Ramsey's claim that the communications were privileged and confidential.

The Court of Appeals held that the defendant's alleged physical and sexual abuse, to establish that the defendant was suicidal but not homicidal, was required to be delivered by expert testimony. The court also held that the psychotherapist-patient privilege did not exclude the statements made to the nurse, after his arrest, that the defendant was not suicidal. The courts also held that the defendant killed a fellow high school student but could be found guilty only of attempted murder if he had specific intent to kill the fellow high school bystander. Alaska Statute § 11.81.900 (a) (1) (2017) declares that where there is intent that has caused a specific result it is an element of the offense. The statute also indicates the intent should not be the defendant's only objection to the intention. The doctrine of Alaska Statute § 11.41.100 (2017) stated first degree murder is with the intent to cause death of another person. Plus, from the Alaska Supreme Court (*State v. Dunlop*, 721 P.2d 604 (Alaska 1986)), if the defendant kills and injury is brought on others, then the law separates every conviction of homicide or assault for every single victim of the defendant's act. One part of Ramsey's defense was the claim that he was suicidal because he was not intending to kill anyone at school. In the rebuttal of the testimony, the Department of

Corrections' intake nurse testified to Ramsey's mental state. Ramsey gave testimony to the intake nurse when he entered the Department of Corrections' facility after he was arrested.

Alaska Rule of Evidence 504(b) (2013-2014) purposes that a patient with a diagnosis of treatment for a physical, mental, or an emotional condition has a right not to allow disclosure of the confidentiality privilege. The privilege applies to confidential communication and is not intended for disclosure to a third party unless third party is for the purpose treatment of the client, according to Alaska's Evidence Rule 504(a) (4) (2013-2014). The Alaska Evidence Rule 503(b) defines the attorney-client privilege, and Evidence Rule 504(b) defines the psychotherapist-patient privilege. However, Nurse Ford's statements were not viewed as confidential, due to her purpose to determine whether the defendant was suicidal. Nurse Ford would have treated the information as privileged had the defendant been determined suicidal.

The premise that the defendant's intent was due to past alleged physical and sexual abuse was not self-evident. Also, a reasonable person would not believe that the defendant's conversation with the registered nurse at the jail was going to be confidential. As applying the reasonable person application test, the psychotherapist-patient privilege did not apply. *Plate v. State*, 925 P.2d 1057 (Alaska App.1996), from Alaska's Court of Appeals, concluded that a confidential communication is confidential when the expectation of the conversation being confidential is established by the person in consultation with by a lawyer, psychotherapist, or preacher.

Disposition: The court reversed Ramsey's conviction of attempted murder in the first degree. All other convictions were affirmed.

Citation: *City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11 (Iowa 2000).

Key Facts: In September 1995, the City of Cedar Falls, Iowa had several elementary schools to attend an annual safety program. During the safety program, called “Safety City,” two kindergarten classes of students were participating in the program. The safety program was conducted by the police and fire divisions of the City’s Department of Public Safety, Sartori Memorial Hospital, and Cedar Falls Utilities. The police department was in charge of the Safety City program. Two kindergarten classes attended the City’s Recreation Center at the same time during the course of the week. One class would attend the presentation by the fire and utilities personal inside the building. Another class would attend the presentations where the police and hospital presented outside the building in the parking lot. The kindergarten classes would then exchange places. Using the golf cart, Sergeant Wilson simulated a motorist while Officer Eich pretended to be a careless pedestrian. Sergeant Wilson also pretended to be a stranger enticing children to the cart with candy for stranger danger. Officer Magee would narrate the scenes and give a safety lesson in his uniform.

On September 15, 1995, Derek Bellman was among the 18 member class that went outside to see the police and hospital presentation. Katie Duax was the teacher in charge along with two parent volunteers. After the presentation from the officers, the students could visit the ambulance and other emergency vehicles. Several of the students went to the unattended golf cart, while one parent observed them with no alarm. One student stepped on the accelerator and activated the electronic motor. The golf cart pinned Derek against the ambulance. Derek Bellman obtained injuries from a golf cart used during one of the presentations. Derek died from the injuries.

The kindergarten student’s estate brought wrongful death action against the City of Cedar Falls. The student’s death was due to a golf cart accident at a fieldtrip safety program. After

admitting liability, a judgment was entered against the City of Cedar Falls. The City sought contributions from the Cedar Falls Community School district. The jury determined the school district and the city shared fault for the accident. The City of Cedar Falls cross-petitioned against both the school district and the hospital. The City of Cedar Falls admitted to the fault. A trial was set on the damages where the jury's verdict was for the estate of the kindergarten student. The jury awarded Derek's estate \$909,260.51. A second trial followed and the City claimed fault but the school district appealed.

Issues: Did the school district have immunity from liability, and were the police officers' statements during the debriefing sessions protected by the mental health professional-patient privilege?

Holdings: No, the Supreme Court of Iowa held that the school district was not immune from liability concerning the kindergarten student's wrongful death action. The courts apply a two-step analysis of failure to act and use ordinary care for both supervising students on the field trip and a school board policy implemented for field trips. Looking if the district's actions fell within the discretionary function, the courts looked at whether it was a matter of judgment of the acting employee and whether judgment was a challenged conduct that the discretionary function exception is supposed to shield (Iowa Court of Appeals, *Goodman v. City of Le Claire*, 587 N.W.2d 232 (Iowa 1998)). The district was not immune from liability for Goodman had not been met on either one of the two requirements. The district failed to have a policy for fieldtrips and the district failed to exercise ordinary care in supervising classes.

Due to the fact, under statute exempting employees from liability occurs if damages were caused by a third party, an event or property not under municipality's control. The school district was liable for the torts from both the officers and the employees unless it falls under certain

exceptions. This case argues the third party exemption applied placing blame on the third party. There was a third party liability with an exception. The children were under the district's supervision and control, and immunity does not apply.

Negligence of liability comes when there is a breach of duty of care and there is a legal or a proximate cause of the injuries sustained (Iowa Supreme Court, *Hartig v. Francois*, 562 N.W.2d 427 (Iowa 1997)). The proximate cause includes the defendant's conduct factually caused the damages, and the requirement for the defendant to be legally responsible due to a policy of the law (Iowa Supreme Court, *Hasselman v. Hasselman*, 596 N.W.2d 541 (Iowa 1999)). The proximate cause of the accident was the district's failure to adequately supervise the children who climbed onto the golf cart. Also, Dr. Edward Dragan, an educational administrator expert, claimed the teacher, Mrs. Duax, being a first-year teacher at North Cedar Elementary school, the age of the students, and a fieldtrip at the beginning of the school year were all reasons for the principal to conduct a meeting with all of the teachers attending the fieldtrip. The teachers should meet with the parent volunteers and assign students to each parent volunteer and explain in detail the agenda and format of the field trip. The district also claimed immunity from liability based on 2014 Iowa Code, Title XV, Chapter 670 (2017). Chapter 670 governs tort liabilities of governmental subdivisions that include school districts. The jury was not told that the supervision at the safety program was given to the parent volunteers. From the Iowa Code 2017, Section 670.2, liability imposed, the district could not claim parent volunteers as considered to be employees. The court questioned was it ordinary care if one of the adult volunteers would have intervened if they had noticed the children on the golf cart. Ms. Duax testified she saw children on the golf card and instructed the children to get off. Without the children on the golf cart, the cart would not have started and moved.

The actual cause, the cause-in-fact component, is established because of the defendant's conduct. But the district's negligence was a substantial factor for there was a foreseeable injury with the children playing on the golf cart to bring about the accident. The district's negligence of duty to care was a substantial factor. *Hayward v. P.D.A., Inc.*, 573 N.W.2d 29 (Iowa 1977), Iowa Supreme Court, purported the school district had a substantial factor in the accident happening and the district's conduct was the cause of the harm. The defendant must show a substantial factor in bringing about harm to satisfy the cause-in fact component, as being the actual cause of the injury. *Boham v. City of Sioux City, Iowa*, 567 N.W.2d 431 (Iowa 1997), Iowa Supreme Court, purported when evidence is challenged by a particular party, the jury examines to see if the evidence supports the findings. The statutory violations come from the defendant's conduct in violating both the foreseeable consequence of harm and the proximity cause of the educator's conduct in seeing the harm that violated the duty of care, in the Supreme Court of Iowa (*Scoggins v. Walmart-Stores, Inc.*, 560 N.W.2d 564 (Iowa 1997)). The trial court's refusal to give the school district reason as to how the City was negligent was not an error and not prejudicial. The school district claimed the city's contribution in the accident; however, the City had no right of indemnity. The City's duty to the district and to the children is to have a safety program. The School district's duty to the City was to supervise the school children. From the Supreme Court of Iowa (*Hollingworth v. Schmikey*, 553 N.W.2d 591 (Iowa 1996)), school districts must exercise the care and standards as a parent of ordinary wisdom and common sense under similar circumstances. The district's responsibility for care, supervision, and control for its students equaled the same standard of care as a parent would conduct in an ordinary comparative situation (Supreme Court of Iowa, *Godar v. Edwards*, 588 N.W.2d 701 (Iowa 1999)). The district was negligent in the supervision of the children; however, the district's liability was not

based on the City creating a dangerous condition or the district's failure to discover and foresee the dangerous condition.

The privileged communication occurred between the licensed mental health professionals and the police officers later after the accident. The mental health professionals were assisting the officers to deal with the traumatic event. The debriefing counseling sessions the police officers attended were considered professional communication privilege. The district claimed the communication was not confidential due to the number of police officers present. However, *In re Grand Jury Investigation* (918 F.2d 374 3rd Cir. (Pa. 1990)), the United States Court of Appeals (Third Circuit) protects group counseling, plus the officers were obtaining treatment. A party seeking to disclose privileged communication, as the police officers, must show the privilege exists and applies. When a privilege is based on a statute, it is narrow in reach. Third parties were present when those either received counseling or those assisted with the counseling services. The communication privileges which exist between mental health professionals and police officers are (1) a professional relationship, (2) acquired information obtained during the relationship, and (3) the information necessary for helping the police officers through a traumatic event (Iowa Supreme Court, *State v. Deases*, 518 N.W.2d 784 (Iowa 1994)). However, professional communication privilege may be lost if made in third parties' presence. Iowa Supreme Court, *State v. Tornquist*, 120 N.W.2d 483 (Iowa 1963), states that privileges may be lost if communications are made in front of third parties. The communications were not on a one-to-one basis for the privilege is covered under group counseling practices. The sessions not conducted on a one-to-one basis do not defeat the privilege (*In re Grand Jury Investigation*, 918 F.2d 374 3rd Cir. (Pa. 1990)). The courts concluded the privilege stands.

The Supreme Court examined records to support meaningful substantial evidence taking in consideration all the reasonable inferences made to the jury. The court looks at the proximate cause through the factual issues to resolve negligence. The school district's negligence was supported by substantial evidence. In the student's estate's wrongful death action there were eight adults in close proximity of the class. There was only one teacher supervising and responsible for the school children. The jury found failure of supervisory responsibility for the principal and the teachers. Negligence or liability is not imposed unless there is proximate cause of the injury as in a breach of duty. Proximate cause was also due to the school board not having a policy for school field trips. The supervision of the Kindergarten class at the safety program was also proximate cause for the death of the student. It was foreseeable for the supervision of the children getting on the golf cart and it was foreseeable for the kindergarten children to be interested in and curious about the golf cart. To show a substantial factor of neglect, the plaintiff had to show the defendant's conduct was a substantial factor. The general rule says an actor's conduct is legal cause of harm if there is a substantial factor in the defendant's conduct to bring about harm and if there is no other rule to relieve the defendant of his liability due to the way the negligence occurred.

Reasoning: The District Court from the jury's verdict found the City 66% at fault and the school district was found to be 34% at fault. The district claimed immunity because the police officer left the keys in the golf cart. Proximate cause has two components: the defendant's conduct caused the damages; and the defendant must be legally responsible to the policy of the law. The plaintiff must prove the damages would not have happened if it were not for the defendant's negligence. Proximate cause of the accident was due to the district's failure of supervision. From the district's policy manuals, principals are to delegate supervision for

appropriate activities and school functions. The principal failed to delegate supervision through a conversation with the teacher about the field trip. Therefore, the teacher's judgment of her supervisory duty of the kindergarten students was not shielded. There is a two-step test to determine if a challenging action is within a discretionary function exception for making the action a statutory immunity from tort liability. The court is required to look at the two-step test. The first step is whether the employee's actions are a matter of choice. The second step involves if the element of judgment of the conduct is a kind that the discretionary function exception shields. If the answer is no to either one of this two-step process, then the discretionary function exemption is not valid.

The district argues immunity (Iowa Code, Section 670.4(10)) from any liability from the student's death. The courts conclude the section does not give protection from this lawsuit. The district then claimed Iowa Code, Section 670.4(3) exemption. This section is a discretionary function immunity claiming the immunity basis on exercise or failure of exercise of a discretionary duty. The discretionary power and duties protects governmental actions that are made on public policy that are rooted in social, economic, and political reasons. The discretionary function exception entitles governmental entities from tort liability covered under statutory immunity. The discretionary duty on the employee of the municipality questions whether or not the discretion is abused. The court views negligence two ways: whether the action was a matter of judgment or the employee's choice of action and whether the judgment was to be shielded. However, the courts claimed the school district is responsible for the supervision of children. The principal's judgment was on what supervision should have been applied to the fieldtrip. However, it was not a matter of judgment as to the amount and type of supervision to apply. The courts found the discretionary function exemption does not apply where focus was on

the first step. The second factor of the discretionary function exception protects governmental actions which are made on public policy, on social economics, and political reason. The teacher's judgment for supervising her students was not based on these reasons. Therefore, there is not protection from the exception. Through the second step, the immunity did not apply and continued to give the liability to the school district. The school district must put into action the same care toward school children as a parent would in an ordinary situation. Contribution is claimed when two or more wrongdoers, as joint tortfeasors, commit a wrongful act that brings harm or injury to another person, are liable for third-party damages because they share a burden of proof.

Disposition: The Supreme Court of Iowa found the district court had no prejudicial error and the court affirmed the district court's judgment concluding the school district was not immune and was liable.

312 Psychotherapist

Citation: *People v. Meza*, Not Reported Cal.Rptr.2d (Cal.App. 2002).

Key Facts: The victim, O., age 12, lived with her mother and her aunt, Leticia M., and O. and her mother shared the same bedroom. The mother's boyfriend, the defendant, Roberto Arreguin Meza, often visited their home. In September and October 1999, the defendant, visited the home and spent-the-night. O.'s mother, Maria M., went to Mexico on September 20, 1999. O.'s mother returned from Mexico on October 2, 1999. However, before her mother returned home, the defendant came to O.'s room and placed his hand on her private parts. O. asked the defendant what he was doing and he stated he was covering her up. She told him to get out of the room and he left. The next morning, O. told her aunt, Leticia. She also told her friend,

Guadalupe, about the incident. Her friend, Leticia, thought O. was referring to Leticia's son as touching her.

O. told her school counselor, Patricia Macie, in January 2000. Macie reported the incident to the Child Protective Services. Macie continued to be O's counselor. On February 16, 2000, Jose Barrera, a detective interviewed O. O. told the detective her Aunt Martina was also in the bedroom when the defendant touched her rubbing her up and down. According to the victim, O., she looked at the television and saw that the time was 2:00 or 2:30 a.m. when the incident occurred. The defendant denied the allegations.

On January 27, 2000, O. was interviewed by Officer Randy Pesce. O. told the Officer the defendant placed his hand on her pants and touched her private parts. O. stated the incident happened at 6:00 a.m. on October 1, 1999. Then on July 3, 2000, an investigator, Nancy Romero, from the public defender's office interviewed O. O. told the investigator she felt someone's hand touching her. She stated she did not know the time the incident occurred. O. did not talk to the defendant. On August 17, 2000 another detective, George Rivera, interviewed O. She told Rivera the defendant entered the room and the defendant moved his hand in a circular motion. The victim stated she then called out for Guadalupe and the defendant got mad. O. stated she turned on the light during the touching. O. told the detective she lied about her Aunt Martina being in the bedroom. The defendant's friend, Theresa Abrego, testified that the defendant was trustworthy, and she even trusted him with her own children. Also, Maria Ramires, another friend of the defendant, testified. She stated she had never seen inappropriate behavior from the defendant with her students. The two testified they did not know of him to lie.

The defendant claimed the disclosure of the school counselor's notes was not allowed. The defendant also stated the trial court abused its discretion. The defense counsel subpoenaed

the confidential communications of Macie's notes. The confidential communication of Macie, a licensed school counselor, was brought up to be excluded. The prosecutor demanded the licensed school counselor's communication was privileged under the California Evidence Code § 1010, a certified school psychologist, and the California Evidence Code § 1035.2, sexual assault counselor.

Issues: Did the court err on not allowing the sexual assault counselor-victim privilege nor the psychotherapist-patient privilege to apply to the school counselor's conversations and notes with the victim? And did the court err when reopening the case calling the school counselor as an expert witness?

Holdings: No, the sexual assault counselor victim privilege does not apply to school counselor's communications with victims due to lewd conduct on a child under the age of 14. Also, the psychotherapist-patient privilege does not apply to the school counselor's notes. The trial court did not abuse the law because the courts exercised sound legal decision making in calling the school counselor as an expert witness.

Reasoning: The California Court of Appeal, Sixth District, ruled the school counselor's communications were not held privileged. The defense counselor sought to have disclosure of Macie's notes. She stated the notes were privileged and had not met the California Evidence Code EVID Sections § 1010, a certified school psychologist. The counselor did meet the statutory definition of psychotherapist; however, the counselor was a school employee with a mandate to report child abuse and neglect under the Child Abuse and Neglect Reporting Act. Counseling the student as a victim of sexual assault was not the primary responsibility of the school counselor, and the counselor was not certified in sexual assault victim counseling.

The trial courts did not disclose the school records from E. A. Hall of the Pajaro Valley School District, the Child Protective Services records, nor the school counselor's records of Patricia Macie. The courts found none of these records contained evidence pertinent to the declaration from the defendant. The records were not revealed. The courts claimed they would base disclosure on the witnesses' testimony and claimed they would consider admission.

From the Supreme Court of California (*People v. Superior Court*, 80 Cal.App.4th 1305 (Cal.App. 2000)), the court outlines the principle covering their parties, for a criminal defendant, the party seeking disclosure of evidence, must show good faith that the facts will facilitate the defense. California Penal Code Sections § 1326 and Code § 1327 set procedures for both the prosecutor and the defendant to obtain records which a third party possesses. A subpoena does not force the victim's prosecution to provide the defendant with the confidential material but does require an *in camera* inspection for the defendant. Nevertheless, a criminal defendant has a right to third party records to show the requested information will facilitate the facts for a fair trial. However, it is not absolute in criminal cases for a right of discovery of material evidence. The unprivileged information (*People v. Gill*, 60 Cal.App.4th 743 (Cal.App. 1997)), is permitted to the defendant if it seems to develop reasonable material that will assist the defendant's defense.

The defendant claimed that Macie's notes did not apply the sexual assault counselor-victim privilege. California Evidence Code Section § 1035.2 resolves a sexual assault counselor is a person who holds a training in the counseling of sexual assault victims and becomes certified and has other specified requirements. However, the trial court did not establish whether Macie was a sexual assault counselor. In court, Macie testified as a Pajaro Valley Unified School District's school counselor. Her job description involved working with families and counseling

students with only 25% of her counseling duties being involved with sexual abuse. Macie did not have a certificate in counseling sexual assault victims. Macie did not meet the statutory definition of a sexual assault counselor-patient privilege. Therefore, the privilege did not apply.

The defendant claimed the psychotherapist-patient privilege was also not applicable to Macie's notes. The defendant seemed to acknowledge that Macie met the statutory definition of psychotherapist, California Evidence Code Section § 1010. Code Section § 1010 asserts a school psychologist holds the credentials the state has authorized. However, the defendant claimed the privileged information under the Child Abuse and Neglect Reporting Act, California Penal Code §§ 11164, did not apply.

The Code's Reporting Act protects children from child abuse by requiring the psychotherapist to report incidences immediately. California Penal Code Section § 123115 positions the psychotherapist-patient privilege does not apply where child abuse is reported. The psychotherapist-patient privilege is protected by statute, California Criminal Evidence Code §1014, EC. The privilege is a constitutional right of the patient's privacy (Supreme Court of California, *People v. Stritzinger*, 34 Cal.3d 505 (Cal.App. 1983)). The Evidence Code § 1014, EC, provides the patient has a right to refuse disclosure and to prevent another from disclosing private confidential communication between the psychotherapist and the patient. Macie was a mandatory reporter of child abuse as a public school employee. The courts directed attention to *Stritzinger*. When an incident is reported, the psychotherapist-patient privilege does not apply. Also, Macie's notes were not privileged facts to the psychotherapist-patient privilege. Macie's notes indicated O. had told her mother about the incident; however, her mother did not believe her. O. had made inconsistent statements concerning the incident. The defendant claimed his right to a fair trial was violated along with his right for due process.

Within the Fifth Amendment due process clause, the courts required the defendant to receive the right to a fair trial and evidence. *People v. Webb*, 6 Cal.4th 494 (Cal.App. 1993), Supreme Court of California, supported the federal due process by allowing the defendant to seek the pretrial evidence. The Sixth Amendment grants pretrial discovery to the criminal defendant; however from *Pennsylvania v. Ritchie*, 480 U.S. 39, 1987, Certiorari to the Supreme Court of Pennsylvania, it is not clear whether or to what extent the evidence is granted. The argument stated the defendant had rights to cross-examine Macie's notes due to O.'s statements made to Macie.

When privileged communication is protected from disclosure by the state, the courts conduct an *in camera* inspection to determine if the material would support guilt or innocence (*Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). If the material from the *in camera* review discloses information that would have changed the outcome of the trial, the conversation facts are deemed material evidence to release privileged evidence (*People v. Boyettes*, 201 Cal.App.3d 1527 (Cal.App. 1988)). The courts concluded Macie's counseling notes contained no material evidence that would help support the defendant's defense.

Before the final day of the trial, the prosecutor intended to call the expert witness for rebuttal on how sexually abused children could forget the details of an incident. After the defense presented, Macie was called to testify on her professional opinion. The trial court stated the expert testimony was an improper rebuttal. However, the courts concluded the prosecution could reopen their case.

The defendant claimed the courts abused their discretion by permitting the reopening of the prosecutor's case by allowing the expert witness to testify. However, the trial court has the broad discretion to reopen a case for allowing new evidence (Appellant Division of the Supreme

Court, First Department, *People v. Rodriguez*, 152 Cal.App.3d 289 (Cal.App. 1984)). The trial court's decision for reopening the case must include the progression leading up to the primary motion by the moving party who filed the motion to show thoroughness in discovering new evidence, and the substantiation of the evidence must be significant.

The prosecutor's motion to reopen the case was to gain a tactical advantage over the defendant. The court rejected the defendant's declaration of the courts abusing its decision by allowing the reopening of the case. The defendant also claimed he was deprived the right to confront witnesses. The Sixth Amendment's Confrontation Clause is satisfied when through fair treatment opportunity is given to inquire about the witness's testimonies susceptibilities through cross-examination and thus lessening the witnesses' testimony. From the Supreme Court of United States, the Confrontation Clause gives the defendant a full opportunity to probe by allowing a face to face cross-examination, as well this calls attention to the fact-finder, the jury, giving limited significance to the testimony of the witness (*Delaware v. Fensterer*, 474 U.S. 15 (1985)). The fact-finder determines the absolute credibility of the witness's testimony.

If a defendant's opportunity to cross examine a witness is rejected it is subject to an independent review by the courts (*Lilly v. Virginia*, 527 U.S. 116 (1999)). The defendant was not denied his rights to cross-examine the expert witness. The defense revealed Macie's role was only to report the victim's statements, not to evaluate the statements as being true or false. The court rejected the defendant's argument because the defense made a thorough cross-examination. The defendant also claimed the expert's testimony was not an expert testimony and the testimony extended across the permissible boundary. The expert testified sexually assaulted children would give inconsistent details about a sexual assault. The trial court ordered Macie not to speak specifically about the facts of the incident. Macie responded it would be very uncomfortable for

a sexually assaulted child to recall the specific details of an incident. The California Court of Appeals case, *People v. Gilbert*, 5 Cal.App.4th 1372 (Cal.App. 1992), purposed the expert testimony described the victim's evident characteristics and observable behaviors. However, it may not be admissible in a trial court.

Lastly, the defendant argued the trial court gave ineffective counsel assistance. The defendant stated the court erred in striking Macie's statements for fresh complaint testimony where Macie should have only given the minimal facts in describing the sexual assault in her expert testimony. When a defendant seeks help on ineffective assistance of counsel it must be shown the counsel failed to act as another reasonable attorney would have acted by being a thorough advocator pleading the cause for the defendant where a further and more reasonable opportunity to gain another favorable outcome would have been concluded for the defendant (*People v. Price*, 1 Cal.4th 324, (Cal. App. 1991)). In making this decision, the courts revealed a strong assumption that the counselor's conduct fell within a reasonable professional's assistance. From the United States Supreme Court, *Strickland v. Washington*, 466 U.S. 668, (1984), the criminal defendant's Sixth Amendment constitutional right was not violated for the courts ruled he received an effective assistance of counsel. The decision of inadequate counsel comes from counsel showing no rational strategic purpose for the criminal defendant's actions or omission of actions from the Supreme Court of California (*People v. Frye*, 77 Cal.Rptr.2d 25, (Cal.App. 1998)). Also used for the defendant seeking ineffective assistance of counselor, the defendant claimed Macie's use of notes to refresh her memory concerning the counseling were not disclosed to him. California Evidence Section § 771 indicated if a writing is used to refresh a memory concerning material that is used to testify, the writing must be produced at the hearing at the adverse parties' request. If the writing is not produced the witness's testimony is struck. The

defendant also claimed the trial counsel ineffectively failed to request a continuation to prepare for Macie's cross-examination. However, the defendant failed in establishing he was deprived of an effective counsel assistant.

Disposition: The California Court of Appeals, District 6, affirmed the judgment of the trial court.

313 Physicians: Psychiatrist

Citation: *Goral v. Illinois State Bd. Of Educ.*, 2013 IL App (1st) 130752 (Ill.App. 2013).

Key Facts: Bradley Goral was a chemistry teacher at New Trier Township High School District 203. He was terminated from his employment due to insubordination. The event started from a parent complaint about Goral. The parent's complaint came to the administration about Goral not helping his science students with questions. Goral saw the complaint as nonsense and the parent's email as criminal. Emails escalated and Goral pursued a criminal charge against the parents and the school district. Goral filed a grievance against the assistant superintendent and his department chair for harassing him about the parent's complaint. The Board rejected the requested complaint. With a pending grievance, Goral did not cooperate with the District superintendent, Linda Yonke. Goral's communications through emails were threatening to the employees of the school. Goral sent the Board and the principal an email accusing all involved of abuse of authority thus involving criminal conduct. On June 24, 2011, Goral was suspended for 5 days without pay. The District Superintendent told Goral the recommendation was dismissed due to his threatening directives in his emails to the superintendent. The email notices to Yonke told Goral his behavior could result in disciplinary actions, even termination. Yonke informed Goral the emails were another behavior he was recommended to stop.

On July 8, 2011, Yonke sent a memo to Goral concerning the Board's recommendation for a remedy notice. Due to Goral's negative conduct, the remedy notice included his negativity from the parent's complaint, his angry responses in the emails, and his behavior when questioned about completing a fitness-for-duty examination given to him by the Board. Goral's remedy notice statement recommended appropriate actions for Goral to carry out. These actions included the following: to be professional and respectful with his colleagues; to follow directives from supervisors, such as his department chair, promptly in a collaborative and professional way; to adhere to his Superintendent's recommendation to complete an examination by a physician to evaluate his ability to perform his duties as a teacher; and to comply completely and thoroughly to return to his employment.

The physical for Goral's fitness-for-duty examination was to be done by Dr. Marie-Claude Rigaud, a psychiatrist. The Board scheduled Goral for an appointment on August 10. The principal asked Goral to confirm the appointment by August 1. Goral was asked to sign a release authorizing Dr. Rigaud to share the examination report with the Board. Goral did not confirm his intention of attending the doctor's examination. Yonke notified Goral that his failure to take the exam would result in the recommendation to the Board for his suspension and termination. Goral did not go for the examination. The District was charged one thousand dollars due to Goral's cancellation fee from Dr. Rigaud.

The Board's resolution pertaining to the dismissal of Goral's tenured teaching position was adopted on August 22, 2011. Goral challenged his dismissal and the case was given to a hearing officer due to the challenge. The hearing officer conducted an evidentiary hearing on February 16-17, 2012. Then on June 11, 2012, the Board's recommendation for termination was upheld. The hearing officer indicated Goral had blatant violations that he did not adhere to from

the assistant principal's notice of emails with his supervisors and violations to the Board due to not taking his fitness-for-duty exam. On February 6, 2013, Goral filed an administrative review petition.

Issues: Did the court err claiming the results of the Board's recommended fitness-for-duty exam was not protected communication, and did Goral forfeit his argument by not taking the scheduled exam?

Holdings: No, since the psychiatrist and the teacher were not engaged in a therapeutic relationship the fitness-for-duty exam was not protected. Goral forfeited his rights by not taking the exam at the Board's recommendations.

Reasoning: The Appellant Court of Illinois, First District, Third Division held there was no therapeutic relationship to establish privilege. The district claimed Goral waived his issues regarding the Board's alleged violations by not raising the issues at the administrative level (*Chicago Teachers Union Local 1 v. Chicago School Reform Board of Trustees*, 787 N.E.2d 224, Ill.App. 1 Dist. (Ill App. 2003)). Goral raised issues that the fitness-for-duty examination was illegal; however, Goral did not raise specific issues regarding the 2010 Mental Health and Developmental Disabilities Confidentiality Act (2002). The courts reviewed the Act as if looking at the case again without looking at the legal rulings that had been decided, *de novo*, and sent the case back to the lower court as if it had never been heard before (Illinois Supreme Court, *City of Belvidere v. Illinois State Labor Related Board*, 692 N.E.2d 295 (Ill.App. 1998)).

Because Goral did not raise the issues of the Acts application this did not halt the resolving the issue on appeal. The waiver is given to the parties, not the courts, with one exception applying (Illinois Supreme Court, *Halpin v. Schult*, 917 N.E.2d 436 (Ill.App. 2009)). Mental Health and Developmental Disabilities Confidentiality Act 740.11 LCS 11.2 purposes

when a therapist provides mental health services to a patient, specifically concerning the patient receiving the mental health treatment, the services to the patient are confidential. Goral claimed the Board was required to obtain a court order to require him to attend and have him to disclose the exam's results. Goral was terminated for refusing to take the fitness-for-duty exam and his conduct was determined insubordinate by the hearing officer.

If Goral had taken the fitness-for-duty exam and had he questioned the release's scope, the courts would have had the consent context from the treatment results to evaluate the claim. However, the information the District had was entitled because the Act did not protect the fitness-for-duty exam and there was no therapist relationship with Goral.

Goral was terminated for failing to take the exam and not for failing to authorize the release of the results. He only argued the fact of privilege after his lack of attendance. The psychiatrist was retained by the school district to specifically evaluate Goral's mental health as it related to his fitness for continued employment. The psychiatrist was not engaged in a therapeutic relationship. Goral's argument concerning the release form was an after-the-fact justification for Goral refusing to participate in the examination. Goral appealed; however, the courts would not allow him to raise the issues of the release at the administrative level. The courts found Goral's arguments were forfeited.

The issue is the Act covering the fitness-for-duty exam to evaluate the employee's mental health. Based on the Act's provision (Illinois Appellant Court, First District, *Sangirardi v. Village of Strickney*, 793 N.E.2d 787, Ill.App. 1 Dist. (Ill.App. 2003)), it was found there was no merit of a refusal of a fitness-for-duty exam, because the Act states that the confidentiality of mental health records is important. The courts decided a supervisor's directive to disclose confidential results from the fitness-for-duty exam was not a reason to release the mental health

records. Also associated to the circumstance, Illinois Supreme Court in *Johnston v. Weil*, 946 N.E.2d 329, (Ill. App. 2011), was the Act was not violated when the psychiatrist report was disclosed to other parties from a trial courts-appointed psychiatrist in a child custody case. There are many exceptions to privileges; however, a privilege is not waived when patients are seeking treatment from a mental health professional. In Illinois Supreme Court, *Novak v. Rathnam*, 478 N.E.2d 1334 (Ill. App. 1985) cited the Act's plain language's purpose was to keep the persons receiving mental health services records confidential, this applies to patients in situations seeking treatment for a mental health issue. Citing Illinois Appellant Court, First District, *House v. Swedish American Hospital*, 564 N.E.2d 922 Ill.App. 2 Dist. (Ill.App. 1990), the court's appointment of a psychiatrist was only retained to make an evaluation for the Circuit Court. The Act did not apply because the plaintiff was not in a therapeutic relationship with the psychiatrist.

Goral's case resolution was controlled by *Johnston v. Weil*, 946 N.E.2d 329 (Ill.App. 2011). There was not a therapeutic relationship between Goral and Dr. Rigaud due to the District's referral to the doctor. Also, the District retained Dr. Rigaud for the sole purpose of evaluating Goral's mental health fitness condition for employment. From *Johnston*, the District had a right to require Goral to complete the fitness-for-duty exam and Goral had acknowledged this. In the intervening time, Goral had acknowledged the District's right, and the District was also entitled to require the disclosure of the exams' results. *Johnston's* cases concluded the disclosure of the exam's outcomes but did not associate that with the Act. Because Goral refused to attend the fitness-for-duty examination, the court ruled Goral was insubordinate and this was the effect of his termination. It stands alone. The courts agreed to the Board's decision for termination of Goral's employment. It was affirmed.

Disposition: The Board's decision was acknowledged after the hearing officer held an extensive hearing review on the factual and legal disputes presented. The Circuit Court upheld the Board's decision of dismissing Goral.

Citation: *Child C. v. Fleming School*, 179 N.Y.S.2d 460 (N.Y.App. 1992).

Key Facts: A former student brought a lawsuit against Fleming School due to alleged sexual abuse committed by school teacher, Seth B. At the trial, the student's council questioned the teacher's psychiatric treatment. However, the council did not question the communication that occurred in the treatment session. New York Civil Practice Law and Rules, CPLR § 4504, physician-patient privileged relationship stood, and CPLR § 4507, psychologist-patient privilege relationship stood. The teacher, Seth B., pled guilty to the sexual abuse charges in the second degree. The plaintiff and another underage person were subjected to sexual abuse conduct by the teacher. The defendant refused to answer questions about his employment, the infant plaintiff, and his post college history. He also did not answer questions about receiving psychiatric treatment. He asserted the physician-patient privilege. The plaintiff sought discovery of evidence from the defendant while the defendant sought an order of protection, sending the message for the accuser to stop abusing.

Issues: Did the court err in allowing the student to question the teacher's psychiatric treatment and was the content covered under the physician-patient privilege?

Holdings: No, the plaintiff was allowed to seek the treatment information of the defendant's mental health treatment concerning facts; however, the plaintiff was not allowed the privileged communication's content between the psychotherapists and patient.

Reasoning: The Supreme Court, Appellant Division, First Department, New York court ruled the defendant did not have to respond or answer any questions about the defendant's

psychiatric care nor even if he ever sought psychiatric care. The court required the defendant to answer questions. However, the court granted, as well as denied, a part due to determining an actual possibility of criminal prosecution coming from the abuse the defendant did to other students at the school.

The courts allowed the defendant to conduct an *in camera* affirmation. However, the courts directed the defendant not to answer questions regarding his employment and prior work history before his employment at Fleming School. The statute of limitations of 5 years had expired in March 1992, concerning Fleming's possible offenses at school. The statute of limitation is set by New York Crime Procedure Law, CPL § 30.10(2) (b), which sets the limitation at 5 years. The plaintiff conceded to the limitation statute. However, after March 30, 1992, the defendant could be questioned about the events at Fleming School, for the Supreme Court has the authority to continue a civil proceeding where the court is waiting for the criminal proceeding's outcome. The courts saw the short delay of the deposition as no risk to the plaintiff until the criminal trial prosecution had passed.

The plaintiff was concerned about the defendant's physician-patient privilege, where the defendant protested the demand for having to reveal his testimony. However, the physician must reveal through testimony that the defendant was a patient of the doctor, from the Appellant Division of the Supreme Court of the State of New York, Second Department, *Hughson v. St. Francis Hospital of Port Jervis*, 463 N.Y.S.2d 224, N.Y.A.D. 2 Dept. (N.Y.App. 1983). The physician-patient privilege relationship is upheld by CPLR § 4504, and the CPLR § 4507 upheld the psychologist-patient privilege. Both the physician privilege and the psychologist privilege look accurately to factual treatment sought by the patient; however, not the communication's content. The Supreme Court (*Upjohn Co. v. United States*, 101 S.Ct. 677, U.S.Mich. (Mich.

1983)), purposes that the privilege extends to the communication only, and the defendant's physician must answer questions regarding the facts as treatment, dates, and times. Therefore, the plaintiff is allowed to seek the relevant facts from the treatment information.

Disposition: With the deposition's delay, the courts changed the court order from the Individual Assignment Systems, ISA. The modification allowed the defendant to be questioned about his prior work history before his employment at Fleming School. However, the defendant's attorney made objection as to the questions made from the *in camera* inspection. The courts granted that the psychotherapist-patient privilege was protected only in part. The privilege communication was not protected under privileged communication concerning the treatment the defendant had sought.

Citation: *People v. Plummer*, 37 Mich.App. 657 (1972).

Key Facts: In a criminal case, the Circuit Court Appellant Division No. 2 of Michigan convicted the defendant of kidnapping, rape, assault with intent to murder, and unlawfully driving away in a vehicle. The court convicted the defendant on all counts. The defendant was sentenced and the defendant appealed. The defendant alleged that the court had erred on 15 counts. The defendant claimed that the errors should be lessened. These included errors needing annulment of the judgment being a reversal; errors standing alone, and are reversible errors; some errors at retrial should be avoided; and some errors are not errors at all. He claimed the case did not reveal the facts up to the trial, claiming relevancy. Three years prior, March 1969, Dr. Shafii, a psychiatrist at the Boys' Training School, performed a psychiatric evaluation of the defendant. Dr. Shafii was called by the prosecution to testify. He refused to testify to the court based on the privileged communication statute.

The prosecution was able to allow testimony of the defendant's sanity before the defense sanity was supported. The defendant is presumed sane until testimony supports the defendant's claim of insanity. Even when there is knowledge of the defense of insanity, testimonial support may never be given. Until the defendant raises the issue of insanity, the process prevents future contention because the issue is really attacking the character of the defendant before the defendant's character is even made an issue. At trial, the defendant was told that the defense of insanity would be granted authority. Therefore, the prosecution witness gave several incidents of sexual relations with the defendant. Based on the issue of insanity, the prosecution claimed that the testimonies were admissible as background testimony. The defendant was required to see a court appointed psychiatrist. The trial court agreed.

Issues: Did the court err in the decision that the psychotherapist-patient privilege existed and applied to the privileged relationship between the psychiatrist and the defendant?

Holdings: Yes, the psychiatrist had the right to refuse to testify at trial when the privilege had not been waived by the defendant.

Reasoning: The Court of Appeals of Michigan, Division No. 2 held the psychiatrist privilege stood. Proper procedure required the sanity evidence from the prosecution to be held until the defendant offered supporting testimony to the issue (Court of Appeal of California, Third District, *People v. Williams*, 188 N.W. 413 (Mich. 1922)). The trial judge allowed the testimony of the prior treating psychiatrist called by the prosecution in rebuttal, stating that the defendant had waived the privilege by calling a doctor to testify for the defense. This rationale is only applicable in actions for personal injuries or malpractice cases. The defendant had not waived psychiatrist/patient privilege in this case. When the defendant stated that the issue of insanity had been raised, the prosecution claimed that the testimonies were admissible; however,

Michigan Court of Appeals in *People v. Shaw*, 157 N.W.2d 811 (Mich.App. 1968) purposes that the prosecution's responsibility is for bearing the burden to show relevancy. However, the prosecution made no effort to show relevant evidence to the sanity issue. Until the court provided testimonial support for the claim of insanity, it viewed the claim as a reversible error. The prosecution called Dr. Shafii, a psychiatrist at Boys' training School, as a rebuttal witness to the defendant's expert. Based on privileged communication, Dr. Shafii declined to testify. The defendant's privileged communication was waived when the defendant requested the doctor to testify on his behalf for his defense. By the courts requiring the defendant to see a court appointed psychiatrist, his rights were not violated (California Court of Appeals, *People v. Early*, 181 N.W.2d 586 (Mich. App. 1970)). However, the Michigan Supreme Court (*Kelly v. Allegan Circuit Judge*, 169 N.W.2d 916 (Mich. 1969)) held that a waiver occurs only in malpractice cases and personal injury cases. The prevailing case was based on the psychiatrist-patient privilege, this was identified in Michigan Supreme Court, *People v. Wasker*, 91 N.W.2d 866 (Mich. 1958).

Disposition: The court's decision concerning Dr. Shafii's testimony was reversed. The admission of the privileged communication testimony from Dr. Shafii was a reversible error and should have not been allowed. This case was returned to a lower court for a new trial.

Citation: *In re Sippy*, 97 A.2d 455 (D.C.App. 1953).

Key Facts: In January 1953, the mother of Camille Sippy, the complaining petitioner, filed a grievance through the Juvenile Court that her daughter habitually disregarded her commands as a parent. The mother, a widow, stated that her daughter was beyond her control. Camille Sippy would be turning 18 on February 3, 1953. After a hearing, Camille was ordered for an indefinite period of time to the Board of Public Welfare. She would attend Devereux

School near Philadelphia. At Devereux School, she would receive education courses and psychiatric treatment. The daughter sought a review of the order of the Juvenile Court of the District of Columbia. The daughter, the respondent-appellant, had an attorney. The mother had an attorney, and a second attorney for the mother was allowed in the proceedings. The second attorney admitted that he had the interest of the mother, who was viewed as the antagonistic. The court permitted his presence as a friend of the court and directed him to file an appearance as counsel for the limited purpose of the record. The second attorney made a hearsay statement about conversations concerning privileged information with the appellant's physician. The court's permitting another attorney was improper. The daughter appealed the order of commitment to the mental facility by protesting against the commitment from the court.

Issues: Did the court err in waiving the social worker-client privilege, and was the daughter's right adjudicated?

Holdings: Yes, the court ruled that the error was of procedure when there was an additional attorney, who divulged privileged information gained from the respondent-appellant's physician. The court ruled that the error was of harm to the respondent. The appellant's rights were violated and taken from her due to the alleged doctor's professional opinion.

Reasoning: The Municipal Court of Appeals of the District of Columbia ruled the privilege was covered under the District of Columbia's Code Ann. § 14-308 (1951). Even though the privilege could be waived, it could not be waived by the appellant's mother, viewed as the antagonist. The error was harmful to the respondent-appellant because it violated the client's physician-patient privilege. The courts erred by permitting Miss Ryder, an employee of the Social Service Department of the Juvenile Court, to read a report she had prepared containing her own conversation with the respondent's physician, including privileged communication matters.

The privileged communication included the doctor's interpretation of his diagnosis and prognosis, along with his recommendation that the respondent should be enrolled in the Devereux School. Camille's attorney objected to the report. The respondent did not waive the physician-patient privilege for the doctor to divulge information concerning her case (District of Columbia Code 11-906 (a) (2), (1951)). The Juvenile court Act of the District of Columbia establishes a student under the age of 18 who is habitually beyond the parent's control, termed as delinquent, can become the jurisdiction of District of Columbia's juvenile court. Also, the respondent did not authorize the doctor to discuss her case or her diagnosis with anyone because the doctor had assured his client that the information from their confidential relationship would never be disclosed. The mother's counsel objected on the grounds of the right to cross-examine the physician and stated that her right was being denied.

The daughter had a right to insist that the facts in the statutory proceeding be presented by witnesses under oath as in other judicial proceedings. As a court of record, the Juvenile Court, has the power to administer under oath (District of Columbia Code § 11-904 (1951)). The design of the court hearing's purpose, as a judicial proceeding, is prescribed by statute, and has a final judgment. Camille's liberty was questioned by taking her privilege away from her based on the alleged professional's opinion from a doctor. The respondent's attorney protested that his client had not given authorization to the doctor to divulge privileged information concerning her case. The trial court just held that the mother had waived the privilege. The court stated that a privilege may not be waived by a mother viewed as the antagonist in the court proceeding. The court's conclusion was that the respondent's statutory right of privilege was wrongfully attacked.

The principle objective was for the daughter to receive psychiatric treatment. The judge commented that the fault was not solely that of the daughter. Responsibility also was on the

petitioner, the mother. There had been friction, disobedience, and spiteful conduct toward the mother from the daughter. The court ruled that there was not enough proof to establish that Camille was habitually beyond the mother's control. The appellant, the daughter, made a statement that the mother had not been able to evaluate her own problems; however, she had determined the appellant's problems. The appellant indicated her mother had stated that both had strong wills and strong tempers, and had trouble avoiding arguments. She concluded that she did not want to go to a facility and that she got along well with normal people.

The District of Columbia Code Ann. § 16-2307 (1966) claimed courts shall not hear cases without a jury trial unless a jury trial is commanded from the child, the parent, the guardian, or the courts. Clearly expressed in the United States Courts of Appeal for the District of Columbia Circuit, *In re Lambert*, 86 A.2d 411 (D.C.Mun.App. 1953), the courts assignment through the Juvenile Courts was to keep children safe and to rehabilitate children. There is no trial court with children when there is non-criminal charges and no common law; therefore, there was no right by jury trial under the statute. The court's assignment of another attorney was wrong because, when a defendant appears at court by their own choice, another attorney does not have to be assigned. Referencing, Court of Appeals of the State of New York (*People v. Price*, 187 N.E. 298 (N.Y. 1933)), when one appears by counsel on their own, the court has no right to assign another attorney to the defendant. The cases prior to 1942, the party who is affected by being harmed or treated improperly by another party had a right to petition the United States Court of Appeals. As referencing Pennsylvania Superior Court (*Commonwealth v. Sendrow*, 119 Pa.Super. 603, 181 A. 450, (1935)), the ruling supported the second attorney, as in an antagonistic position, had no right to be a part of the trial standing for the respondent, Camille.

Disposition: The District of Columbia Court of Appeals' decision of the order of commitment to the Board of Public Welfare was reversed because neither the welfare of the child nor the public's safety and protection provided grounds for the order to be entered into for this case.

314 Psychologist

Citation: *Correia v. Sherry*, 335 N.J. Super. 60 (2000).

Key Facts: On March 10, 1998, Curtis Correia was a passenger in Kenneth Sherry's pickup truck. The vehicle left the road and collided with a large boulder. Curtis died from the injuries he sustained from the accident. Curtis was 18 years old and a member of Lenape Valley Regional High School's senior class. Curtis's mother, on behalf of herself and her family, brought a wrongful death action against the driver of the car. Curtis's mom testified at her deposition that Curtis had been part of the child study team at the high school. The driver applied for a court order asking the parents of the deceased to authorize release of the passenger's child study team's records. The child study team's records consisted of the school psychologist, learning disability teacher, and school social worker. The mother sought damages based upon the parents' loss of his care, assistance, guidance, advice, and companionship, and economic loss. The defendants now sought a court order compelling the plaintiff to authorize the release of Curtis's child study team records. The court denied the release of the child study team's records.

The plaintiff retained an expert to conduct an economic loss study. The economic loss amount value was \$312,423,000, constituting the parents' loss. Also, a loss of future income was calculated. The expert's monetary value for Curtis's contributions in life was \$591,925,000. This value was based on Curtis obtaining a high school diploma and income average from a high school education. Curtis's high school records are an indicator that Curtis would have graduated

high school June 1998. The records also stated that Lenape Valley Regional High School had awarded Curtis a posthumous diploma on June 20, 1998. The loss of financial support to the parents would project how much income to award for Curtis's income and family circumstances. The economic loss study indicated that Curtis was responsible and hardworking. He had a job at the gas station the summer before his death. He had also worked at a restaurant. Curtis wanted a career in law enforcement and also wanted to pursue going into military service.

The defendant argued that when the plaintiff is claiming a wrongful death action of the deceased person, privilege of records does not exist. The defendant also claimed that the plaintiff should not have been able to declare future financial losses while withholding privileged records. The defendant claimed that the child study team's records might tend to prove to show the negative relationship with the deceased defendant and his parents and might call into question his ability to perform in military service or to pursue a career in law enforcement. When the plaintiff's expert prepared his report, he did not have access to Curtis's child study team's reports.

The court conducted an *in camera* review of the psychologist's records.

Issue: Did the psychologist-patient privilege survive the death of Curtis Correia, and was the driver entitled to the privileged records from the child study team's records?

Holding: Yes, psychologist/patient communications are privileged, and that privilege extends after death to protect the full disclosure of communication to have effective treatment during the client's life. There was no justification to pierce the privilege for the defendant to have access to Curtis's child study team's records. The court held that there was no justification for obtaining the privileged records because of the son's projected income for his life. Curtis and his parents were advised by the child study team that the records were privileged.

Reasoning: The Superior Court, Law Division, Sussex County, held the New Jersey Court Rule 4: 10-2(d) (1) requires a party disclosure of privileged communication made to an expert if the information will be used at trial to give an opinion. The party discloses the names and addresses of the witnesses as well as the name of the physician who conducted the examination. Even though the physician may or may not testify, the names are given. However, the psychologist-patient privilege confidential relations and communications, New Jersey Statutory Annotated (N.J.S.A.) 45: 14B-28, and New Jersey's claim position that any privileged communication should not be disclosed due to an issue from a party bringing a claim against a deceased client. However, the rulings do not address whether the psychologist-patient privilege survives death. There is not a reported case in the State of New Jersey concerning whether or not privilege of records survives the death of a patient. New Jersey Statutory Annotated (N.J.S.A.) 45: 14B-28 claimed that communication to a licensed or certified social worker is privileged. New Jersey modeled the psychologist-patient privilege of the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, (1996) after the attorney-client privilege. The nature of psychotherapy is for the client to fully disclose intimate emotions and fears. Referencing New Jersey Superior Court in *Arena v. Saphier* 201 N.J.Super. 79, 86, 492 A.2d 1020 (App.Div.1985), the psychotherapeutic process is to promote complete disclosure of the confidential beliefs of the patient to the therapist. Also, the New Jersey Supreme Court in *Kinsella v. Kinsella*, 150 N.J. 276, (1997) invoked a time-honored court standard that the privilege's purpose is to allow patients open and productive relationships with their psychologists to facilitate effective treatment. The patient expects that the communication will not be exposed in court for public examination.

The court conducted an *in camera* review of the psychologist's records. Both Curtis and his parents were advised by the child study team that the records were privileged. N.J.S.A. § 18A:46-5.1 claims a basic child study team consists of a school psychologist, a special education teacher consultant, and a school social worker. Therefore, the court denied authorization to disclose the privileged and confidential records. The court case *In re Kozlov*, 79 N.J. 232, (1979) from the Supreme Court of New Jersey established a three-part test for determining if the attorney-client privilege should be overridden to disclose information. The first part is to establish a legitimate need. The second part stipulates that the evidence to address the issue must be relevant and material. The third part is the party must show that the information that is not disclosed must be the only way to secure the information, and that the information cannot be obtained from other less intrusive information sources. In this court case, based on the legal standards of *In re Kozlov*, 79 N.J. 232, (1979), the defendants failed to establish the need for disclosure of confidential communication evidence and this was outweighed by the statutory reasons for confidentiality.

In determining the decision as to psychotherapist-patient privilege, the court reviewed and compared the case laws within the United States that govern attorney-client privilege. In its findings, the court supported the continued confidentiality for patients to fully disclose and have effective treatment during the patient's lifetime. Referencing *Kinsella v. Kinsella*, 150 N.J. 276, (1997), the purpose of the psychotherapist-patient privilege is to promote open relationships to aid in productive, effective mental health counseling treatment. *Arena v. Saphier*, 492 A.2d 1020 (App.Div.1985) set forth that the psychotherapeutic process is to support full disclosure so that the patient can express their innermost personal thoughts and feelings. In order to promote the patient fully disclosing, it is necessary for the privilege to survive the death of the patient. The

patient expects that the privileged communication will not be subject to public scrutiny. The psychologist must gain the confidence of the client or treatment will not be successful. When the patient has an understanding that the private communication will remain confidential, even after death, this encourages the client to communicate frankly with the therapist. There are exceptions to the rule, however. In this case, the defendant failed to establish that the evidentiary need for disclosure outweighed the reasons for privileged communication and confidentiality.

From the Supreme Court of the United States case *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the court examined the United States case law and found that the attorney-client privilege common law survived death. The New Jersey Supreme Court, *Runyon v. Smith*, 322 N.J.Super. 236 (App.Div.1999), declared that when no specific exception applies, cases look for interpretation from the attorney-client privilege to provide applicable guidance, for there is potential harm, even to the patient's family, from disclosed information. The courts stated that the family's loss could better be identified by witnesses and the deceased's family members themselves. There was no justification to disclose the psychologist-patient privilege.

The consortium of financial resources for the loss of a child is loss of a child's earning and services during their life as well as loss of companionship for the family. In criminal cases, the psychologist-patient privilege survives the death of a patient but may be disclosed for the defendant to have a right to a fair trial. In a wrongful death case, expert testimony is not necessary to establish monetary damages; however, it is often helpful. Nevertheless, referencing the Superior Court of New Jersey, Appellant Division, *Coyle v. Estate of Simon*, 247 N.J. Super. 277 (App.Div.1991), a party must disclose to other parties the privileged communication, either to an attorney or an expert, if the communication is to be used by the expert where the professional gives a knowledgeable opinion at trial. The defendant failed to make the case that

evidentiary need for the child student team's records overshadowed the established standards for reasons of confidentiality. The defense acknowledged they did not know if the information from the child study team's records were relevant. Addressing the issue, in the New Jersey Superior Court, Appellant Division, *State v. Swint*, 745 N.J.Super. 570 (App.Div.2000) purposed that the main issue and the nature of the case helps to answer the question regarding relevancy, since the inquiry into evidence to determine relevancy is based on the logical connection between the presented evidence and the facts at issue.

Disposition: The courts ruled that the party to take some action, the motion to compel, was denied. The records were not admitted.

Citation: *J.N. By and Through Hager v. Bellingham School Dist.* No. 501, 74 Wash.App. 49 (1994).

Key Facts: At Geneva Elementary School, a first grade student, J. N., was sexually assaulted by a fourth grade student, A. B., on the school grounds in November 1989. The repeated sexual assaults happened in the boys' rest room. A. B. was 9 years of age and a student with disabilities and J. N., then was 7 years old. In mid-April 1990, J. N.'s teacher, Julie Batten, suspected he might be a victim of abuse and she reported her concern to Child Protective Services. From the report, J. N. disclosed that he had been sexually assaulted by A. B. in the boys' rest room at the school's recess time. The student with disabilities, A. B., was expelled from Geneva Elementary School.

During the school year, 1989-1990, school personnel had numerous documentations of instances of A. B.'s aggressive behavior in school. Jean Sigmar, A. B.'s fourth grade teacher, spoke with A. B.'s mother and wrote her a letter in January 1990. The letter stated that the school wanted to pursue the possibility of A.D.D. (Attention Deficit Disorder) and other medical issues.

Sigmar also spoke with other school officials about concern for sexual abuse. The school principal, Robert Austin, through a telephone conversation with a school social worker, stated that he was concerned about the student, A. B., all year. The school principal wrote a letter to A. B.'s mother, explaining concern for the student and requesting permission to conduct a special education assessment by a multidisciplinary team to test A. B. The testing would be administered by the school psychologist, Mrs. B. A.B.'s mother gave permission for the psychological test to be performed by Jeremiah Schwartz, Ph.D., school psychologist. The principal, Mr. Austin, sent Mrs. B. a copy of the psychological testing summary of May 21, 1990.

The parents of A. B. sued the school district claiming negligent supervision. However, the trial court did not allow disclosure of the psychological assessment of J.N. The court granted summary judgment for the school district without a full trial.

Issues: Did the courts err in deciding the psychologist-patient privilege applied to the fourth grade student's interview with the school psychologist?

Holdings: No, the privilege could have been asserted or waived by the patient or through a personal representation as a court representative such as the patient's parent or Guardian *ad litem*. This questioned, "Who is the holder of the psychologist-patient privilege?" Does the privilege apply to the facts of this case and when does the psychologist-patient privilege not apply?

The school assessment was performed by the school psychologist for reasons of concern for A.D.D. and/or other behavior issues. When assessing a student for the purpose of providing recommendations to the multidisciplinary team for assessment for a student's needs, the privilege does not apply.

Reasoning: The Court of Appeals of Washington, District One claimed there was no reasonable expectation that the information would remain privileged. There was no expectation that the communication with the school psychologist would remain confidential. Citing New Jersey Superior Court, Appellant Division, *State v. Holland*, 635 P.2d 142, Wash. App.Div. 1, (1981), the courts rejected the argument of court-appointed psychologist communication with the juvenile defendant being privileged. There was not a purpose of treatment, only evaluation. The courts ruled the psychologist-patient-privilege does not apply when the purpose of the communication was not intended to be confidential. The intended purpose for communication was for examination by a third party and not to be confidential (Washington Court of Appeals, *In re Henderson*, 630 P.2d 944 (1981)). The trial court's testimony of the expert witness of J. N. discounted the affidavit of the expert's opinion (Washington Supreme Court, *Lamon v. McDonnell Douglas*, 588 P.2d 1346 (Wash. 1979)). The Superior Court for Skagit County decided only the patient has the right to assert or waive the confidential privilege (*Sauter v. Mount Vernon School District*, 791 P.2d 549, Wash.App. Div. 1, 1990).

The admissible expert opinion based on the facts of the issue from the school district was having foreseeability into A. B.'s aggressive behavior to other students. *Gordon v. Deer Park School District*, 426 P.2d 824, Wash., (1967) established that reasonable care is what a person under ordinary care would exercise in a similar condition as well. Washington State Legislature, Revised Code of Washington, RCW § 18.83.110 (2005) affirmed the psychologist-client-privilege against disclosure holds the same weight as the attorney-client privilege.

The court stated that the school district had a duty to supervise J. N. and could be held liable if the injury could have been anticipated. *McLeod v. Grant City School District*, 255 P.2d 360, Wash., (1953) in Washington Supreme Court claimed school districts have the duty to

protect children from reasonable danger. Students have rules and procedures to follow in school, and teachers are to provide protective custody of their environment. One of reasonable care is to supervise students with the School District exercising care as a parent would or a reasonable prudent person (*Briscoe v. School Dist. No. 123, Grays Harbor County*, 201 P.2d 697, Wash., (1949)).

The district attempted to separate *McLeod* from the case because *McLeod* was based on the fact there was no supervision at all. The district rejected the issue because there was supervision. The district acknowledged there was supervision even though it was only one supervisor with 350 students on the playground.

The school district knew of the aggressive behavior of the student with disabilities. The district had noticed that A. B.'s behavior was possibly harmful to others (*Christen v. Lee*, 780 P.2d 1307 (Wash. 1989)). Due to A. B.'s behavior of being unruly and hostile, the district could not anticipate a serious issue could happen (*Moore v. Mayfield Tavern, Inc.*, 451 P.2d 669, (Wash. 1969)). The court stated that the school knew of the possibility of injury to the victim. *Peck v. Siau*, 827 P.2d 1108, Wash.App. Div. 2, (1992) was cited due to the act of providing reasonable supervision to students as well as the school district having the authority to control students' conduct while at school or when at school activities. The duty of reasonable care extends to the act of foreseeability (*Bernethy v. Walt Taylor's Inc.* 653 P.2d 280, (Wash. 1982)). To establish foreseeability, one must reasonably perceive the harm being in the general field of danger covered by the school district's specific duty (*Maltman v. Sauer*, 530 P.2d 254, (Wash. 1975)). The question of issue is usually the defendant's general field of danger. The general field of danger is decided where reasonable minds do not differ in a matter of law (*Rikshad v. Holmberg*, 456 P.2d 355, (Wash. 1969)). Reiterating, *Peck v. Siau*, 827 P.2d 1108, Wash. App.

Div. 2, (1992) claimed the scope of the school district is to protect students by exercising reasonable care from physical hazards in the school building and on the school property grounds, and protect them from harmful actions of others. The district is responsible for the foreseeability of the wrongful actions occurring. School counselors are not responsible for the mere fact the action occurred and are not liable. Foreseeability signifies the district knew about the harm or the district should have known of the potential harm that resulted in the issue's occurrence.

Disposition: The trial court reversed the decision on the summary judgment and remanded for purposes of allowing the school psychologist's interview to be admitted. When school authorities know of a child's disturbed, aggressive nature, proper supervision must be in place for the protection of other children from the potential harm the behavior can cause. The school district under Washington law had a duty to do what an ordinary reasonable person would do under similar circumstances.

Citation: *State in the Interest of L.P.*, 593 A.2d 393 (N.J.App. 1991).

Facts: Five juveniles were charged with aggravated sexual assault upon one female victim. All five juvenile cases were still in the pre-trial stages. L. P., co-defendant, subpoenaed Monroe Township High School principal, Charles Stein, and two guidance counselors, Castaldo and Longo. All five students, the defendants, and the victim attended Monroe Township High School. The courts ordered by subpoena the witness to deliver the documents, *duces tecum*, seeking production of tangible records of the school's investigation of the alleged incident from the alleged victim, T. M., and from the defendant, L. P. Subpoenas were also issued for school counselor, Rockoff, and the school psychologist, Licata. The school psychologist's records of the victim T. M. were also subpoenaed. The alleged event happened October 16, 1990, and the three guidance counselors interviewed several students about the incident. Specifically, the three

guidance counselors interviewed the victim and the five other co-defendants involved in the situation. Longo, the guidance counselor/football coach, was present for all the boys' interviews. All the boys were members of the football team. Longo made no notes from the interviews. Rockoff also made no notes from the interviews she sat in on. The guidance counselors were represented by counsel, as well as, the Monroe Township Board of Education. From the *in camera* inspection, Castaldo's notes were determined by the court as notes for information as a memory aid. The notes were protected.

Issues: Did the courts err in accepting statements concerning the procedures questioning the school authorities before the complaints were signed as "confidential" under state and federal statutes and, if so, did the accused gain access to any records of any statements in preparation for his defense?

Holdings: No, court held that the substance abuse guidance counselor's notes were not to be disclosed except for the complainant's statement where he denied everything. Also, the notes of each accused juvenile's interview were not to be disclosed. The courts also held the school psychologist's notes from interviewing the victim were protected by the psychologist-client privileged communication. The court agreed with the trial judge's determination concerning the defendant's Sixth Amendment right to confront witnesses.

Reasoning: The Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County held that the substance abuse guidance counselor's notes were privileged, except for the defendant's statement of the complainant denying everything which was covered under *Brady v. Maryland* 373 U.S. 83, (1963) material. The Substance Abuse Guidance Counselor's notes are privileged under New Jersey's Administrative Code. Respectfully following the New Jersey Administrative Code (N.J.A.C.) 6:3-2.6 (a) 4, the privilege was

regarding records. The guidance counselor was represented by counsel. The defense counsel pursued records of statements made to the school counselors. Under statutory law for Code of Federal Regulations for confidentiality of drug abuse patient records, 42 C.F.R. § 2.1, drug abuse account records are restricted disclosure. The defendant's claim of good cause to review the confidential records had not been met. With T. M.'s denial of everything, it was considered *Brady* material.

In *Brady v. Maryland*, 373 U.S. 83, (1963), the United States Supreme Court established a pretrial discovery rule known as the *Brady* material. The rule emphasized the prosecution in a criminal case has the duty to turn over evidence that may exonerate the defendant. The *Brady* rule held that when the prosecution suppressed evidence that could be favorable to the defendant, even after the accused had requested the records, due process is violated. For the suppressed evidence could either be material to establish guilt, innocence, or for punishment. When all the evidence is given in the pre-trial discovery rule, then it is determined if the material evidence could bring about a different result of the proceeding.

In *State In the Interest of L. P.*, the defendant did not seek the juvenile's records. The court ruled the guidance counselor conducted the interview under the Substance Abuse Counselor privilege. The Administrative Code: Title 6, Subchapter 6, concerns substance abuse in schools. The school guidance counselor, Castaldo, declared the notes fell under her role as a substance abuse counselor at Monroe Township High School. The courts held the guidance counselor's meeting with the students were directed in this capacity as a substance abuse counselor. School district boards are required to adopt and implement policies and final procedures from evaluations, to interventions, and then referrals to alcohol and drug treatments. Their Federal guidelines establishes the requirements for confidentiality. The Superior Court

stated the right to confront the witness did not outweigh the need for confidentiality and was supported by the record. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) purposed the state's interest in protecting the child abuse information outweighs the defendant's interest to discover evidence to help in his defense. The courts conducted an *in camera* review of the notes of the school psychologist, Licata, and the victim, T.M. The court was content with the licensed practicing psychologist, Ms. Licata, and her statements with her client. The courts ruled the notes contained no verbatim statements to warrant discovery, and these communications were privileged. Also, if the notes were going to be waived, the waiver would have to be made by the patient. The psychologist's notes also fell within the privilege that New Jersey's Statutes Annotated (N.J.S.A.) § 45:14B-28. The N.J.S.A. §45:14B-28 offers confidential communication between licensed practicing psychologists and their patients is privileged. This holds the same basis as the attorney-client privilege.

The New Jersey Supreme Court distinguishes a defendant accused of a criminal offense has a balancing right to a juvenile's confidential records, as well as, a constitutional right to confront the juvenile using a limited use of the juvenile's records (*State v. Allen*, 70 N.J. 474 (1976)). The *Allen* court cases reference *Davis v. Alaska*, 415 U.S. 308 (1974) established by the Supreme Court the defendant's Sixth Amendment right to confront the witness is above Alaska's policy protecting juvenile's privileged testimony. In *Allen*, the courts held the right to confrontation supersedes protecting a juvenile and his family from embarrassment of disclosure of private information due to the petitioner's higher rights to evaluate the bias, prejudices, and credibility of the juvenile. *Commonwealth v. Ritchie*, 480 U.S. 39 (1987) supported there could be material evidence to help support and be favorable to the defendant. In *Commonwealth*, the trial court did not allow the defendant to have access to the Child Welfare Service's (CWS) files

on the victim. However, the appellant court claimed the defendant could have access to limited records under the Supreme Court of Pennsylvania (*Matter of Pittsburg Action against Rape*, (494 Pa. 15, 1981)). Under *Matter of Pittsburg Action against Rape (PAAR)* (1981), limited access is given to privileged records and to the defendants of rape victims. The Pittsburg Action against Rape balanced societies' interest of privileged communication of rape crisis counselors and their rape victims with the truth that needed to be revealed through a trial court. Looking through these two windows for justice of a fair trial, inspection of the complainant's verbatim statements are the issues of the facts at hand. *Ritchie* granted similar rights to the defendant through the accepted *PAAR in camera* procedures and the limitations to the procedures revealed under *PAAR*. These standards include notes of verbatim statements that the complainant viewed and approved as accurate; an *in camera* review is conducted for the rape crisis counselor's statements; once complainant verbatim statements are identified, the defense counselor examines the statements for their trial; and the defense counselor is denied access to privileged records concerning the counseling services.

The Pennsylvania Supreme court, based on the Sixth Amendment considerations, claimed the trial court erred in not allowing the defendant access to the SCS files. However, the United States Supreme Court reversed the decision claiming access to the CWS files from the Pennsylvania Supreme Court (*Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)).

An *in camera* review from the courts determined if verbatim statements to the victim were necessary to the defense. The counselor's records from Castaldo mirrored the specific details of the alleged offense. The records stated T.M. denied everything. An *in camera* inspection of the records also told of the communications between the psychologist, Licata, and the victim, T.M. The courts claimed no statements would be subject to discovery. The ruling

from the courts was after an *in camera* inspection and reviewing of the counselor's notes by weighing the competing interest of the parties there were no grounds to overrule the statutory and judicial concern of a juvenile's records of confidentiality. The courts claimed the communication to the psychologist, Licata, were privileged and the privilege belongs to the patient. If a waiver of the privilege was going to be made, the waiver would be made by the patient. *State v. Cusick*, 219 N.J.Super. 452 (1987) cited the defendant could have retained the factual documented information from other sources besides the privileged communication records and those records would not have changed the result of the trial.

Disposition: The court ruled the psychologist-patient privilege stood. The privilege belonging to the patient was not waived by the patient. The notes reviewed in the *in camera* inspection contained no verbatim statements that could be used for the defendant's defense. The opinion of the court was that the same legal efficiency applied to all the comparable companion cases of the 5 co-defendants who were a part of the motion.

Citation: *Sauter v. Mount Vernon School District No. 320*, 58 Wash.App. 121 (1990).

Key Facts: Rocke J. Sauter, a math teacher, at Mount Vernon High School was notified by the school district's superintendent he had probable cause for termination of Sauter. Sauter began teaching in 1985 at MVHS. He taught Algebra 1 and coached at the middle school. Sauter had been a teacher to student, J. Sauter and J. daily had conversations and contact with one another. On September 19, 1986, Sauter wrote J. a note during second period class. After second period, he gave the note to J. The note was not addressed, dated or signed by Sauter. The note to J. made references to Sauter's feeling, his fantasies toward J., and how he was tempted to cheat on his wife with J. when he saw her. J.'s testimony supported the statements made to J. On October, 6, 1983, the school district suspended Sauter with pay. Then on October 10, 1986, the

Mount Vernon School District superintendent alerted Sauter by letter the district found a probable cause to discharge the employee due to unprofessional conduct in a relation with a student and a minor. Then on July 1, 1987, the hearing officer concluded the school district had probable cause to discharge Sauter. The defendant admitted that a sexual relationship dialogue occurred with the victim. Sauter appealed his discharge from Mount Vernon School District to the Superior court where the decision was affirmed on February 25, 1989.

Issues: Did the court err in denying access to the student's counseling records and privileged and confidential mental health records with the school psychologist since the privilege did not fall under the exception of child abuse reporting?

Holdings: No, the communication with the psychologist was privilege communication and does not fall within any exception to the rule such as child abuse reporting.

Reasoning: The Court of Appeals of Washington, District One ruled the information Sauter was seeking was privileged by the psychologist-patient privilege. The student, J., had not waived the privilege. The case related to having no exception to the psychologist-patient privilege. The appellant accepted the communication from the counseling sessions that J.'s communication with psychologist were privileged, and the privilege was not waived when the appellant placed J's emotional health as an issue. J's psychologist counseling session was privilege under Washington Revised Code, RCW § 18.83.110, because no waiver by J. had occurred to breach the privilege. The psychologist-patient privilege stands; however, the appellant argues the psychologist-patient privilege fell with the exception of reporting child abuse. The privilege fell under the exception of psychologist-patient-privilege of child abuse reporting.

Psychologist-patient privileged communication is subject to the same provisions as an attorney-client privilege. The Washington legislature reports the psychologist-patient privilege

with limited exception of reporting child abuse RCW § 26.44.030 (1). A psychologist has required affirmative authority to report child abuse and/or neglect. From the handwritten note, the defendant engaged in sexual exploitation conduct toward a student. The note was unprofessional. The sexual exploitation in the note validated there was factual evidence of a relationship. The appellant's note which gave reason why they should not be involved in a sexual relationship was not credible. The hearing officer viewed the appellant's attempt as a great concern due to the circumstances laying the groundwork to the delivery of the note to the student and the language of the note (*Franklin City Sheriff's Office v. Sellers*, 646 P.2d 113 (Wash. 1982)). The predatory conduct established material to breach the duties as a teacher. The conduct affects the fitness to teach and lacks legitimate professional purpose. When a teacher's discharge is due to a matter of law, known as the *Sauter* test, the teacher's deficiency affects the teacher's performance or lacks a positive educational aspect or purpose. *Clarke v. Shoreline School District 412, King County*, 720 P.2d 793 (Wash. 1986) indicated an alternative as the teacher's discharge is a matter of law. The teacher's deficiency either cannot be remediable or affect performance or the teacher's conduct does not display positively from an educational aspect or professional aspect. Washington's general rule is that a teacher's discharge is a matter of law with the teacher's deficiency being unrecoverable. This affects a teacher's performance or the teacher lacks a legitimate professional purpose (*Hoagland v. Mount Vernon School District No. 320, Skagit County*, 623 P.2d 1156 (Wash. 1981)). In relying on *Clarke* (1986), the position was that the teacher's alleged inappropriate conduct was outside the scope of the professional teacher's conduct occurring separate from his professional duties. This related to his ability to have an appropriate conduct for fitness to teach and his performance to conduct himself as a professional certified teacher.

Under Washington Legislation, Revised Code of Washington, RCW § 28A. 58.099 (1), common school provisions of when a teacher lays the groundwork to pursue sexual relations with a student constitutes the teacher's discharge due to sufficient cause. RCW § 26.44 under the Washington Legislature enacts the psychologist-patient privilege with limited exception. Under RCW § 26.44.030 (1), the psychologist has a mandatory duty to report child abuse or neglect to an agency of law enforcement. However, this mandatory requirement may not be used to discredit the victim. RCW § 26.44.060 (3) the psychologist-patient privilege is not violated when one fulfils the mandatory duty of reporting child abuse. RCW § 26.44.010 establishes the exception's determination of the psychologist-patient-privilege is to prevent further additional abuse to the abused child. The psychologist-patient privilege can only be waived by the patient, and the student did not waive the privilege (Washington Revised Code, RCW § 26.44.030 (1)). The psychologist was not able to give a witness testimony because the information was privileged under Washington Revised Code, RCW § 18.83.110.

Sauter was in a position of trust and care for students. Sauter misrepresented himself as a professional. He also left doubt in the administrations' mind that he would not repeat an incident such as this one. He had developed a special relationship with the student. The attempted seduction of J. happened within the school hours. J. was a student who was extremely vulnerable due to her prior history of sexual abuse and she had continuing medical and emotional problems.

Disposition: The court of Appeals of Washington affirmed the Superior Court for Skagit County, Washington's decision for their action. The process of giving sworn evidence from the psychologist was not allowed.

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Citation: *Humberstone v. Wheaton*, 801 N.Y.S. 2d 868 (2005) (slip opinion).

Key Facts: A custody battle in the state of New York. Mother, Amy Wheaton, respondent, appeals from an order in a proceeding, pursuant to the Family Court, that had awarded sole custody and physical residence of the parties' children to the father, Timothy Humberstone, on September 30, 2005. The mother had specific conditions for visitation. The mother's unfounded report of sexual abuse by the father was inadmissible at the child custody proceeding. The court ordered psychological evaluations for all of the parties involved after the hearing.

Issues: Did the court err in not allowing the testimony of a school guidance counselor concerning the communications made between the guidance counselor and the child, and should the communication have been stricken from the record?

Holdings: No, the testimony to the school guidance counselor was not privileged communication. The testimony should not have been stricken because the school guidance counselor was not a certified social worker.

Reasoning: The New York Supreme Court, Appellant Division, Fourth Department held there was no privilege for the communication with the school guidance counselor. New York's Civil Practice Law and Rules, CPLR § 4508 is a privilege for social workers. The social worker privilege allows the social worker the option to waive the privilege, even over the client's objection. However, the privilege does not apply if the client has the intent to commit a crime or other "harmful act." The Supreme Court of Appeals holds that persons licensed as a master-level social worker or licensed clinical social worker could disclose communication only made by the client. The statute of privileged communication of the licensed clinical social worker did not

extend to the communications between the school guidance counselor and the child, according to New York's CPLR § 4508. Therefore, the testimony to the school guidance counselor should not have been stricken. It was not a privileged communication, even though the respondent-appellant, Amy Wheaton, stated that the conversation should be stricken because the child did not authorize the disclosure of the communications between the school guidance counselor and the child. Also, the court held that before awarding temporary custody of the children to the father, the failure of the court to conduct an evidentiary hearing was viewed as a harmless error and did not warrant reversal of the order to award sole custody of the children to the father.

Under the New York Family Court Act § 651-(a), also known as New York Social Services Law, SOS § 422 (5) (b) (i) (ii), the respondent, Wheaton, was not allowed to introduce an unfounded or false report of sexual abuse evidence into court. According to *Matter of Youngok Lim v. Sangbom Lyi*, 299 A.D.2d 763 (2002), there was no error from the Family Court not allowing the admission of the unfounded evidence report. Because the evidence was inadmissible, the courts did not commit error on refusing to permit Wheaton to testify to the unfounded report.

The communication to the school guidance counselor for the evaluation team report should not have been admitted. Under New York's Civil Practice Law and Rules, CPLR § 4508 concerning social worker-client-privilege, the school counselor was not a licensed social worker. Referencing *Perry v. Fiumano*, 403 N.Y.S.2d 382, N.Y.A.D. 4 Dept. (1978), New York's CPLR § 4508 does not apply for school guidance counselors. Whereas, the court did not abuse its discretion in requiring the psychological evaluation of all parties involved even after the hearing was underway (*Matter of Gray v. Jones*, 251 A.D.2d 765, (1998)).

Even though the court erred giving custody of the parties' children to the petitioner, Timothy Humberstone, without having an evidentiary hearing as to witnesses giving testimony; a reversal of the order was not justified. The courts conducted a vital hearing after the court was going on, and the records from the hearing showed full support of the court's ruling (*Matter of Smith v. Patrowski*, 226 A.D.2d 1073 (1996)). Nevertheless, the court case followed *Matter of Cucinello v. Cucinello*, 651 N.Y.S.2d 93, N.Y.A.D. 2 Dept., (1996) where the father was awarded custody due to the mother's eradicated allegations that the father hurt the child.

The statute of privileged communication of the licensed clinical social worker did not extend to the communications between the school guidance counselor and the child, according to New York's CPLR § 4508. Therefore, the testimony to the school guidance counselor should not have been stricken. It was not a privileged communication, even though the respondent-appellant, Amy Wheaton, stated that the conversation should be stricken because the child did not authorize the disclosure of the communications between the school guidance counselor and the child. Also, the court held that before awarding temporary custody of the children to the father, the failure of the court to conduct an evidentiary hearing was viewed as a harmless error and did not warrant reversal of the order to award sole custody of the children to the father.

Disposition: In this case, the school guidance counselor was not a licensed social worker or a licensed clinical social worker. Therefore, the guidance counselor was not protected under the social worker statute. The guidance counselor's confidential testimony could be given and did not have to be stricken from the court record. Privileged communication did not apply for the school guidance counselor. The Supreme Court of New York, Appellate Division, Fourth Department, ordered that the order to appeal was unanimously affirmed as the same and without cost.

320 Mental Health Records

Citation: *State v. Robert Scott R., Jr.*, 233 W.Va. 12 754 S.E. 2d. 588 (2014).

Key Facts: The defendant, Robert Scott R., Jr., was involved in alleged sexual offenses against four minors. The four minors included C. R., who dated Mr. Scott's step-son; J. D., a 14-year-old hearing-impaired friend to the step-daughter; A. M., a 13-year-old friend of the step-daughter; and R. R, Mr. Scott's step-daughter whom he had adopted. A. M. first reported the sexual assault to her mother. A. M.'s mother reported it to the authorities. The alleged sexual offenses occurred at the defendant's home during 2008 through 2010. The defendant was married. His wife had had three children before the marriage. The defendant had one child, a son, during the marriage. Victim A. M. made the initial report. Each victim testified in a magistrate courtroom on a closed-circuit television. On September 8, 2010, a grand jury found the defendant guilty on 56 counts of indictment. The defendant appealed an order to the Circuit Court of Mineral County, West Virginia. The Circuit Court sentenced him to prison from 125 to 295 years for committing 30 sexual offenses against four minors.

Issues: Did the courts err in denying access to J.D.'s privileged and confidential mental health records to Mr. Scott?

Holdings: No, the court did not err in withholding the mental health records from the Ohio institution called Fox Run Center for Children and Adolescents.

Reasoning: The Supreme Court of Appeals of West Virginia ruled the court did not err in withholding the mental health records from the Ohio institution called Fox Run Center for Children and Adolescents. This was West Virginia Code § 27-3-1, Confidentiality of Mental Health Records concerning mentally ill persons with intellectual disabilities. Referencing *State v. Audia*, 171 W.Va. 568 (1983), privileged communication exceptions in criminal cases are at the

discretion of the trial court. The question asked did the trial court err in its discretion by not allowing Mr. Scott the confidential information of the mental health records. When there is not an abuse of the courts, the discretion from the court's rule the defendant requesting a reversible is not awarded when a pre-trial discovery is denied. Therefore, the child's records remain confidential and the records are maintained by the agency, West Virginia Code § 49-7-1. For West Virginia Code § 27-3-1 involves the confidentiality of the mental health records. Due to the records being held by Fox Run Center for Children and Adolescents, Mr. Scott did not satisfy the requirements for obtaining the confidential records.

West Virginia's Rules of Criminal Procedures Rule (LR Cr P) 16 (a) (1) (D) allows the results of the physical and mental examination reports, which are material evidence, to the defense if they are used in the prosecution's evidence. This procedural rule is known as the time for reciprocal discovery response. Under *State v. Roy*, 194 W.Va. 276 (1995), the trial court holds an *in camera* inspection of the privileged communication records before they are disclosed. However, before the statutory privileged communication *in camera* inspection can be justified, *Roy* requires the defendant to make a relevant showing stating a legitimate need for the records. Also, rejected are those communications which are only needed to attack the victim's credibility. The preliminary showing is not for daring and murky allegations that the privileged evidence might be relevant. The court denied an in-camera review because the defendant did not show an obvious allegation for suspicion.

Mr. Scott claimed J. D. made false allegations at the school about boys touching her inappropriately; therefore, false reporting could have been made. The circuit court rejected the trial court allowing Mr. Scott to cross-examine the victim regarding the false allegations. *State v. Quinn*, 200 W.Va. 432 (1997), purposed the trial court's denial of the motion to cross examine.

Mr. Scott used the court's testimony to try to establish A. M. made false allegations that she was a victim of other sexual misconducts by other people. Under *Quinn*, the trial court found the evidence did not show proof to meet the strong probability requirement of *Quinn*. This was due to the fact that A. M. informed school officials that the statements were never made and the conduct never occurred. Also, A. M.'s allegations were never reported to law enforcement. The principle end of *State v. Crockett*, 164 W.Va. 435, (1979) indicates the defendant has a fundamental constitutional right to be granted a full and fair opportunity to cross-examine the witnesses. Mr. Scott claimed the trial court failed in limiting the cross-examination of A.M. There was limitation for Mr. Scott to cross-examine the forensic nurse, Debbie Wolford. However, as stated by *State v. Richey*, 194 W.Va. 276, (1982), to cross examine a witness the scope of the exam is limited to the evidence given for direct examination. A witness can be examined about evidence affecting credibility, and a trial judge can determine the extent of the cross-examination. When the credibility of a witness is examined to completely assess the witness's interests, biases, and inconsistent statements, as well as, the point of examining unrestrainedly the witnesses' character cross examination is limited. The court also limited cross-examination of A. M. A. M. had told her aunt she was touched inappropriately by a boy at a school dance. The aunt told school officials. School officials questioned A. M. and the boy, and both reported it had not happened. Mr. Scott stated he should have been able to question her credibility for false allegations. Also, cross-examination was limited against Debbie Wolford, R. R., the step-daughter's forensic nurse. The court also limited cross-examination about R. R.'s sexual abuse at the age of 5 years by someone else. Lastly, the state dropped several charges regarding actions that had occurred outside the country. The court ruled no error. The court did not err on the prosecutor's opening remarks. The court contended that admitting Rule 404

evidence was not an error. The court did not err on the prosecutor's opening remarks because Mr. Scott failed to make a timely objection and failed to ask for a curative instruction regarding the opening statement. Also, the prosecutor's comment did not prejudice Mr. Scott. The court contended that admitting Rule 404 evidence was not an error. The court admitted evidence of a 17-year-old girl, who was not one of the victims. The witness showed evidence of Mr. Scott texting pornographic material. This showed lustful intent from Mr. Scott and the court allowed the evidence. The court also limited cross-examination of A. M. and Debbie Wolford. Lastly, the state dropped several charges that occurred outside the country. The court ruled no error.

Disposition: The Supreme Court of West Virginia declared to uphold the circuit court's incarceration sentencing of Mr. Scott on May 24, 2012.

Citation: *Krystal G. v. Roman Catholic Diocese of Brooklyn*, 34 Misc.3d 531 (N. Y. App. 2011).

Key Facts: Krystal G. attended School at St. John the Baptist School in Brooklyn, New York. The assistant pastor, Cortez, was supervised at church by the lead pastor, Agostino. The parents of Krystal G., their 12-year-old daughter, filed a lawsuit against the Roman Catholic Diocese of Brooklyn. The suit also included action against the parish, congregation, church, school and former pastor, Joseph Agostino. The suit was filed for alleged negligence of hiring, retaining, and supervising the former assistant pastor, Cortez. On May 28, 2008, the plaintiffs' alleged defendant, Cortez, sexually assaulted and abused Krysta G., a student at St. John the Baptist School. The daughter of Vivian G. and Juan F., was 12 years old. The defendant, Cortez, touched her, held and fondled her breasts. The former pastor, Agostino, moved to dismiss the contention brought against him by requesting the court to rule as to no case pending due to there being no facts on the issue brought before the court. This is known as a summary judgment

motion of the court. The Supreme Court of Kings County states the motion was premature of knowing the evidence and denied the motion. The assistant pastor moved to dismiss the claim by filing a summary of judgment, claiming there was not enough evidence for a case and to dismiss the victim's allegations of negligent supervision. The courts denied the motion for the ruling. The victim claimed the pastor, Agostino, was held responsible for the church's spiritual well-being, along with the church's daily operations and supervision of assistant pastors. The parents filed a negligence supervision claim against the pastor. The assistant pastor moved to dismiss the claims. The parents cross-moved filing a cross-motion to the defendant's summary judgment against the original moving party to have a discovery of evidence. The defendants also responded to the plaintiffs by cross-moving for a protective order. This was in an effort to seal the confidential records. The victim's parents sought the records of discovery document that the defendants held were protected under the priest-penitent privilege. The victim's parents professed the church administration should have known of the assistant pastor's tendency to commit sexual abuse when they forbid the assistant pastor from coming on school grounds. However, the assistant pastor defied the request and came on school grounds.

Issues: Did the court err in excluding the parents from the discovery evidence from the other party, and excluding the documents sought by the parents which required an *in camera* review?

Holdings: No, the pastor's and assistant pastor's medical records and priest-penitent records were privileged.

Reasoning: The Supreme Court, Kings County, New York ruled under New York Law, as a supervisor of an assistant pastor, the Roman Catholic pastor has a sufficient relationship and has a responsibility for the spiritual well-being of the church. The church is seen as having

governance over the influence of the assistant pastor. Also, there is a permitted inference the authority of the supervision over the church is the pastor's duty. The pastor can be held liable for the principal's actions under the Restatement (Second) of Agency, from the United States Court of Appeals Second Circuit in the *United States v. Montreal Trust Company*, 358 F.2d 239, 1966. New York's Civil Practice Law and Rules CPLR 3101(a) resolves whether courts grant disclosure of witness's names when the defendant can prove no other material evidence to gain the information. New York's Civil Practice Law and Rules, CPLR § 3211 (a) (7), addresses dismissal due to the pleading failing to state a cause of action.

The First Amendment's Free Exercise Clause requires courts to establish a standard of care that religious practitioners have to adhere to while providing spiritual guidance. Under the First Amendment's Establishment Clause, courts must decide on issues with natural principles of law. The priest-penitent privilege covers protection of communication made in confidence and solely for the purpose to gain spiritual guidance, New York's Civil Practice Law and Rules, CPLR § 4505. The priest-penitent privilege is not privileged when a conversation between two parties happens to be a minister.

New York's CPLR § 4505 does not give priest-penitent privilege an absolute complete immunity. The privilege exists if the communication was made in confidence and for the purpose of spiritual guidance (*People v. Carmona*, 82 N.Y.2d 603 (N. Y. App. 1993)). The privilege does not hold just because communication was made with a priest. The privilege protects the confidential communication made to a clergyman when the clergyman is acting in a spiritual capacity. Defendant Cortez provided no legal background for the communication to be privileged. Agostino, responsible for the operations of the school, conducted supervisory documentation that is viewed as a report and not as confidential confessions. The sealing of all

the discovered items of evidence was denied. Documents can be evaluated one document at a time. *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499 (2008) claimed documents being sealed from public review must be done from an independent determination of a good cause by weighing the public's interest against the parties' interest.

The Roman Catholic district included the school. The church had to provide documents for an *in camera* inspection to the courts. Because of the alleged sexual assault by the assistant pastor, the documents were required. The privilege logs from Agostino and Cortez were to be given to the courts within twenty days. The courts were conducting an *in camera* inspection to determine if the documents were privileged communication. Also, the documents were to be under a protective order for the court's review. The documents included privileged logs from conversations. The privileged logs were obtained to determine if the communication was protected by the privilege.

Because the parent's suit was claiming negligence of supervision, then privileged records of the medical health records and psychological records of both the pastor and the assistant pastor were held privileged (New York's CPLR § 4504 and CPLR § 4507). Furthermore, the documents and papers about the lead pastor's care and treatment, plus counseling records, were privileged. These records were privileged because the claim was not against the main pastor's sexual conduct. The party seeking for the records to be sealed must demonstrate persuasive circumstances.

Disposition: Agostino's medical records and psychological records are privileged, so are Cortez's under New York's CPLR § 4504. The courts grant a motion to dismiss Agostino's negligent hiring; however, the courts ruled negligence of supervision. The plaintiffs could not cut the protective order inquiring about the lead pastor's alleged sexual conduct.

Citation: *Commonwealth v. Bourgeois*, 68 Mass.App. 433 (2007).

Key Facts: The Superior Court jury of Massachusetts convicted the defendant, Phillip Bourgeois, of one count of rape of a child and five counts of assault and battery. The sexual abuse of the defendant's stepdaughter occurred between 1993 and 2000. At the time of the abuse, the stepdaughter was 7 years old. The victim's abuse continued from ages 7 years to 13. The stepdaughter, the victim, lived with the defendant and her mother. In March 2000, the victim told her mother, who failed to believe her. The victim told her stepmother and informed the police. The victim's mother is married to the defendant. The commonwealth's counsel obtained the victim's medication records only two months before trial. Among the victim's records were records from the University of Massachusetts Memorial Children's Medical Center in the Child Protection Program Clinic. These evaluations contained the victim's mental health issues. From the defendant's counsel, this was alertness for exculpatory evidence. Following jury trial in July 2002 and the defendant's conviction, the defendant filed for a new trial. The defendant alleged that his trial counsel was ineffective due to neglecting to push for pretrial production of privileged communication records of the victim's treatment.

Issues: Did the court err in providing inadequate failure of counsel to obtain the mental health records which constituted ineffective assistance of counsel for the defendant?

Holdings: No, the defendant's claim that the victim's psychiatric history and substance abuse history could contribute to the victim's lies does not constitute relevant evidence to exonerate the defendant. The counsel's failed access to the victim's privileged communication records did not prove ineffective assistance from counsel. The records of the victim's attempted suicide, abuse of drugs and alcohol, and the victim failing in school were not information relevant to prove inadequate representation.

Reasoning: The Appeals Court of Massachusetts, Worcester claimed counsel's ineffective assistance, the defendant has to show serious inefficiency on the part of the lawyer, a performance falling well short of what the client would expect from an ordinary lawyer; and that the defendant was deprived of a grounded substantial defense. The two programs from the *Saferian* test were established by *Commonwealth v. Saferian*, 366 Mass. 89 (1974). As evidence, this would create reasonable doubt. Generalities of the victim's credibility are not sufficient. The defendant did not meet the standards of Fuller because the defendant's reasons were speculative concerning the victim's medical health records. The defendant did not establish a threshold that the victim's medical health records would substantiate the victim's credibility. This standard, *Commonwealth v. Poitras*, 55 Mass.App. 691 (2002), prevents looking into confidential records in the hope of finding unspecified information that would benefit the defendant. The victim's stepmother was the only complainant witness in the case. The judge allowed both motions. The judge later denied the Commonwealth's motion for reconsideration. The appeal followed. The Bishop-Fuller protocol was developed from Massachusetts Supreme Judicial Court Cases, *Commonwealth v. Bishop*, 416 Mass. 169 (1993) and *Commonwealth v. Fuller*, 423 Mass. 216 (1996). The *Bishop-Fuller* authority of protocol allows for the request of all privileged treatment records. From the *Bishop-Fuller* protocol, the counselor-victim privilege must surrender to the constitutional right of the defendant in criminal cases. The defendant has the right of entry into privileged records. The courts are required to conduct a procedural *in camera* inspection if the defendant is able to show a justifiable need for the records.

There was a specific treatment record on October 6, 2000, referring to the emergency services at Herbert Lipton Center, a mental health treatment facility. The defendant argued that if his defense counsel had sought these records, then there would be knowledge of the victim's

mental health issues. This enrollment into the treatment center was about the time of the abuse. *Commonwealth v. Fuller*, 423 Mass. 216 (1996) referenced that the defendant must demonstrate a credible showing of evidence. The victim's mental health referral around the same time she revealed the abuse is a mere fact and does not constitute a credible showing.

The defendant claimed these treatment records would show attempted abuse, criminal behavior, and impulsive behaviors from the victim. Also, they would show that the victim was failing in school and known to abuse alcohol and drugs. The defendant claimed that the high relevancy of facts of the victim's psychiatric treatment and alcohol and drug use could have provided facts to impeach the victim and the victim's stepmother in the case. In addition, the defendant claimed that the defense counsel's oversight deprived him of revealing the mental health issue concerning the victim. Through the use of expert testimony, the defendant was even deprived of the opportunity to present a troubled child with a serious mental health illness. By missing the opportunity to reveal contrasting characteristics of the victim, the defendant was deprived of the opportunity to reveal these dramatically different characteristics than those portrayed by the commonwealth. The defendant established broad claims concerning the credibility of the victim due to the victim's mental health issues. These speculations lack the reasonable evidence required for the defense.

For the motion of a new trial, the defendant was given copies of the victim's pediatric records and mental health records. He also received other records from the victim's mother. Included in the records was a board-certified affidavit from the psychiatrist. Referencing *Commonwealth v. Fuller*, 423 Mass. 216 (1996), to obtain a pretrial inspection of confidential privileged records, the defendant must present a specific good-faith reason to believe that the records contained evidence that would exonerate the defendant. Material evidence is evidence

that not only meets the requirement of admissibility but also creates a reasonable doubt. *Commonwealth v. Bishop*, 416 Mass. 169 (1993), regarding evidence, declares that giving only generalized statements concerning the witness' credibility is not sufficient. These are requirements from the *Bishop-Fuller* extended standards. However, the trial court cannot be at fault for the defendant's motion for a new trial based on the *Bishop-Fuller* criteria. The trial counsel could not obtain the privileged record documents because their records were not discoverable. Under the *Fuller* ruling, a defendant must show a specific and reasonable belief that the disclosed records would contain evidence favorable to the defendant and relevant to exonerate the defendant.

The defendant's offer of evidence to prove the truth for immediate acceptance does not advance the allegation that the victim or her stepmother lied. This is a generalized claim, making only a reference that the records would have been evidence to support his defense. After the court examined the records, the opinion was that the records did not warrant disclosure. The defendant's reference concerning the victim's psychiatric issues and the time of the incident could be viewed as the victim's suffering of the abuse and the trauma of having to testify.

The court case of *Commonwealth v. Vinton*, 432 Mass. 180 (2000) introduced the evidence as being a double-edged sword, stating that it could be productive or could backfire on the defendant. The defendant failed to establish a factual reason for how the privileged records were both relevant and material--or that they would contain factual, material information to refute the defendant's guilt. Trial council's decision to not pursue statutory privileged communication records was not constitutional ineffectiveness.

Disposition: The judge erred, and the orders for a new trial and discovery of evidence were reversed. The defendant's convictions were reinstated.

Citation: *People v. Brown*, 24 A.D. 3d 884 (N. Y. App. 2005).

Key Facts: On December 8, 2005, County Court of Otsego County, New York, convicted the defendant, James Brown, of rape in the first degree, two counts of sodomy in the first degree, three counts of assault in the first degree, two counts of robbery in the first degree, and second-degree kidnapping. Brown was convicted of a total of nine violent felonies. These convictions came from the abduction, physical abuse, and sexual assault of a 15-year-old girl. At trial, the victim gave testimony of sneaking out of her home and going to a convenience store. At the convenience store, she came in contact with the defendant. The victim asked the defendant to buy her cigarettes. After Brown purchased the cigarettes, he grabbed her in a head-lock and put her in his car while punching her in the face. The defendant forced the victim by threatening to kill her. He told her that he had killed another girl the night before. The defendant, Brown, drove for a while and then stopped the car. He ordered the 15 year old to undress, and he allegedly sexually assaulted the victim. He then stole the money she had, tied her wrists together, and stabbed her around the eyes. He asked the victim if she could see him. He burnt her eyes with the cigarette lighter in the car. She told the defendant she could not see him. When the victim told the defendant she could not see, he pushed the naked victim out of the car onto the interstate. There the victim flagged down a tractor-trailer. The driver of the tractor-trailer called the police.

The victim's testimony to the police included the physical evidence the victim had on her body. Her physical evidence was a broken nose, approximately 10 stab wounds around her eyes and burn markings on her face. The defendant's oral statements and his written statements had portions that aligned with the testimony from the victim to the police. However, at trial, the defendant claimed that the victim voluntarily got into his car, wanting him to take her to buy drugs. He stated that the 15 year old wanted to have consensual sex. He also claimed that the

victim stated she would scream rape if the defendant did not get her drugs. The defendant testified that he assaulted the victim and had consensual sex with the victim; however, the defendant denied raping the victim. The defendant also denied the robbery and the kidnapping of the 15 year old. The defendant appealed.

Issues: Did the court err in not allowing the defendant to cross-examine the victim concerning her counseling session?

Holdings: No, the defendant, Brown, was not allowed to cross-examine the victim concerning her counseling sessions.

Reasoning: The New York, Supreme Court, Appellant Division, Third Department ruled due to the defendant being charged with rape, he was not warranted to gather or review the victim's school and counseling records. The defendant showed no substantial reason to request the records for the trial. Referencing, the Court of Appeals of the State of New York, *People v. Gissendanner*, 48 N.Y.2d 543 (N. Y. App. 1979), the circumstances include the subpoena to search for processes of aggressively attacking the credibility of the victim, known as a fishing expedition. Also, there was no likely reason for the school records and the privileged mental health records to contain relevant material for the defendant's defense. The jury weighed the conflicting evidence between the defendant's violent attacks stabbing the victim, with the defendant's claim of consensual sex from the victim, the Appellant Division of the Supreme Court of the State of New York, Third Department, *People v. Allen*, 13 A.D.3d 892 (N.Y.App. 2004). *People v. O'Malley*, 282 A.D.2d 884 (N.Y.App. 2001) in the California Supreme Court, concerning no factual basis, was given for the victim's hallucinations or fantasies suffered and/or prior false claims of other sexual assaults.

The defendant also had 13 prior convictions against him. At trial, the defendant laid blame on the victim, trying to portray her as a drug user and being sexually active. Under *People v. Gissendanner*, 48 N.Y.2d 543 (N.Y.App. 1979), the courts denied testimony from the victim's former boyfriend, for the extrinsic evidence was solely to strike the credibility of the victim. The defendant's claim to the victim's consensual sex was not believable due to the violence of the attack. The defendant stated to the probation officer that he tried to use the cigarette lighter to cauterize the stab wounds to stop the bleeding. New York's Penal Law, § 70.30 (1) (e) (vi), defines the calculation of the total maximum terms for the defendant. The New York Criminal Procedure Law, CPL § 60.42, rules for the admissibility of evidence of the victim's sexual manner in sex offense cases; whereas the Rape Shield Law prevents evidence being entered into trial due to it being remote in time, irrelevant, or prohibited by the Rape Shield Law. The evidence included the victim's clothing, journal, a poem, and a letter written by the victim. The evidence was considered to be remote in time and irrelevant by the Rape Shield Law, *People v. Thompson*, 267 A.D.2d 602 (N.Y.App. 1999). All were excluded from evidence under the New York Rape Shield Law, CPL§ 6042. The Appellate Division of the Supreme Court weighs heavily on the credibility to determine if the written formal request of the judge, known as a suppression motion, was excluded from evidence. The court ruled that there was no evidence wrongfully obtained due to the defendant stopping his car for the police. The defendant showed no substantial reason to request the records for the trial. Also, there were no likely reason for the school records and the privileged mental health records to contain relevant material for Brown's defense. The court ruled that the sentencing and punishment for the defendant's 50-year collective sentence, was justified in light of the brutal acts against the 15-year-old victim. The brutal acts included abducting the victim, raping, stabbing and burning her eyes, robbing her, and

leaving her naked on the side of the road bleeding. Therefore, the defendant's sentence was not considered harsh due to the brutal acts inflicted on the victim. *People v. Humphrey*, 15 A.D.3d 683 (N.Y.App. 2005), claims maximum sentence when appropriate due to an outrageous crime.

Disposition: The Supreme Court of the Appellate Division of the State of New York, Third Department, ordered the judgment affirmed.

Citation: *State of Connecticut v. Charles Slimskey*, 779 A.2d 723 (Conn. 2001).

Key Facts: After a jury trial, the defendant, Charles Slimskey, was convicted on September 4, 2001, of two counts of risk of injury to a child, one count of second degree sexual assault, and one count of possession of fireworks. In regard to the counts, the defendant brought an appeal. The defendant brought claim against the court due to a written statement by the victim's father that was given to the police. The court declined to address the claim of the written statement. The defendant filed a motion to have the court conduct an *in camera* review of the victim's records to determine if the victim's credibility to testify truthfully could be questioned. The school psychologist objected, stating that the information was privileged. The court granted the motion. The court reviewed the records and determined that nothing prohibited the victim from testifying truthfully. However, the school records of the psychologist's report of the teenage sexual abuse victim stated that the victim was prone to distort reality with paranoid ideation. The school psychologist reported that the victim had told a fictitious story about being victimized and being suspended for bringing a plastic gun to school. He stated that he had been framed by the school, even though evidence showed him responsible. The report from the psychiatrist described numerous episodes of inappropriate sexual behaviors by the victim. However, the court denied the defendant access to the school records. The case proceeded to trial, and again the defendant moved for the court to conduct an *in camera* review of the school

records. The trial court denied the motion again due to the fact that a lesser court had denied access to the records. The case was appealed to the Supreme Court of Connecticut. The Appellate Court affirmed the lower court's decision.

Issues: Did the courts err in not entitling the defendant, Charles Slimskey, to review the school psychological and psychiatric records of the victim?

Holdings: Yes, the trial court erred, and the defendant was entitled to review and use the school records and psychiatric records.

Reasoning: The Supreme Court of Connecticut ruled that the defendant was entitled to review the school records. The courts agreed that a portion of the school records and psychological records were discoverable (*State v. Slimskey*, 761 A.2d 764 (Conn. 2000)). This was related to the victim's credibility and could create reasonable doubt of the defendant's guilt. The denial of the records was not harmless beyond a reasonable doubt. The court's decision on disclosure of privileged communication records is determined by the defendant's constitutional right to deliver to the courts the witness's mental health conditions that could affect the witness's credibility (*State v. Hufford*, 533 A.2d 866 (Conn. 1987)). In citing the Connecticut Supreme Court case of *State v. Storlazzi*, 464 A.2d 829 (Conn. 1983), the determination is whether the defendant can show material facts to relate to the truth as the breach of confidentiality can be justified by the courts. The records did not reveal the victim's ability to be mentally sound. It is the defendant's burden to provide the court with adequate record to conduct a review; however, if a defendant is not given an opportunity to cross examine a witness due to a review of the records, then the defendant's constitutional rights may be violated (Supreme Court of Connecticut, *State v. Bruno*, 673 A.2d 1117 (Conn. 1996)). From the appeal, the courts are required to conduct their own *in camera* inspection of the privileged communication records

looking to determine if abuse of discretion was conducted by the trial court. There was a necessity to establish a balance of the witness' statutory privilege to keep privileged records confidential against a defendant's rights under the Confrontation Clause.

The United States Constitution, Sixth Amendment Confrontational Clause, awards the criminal defendant a right to a fair trial with an impartial jury while also knowing the accusers, the evidence, and charges brought against him/her. Referencing the Supreme Court of Connecticut in *State v. Herring*, 554 A.2d 686 (Conn. 1989), it is the courts need to balance the statutory privilege for the witness' privileged communication records against the defendant's rights due to the Confrontational Clause. An *in camera* review of the privileged evidence was an effective way to balance the criminal defendant's rights and the privacy citizens expect in regard to confidentiality of their psychiatric treatment and assessment. After an *in camera* review, the court's willingness to give the records to the defendant lies in the courts ability to not disturb the confidential information unless there is abuse. The Appellant Court of Connecticut (*State v. Harris*, 631 A.2d 309 (Conn. 1993)) purposed the courts are ruling and weighing the value of the case to the value of the privileged communication records. The foundation of the courts is to determine and assess the value of the evidence if a case warrants disclosing materials that have the quality of proving some evidence relating to the significant truth of justifying waving the patient's confidentiality (Appellant Court of Connecticut, *State v. Kelly*, 545 A.2d 1048 (Conn. 1988)). The restriction of the courts for not allowing the defendant access to the privileged communication records impedes the defendant's constitutional right to discredit the witness's testimony to further impeachment (*State v. Bruno*, 1996).

Disposition: The Supreme Court held that the defendant could have an *in camera* review of the victim's school records. The court looked to view and weigh the value of the evidence, as relating to the case, and to weigh the value against the confidentiality interest.

Citation: *People v. Kukon*, 275 N.Y.App.2d 478 (2000).

Key Facts: A foster child lived with the defendant, Lloyd Kukon, Jr., and his wife. The defendant and his wife had other children. The foster child lived with the family beginning in 1992, when she was 11 years old. The foster child made allegations that Kukon had done something wrong.

At trial, the victim testified of 10 occasions of sexual contact with the defendant. The sexual incidents began in June 1996, when she was 15, and lasted until December 1997. One incident involved the defendant's second cousin, who was a witness to the sexual acts during the summer of 1996. The defendant testified, firmly denying any sexual contact with the victim. The defendant had alibi witness' testimonies to some of the incidents.

On August 3, 2000, the defendant was convicted of two counts of sodomy in the third degree, three counts of rape, and endangering the welfare of a child. The defendant appealed the judgment from County Court of Columbia County that reduced the sentence September 10, 1999. The defendant had a 25-count indictment but was convicted of only 4 counts due to the jury being deadlocked on the remaining 21 counts. The conviction for one count of sodomy came from the sexual incident being witnessed by the defendant's second cousin. The other three counts were related to the December 23, 1997, incident. The defendant sought reversal of the conviction and the child's foster care records were the issue.

Issue: Did the County Court err in the refusal to allow the defendant access to certain school records and psychiatric records?

Holdings: No, the County Courts denial of the victim's school records and psychiatric records were properly withheld from the defendant.

Reasoning: The Supreme Court, Appellant Division, Third Department, New York ruled the County Court's denial was proper. The defendant claimed that not having the victim's privileged records obstructed his ability to cross-examine the expert witness and that this violated the right to confrontation. The defendant's request was based on privileged records revealing that the victim had professed prior sexual abuse and/or was confused by the abuser's identity. The defendant's dispute about the victim being confused about the abusers identify was unsubstantiated. The defendant's offer was to show that the victim's prior abuse could manifest itself as child sexual abuse syndrome or suggest that the victim was confused by her abuser due to the lapse of time in reporting. The Supreme Court of New York Appellant Division, Third Department, *People v. Rogowski*, 228 N.Y.App.2d 728 (1996) purposed that cross-examination was limited because the victim showed no confusion concerning the defendant. The records were privileged, and the exception to the privilege did not apply. The expert testimony did not indicate the expert had examined the victim. The expert also did not advise the victim had been sexually maltreated as the victim showed no signs of an individual who had been sexually abused (*People v. Taylor*, 75 N.Y.2d 277 (1990)). The courts gave limited instruction to the expert's testimony (Supreme Court of New York, Bronx County, *People v. Archer*, 649 N.Y.S.2d 204 (1989)). The defendant's request was based on the privileged records that revealed information where the victim had professed prior sexual abuse and/or was confused by the abusers' identity. The records were privileged, and the exception to the privilege did not apply. The County Court conducted two *in camera* reviews of the records, and then denied the application the defendant was trying to make. The County Court claimed that the records documented only one

molestation, which had occurred years before the court hearing and was unspecified. The County Court did not err in not disclosing the privileged confidential records because the disclosure was not standard nor would the disclosure prove a basis for the defendant's permissible cross-examination (*People v. Rogowski*, 1996). The court also noted that the County Court gave appropriate limited instruction for the jury not to consider the expert's testimony as an improper purpose.

The testimony was properly presented as background evidence. The courts found no merit in the defendant's accusation of an unfair trial. The defendant claimed not having the victim's privileged records impeded his ability to cross-examine the expert witness, which violated his right to confrontation. The records are the possession of the foster care agency. The defendant's request was based on the belief the privileged records held disclosed information that the victim had prior sexual abuse and was confused by the abuser's identity. The defendant's offer was to show the victim's prior abuse could manifest itself as the child sexual abuse syndrome, and could suggest the victim had possibly confused her abuser due to the lapse of time of reporting. The County Court rejected the defendant's statements that the testimony of the People's expert witness relating child sexual abuse syndrome as bolstering the victim's credibility by producing an attention seizing moment to the jury's function. A scientific clarification of the child sexual abuse syndrome was given to jurors who might not have an understanding of the characteristics (*People v. Carroll*, 263 N.Y.App.2d 768 (1998)). Thus an explanation was given as to why sexually abused victims may often have a delay in the offense and the reporting the abusive incident. For one of the three incidents, the defendant was able to give an alibi and the defendant was not convicted to that evening's alleged sexual misconduct. Therefore, the testimony was harmless for it did not supplement the evidence for conviction

(*People v. Norris*, 238 N.Y.App.2d 608 (1977)). The defendant claimed the victim was confused about the identity of the abuser due to the time that separated the incident and the alleged prior abuse allegations (*People v. Rogowski*, 1996). The County Court did not reveal the privileged communication because the records were not admissible nor gave a basis for cross-examination, *Rogowski*. The County Court conducted two *in camera* reviews of the records and then denied the application the defendant was trying to make. The County Court claimed the records only documented one molestation, which had occurred years before the court and was unspecified. The County Court did not err in not disclosing the privilege records because the disclosure was not warranted, nor provided a basis for the defendant's permissible cross-examination. The County Court also did not abuse its discretion by not allowing the disclosure of privileged records.

Disposition: The Supreme Court Appellate Division, Third Department of New York, ordered the judgment affirmed. The court forwarded the matter for further proceedings pursuant of New York Criminal Procedure Law (CPL) § 460.50(5), stay of judgment pending appeal to intermediate appellate court, to the County Court of Columbia County. New York's CPL § 460.50 (5) supported the defendant released on bail during the appeal process, where the case was remitted to the criminal court from where judgment was given.

Citation: *State v. Walsh*, 52 Conn.App. 708 (1999).

Key Facts: The defendant, Michael Walsh, lived with his girlfriend in Naugatuck, Connecticut. The girlfriend's 9-year-old daughter, victim A, the defendant, and the victim's mother lived together. The defendant ordered victim A to go to the bedroom one morning after her mother left for work. The defendant anally penetrated the victim. Victim A claimed that she screamed and tried to get away from the defendant. From February to March 1995, the defendant

assaulted victim A three more times. After the last incident, the defendant threatened victim A that he would double it next time. Victim A talked to Detective Laura Wigglesworth from the Naugatuck Police Department. Victim A told the police officer that the defendant might have also assaulted her friend, victim H. The defendant, Michael Walsh, was convicted of fourth-degree sexual assault and risk of injury to a child. In connection, the defendant was also convicted of sexual assault of two young female victims. The defendant was convicted in the Superior Court Judicial District of Waterbury, Connecticut.

The offense appealed. This appeal contained information of two separate cases. The defendant was charged with each one for sexually assaulting a girl. Victim A was the first victim, born December 7, 1985. Victim H was the second victim, born August 9, 1984. The trial court consolidated both incidents for a concise trial. The defendant appealed the trial court's decision of the two consolidated cases. The defendant claimed that the state's motion to consolidate the two cases was improper. The trial court objected to the defendant's arguments. The trial court held that the joining of two cases did not result in the defendant not having a fair trial due to procedural errors in litigation joining two cases.

Following the jury trial, the defendant appealed his convictions. He claimed violation of Connecticut's General Statute § 53-70(a) (2) on four counts of sexual assault in the first degree with the intent to disfigure victim; violation of Connecticut's General Statute § 53-21 on two counts of risk of injury to a child; and violation of Connecticut's General Statutes § 53-73a (a) (1) (A) for one count of sexual assault in the fourth degree of a victim under the age of 15. The defendant motioned for a judgment of acquittal, and the judgment of acquittal was granted by the trial court.

Issues: Did the trial court abuse its discretion in denying the defendant access to school records and psychiatric records of one of the victims, and err in a violation of the defendant's constitutional rights?

Holdings: No, due to the appeal, the state had a duty for accountability to conduct an *in camera* assessment of the sealed records. The appeal court found evidence from the challenged records that was factual to indicate that victim H did not have the capacity to testify truthfully. The defendant's constitutional rights were not violated, and his argument had no value.

Reasoning: The Appellant Court of Connecticut stated the defendant aimed to use the subpoenaed records to impeach the witness H. The court ordered an *in camera* review of the psychiatric records, and the defendant was given numerous privileged records that the court reasoned to be exculpatory, giving favorable evidence that would clear the defendant of guilt or blame. The records that the defendant did not receive were sealed by the courts. The defendant claimed that he had not received all of the records containing information from the sealed records. He claimed that he was entitled to the records and that all the privileged records were needed to fully understand the partial information that he had received. The defendant's motion to receive the records that remained sealed was denied.

Referencing *State v. Bruno*, 236 Conn.App. 514 (1996), the privacy of the records of the witness's confidential information is of legitimate interest, and is mindful to the courts. Upon the defendant's appeal for the motion to unseal the privileged documents, the court's responsibility is to conduct its own inspection of the sealed confidential records. An *in camera* assessment is the way to determine if an abuse of discretion has occurred through the trial court's refusal to release privileged communication records(*State v. Tyson*, 43 Conn.App. 61 (1996)). Also, the courts referenced *State v. Storlazzi*, 191 Conn.App. 453 (1983), which claimed that the

cornerstone of the determination of the records being released to the defendant hinged on whether factual evidentiary material was available that could relate the truth. This is to justify the breach of confidentiality. From a case-by-case basis, it is vital to determine whether the defendant should have access to privileged communication records, and how much access, to protect the defendant's right to confront. *State v. Storlazzi*, 191 Conn.App. 453 (1983) determined if the defendant's access to privileged records is ample to disclose material when relating the truth to justify a reason to breach confidentiality of privilege. The trial court examined the privileged records and concluded that there was no evidence to provide proof of the testimony as relevant to the witness' impeachment. The trial court did not allow the release of the disclosed communication. After the *in camera* assessment, the remaining documents had no finding of relevant material for evidence.

The trial court held that the joining of the two cases did not result in the defendant not having a fair trial due to procedural errors in litigation joining two cases. The trial court ruled the two cases were also similar in fact and legally connected due to a common pattern of sexual abuse. The case's similarities were that there were two young girls; alleged abuse happened at the defendant's home; similar threats were made to both girls; and both cases had similar perpetration of sexual assault. From *State v. Pollitt*, 205 Conn.App. 61 (1987), the trial court can determine whether the same defendant's charges in separate cases should be consolidated. On appeal, the court's discretion cannot be disturbed unless the defendant convinces the court that the defendant would incur substantial injustice due to the two cases being joined together.

In Connecticut, from *State v. Hilton*, 45 Conn.App. 207 (1997), joinder of cases is largely favored. Joinder of cases results in expedited justice; reduced trial dockets; limited judicial time; and a smaller burden on those serving on juries due to time and money. This, in turn, avoids the

problem of having to call witnesses multiple times (*State v. Vinal*, 198 Conn.App. 644 1986). The courts consider seven factors to determine if joinder is appropriate. These factors include whether there are discrete and easily distinguishable factual scenarios to the charges, the length and complexity of the trial, and whether one of the courts from the conviction alleged conduct by the accused is brutal or shocking. If any one of these factors is viewed, then the reviewing court questions whether prejudice resulted from improper joinder. In this case, the factual incidents are easily described, distinguishable, and discrete. The records also indicate orderly arrangement of evidence. Secondly, the trial was not long or complex. The trial lasted for 6 days. *State v. Chance*, 236 Conn.App. 31 (1996) indicates six days is not excessively long. Thirdly, the purpose of the joinder of two cases was not for the purpose of making the defendant's actions appear more brutal or shocking. The information obtained from the two victims was equally brutal and shocking. The trial court agreed that all sexual assault charges are brutal and shocking. The trial court instructed the jury to keep the two information incidents separated.

The defendant cites *State v. Boscarino*, 204 Conn.App. 714 (1987), claiming by argument that the information from the two incidents should not have been consolidated. In *Boscarino*, the case was about four trials for the defendant's repeated sexual assaults covering over 7 years. The state conceded that if the trials were separately held, the evidence would not have been admissible in all cases. Referencing *State v. Kulmac*, 230 Conn.App. 43 (1994), evidence must be material, and the evidence value must prevail over its prejudicial effect.

Disposition: The appellate court's judgment was affirmed. The appellate court agreed that the trial court consolidated the two cases properly. The appellate court also agreed with the trial court's refusal to disclose the victim's privileged, confidential records.

Citation: *The State of New Hampshire v. Raymond Ellsworth*, 142 N.H. 710 (1998).

Key Facts: The defendant, Raymond Ellsworth, was a teacher at Spaulding Youth Center, a residential treatment facility for boys. The Youth Center treated boys with emotional, developmental, and behavioral problems. The victim, an 11-year-old boy, stated that the defendant, Ellsworth, had engaged in sexual acts and inappropriate contact with him. In November 1992, the victim told a Spaulding counselor about the incidents. The victim testified on three separate occasions concerning alleged sexual engagements with the defendant for inappropriate touching, anal-oral contact, and fellatio. The victim was placed at Pine Haven School for emotional counseling and behavioral problems. Ellsworth was convicted on five counts of criminal sexual assault and two counts of aggravated felonious sexual assault. These sexual assaults were committed against an 11-year-old boy. The defendant appealed the conviction petitioning the Superior Court erred in the victim's counseling sessions at Spaulding Youth Center.

Issues: Did the courts err in refusing to give the defendant an *in camera* review of the counseling records concerning the victim's treatment at Pine Haven, the treatment facility he attended after reporting the assaults?

Holdings: No, the records were not reviewed and the motion was denied. The defendant failed to establish that the victim had spoken with Children and Youth Services.

Reasoning: The Supreme Court of New Hampshire ruled the trial court did not err in the refusal of the *in camera* review of the Pine Haven records. The trial court did not err in denying the defendant's motion of access for the Pine Haven Counselors' testimony. The court found no abuse of discretion on not allowing Klare, the counselor, to testify about the victim's false allegations of the boys looking in the bathroom at the victim and the theft of the toy from the

child at the treatment center. New Hampshire's Rules of Evidence 404(b) stated evidence of a person's character traits, or other wrongdoings, is not admissible to prove conduct or other crimes. Evidence has to show a logical relationship between the victim's prior acts or state of mind with his later acts to show relevance of proof to the credibility or character of witnesses. The counselor's testimony of the victim's false allegations and alleged theft of other minor individuals did not violate the due process or confrontation of the defendant. The evidence's value from the victim to tend to prove guilt was weak and considered a minor infraction. The defendant claimed the trial court erred in not allowing an *in camera* inspection of the counseling records concerning the victim's treatment at Pine Haven. Also, the refusal to allow the victim's Pine Haven counselor's testimony, the defendant stated was in violation. The *in camera* review requested by the defendant is governed by *State v. Gagne*, 136 N.H. 101 (1992), asserting the defendant established a reasonable probability the records contained relevant facts for his defense. From *Gagne*, the consideration of due process requires the courts to weigh the State's protective interest of confidentiality of child abuse records with the defendant's rights to evidence for his defense. *State v. Taylor*, 139 N.H. 96 (1994) included the defendant must produce logical and factual basis for the court to conduct an *in camera* review request, and prove the files would present a relevant evidence basis to establish a threshold. However, the defendant claimed that the Pine Haven records from the counselor were relevant due to the victim making the allegations toward the defendant after seeing the counselor.

The defendant appealed and argued the testimony of the Pine Haven staff member, Craig Klare, should have been heard. However, the defendant did not give another request for an *in camera* review of Klare's testimony. Under *State v. Smart*, 136 N.H. 639 (1993), the court did not err. Also, the defendant argued the courts erred in denying the testimony of the Pine Haven

counselor. From *State v. Rhoades*, 139 N.H. 432 (1995), the case set the abuse of discretion stood. *Rhoades* asserted the defendant had no due process rights to ask for testimony in a criminal case under the state or federal constitution. The defendant must first make a threshold showing circumstances and facts particularly to support the issue at hand. The defendant, looking at the evidence at Pine Haven, wanted to show the victim lied about the events. That the victim had lied about other boys peeking in on him in the bathroom showers, as well as, stealing his toys. The defendant sought to prove the victim was lying at Spaulding Youth Center when he gave details of the defendant molesting him. The courts found no abuse of discretion. The defendant was trying to show a common plan to gain attention. *State v. Melcher*, 140 N.H. 823 (1996) concluded two events had a logical connection involving the victim's alleged character to lie. However, the courts ruled this cited case as irrelevant, with *Melcher* case not existing.

The defendant sought due process and confrontation to require Klare's testimony for the sole purpose of attacking the credibility of the victim (*Davis v. Alaska*, 415 U.S. 308 (1974)). Under *Chambers v. Mississippi*, 410 U.S. 284 (1973), one's basic constitutional right may not be overstepped by the state enforcing its evidentiary rules as to when, how, and for what purpose the rules establish proof of evidence. First, the courts addressed the defendant's assertion within the state Constitution (*State v. Ball*, 124 N.H. 226 (1983)). However, if federal law is more favorable, the courts will look at the analysis of the case under federal law (*State v. Seymore*, 140 N.H. 736 (1996)). From New Hampshire's Rules of Evidence 412, the state and federal Constitution surpass due process and confrontation rights established by evidentiary rules evaluating the records of evidence (*State v. Goulet*, 129 N.H. 348 (1987)). The courts ruled the defendant's argument had no merit and did not warrant further attention (*Vogel v. Vogel*, 137 N.H. 321 (1993)).

The defendant asserted the trial court erred in not cross-examining the victim's prior sexual victimization to show the victim had sexual knowledge beforehand. Under *State v. Ellsworth*, 136 N.H. 115 (1992), courts have broad discretion in determining if allowing cross-examination, and will not overturn trial court unless abuse of discretion. The defendant did not establish a clear unreasonableness to the judgment of the case (*State v. Berrocales*, 136 N.H. 115 (1996)). The trial court denied cross-examination, stating that it was irrelevant due to the age of the child. The defendant did not establish a reasonable factual basis that the victim's confidential records would contain material and relevant facts toward his defense. The defendant did not meaningfully articulate how the evidence was relevant. He did not present a plausible theory of relevance to justify documents to be viewed. However, he did not have to prove the theory but only establish a logical factual basis for the information that the files might reveal as relevant evidence. The defendant only mentioned that the victim was seeing a counselor at Pine Haven. The defense, through cross-examination, questioned the victim about his false allegation concerning other children's sexual practices for pleasure and theft at Pine Haven. The victim denied making false allegations. The defendant denied the allegations, stating that the victim was neither gaining attention nor retaliating against the defendant administering discipline to the victim.

Disposition: On March 31, 1998, the Supreme Court of New Hampshire affirmed the trial court's decision.

Citation: *State v. Bruno*, 236 Conn. 514 (1996).

Key Facts: On the evening of July 17, 1991, the defendant, Martyn Bruno, allegedly killed David Rusinko while partying at a cabin in New Hartford. David Rusinko was partying with the defendant, Martyn Bruno, Brian Bingham, and Cara Ignacak. Bingham was 16 years

older than the other two men. Rusinko and Bruno were in their thirties. All men had been drinking buddies for several months. Both Bingham and Bruno, the defendant, would visit the abandoned summer camp that was next to the property of the defendant's home. Cara Ignacak, then 18 years old, had known Bingham from high school for approximately 2 years. Ignacak and Bingham had dated for three and a half weeks. Bruno told Bingham he was angry with Rusinko for losing his driver's license and for Rusinko's role with a drug deal. He stated that he wanted to beat him to death.

In the evening, Bingham and Ignacak went to Bruno's home, and the three went to the camp. Bruno, the defendant, and Bingham left the camp to buy liquor. They met Rusinko on the road and invited him. Rusinko rode his bike to the camp. Later, Bruno and Bingham returned with alcohol. The four remained at the camp. Later, Bingham claimed that the defendant, Bruno, had asked him to help out with a fight if Rusinko started to fight. Bingham agreed to help in the fight. When Rusinko was in the house, the defendant told Bingham and Ignacak on the porch that he intended to harm Rusinko.

Later that evening, Bruno yelled and shoved Rusinko. However, he stopped when Ignacak had a seizure. After Ignacak recovered, the altercation continued. Then Bingham stepped into the fight and knocked Rusinko on the ground. The two continued to beat up Rusinko until he was unconscious. They punched him, kicked him, and hit him with pieces of metal pipe. When Rusinko appeared dead, they rolled his body into the fireplace. At 11:30 p.m., Bingham and Ignacak left the cabin, and the defendant, Bruno, spent the night at the cabin.

Two days later, Bingham and the defendant returned to the cabin to dispose of the body and to conceal all other evidence. The girl, Ignacak, initiated the investigation by the police. At trial, the defendant testified that, during the day, he had consumed a large amount of alcohol and

drugs. He claimed that the levels of alcohol made him experience a blackout and that he did not remember the murder. He admitted concealing the evidence of the murder. Bruno's theories of defense included: 1) Bingham and Ignacak killed Rusinko without any of his help, and 2) due to his alcohol and valium consumption, he was unable to perform the specific intent to murder Rusinko. Bruno was convicted on all counts except conspiracy to commit a murder. He denied.

The defendant did not have any other witnesses at the trial hearing. The sentencing and punishment for the defendant was a 50-year aggregated sentence. The defendant was convicted in Superior Court Judicial District of Litchfield, Connecticut. The defendant, Martyn D. Bruno, was convicted by the convening three-judge court, for when there are actions challenging the constitutional rights of the defendant, a district court can use this arrangement. The defendant was convicted of one count of murder and three counts of tampering with evidence. The defendant appealed.

Issues: Did the trial court err in not allowing the defendant and his counsel to inspect the medical and psychiatric records of a state's witness, and was it necessary to invade the statutory privacy of the witness in order to provide the defendant with his constitutional right to confront that witness which includes the ability to cross-examine the witnesses effectively?

Holdings: No, the trial court claimed that the defendant failed to show relevancy and denied him the request for an *in camera* review of the psychiatric and medical records.

Reasoning: The Supreme Court of Connecticut specified the defendant did not establish reasonable grounds that the failure to receive the records would impair his right to confront the witnesses' direct testimony. Also, the defendant claimed that the records would establish a factual basis of the witnesses' mental problems, which would affect their testimonies. The defendant called two witnesses. The two witnesses were Ignacak and S. Patricia Keener, a

special education administrator from the high school. Ignacak testified that she had, during her senior year, been enrolled in the special education program at the high school. She was enrolled in special education due to academic difficulties. She testified to having trouble recalling things. However, in this context, she had no difficulty recalling things from the events in her life. She testified to having psychiatric treatment for mild depression in 1987 and 1988. She claimed that she understood the obligation to tell the truth, and she had never been told she suffered from not remembering things.

The special education specialist, Keener, testified that Ignacak had academic classes for special education. However, Ignacak had no problems with memory or association. Her issue had to do with commitment to school, following school rules, and interpersonal difficulties. The defendant argued Ignacak's memory problems, interpersonal problems, and inconsistent statements given to the police were relevant material reasons for an *in camera* review of her mental health records. The defendant only gave speculation, which did not constitute Ignacak's testimonial reliability. Additionally, the defendant failed to establish reasonable grounds that the records would reveal substantial evidence to aid in Ignacak's impeachment. Referencing *State v. Hufford*, 205 Conn. 386 (1987), the standards for seeking privileged records involve the witness's right to privacy weighed against the defendant's duty to bring attention to the witness' credibility.

Concerning Bingham's records, the defendant called three witnesses. The witnesses were Ian Bingham, Bingham's father, and Keener. Bingham's father testified that his son had run away to New York, where he became involved with drugs. After returning from New York, Bingham entered a psychiatric treatment center at Mount Sinai Hospital. His father testified that he believed the treatment was for substance abuse. Keener testified that Bingham was in the high

school special education program from fall 1989 to 1991 until he dropped out of high school. Keener testified that Bingham had trouble following school rules and had a problem with authority figures. However, she claimed that he did not struggle with problems of comprehension or relating information.

The defendant argued that Bingham's problems of emotional distress, substance abuse, and psychiatric treatment warranted an *in camera* review of his school records and psychiatric records. The court disagreed. From the Supreme Court of Connecticut (*State v. Joyner*, 225 Conn. 450 (1993)), the courts in a criminal case have never made the use of the history of alcohol, drug abuse, or treatment reasons for disclosure of psychiatric records. The trial court denied the request for the psychological records. The defendant failed to provide a reasonable foundation of evidence that would prove useful for the impeachment of Bingham's testimony. Referencing *State v. D'Ambrosio*, 212 Conn. 50 (1989), the case accounts for the principle of an *in camera* review of psychiatric records requiring preliminary showing that the evidence is admissible to the courts in relating to Connecticut General Statutes § 52-146e, disclosure of communication. The trial court denied the *in camera* review. General Statutes § 52-146e claims that all communication and records are confidential and that disclosure of the records is limited to any part of the record being disclosed unless the patient gives consent to waive the confidentiality. When the defendant is denied access to the confidential, privileged records, this thwarts the defendant's constitutional right to impeach or discredit the witness' testimony.

The defendant did not produce reasonable grounds to claim that the witness' mental conditions interfered with the witness' ability to testify. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the defendant failed to establish a basis that the records contained material evidence favorable for his defense or any evidence to warrant impeaching the witness's testimony. The

trial court denied the defendant's motion for an *in camera* review of the witness' special education records and psychiatric records as evidence. The case referenced *State v. Esposito*, 192 Conn. 166 (1984), which stated that, for a criminal to have access claiming an *in camera* review of a witness' privileged communication records for the aim of impeachment, the defendant must establish reasonable grounds for the courts to review the records. There was proper denial of the *in camera* inspection due to the defendant's failure to offer evidence that the victim's mental health problems affected her ability to testify accurately. The defendant only established that the witness was an emotional and attitudinal youth. This, however, did not impair the witness' ability to testify.

Under *State v. Golding*, 567 A.2d 823 (1989), the defendant claimed a constitutional error on an alleged violation of the defendant's fundamental right to a fair trial. The courts ruled that the defendant had had a fair trial, even though the court erred in marking the privileged records and sealed the records for appellate review. The trial court had a duty to identify and seal for appellate review possible privileged and confidential records, even though an *in camera* review did not occur. The failure stated that the psychiatric records were harmless. On review of sufficiency of evidence claim, the Supreme Court looked for evidence to sustain a verdict, determining whether a finder of fact could have made a reasonable conclusion from the evidence to establish guilt. Fact-finders reviewed evidence and made inferences from the evidence to deem whether the evidence was relevant, reasonable, and logical or not. Inferences from the evidence are to support the judge's or jury's determination of guilt, not the determination of innocence. On an appeal, the Supreme Court seeks to find whether there is reasonable evidence to support the fact-finder's verdict of guilt. The cumulative evidence supported that the defendant was able to perform specific skills to kill the victim. The court ruled that the 50-year

aggregated sentence was justified due to the brutal acts of abducting a 15-year-old victim, raping, stabbing, and burning her eyes, robbing her, and leaving her naked on the side of the road.

Disposition: The trial court did not err in disallowing the inspection of the witness' psychiatric and medical records. Case affirmed.

Citation: *People v. Gutkaiss*, 84 N.Y.S.2d 936 (N.Y.App. 1994).

Key Facts: On July 27, 1992, state police investigator, Thomas Aiken, conferenced two boys, age 11 (victim A) and age 8 (victim B). Reporting on the child abuse hotline, the two boys indicated they were sexually abused from 1987 to 1988 by the defendant, Timothy G. Gutkaiss. Gutkaiss was arrested at the State Police barracks, where the defendant gave a written statement concerning the incident. From that point, the defendant was accused. At trial, the defendant, Timothy G. Gutkaiss was convicted by trial jury in County Court of Washington County, New York. Gutkaiss was convicted of first degree sodomy. The defendant appealed his conviction.

Issues: Did the trial court err in not entitling the defendant to the victim's medical records and school records?

Holdings: No, the courts do not allow the defendant access to the victim's school records, counseling records, nor medical records. The disputed evidence at the trial was not effective in trying to impeach the victim's credibility. After conducting the *in camera* review of the privileged records, the trial court found there was no *Brady* or *Rosario* material.

Reasoning: The New York Supreme Court, Appellant Division, Third Department, detailed from New York's Criminal Protection Law, CPL § 240.20 (1) (c), discovery upon the demand of the defendant. The county court discretion of the law was not abused in denying the defendant's right for the victim's independent psychiatric exam of a sodomy victim. New York law does not authorize the procedure of an independent psychiatric evaluation.

The county court denied the defendant the victim's school records, counseling records, and medical records. The county court responded properly by not allowing the defendant access to the records for the defendant sought the records in the hope of finding relevant material to impeach the credibility of the victim (*People v. Chatman*, 186 A.D.2d 1004 (N.Y.App. 1992)). The defendant's constitutional right was not violated when he had no access to the victim's school records, counseling records, nor medical records. Also, the defendant was denied the medical records from the victim's father, who committed suicide. The county court denied the defendant access to the counseling records due to the defendant wanting the records in the mere hope the records would rebuke the credibility of the victim. The county court had conducted an *in camera* review and determined *Brady* nor *Rosario* material was in the privileged records.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court established a pretrial discovery rule, known as the *Brady* material. The rule emphasized the prosecution in a criminal case has the duty to turn over evidence that may exonerate the defendant. The *Brady* held when the prosecution suppressed evidence that could be favorable to the defendant, even after the accused had requested the records, due process is violated. For the suppressed evidence could either be material to establish guilt, innocence, or for punishment. When all the evidence is given in the pre-trial discovery rule, then it is determined if the material evidence could bring about a different result of the proceeding.

In *People v. Rosario*, 186 A.D.2d 598 (N.Y.App. 1961), the courts established the *Rosario* rule in criminal cases. The prosecution must give the defense all the recorded statements from the prosecution's witnesses. The material of the witness' testimony of record statements include documents as notes, reports, and witness' prior testimony. These are known as *Rosario* material. The overall purpose of *Rosario*'s material rule is for the defense's right to cross-

examine effectively the witness' credibility. The Rosario discovery rules was established in New York CPL § 240.45.

The County Court discretion was not abused when denying the defendant's request for a psychiatric evaluation of victim A. The defendant requested for victim A to have an independent psychiatric examination; however, the New York's Criminal Procedure Law (CPL) did not allow the scrutinizing exam, CPL § 240.20 (1) (c). The exam is not endorsed due to the emotional traumatic influence on the victim (*People v. Beauchamp*, 126 Misc.2d 754 (N.Y.App. 1985)).

In the summer of 1992, the defendant, Gutkaiss, and the victim's stepfather worked construction at Summit Lake camp in Argyle, New York in Washington County. The victim's stepfather construed a story to call the defendant to Summit Lake on the pretense of having construction work so the police could arrest the defendant. The defendant stated his arrest was unlawful, being an unwarranted arrest, where he was arrested when he arrived. The defendant claimed an unwarranted arrest violated his Fourth Amendment United States Constitution rights due to an arrest in a home (*Payton v. New York*, 445 U.S. 573 (1980)). The courts disagreed for the arrest did not coerce the defendant into the car and was not unfair by denying the defendant due process (*People v. Tarsia*, 50 N.Y.2d 1 (N.Y.App. 1980)).

To establish *Brady* material, the defendant, Gutkaiss, did not make a *Brady* request for medical records. Secondly, the defendant was given a significant opportunity and did not take advantage of it. The opportunity was the defendant was able to question the victim A, his mother, and his physician concerning victim A's medical reports, medication, and hallucinations for favorable information to support the defense. Before the trial, a letter from the doctor indicated victim A had a medical condition suffering from hallucinations. The defendant sought the pretrial *Brady* request for all the evidence; however, the doctor's notes were not included.

The defendant did not include the medical report in the *Brady* request. The defendant made a request but the courts did not award the request. The defense felt if the letter had been disclosed earlier, the results of the trial proceedings would have had a different outcome (*People v. Tarsia*, 50 N.Y.2d 1 (N.Y.App. 1980)).

Disposition: The Appellate Division of the Supreme Court, Third Department of New York ordered the judgment affirmed and the case was sent to the County Court of Washington County for further review of CPL § 460.50(5).

Citation: *People v. Manzanillo*, 145 Misc. 2d 511 (1989).

Key Facts: The defendant, Martin Manzanillo, was charged with third-degree sexual abuse and endangering the welfare of a child. The defendant sought supplemental evidence that is held by the prosecution for the assembly of privileged records such as the psychiatric records, mental health records, and special education records of the complainant. The defendant argued that he was entitled to the records, alleging that the complainant's condition could affect the complainant's ability to be reliable, credible, and competent. The complainant was a 14-year-old remedial student at a New York City Board of Education's special education high school. The court denied the defendant's request for the production of the privileged records. The court conducted an *in camera* review of the records and ruled that there was no relevant reason for the defendant's case against the complainant for the privileged records. There was no evidence of a mental health issue identified for the complainant. Therefore, the defendant was not entitled to the privileged records.

Issues: Did the court err when the defendant made no relevant showing of records that contained relevant and material evidence that would allow him access to the psychological records and the social worker's evaluation of the special education records report?

Holdings: No, the defendant will not be granted access to the victim's psychiatric records, mental health records, or special education records without an *in camera* review by the trial court. The *in camera* review would examine the relevancy and need of the records.

Reasoning: Criminal Court, City of New York, New York County, Part AP5 reasoning was the 14 year old had no evidence of having a mental health issue due to the victim being a special education student. It is the trial court's role to examine the potential need for the defendant to have access to the records for his defense based on the relevancy of the records. The court reviewed the following records from the victim: 1983 social history; 1989 social worker evaluation; 1983, 1986, 1988, and 1989 psychological examinations; and 1988 and 1989 psychiatric reports. The New York Education Law § 4005 (1) (e) governs the evaluation of children by stating information regarding special education is considered confidential, and the evaluation is sent to the facility where the student is placed. Also, the employment of the social worker and the psychologist by the Board of Education regards their communication and records as privileged. *Brady v. Maryland* (1963) establishes that the prosecution cannot withhold evidence that may be favorable to the defendant if the material could bring either guilt or punishment. In *People v. Rosario* (1961), the ruling was, when evidence as statements from the witness' testimony is relevant to the court's issue, nothing must be kept confidential. The court establishes when privileged information is sought by the defense tension arises. This tension is due to the rights of the accused to confront and to cross examine witnesses and the witnesses' interest in not having their life laid bare like an open book. Although a witness may have a mental disorder, this does not automatically disqualify the witness from testifying. The jury must consider assessing the illness of the witness and evaluating the testimony given by the witness.

The court referenced, New York Civil Practice Law and Rules, New York's CPLR § 4507, the psychologist-client-privilege and New York's CPLR § 4508, the social-worker-client privilege. From the reference of *People v. Chamber*, 134 Misc.2d 688 (1987), the court held that the defendant was not privileged to view the victim's records. Due to the defendant's pursuit of evidence, the court found that the defendant's fair trial rights through due process were not violated. The issue is the balancing of the defendant's Sixth Amendment's right with balancing the right of both parties to cross-examine adverse witnesses. There is also the issue of the defendant's right to evidence to help the issue of guilt or innocence set by *Brady*. However, the public interest is in keeping confidential material privileged along with the defendant's Sixth Amendment rights. Therefore, the court's action is to conduct an *in camera* review to determine the relevancy of evidence to outweigh the common law confidential need (*People v. Chamber*, 134 Misc.2d 688 (1987)). *People v. Gissendanner* (1979) placed limits on the defendant's ability to subpoena and have full access to a victim's personal records. If the defendant was entitled to access the confidential files of the victim just for attacking the victim's credibility, then the confidential principle would be meaningless. The courts also found that none of the other constitutional or statutory rights were violated, even common law rights. The court has held to the physician-patient-privilege. The privilege must surrender to the constitutional due process rights of the defendant. When there is a key witness for the prosecution who has had a mental health history the privilege does not stand.

Disposition: The court denied the production of high school, psychiatric, and mental health records.

Citation: *Matter of Handicapped Child*, 118 Misc.2d 137 (1983).

Key Facts: Based on the request from the Orchard Park Central School District in 1982, the student's mother halfheartedly agreed to an evaluation of her child for psychiatric and psychological testing by the Western New York Children's Psychiatric Center. She agreed to the evaluation based on expressing that she would be provided copies of the psychiatric and psychological testing report prepared. The evaluation reports were provided to the District and not to the mother. The Western New York Children's Psychiatric Center has the records of the student. The school district is requiring the production of the student's evaluation records by subpoena *duces tecum*. The parent's complaint was that the evaluation was based solely upon the information the school personnel provided exclusively, without her input. The parent withdrew her consent for the release of the psychiatric and psychological testing information. The parent argued that the recommendation for referral for special education services was made solely from the report and would not be relevant in the fair hearing proceeding. The Orchard Park Central School District brought a motion for a subpoena for psychiatric, psychological, and evaluation records of an infant student relating to the educational service for the child. The parents of the child asserted that the evaluation report was absolute privilege. The parents did not want to turn over the information to the school district for any reason. Also, the parents noted that there was no need for the evaluation from the district when testimony was coming from the director of special education services, the school psychologist, the classroom teacher, and the school principal.

Issues: Did the courts err in affirming a school was eligible to command the psychiatric and psychological reports and evaluation of records of an infant student over the objection of the infant student's parents?

Holdings: No, the school should not be allowed the psychiatric and psychological testing records upon their request for discovery from the Western New York Children's Psychiatric Center.

Reasoning: Supreme Court, Erie County, New York reasoned that the school district pursued a student's confidential records subpoena to collect the confidential records from Western New York Children's Psychiatric Center under New York's Civil Practice Law & Rules CPLR § 2307. However, the parents of the student cross-moved to stop the subpoena under the covering New York's Civil Practice Law & Rules CPLR § 2304. The Attorney General asked the courts to deny the records the school district requested. Under statutory mandate, New York's Education Law (EDN §4402), the school district established a committee for the handicapped. Due to the parents being unsatisfied from the results, the parents appealed the school district's decision. The parents requested a fair hearing under New York Education Law, EDN § 4404 and New York State's Compilation of Codes, Rules and Regulations, 8 NYCRR § 2005. The hearing pertained to New York's Education law, EDN § 4404 (1), an appeal for procedures for children with disabilities. In relation to when the parents do not accept the committee's recommendation, the parents then notify the school district. The school district then appoints an impartial hearing officer to hear the parent's appeal. The hearing officer makes a recommendation to the school district. The school district has a duty to create a committee to conclude the student's determination of a handicapped condition, New York Education Law, EDN § 4402. The hearing is held as if it is a new hearing without any legal conclusions, *de novo*, and the parties present evidence and give testimony. The party is to be represented by counsel with the ability to confront the witnesses through questioning, New York's Civil Practice Law & Rules CPLR § 4503. The New York state laws and the New York Mental Hygiene Law § 33.13 both comply

and recognize the attorney-client privilege as a privilege of confidential communication, that has long been vested by law. On the same basis as the attorney-client privilege, New York Statute has established registered psychologist-client privilege communication under New York's Civil Practice Law & Rules CPLR § 4507, and certified social worker-client privilege CPRL § 4508. Even though the communication is privileged, the privilege does not stand completely unbreakable. There are exceptions to the rules. These exceptions can be investigating billing practices, detection and prevention of child abuse from doctor's records (New York's Family Court Act § 1046), or narcotic treatment (New York's Public Health Law § 3373). The court found no legislative exception to the privilege to allow release of the psychiatric and psychological testing records to the district. The school district did not receive a court-ordered subpoena to give directions for the school district to produce the psychiatric and psychological evaluation of the records. Privilege is confidential communication vested by law, not to be disclosed. However, no exception, as a legislative exception, to the privilege was found or noted. The paramount concern for the court is the welfare and best interest of children. The statutory enactment expressed by public policy does not provide for information to be turned over to the school district for any reason. In this case, the child's records have no exception to the privilege for turning over the information of records to the school district, Mental Hygiene Law § 33.13. The Mental Hygiene Law § 33.13 does not allow clinical records of privileged communication to be disclosed to a school district for any reason (*People v. Doe*, 61 AD2d 426 (1979)). If confidential communication is made under the statute of public policy or if there is an overriding concern of the public's constitutional element, then the confidential communication is kept secret. *Bloodgood v. Lynch*, 293 N.Y. 308 (1944) established the party asserting the privilege has the burden to establish the privilege. *Perry v. Fiumano*, 61 A.D.2d 512 (1978) cited, furthermore,

the privilege is for the welfare of the child and the child's best interest is the court's paramount concern. The court must give the privilege proper effect of the law unless the legislature gives other rulings in a different direction. *Fiumano* concludes the psychologist or certified social worker has the client's trust, just as the client puts trust in the physician while relying on the information to be kept confidential. This is where trust in the psychologist or certified social worker is established.

Disposition: The court denied the motion for the District to have production of the psychiatric and psychological test results.

322 Persons Entitled to Assert Privilege

Citation: *McCormack v. Board of Education of Baltimore County*, 158 Md.App. 292 (2004).

Key Facts: On June 7, 1999, Ryan McCormack, a 4-year-old student, was riding home on a Baltimore County school bus. Ryan was the only child remaining on the bus except for the bus driver, Virginia T. Carter, and the bus aide, Ethel Reinhart. The school bus crossed over the center line on Golden Ring Road in Baltimore County. Losing control of the bus, the bus driver struck an oncoming vehicle. After this initial impact, the school bus next struck a utility pole, then a tree, and finally rammed into the front porch of a nearby home. The driver of the school bus died. Ryan, the student, was injured. Ryan was bleeding from his head and was transported to a hospital. The police officer observed Ryan crying hard, being very nervous, and becoming lethargic. Ryan chose not to ride the school bus anymore, with only 3 days remaining in the school year. The following school year, Ryan rode the bus, except when his fears were great. Ryan's parents, the appellants, Duane and Renee McCormack, brought a negligence action claim against the Board of Education of Baltimore County on September 2, 2004. In the Circuit Court

of Baltimore County, the appellants, the McCormacks', brought claim against the appellee, the Board of Education, seeking damages for their son's injuries. They also sought action for monies spent for the child's care and psychiatric and psychological treatment. The Board accepted liability. The case was tried before a jury on the sole issue of Ryan's injuries and the cost of his care and treatment due to the accident. At trial, Ryan was 9 years old and testified himself.

The trial was a small victory for the McCormacks; therefore, the McCormacks sought rectification or equitable remedy from the court. The McCormacks' complaint was not regarding the physical injuries of the student but, rather, the psychological injuries he suffered. The Court of Special Appeals' reviewed *de novo* of the issue, as if reviewing the issue for the first time. The Appeals' court reviewed the child's psychologist videotaped disposition. Based on the issue of privilege, the privilege could not be waived by the parents based on the interpretation of the law. The interpretation of the law involved the therapist-patient communication statute. The court appointed a guardian due to the statute. Prior to 1966, through the Court of Appeals provision, Maryland's Courts and Judicial Proceedings Code § 9-109(b), the court was to not disclose the psychiatrist-patient privileged communication related to a patient's diagnosis or treatment of the patient's mental or emotional disorders. In 1966, legislation mandated language stating that disclosure involving custody of a child could come only from a judge. Then, in 1977, from the court case *Nagle v. Hooks*, 296 Md. 123 (1977), the General Assembly revised the language of the law to stipulate that a minor could not assert or waive his or her psychologist-patient privilege. The statute mandated an appointment of a guardian for the best interest of the child. The court claimed that the parents had a conflict of interest.

The Court of Special Appeals held that the trial court should have reviewed the child's psychologist's deposition and the child's psychiatric and psychological records to determine if

there was a conflict of interest between the parents and the child concerning the ruling of the child's psychotherapist-patient privilege. The Circuit Court excluded evidence of the psychologist's testimony and Ryan's psychological and psychiatric records. The court removed, vacated, the judgment and remanded the case by ordering a new trial.

The Board's argument was that the McCormack's claim for Ryan's medical expenses created a conflict of interest with Ryan's psychologist-patient privilege. The Circuit Court offered the McCormack's two choices: either agree to a trial postponement so a guardian could be appointed who would assert or waive the psychologist-patient privilege or prohibit the issue at hand of allowing no psychologist's testimony and no psychologist's records. Also, the McCormacks would have to pay the cost the Board had incurred for the trial. The McCormacks chose no guardian appointed and thus excluded the testimony and records of the videotaped psychologist. The McCormacks were also not allowed to testify of Ryan's behavior after the accident. Therefore, the McCormacks could not establish a connection between the accident and Ryan's post-accident emotional distress.

The Board moved to exclude the doctor's videotaped deposition and the psychologist-patient privilege could not be waived by Ryan's parents. The psychologist's videotaped testimony testified that, following the accident, Ryan experienced post-traumatic stress disorder. The symptoms that Ryan suffered were wetting on himself during the day, nightmares, anxiety, and violent behavior. Ryan testified that, when he rode the bus, he would ride in the back of the bus to get out the emergency doors in case of another accident. He also testified to having nightmares in which he saw the bus driver dead.

Issues: Did the court err in not including the videotaped deposition of the psychologist, Dr. Joseph H. Kaine, Ph.D., the psychiatric and psychological records, and the evidence of Ryan's long term psychological problems?

Holdings: No, the psychologist-patient privilege was not waived due to Ryan's mental condition being an element of the claim. The court reviewed the evidence but made no discussion of bringing the evidence into the case at trial, known as a motion *in limine*. The doctor's testimony was not allowed.

Reasoning: Court of Special Appeals of Maryland identified the Circuit Court disallowed the doctor's testimony. The psychotherapist-patient privilege serves both the interest of the patient and the public's interest. The privilege serves the patient by protecting confidence and trust, and serves the public by facilitating appropriate treatment for individuals having mental health issues. From Maryland's Code, Courts and Judicial Proceedings, Code § 9.109(c), the courts reviewed by reciting the issues without reviewing the decisions rendered, *de novo*, to whether the parents could waive the psychologist-patient privilege. When courts interpret a statute, they look for the fundamental reasonableness of the statutory principle. Courts seek rationality, practicality, and common sense. They avoid interpretation of the statute that leads to absurd results because they look for true interpretation of the legislature. There was a conflict of interest between Ryan's parents disclosing confidential information about Ryan's post-accident mental issues in order to recover the cost from Ryan's psychiatric and psychological treatment and in not disclosing confidential sensitive communication. The fundamental statute is read where no words are surplus or meaningless. Statutes are to be read so there is no words or expressional phrases changed giving unrestrained lavish meaning or meaninglessness to the statute (*Kerpelman v. Smith, Somerville & Case, L.L.C.*, 693 A.2d 357, Md.App. (1997)).

Prior to 1966 through the Court of Appeal, provision was to disclose psychiatrist-patient-privilege communication related to a patient's diagnosis or treatment of the patient's mental or emotional disorders. It was the 1966 legislation claiming only disclosure could come from a judge involved with the custody of a child. Then in 1977 (*Nagle v. Hooks*, 296 Md.App. 123), the General Assembly turned the language of the law to a minor. A minor could not affirm or abandon his psychologist-patient privilege and the statute mandated an appointment of a guardian for the betterment and interest of the child. The courts maintained the parent had a conflict of interest.

The McCormacks were seeking medical payment from the bus accident. However, this created a conflict of interest because they were using the mental health condition of their son as the issue of facts. The Conflict of interest came from their son's psychologist-patient-privilege. The courts gave the parents a choice. The first choice was for the agreement of a postponement of the trial in order to have time to gain a guardian appointed by the courts. The second choice was to continue the court order of not allowing the introduction of the records of testimony into the court. The appointed court guardian is construed under courts of Judicial Proceeding Article, CJP section Code § 9-109. Whereas, Maryland courts and Judicial Proceedings, MD Courts & Judicial Procedural Code § 9-109 (b), psychologist-patient privilege could not be waived by the parents.

When the court made the decision on exclusion of evidence as Ryan's notes, the McCormack's observation of Ryan after the accident, and the videotaped deposition from Dr. Kaine, the admission of evidence was the responsibility of the courts. Therefore, only a showing of abuse of the discretion of evidence ruling would stand under appeal (*J.L. Matthews Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md.App. 71 (2002)).

Due to the potential conflict, the courts ordered the court-appointed guardian to help Ryan with his decision to surrender his psychologist-patient-privilege. The canons of statutory construction determine the validity of the court's ruling. For the cardinal rule of interpreting statutes is to determine the effective legislative intent of the statute (*Mayor and City Council of Baltimore v. Chase*, 756 A.2d 987, Md. (2000)). The statutory aim's objective is to look for the purpose of the law in a natural way and through the ordinary significance of the traditional canons of statutory interpretation (*Azarian v. Witte*, 779 A.2d 1043, Md.App. (2001)). The courts are mindful of the statutes' fundamental principles. The goal is to avoid a non-common sense perspective that is both illogical and unreasonable (*Frost v. State*, 647 A.2d 106, Md. (1994)).

From *Jaffee v. Redmond*, 116 S. Ct. 1923, U.S. Ill. (1996), the psychologist-patient-privilege is rooted in the need for confidence and trust with the psychologist. As stated by *Laznovsky v. Laznovsky*, 357 Md. 586 (2000), physicians help effectively with physical ailments and there does not have to be trust of the physician. The psychiatrist effectiveness depends on the patient's confidence in the doctor (*Taylor v. United States*, 222 F.2d 398, D.C. Cir. (1955)). However, Ryan as a 4 year old, could not make those decisions on his own concerning relinquishing the psychologist-patient-privilege. *Nagle v. Hooks*, 296 Md. 123 (1983), stated the age to waive a privilege was 10 years old or older in order to make a competent decision about surrendering the privilege.

Mentioning *Kovacs v. Kovacs*, 633 A.2d 425, Md.App. 1993, then years later, a custody case considered the issue of a parent's right of a psychologist-patient-privilege. The parents do not have a right to surrender the privilege of a minor, even if both parents are in agreement to surrender the privilege. Only an appointed guardian makes the declaration to waive the privilege. In child custody cases, conflict of interest moves away from the conflict to make the issue for the

best interest of the child. Other states have statutes of disqualifying in criminal cases and child abuse and neglect cases, the conflict of interest claim (*State v. Hunt*, 406 P.2d 208, Ariz.App. (1965)). In criminal cases, even if the defendant is the child guardian, the defendant cannot assert statutory privilege (*People v. Lobaito*, 351 N.W.2d 233, Mich.App. (1984)). Running through American family law and through Maryland's family law is the presumption that parents act in the best interest of their children (*Ashcraft & Gerel v. Shaw*, 728 A.2d 798, Md.App. (1999)). As well, *Troxel v. Granville*, 120 S.Ct. 2054, U.S. Wash. (2000) stated fit parents act in their children's best interest.

The McCormacks never initiated the Board's untimeliness as an issue at trial; therefore, the appellate court does not rule on issues not raised in the records by the trial court. Also, the court erred in granting a motion *in limine*, for the judge to prevent certain sections of evidence being brought into court, of untimely filing by the Board. The McCormacks at trial opposed the School Board's motion *in limine* of bringing certain evidence into the record, the McCormacks never made claim of the Board's untimeliness at trial. The McCormacks could not testify about Ryan's behavior after the accident because such testimony was not from an expert witness.

Disposition: The Supreme Court ruled the judgment removed. The case was sent back to the Baltimore County Circuit Court for further proceedings consistent with the opinion. The appellee was to pay for the cost. The admission of evidence is left to the decision of the trial.

Citation: *Matter of Charles R.R.*, 166 N.Y.App.2d 763 (1990).

Key Facts: The Family court of Clinton County, New York found the juvenile in need of supervision. Three petitions, two juvenile delinquent petitions and one person in need of supervision petition, were filed against the juvenile from November 1988 to June 1989. From a plea agreement, the juvenile admitted to one of the petitions in return for the courts to forgive the

other petitions. The one petition was the juvenile was in need of supervision, the petition that was forgiven was the juvenile was a delinquent. The psychologist-patient-privilege would have been asserted; however, the juvenile did not assert the privilege. The psychologist testimony was allowed in court. The juvenile also admitted to being a person in need of supervision. The juvenile's special education records were admitted even though the juvenile's parents had not permitted them to be. The juvenile admitted to the Family Court stealing stolen property. The juvenile accepted he was in need of supervision. The juvenile was placed in the State Division of Youth for one year. The juvenile appealed the court order.

Issues: Did the court err at the dispositional hearing admitting the school's psychologist's testimony?

Holdings: No, the courts found the school psychologist's testimony was properly admitted into court because the juvenile did not assert his psychologist-patient privilege.

Reasoning: Supreme Court, Appellate Division, Third Department of New York identified on appeal, the respondent argues the school psychologist's testimony was not allowed in court. Even though the respondent was represented by counsel, the respondent waived the privilege. The privilege was not asserted by the respondent (*Matter of Delia v. Spina*, 132 N.Y.App.2d 1006. (1987)). The respondent claimed double jeopardy because the respondent had two petitions along with the petition for supervision. However, the Family Court made a fact-finding hearing, New York Family Court Act § 712 (e). The respondent's placement was based on the respondent's admission of being in need of supervision. He pursued a plea bargain accepting the petition of a person in need of supervision.

The court rejected the argument from the respondent. The court allowed impermissible facts concerning the respondent's need for required supervision. Under the New York Family

Court Act § 712 (f), the courts conducted a dispositional hearing before the judge during the juvenile proceedings to determine if the respondent required supervision or treatment. The reason for the hearing was for the Family Court to provide the intentional needs of the respondent. Therefore, any factual and material evidence could be admitted. The facts were the underlying cause of the petition. The courts also rejected the argument concerning the school psychologist's testimony being admitted into court. The court cited, even in child custody cases, the Health Insurance Portability and Accountability Act of 1996 (HIPPA) release of records did not override a state's psychotherapist-patient-privilege, in New York Superior Court, *Liberatore v. Liberatore* (2012). The court even held the respondent's special education committee report was determined harmless because the report was only used as fact finding. Even without the consent of the respondent's parents, the records were admitted into the case, following Individualized Education Plan, IEP implementation, from New York Codes, Rules and Regulations, Education Department 8 NYCRR §§ 200.4 (g). The information was not used at the fact-finding hearing, *Matter of Anthony C.*, 143 Misc.2d 475, (2003). The confidential information was only used to offer the respondent help after judgment of being a person in need of supervision. HIPPA release did not override state patient/psychotherapist privilege in child custody dispute, *Liberatore v. Liberatore* (2012)

Disposition: The case was affirmed. The juvenile was a person in need of supervision without cost.

323 Waiver of Privilege

Citation: *Johnson v. Rogers Memorial Hospital, Inc.*, 283 Wis.2d 384 (2005).

Key Facts: In summer 1991, Charlotte Johnson, an adult child at the time, began psychotherapy treatment with Kay Phillips at Heartland Consulting Services. Charlotte was

referred to Rogers Memorial Hospital for specialty programs for eating and addictive disorders. She was also admitted for sexual and physical abuse treatment. Charlotte received therapy from two licensed psychologists, Jeff Hollowell and Tim Reisenauer. It was during therapy treatment that Charlotte developed the belief she was raped as young as age 5 by her father and physically abused by her mother. Charlotte confronted her father and her mother. On May 29, 1996, the plaintiffs, Charles and Karen Johnson, Charlotte's parents, filed a negligent treatment allegation toward Charlotte Johnson's therapist for planting false memories of childhood physical and sexual abuse that her parents committed on the patient. The allegation was hindered because Charlotte refused to waive her therapist-patient privilege. Charlotte Johnson, the patient, had accused her parents Charles and Karen Johnson of being child abusers. She had also disassociated herself from her parents due to the abuse. The Dane County Circuit Court dismissed the claim, and the Johnsons appealed. The Johnsons filed a claim against the therapist.

Issues: Did the court err in that there should have been an exception for the therapist-patient privilege when, as an adult, she accused her parents of physical and sexual abuse when she was a child.

Holdings: No, Charlotte did not waive her therapist-client privilege. Charlotte did not breach her therapist-patient privilege when she signed limited authorization for her medical tests and general progress.

Reasoning: The Supreme Court of Wisconsin stated the therapist-patient-privilege was not waived by the victim by signing limited authority to release her medical test records and general progression of treatment. Even though the victim's parents received the information by accident the recorded privileged communication was private, detailed under confidentiality of patient health care records in Wisconsin Statutes and Annotations, W.S.A. § 146.82. In addition,

the patient privilege was not waived by the treatment center sending her billing statements to her parents, W.S.A. § 146.82 (2) (a) (3). Even when the patient invited her parents to attend a counseling session to confront them about the alleged abuse her privilege was not waived (W.S.A. § 905.04 (1) (b)). The therapist-patient privilege was not waived by the patient filing a restraining order against her parents, as well as, stating her parents were perpetrators of physical and emotional abuse to her, W.S.A. § 905.04 (4) (c), and § 905.11. Concurrently, as the patient communicated with her attorney concerning civil actions against her parents, the patient did not waive the therapist-patient-privilege, W.S.A. § 905.03(2). Even though the patient's communication took place with an unlicensed therapist, the conversation was still confidential. The unlicensed therapist was supervised by a licensed psychiatrist who consulted with the unlicensed therapist monthly, W.S. A. § 905.04 (1) (d). The privilege with an unlicensed therapist stands because the client's expectation that the privilege was present and the therapist was supervised by a licensed therapist. The therapist had not received her certification; however, she was under the supervision of Dr. David Isralestam. The physician, the licensed psychiatrist, supervised all practicing counseling therapists at Heartland. During one session in April 1992, Charlotte's father, Charles, tried to interrupt one of the therapy session at Rogers Memorial Hospital. The police were called.

The Johnsons tried to assert the public policy exception by claiming confidentiality did not apply. They claimed confidentiality is not applied due to Charlotte signing a release for limited records, medical bills being proved to her parents for treatment, during a therapy session she confronted her parents concerning the abuse, telling a school friend about the therapy, filing a restraining order on her parents, and consulting with an attorney concerning a civil suit against her parents. The courts denied the idea for a new exception to the therapist-client-privileged

communication. The circuit court claimed Charlotte did not waive her privilege. The Court of Appeals of Wisconsin recognized *State v. Locke*, 502, N.W.2d 891 (Wis.App. 1993), in that the patient perceived the therapist communication privileged and the key purpose was the expectation of the privilege from the medical provider. No evidence was presented referencing that Charlotte did not expect the communication with the therapist, Phillips, to be privileged.

The Court of Appeals of Wisconsin in *State v. Allen*, 546 N.W.2d 517 (Wis.App. 1996) stated that a patient's health care records may include privileged communication records between the patient and health care provider. There are two statutes pertaining to a patient's health care records: The statutes under Wisconsin State Legislature §146.82 (2017), and patient and health care provider under Wisconsin State Legislature § 905.04 (2017). They collectively attach patient and client records of communication. The canon of statutory has 2 statutes with one more specific statute overriding the general statute. Therefore, the confidential communication is not waived. Wisconsin State Legislature, § 905.11 (2017), states that the waiver of privilege by voluntary disclosure, directs a person with privilege of communication to waive the privilege if the person, as holder of the honor, intentionally consents to bare any part of the communication.

Also, the attorney-client could not waive the privilege without Charlotte's consent, *Harold Sampson Children's Trust v. Linda Gale Sampson Trust*, 679 N.W.2d 794 (1979). The client is the only one to surrender the privilege. The fundamental tenet is that every person's evidence has a right to be presented before the law. However, as a witness, the person cannot be forced to disclose privileged information, evidentiary privilege, and this privilege can interfere with the trial courts search for truth, court of Appeals of Wisconsin (*State v. Echols*, 449 N.W.2d 320 (1989)). Therefore, evidentiary privilege must be strictly held. This privilege must align with helping the judicial system seek the truth, serve the justice system, and give the fact-finders the

relevant information (*Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 625 N.W.2d 876 (Wis. App. 2001)). The therapist-client privilege exists to help bring about candid discussion of health care concerns with a therapist, Court of Appeals of Wisconsin (*State v. Agacki* 595 N.W.2d 31 (Wis.App. 1999)). The United States Supreme Court decision *Jaffee v. Redmond* 116 S. Ct. 1923 U.S. Ill. (1996) established the psychotherapist-patient privilege to facilitate and encourage communication. Sexual abuse of a child in our society ranks as one of the most heinous crimes committed by a person (Wisconsin Supreme Court, *Doe v. Archdiocese of Milwaukee* 565 N.W.2d 94 (Wis. 1997)).

Charlotte put her emotional and mental conditions as an issue to the case and when a patient does this, the confidentiality physician-patient communication are compromised and no longer privileged (*Steinberg v. Jensen*, 534 N.W.2d 361 (1995)). Courts rule a patient's health care records must remain confidential. However, if mental health issues are used as the issue this frustrates the public policy of the therapist-patient privilege, as holder of the privilege, and weakens privileged communication and confidentiality (Wisconsin Statute § 146.82(1) (2017)).

The courts acknowledged Wisconsin State having an exception that was narrowly defined to health records of child abuse victims being disclosed to police departments and district attorneys for investigation purposes (Wis. Stat. § 146.82 (2) (a) (1), (2017)). Also, the courts stated the privileges are narrowly constructed; however, the trend has been the health patient exception to privileged and confidentiality causing the psychotherapy privilege to not be as effective.

Johnson v. Rogers Memorial Hosp., Inc., 627 N.W.2d 890 (Wis. 2000), was the first case of this issue before the courts after a motion to dismiss and the case was sent back to the circuit court. The Johnsons appealed. The court of appeals noted the medical records were not released

to the Johnsons; however, Charlotte did not waive her rights to keep confidential. The basis was the Johnsons could not prove their claim. Charlotte had reasonable understanding that the communication with her therapist would be privileged. The court of appeals stated that the Johnsons' claim could not be proven and that the therapist could not defend against the claim. The confidential records on her abuse are based on memories being recovered during therapy. If the therapists defended the claim, it would impose a significant collateral burden upon the therapist-patient relationship. The unlicensed therapist was supervised by Dr. David Israelstan. Dr. Israelstan was a licensed psychiatrist at Heartland Counseling and supervised all therapists at the facility. Charlotte did not waive her therapist-patient privilege when her parents inadvertently received the information from the bill which did not warrant the waiver of privileged communication. Charlotte did not waive her privilege when her parents came to a therapy session for her to confront them about the alleged abuse. She did not waive her therapist-patient privilege by telling her friend she was in therapy with an affidavit stating she said nothing more. The privilege was not waived by Charlotte's filing a restraining order for protection from her parents, whom she viewed as perpetrators of sexual and physical abuse. Lastly, the privilege was not waived when Charlotte communicated with her attorney. However, in this instance, there should be an exception to the privilege due to an adult child's accusations of her parents. Therefore an exception is decided, and an exception for privilege can be waived for the interest of public policy (Wisconsin Supreme Court decision in *Schuster v. Alterberg*, 424 N.W.2d 159 (Wis. 1988)). This was modeled after criminal law exception (Wisconsin Supreme Court, *State v. Green* 646 N.W.2d 298 (2002)). *Schuster's* reasoning comes from the Supreme Court of California in *Tarasoff v. Regents of the University of California*, 131 Cal.Rptr. 14 (Cal. 1976). In the *Tarasoff's* case, the courts imposed liability, and the liability was given to the therapist

psychologist, holding the psychologist had a duty to conduct reasonable care to protect an intended victim against danger of violence from his patient. However, this concern for public safety is not equal to or present in this case in *Schuster* nor *Tarasoff*. Charlotte posed no threat of danger to anyone. The courts ruled Charlotte's right to privileged communication and confidentiality of health care records trumped the Johnson's financial demands. The defendant has a right to examine the victim's medical health records in criminal cases if the defendant makes showing the records contain factual and relevant information to help determine guilt or innocence. As after an in camera inspection of the records, the courts determine if the records likely contain evidence that is probative to the defense (*State v. Green*, 646 N.W.2d 298 (2002)).

The Johnsons stated that the court need not reach an agreement on this issue and that Charlotte's privilege was waived due to communication with an unlicensed therapist. The privilege was relinquished when Charlotte signed limited release of medical records; the parents received billing of the therapy, stating the date, therapist, and therapy; she confronted her parents; Charlotte told her friend, Jain, she was being hypnotized in therapy; Charlotte filed a restraining order against her parents; and communicated with her attorney about a suit against her parents for the sexual and physical abuse.

The court held that there was a public policy exception involving negligent therapy, causing false allegations against the parents of the adult child through the therapist-patient privilege. The court reasoned an exception when the plaintiff can establish the likelihood of negligence and the trial court agrees after an *in camera* review of the confidential records and when the exception is not unlimited.

Disposition: The Supreme Court of Wisconsin affirmed the circuit court's ruling of "dismissing" the case. There was no trial without access to the therapist-client records.

Citation: *Norskog v. Pfiel*, 197 Ill.2d 60 (2001).

Key Facts: On July 14, 1993, Hillary Norskog, plaintiff Marsha Norskog's 13-year-old daughter, was stabbed to death by a minor mental patient, Steven Pfiel, a 17 year old. Hillary and Steven had been dating. Steven was charged with murder. Steven pleaded not guilty to the criminal charges. He stated that he would plead insanity. On March 18, 1995, while Steven was out on bail, he killed his brother and assaulted his sister. On July 26, 2001, in the Supreme Court of Illinois, Marsha Norskog, the administrator of the Estate of Hillary Norskog, filed a civil complaint of wrongful death and survival action against the defendants, Steven Pfiel and his parents.

Steven then entered into a negotiated plea agreement. He pleaded guilty to the two murders and was sentenced to life in prison without parole. The court included wrongful death and survival actions against Steven, wrongful death and survival actions against the Pfiels for negligent supervision and entrustment, reckless infliction of emotional distress, and an action against the Pfiels following the Family Expenses Act. The plaintiff alleged negligent supervision on the basis of the Pfiels knowledge of their minor son's hostile behavior and their failure to supervise him properly. The negligent entrustment allegation for negligently trusting him with a 5½-inch blade knife used to kill Hillary and an automobile owned by his mother, Gayle Pfiel. The plaintiff alleged that Steven was receiving mental health services; however, his parents objected. The defendants, the Pfiels, contended that mental health services and providers were privileged under the Mental Health Act. The Pfiels, Steven's parents, were covered with the privilege because Steven was a minor and Steven had not consented to his medical health records being disclosed.

The plaintiff, Norskog, subpoenaed Steven's school records and those of Dr. Markos, the court-ordered psychiatrist. Dr. Markos examined Steven's fitness for trial. The plaintiff claimed that Steven had waived his confidential privilege to his mental health records by disclosing information to Dr. Markos during the fitness examination; providing school officials his mental health information; and providing information to his probation officer and others. The plaintiff claimed that these made Steven's mental health treatment a public record. Also, an article in *Chicago Magazine* disclosed Steven's mental health issues. The plaintiff sought waiver of confidentiality privilege and fundamental fairness in the proceeding to make the mental health information available. On April 14, 1999, the Pfiels declined to identify the mental health therapist.

On April 30, 1999, the Cook County Circuit Court issued a collective contempt citation against Roger and Gayle Pfiel and their son, Steven, for refusal to identify the mental health service providers their son, Steven, had seen. Also, the court held the Pfiels in contempt for nondisclosure of information regarding Steven's mental diagnosis and treatment. The court fined each defendant \$25 and noted that they were acting in good faith for the purpose of seeking an appeal.

The defendants appealed. The Appellate Court reversed and remanded the orders of contempt. The Estate of Hillary, led by Marsha Norskog, plaintiff, petitioned the court, and the petition was granted for leave to appeal. The Appellate Court found that the trial court had erred when the court compelled the defendants to disclose privileged information of the Mental Health and Developmental Disabilities Confidentiality Act. The appellate court reversed the orders. The defendant was no longer held in contempt of court for not complying with the court. The court held that statutory confidentiality privilege was not waived.

Issues: Did the courts err in allowing statutory privilege to prohibit disclosure of mental health information, and whether any exception applies through the fundamental fairness exception concerning Steven's privileged mental health records?

Holdings: No, the Supreme Court of Illinois ruled that Steven's mental health records were privileged under the Mental Health and Developmental Disabilities Confidentiality Act. The court held that statutory confidentiality privilege was not waived.

Reasoning: Mental health records are kept confidential under the Illinois Mental Health and Developmental Disabilities Confidentiality Act, Illinois Compiles Statutes, 740 ILCS § 110, (2016). The Mental Health Act was cited from the Appellant Court of Illinois, Second District, *Sassali v. Rockford Memorial Hospital*, No. 2--97—0635 (1998). The legislature is careful in allowing disclosure of privileged communication whereby restricting the disclosure to only exceptions of the Confidentiality Act that have been narrowly created to establish a particular purpose, from the Illinois Appellant Court, Second District (*Pritchard v. Swedish American Hospital*, 547 N.E.2d 1279 (Ill.App.2 Dist. 1989)). *Mandziara v. Canelli*, 701 N.E.2d 127 (Ill. App.1 Dist. 1998) supported the Confidentiality Act, which stands for a strong statement of maintaining confidentiality of mental health records. Disclosure of mental health information is rigorous and the statutory rulings is strong from the United State Supreme Court (*Jaffee v. Redmond*, 116 S. Ct. 1923, U.S. Ill. (1996)). The psychotherapist-patient-privilege is recognized in all states, the District of Columbia, and the federal courts. Steven's parents as a recipient, had an independent right to confidential communication with Steven's mental health professional. From the Appellant Court of Illinois (*In re Marriage of Semmier*, 413 N.E.2d 502 (Ill.App.2 Dist. 1980)), as a recipient of the confidential right, his mother received parenting advice.

The Pfiel's sought Steven's mental health information records claiming the record information should be admissible. The reason for the records to be admissible was due to Steven completing a court-ordered fitness examination due to being involved in the criminal case. There was no basis for disclosing Steven's mental health communication and records under the Illinois Mental Health Act 10 (a) (4). The Pfiel's hampered their own defense while seeking disclosure of Steven's confidential records. The confidential protection is to shield communication that the legislature has intended to protect because mental health is a public good just as physical health (Illinois Supreme Court, *Doe v. McKay*, 700 N.E.2d 1018 (Ill. 1998)).

Steven had not consented to the release of the privileged communication concerning his mental health treatment. Steven's privilege also prevents his parents from disclosing therapist-client communication in regard to Steven's treatment. Steven's privilege was not waived during his criminal trial insanity defense; his communication with Dr. Markos during his fitness examinations; nor his sharing information with school officials, probation officer, and others. Steven entered a plea of guilty, and the case never went to criminal trial. From the plea of guilty, there was no longer a question of insanity. Dr. Markos did not mention that a student's confidential records from the fitness examination would or could be shared in a civil proceeding. The information was shared only for a criminal procedure. Steven's voluntary sharing of information with school officials and the probation officer is covered under the Illinois Mental Health Act. The Mental Health Act provides consensual disclosure when the recipient can disclose confidential communication for a limited purpose. However, it does not create a general waiver of privileged communication. The Mental Health Act limits waivers to specific situations for disclosure of confidential information and the amount of confidential information shared. The court looked at the fundamental principles of the Supreme Court of Illinois case of *D. C. v. S. A.*,

687 N.E.2d 1032 (Ill. 1997). The court ruled that there was no resemblance, for the defendants were not using the confidentiality privilege to exploit or subvert the legal process. To support this, the Pfiels were unable to respond to the allegations that they did not control their son's behavior due to the privilege. The opinions rendered by the court affirmed that the confidentiality privilege is employed as the legislature intended it to be employed--to shield a client's information as a protective measure.

Disposition: The appellate court's judgment found no legitimate cause to reject upholding the privilege. The judgment was affirmed.

Citation: *Zimmer v. Cathedral School of St. Mary and St. Paul*, 204 N.Y.App.2d 538 (1994).

Key Facts: Michael Zimmer, the plaintiff, and David Zoni, the defendant, were in an altercation with each other. Michael Zimmer brought action against David Zoni and Cathedral School of St. Mary and St. Paul. The defendant, Zoni, claimed Zimmer as the aggressor and requested release of Zimmer's tax records from 1990 to 1991, psychiatric treatment records, and the social worker-client relationship records. On August 6, 1992, the plaintiff appealed to the Supreme Court of Nassau County, New York. In the Supreme Court, Appellate Division, Second Department, New York, the plaintiff appealed the denial of a protective order excluding disclosure of the defendant's psychiatric records and his social worker's records. The Supreme Court granted the defendant for the plaintiff to prove authorization for records and the plaintiff's tax records. The plaintiff appealed. After the plaintiff moved for a protective order for the psychiatric and social worker's records, the defendant's attorney claimed that her office knew the plaintiff, Michael Zimmer, had worked at construction in 1990 and 1991.

The defendant's request for the plaintiff's tax records was a substantially improper request. The tax records are confidential and did not appear to be an issue or significant to the case; however, the tax records were viewed as relevant by the defendant's attorney. The relevancy of the plaintiff's employment was viewed by the defendant as essential. The defendant stated that the plaintiff's tax records for both years, 1990 and 1991, were relevant because the plaintiff had testified that he had been unemployed until the summer of 1991. The plaintiff's ability to perform construction work was relevant as an issue due to the defendant's injuries. Also, the defendant's attorney claimed that the psychiatric and social worker's records were evidence that would easily lead to demonstrating the plaintiff's aggressive, violent behavior. This was an issue because the defendant had cited the plaintiff as the aggressor in the altercation.

Issues: Did the courts err in whether the psychiatric records and the social worker's records, as well as the tax records of the defendant, were privileged or not?

Holdings: No, the New York Supreme Court Appellate Division, Second Department, denied the psychiatric treatment and social worker's privilege of records from the defendant.

Reasoning: New York's Civil Practice Law and Rules CPLR § 3101(b) (2017) concerning privileged matter is not obtainable. New York's CPLR § 3101(a), states in a prosecution or defense action that there shall be full disclosure of all material regardless of burden of proof where the evidence supports the position. The records could not be waived because the defendant had stated that the plaintiff was the aggressor in the altercation. The plaintiff's aggressive behavior was not the issue at hand. Also, the court held that the defendant's attorney's statements were too strong in showing the necessity for Zimmer's tax records.

The defendant's claim that the plaintiff's mental illness might be the excuse for the incident is insufficient to disclose mental health records. Zion's argument placed the plaintiff's

aggressive behavior as the issue, New York's Civil Practice Law and Rules, CPLR (2012) § 3121 (2017). CPLR § 3121 is New York's disclosure of mental records. The waiver of privilege for the medical records can only occur if the party's physical and mental issues are the subject for the courts. The defendant claimed that the plaintiff was the aggressor. Referencing *Dillenbeck v. Hess* (539 N.Y.S.2d 707, N.Y. (1989)), the privilege cannot be waived due to the defendant alleging that the plaintiff was the aggressor. However, the plaintiff's propensity for ferocious behavior was not an issue to waive the privilege. The privileged communication and confidentiality of the plaintiff's psychiatric records, New York's CPLR § 4504, and social worker-client records, New York's CPLR § 4508, could not be waived. Additionally, tax records cannot be disclosed because they are confidential and private information. Unless the tax records contain sufficient, relevant information that the plaintiff cannot obtain from another source, the tax records remain closed. Referencing *Grossman v. Lacoff* (562 N.Y.S.2d 724, N.Y.A.D. 2 Dept. (1990)) it is improper to seek confidential information that has no relevancy to the issues of the case.

Disposition: In a personal injury action, the courts held that the plaintiff cannot be compelled to disclose confidential psychological or psychiatric records. The plaintiff's request for finances to pay for their imposition was denied under New York Administrative Rules of the Unified Court System and Uniform Rules of the Trial Courts, NYCRR 130-1.1.

Citation: *Caroline SYKES, a minor, By and Through her parents and next friends, Philip SYKES, and Martha Sykes, and Philip Sykes and Martha Sykes v. St. Andrews School*, 619 So. 2d 467 (Fla.App.1993).

Key Facts: The parents of Caroline Sykes, a minor, filed a claim with the District Court of Appeals of Florida. The petitioners, Caroline's parents, Philip and Martha Sykes, had earlier

filed a complaint of emotional and mental harm but dropped the issue. From the alleged sexual battery, the complainant sought damages for emotional harm to her daughter. Before the mother, the petitioner, abandoned her claim, she underwent a psychiatric examination by a defense psychiatric expert. At the hearing, the defendant argued that she was warranted to remove the petitioner's psychotherapist. The mother claimed emotional damages and wanted to obtain the psychiatric records, as well as, throw out the psychotherapist's communication. In a civil suit, if the victim uses their emotional state as a claim in their defense, then the statutory privilege does not stand. The father and the victim filed suit against St. Andrews' school. The defendants requested the information for their defense, claiming that their daughter's injuries were from her mother's psychological issues and were, in part, the result of coming from a dysfunctional family. They claimed that the issue was not the alleged rapes.

The respondents from St. Andrews' school claimed the psychotherapist-patient-privilege was waived when the victim voluntarily participated in the mental examination given by the expert for the defense. Martha Sykes sought for the court to re-examine the lower court's action, *certiorari*, from the appellate court proceedings to review the lower court and to re-examine the actions of the trial court for the mother to be more informed. This requires a signature for the defense to obtain psychiatric records and for the psychotherapist to give a deposition under oath in a written format. The father and daughter filed alleged charges of battery and sexual battery against the school.

Issues: Did the court err when the psychotherapist-patient privilege was withdrawn when the petitioner, the mother, filed the alleged sexual battery charges against St. Andrews School?

Holdings: No, the courts ruled that the privilege had not been waived.

Reasoning: The District Court of Appeal of Florida, Fourth District ruled when a patient applies mental or emotional condition as a defense, the psychotherapist-patient privilege does not apply. The courts addressed the psychotherapist-patient privilege ruling from the District Court of Appeal of Florida *Cantor v. Toyota Motor Sales, USA, Inc.*, 546 So.2d 766, Fla.App. 5 Dist. (1989). The court also mentioned District Court of Appeal of Florida, Fourth District, *Yoho v. Lindsley*, 248 So.2d 187, Fla.App. 4 Dist. (1971), where the defendant sought discovery of information of the plaintiff's treatment through a psychiatrist for personal injury. The protection of the waiver, from the Statutes and the Rule, is to prevent the psychotherapist-patient privilege from being used as a sword--or as a shield. Thus the privilege is not to be used to seek damages from the emotional distress nor to use the privilege to hide behind. Florida Statutes, Section F.S. § 90.503, (2017) outlines the psychotherapist-patient privilege, where the patient reveals matters of private issue in order to receive effective treatment. However, effective treatment will not be obtained if the psychologist has to reveal the patient's inner thoughts and fears during a trial. However, the statutory privilege is not applicable when the client-patient uses mental health conditions as a defense, Florida Statutes Annotated, F.S.A. § 90.503 (2017). Florida Rules of Civil Procedure, RCP § 1.360(b) (2) (2017) standards declare that the party who requests an examiner's report of an examination waives the privilege.

The petitioner's attorney argued that the psychotherapist-patient privilege should continue because the petitioner was not claiming her mental condition as a defense in the case. At first, the petitioner placed her mental condition as the issue because she was seeking damages for her mental distress. This placed the waiver for both the Florida Statute and the Florida's Rules of Civil Procedure. The Florida Statutes, Section § 90.503 (2017) is the psychotherapist-patient privilege. Also, Florida's Rules of Civil Procedure, § 1.360(b) (2) (2017) is initiated

when an examination report is requested and the examiner gives a deposition. The party examined waives the privilege and the waiver is permanent.

Disposition: The court granted the petition for *writ of certiorari*, for a re-examination from the trial court, and completely nullified the order under review.

Citation: *Palm Beach County School Board and Terry Andrews v. Claudia Morrison*, 621 So.2d 464 (Fla.App.1993).

Key Facts: Claudia Morrison was an assistant principal at Palm Beach County High School during the school year 1989-1990. Terry Andrews was the principal. Morrison made claim that Terry Andrews, the principal, sexually harassed her and discriminated against her through employment evaluations and write-ups. He brought retaliations against her.

Approximately in the year 1990, 3 years from the case's date, Morrison filed suit in the District Court of Appeals, Fourth District, against the Palm Beach School Board and Terry Andrews. Morrison sought damages for the emotional and psychological injury she had incurred due to the incident. She claimed Andrews had sexually harassed her and discriminated against her with write-ups, evaluations, and retaliations against her.

The School Board and Andrews, the petitioners, answered the question to the complaint declaring they were entitled immunity because their action had been reasonable and in good faith. The petitioners sought review from the Circuit Court from Palm Beach County, Florida. The petitioners sought judgment during an intermediate stage between the determinations of the action for a temporary decision on the issue. Morrison raised disagreement when she learned of Andrews having a mental illness. She brought up Andrews having psychotherapy for mental illness and the reactions to medications may have caused the improper interaction and

knowledge of the assistant principal's actions. Early in 1992, Morrison interrogated Andrews on his medical background, psychotherapy treatment, and medications.

On March 5, 1992, Andrews filed objection to those interrogations stating the grounds for the interrogations were irrelevant, not likely to lead to discovery of evidence, and was for the purpose of harassment. He also filed an objection for the production of the records; however, he did not include the defense for the psychotherapist-patient privilege until later on. September 29 and 30, 1992, there was a mini-trial, unreported, where Andrews testified. He asked for the psychotherapist-records at the unrecorded hearing. On December 23, 1992, at Andrews' deposition of giving a formal statement to tell the truth, he testified that he had not been taking medication at the mini-trial. Also, he was not taking medication at the time of the deposition and could not remember when he took medication. Andrews' attorney objected when asked did Andrews take the medication Prozac. Andrews stated he did not take medication during the timeframe when Morrison worked at the high school. Morrison served trial subpoenas for the production of evidence on Andrews' health insurance carrier, medical providers and pharmacies. The courts ruled a mental health patient's lack of remembering events does not lift the psychotherapist-patient-privilege. From the evidence, Morrison learned Andrews had received psychotherapy from Dr. Mary Jo Thomas in January 1993. She also learned Morrison had prescriptions for Prozac filled on March 17, 1991 and April 16, 1991. On February 5, 1993, Morrison served a subpoena on Andrews for him to appear for a continuation of his deposition to give a formal statement of truth.

The School Board and Andrews filed a motion for protective order to prevent the defendants from a potentially abusive deposition. The grounds for the motion for protective order that the courts had already ruled. February 16, 1993, a court hearing was held for Andrews'

mental health history. The hearing was one that discovered the following: Andrews falsely testified at the mini-trial about psychiatric medications, the trial was just to evaluate Andrews' credibility to remember, and Andrews' medications may have had side effects to affect his interaction with Claudia Morrison. Counsel for the School Board and Andrews argued only relevant was the 1989-1990 school year. Andrews had not lied because the testimony needed more clarification; and Andrews used psychiatric medication, both before and after the relevant time period, but not during the timeframe. The courts ruled that Morrison could question Dr. Thomas and if Andrews did not sign a release for Dr. Thomas' testimony, the court would order him to sign the release. On February 17, 1993, Andrews signed a written authorization to give the reports and to disclose professional information to Dr. Thomas which gave the doctor authority to testify about the treatment and medications from the time period July 1, 1989 through June 30, 1990. Also authority was given to waive the psychotherapist-patient privilege to limit testimony during the deposition. On February 23, 1993, Dr. Thomas refused to discuss anything from July 1, 1989 through June 30, 1990. On February 24, 1993 Andrews' deposition continued with his lawyers refusing to respond to the questions about medication. Andrews argued this violated his psychotherapist-patient privilege.

The deposition was terminated by Morrison and he filed an emergency motion that Andrews was refusing to comply with the trial court's ruling from February 16, 1993. The order was for Andrews to furnish information on his mental health issues. March 1, 1993, the trial court hearing concluded he had not waived the psychotherapist-patient privilege relating to medication and doctor care. The court ordered a review. On March 3, 1993, Morrison filed an emergency motion for Dr. Thomas' deposition to answer questions and give records. March 8, 1992, the hearing appointed a special master who would preside over Dr. Thomas' deposition.

Dr. Thomas claimed the psychotherapist-patient privilege for only the timeframe of July 1, 1989 through June 30, 1990. The official appointed by the judge reported recommendations to the judge finding the privilege acceptable.

Issue: Did the trial court err in waiving the psychotherapist-patient privilege and can the privilege be waived by not asserting it at the earliest opportunity?

Holding: Yes, the courts granted the petition but the courts stopped the trial court's order for the petitioner, Terry Andrews, to give testimony and not give his privileged medical records. This violated Andrews's confidentiality privilege with his psychotherapist. For the records were not the subject concerning the petitioner's mental health records. In this case it was never asserted as a defense, and Andrew's mental condition was not placed as an issue. For the statutory psychotherapist-patient privilege is not substantial if the patient uses the mental condition as a component of the defense, and the petitioner did not.

Reasoning: District Court of Appeal of Florida, Fourth District ruled the Florida Statutes section § 90.503 (2017) purposes the psychotherapist-patient privilege was violated when the defendant was forced by Morrison in an attempt to discredit his testimony. Morrison was making an attempt to impeach Andrew's testimony. When and if a patient relies on his mental or emotional condition for his defense, the statutory privilege does not apply. The District Court of Appeal of Florida in *Cantor v. Toyota Motor Sales USA, Inc.*, 546 So.2d 766, Fla.App. 2 Dist. (Fla.App. 1989) purposed the privilege does not hold if the patient relies on their mental or emotional condition as their defense. As well, the burden rests on the party trying to void the psychotherapist-patient privilege. The issue of the case is for the party to seek to question the psychotherapist to show the patient's mental condition establishing the burden of proof. The courts claimed the party who asserted the psychotherapist-patient privilege, both the school

board and the principal, had not placed the petitioner's, Terry Andrews, mental condition as the issue. The citation of *Cantor v. Toyota Motor Sales USA, Inc.*, 546 So.2d 766, Fla.App. 5 Dist. (Fla.App. 1989) references the purpose that the statutory privilege is not applicable if the mental or emotional condition of a defense is used as an issue. However, the burden to prove rests on the party to overthrow the psychotherapist privilege showing the patient's mental health issue is the leading issue in the case. Claudia Morrison had records she already obtained to impeach Andrew's testimony. So she did not need further production of the records. She was attempting to dishonor the principal's credibility.

The inability to recall events from the defendant does not constitute a justification for waiving the psychotherapist-patient privilege. Also, it does not give way to attack the defendant's credibility by showing the defendant has an inability to recall events. Even though the psychotherapist-patient privilege was not presented at the earliest opportunity does not breach the privilege. A privilege is not waived because it is not presented early in the case. The privilege is declared before there was any actual disclosure of information for which the defendant claimed as privileged. Florida Statute, F.S. Code § 90.507 (2017) provides waiver of privilege by disclosing privileged information voluntarily. If the person discloses any part of the confidential material, when the disclosure is privileged, he has waived the privilege. However, the information that was already disclosed from the privilege does not apply and the information cannot be taken back.

The best practice is to assert privilege at the beginning of any request. And, the mere passage of time does not take away the privilege. Only the use of the information that she obtained by Andrew's own testimony, information she produced, or waives is she privileged to. The privilege was not waived by the patient, the petitioner, giving voluntary disclosure of some

of the information to the plaintiff. Attacking the patient's credibility through the petitioner's mental health issues does not waive the psychotherapist-patient privilege. Andrews argued the order to view the psychotherapist-patient privilege violated his right. Under Florida Statutes (2017), section § 90.503, the psychotherapist-patient privilege, is based on the patient's expectation to bare his soul to reveal private matters in order to receive help. However, the patient will not do so if the psychologist reveals the patient's confidences in a trial.

Disposition: The trial court ruled the previously disclosed information or records that was given by Andrew's testimony can be admitted. Also, from her signing a waiver for certain periods of time, that information can also be admitted. However, the trial court order permitting the respondent's motion to compel discovery of evidence of all other non-disclosed records and information was defeated. This was due to the fact the information in the records was protected. The information concerning her psychiatric treatment remained protected by Florida state law psychotherapist-patient privilege.

332 *In Camera* Review

Citation: *People of the State of Michigan v. Devon Howard*, 783 N.W.2d 116 (Mich.App.2010).

Key Facts: Devon Howard, the defendant, was charged with two counts of second-degree criminal sexual conduct. Prior to the trial, the defendant asked for a private, *in camera*, inspection--that is, in the court's chambers--without the public or press knowing the process of inspecting the two minor's school records. From the Oakland Circuit Court order on March 18, 2010, the judgment for appeal was first considered. Then the prosecution appealed the Circuit Court's orders. They were denied based on the fact that the court did not know if the questions presented should be looked over by the court. The trial court had established an *in camera*

review of the privileged communication and school records, even though the defendant had failed to establish that the privileged communication contained substantial material to aid in his defense. The prosecution appealed the circuit court's approval of granting an *in camera* examination of the counseling and school records. The prosecution claimed that the circuit court had erred by first studying the material to determine if it was substantial enough for an *in camera* review of the privileged records. The Michigan Court of Appeals sent the case back to the lower Circuit Court for further action. The Appellate Court would review and would decide if there was found to be an abuse of discretion. This occurs when a court's decision is out of range of a reasonable and principled outcome.

The defendant argued that the records should have had an *in camera* review based on the assumption that the records might contain evidence. The defendant was examining the counseling records for possible statements from the alleged victims that would be inconsistent with their testimonies. The Circuit Court granted an *in camera* review of the two alleged minor victims' counseling and school records. The Circuit Court granted the review in spite of the legal standard. The courts used the word nevertheless. This questioned whether the defendant did or did not meet his burden under Michigan Supreme Court of *People v. Stanaway*, 521 N.W.2d 557 (Mich.App.1994), the due process right for the defense to present favorable evidence for the defense. The decision was reversed.

Issues: Did the courts err in granting an *in camera* review of the privileged communication and school records of the two minor children?

Holdings: Yes, based on the records, the trial court erred in its decision to inspect the privileged counseling and school records. The Circuit Court granted an immediate consideration for review.

Reasoning: The Court of Appeals of Michigan claimed that the Circuit Court had erred in allowing the defendant an *in camera* review of access to the victim's school records (Michigan Court Rules, MCR 6.201 (2016)). First, the courts are to determine if the defendant met the burden of relevant and material evidence. The defendant did not establish the necessary proof for the Circuit Court to grant the defendant's request for the confidential records in the first place. In general court proceedings, privileged information is not intended to be available for one to use as evidence. It is not available to be used for impeachment or as exculpatory evidence in any trial. Given that there is an exception to this general rule, the Michigan Supreme Court balances the protection of the confidential privileged records with a criminal defendant's constitutional rights in order to obtain evidence necessary to help the defendant with his defense. The Circuit Court erred in its abuse of discretion for an *in camera* review of records (*People v. Laws*, 554 N.W.2d 586 (Mich.App. 1996)). An abuse of discretion happens when the courts choose an outcome falling outside a reasonable range of principle (*People v. Unger*, 749 N.W.2d 272 (Mich.App. 2008)). The defendant has to present a good-faith effort grounded in significant fact that there is a rational likelihood that the records will probably contain applicable material necessary for the criminal's defense. The prosecution argued that the defendant had not established a necessary burden that should give him the school records. The defendant had only acknowledged that the records might contain proof beneficial to the defense's case. However, in *People v. Stanaway*, 521 N.W.2d 557 (1994), the Supreme Court balanced protecting the confidential privileged information records with a defendant's constitutional rights for evidence when charged in a criminal case. The *Stanaway* case established that when there is reasonable probability that the privileged records contain relevant information for the defense, then the trial courts are to conduct an *in camera* review to inspect and obtain evidence that is necessary. The proper legal

stand of *Stanaway* is for the grounded facts that give reasonable probability for the records to support the evidence necessary for the defense that will result in the trial court conducting an *in camera* inspection of privileged records.

The Circuit Court did not state if the defendant had or had not met the burden to show proof of significant evidence under *Stanaway*. After reviewing the transcript of the hearing, the Circuit Court was aware of the proper legal standard protocol. The Circuit Court knew that the defendant had not met the responsibility of establishing the burden the law placed upon him to show that the records were in need of an *in camera* review due to the records holding substantial evidence.

Privileged information is not intended to be available to prove impeachment or favorable evidence to the defendant. Therefore, a defendant must establish a probability that the records will likely contain factual material information for the defense. With an *in camera* review, the records can expose evidence that could be regarded as reasonable and necessary for the defendant's defense. Following *Stanaway*, the Supreme Court amended MCR 6.201(c) (2016) to detail the decision of *People v. Fink*, 574 N.W.2d 28 (Mich.App. 1998), from the Michigan Supreme Court.

Disposition: On order of the Supreme Court, the Court reversed and sent the case back to consider granting a new trial. The judgment from the Court of Appeals was denied. The question presented is whether the case had been reviewed by this court due to jurisdiction.

Citation: *Commonwealth v. Paul C. Poitras*, No. 00-P-526, Appeals Court of Massachusetts (2001).

Key Facts: The defendant, Paul Poitras, was convicted by the Superior Court Department of sexual abuse of a child under the age of 16 on February 26, 1997. The complainant did not tell

of the abuse until 3 years after the last incident. The sexual abuse went on while the victim was between ages 7 and 13. The case was based on the complainant's credibility. The complainant told of the abuse when she was placed in a group home. The prosecution had a licensed psychologist, as an expert, give characteristics of sexually abused children. The expert gave testimony. The defendant had access to the complainant's school records.

The defendant asked the court to appeal his conviction on one count of rape of a child under the age of 16, his stepdaughter, one count of assault with intention to commit rape, and one count of indecent assault and battery on the same child. The defendant asked the court to conduct an *in camera* review of the complainant's counseling records prior to trial. The trial court denied the request. After conviction, the defendant appealed. The appeal was based on the theory that the trial court should have inspected the complainant's counseling records. The issue was confidentiality of the counseling records. The defendant's argument for appeal was also based on a testimony by a Commonwealth expert on child sexual abuse. The expert's testimony was erroneous, for it provided characteristics that profiled the defendant as a child abuser. Additionally, the defendant also tried to establish ineffective counsel from the court, asking for a new trial based on the motion: new evidence and ineffective guidance assistance.

Issues: Did the trial court act within its discretion in refusing to review the complainant's counseling records?

Holdings: No, the trial court acted within its discretion. The judge did not abuse discretion in refusing to conduct an *in camera* examination of complainant's privileged counseling records. For the *in camera* review of records, the defense counsel gave speculative theories concerning when the examination of the records should be made.

Reasoning: The Appeals Court of Massachusetts, Norfolk, detailed the defense counsel was not specific about why the examination of the complainant's counseling records were warranted. They only asserted speculative theories. Poitras's governing standard was *Commonwealth v. Fuller*, 667 N.E.2d 847 (Mass. 1996) from the Superior Court of Massachusetts. The defendant only established theories as to the records would likely hold facts relevant to the issue. He did not establish a good faith, reasonable basis that the records would contain relevant and material evidence toward his defense. They stated that speculative theories were available in the non-privileged school records. The defense filed a motion *in limine* to limit or exclude the expert's testimony of the characteristics of sexually abused children. The court ruled that the expert had never made reference to the complainant. The defendant challenged the court based on the witness's reference to the complainant's sister being in harm's way when going to the defendant's home. With privileged counseling records of sexually assaulted victims, the defense counsel must have a specific basis for believing that the privileged records would contain exculpatory evidence relevant to the issue of the defendant's guilt. The complainant's statement on redirect examination concerning her younger sister's access to the sexual abuse was permissible--regardless of her delay in disclosure of the statements during cross-examination. Also, the court determined that the defendant should not be given a new trial, for those motions did not warrant a new trial. At the criminal trial, the judge did not err by not allowing a mistrial. The judge denied the motion. The defendant's motion for a mistrial was denied based on the witness's testimonial reference to sexual allegations against the complainant's sister. The court concluded that the sister's second testimonial reference, concerning the younger sister being at the defendant's home, was permissible. Lastly, the denial of a new trial without a hearing was correct.

The expert testimony from the psychologist on the characteristics of sexually abused children was not considered vouching for credibility and was admissible for child rape victims under the age of 16. The psychologist's expert opinion did not compare the characteristic behaviors to the complainant. However, the psychologist's expert testimony about the typical attributes of those who most likely abuse children was not admissible, since the court claimed that this mirrored the evidence from prior prosecution--specifically about the defendant. The jury had already heard the description of the child abuser profile and evidence about the defendant from other witnesses. The court's opinion of the evidence claimed that the profile of the child abuser was not considered harmless for the issue because of the defendant's guilt and the complainant's credibility. The information that the defense counsel gave was in other available non-privileged documents as the complainant's school records. From the Supreme Judicial Courts of Massachusetts, Norfolk (*Commonwealth v. Dockham*, 542 N.E.2d 591 (Mass. 1989)), evidence of typical patterns of behavior disclosed by a child of abuse is admissible. The testimony neither links directly or indirectly the behaviors to the complainant in the case, (Massachusetts Supreme Judicial Court *Commonwealth v. Ianello*, 515 N.E.2d 1181 (Mass. 1987)). The entire case was based on the complainant's credibility because there was no eyewitnesses to any abuse; there was no physical evidence; and it was 3 years before the complainant brought up the alleged abuse. The courts ruled error on allowing the admission of testimony profiling a typical abuse because the jury could take the expert's testimony and identify the defendant as to having committed the crime even though he may not be guilty of the crime (Supreme Judicial Court of Massachusetts, Essex, *Commonwealth v. Day*, 569 N.E.2d 397 (Mass. 1991)). This is viewed as harmful because the issue of guilt for the defendant is weighted against the complainant's credibility. In the Supreme Judicial Court of Massachusetts,

Commonwealth v. Federico, 683 N.E.2d 1035 (Mass. 1996), the courts may not allow profiles of the characteristics of the accused perpetrators of abused children.

The trial judge struck the challenging testimony of the prejudicial taint of reference to the defendant's allegations to the abuse of the complainant's sister. The complainant's statement on redirect examination about the defendant's concern for sexual abuse against her younger sister was permissible. The trial court properly denied the motion for a new trial because there was no evidence that the defendant or his counsel did not have reasonable knowledge. Also, some of the evidence was introduced at trial, for there was no impeachment or contradiction of evidence present. The evidence from the council could not have provided the defendant's counsel with substantial evidence of defense.

Disposition: Norfolk Superior Court, trial court, acted within its discretion by refusing to conduct an *in camera* examination of the complainant's privileged counseling records.

Therefore, the judgments were reversed and the court dismissed the case.

Citation: *State of Missouri v. Seiter*, 949 S.W. 2d 218 (Mo.App. 1997).

Key Facts: In 1993, the victim, M. P., a 10-year-old girl, lived in the home with her single mother and two brothers. During a counseling session with the social worker, the victim made a drawing and wrote letters concerning an alleged rape, even 2 years after the offense. The defendant, William Seiter, was involved in a relationship with M.P.'s mother. The defendant and the victim's mother had a son. The defendant was the father of the victim's younger brother. From June 1 to September 1, 1993, during the defendant's lunch break, he would visit M. P.'s home. During these visits, the victim was often alone and the alleged multiple sexual acts occurred. Around January 1994, M. P., the victim, told her mother that the defendant, Seiter, had

attempted to touch her. After confronting the defendant, who admitted the act, the mother ended the relationship with the defendant.

Then, in March 1995, M. P. attempted to cut her wrist with a kitchen knife when she was in an argument with her mother. The victim was taken to the hospital where she spoke to a social worker. The defendant, William Seiter, was convicted of two counts of sodomy of a child under the age of 14 (Counts I and II), two counts of rape of a child under the age of 14 (Counts III and IV), and two counts of first-degree sexual abuse (Counts V and VI). He was sentenced to serve 15 years on Count I and 20 years on Count II. For Count III, he was to serve 10 years; and for Count IV, 10 years. Counts V and VI were for 5 years each. The defendant was ordered to serve the sentences concurrently except for Counts I and V, which the court ruled were to be served consecutively. The court affirmed. The defendant appealed his convictions after the jury trial. The defendant's reference to the records could be possible evidence favorable to the defendant, known as exculpatory evidence. This evidence could possibly question the credibility of the victim's or witness' testimony, known as impeachment. By blocking the subpoenas for production of evidence from the social worker, a psychologist, and the school district's records of the psychological records, the defendant was placing the burden of proof on these three items. The defendant requested the burden of proof be placed on the witnesses by asking the witnesses to appear before the court with their documentation, subpoenas *duces tecum*, on the victim and her mother. The defendant contended that the trial court had erred when they subpoenaed the social worker and a psychologist for privileged confidential records. The defendant also served a subpoena on the school district for all school records.

Issues: Did the defendant show the courts sufficient evidence for an *in camera* review of the victim's psychologist, social worker, and school records?

Holdings: No, the defendant was not entitled to ask the trial court to review school records. The trial court stopped all subpoenas except those involving the victim's attendance records. The court held the defendant was not entitled to an *in camera* review of records from the victim's psychologist.

Reasoning: The Missouri Court of Appeals, Eastern District, Division Five specified the West Virginia's Rules of Evidence 404 (b) (2011) established the trial court and determines the admissibility of evidence for proof, motive, or action. Specific facts needed from the records, both relevant and material, were not presented by the defendant. The defendant must establish a need showing the records will contain evidence to benefit him. The defendant only presented a general claim, stating that the file could show a possible exculpatory statement. The defendant failed to show how the facts and information would be used relevantly for his defense, only stating a possibility. The defendant also did not give a reasonable claim for the psychological and school records to be viewed. Missouri's Rules of Criminal Procedures 25.03 (A) (9) (1980) purposes the state's control over material either contradicts the defendant's guilt, lessens the degree of charges from the offense, or lessens the punishment. The purpose is the confidential communication of the mental health records is not available to the defendant through an *in camera* inspection concerning the victim's psychological evaluation, social worker's records and school records with showing a relevancy for material. Therefore, the defendant failed to meet the requirement for the trial court to view the psychological and school records. The defendant was futile in establishing the trial court's threshold requirements to order the production of the confidential records. He did not establish a basis that the records would contain material evidence for his defense or how the material evidence would benefit him.

The defendant cannot only present a mere speculation of evidence that might prove to be helpful. The Supreme Court of Missouri in *State v. Parker*, 886 S.W.2d 908 (Mo.App.1994) supported the defendant must show the specific facts of how the evidence will be material and favorable for the defendant. The case cited *State ex rel. King v. Sheffield*, 901 S.W.2d 343 (Mo.App. S.D.1995), Missouri Court of Appeals, Southern District, Division Two, where the defense failed to show the threshold requirement for a court to enforce an order to produce the psychological and school records of the defendant. From the Missouri Court of Appeals, Eastern District, Division Four in *State v. Newton*, 925 S.W.2d 468 (Mo.App. 1996), the defendant stated the courts should have conducted an *in camera* inspection of the psychological records due to the judge's act of authority on his own will, *sua sponte*. The *Newton* case was different from the present case because the defendant made a sufficient showing of the requested records were both material and relevant. On appeal, the trial court had broad discretion about the relevance of material and admission of evidence.

Both the drawings and the written letters by the victim were admissible in court; they showed the psychological changes that had occurred in the victim since the alleged offense. This is covered under Missouri's Revised Statutes, RS Mo §§ 566.060 (2016). The drawings and letters were asserted to show the victim's state of mind both after the sexual abuse and before the victim revealed the sexual abuse--even 2 years after the incidents. The trial court has broad discretion over the necessity and scope of proof establishing relevancy. For proof of the sexual offense, evidence of a victim's physical and psychological changes is relevant to show that the offense actually occurred. The Missouri Court of Appeals, Eastern District, Division Four in *State v. Burke*, 719 S.W.2d 887 (Mo.App. 1986) was cited that evidence may be admitted to show the victim's physical and psychological changes due to the fact the elements of sexual

offense did occur. For common experiences can show that behavioral changes and personality changes can come about from sexual abuse. The drawings were relevant under *Burke* because the drawings showed emotions and behaviors consistent with sexual abuse as one grows older and matures past the incident. The defendant asserted the letters from the victim produced inappropriate bolstering of the victim's testimony, also from Missouri Court of Appeals, Eastern District, Division Four in *State v. Cole*, 867 S.W.2d 685 (Mo.App. 1993). The courts claimed if the letters created improper bolstering of the victim's testimony it was only showing a child's sexual abuse causes emotional problems in victims. As cited by Missouri Court of Appeals, Southern District, Division One in *State v. Ogle*, 668 S.W.2d 138 (Mo.App. 1984), rape also causes emotional problems. The trial courts allowance of the letters into evidence was not an abuse of the court's discretion. The court also settled that the drawing and letters were not bolstering the victim's testimony because the evidence did not provide additional information of the victim's mental state after the offenses occurred. When a court fails to call a witness to testify, it is due to the inference that the testimony would be unfavorable to the defense.

The defendant failed to make sufficient proof of the victim's father's accusations of sexual abuse of the stepdaughter based on mere possibility of false evidence. The defendant's claim to exclusion of evidence must be specific, for the defendant must attempt to offer sufficient proof that such evidence is informative, material, and favorable. The court limited the defendant's closing arguments because of his inference that the state had failed to bring certain witnesses, and that the defense was not arguing his legal conclusions for the case.

Disposition: The Missouri Court of Appeals, Eastern District trial court, denied the request for the defendant to view the psychological records and school records of the victim. The court asserted the defendant's sentence.

Data Analysis of Cases

Introduction

The purpose of this study was to examine court cases about privilege and confidentiality for caring professionals and their clients in an effort to understand the extent of privilege for school counselors and confidentiality for their students. The data were retrieved from case law classified under the West Key Number System, under the heading of 311H: Privileged Communications and Confidentiality, 311HV; Counselors and mental health professionals, followed a range of Key Numbers 311HV 311 to 311HV 332. Each case was outlined to distinguish the citation; key facts; issues; holding from the court case; reasoning for the holding; and the court's disposition. These guidelines from Statsky and Wernet's (1995) standard format were used to discover trends and patterns from the court's decisions. Then the discovered trends and patterns were deployed to formulate outcomes for privileged communication and confidentiality.

Creswell's (2007) bottom up inductive analysis builds upon specific observations to broader generalizations of trends, issues, and themes. The relevant court cases helped identify issues and outcomes to generate themes of trends and future influences of privileged communication and confidentiality. In keeping with Creswell's model, the researcher listed each court case on a computer spreadsheet. As each case was briefed, the researcher added key issues to the spreadsheet generalizing the topic of each case, key issues presented by each case, and the key outcomes of the courts' decisions. Also, the researcher divided court cases by their primary ruling from state statutes or from previous court case rulings. The cases were then divided into categories and subcategories.

The researcher described the facts that built and developed the case brief's format. The case brief's format contained key issues about the cases' factual material. The format allowed the researcher to give a rich detailed description of each court case to illustrate the issue and outcome of the court case. The categorization not only helped issues emerge within the specific identified types of professionals, but issues became apparent across categories after multiple readings. Also from the categories, cross-categories developed. Organized groups developed as the type of issues highlighted unique themes that ran across categories of professionals, showing similarities or contrasting results. Following the completion of the case briefs, the researcher reviewed and summarized the case briefs to discern initial broad categories found in the data. The objectives of categories were accomplished by merging patterns within the different categories of caring professionals and cross case analysis developed.

While reviewing the cases' briefs in terms of issues, outcomes, and trends, the researcher constantly returned to the lens of a counseling professional. The assembly of tables helped to assist and cluster issues. By reviewing from within the view of the counseling profession, consideration was given to how other caring professionals and school counselors were similar. A detailed case brief format helped to determine what issues and outcomes led to other caring professionals' privilege communication rulings or state statutes. With the use of cross-case analysis, each court case was viewed individually and then viewed to compare akin issues and outcomes of court cases to determine common characteristics within the court cases of other caring professionals. The cross-categories also helped develop new categories and subcategories covering similar court cases' issues and outcomes.

This study examined issues, trends, and outcomes through the categories of the professional relationships with the client having or not having privileged communication and

confidentiality. A total of 35 court cases were assessed under the initial categorization of Westlaw® concerning caring professionals involving privileged communication and confidentiality in some manner. After pertinent court cases were found from West® Publishing Company's Key Number system concerning caring professionals, the data of each court case was reexamined by categories. The organization from Westlaw® of the data led to the detection of subcategories within the categories.

Overview of Cases

Refer to Table 1 for a more detailed description of the court cases found in Westlaw® including year and state.

Table 1

Court Cases by Category, State, and Year

Case Law Categorized by Westlaw	
311 Professionals in General	<i>Poole v. Hawkeye Area Community Action Program, Inc.</i> , 666 N.W.2d 560 (Iowa 2003) <i>Ramsey v. State</i> , 56 P.3d 675 (Alaska 2002) <i>City of Cedar Falls v. Cedar Falls Community School Dist.</i> , 617 N.W.2d 11 (Iowa 2000)
312 Psychotherapist	<i>People v. Meza</i> , Not Reported in Cal.Rptr.2d (Cal.App. 2002)
313 Physicians: Psychiatrist	<i>Goral v. Illinois State Bd. Of Educ.</i> , 2013 IL App (1 st) 130752 (Ill. App. 2013) <i>Child C. v. Fleming School</i> 179 N.Y.S.2d 460 (N.Y.App. 1992) <i>People v. Plummer</i> , 37 Mich.App. 657 (1972) <i>In re Sippy A.2d</i> 455 (D.C.App. 1953)
314 Psychologist	<i>Correia v. Sherry</i> , 335 N.J. Super. 60 (2000) <i>J.N. By and Through Hager v. Bellingham School Dist. No. 501</i> , 74 Wash.App. 49 (1994) <i>State in the Interest of L.P.</i> , 593 A.2d 393 (N.J.App. 1991) <i>Sauter v. Mount Vernon School District No. 320</i> , 58 Wash.App. 121 (1990)
316 Social Workers	<i>Humberstone v. Wheaton</i> , 801 N.Y.S. 2d 868 (2005) (slip opinion)
320 Mental Health Records	<i>State v. Robert Scott R., Jr.</i> , 233 W.Va. 12 754 S.E. 2d. 588 (2014) <i>Krystal G. v. Roman Catholic Diocese of Brooklyn</i> , 34 Misc.3d 531 (N.Y.App.2011) <i>Com. v. Bourgeois</i> , 68 Mass.App. 433 (2007) <i>People v. Brown</i> , 24 A.D. 3d 884 (2005) <i>State of Connecticut v. Charles Slimskey</i> , 779 A.2d 723 (Conn. 2001) <i>People v. Kukon</i> , 275 N.Y.App.2d 478 (2000) <i>State v. Walsh</i> , 52 Conn.App. 708 (1999) <i>The State of New Hampshire v. Raymond Ellsworth</i> , 142 N.H. 710 (1998) <i>State v. Bruno</i> , 236 Conn. 514 (1996) <i>People v. Gutkaiss</i> , 84 N.Y.S.2d 936 (N.Y.App. 1994) <i>People v. Manzanillo</i> , 145 Misc.2d 511 (1989) <i>Matter of Handicapped Child</i> , 118 Misc. 2d 137 (1983)
322 Persons Entitled to Assert Privilege	<i>McCormack v. Board of Education of Baltimore County</i> , 158 Md. App. 292 (2004) <i>Matter of Charles R.R.</i> , 118 Misc.2d 137 (1990)
323 Waiver of Privilege	<i>Johnson v. Rogers Memorial Hospital, Inc.</i> , 283 Wis.2d 384 (2005) <i>Norskog v. Pfiel</i> , 197 III.2d 60 (2001) <i>Zimmer v. Cathedral School of St. Mary and St. Paul</i> , 204 N.Y.App.2d 538 (1994) <i>Caroline SYKES, a minor, By and Through her parents and next friends, Philip SYKES, and Martha Sykes, and Philip Sykes and Martha Sykes v. St. Andrews School</i> , 619 So.2d 467 (Fla.App. 1993) <i>Palm Beach County School Board and Terry Andrews v. Claudia Morrison</i> , 621 So.2d 466 (Fla.App. 1993)
332 In Camera Review	<i>People of the State of Michigan v. Devon Howard</i> , 783 N.W.2d 116 783 N.W.2d 116 (Mich.App. 2010) <i>Commonwealth v. Paul C. Poitras</i> , No. 00-P-526, Appeals Court of Massachusetts (2001) <i>State of Missouri v. Seiter</i> , 949 S.W. 2d 218 (Mo.App. 1997)

Issues

One of the relevant facts in each issue statement was the category of professionals in the court cases. The caring professionals and caring professionals' mental health records have been identified and sorted by the type of professionals in Column 2. Of the 35 court cases, there were nine broad categories covering the category of caring professionals and caring professionals' mental health records. The caring professional categories were as followed: five of the cases involved privileged communication of psychotherapists; one case dealt with a psychiatrist; two cases dealt with privileged communication and psychologists; one case concerned a priest; four cases involved other caring professionals; two cases of school psychologists and school counselors; three cases of counseling records; four cases of mental health records and school records; and thirteen cases of school records and other privileged communication records. Another important issue of privileged communication and confidentiality with regard to caring professionals were issues with records--mental health and school records.

While examining the issues of the 35 court cases, 11 categories of issue statements emerged. Issues were presented from relevant client facts by the dominant issue of privileged communication and confidentiality. The issue statements led to the court case decision's legal ruling. The types of issues of the court cases emerged as follows: one court error, six counseling, one limited authority to test, two teacher examinations through testing, three privilege communications, one statement to third parties, five mental health not used as an issue, one death, two special education referrals, five *in camera* reviews of school and counseling records, and eight school records and agency records.

One of the significant types of issues within the category of counseling included issue statements concerning substance abuse guidance counselor, school guidance counselor, school

psychologist, sexual assault counselor-victim, and professional-patient-privilege. Issue statements, always “in light of the facts,” examined the types of issues within the categories of caring professionals in Column 3. An example of an issue statement within the category of counseling was observed in the court case *Sauter v. Mount Vernon School District*, 58 Wash.App. 121 (1990). The issue statement from the *Sauter* court case was as follows: Did the court err in denying access to the student’s counseling records and privileged and confidential mental health records with the school psychologist? The ruling from the court’s judgment resulted in the decision that the courts did not err in denying access to the student’s counseling records and privileged and confidential mental health records with the school psychologist. The psychologist has privilege in his communication and does not fall within any exception to the rule such as child abuse reporting. The psychologist counseling sessions were privileged under Washington Revised Code, RCW § 18.83.110, because the victim gave no waiver of the privilege in order to breach the privilege. The psychologist-patient privilege stood. However, the appellant disputed the psychologist-patient privilege, stating the privilege fell within the exception of reporting child abuse. The psychologist-patient privileged communication is subject to the same provisions as an attorney-client privilege.

Other central types of issues within the counseling category included issue statements concerning school records, and records concerning agency, psychologist, grades, and social work evaluations. An example of an issue statement in the category of school records and other mental health records involved the court case, *Poole v. Hawkeye Area Community Action Program, Inc.*, 666 N.W.2d 560 (Iowa 2003). The issue statement involved the following: Did the courts err in whether the privilege statute prohibited mental health therapists from disclosing the older children’s confidential school records and psychological records? The court’s holding

maintained the court did not err in not disclosing the privileged communication. The therapist-patient privilege forbids disclosure of the mental health therapist confidential records. However, the therapist-patient privilege did not apply to the older children's school records and psychological records. The records were only prepared for the purpose of sharing information with outside professionals and were not viewed as being confidential. Iowa's Code, Section 622.10 (2001) includes privilege to medical, health care, school guidance counselors, and mental health professional records. Also, Iowa's Code, Section 22.7(1) includes confidential school records. School records were prepared to share information with others, specifically the school staff and administration; therefore, mental health therapists' disclosure of the older children's confidential school records and psychological records was not warranted.

The issue statements also emerged across categories of professionals. The issues were not unique to specified and identified types of professionals, but went across categories of professionals. Issues also came to light across categories of the types of professionals. First, the issue of counseling appeared across the following five categories: privileged communication, privileged communication of psychotherapists, privileged communication from schools, counseling records, and mental health records. In the area of a teacher's examination, the following categories were observed crossing types of professionals: privileged communication and privileged communication of a psychiatrist. A different category crossing over between two category types included special education referrals involving the categories of privileged communication of a psychologist and school records and other mental health records. Another cross category involved the client not placing their mental health as the issue crossed over three categories: school records, counseling records, and privileged communication of a psychotherapist. Additionally, the category of privileged communication crossed over into the

categories of privileged communication of psychotherapist and privileged communication of a priest. Likewise, the category of *in camera* review of records crossed over between three categories: counseling records, mental health records, and school records and other mental health records. The last cross-category involved school records crossing over four types of privileged communication of schools: counseling records, mental health records, and school records and other mental health records. The type of issues that ran across categories of professionals is identified in Column 3 of Table 2.

An example of the type of issue statements that ran across categories of professionals involved the category of special education referrals connecting the categories of privileged communication of a psychologist and school records and other mental health records. An example of the cross category involving privileged communication of a psychologist occurred in the court case *J.N. By and Through Hager v. Bellingham School Dist.* No. 501, 74 Wash.App. 49 (1994). The issue statement questioned, "Did the courts err in deciding the psychologist-patient privilege applied to the fourth grade student's interview with the school psychologist?" The court's holding declared there was no reasonable expectation that the reported information would remain privileged. There was no belief that the communication with the school psychologist would remain confidential. The school assessment was performed by the school psychologist for reasons of concern for attention deficit disorder (A.D.D.) and other behavior issues. When assessing a student for the purpose of providing recommendations to the multidisciplinary team for assessment for a student's needs, the privilege does not apply. Washington State Legislature, Revised Code of Washington, RCW § 18.83.110 affirmed the psychologist-client-privilege against disclosure and holds the same weight as the attorney-client privilege. The trial court reversed the decision on the summary judgment and remanded for purposes of allowing the

school psychologist's interview to be admitted. When school authorities know of a child's disturbed, aggressive nature, proper supervision must be in place for the protection of other children from the potential harm the behavior can cause. The school district under Washington law had a duty to do what an ordinary reasonable person would do under similar circumstances.

An example of the cross-category involved the category type of special education referrals connected by crossing over the two categories of privileged communication of psychologist and school records and other mental health records impacted in the New York Supreme Court, Erie County, court case *Matter of Handicapped Child*, 118 Misc.2d 137 (1983). The issue statement involved the following: "Did the courts err in stating a school is entitled to direct the psychiatric and psychological reports and evaluation of records of an infant student over the objection of the infant student's parent?" The New York Criminal Procedure Law Rules of Evidence, CPLR § 4501, Mental Hygiene Law § 33.13 (2015) of New York Statute recognizes the attorney-client privilege as a privilege of confidential communication and has long been vested by law. The court's holding stated the school should not be allowed access to the psychiatric and psychological testing records of the student from the Western New York Children's Psychiatric Center. The reasoning involved the school district's subpoena pursued the student's confidential records to collect the privileged records from Western New York Children's Psychiatric Center under New York's CPLR § 2307. On the same basis as the attorney-client privilege, New York Statute has established registered psychologist-client privilege communication under New York's CPLR § 4507, and certified social worker-client privilege, New York's CPLR § 4508. In this case, the child's records have no exception to the privilege for turning over the information of records to the school district, New York's Mental Hygiene Law, MHY § 33.13. The MHY § 33.13 does not allow clinical records of privileged

communication to be disclosed to a school district for any reason, New York Supreme Court, Criminal Term, Queens County, *People v. Doe* (1979). These types of issues fall within the categories of professional school records and other mental health records. The issues that ran across categories of professionals are important in recognizing the issues similar to other caring professionals. It was important to view the cross categories of professionals to locate similar or different issues of the different caring professionals. These cross categories are identified in Column 3 of Table 2.

Table 2

Categorized by Type of Privilege Communication

Case	Type	Issues
	Privileged Communication	
<i>In re Sippy</i>	Social worker-client-privilege	Additional attorney
<i>Cy of Cd Fs v. Cedar</i>	Professional-patient-privilege	Counseling
<i>John v. Rogers Memorial Hospital, Inc.</i>	Therapist-patient-privilege	Signed limited authorize of test, parent pay
<i>Child C. v. Fleming School</i>	Physician-patient-privilege	Teachers psychiatric treatment
	Privileged Communication Psychotherapist	
<i>People v. Plummer</i>	Psychotherapist-patient-privilege	Privilege relationship
<i>Child C. v. Fleming School</i>	Physician-patient-privilege	Teachers psychiatric treatment
	Privileged Communication Psychotherapist	
<i>People v. Plummer</i>	Psychotherapist-patient-privilege	Privilege relationship
<i>Child C. v. Fleming School</i>	Physician-patient-privilege	Teachers psychiatric treatment
	Privileged Communication Psychotherapist	
<i>People v. Plummer</i>	Psychotherapist-patient-privilege	Privilege relationship
<i>Ramsey v. State</i>	Psychotherapist-patient-privilege	Statements to nurse
<i>People v. Meza</i>	Sexual assault counselor-victim, psychotherapy	Conversation and notes
<i>Sykes By Through Sykes v. St. An School</i>	Psychotherapist-patient privilege	Client did not use mental issue as issue
<i>Palm Beach C. Bd. v. Morrison</i>	Psychotherapist-patient priv.	Mental health rec not placed as issue
	Privilege Communication Psychiatrist	
<i>Goral v. Ill St. Bd. of Educ.</i>	Psychiatrist-patient-privilege	Fitness for duty exam
<i>Correia v. Sherry</i>	Psychologist-patient-privilege	Death
<i>J. N. by Hager v. Bell School Dt.</i>	Psychologist-patient-privilege	Multidisciplinary team ass- special ed.
	Privilege Communication Priest	
<i>Krystal G. v. R Catholic Dioceses</i>	Priest-patient-privilege	Com/supervision over church
	Privilege Communication School	
<i>Sauter v. Mt Vernon School Dt</i>	School psychologist	Communication
<i>State in the Interest of L.P.</i>	Substance abuse guidance counselor	Notes, juvenile interview, school authorities
<i>Humberstone v. Wheaton</i>	School guidance counselor	Communication, not privileged

(table continues)

Case	Type	Issues
	Counseling Records	
<i>People v. Brown</i>	Counseling records	Counseling session
<i>St. New Hampshire v. Ellsworth</i>	Counseling records	<i>In camera</i> , counselor not testify
<i>Commonwealth v. P.C. Poitras</i>	Counseling records	<i>In camera</i> review of records
	Mental Health Records	
<i>Poole v. Hawkeye</i>	Mental health therapist records	School records and psychologist records
<i>State v. Robert Scott R., Jr.,</i>	Mental health records	Agency
<i>Com. v. Bourgeois</i>	Mental health records	Psychiatric history, sub ab history, failing school
<i>Norskog v. Pfiel</i>	Mental health records	17 year old killed 13 year old
<i>People v. Gutkaiss</i>	Medical records and school records	<i>In camera</i> , school rec, counseling rec, med rec
	School Records and Other Mental Health Records	
<i>People v. Kukon</i>	School records and psychiatric records	Cross-examine expert witness
<i>State v. Walsh</i>	School records and psychiatric records	<i>In camera</i> to impeach wit - given records
<i>St of Con v. Charles Slimskey</i>	School psychologist and psychiatric records	Review records, <i>in camera</i>
	School Records and Other Mental Health Records	
<i>In the Matter of Charles R.R People v. Devon Howard</i>	School psychologist test	Juvenile did not assert privilege
<i>People v. Manzanillo</i>	School records and priv. communication	<i>In camera</i> review of records
<i>State of Missouri v. Seiter</i>	Psychological rec and social work evaluation	<i>In camera</i> , for victim credibility
<i>Zimmer v. Cat School St. M & S.P</i>	Psychologist, social worker, school rec.	Stop <i>in camera</i> rev., subpoena stop
<i>State v. Bruno</i>	Psychiatric rec, social worker's records	Claim plaintiff was aggressor, not mental
<i>Matter of Handicapped Child</i>	Medical and psychiatric records	Cross-exam, witness mental condition interfere
<i>McCormack v. Board of Ed Baltimore County</i>	Psychological and psychiatric records	Special ed. Evaluation
	Psychologist, psychiatric & psychology	Ryan's mental condition, bus accident

Subcategories of Privilege Communication

While examining the issues of the 11 categories, 16 subcategories from the issue statements emerged. Issues were presented from relevant client facts by the dominant issue of privileged communication and confidentiality. The types of subcategories that surfaced from the issue statements within the court cases were as follows: one error in releasing; two cross examinations; three child abuse; one sanity issue; one privileged waived, then stopped; one appointed guardian; two balancing and confronting victim; two examinations; one character traits; one ineffective counsel; eight privileged records, four waived records; eight privilege communication; and two waived privilege communication.

Within the category of school records and other mental health records the subcategory of balancing with confrontation emerged. The subcategory of balancing with confrontation linked the two following court cases: the Connecticut Supreme Court case *State v. Bruno*, 236 Conn. 514 (1996), and the Connecticut Supreme Court case of *State of Connecticut v. Charles Slimskey*, 779 A.2d 723 (Conn. 2001). Both cases viewed balancing the victim's rights with the defendant's constitutional rights. In *State v. Bruno*, 236 Conn. 514 (1996),

The issue statement involved the following: "Did the trial court err in not allowing the defendant and his counsel to inspect the medical and psychiatric records of a state's witness, and was it necessary to invade the statutory privacy of the witness in order to provide the defendant with his constitutional right to confront that witness, which included the ability to cross-examine the witnesses effectively?" The court holdings declared the trial court claimed that the defendant failed to show relevancy and denied him the request for an *in camera* review of the psychiatric and medical records. The defendant argued that Bingham's problems of emotional distress, substance abuse, and psychiatric treatment warranted an *in camera* review of his school records

and psychiatric records. The court disagreed, referencing the Supreme Court of Connecticut, *State v. Joyner* (1993), where the courts in a criminal case have never made the use of the history of alcohol, drug abuse, or treatment reasons for disclosure of psychiatric records. The trial court denied the request for the psychological records. The defendant failed to provide a reasonable foundation of evidence that would prove useful for the impeachment of Bingham's testimony. Referencing the Supreme Court of Connecticut *State v. D'Ambrosio* (1989), the case accounts for the principle of an *in camera* review of psychiatric records requiring a preliminary showing that the evidence is admissible to the courts, relating to disclosure of communication under Connecticut's General Statutes § 52-146e. General Statutes § 52-146e claims that all communication and records are confidential and that disclosure of the records is limited to any part of the record being disclosed unless the patient gives consent to waive the confidentiality.

In the court case *State of Connecticut v. Charles Slimskey*, 779 A.2d 723 (Conn. 2001), the issue statement involved the following: Did the courts err in entitling the defendant, Charles Slimskey, to review the school psychological and psychiatric records of the victim? The trial court erred, and the defendant was entitled to review and use the school records and psychiatric records. The Supreme Court ruled that the defendant was entitled to review the school records. This was related to the victim's credibility and could create reasonable doubt as to the defendant's guilt. The denial of the victim's records was not harmless beyond a reasonable doubt. From the appeal, the courts are required to conduct their own *in camera* inspection of the privileged communication records looking to determine if abuse of discretion was conducted by the trial court, per the Supreme Court of Rhode Island, *State v. Walsh* (1999). The court's decision on disclosure of privileged communication records is determined by the defendant's constitutional right to deliver to the courts the witness' mental health conditions that could affect

the witness' credibility, the Supreme Court of Connecticut, *State v. Hufford* (1987). In citing the Connecticut Supreme Court case of *State v. Storlazzi* (1983), the determination is whether the defendant can show truthful material facts that the courts can justify to breach the confidentiality. Referencing Column 4 in Table 3.

The categorization also unearthed subcategory issues within the cross-categories of the specific identified types of professionals. Issues also came to light across categories of the types of professionals. Crossing over the two categories of school records and other mental health records and the category of counseling records, the subcategory of cross examination emerged. The subcategory of cross examination linked the two following court cases, the *People v. Kukon*, 275 N.Y.App.2d 478 (2000) and the *People v. Brown*, 24 N.Y.App.3d 884 (2005).

People v. Kukon 275 N.Y.App.2d 478 (2000) was categorized as school records and other mental health records. The issue statement involved the following: Did the County Court err in the refusal to allow the defendant access to certain school records and psychiatric records? The County Courts denied the victim's school records and psychiatric records. The court ruled the records were properly withheld from the defendant. The defendant claimed that not having the victim's privileged records obstructed his ability to cross-examine the expert witness and that this violated the right to confrontation. The defendant's request was based on privileged records revealing that the victim had professed prior sexual abuse and/or was confused by the abuser's identity. The defendant's offer was to show that the victim's prior abuse could manifest itself as child sexual abuse syndrome or suggest that the victim was confused by her abuser due to the lapse of time in reporting. The Supreme Court of New York Appellant Division, Third Department, *People v. Rogowski* (1996) proposed that cross-examination was limited because the victim showed no confusion concerning the defendant. The records were privileged, and the

exception to the privilege did not apply. The expert testimony did not indicate the expert had examined the victim. The expert also did not advise the victim had been sexually maltreated as the victim showed no signs of an individual who had been sexually abused, according to the ruling in this case the Court of Appeals of the State of New York, *People v. Taylor* (1990). The courts gave limited instruction to the expert's testimony, the Supreme Court of New York, Bronx County, *People v. Archer* (1989). The defendant's dispute about the victim being confused about the abusers identify was unsubstantiated.

The court case, *People v. Brown*, 24 N.Y.S.3d 884 (N.Y.A.D. 2005), was categorized as counseling records. The issue statement involved the following: "Did the court err in not allowing the defendant to cross-examine the victim concerning her counseling session?" The courts ruled the defendant was not allowed to cross-examine the victim concerning her counseling sessions. The reasoning was due to the defendant being charged with rape, and he was not warranted to gather or review the victim's school and counseling records. The defendant showed no substantial reason to request the records for the trial. Referencing the Court of Appeals of the State of New York, *People v. Gissendanner* (1979), the circumstances included the use of subpoena to search for ways of attacking the victim's credibility. This is known as a fishing expedition when searching for ways of attacking the victim's credibility. Also, there was no likely reason for the school records and the privileged mental health records to contain relevant material for the defendant's defense. The jury weighed the conflicting evidence between the defendant's violent attacks as stabbing the victim with the defendant's claim of consensual sex from the victim, according to the Supreme Court of New York in *People v. Allen* (2004). Referenced in Column 4 of Table 3 are the subcategories of the issues that occurred from the category's issue.

Table 3

Categorized by Subcategories of Privilege Communication

Issue	Court Case	Category	Subcategory
Error additional attorney	<i>In re Sippy</i>	Social worker-client-privilege	Erred in releasing
Counseling	<i>Cy of Cd Fs v. Cedar</i> <i>People v. Brown</i> <i>Sauter v. Mt Vernon School Dt</i> <i>State in the Interest of L.P.</i> <i>People v. Meza</i>	Professional-patient-privilege Counseling records School psychologist Substance abuse guidance counselor Sexual assault counselor-victim, psychotherapy	Privileged Cross-examine Child abuse Records privilege Child abuse
	<i>State of Missouri v. Seiter</i>	Psychologist, social worker, school records	Not waived
Limited authority for testing	<i>John v. Rogers Memorial Hospital, Inc.</i>	Therapist-patient-privilege	Not waived
Privilege communication	<i>Krystal G. v. R Catholic Dioceses</i> <i>Humberstone v. Wheaton</i> <i>People v. Plummer</i>	Priest-patient-privilege School guidance counselor Psychotherapist-patient-privilege	Sanity issue Mental health record Child abuse
Statement to third party	<i>Ramsey v. State</i>	Psychotherapist-patient-privilege	Privileged
Mental health as an issue	<i>Sykes By Through Sykes v. St. An School</i> <i>Palm Beach C. Bd. v. Morrison</i> <i>Norskog v. Pfiel</i>	Psychotherapist-patient privilege Psychotherapist-patient privilege Mental health records	Not waived Waived, but stop Privilege, Confidentiality Act
	<i>McCormack v. Bd. of Ed Baltimore Co.</i> <i>State v. Bruno</i>	Psychologist, psychiatric & psychology Medical and psychiatric records	Privilege from parents Balance
Death	<i>Correia v. Sherry</i>	Psychologist-patient-privilege	Privileged
Special education referral	<i>J.N. by Hager v. Bell School Dt.</i> <i>Matter of Handicapped Child</i>	Psychologist-patient-privilege Psychological and psychiatric records	Examination Privileged
Teacher psychological testing	<i>Child C. v. Fleming School</i> <i>Goral v. Ill St. Bd. of Educ.</i>	Physician-patient-privilege Psychiatrist-patient-privilege	Psychologist-patient Fitness-for-duty ex

(table continues)

Issue	Court Case	Category	Subcategory
<i>In camera</i> review of records	<i>St. New Hampshire v. Ellsworth</i>	Counseling records	Character traits
	<i>Commonwealth v. P.C. Poitras</i>	Counseling records	Not waived
	<i>People v. Gutkaiss</i>	Medical records and school records	School rec privilege, denied
	<i>St of Con v. Charles Slimskey</i>	School psychologist and psychiatric records	<i>In camera</i>
	<i>People v. Devon Howard</i>	School records and privilege communication	Waived
School records, agency, Psychology	<i>Poole v. Hawkeye</i>	Mental health therapist records	School rec privilege
	<i>People v. Manzanillo</i>	Psychological rec and social work evaluation	Deny access
	<i>State v. Robert Scott R., Jr.,</i>	Mental health records	Records privilege
	<i>Com. v. Bourgeois</i>	Mental health records	Ineffective counsel
	<i>People v. Kukon</i>	Medical records and school records	Cross-examine
	<i>State v. Walsh</i>	School records and psychiatric records	Privacy of record
	<i>People v. Devon Howard</i>	School records and privilege communication	Waived
	<i>People v. Manzanillo</i>	Psychological rec and social work evaluation	Not waived
	<i>In the Matter of Charles R.R</i>	School psychologist test	Not asserted

States Asserting and/or Waiving Privileged Communication

Eight states asserted privilege in all reported court cases. Those states were as follows: West Virginia, Massachusetts, Missouri, New Jersey, New Hampshire, Wisconsin, Alaska, and Maryland. The two jurisdictions that waived privilege in the court cases were the District of Columbia and California. States having decided case laws with some cases asserted and other cases waived were Washington, Iowa, Connecticut, Michigan, Illinois, and Florida. The state of Maryland's psychiatrist/psychologist privilege was asserted in all judicial proceedings, patients have a right to refuse to disclose confidential information or medical records relating to a patient's diagnosis or treatment received.

California's psychotherapist-patient privilege, known as therapist-patient-privilege, posits that a patient has a right not to disclose confidential information made between a therapist and themselves. The patient also has the right not to allow the therapist to disclose confidential information. The courts also determined exceptions to California's therapist-patient-privilege. Those exceptions include the following: in a criminal trial where the defendant uses their mental health as an issue, in a trial where the defendant uses the counseling relationship to cover up a crime, in confidence the defendant poses a threat to themselves or others, and in confidence if the defendant is accused of alleged child abuse or neglect. In *People v. Meza*, Not Reported in Cal. Rptr.2d (Cal.App. 2002), the courts determined the privilege was waived due to alleged lewd behavior brought upon the child and the confidential communication addressing the conduct. The courts resorted to California Evidence Code § 1010 as the legal reasoning of psychotherapist-patient-privilege. Table 4 illustrates the court case's decision rendered by the states. Table 4 details the states that awarded privilege, the states that waived privilege, and the states that had a combination of awarding and waiving privilege.

Table 4

States Asserting and/or Waiving Privileged Communication

States Awarded Privilege	States Awarded and Waived (A and W)	States Waived Privilege
Case	Type	Issues
Alaska	Washington (A, 2 W)	California
New Jersey	Iowa (A,W)	District of Columbia
New Hampshire	Connecticut (2A, W)	
Massachusetts	Michigan (A, W)	
Maryland	Illinois (A, W)	
Missouri	Florida (A, W)	
Wisconsin	New York (6A, 2W)	

Case Law Ruled in State Courts or Federal Courts

Court cases may begin in either a state court or a federal court, and then can be removed to a court in the other jurisdiction, or appealed to higher courts in either jurisdiction. Table 5 identifies the court issuing the order identified as a “case” for briefing and review in this study. The jurisdictions from the court cases conveyed the New York Supreme Court, Appellant Division, Third Department held three court cases. The Connecticut Supreme Court held 2 court cases, and Florida’s District Court of Appeals, Fourth District held two court cases. The other 28 court cases were held in courtrooms holding only one court case. Table 5 exhibits the state court and/or the federal courts where the court case was held.

Table 5

State Courts and Federal Courts for the Case Law

Case	State Courts and Federal Courts
<i>Evan E. RAMSEY v. STATE of Alaska</i>	Alaska Court of Appeals
<i>Child C., C.C. & M.C. v. FLEMING SCHOOL</i>	Supreme Court, Appellate Division, First Department, N.Y.
<i>T. HUMBERSTONE v. A. WHEATON</i>	Supreme Court, Appellate Division, Fourth Department, N.Y.
<i>M. ZIMMER v. CATHED SCH of ST. Mary</i>	Supreme Court, Appellate Division, Second Department, N.Y.
<i>Krystal G. v. ROMAN CATHOLIC D of B</i>	Supreme Court, Kings County, New York
<i>The PEOPLE v. James BROWN</i>	Supreme Court, Appellate Division, Third Department, N.Y.
<i>The PEOPLE of v. Timothy G. GUTKAISS</i>	Supreme Court, Appellate Division, Third Department, N.Y.
<i>PEOPLE v. M. MANZILLO</i>	Criminal Court, City of New York, New York County, Part AP5
<i>Matter of a HANDICAPPED CHILD</i>	Supreme Court, Erie County, New York
<i>In the Matter of Charles R.R.</i>	Appellate Division of the Supreme Court of the State of N.Y., Third Dept.
<i>People v. KUKON</i>	Appellate Division of the Supreme Court of the State of N.Y., Third Dept.
<i>STATE of New Hampshire v. R. ELLSWORTH</i>	Supreme Court of New Hampshire
<i>C. JOHNSON & K. J. v. Rogers Memorial Hospital</i>	Supreme Court of Wisconsin
<i>CITY OF CEDAR FALLS v. CED SCHOOL</i>	Supreme Court of Iowa
<i>POOLE v. HAWKEYE Area Community Action</i>	Supreme Court of Iowa
<i>STATE of Missouri v. William SEITER</i>	Missouri Court of Appeals, Eastern District, Division Five
<i>People v. Meza</i>	Court of Appeals of California, Sixth Appellate District
<i>B. GORAL v. ILLINOIS ST BD OF EDUCATION</i>	Appellate Court of Illinois, First District, Third Division
<i>Hillary NORSKOG v. R and G PFIEL</i>	Supreme Court of Illinois
<i>J.N. By & Thro HAGER v. BELL SCHOOL</i>	Court of Appeals of Washington, Division 1
<i>Rocke J. SAUTER v. MT VERNON SCHOOL</i>	Court of Appeals of Washington, Division 1
<i>SYKES v. ST. ANDRES SCHOOL</i>	District Court of Appeal of Florida, Fourth District
<i>PALM BEACH Co SCH BD v. C MORRISON</i>	District Court of Appeal of Florida, Fourth District
<i>STATE of West Virginia v. R SCOTT R.</i>	Supreme Court of Appeals of West Virginia
<i>Duane MCCORMACK, v. Bd. of Ed. of Baltimore County</i>	Court of Special Appeals of Maryland
<i>PEOPLE v. Keith PLUMMER</i>	Court of Appeals of Michigan, Division No. 2
<i>PEOPLE v. Devon HOWARD</i>	Court of Appeals of Michigan
<i>In re SIPPY</i>	Municipal Court of Appeals for the District of Columbia
<i>Constance E. CORREIA v. K. V. SHERRY</i>	Superior Court, Law Division, Sussex County, New Jersey

(table continues)

Case	State Courts and Federal Courts
<i>COMMONWEALTH v. Paul C. POITRAS</i>	Appeals Court of Massachusetts, Norfolk
<i>COMMON v. Phillip BOURGEOIS</i>	Appeals Court of Massachusetts, Worcester
<i>STATE of Connecticut v. Charles SLIMSKEY</i>	Supreme Court of Connecticut
<i>STATE of Connecticut v. Michael WALSH</i>	Appellate Court of Connecticut
<i>STATE v. Bruno</i>	Supreme Court of Connecticut
<i>STATE in the Interest of L.P., a Juvenile</i>	Superior Ct. of N. J., Chancery Division Middlesex Co., Family Part

Issues of Other Caring Professionals

The intention of this research was not only to capture the essence of the caring professional's privileged communication and confidentiality, but was to also seek issues that would correlate to a school counselor's ability or inability to seek privilege. In order to get a representative view of all the court cases, it was important to find the issue and outcome of each case. The court cases, having different issues and outcomes, became the basis for the guiding principles in gathering the data. The research questions helped guide the discovery of the issues and outcomes that emerged from the data. State law governs privileges, and privileges in one state does not mean the same privilege is granted in another state. Federal courts decide privilege statutes that are rendered in state law. Because state law governs the privilege statutes, states can readjust privilege statutes according to each individual state, creating different state laws. In and of itself, this can become an issue of knowing the state laws of the caring mental health professionals.

Mental Health Professional Issues

Of the 35 cases briefed, 16 of the court cases involved issues of mental health professionals. The cases in this area involved professionals regarding privileged communication. With Westlaw® first having the categories of privileged communication, each case was then reexamined to further analyze the issues of the caring professionals in this area. This led to subcategories within the area of professionals regarding privileged communication.

The area of mental health professionals brought up litigation by individuals for different reasons such as privileged counseling, statements to a nurse, and signing limited authorization of testing to be released. Typical of the first kind of suit was the court case *People v. Plummer*, 37 Mich.App. 657 (1972). In this criminal case, the Circuit Court Appellant Division No. 2 of

Michigan convicted the defendant of kidnapping, rape, assault with intent to murder, and unlawfully driving away in a vehicle. The prosecution called Dr. Shafii, a psychiatrist at Boys' Training School, as a rebuttal witness to the defendant's expert. Based on privileged communication, Dr. Shafii declined to testify. The defendant's privileged communication was waived when the defendant requested the doctor to testify on his behalf for his defense. By the courts requiring the defendant to see a court appointed psychiatrist, his rights were not violated, according to Michigan Court of Appeals, in *People v. Early* (1970). The court erred in the decision that psychotherapist-patient-privilege existed and applied to the privileged relationship. The psychiatrist had the right to refuse to testify at trial when the privilege had not been waived by the defendant. The prevailing case was based on the psychiatrist-patient privilege, according to Michigan Supreme Court Division, in *People v. Wasker* (1958). The admission of the privileged communication testimony from Dr. Shafii was a reversible error and should have not been allowed. This case was returned to a lower court for a new trial.

The court case *City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11 (Iowa 2000).concerned the issue of asserting the privilege of counseling due to the victim experiencing a traumatic event. Another issue of the category mental health professionals was the issue of the social workers communication being privileged. On September 15, 1995, Derek Bellman was among the 18-member class that went outside to see the police and hospital presentation at a safety program, called "Safety City." Katie Duax was the teacher in charge along with two parent volunteers. After the presentation from the officers, the students could visit the ambulance and other emergency vehicles. Several of the students went to the unattended golf cart, while one parent observed them with no alarm. One student stepped on the accelerator and activated the electronic motor. The golf cart pinned Derek against the ambulance, and he

obtained injuries from a golf cart used during one of the presentations. Derek died from the injuries.

During the debriefing sessions of the police officers, their statements were protected by the mental health professional-patient-privilege. Privileged communication occurred between the licensed mental health professionals and the police officers. The mental health professionals were assisting the officers to deal with the traumatic event. The debriefing counseling sessions the police officers attended were considered professional communication privilege. The school district claimed the communication was not confidential due to the number of police officers present. However, in the United States Supreme Court of Appeals, *In re Grand Jury Investigation* (1990), this protects group counseling, additionally the officers were obtaining treatment.

A party seeking to disclose privileged communication, as the police officers, however, must show the privilege exists and applies. When a privilege is based on a statute, it is narrow in reach. The police officer's debriefings involved a third party. The third parties were present when the police officers either received counseling or assisted with the counseling services. The professional communication privileges that exists between mental health professionals and police officers are (1) a professional relationship, (2) acquired information obtained during the relationship, and (3) the necessary information for helping the police officers through a traumatic event, per the Supreme Court of Iowa, *State v. Deases* (1994). However, professional communication privilege could be lost if made in a third party's presence. The Supreme Court of Iowa, in *State v. Tornquist* (1963), declared privileges may be lost if communications are made in front of third parties. The communications were not on a one-to-one basis with the police officers. The privilege covers group counseling practices. The sessions not conducted on a

one-on-one basis does not defeat the privilege, according to the United States Court of Appeals, Third Circuit, *In re Grand Jury Investigation* (1990). The courts concluded the privilege stands.

The courts also provided some input on multidisciplinary team assessment for special education in the Supreme Court of the State of Washington Court case court, *J.N. By and Through Hager v. Bellingham School Dist.* No. 501, 74 Wash.App. 49 (1994). During the school year, 1989-1990, school personnel had numerous documentations of instances of A. B.'s aggressive behavior in school. The school wanted to pursue the possibility of A.D.D. (Attention Deficit Disorder) and other medical issues of the student. The school principal wrote a letter to A. B.'s mother, explaining concern for the student and requesting permission to conduct a special education assessment of A.B. by a multidisciplinary team. The testing would be administered by the school psychologist, Mrs. B. A. B.'s mother gave permission for the psychological test to be performed by Jeremiah Schwartz, Ph.D., school psychologist. The principal, Mr. Austin, sent Mrs. B. a copy of the psychological testing summary of May 21, 1990.

The Washington State Court of Appeals asserted the privilege could have been asserted or waived by the patient or through a personal representative such as the patient's parent or Guardian *ad litem*. The school assessment was performed by the school psychologist for reasons of concern for A.D.D. or other behavior issues. When assessing a student for the purpose of providing recommendations to the multidisciplinary team for assessment of a student's needs, the privilege does not apply. There was no reasonable expectation that the information would remain privileged. The multidisciplinary team's evaluation gave recommendations and services to meet the student's needs. There was also no expectation that the communication with the school psychologist would remain confidential. Citing the Supreme Court of New Hampshire in

State v. Holland (1981), the courts rejected the argument of court-appointed psychologist communication with the juvenile defendant being privileged. There was not a purpose of treatment, only evaluation. Table 6 demonstrates the issues that were asserted or waived in court cases regarding mental health professionals.

Table 6

Mental Health Professional Issues

Case	Privilege By Category	Issues	Asserted or Waived	W or A
Privileged Communication				
<i>In re Sippy</i>	Social worker-client-privilege	Additional attorney	Waived-error procedure	W
<i>Cy of Cd Fs v. Cedar</i>	Professional-patient-privilege	Counseling	Asserted traumatic event	A
<i>John v. Rogers Memorial Hospital, Inc.</i>	Therapist-patient-privilege	Signed limited authorize of test, parent pay	Asserted	A
<i>Child C. v. Fleming School</i>	Physician-patient-privilege	Teachers psychiatric treatment	Private content, not facts	A
Privileged Communication Psychotherapist				
<i>People v. Plummer</i>	Psychotherapist-patient-privilege	Privilege relationship	Asserted by defendant	A
<i>Ramsey v. State</i>	Psychotherapist-patient-privilege	Statements to nurse	Asserted-suicidal or not	A
<i>People v. Meza</i>	Sexual assault counselor-victim, psychotherapy	Conversation and notes	Waived- lewd conduct on child	W
<i>Sykes By Through Sykes v. St. An School</i>	Psychotherapist-patient privilege	Client did not use mental issue as issue	Asserted	A
<i>Palm Beach C. Bd. v. Morrison</i>	Psychotherapist-patient priv.	Mental health rec not placed as issue	Waived for a short timeframe, waived	W
Privilege Communication Psychiatrist				
<i>Goral v. Ill St. Bd. of Educ.</i>	Psychiatrist-patient-privilege	Fitness for duty exam	No therapeutic relationship	W
Privilege Communication Psychologist				
<i>Correia v. Sherry</i>	Psychologist-patient-privilege	Death	Asserted privilege even after death	A
<i>J.N. by Hager v. Bell School Dt.</i>	Psychologist-patient-privilege	Multidisciplinary team ass.-special education	Waived	W
Privilege Communication Priest				
<i>Krystal G. v. R Catholic Dioceses</i>	Priest-penitent-privilege	Com/supervision over church	Asserted- privileged	A

(table continues)

Case	Privilege By Category	Issues	Asserted or Waived	W or A
Privilege Communication School				
<i>Sauter v. Mt Vernon School Dt</i>	School psychologist	Communication	Asserted privilege	A
<i>State in the Interest of L.P.</i>	Substance abuse guidance counselor	Notes, juvenile interview, school authorities	Privileged, 6th Amend confront witness	A
<i>Humberstone v. Wheaton</i>	School guidance counselor	Communication, not privileged	Waived, not certified social worker	W

School Records and other Privileged Communication Records

In looking at the privileged communication, the overriding issue was the way mental health records and privileged communication were impacted by the courts. The decisions in the cases were not evenly split between those found in favor for the privileged records to be asserted and those found in favor of not asserting privilege. In both, however, the way privilege is enforced through litigation is as important as any other factor in the case. The most heavily litigated issues involve 19 cases of school records and other privileged communication records. Cases in this area focus on issues such as privilege after death, the multidisciplinary team assessment for student's special education services, and privileged notes of a juvenile's interview involving school authorities.

A court decision involving school records and other privileged communication records was demonstrated in the Supreme Court of Appeals of West Virginia's court case of *State v. Robert Scott R., Jr.*, 233 W.Va. 12 754 S.E. 2d. 588 (2014). In this case, the defendant, Robert Scott, was charged with a sexual offense against four minors. The student, A. M., first reported the sexual assault to her mother. A. M.'s mother reported it to the authorities. The alleged sexual offenses occurred at the defendant's home during 2008 through 2010. The court suspended the mental health records from the Ohio institution called Fox Run Center for Children and Adolescents. The courts did not err in withholding the mental health records. The statute that applied to this situation was West Virginia Code § 27-3-1, Confidentiality of Mental Health Records. Referencing The Supreme Court of Appeals of West Virginia in *State v. Audia* (1983), privileged communication exceptions in criminal cases are at the discretion of the trial court.

The Appellate Court of Connecticut highlighted an important concept of denying the defendant access to school records and psychiatric records of one of the victims. The Appellate

Court of Connecticut in *State v. Walsh*, 52 Conn.App. 708 (1999), consolidated both incidents for one concise trial, which contained factual evidence of two separate cases. The defendant was charged with each case of sexually assaulting a girl. Victim A, a 14 year old, was the first victim. Victim H, a 15 year old, was the second victim involved in the court case. Due to the defendant's appeal, the state had a duty for accountability to conduct an *in camera* assessment to pierce the sealed records. The appeal court found proof from the challenged records that was factual to indicate that victim H did not have the ability to give evidence truthfully. The defendant's constitutional rights were not dishonored and his argument had no value.

The court referenced the Supreme Court of Connecticut's decision in *State v. Storlazzi* (1983), which claimed that the cornerstone of the determination of the records being released to the defendant hinged on whether factual evidentiary measureable specifics were available that could relate the truth. This is to justify the breach of confidentiality. From a case-by-case basis, it is vital to determine whether the defendant should have right of entry to privileged communication records, and how much access, to protect the defendant's right to confront. *State v. Storlazzi* (1983) determined if the defendant's access to privileged records is sufficient to disclose material then the courts are justified and have a reason to breach confidentiality of privilege.

The courts also provided some input from the Supreme Court of Erie County, New York case, *Matter of Handicapped Child*, 118 Misc.2d 137 (1983), where the school should not be allowed the psychiatric and psychological testing records upon their own request for discovery from the Western New York Children's Psychiatric Center. The student's mother halfheartedly approved for evaluation of her child concerning both psychiatric and psychological testing by the Western New York Children's Psychiatric Center. She granted the evaluation based on

expressing that she would be supplied copies of the psychiatric and psychological testing report prepared.

The evaluation reports were only provided to the Orchard Park School District and not to the mother. The Western New York Children's Psychiatric Center was the holder of the records from the student. The parent's complaint was that the evaluation was based solely upon the information the school personnel provided entirely, without her involvement. The parent withdrew her permission for the release of the psychiatric and psychological testing information.

The Orchard Park Central School District brought a motion for a subpoena for psychiatric and psychological examination and evaluation records of an infant student relating to the educational service for the child. The parents of the child asserted that the evaluation report was absolute privilege. The parents argued that the recommendation for referral for special education services was made solely from the report and would not be relevant in the fair hearing proceeding. Also, the parents noted that there was no need for the evaluation from the district when testimony was coming from the director of special education services, the school psychologist, the classroom teacher, and the school principal.

The school district pursued a student's confidential records subpoena to collect the confidential records from Western New York Children's Psychiatric Center under CPLR § 2307. This statute allows justices of the Supreme Court to issue subpoenas for records to be handed over to the courts from the holding party. However, the parents of the student stopped the subpoena under the protective New York's Civil Practice Law and Rules, CPLR § 2304. This statute establishes that the subject of a subpoena can move to quash a subpoena. The Attorney General asked the courts to deny the records the school district requested. Under statutory mandate, New York Education Law §4402, the school district established a committee on the

handicapped. However, the student psychological test evaluation was waived and provided for the district for evaluation of the student. The courts ruled the student never asserted the privilege. Table 7 lists court cases involving school records and other privileged communication records that the courts either asserted or waived privilege.

Table 7

Court Cases Involving School Records and other Privileged Communication Records

Case	Privilege By Category	Issues	Asserted or Waived	A/W
Counseling Records				
<i>People v. Brown</i>	Counseling records	Counseling session	Asserted-privileged	A
<i>St. New Hampshire v. Ellsworth</i>	Counseling records	<i>In camera</i> , counselor not testify	Asserted, counselor refuse to testify	A
<i>Commonwealth v. P.C. Poitras</i>	Counseling records	<i>In camera</i> review of records	Asserted, defendant gave speculative theories	A
Mental Health Records				
<i>Poole v. Hawkeye</i>	Mental health therapist records	School records and psychologist records	Waived- prepared for purpose shared	W
<i>State v. Robert Scott R., Jr., Com. v. Bourgeois</i>	Mental health records	Agency	Asserted-privileged	A
<i>Norskog v. Pfiel</i>	Mental health records	Psychiatric history, sub ab history, failing school	Not proven in effect assist from lawyer	A
<i>People v. Gutkaiss</i>	Medical records and school records	17 year old killed 13 year old	Asserted-privilege	A
<i>People v. Gutkaiss</i>	Medical records and school records	<i>In camera</i> , school rec, counseling rec, med rec	Asserted, try impeach victim's credibility	A
School Records and Other Confidential Records				
<i>St of Con v. Charles Slimskey</i>	School psychologist and psychiatric records	Review records, <i>in camera</i>	Waived, error	W
<i>In the Matter of Charles R.R</i>	School psychologist test	Juvenile did not assert privilege	Waived for inquiry into juvenile supervise	W
<i>State v. Walsh</i>	School records and psychiatric records	<i>In camera</i> to impeach wit - given records	Subpoenaed records, no evidence	A
<i>People v. Kukon</i>	School records and psychiatric records	Cross-examine expert witness	No privilege	A

(table continues)

Case	Privilege by Category	Issues	Asserted or Waived	A/W
<i>People v. Devon Howard</i>	School records and priv. communication	<i>In camera</i> review of records	Waived, trial court erred, defend said might	W
<i>People v. Manzanillo</i>	Psychological rec and social work evaluation	<i>In camera</i> , for victim credibility	Asserted, social worker privilege	A
<i>State of Missouri v. Seiter</i>	Psychologist, social worker, school rec.	Stop <i>in camera</i> rev., subpoena stop	Asserted all but attendance rec.	A
<i>Zimmer v. Cat School St. M & S.P</i>	Psychiatric rec, social worker's records	Claim plaintiff was aggressor, not mental	Asserted	A
<i>State v. Bruno</i>	Medical and psychiatric records	Cross-exam, witness mental condition interference	Asserted, no relevancy	A
<i>Matter of Handicapped Child</i>	Psychological and psychiatric records	Special Ed. Evaluation	Asserted against agency wanting records	A
<i>McCormack v. Bd. of Ed Baltimore Co</i>	Psychologist, psychiatric & psychology	Ryan's mental condition, bus accident	Privilege	A

Jaffee v. Redmond (1996)

The United States Court case *Jaffee v. Redmond* (1966) ruling established the psychotherapist-patient-privilege in Federal Courts. The United States Supreme Court's ultimate decision was to express society's need to help professionals provide protective communication disclosure between psychotherapists and their clients. *Jaffee* protects the character of the confidential relationship for trust to develop. Trusting relationships with psychotherapists is for patients to have the courage to make frank disclosure for effective evaluation and treatment. The psychotherapist-patient-privilege is governed by state statutes with all states having varying amounts of privacy protection of the records. In the research, all of the court case rulings came from state statutory laws. The foundation of *Jaffee*, shaped through statutory law, demonstrates how states have adopted similar privileges, such as social worker privilege. With regard to the research questions that pertain to the issues, trends, and outcomes of privileged communication and confidentiality, many of the cases represented the courts' attempt to balance the demands of the United States Constitution, both the Fifth Amendment and the Sixth Amendment, legislation, and legal precedent. A privilege is an exception to full communication disclosure where the law protects caring professionals' conversations from disclosure in a court of law. The Supreme Court's reluctance to create and expand new federal common law privileges have been stifled in Federal Rules of Evidence, FRE 501. However, *Jaffee* seems to offer the best possible way for the Supreme Court to recognize a common law procedure of students seeking confidential help.

The landmark Supreme Court decision of *Jaffee v. Redmond* (1996) has been a pivotal ruling in the mental health field. The *Jaffee* decision of psychotherapist-patient-privilege was established from a federal common law and respected and recognized as a psychotherapist privilege. The ruling was made so that in federal court proceedings, the patient of the

psychotherapist would not have to worry that their frank and honest conversations to the therapist would be in front of a court of law. The federal court ruling was not narrowed and gave leverage for the lower courts to decide the parameters of the psychotherapist. With federal courts applying *Jaffee* to cases filed in federal courts, many states apply the ruling of *Jaffee* under their jurisdiction. From the state statutes, states have used the *Jaffee* decision as a framework to establish other privileges and define the scope of the circumstances for particular privileges. State statutes are written from a frame of legislative action and originate from local government, state government, or federal government. The *Jaffee* ruling established a core decision of absolute privilege around a law. The ruling also separated the psychotherapist privilege from other qualifying privileges.

The *Jaffee* decision created a barrier to disclose confidential psychotherapy records in court case decisions. The Supreme Court of Wisconsin Court case, *Johnson v. Rogers Memorial Hospital, Inc.*, 283 Wis. 2d 384 (2005), cited the *Jaffee* decision. The case reiterated that courts ruled a patient's health care records must remain confidential. However, if the patient's mental health issues are used as the subject in the court case, this frustrates the civic policy of the therapist-patient-privilege, and weakens privileged communication and confidentiality, Wisconsin Statute § 146.82(1). Illustrated in Table 8, *Jaffee* decision cited in the court's ruling internally influenced the court cases' issues.

Table 8

Jaffee v. Redmond (1966) Case Law Ruling

Case	Primary Ruling	Legislation	Issue	Amend
State Statute				
<i>Norskog v. Pfiel</i>	740 ILCS § 110	Illinois	Mental Health Confidentiality Act	<i>Jaffee</i>
<i>Correia v. Sherry</i>	(N.J. S.A.) 45:15BB-1.3	New Jersey	Social worker licensure	<i>Kinsel/Jaffee</i>
<i>John v. Rogers Memorial Hospital, Inc.</i>	Wisconsin Statute § 146.82	Wisconsin	Confidentiality patient health care records	<i>Jaffee</i>

State Law Precedents of Privileges

State laws govern privileges. States have a jurisdiction on the privilege they assert. Privileges are a secure safeguard to protect conversations that our society finds as valuable. The most common privilege is evidentiary privilege which is testimonial privilege in criminal case law.

Like other statutes, to establish a privilege statute the communication must be intended to be confidential at the time the communication was initiated. The privilege statutes controls the release of confidential information to individuals. The privilege also is defined by legal circumstances as to when the information may be released without the holder of the privilege’s consent. Being a statute concept of law, privileged communication is only an issue when there is a legal interest. Thirty-three of the court cases were ruled on by state statutes. The state statutes’ decisions were split between the Fifth Amendment and the Sixth Amendment. Twenty-four cases cited the Fifth Amendment, while eight court cases cited the Sixth Amendment.

From the court cases reviewed, the majority of court cases supporting the privilege under the Fifth Amendment were 12 states. These states included Alaska, California, District of

Columbia, Florida, Iowa, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Washington, and West Virginia. New York had 11 case laws, and ten of the cases supported the Fifth Amendment. Only one case supported the Sixth Amendment, and that was the case *People v. Gutkaiss* (1994), from the New York Supreme Court Appellate Division, Third Department, with the primary ruling referencing the Criminal Procedural Law 240.20(1). CPL 240.20(1) is concerned with the demand for discovery of evidence. The New York Court of Appeals in the court case *People v. Brown* (1979), established the ruling of the important decision of the limited ability for defendants to subpoena confidential records.

The states in which the court cases succumbed to the Sixth Amendment were Connecticut; Illinois referencing *Jaffee*; Michigan; Missouri; New Jersey; one case from New York; and Wisconsin. The following table shows the court cases that were influenced by legislation governed by state statutes and doctrines. The influence of the Fifth and Sixth Amendment of the United States Constitution is also referenced in the court cases. The primary ruling, from state statute and state doctrine, was influenced by the Fifth and Sixth Amendment of the United States Constitution. In Table 9, state statute was shown along with the primary ruling that governed the issues at hand.

Table 9

Legislation Governed by State Statutes and Doctrines

Case	Primary Ruling	Legislation	Issue	Amendment
		State Statute		
<i>Ramsey v. State</i>	Evidence Rule 504(b)	Alaska	Psychotherapist	5th
<i>People v. Meza</i>	Evidence Code § 1010	California	Psychotherapist-patient-privilege	5th
<i>State v. Bruno</i>	Statutes § 52-146e	Connecticut	Discovery of evidence	6th
<i>State v. Walsh</i>	<i>State v. Bruno (1996)</i>	Connecticut	Evidence	6th
<i>St of Con v. Charles Slimskey</i>	6th Amendment	Connecticut	Cross-examine wit, sch. Rec	6th
<i>In re Sippy</i>	§ 11-906(a)(2) (1951)	Dist. Of Colum	Psychiatrist-patient-priv.	5th
<i>Sykes By Through Sykes v. St. An School</i>	F. S.A. § 90.503	Florida	Psychotherapist-pat-privilege	5th
<i>Palm Beach C. Bd. v. Morrison</i>	Rule 25.03(A) (9).	Florida	Psychotherapist-pat-priv.	5th
<i>Goral v. Ill St. Bd. of Education</i>	M H ConfAct740.11LCS11.2	Illinois	Mental Health Conf. Act	6th
<i>Norskog v. Pfiel</i>	740 ILCS § 110	Illinois	Mental Health Conf. Act	Jaffee
<i>Poole v. Hawkeye</i>	Iowa Code 622.10 (5) (2008)	Iowa	Communication in profess. Confidence	5th
<i>Cy of Cd Fs v. Cedar</i>	Code § 622.10	Iowa	Communication in profess. Confidence	5th
<i>McCormack v. Board of Ed Baltimore Co</i>	MD Courts & J Pro § 9-109 (b)	Maryland	Psychologist privilege	5th
<i>Com. v. Bourgeois</i>	<i>Commonwealth v. Saferian</i>	Mass	No ineffective counsel no deprive	5th
<i>Commonwealth v. P.C. Poitras</i>	<i>Commonwealth v. Fuller (1996)</i>	Mass	No pierce priv. without merit	5th
<i>People v. Devon Howard</i>	MCR 6.201	Michigan	Discovery of evidence	6th
<i>People v. Plummer</i>	<i>People v. Wasker (1958)</i>	Michigan	Psychiatrist-p-privilege, respondent's rights	6th
<i>State of Missouri v. Seiter</i>	Rule 25.03 (a) (9)	Missouri	Disclosure by St Without Court Order	6th
<i>St. New Hampshire v. Ellsworth</i>	Evidence Rule 404 (b)	New Hampshire	Prior bad act evidence	5th
<i>Correia v. Sherry</i>	(N.J. S.A.) 45:15BB-1.3	New Jersey	Social worker licensure	Kinsel/Jaffee
<i>State in the Interest of L.P.</i>	(N.J.S.A.) § 45:14B-28	New Jersey	Conf. relations and com	5th
<i>Child C. v. Fleming School</i>	CPLR § 4504	New York	Physician privilege	5th
<i>Krystal G. v. R Catholic Diocese</i>	CPLR § 4505	New York	Clergy privilege	5th
<i>Zimmer v. Cat School St. M & S.P</i>	CPLR § 4504 & §4508	New York	Physician/Social worker	5th
<i>People v. Manzanillo</i>	CPLR § 4507	New York	Psychologist privilege	5th
<i>Matter of Handicapped Child</i>	CPLR § 4507	New York	Psychologist privilege	5th
<i>Humberstone v. Wheaton</i>	CPLR § 4508	New York	Social worker	5th
<i>People v. Gutkaiss</i>	CPL § 240.20 (1)	New York	Discovery of evidence	6th
<i>People v. Kukon</i>	<i>People v. Rogowski (1996)</i>	New York	Records not admissible; no cross-examine	5th
<i>People v. Brown</i>	<i>People v. Gissendanner</i>	New York	Limits to subpoena records	5th
<i>In the Matter of Charles R.R</i>	<i>Mat of Delia v. Spina (1987)</i>	New York	School psychologist-privilege	5th
<i>J.N. by Hager. v. Bell</i>	RCWA 18.83.110.	Wash	Psychologist privilege	5th
<i>Sauter v. Mt Vernon School Dt</i>	RCW § 18.83.110	Wash	Psychologist privilege	5th
<i>State v. Robert Scott R., Jr.,</i>	W.V. Code 27-3-1	West Virginia	Confidential, disclosure	5th
<i>Johnson v. Rogers Memorial Hospital, Inc.</i>	Wis. Statute §146.82	Wisconsin	Conf. pat. health care records	Jaffee

Fifth Amendment Supportive to Court Cases

Historically, the Fifth Amendment establishes a privilege from self-incrimination. The Fifth Amendment is a safeguard against misleading evidence. The Fifth Amendment was designed to assume that no person shall be a witness against himself within the criminal legal system. The person is entitled to due process of law proceedings and shall not be deprived of liberty. The Fifth Amendment may not be used as a shield and a sword where one withholds valid information or where one “pleads the fifth” from incriminating oneself. Like most privileges, this privilege can be waived. The Fifth Amendment, giving a constitutional right, must be used in a fair way, not allowing a civil case from providing an unfair advantage against the defendant. If unfairness is determined the courts will waive the privilege.

The Fifth Amendment ruling supported the issues of state statutes for psychotherapist privilege, psychologist privilege, and privileges involving other mental health professionals. The other mental health professionals included psychiatrists, physicians, clergy, social workers, and school psychologists. The Fifth Amendment also ruled in favor of case laws from *Commonwealth v. Saferian* (1974) from Supreme Judicial Court of Massachusetts; *Commonwealth v. Fuller* (1996) from Superior Court of Massachusetts; *People v. Rogowski* (1996) from the New York Supreme Court Appellate Division, Third Department; *People v. Gissendanner* (1979) from the New York State Court of Appeals; and *Matter of Delia v. Spina* (1987) from the New York Supreme Court Appellant Division, Fourth Department. For example, the New York Supreme Court Appellate Division, Third Department ruled in the court case *People v. Brown* (2005) claim of privilege from the victim’s counseling records. The defendant was appealing the admission into the record of the victim’s confidential information by affirming a charge to fish for privileged information to discredit the victim. *Brown* affirmed the primary

ruling from the New York Court of Appeals of *People v. Gissendanner* (1979). The ruling of *Gissendanner* determined the precedent that courts place a limit on the defendant's ability to subpoena confidential records. Also, from the Massachusetts Court of Appeals, the primary ruling of *Commonwealth v. Fuller* (1996) was asserted in the Massachusetts Appellant Court case *Commonwealth v. Paul C. Poitras* (2002). The *Fuller* ruling set the expectation for the defendant to show a good faith effort to specifically give relevant facts as to why an *in camera* inspection of the privileged communication should occur. The courts ruled in *Poitras* that if there was no merit then there was no reason to pierce the privilege. The case laws that drew from the ruling of the Fifth Amendment includes the following cases. Table 10 represents the court cases that cited primary rulings supporting the Fifth Amendment.

Table 10

Fifth Amendment Case Law Rulings

Case	Primary Ruling	Legislation	Issue	Amendment
		State Statute		
<i>Ramsey v. State</i>	Evidence Rule 504(b)	Alaska	Psychotherapist	5th
<i>People v. Meza</i>	Evidence Code § 1010	California	Psychotherapist-patient-privilege	5th
<i>In re Sippy</i>	§ 11-906(a)(2) (1951)	Dist. Of Columbia	Psychiatrist-patient-privilege	5th
<i>Sykes By Through Sykes v. St. An School</i>	F. S.A. § 90.503	Florida	Psychotherapist-pat-privilege	5th
<i>Palm Beach C. Bd. v. Morrison</i>	Rule 25.03(A) (9).	Florida	Psychotherapist-pat-privilege	5th
<i>Poole v. Hawkeye</i>	Iowa Code 622.10 (5) (2008)	Iowa	Communication in profess. Confidence	5th
<i>Cy of Cd Fs v. Cedar</i>	Code § 622.10	Iowa	Communication in profess. Confidence	5th
<i>McCormack v. Board of Education Baltimore Co</i>	MD Courts & J Pro § 9-109 (b)	Maryland	Psychologist privilege	5th
<i>Commonwealth v. Bourgeois</i>	<i>Commonwealth v. Saferian</i>	Mass	No ineffective counsel no deprive	5th

(table continues)

Case	Primary Ruling	Legislation	Issue	Amendment
		State Statute		
<i>Commonwealth v. P.C. Poitras</i>	<i>Commonwealth v. Fuller (1996)</i>	Mass	No pierce privilege without merit	5th
<i>St. New Hampshire v. Ellsworth</i>	Evidence Rule 404 (b)	New Hampshire	Prior bad act evidence	5th
<i>State in the Interest of L.P.</i>	(N.J.S.A.) § 45:14B-28	New Jersey	Conf. relations and com	5th
<i>Child C. v. Fleming School</i>	CPLR § 4504	New York	Physician privilege	5th
<i>Krystal G. v. R Catholic Diocese</i>	CPLR § 4505	New York	Clergy privilege	5th
<i>Zimmer v. Cat School</i>	CPLR § 4504 & §4508	New York	Physician/Social worker	5th
<i>St. Mary & St. Paul</i>	CPLR § 4507	New York	Psychologist privilege	5th
<i>People v. Manzanillo</i>	CPLR § 4507	New York	Psychologist privilege	5th
<i>Matter of Handicapped Child</i>	CPLR § 4507	New York	Psychologist privilege	5th
<i>Humberstone v. Wheaton</i>	CPLR § 4508	New York	Social worker	5th
<i>People v. Kukon</i>	<i>People v. Rogowski (1996)</i>	New York	Records not admissible, no cross-examine	5th
<i>People v. Brown</i>	<i>People v. Gissendanner</i>	New York	Limits to subpoena records	5th
<i>In the Matter of Charles R.R</i>	<i>Mat of Delia v. Spina (1987)</i>	New York	School psychologist-privilege	5th
<i>J.N. by Hager. v. Bell</i>	RCWA 18.83.110.	Wash	Psychologist privilege	5th
<i>Sauter v. Mt Vernon School District</i>	RCW § 18.83.110	Wash	Psychologist privilege	5th
<i>State v. Robert Scott R., Jr.,</i>	W.V. Code 27-3-1	West Virginia	Confidential, disclosure	5th

The Sixth Amendment Supportive to Court Cases

The United States Constitution Sixth Amendment guarantees the defendant in a criminal trial has the right to confront the witnesses against them. They may also obtain witnesses to testify in their favor. The Sixth Amendment being a constitutional right would seem to trump the attorney-client-privilege, as well as a mental health professional privilege. However, courts have not been willing to allow the attorney-client-privilege to be waived. The attorney-client-privilege appears to be a priority at all times. The United States Supreme Court case law, *Pennsylvania v.*

Ritchie, confirmed that a defendant charged with a criminal intention has the right to view and have a knowledge of all the evidence for a jury to consider. This leaves a question for courts to consider; however, courts have been careful not to provide the disclosure of the attorney-client-privilege weakening the shelter of privileged communication and confidentiality. The Supreme Court of the United States recognized in case law, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), that the attorney-client privilege common law survived death, Federal Rule Evidence 501. The *Swidler* case law tried to establish a balance test in criminal justice cases of the defendant's Sixth Amendment rights and the protected unyielding attorney-client-privilege; however, the courts rejected a balancing test to overpower the privilege.

From the research, the Supreme Court of the State of Washington Court case, *J.N. By and Through Hager v. Bellingham School Dist.* No. 501, 74 Wash.App. 49 (1994), referenced *Ritchie*. The case proposed that the state's interest in protecting the child abuse information outweighs the defendant's interest to discover evidence to help in his defense. The courts conducted an *in camera* review of the notes of the school psychologist, Licata, and the victim, T.M. The court was content with the licensed practicing psychologist, Ms. Licata, and her statements with her client. The courts ruled the notes contained no literal statements to warrant discovering the records and these communications were privileged. The court case, *The State of New Hampshire v. Raymond Ellsworth*, 142 N.H. 710 (1998), from the New Hampshire Supreme Court also cited *Ritchie*. In the United States Supreme Court in *Pennsylvania v. Ritchie* (1987), the defendant was futile in establishing a basis that the records contained material evidence favorable for his defense or any evidence to warrant impeaching the witness's testimony. The trial court disagreed with the defendant's motion for an *in camera* review of the witness' special

education records and psychiatric records as evidence. Table 11 introduced the court cases' primary ruling that were strongly influenced by the Sixth Amendment.

Table 11

Sixth Amendment Case Law Rulings

Case	Primary Ruling	Legislation	Issue	Amendment
State Statute				
<i>State v. Bruno</i>	Statutes § 52-146e	Connecticut	Discovery of evidence	6th
<i>State v. Walsh</i>	<i>State v. Bruno</i> (1996)	Connecticut	Evidence	6th
<i>State of Connecticut v. Charles Slimskey</i>	6th Amendment	Connecticut	Cross-examine witness, school records	6th
<i>People v. Gutkaiss</i>	CPL § 240.20 (1)	New York	Discovery of evidence	6th
<i>Goral v. Ill State Board of Education.</i>	M H ConfAct740.11LC S11.2	Illinois	Mental Health Confidentiality Act	6th
<i>People v. Devon Howard</i>	MCR 6.201	Michigan	Discovery of evidence	6th
<i>People v. Plummer</i>	<i>People v. Wasker</i> (1958)	Michigan	Psychiatrist-patient-privilege, respondents rights	6th
<i>State of Missouri v. Seiter</i>	Rule 25.03 (a) (9)	Missouri	Disclosure by State w/out Court Order	6th

Privileges

Privileges are asserted in civil cases by the holder of the privilege. The holder of the privilege is the patient. Even after a patient is dead, the privilege is still asserted, as in the New Jersey Superior Court, Law Division, Sussex County Court case *Correia v. Sherry*, 335 N.J. Super. 60 (2000). Even the child's parent does not hold the privilege. The only way a privilege is held by a parent is if the courts award the parent as the *guardian ad litem*. Courts appoint *guardian ad litem* for children and these are court-selected custodians representing the child's best interest. In the Court of Special Appeals of Maryland case, *McCormack v. Board of Education of Baltimore County*, 158 Md.App. 292 (2004), the courts appointed a guardian ad

litem for the child's best interest to assert the privilege. The child was involved in a bus accident and the courts ruled the child could not assert or waive his or her psychologist-patient privilege. The Board's argument was that the parents, the McCormacks, brought a claim for Ryan's medical expenses and this created a conflict of interest with Ryan's psychologist-patient privilege. The Appellant Court's decision has a binding authority that stated the psychologist-patient privilege was not waived due to Ryan's mental condition being an element of the claim. The court made no attempt of bringing the evidence into the case at trial.

The classical common law belief is that when any part of the privilege is disclosed it will ruin the whole privilege. The reliability of the privilege is destroyed when the client willingly waives the privilege. Waivers make evidence discoverable that otherwise would be confidential. When privileges are waived, they cannot be reinstated. The importance of the confidential material must be weighed against the judicial systems demands and not impede litigation. In the State of New York Supreme Court, Appellate Division, First Department court case, *Child C. v. Fleming School* 179 N.Y.S.2d 460 (N.Y.App. 1992), the case referenced the United States Supreme Court ruling of *Upjohn Co. v. United States* (1983). *Upjohn Co.* involved a situation where the courts were looking at the lawyer's intentions and not the client's intentions. *Upjohn Co.* settled that the privilege extends to the privileged communication only; therefore, the defendant's physician must answer questions regarding the facts as to treatment, dates, and times. Due to this fact, the plaintiff is allowed to seek the relevant facts from the treatment information.

Privilege is waived or lost when the privileged material has been partially or totally disclosed by the client. The client/patient can waive the privilege by telling others the confidential information. However, the privilege remains confidential if the patient only tells

about the mental health issues in general without talking about what was stated in the private conversations with a therapist. Privilege cannot be waived by other parties, including the therapist themselves. If the therapist reveals the confidential communication to others, the privilege is not waived.

In the Wisconsin Supreme Court case, *Johnson v. Rogers Memorial Hospital, Inc.*, 283 Wis.2d 384 (2005), the case was filed by the parents alleging the therapist placed false memories of sexual abuse in the victim's mind during treatment. The courts asserted, the victim's attorney-client-privilege was not waived when the client communicated to her attorney about bringing a civil action suit against her parents for child abuse, specified under lawyer-client-privilege in Wisconsin Statute Annotated, W.S.A. § 905.03(2). Within the case, the privilege was also not waived when the patient's communication took place with an unlicensed therapist who was under the supervision of a licensed therapist.

Results of Issues of Caring Professionals

Researching the issue of caring professional privileged communication and confidentiality, the concentration was on the one issue of privileged communication. The issues of caring professionals stemmed from the results of the two parties' disagreement in the lawsuit. State courts decide on these issues. These issues covered a wide spectrum of disputes from privileged relationships to no therapeutic relationship established from the caring professional and the client. Other issues included private conversations to statements made in a group counseling session. Within the school setting, the issues were a student's special education referral, placement, to a teacher's psychiatric evaluation and treatment. The majority involved privileged relationships and the courts tried to consider the constitutional rights of the plaintiff and the defendant, along with other case laws, to the facts in the case. Substantial issues, such as

school records, death, special education referrals, and counseling sessions were recognized through case briefings. In the briefing of the case, issues were illuminated from the disputed point of law and from the case’s facts. There were also issues due to procedural issues where the appealing claim was questioning the court’s procedures. Procedural issues included additional attorney ruled as a court error, *in camera* review of evidence, and cross-examining expert witnesses. Referenced in Table 12 are the results of the issues from the caring professionals’ court cases.

Table 12

Issues of the Caring Professionals’ Court Cases:

Issues		
Mental health issues	Fitness for duty exam for employees	No therapeutic relationship established
Death	Special education referral	Teacher’s psychiatric treatment
Limited signing of privileged communication material	Additional attorney – court error	Priest supervision for communication
Not a certified social worker	Counseling session	<i>In camera</i> review
School records	Agency	Mental health records
Privileged relationship	Statements to nurse	Private conversation
Psychologist records	School psychiatric test	Cross-examine expert witness

Outcomes

The decisional outcomes rendered by the courts included outcomes that the relevant issues created for caring professionals and their clients. The research question guided extracting outcomes gathered from the issues. The outcomes are indicators of what trial courts are contending with in the different caring professions. The nature and justification of privileges are communications from the courts litigation involving two different scenarios: courts asserting privilege communication or courts waiving privileged communication. This research was strongly influenced by the courts’ assertions of privilege or waiving privilege communication within the court cases. Court litigation involving the assertion of privilege entails the party

claiming the documents are privileged and should not be disclosed. The outcomes are not always simple and straightforward because the courts have ruled in partial waiving of protected privileged information. Through purposed analysis from the research, twenty-five cases asserted privilege of communication and ten cases waived the privilege. Table 13 shows an overall listing of privilege waived or asserted in the following 35 court cases.

Table 13

Court Cases Waived or Asserting Privilege

Court Case	Waived (W) or Asserted (A)
<i>In re Sippy</i>	W
<i>City of Cedar Falls v. Cedar</i>	A
<i>John v. Rogers Memorial Hospital, Inc.</i>	A
<i>Child C. v. Fleming School</i>	A
<i>People v. Plummer</i>	A
<i>Ramsey v. State</i>	A
<i>People v. Meza</i>	W
<i>Sykes By Through Sykes v. St. Mary School</i>	A
<i>Palm Beach C. Bd. v. Morrison</i>	W
<i>Goral v. Ill State Board of Education.</i>	W
<i>Correia v. Sherry</i>	A
<i>J. N. by Hager v. Bell School District</i>	W
<i>Krystal G. v. R Catholic Diocese</i>	A
<i>Sauter v. Mt Vernon School Dt</i>	A
<i>State in the Interest of L.P.</i>	A
<i>Humberstone v. Wheaton</i>	W
<i>People v. Brown</i>	A
<i>St. New Hampshire v. Ellsworth</i>	A
<i>Commonwealth v. P.C. Poitras</i>	A
<i>Poole v. Hawkeye</i>	W
<i>State v. Robert Scott R., Jr.,</i>	A
<i>Commonwealth. v. Bourgeois</i>	A
<i>Norskog v. Pfiel</i>	A
<i>People v. Gutkaiss</i>	A
<i>State of Connecticut v. Charles Slimskey</i>	W
<i>In the Matter of Charles R.R</i>	W
<i>State v. Walsh</i>	A
<i>People v. Kukon</i>	A
<i>People v. Devon Howard</i>	W
<i>People v. Manzanillo</i>	A

(table continues)

Court Case	Waived (W) or Asserted (A)
<i>State of Missouri v. Seiter</i>	A
<i>Zimmer v. Cat School St. Mary & St. Paul</i>	A
<i>State v. Bruno</i>	A
<i>Matter of Handicapped Child</i>	A
<i>McCormack v. Board of Education Baltimore County</i>	A

Waived Mental Health Professional Privilege

Privileged communications between mental health professionals and patients are confidential. The protected communication is not disclosed to other parties without the consent of the patient. However, there are exceptions to the privileges. Research supported the exceptions include child abuse and/or neglect; a judge's order for one or both of the parties to participate in mental health evaluations for the courts; one party claiming the other party is unfit due to a mental health illness; and/or the dispute of a child's mental health condition. Most states have laws requiring mental health professionals to disclose patient information when violence or the threat of violence is a concern. This disclosure of information due to a threat is called a mandatory duty to warn. A patient's confidential communication between licensed psychotherapists and psychologists are placed on the same level of privilege as the law provides for attorney-client-privilege.

In 1993, in *Palm Beach County Board v. Morrison*, 621 So.2d 464 (Fla.App.1993). The district Court of Appeals of Florida, Fourth Division (1993) the courts ruled the psychotherapist-patient-privilege was violated. The privilege was violated when the defendant and the defendant's psychotherapist were forced to testify in an attempt to discredit the defendant's testimony. An assistant principal, Morrison, sought damages for the emotional and psychological injury she had occurred during her position as assistant principal. She claimed Andrews had sexually harassed her and discriminated against her with write-ups, evaluations, and retaliations.

The Florida Statutes section § 90.503 (1991) resolves the psychotherapist-patient privilege was violated when the defendant was forced by Morrison to testify in an attempt to impeach Andrew's testimony. When and if a patient relies on his mental or emotional condition for his defense, the statutory privilege does not apply. The District Court of Appeals of Florida in *Cantor v. Toyota Motor Sales* (1989) proposed the privilege does not hold if the patient relies on their mental or emotional condition as their defense. Additionally, the burden rests on the party trying to void the psychotherapist-patient privilege. The issue of the case was for the party to seek to question the psychotherapist to show the patient's mental condition established as the burden of proof. The privilege was waived for a short period of time. The courts rejected the discovery of evidence based on the evidence the assistant principal already had could not be used to impeach the defendant.

Other outcomes of waived mental health professionals included a waiver due to a procedure error in the District of Columbia Court of Appeals, in *In re Sippy*, 97 A.2d 455 (D.C.App. 1953). The court case involved a social worker-client-privilege. However the appellee had an additional attorney to enter the trial. The courts regarded this error as harmful to the defendant. In addition, the court allowed the attorney to give his opinion. The additional attorney addressed what the social worker had spoken of for the defendant to remain in the custody of the Board of Public Welfare and attend school at Devereux School in Pennsylvania. Other cases involved issues of establishing no therapeutic relationship because the defendant was to participate in a fitness-for-duty exam provided by a psychiatrist. However, a psychiatrist-patient-privilege was not established because there was no intention of the evaluation being confidential. This court case was *Goral v. Illinois State Bd. Of Educ.*, 2013 IL App (1st) 130752 (Ill.App. 2013), in Illinois Cook County Circuit Court, Appellant Court, First District, Third Division.

Table 14 validates the court cases that waived privilege of mental health professionals as a social worker, psychotherapist, psychiatrist, psychologist, and a school guidance counselor.

Table 14

Waived Mental Health Professional Privilege

Case	Privilege By Category	Issues	Asserted or Waived	W
Privileged Communication				
<i>In re Sippy</i>	Social worker-client-privilege	Additional attorney	Waived-error procedure	W
Privileged Communication Psychotherapist				
<i>People v. Meza</i>	Sexual assault counselor-victim, psychotherapy	Conversation and notes	Waived- lewd conduct on child	W
<i>Palm Beach County Board v. Morrison</i>	Psychotherapist-patient priv.	Mental health rec not placed as issue	Waived for a short timeframe, waived	W
Privileged Communication Psychiatrist				
<i>Goral v. Illinois State Board of Education</i>	Psychiatrist-patient-privilege	Fitness for duty exam	No therapeutic relationship	W
Privileged Communication Psychologist				
<i>J.N. by Hager v. Bell School District</i>	Psychologist-patient-privilege	Multidisciplinary team special education	Waived	W
Privileged Communication School				
<i>Humberstone v. Wheaton</i>	School guidance counselor	Communication, not privileged	Waived, not certified social worker	W

Waived School Records and other Mental Health Records

The common law standing is that courts are required to view every man’s evidence. Mental health professionals and providers are required to keep records confidential. As an example, there is not an automatic right for a parent to view their child’s mental health records. The parent must be acting in the child’s best interest and on the child’s behalf. Parents can also act for the child’s best interest by protecting professionals and providers from disclosing their child’s mental health records.

Mental health record privacy is an important societal value and individual value. Medical record value can contradict judicial values. The research has shown medical records were waived in a court of law due to the school records and psychologist records being prepared for a specific purpose of being shared. In the court case *Poole v. Hawkeye Area Community Action Program, Inc.*, 666 N.W.2d 560 (Iowa 2003) the privacy of the mental health therapist records in the case was waived when the social value of children being exposed to lead was higher than the individual value. Another court case that involved school records and mental health records being waived was *State of Connecticut v. Charles Slimskey*, 779 A.2d 723 (Conn. 2001) in the Connecticut Supreme Court. An additional case involved the school psychologist test was waived due to inquiry about a juvenile needing to be supervised and school records and privileged communication records waived when the defendant stated the records might contain evidence. This waiver of records precipitated the need for an *in camera* review of the records. The Supreme Court of Michigan pointed out in *People v. Devon Howard*, 783 N.W.2d 116 (2010) the trial court erred when waiving the school records and privileged communication records when the defendant's only statement was that the records might show the testimonies of the alleged victim's inconsistencies. Table 15 demonstrates the court cases categorized by school records and other mental health records that waived the privilege either due to court error or the case's inquiry concerning a juvenile's evaluation and supervision.

Table 15

Waived School Records and Other Mental Health Records

Case	Privilege By Category	Issues	Asserted or Waived	A/W
<i>Poole v. Hawkeye</i>	Mental health therapist records	School records and psychologist records	Waived, prepared for purpose shared	W
<i>State of Connecticut v. Charles Slimsky</i>	School psychologist and psychiatrist records	Review records, <i>in camera</i>	Waived, error	W
<i>In the Matter of Charles R.R</i>	School psychologist test	Juvenile did not assert privilege	Waived for inquiry into juvenile supervise	W
<i>People v. Devon Howard</i>	School records and priv. communication	<i>In camera</i> review of records	Waived, trial court erred, defend said might	W

Outcomes Involving *Jaffee v. Redmond* (1966)

The *Jaffee* decision was cited in the decisional outcomes of three court cases in this study: Wisconsin Supreme Court Case of *Johnson v. Rogers Memorial Hospital, Inc.*, 283 Wis.2d 384 (2005); New Jersey Superior Court case *Correia v. Sherry*, 335 N.J. Super. 60 (2000); and the Supreme Court of Erie County, New York, *Matter of Handicapped Child*, 118 Misc.2d 137 (1983). Table 16 demonstrates the court cases which involved *Jaffee* in their decisional outcomes that can strongly influence the caring professionals.

Table 16

Jaffee v. Redmond (1966) Case Law Ruling

Case	Primary Ruling	Legislation	Issue	Amendment
<i>State Statute</i>				
<i>Norskog v. Pfiel</i>	740 ILCS § 110	Illinois	Mental Health Confidentiality Act	<i>Jaffee</i>
<i>Correia v. Sherry</i>	(N.J. S.A.) 45:15BB-1.3	New Jersey	Social Worker Licensure	<i>Kinsel/Jaffee</i>
<i>John v. Rogers Memorial Hospital, Inc.</i>	Wisconsin Statute §146.82	Wisconsin	Confidentiality Patient Health Care Records	<i>Jaffee</i>

Outcomes Involving Fifth Amendment Supportive to Court Cases

The Self-Incrimination Clause of the Fifth Amendment is supported in state case laws and federal laws to maintain a fair justice system in criminal cases through the Fourteenth Amendment’s Due Process Clause. The interpretation of the Fifth Amendment from the United States Supreme Court addresses the Due Process Clause providing a fair and orderly trial through procedures for the defendant by prohibiting self-incrimination. Prohibiting self-incrimination is accomplished by the witness’ depositions. If the witness believes their testimony will cause self-incrimination, the witness has the authority to plead the fifth over privileged communications. Privileged communication is the only communication that the witness may not be examined on. Also, the defendant has a constitutional right of not testifying against oneself. The defendant has a right of prohibiting self-incrimination. Courts address due process through the procedure of the defendant being heard in a criminal judicial court case. Twenty-four court cases were supportive of the Fifth Amendment. Table 17 demonstrates decisional outcomes of the court cases’ primary ruling involving the Fifth Amendment.

Table 17

Outcomes Involving the Fifth Amendment Case Law Rulings

Case	Primary Ruling	Legislation	Issue	Amendment
State Statute				
<i>Ramsey v. State</i>	Evidence Rule 504(b)	Alaska	Psychotherapist	5th
<i>People v. Meza</i>	Evidence Code § 1010	California	Psychotherapist-patient-privilege	5th
<i>In re Sippy</i>	§ 11-906(a)(2) (1951)	District of Columbia	Psychiatrist-patient-privilege	5th
<i>Sykes By Through Sykes v. St. Ann's School</i>	F. S.A. § 90.503	Florida	Psychotherapist-patient-privilege	5th
<i>Palm Beach County Bd. v. Morrison</i>	Rule 25.03(A) (9).	Florida	Psychotherapist-patient-privilege	5th
<i>Poole v. Hawkeye</i>	Iowa Code 622.10 (5) (2008)	Iowa	Communication in professional Confidence	5th
<i>City of Cedar Falls v. Cedar</i>	Code § 622.10	Iowa	Communication in professional Confidence	5th
<i>McCormack v. Board of Education Baltimore County</i>	MD Courts & J Pro § 9-109 (b)	Maryland	Psychologist privilege	5th
<i>Commonwealth v. Bourgeois</i>	<i>Commonwealth v. Saferian</i>	Massachusetts	No ineffective counsel No deprive	5th
<i>Commonwealth v. P.C. Poitras</i>	<i>Commonwealth v. Fuller</i> (1996)	Massachusetts	No pierce priv. without merit	5th
<i>State New Hampshire v. Ellsworth</i>	Evidence Rule 404 (b)	New Hampshire	Prior bad act evidence	5th
<i>State in the Interest of L.P.</i>	(N.J.S.A.) § 45:14B-28	New Jersey	Confidential relations and com	5th
<i>Child C. v. Fleming School</i>	CPLR § 4504	New York	Physician privilege	5th
<i>Krystal G. v. R Catholic Diocese</i>	CPLR § 4505	New York	Clergy privilege	5th
<i>Zimmer v. Cat School St. Mary & St. Paul</i>	CPLR § 4504 & §4508	New York	Physician/Social worker	5th
<i>People v. Manzanillo</i>	CPLR § 4507	New York	Psychologist privilege	5th
<i>Matter of Handicapped Child</i>	CPLR § 4507	New York	Psychologist privilege	5th
<i>Humberstone v. Wheaton</i>	CPLR § 4508	New York	Social worker	5th
<i>People v. Kukon</i>	<i>People v. Rogowski</i> (1996)	New York	Records not admissible, no cross-examine	5th
<i>People v. Brown</i>	<i>People v. Gissendanner</i>	New York	Limits to subpoena records	5th
<i>In the Matter of Charles R.R</i>	<i>Mat of Delia v. Spina</i> (1987)	New York	School psychologist-privilege	5th
<i>J.N. by Hager. v. Bell</i>	RCWA 18.83.110.	Washington	Psychologist privilege	5th
<i>Sauter v. Mount Vernon School District</i>	RCW § 18.83.110	Washington	Psychologist privilege	5th
<i>State v. Robert Scott R., Jr.,</i>	W.V. Code 27-3-1	West Virginia	Confidential, disclosure	5th

Outcomes Involving the Sixth Amendment Supportive to Court Cases

The Sixth Amendment guarantees the right to a fair trial where the defendant has a right for adequate and effective assistance from counsel. The Due Process Clause of the Fourteenth Amendment assures the client of a fair trial. The Sixth Amendment and the Due Process clause are parallel and provides protection for the defendant. The court case, *Pennsylvania v. Ritchie* (1987) reiterated the Compulsory Process Clause from the Sixth Amendment where courts allow the defendant any witness in their favor through the police system to subpoena the witness to testify. From *Ritchie*, where the courts decide after a review of the information that the revealed information would have probably changed the outcome of the case, the Compulsory Process is a success. The U.S. Constitution gives a criminal the right to present a complete defense. The Sixth Amendment grants pretrial discovery to the criminal defendant. However, from *Pennsylvania v. Ritchie* (1987), it is not clear whether or to what extent the evidence is granted. An *in camera* review of material can allow courts to search for evidence that is both in favor of the defendant and/or evidence that can provide guilt and punishment.

From the research, in the Washington Court of Appeals court case, *J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wash.App. 49 (1994), the courts referenced *Ritchie*. The case's intentions supported the state's interest in protecting the child abuse information that outweighed the defendant's interest to discover evidence to help in his defense. The courts conducted an *in camera* review of the notes of the school psychologist, Licata, and the victim, T.M. The court was content with the licensed practicing psychologist, Ms. Licata, and

her statements with her client. The courts ruled the notes contained no verbatim statements to warrant discovery and these communications were privileged.

The New Hampshire Supreme Court case, *The State of New Hampshire v. Raymond Ellsworth*, 142 N.H. 710 (1998), also cited *Ritchie*. In *Pennsylvania v. Ritchie* (1987), the defendant failed to establish a basis that the records contained material evidence favorable for his defense or any evidence to warrant impeaching the witness's testimony. The trial court denied the defendant's motion for an *in camera* review of the witness's special education records and psychiatric records as evidence. This is an example of the courts sitting in opposition to the privilege right of protection of records against the Sixth Amendment right to reveal the confidential information. The victim's privilege right of confidential special education records outweighed the defendant's Sixth Amendment right for pretrial discovery of evidence to the criminal defendant.

The court cases that leaned toward the Sixth Amendment ruling were court cases primary rulings involving five cases concerning state statutes, two cases with case laws as the primary ruling, and one case replication of the Sixth Amendment. The state statutes came from the states of Connecticut, Illinois, and Michigan. The two court cases whose legal standing came from case law were applied in the states of Connecticut and Illinois. From the Appellant Court of Connecticut, the court case *State v. Walsh* (1996) emphasized the ruling of the Supreme Court of Connecticut, *State v. Bruno* (1996). In the *Bruno* ruling, the courts viewed through an *in camera* inspection for the defendant's responsibilities to establish the foundation of evidence as well as being extremely mindful of the reasons for the witness' interest in retaining the communication privilege as evidence. This applied to the assertion of the discovery of evidence in the court case. As in the court case *People v. Plummer* (1972), Michigan Court of Appeals, the courts ruled in

favor of the psychiatrist-patient-privilege. The court’s primary ruling came from the Michigan Supreme Court ruling of *State v. Wasker* (1958). *Wasker* highlighted that testimony from the psychiatrist was a prejudicial error when he was allowed to testify about confidential information learned from their treatment. The court case, *Plummer*, highlighted the *Wasker* court case, in that the violation of the physician-patient confidentiality of sharing the privileged notes in court, as the psychiatrist-patient-privilege was asserted. Table 18 demonstrates the decisional outcomes involving eight court cases’ primary ruling with the Sixth Amendment strongly influencing the cases.

Table 18

Outcomes Involving Sixth Amendment Case Law Rulings

Case	Primary Ruling	Legislation	Issue	Amendment
State Statute				
<i>State v. Bruno</i>	Statutes § 52-146e	Connecticut	Discovery of evidence	6th
<i>State v. Walsh</i>	<i>State v. Bruno</i> (1996)	Connecticut	Evidence	6th
<i>State of Connecticut v. Charles Slimskey</i>	6th Amendment	Connecticut	Cross-examine witness, school records	6th
<i>Goral v. Illinois State Board of Education</i>	Mental Health ConfAct740.11LCS11.2	Illinois	Mental Health Confidentiality Act	6th
<i>People v. Devon Howard</i>	MCR 6.201	Michigan	Discovery of evidence	6th
<i>People v. Plummer</i>	<i>People v. Wasker</i> (1958)	Michigan	Psychiatrist-patient-privilege, respondent rights	6th
<i>State of Missouri v. Seiter</i>	Rule 25.03 (a) (9)	Missouri	Disclosure by State w/out Court Order	6th
<i>People v. Gutkaiss</i>	CPL § 240.20 (1)	New York	Discovery of evidence	6th

Pretrial Discovery of Evidence

The Supreme Court upholds a constitutional right for pretrial discovery of evidence. In criminal trials, the prosecution has the duty to disclose evidence to the defense that will

exonerate the defendant. However, protected privileged records are not normally addressed to be disclosed to the defense. In *Brady v. Maryland* (1963), the United States Supreme Court established a pretrial discovery rule known as the *Brady* material. The rule emphasized the prosecution in a criminal case has the duty to turn over evidence that may vindicate the defendant. The *Brady* case (1963) held when the prosecution suppressed evidence that could be favorable to the defendant, even after the accused had requested the records, due process is violated. The suppressed evidence could either be material to establish guilt, innocence, or for punishment. When all the evidence is given in the pre-trial discovery rule, then it is determined if the material evidence could bring about a different result of the proceeding.

In *People v. Rosario* (1961), the New York Court of Appeals established the Rosario rule of materials in criminal cases. The prosecution must give the defense all the recorded statements from the prosecution's witnesses. The material of the witness' testimony of record statements include documents as notes, reports, and witness' prior testimony. The overall purpose of Rosario's material rule is for the defense's right to cross-examine the witness' materials to effectively establish the witness' credibility. The Rosario discovery rules was established in New York CPL § 240.45, where handwritten notes of the person testifying can be used in a court of law.

In the court case *People v. Gutkaiss*, 84 N.Y.S.2d 936 (N.Y.App. 1994) two boys reported on the child abuse hotline, that they were sexually abused from 1987 to 1988 by the defendant, Timothy G. Gutkaiss. The courts did not allow the defendant access to the victim's school records, counseling records, nor medical records. The disputed evidence at the trial was not effective in trying to impeach the victim's credibility. After conducting the *in camera* review of the privileged records, the trial court found there were no *Brady* or *Rosario* material.

From the research in the court case, *State in the Interest of L.P.*, 593 A.2d 393 (N.J.App. 1991), the courts held the substance abuse guidance counselor's notes were privileged except for one item. The defendant's statement of the complainant was not privilege where the defendant was denying everything which was covered under *Brady* material. The facts from the case involved five juveniles who were charged with aggravated sexual assault upon one female victim. All five students, the defendants and the victim attended Monroe Township High School.

In order to establish *Brady* material, the defendant must make a *Brady* request for medical records, and the defendant did not. Secondly, the defendant was given a significant opportunity to make the request and did not take advantage of it. The opportunity came when the defendant was able to question the victim A, his mother, and his physician concerning victim A's medical reports, medication, and hallucinations for favorable information to support the defense. Before the trial, a letter from the doctor indicated victim A had a medical condition and suffered from hallucinations. The defendant sought the pretrial *Brady* request for all the evidence; however, the doctor's notes were not included. The defendant did not include the medical report in the *Brady* request. The defendant made a request but the courts did not award the request. The defense felt if the letter had been disclosed earlier, the results of the trial proceedings would have had a different outcome, citing the New York Court of Appeals, *People v. Vilardi* (1990).

Also privileged were the records of the social worker and the psychologist, who were both employed by the Board of Education. The records included the social worker and the psychologist's communications and records. The Supreme Court ruling in *Brady v. Maryland* (1963) establishes that the prosecution cannot withhold evidence that may be favorable to the defendant if the material could bring either guilt or punishment. *Brady* parallels to the United States Constitutional assurance of the defendant's due process requiring disclosure of evidence

that may be material in evidence for a court decision. In *People v. Rosario* (1961), the ruling was that, when evidence as statements from the witness' testimony is relevant to the court's issue, nothing must be kept confidential. There is also the issue of the defendant's right to evidence to help the issue of guilt or innocence set by *Brady*.

***In Camera* Review Standards**

The litigation regarding an *in camera* review of records became a pursuit for the Supreme Court. In the United States, an *in camera* review of records means examining records in private as in the judge's chambers. This litigation typified the issues regarding observing the victim's and the defendant's confidential information. In many of the court cases, the defendant's defense made an effort to disclose confidential communication to impeach the victim or to discredit the state's witnesses. In the Supreme Court opinion of *United States v. Zolin* (1989), an *in camera* review was asserted as a factual way to support a good faith means of viewing the privileged material, to see if the privilege applied. In 1984, *People v. Stanaway* specified defendants are not allowed to fish for evidence to search for information that is not articulated as truthful information. A generalized assertion is prohibited and disclosure of confidential information should not occur when the defendant can only offer assumptions. In the court case, the Michigan Supreme Court articulated that the defendant must show a good faith belief that there is reasonable probability of factual information for an *in camera* inspection of the records to occur. The courts can direct an *in camera* inspection of the records, necessary to the defense, to pierce the privilege.

With the ever-increasing current of sexual assaults from the 1980's, legal opinion regarding sexual assault changed. The Superior Court of Pennsylvania in both court cases, *Commonwealth v. Bishop* (1993) and *Commonwealth v. Fuller* (1996), saw a need to create a

standard for judges to view victim's privileged communication records. The *Bishop-Fuller* protocol was established from these two Massachusetts Supreme Judicial Court Cases for disclosure of privileged records at a criminal trial. Referencing *Commonwealth v. Fuller* (1996), to attain a pretrial inspection of confidential privileged records, the defendant must present a specific good-faith reason to believe that the records contained evidence that would exonerate the defendant. Material evidence is evidence that not only meets the requirement of admissibility but also generates a reasonable doubt. *Commonwealth v. Bishop* (1993), regarding evidence, affirms that giving only generalized statements concerning the witness' credibility is not sufficient. These are requirements from the *Bishop-Fuller* extended standards. However, the trial court cannot be at fault for the defendant's motion for a new trial based on the *Bishop-Fuller* criteria. The trial counsel could not obtain the privileged record documents because their records were not discoverable. Under the *Fuller* ruling, a defendant must show an explicit and rational belief that the disclosed records would contain substantial evidence favorable to the defendant and relevant to exonerate the defendant.

The courts created a five-stage *Bishop-Fuller* procedure to access privileges by statute. This was created to balance both the victim's concealed privileged confidential communication records and provide the defendant with a fair trial. The courts were called upon in many court cases to settle the balancing of the defendant's rights and the injured parties' rights. The following court cases referenced the *Bishop-Fuller* procedure: *Com. v. Bourgeois*, 68 Mass. App. Ct. 433 (2007); *Commonwealth v. Paul C. Poitras*, No. 00-P-526, Appeals Court of Massachusetts (2001); *Sauter v. Mount Vernon School District*, 58 Wn.App. 121 (1990); and *In the Matter of Charles R.R.* 118 Misc.2d 137 (1983). Table 19 displays the court cases in which

the Bishop-Fuller Standard procedure was addressed to balance the victim's and defendant's rights.

Table 19

Cases Referencing Bishop-Fuller Standard

Case	Year	State	Privilege	Code	Reason	Code
<i>Commonwealth v. Bourgeois</i>	2007	Massachusetts	Psychiatrist & substance abuse	<i>Commonwealth v. Saferian</i> (1974)	Ineffective counsel	<i>Commonwealth v. Poitras</i>
<i>Commonwealth v. P.C. Poitras</i>	2001	Massachusetts	Counseling records	<i>Commonwealth v. Fuller</i> (1996)	Not waived	<i>Commonwealth v. Federico</i>
<i>Sauter v. Mount Vernon School District</i>	1990	Washington	Psychologist -patient privilege	RCW § 18.83.110	Child abuse	RCW §26.44.030-1
<i>In the Matter of Charles R.R</i>	1990	New York	Psychologist -patient privilege	<i>Matter of Delia v. Spina</i> (1987)	Not asserted	8 NYCRR §§ 200.4

The Supreme Court reached several similar conclusions that impacted litigation in this area of *in camera* review of privileged records. The court case *State of Connecticut v. Charles Slimskey* (2001) also referenced *State v. Herring* (1989). Herring asserted it was the court's need to balance the statutory privilege for the witness's psychiatric privileged communication records against the defendant's rights due to the Confrontational Clause. An *in camera* review of the privileged evidence was an effective way to balance the criminal defendant's rights and the privacy citizens expect in regard to confidentiality of their psychiatric assessment and treatment. After an *in camera* review, the court's willingness to give the records to the defendant lies in the courts ability to not disturb the confidential information unless there is abuse. *State v. Harris* (1993) proposed the courts are ruling and weighing the value of the case to the value of the privileged communication records.

In *State In the Interest of L.P.*, 593 A.2d 393 (N.J.App. 1991), the Superior Court, Chancery Division, determined the legal guardian, assigned to the case by the courts for the

child, held the privilege. The patient is the holder of the privilege and if the privilege is going to be surrendered it can only be waived by the patient. The plaintiffs brought suit by making an attempt to state a violation of his due process. In *Pennsylvania v. Ritchie* (1987), the Supreme Court held the courts must yield to an *in camera* inspection of privileged records in support of the defendant's due process of law under the United States Constitution. Following the attorney-client-privilege the courts advocated the psychologist-patient-privilege by the privilege serving the public good where the psychologist is fully informed as an attorney, *Upjohn Co. v. United States* (1981).

In the court case, *People v. Meza*, Not Reported in Cal.Rptr.2d (Cal.App. 2002), O. told her school counselor, Patricia Macie, her mother's boyfriend had touched her inappropriately. Macie reported the incident to the Child Protective Services. Macie, a licensed school counselor, continued to be O.'s counselor. Macie took notes of the counseling sessions. It was noted that O. continued to change her story of the events. However, the sexual assault counselor victim privilege did not apply to the school counselor's communications with victims due to lewd conduct on a child under the age of 14. The psychotherapist-patient privilege does not apply to the school counselor's notes. The trial court exercised sound legal decision making when they called the school counselor as an expert witness. The Fifth Amendment due process clause was addressed. The courts require the defendant to receive the right to a fair trial and to evidence.

When privileged communication is protected from disclosure by the state, the court conducts an *in camera* inspection to determine if the material would support guilt or innocence, per *Pennsylvania v. Ritchie* (1987). If the material from the *in camera* review discloses information that would have changed the outcome of the trial, the conversation facts are deemed material evidence to release privileged evidence, *People v. Boyettes* (1988). The courts

concluded Macie's counseling notes contained no material evidence that would help support the defendant's defense.

In the Supreme Court of Massachusetts's decision in the case, *State v. Bruno*, 236 Conn. 514 (1996), the defendant did not bring about reasonable grounds to claim that the witness' mental condition restricted the witness' ability to testify. In *Pennsylvania v. Ritchie* (1987), the defendant was unsuccessful in establishing a basis that the records contained material evidence favorable for his defense or any evidence to warrant impeaching the witness's testimony. The trial court denied the defendant's motion for an *in camera* review of the witness' special education records and psychiatric records as evidence. The case referenced the Supreme Court of Connecticut, *State v. Esposito* (1984). *Esposito* stated that for a criminal to have access claiming an *in camera* review of a witness' privileged communication records for the aim of impeachment, the defendant must establish reasonable grounds for the courts to review the records for the defendant. If given access, the defendant would have grounds to challenge the witness' testimony. There was proper denial of the *in camera* inspection due to the defendant's failure to offer evidence that the victim's mental health problems affected her ability to testify accurately. The defendant only established that the witness was an emotional and attitudinal youth. This, however, did not impair the witness' ability to testify. Table 20 illustrates the *in camera* review resulting in the court's outcome of the asserted or waived privilege.

Table 20

In Camera Review Outcome

Court Case	Privilege	Outcome	Asserted (A) or Waived (W)	A/W
<i>State New Hampshire v. Ellsworth</i>	Counseling records	<i>In camera</i> , counselor not testify	Asserted, counselor refused to testify	A
<i>Commonwealth v. P.C. Poitras</i>	Counseling records	<i>In camera</i> review of records	Asserted, defendant gave speculative theories	A
<i>People v. Gutkaiss</i>	Medical records and school records	<i>In camera</i> , school records, communication records, medical records	Asserted, try impeach victim's credibility	A
<i>State of Connecticut v. Charles Slimskey</i>	School psychologist and psychiatric records	review records, <i>in camera</i>	Waived, error	W
<i>State v. Walsh</i>	School records and psychiatric records	<i>In camera</i> to impeach witness - given records	Subpoenaed records, no evidence	A
<i>People v. Kukon</i>	School records and psychiatric records	Cross-examine expert witness	No privilege	A
<i>People v. Devon Howard</i>	School records and priv. communication	<i>In camera</i> review of records	Waived, trial court erred, defend said might	W
<i>People v. Manzanillo</i>	Psychological rec and social work evaluation	<i>In camera</i> , for victim credibility	Asserted, social worker privilege	A
<i>State of Missouri v. Seiter</i>	Psychologist, social worker, school rec.	Stop <i>in camera</i> review, subpoena stop	Asserted all but attendance rec.	A

Discovery of Evidence

There is a balance in trial courts as to whether to disclose a discovery of evidence or not. Courts have the duty to weigh the scale between the victim's protected privileged communication records with the defendant's right to confront the victim's evidence in criminal cases. With the need for the defendant to cross-examine, there must be the belief that certain privileged records have a probably or reasonable cause that would reveal the victim's credibility. This requires an *in camera* inspection. The Supreme Court rulings have a decision whether to disclose privileged records in whole or in part, and this decision is at the trial court's discretion. However, the court's attention is to whether a restriction on the privileged records infringes on

the defendant's constitutional right or not. The defendant has a constitutional right to impeach or discredit state witnesses. If there is error in the trial court, then defendants are awarded a new trial. It is the defendant's responsibility to demonstrate a reasonable doubt that the evidence would determine a different outcome. Court cases with the issue of discovery of evidence encompassed twelve of the 35 court cases. Of the twelve court cases involving piercing the privilege, the courts asserted privilege in ten of the cases. From this research, the courts only waived the privilege twice, either in part or whole: *State of Connecticut v. Charles Slimskey*, 779 A.2d (Conn. 2001), and the Supreme Court of Michigan's *People v. Devon Howard*, 783 N.W.2d 116 (2010).

In regard to *Slimskey* in relation to the sexual assault counts, the defendant brought an appeal. The defendant brought claim against the court due to a written statement by the victim's father that was given to the police. The court declined to address the claim of the written statement. The defendant filed a motion to have the court conduct an *in camera* review of the victim's records to determine if the victim's credibility to testify truthfully could be questioned. The school psychologist objected, stating that the information was privileged. The court granted the motion. The court reviewed the records and determined that nothing prohibited the victim from testifying truthfully. However, the school records of the psychologist's report of the teenage sexual abuse victim stated that the victim was prone to distort reality with paranoid ideation. The school psychologist reported that the victim had told a fictitious story about being victimized in the boy's bathroom and being suspended for bringing a plastic gun to school. He stated that he had been framed by the school, even though evidence showed him to be responsible. The report from the psychiatrist described numerous episodes of inappropriate

sexual behaviors by the victim. However, the court denied the defendant access to the school records.

The case proceeded to trial, and again the defendant moved for the court to conduct an *in camera* review of the school records. The trial court denied the motion again due to the fact that a lesser court had denied access to the records. The case was appealed to the Supreme Court of Connecticut. The Appellate Court affirmed the lower court's decision. The Supreme Court ruled that the defendant was entitled to review the victim's school records. This was related to the victim's credibility and could create reasonable doubt of the defendant's guilt. The denial of the records was not harmless beyond a reasonable doubt. From the appeal, the courts are required to conduct their own *in camera* inspection of the privileged communication records looking to determine if abuse of discretion was conducted by the trial court, *State v. Walsh* (1999).

The ruling from *Howard*, the Court of Appeals claimed that the Circuit Court had erred in allowing the defendant an *in camera* review of access to the victim's school records, from Michigan's criminal procedure discovery of evidence, Michigan Court Rules, MCR 6.201. The courts must determine if the defendant met the burden of relevant and material evidence. The defendant did not establish the necessary proof for the Circuit Court to grant the defendant's request for the confidential records in the first place. Within general judicial proceedings, privileged information is not intended to be available for one to use as evidence. It is not available to be used to fish for evidence to bring about impeachment or exculpatory evidence in any trial. Table 21 references the discovery of evidence in the following court cases as noted in the issue.

Table 21

Discovery of Evidence in Court Cases

Case	Primary Ruling	Legislation	Issue	A/ W	Amend.
State Statute					
<i>Commonwealth v. Bourgeois</i>	<i>Commonwealth v. Saferian</i>	Massachusetts	No ineffective counsel not deprived	A	5th
<i>Commonwealth v. P.C. Poitras</i>	<i>Commonwealth v. Fuller</i> (1996)	Massachusetts	No pierce privilege without merit	A	5th
<i>State New Hampshire v. Ellsworth</i>	Evidence Rule 404 (b)	New Hampshire	Prior bad act evidence	A	5th
<i>People v. Kukon</i>	<i>People v. Rogowski</i> (1996)	New York	Records not admissible, no cross-examination	A	5th
<i>People v. Brown</i>	<i>People v. Gissendanner</i>	New York	Limits to subpoena records	A	5th
<i>State v. Robert Scott R., Jr.</i>	W.V. Code 27-3-1	West Virginia	Confidential, disclosure	A	5th
<i>State v. Bruno</i>	Statutes § 52-146e	Connecticut	Discovery of evidence	A	6th
<i>State v. Walsh</i>	<i>State v. Bruno</i> (1996)	Connecticut	Evidence	A	6th
<i>State of Connecticut v. Charles Slimskey</i>	6th Amendment	Connecticut	Cross-examine witness, school records	W	6th
<i>People v. Devon Howard</i>	MCR 6.201	Michigan	Discovery of evidence	W	6th
<i>State of Missouri v. Seiter</i>	Rule 25.03 (a) (9)	Missouri	Disclosure by State without Court Order	A	6th
<i>People v. Gutkaiss</i>	CPL § 240.20 (1)	New York	Discovery of evidence	A	6th

Outcome Categorized by Westlaw™

Psychotherapist-patient. The first category fell under court cases involving privileged communication and confidentiality of psychotherapist-patient confidential communication.

Judging by the analysis performed, it can be concurred that five court cases concerning privilege communication were privilege relationships, statements and notes but two court cases were not.

In the case *People v. Meza*, Not Reported in Cal.Rptr.2d (2002), the courts concluded the privilege was waived due to alleged lewd conduct brought upon the child and the confidential communication addressing the conduct. California Evidence Code § 1010 is the legal reasoning of psychotherapist-patient-privilege behind this case. However, the privilege was waived due to the communication and notes involving the inappropriate conduct. The school counselor claimed

to be acting in the role of a sexual assault counselor by stating that a majority of her counseling time was spent counseling sexual assault victims. The California Court of Appeals claimed the disclosure of the school counselor's notes was not allowed. The sexual assault counselor-victim privilege does not apply to school counselor's communications with victims due to lewd conduct on a child under the age of 14. Also, the psychotherapist-patient privilege does not apply to the school counselor's notes. The trial court called the school counselor as an expert witness. The counselor did meet the statutory definition of psychotherapist; however, the counselor was a school employee with a mandate to report child abuse and neglect under the Child Abuse and Neglect Reporting Act.

Judging by the analysis, the two cases of the psychotherapist-patient privileges, Florida Statute, F.S. § 90.503 (1991), the primary law concerned the mental issue of the victim. The cases placed the mental health condition as an issue of the case. One case asserted the privileged communication statute. In the District Court of Appeals case, *Sykes By and Through Sykes v. St. Andrews School*, 619 So. 2d 467 (1993), the courts waived for the defendant to review the records. The waiving of the privilege for a short period of time showed a gap in the privilege where the privilege is not always absolutely binding. The courts stated privilege cannot be used as both a sword and a shield. Referencing the legal decision of *Palm Beach County School Board and Terry Andrews v. Claudia Morrison*, 621 So.2d 464 (Fla.App.1993). The party seeking privilege information to show the patient's mental health condition as an issue must bear the burden of proof. The patient had voluntarily waived the privilege by giving a mental evaluation report to the defense. The courts held that the victim, the petitioner, had first sought to use her mental distress as an issue in the case; however, then the victim decided to drop the use of her mental issue of emotional distress. The courts reasoned the privilege had not been waived.

Florida's Fourth District claimed if a patient waives the psychotherapist-patient-privilege, the privilege can be reinstated if the patient discounts their claim concerning damages to emotional distress. Both cases, *Sykes* and *Palm Beach*, were impacted by *Cantor and Toyota* (1989) ruling concerning a person's mental condition being made an issue of the court. The psychotherapist-patient-privilege states as an exception to privileged communication, if and when the defendant places their mental illness as an issue, there is no privilege. Both court cases tried to bring the issue of the client's mental illness as an issue of the court's claim.

The psychotherapist serves a private sector of the public where confidential disclosure ensures the patient of privacy. The privilege did not start at common law. Florida's Statutory Law § 90.503 established the psychotherapist-patient-privilege and its value to mental health treatment. *Jaffee v. Redmond* (1966) protects the ambiance of the confidential relationship of trust to develop for patients to make frank disclosures for effective evaluation and productive treatment.

Most prominent among the cases in this area was the court case *Palm Beach County School Board and Terry Andrews v. Claudia Morrison*, 621 So.2d 464 (Fla.App.1993). The privileged communication was used as an attempt to discredit the victim's testimony. However, Florida's Fourth District claim of Florida Statute F.S. § 90.503 (1991) ruling impacted the decision. The courts did not waive the privilege because the defendant did not use Andrew's mental condition as a motive for sexual harassment to the assistant principal. The defendant, Morrison, was making an attempt to impeach Andrew's testimony. The issue of the case was for the party to seek to question the psychotherapist in order to show the patient's mental condition was relevant, thus establishing the burden of proof. When and if a patient relies on his mental or emotional condition for his defense, the statutory privilege does not apply, referencing *Cantor v.*

Toyota Motor Sales (1989). The burden rests on the party trying to void the psychotherapist-patient privilege. The purpose of the psychotherapist-patient privilege was given to promote open relationships to aid in productive, effective mental health counseling treatment *Kinsella v. Kinsella* (1997). The psychotherapeutic process is to support full protection of privacy so that the patient can express their innermost intimate thoughts and feelings. Table 22 depicts court cases involving privilege communication of caring professionals as psychotherapists including the issue of the case and the outcome.

Table 22

Privileged Communication of Caring Professionals

Court Case	Privilege by Category	Issue	Outcome	Asserted(A) or Waived (W)
<i>People v. Plummer</i>	Psychotherapist-patient-privilege	Privilege relationship	Asserted by defendant	A
<i>Ramsey v. State</i>	Psychotherapist-patient-privilege	Statements to nurse, suicidal or not	Asserted	A
<i>People v. Meza</i>	Psychotherapist, sexual assault counselor-victim Psychotherapist-patient-privilege	Conversation and notes, lewd conduct toward child	Waived	A
<i>Sykes By and Through Sykes v. St. Ann School</i>	Psychotherapist-patient-privilege	Client did not use mental health as an issue	Asserted	A
<i>Palm Beach County Board v. Morrison</i>	Psychotherapist-patient-privilege	Mental health record not placed as issue	Waived for a short timeframe	W

Privileged communication with psychiatrist. The second category of privileged communication and confidentiality is that of the psychiatrist-patient-privilege. The psychiatrist privilege was waived due to the issue of the case in *Goral v. Illinois State Bd. Of Educ.*, 2013 IL App (1st) 130752 (Ill.App. 2013) being a fitness for duty exam to evaluate the employee being able to conduct his teaching position in a professional manner. In the category, privileged communication with a psychiatrist, the duty exam was to determine if the defendant was capable

of maintaining a certified position as a tenured high school teacher. The foundational principle was civil liabilities under Illinois' Mental Health and Developmental Disabilities Confidentiality Act 740 ILCS 110/1. Also persuasive in the ruling was California Evidence Code, Cal. Code § 1035.2. Cal. Code, § 1035.2, which reasons a sexual assault counselor must have received certification through professional training in counseling sexual assault victims.

Goral was terminated for failure to take the exam and not for failing to authorize the release of the exam's results. The chemistry teacher had been involved in inappropriate conduct with a student asking questions in class. The parent sent a complaint to the administration. The parent's concern was for their student having difficulty with Goral's responses to their child asking questions in class. The administration approached Goral. The teacher responded that the parent's concern was nonsense and the teacher demanded an apology. From this point, the communication between administration and Goral escalated.

The psychiatrist was retained by the school district to specifically evaluate Goral's mental health as it related to his fitness for unremitted employment. The psychiatrist was not engaged in a therapeutic relationship with the teacher. The courts waived the privilege due to there being no therapeutic relationship between the psychiatrist who administered the exam and the examinee, the defendant. This case demonstrated that when a relationship with a psychotherapist is not conducted with an intent of privileged communication, there is no privilege. Since the psychiatrist and the teacher were not engaged in a therapeutic relationship the fitness-for-duty exam was not protected.

Goral forfeited his rights by not taking the exam at the School Board's recommendation. He only argued the fact of privilege after his lack of attendance to take the exam. Goral did not raise specific issues regarding the examination under the Mental Health and Developmental

Disabilities Confidentiality Act (2010). Because Goral did not raise the issues of the Acts application this did not stop the resolving of the issue on appeal. The waiver is given to limit the parties, not the courts, with the exception applying from the Supreme Court in the State of Illinois in *Halpin v. Schult* (2009). Also associated to the circumstances is *Johnston v. Weil* (2011), from the same Supreme Court of Illinois. The Act was not violated when the psychiatrist’s report was disclosed to other parties from a trial court. There are many exceptions to privileges; however, a privilege is not waived when patients are seeking treatment from a mental health professional. Mental Health and Developmental Disabilities Confidentiality Act 740.11 LCS 11.2 resolves when a therapist provides mental health services to a patient, the services to the patient are confidential. Table 23 depicts the psychiatrist privileged communication including the issue and the outcome. Table 23 also illustrates how the privilege was waived by the court because there was no therapeutic relationship established.

Table 23

Privileged Communication with Psychiatrist

Court Case	Privilege by Category	Issue	Outcome	Asserted (A) or Waived (W)
<i>Goral v. Ill St. Board of Ed.</i>	Psychiatrist-patient-privilege	Fitness for duty exam	No therapeutic relationship	W

Privilege by psychologist. The third category involved privileged communication and confidentiality with a psychologist. With the rise of legal opinions regarding society’s view on professional setting communication, this category involved two court cases with one awarded privileged communication, while privilege was waived in the other court case. The court concluded that privilege was awarded in the court case *Correia v. Sherry*, 335 N.J. Super. 60 (2000). The courts documented that privilege was conferred even after death. The most important aspect of the Supreme Court’s decision in the case was from the psychologist-patient-

privilege concerning a child study team's report. The prevailing ruling was New Jersey's Legislature of Social Worker's Licensing Act of 1991, New Jersey's Statute Annotated (N.J. S.A.) 45:15BB-13, which established licensing of social workers.

Arena v. Saphier (1995) stated the psychologist-patient privilege was created by the New Jersey legislature as a statutory law to license and regulate licensed practicing psychologists. In order to promote the patient fully disclosing, it is necessary for the privilege to survive the death of the patient. The patient expects that the privileged communication will not be subject to public scrutiny ever. In the professional relationship, the psychologist must gain the confidence of the client or treatment will not be successful. When the patient has an understanding that the private communication will remain confidential, even after death, the client is encouraged to communicate frankly with the therapist. From the court case *Swidler & Berlin v. United States* (1998), the court examined the United States case law and found that the attorney-client privilege common law survived death. The court resorted to *Runyon v. Smith* (2000), which declared when no specific exception applies, cases look to the attorney-client privilege for interpretation, for there is potential harm, even to the patient's family, from disclosed information after the patient's death.

The court next determined that in the case *J. N. by and Through Hager v. Bellingham School Dist. No. 501*, 74 Wash.App. 49 (1994), privilege was waived due to a special education student harming another student. The courts breach of the privilege was due to the defendant seeking information concerning the multidisciplinary team's assessment of a recommendation to place the student into special education. The intended purpose for communication was for examination by a third party for evaluation for the special education placement. The evaluation was not intended to be held confidential, *In re Henderson* (1981). The student was known to

have a learning disability, known to threaten other students, and known to have general behavioral problems in the classroom. The school had specific knowledge that the student had a mental disability. Claims over the years concerning carelessness of supervision had been pursued under the legal claim of negligence. Negligence is the breach of duty to care for another person. The lawsuit involved the school district's negligence of supervision of students. The courts claimed the school district had a legal responsibility to protect the students from foreseeable harm and danger. Table 24 represents privilege by psychologists where one case asserted privilege after death and the other case waived the privilege for assessment to receive special education services.

Table 24

Privilege by Psychologist

Court Case	Privilege by Category	Issue	Outcome	Asserted (A) or Waived (W)
<i>Correia v. Sherry</i>	Psychologist-patient privilege	Death	Asserted even after death	A
<i>J.N. by Hager v. Bell School District</i>	Psychologist-patient-privilege	Multidisciplinary team assessment-special education	Waived	W

Privileged communication by other caring professionals. The third category covered privileged communication and confidentiality given to other caring professionals as a professional therapist and a physician. The courts awarded all three court cases privileged communication and confidentiality concerning issues of counseling, limited authorization for testing, and a teacher's psychiatric treatment. In this case, *Child C. v. Fleming School*, 179 N.Y.S.2d 460 (N.Y.App. 1992), the child sued a teacher for an alleged abuse and desired access to the teacher's psychological counseling. The privilege was identified due to the New York Civil Practice Law and Rules, CPLR § 4504. The rule, CPLR § 4504, upholds the physician-

patient privilege relationship, and CPLR § 4507, defends the psychologist-patient privilege. The New York legislature in 1985 created the certified social worker privileged. The privilege was formed for patients to disclose confidential communication. The courts resolved the defendant was not required to answer questions relating to his employment as a teacher at Fleming School. The courts protected the statutory privilege and have expanded it by affording the privilege to the same respects as the attorney-client-privilege.

From the court's report of *Child C. v. Fleming School*, 179 N.Y.S.2d 460 (N.Y.App. 1992), the court held that the teacher's psychiatric treatment gave privilege communication to the content of the treatment. However, privilege was not awarded to the facts that the teacher, Seth B., did seek treatment such as the specifics as the dates and times. The defendant, Seth B., refused to answer questions about his employment, the infant plaintiff, and his post-college history. He also did not answer questions about receiving psychiatric treatment. However, the courts do not allow hearsay in juvenile proceedings. Both the physician privilege and the psychologist privilege were looked at factually by the courts as to the treatment for the patient. However, the courts asserted the communication content of the teacher's psychiatric treatment evaluation. The case cited the United States Supreme Court ruling in *Upjohn Co. v. United States* (1983), where the purpose of the privilege extends to the communication only and the defendant's physician will only have to answer questions regarding the facts. The plaintiff was allowed to seek the relevant facts of the treatment information supporting that the teacher had received psychiatric treatment. The courts granted that the psychotherapist-patient privilege was protected but only in part of the communication content. The privilege communication was not protected under privilege communication concerning the treatment the defendant had sought. Table 25 represents other caring professionals concerning privilege communication where

privilege was asserted for the physician, professional, and therapist, however, privilege was not asserted for the social worker due to a court error.

Table 25

Privileged Communication by Other Caring Professionals

Court Case	Privilege by Category	Issue	Outcome	Asserted (A) or Waived (W)
<i>In re Sippy</i>	Physician-patient-privilege	Teacher's psychiatric treatment	Private content, not facts	A
<i>City of Cedar Falls v. Cedar</i>	Professional-patient-privilege	Counseling	Asserted traumatic event	A
<i>John v. Rogers Memorial Hospital, Inc.</i>	Therapist-patient-privilege	Signed limited authorize of test, parent pay	Asserted	A
<i>Child C. v. Fleming School</i>	Social worker-client-privilege	Additional attorney	Waived-error procedure	W

In this category, privilege was not waived (*In re Sippy*, 97 A.2d 455 (D.C.App. 1953)).

Today, privilege communication remains privileged when a third party is in the diagnosis and treatment of the patient. The mother, a widow, filed a grievance through the Juvenile Court that her daughter habitually disregarded her commands as a parent. The mother stated her 17-year-old daughter was beyond her control. The courts ordered Camille to the Board of Public Welfare for an indefinite period of time. They decided she would attend Devereux School near Philadelphia.

The courts allowed an additional attorney for the mother, who was viewed as the aggravator. The statements were the doctor's recommendation that the defendant should be placed in a mental facility. The court permitted the extra attorney's presence as a friend of the court and directed him to file an appearance as counsel for the limited purpose of evidence of the record. The second attorney made a hearsay statement about conversations concerning privileged information with the appellant's physician. The social worker-client-privilege was waived due to

the court erring in procedure. As referencing the Superior Court of Pennsylvania, *Commonwealth v. Sendrow* (1935), the ruling supported the second attorney, as in an antagonistic position, had no right to be a part of the trial standing for the respondent, Camille.

The court ruled that the error was of procedure when there was an additional attorney, who divulged privileged information gained from the respondent-appellant's physician. The court ruled that the error created harm for Camille, the respondent. Camilla's rights were violated and taken from her due to the alleged doctor's professional opinion.

When the courts start with one attorney due to the appeal, they do not allow another attorney, a friend of the law, to interrupt proceeding. Referencing the Appellant Court of Illinois, First District, Second Division in *People v. Price* (1991), when one appears by counsel on their own, the court has no right to assign another attorney to the defendant. The privilege was waived due to the second attorney stating confidential statements from the victim. The statements were given without the consent of the defendant. The respondent did not waive the physician-patient privilege for the doctor to divulge information concerning her case, District of Columbia Code 11-906 (a) (2), (1951). The respondent did not authorize the doctor to discuss her case or her diagnosis with anyone because the doctor had assured his client that the information from their confidential relationship would never be disclosed.

In the court case, *Johnson v. Rogers Memorial Hospital, Inc.*, 283 Wis.2d 384 (2005), the court held that the therapist-patient-privilege was not waived by the victim. Even though the victim signed limited authorization to release her medical test records and general progression of treatment, the court ruled the privilege was asserted. Despite the fact the victim's parents received the information by accident, through a bill statement, the recorded privileged communication was private, Wisconsin Statutes and Annotations, W.S.A. § 146.82. In addition, the patient privilege

was not waived by the treatment center sending her billing statements to her parents, W.S.A. § 146.82 (2) (a) (3). The *Jaffee v. Redmond* (1996) decision from the United States Supreme Court established the psychotherapist-patient privilege to facilitate and encourage communication.

Therefore an exception was decided, and an exception for privilege can be waived for the interest of public policy, according to *Schuster v. Alterberg* (1988) in Wisconsin Supreme Court. This was modeled after criminal law exception, *State v. Green* (2002). Schuster's reasoning comes from the Supreme Court of California, *Tarasoff v. Regents of Univ. of California* (1976). In the *Tarasoff's* case, the courts imposed liability, and the liability was given to the therapist psychologist. It was held that the psychologist had a duty to conduct reasonable care to protect an intended victim against danger of violence from his patient. However, the concern for public safety is not equal to or present in this case in *Schuster* nor *Tarasoff*. Charlotte posed no threat of danger to anyone.

Privileged communication by priest. Another category includes privileged communication and priest-penitent privilege. One court case concerned with privileged communication and confidentiality involved the supervision by the assistant pastor. The ruling of the Supreme Court was that they asserted privilege to the issue of a supervision communication log. The court asserted privilege in *Krystal G. v. Roman Catholic Diocese of Brooklyn*, 34 Misc.3d 531 (N.Y.App. 2011). The parents filed suit claiming negligent supervision and sexual assault charges of the church and the principals. The courts noted there were two defendants, the assistant principal and the principal of the school. Both of their medical records and psychological records were privileged. Also under New York's CPLR § 4504, the church, the school, the pastors, and the sexual assault by the assistant pastor were privileged.

Additionally, all documents and papers about the lead pastor’s care and treatment, plus counseling records were privileged. These records were privileged because the claim was not against the main pastor’s sexual conduct. Table 26 presents privileged communication by clergy where the courts asserted privilege due to communication with a priest.

Table 26

Privileged Communication by Priest

Court Case	Privilege by Category	Issue	Outcome	Asserted (A) or Waived (W)
<i>Krystal G. v. Roman. Catholic Diocese</i>	Priest-penitent-privilege	Communicating/supervision over the church/assistant principal	Privilege asserted	A

Privileged communication by school. The fifth category, privileged communication by schools, included school psychologists and substance abuse guidance counselors, with privilege being asserted. The issue involved both communication and notes from a juvenile interviewed by school authorities. The courts held that the substance abuse guidance counselor’s notes were not to be disclosed except for the complainant’s statement where he denied everything. Also, the notes of each accused juvenile’s interview was not to be disclosed. The courts also held the school psychologist’s notes, from interviewing the victim, were protected by the psychologist-client privileged communication. Respectfully following the New Jersey Administrative Code (N.J.A.C.) 6:3-2.6 (a) 4, the privilege was on the subject of records. The psychologist’s notes also fell within the privilege, New Jersey’s Statutes Annotated (N.J.S.A.) § 45:14B-28. The N.J.S.A. §45:14B-28 agreed confidential communication between licensed practicing psychologists and their patients are privileged. This holds the same status as the attorney-client privilege.

The guidance counselor was represented by counsel. The defense counsel pursued records of statements made to the school counselor. The court ruled the guidance counselor conducted the interview under the Substance Abuse Counselor privilege. Under statutory law for Code of Federal Regulations for confidentiality of drug abuse patient records, 42 C.F.R. § 2.1, drug abuse account records are restricted in disclosure. In *Brady v. Maryland* (1963), the United States Supreme Court established a pretrial discovery rule, known as the *Brady* material. The rule emphasized the prosecution in a criminal case has the duty to turn over evidence that may exonerate the defendant. The *Brady* held when the prosecution suppressed evidence that could be favorable to the defendant, even after the accused had requested the records, due process is violated. The suppressed evidence could either be material to establish guilt, innocence, or for punishment. When all the evidence is given in the pre-trial discovery rule, then it is determined if the material evidence could bring about a different result of the proceeding.

Typical to the first kind of case was *Sauter v. Mount Vernon School District*, 58 Wn. App. 121 (1990), for only the patient has the right to assert or waive the confidential privilege. In *Sauter* (1990), a similar conclusion was reached by the courts where the psychologist's privileged communication was affirmed. The privilege did not fall under the child abuse reporting exception.

Sauter was a math teacher-coach at Mount Vernon School District. The evidence Sauter was seeking was privileged by the psychologist-patient privilege. The student, J., had not waived the privilege. The case related to having no exception to the psychologist-patient privilege. The appellant accepted the communication from the counseling sessions with J.'s psychologist were privileged. The privilege was not waived when the appellant placed J.'s emotional health as an issue. J.'s psychologist counseling session was privilege under Washington Revised Code, RCW § 18.83.110, because no waiver by J. had occurred to breach the privilege. The psychologist-

patient privilege stands; however, the appellant argues the psychologist-patient privilege fell with the exception of reporting child abuse. The privilege fell under the exception of psychologist-patient-privilege of child abuse reporting. The *Sauter* test distinguished between the facts of the case and the court's ruling. The *Sauter* test questioned if the teacher's misconduct was connected to the teacher's teaching performance. The characteristics of the *Sauter* test included a teacher's dismissal as a matter of law if a teacher is deficient in material evidence, performance and/or conduct or the teacher shows a lack of positive professional purpose. According to Sauter, any misconduct is grounds for removal.

Psychologist-patient privilege communication is subject to the same provisions as an attorney-client privilege. The Washington legislature supports the psychologist-patient privilege with limited exception of reporting child abuse (Washington's Revised Code, RCW § 26.44.030 (1)). A psychologist has required affirmative authority to report child abuse or neglect. From the handwritten note, the defendant engaged in sexual exploitation conduct toward a student. The note was unprofessional. The sexual exploitation in the note validated there was factual evidence of a relationship.

J.'s psychologist counseling session was privileged under Washington Revised Code, RCW § 18.83.110, because no waiver by J. had occurred to breach the privilege. The psychologist-patient privilege stands; however, the appellant argues the psychologist-patient privilege fell with the exception of reporting child abuse. The privilege fell under the exception of psychologist-patient-privilege of child abuse reporting.

Psychologist-patient privileged communication is subject to the same provisions as an attorney-client privilege. The Washington legislature reports the psychologist-patient privilege stands with limited exception of reporting child abuse Washington's RCW § 26.44.030 (1). A

psychologist has required affirmative authority to report child abuse or neglect. Sexual abuse of a child in our society ranks as one of the most heinous crimes committed by a person, stated through Wisconsin Supreme Court in *Doe v. Archdiocese of Milwaukee* (1997).

Sauter was in a position of trust and care for students. Sauter misrepresented himself as a professional. He also left doubt in the administrations' mind that he would not repeat an incident such as this one. He had developed a special relationship with the student. The attempted seduction of J. happened within the school hours. J. was a student who was extremely vulnerable due to her prior history of sexual abuse and she had continuing medical and emotional problems. Table 27 represents privilege communication by a school psychologist, and two school guidance counselors. Table 27 displays how privilege was asserted for the school psychologist and substance abuse guidance counselor; however, privilege was not asserted for the school counselor.

Table 27

Privileged Communication by School

Court Case	Privilege by Category	Issue	Outcome	Asserted (A) or Waived (W)
<i>Sauter v. Mount Vernon School District</i>	School psychologist	Communication	Asserted privilege	A
<i>State in the Interest of L.P.</i>	Substance abuse guidance counselor	Notes, juvenile interview, school authorities	Privileged	A
<i>Humberstone v. Wheaton</i>	School guidance counselor	Communication, not certified social worker	Waived, not privileged	W

In *Humberstone v. Wheaton*, 801 N.Y.S. 2d 868 (2005) (slip opinion), the out of court testimony to the school guidance counselor was not privileged communication. Under CPLR § 4508 concerning social worker-client-privilege, the school counselor was not a licensed social worker, therefore, the testimony should not have been stricken. The communication to the school

guidance counselor involved information for the evaluation team's report should not have been admitted. Referencing the Appellant Division of the State of New York, Fourth Department, in *Perry v. Fiumano* (1978), the courts protect the welfare of the child; however, CPLR § 4508 does not apply for school guidance counselors.

The testimony to the school guidance counselor was not privileged communication and therefore should not have been stricken. The school guidance counselor was not a certified social worker. The Supreme Court of Appeals held that persons licensed as a master-level social worker or licensed clinical social worker could disclose communication only made by the client. The New York's Civil Practice Law and Rules, CPLR § 4508 provides a privilege for social workers. The social worker privilege permits the social worker the option to waive the privilege, even over the client's objection. However, the privilege does not apply if the client has the intent to commit a crime or other "harmful act." The statute of privileged communication of the licensed clinical social worker did not extend to the communications between the school guidance counselor and the child, according to New York's Civil Practice Law and Rules CPLR § 4508. Therefore, the testimony to the school guidance counselor should not have been stricken.

Privileged by counseling records. In the category privileged by counseling records, the three cases all asserted privilege. The topic for the counseling records included issues as counseling session records and the courts conducting *in camera* reviews of records due to the counselor refusing to testify. In addition, the defendant was only giving speculative theories for the records to be waived and not facts. In recognition of the court case, *The State of New Hampshire v. Raymond Ellsworth*, 142 N.H. 710 (1998), the courts refused to give an *in camera* review of the student's Pine Haven records, a treatment facility. The trial court denied the defendant's motion for the counselor's testimony from the Pine Haven Counselors. The court

allowed Klare, the counselor, to testify about the victim’s false allegations of the boys looking in the bathroom at the victim and the theft of the toy from the child at the treatment center.

New Hampshire’s Rules of Evidence 404(b) identified that evidence of a person’s character traits is not admissible to prove conduct or other crimes. Evidence has to indicate a logical relationship between the victim’s prior acts or state of mind with his later acts to show relevance of proof to the credibility or character of witnesses. The counselor’s testimony of the victim’s false allegations and alleged theft of other minor individuals did not violate the due process or confrontation of the defendant. The evidence’s value from the victim to tend to prove guilt was weak and is considered a minor infraction. Demonstrated in the table, the court cases reported assertion of privilege for counseling records. In Table 28, privilege was asserted for records in a counseling session where two of the court cases involved an *in camera* review of records.

Table 28

Privileged by Counseling Records

Court Case	Privilege by Category	Issue	Outcome	Asserted (A) or Waived (W)
<i>People v. Brown</i>	Counseling records	Counseling session	Privileged asserted	A
<i>State New Hampshire v. Ellsworth</i>	Counseling records	<i>In camera</i> review, counselor not testify	Counselor refused to testify, privilege asserted	A
<i>Commonwealth v. P.C. Poitras</i>	Counseling records	<i>In camera</i> review of records	Defendant gave speculative theories, not facts	A

Privileged by mental health records. The New York Supreme Court case of *People v. Gutkaiss*, 84 N.Y.S.2d 936 (N.Y.App. 1994), involved Timothy G. Gutkaiss, the defendant, who was charged with alleged sexual abuse of 2 young boys, victim A and victim B. The defendant requested for victim A to have an independent psychiatric examination; however, the New

York's Criminal Procedural Law (CPL) did not allow the scrutinizing examine, CPL § 240.20 (1) (c). The exam is not permitted due to the emotional traumatic influence on the victim, *People v. Beauchamp* (1985).

The courts did not allow the defendant access to the victim's school records, counseling records, nor medical records. After conducting the *in camera* review of the privileged records, the trial court found there was no *Brady* or *Rosario* material. The county court responded properly by not allowing the defendant access to the records for the defendant sought the records in hopes of finding relevant material to impeach the credibility of the victim, *People v. Chatman*, (1992). The defendant's constitutional right was not violated when he had no access to the victim's school records, counseling records, nor medical records.

The disputed evidence at the trial was not effective in trying to impeach the victim's credibility. The defendant sought the pretrial *Brady* request for all the evidence; however, the doctor's notes were not included. To establish *Brady* material, the defendant did not make a *Brady* request for medical records. Secondly, the defendant was given a significant opportunity and did not take advantage of it. The opportunity came from the defendant being able to question victim A, his mother, and his physician concerning victim A's medical reports, victim A's medications, and victim A having had hallucinations. This would have been favorable evidence to support the defense. Before the trial, a letter from the doctor specified victim A had a medical condition and suffered from hallucinations.

The privilege was waived in the court case *Poole v. Hawkeye Area Community Action Program, Inc.*, 666 N.W.2d 560 (Iowa 2003). The courts barred the mental health therapist's privilege statute from releasing the older children's confidential school records and psychological records. The therapist-patient privilege did not apply to the older children's school

records and psychological records. The records were only prepared for the purpose of sharing information with outside professionals and were not viewed as being confidential.

Iowa’s Rule of Evidence 401 establishes the courts can have access to records that may have a tendency of clarifying the facts. This comes from the reason that the defendant’s actions can be the consequence to the facts as being evidence shown, from the Supreme Court of Hawaii, *State v. Rodrigues* (2001). The courts admitted the school records and did not abuse the court’s discretion. Table 29 outlines privilege by mental health records with privilege being asserted in four out of the five cases. Table 29 indicates the mental health therapist records were waived because the school records and psychological records were intended to be shared to evaluate the student.

Table 29

Privileged by Mental Health Records

Court Case	Privilege by Category	Issue	Outcome	Asserted (A) or Waived (W)
<i>People v. Hawkeye</i>	Mental health therapist records	School records and psychological records, prepared for a purpose to share	Waived	W
<i>State v. Roberts Scott R., Jr.</i>	Mental health records	Agency for special education referral	Privilege asserted	A
<i>Commonwealth v. Bourgeois</i>	Mental health records	Psychiatric history, substance abuse history, failing school	Not waived, not proven ineffective assistance from lawyer	A
<i>Norskog v. Pfiel</i>	Mental health records	17 year old killed, 13 year old	Privilege asserted	A
<i>People v. Gutkaiss</i>	Medical records and school records	<i>In camera</i> review, school records, counseling records, and medical records	Asserted tried to use to impeach victim’s credibility	A

Privileged by school records and other records. The final category of privilege is school records and other records such as psychologist records, psychiatric records, social worker records, and medical records examined by courts. The issues in this category concentrate on the courts conducting an *in camera* review, cross-examining the expert witnesses, and the use of mental health conditions as the issue at hand. Privilege was asserted in eight of the eleven cases. While the court employed similar reasoning as asserting privilege in the majority of the cases in this subcategory, three of the court cases came to a different resolution. Most prominent among the cases in this category was the court determination of whether or not to waive the privilege, *In the Matter of Charles R.R.*, 118 Misc.2d 137 (1990). The Family court of Clinton County, New York, established the juvenile in need of supervision. Three petitioners, two juvenile delinquent petitions and one person in need of supervision petition, all filed against the juvenile. From a plea agreement, the juvenile admitted to one of the petitions in return for the courts to forgive the other petitions. The juvenile also admitted to being a person in need of supervision. The juvenile admitted to the Family Court of stealing stolen property. The juvenile accepted he was in need of supervision. The juvenile was retained in the State Division of Youth for one year. The juvenile appealed the court order. At the dispositional hearing the courts admitted the school's psychologist's testimony. The juvenile did not assert his psychologist-patient privilege. Even though the respondent was represented by counsel, the respondent waived the privilege.

Under the New York Family Court Act § 712 (f), the courts directed a dispositional hearing during juvenile proceedings. This was to determine if the respondent required supervision or treatment. The reason for the hearing was for the Family Court to provide the intentional needs of the respondent through any factual and material evidence admitted. The facts were the underlying cause of the petition.

In the court case *People v. Manzanillo*, 145 Misc.2d 511 (1989), the defendant was not granted access to the victim's psychiatric records, mental health records, nor special education records without an *in camera* review by the trial court. It is through the courts *in camera* review that relevancy is examined and a need for the defendant's defense. Although a witness may have a mental disorder, this does not automatically disqualify the witness from testifying. The jury must assess the illness of the witness and evaluate the testimony given by the witness, *People v. Rensing*, State of New York Court of Appeals (1964). Therefore, the court's action is to conduct an *in camera* review to determine the relevancy of evidence to outweigh the common law confidential need, *People v. Chamber*, New York County Supreme Court (1987). The court affirmed the New York Civil Practice Law and Rules, CPLR § 4507, the psychologist-client-privilege and CPLR § 4508, the social-worker-client privilege.

In *People v. Rosario* (1961), the ruling was that, when evidence as statements from the witness' testimony is relevant to the court's issue, nothing must be kept confidential. The court establishes when privileged information is sought by the defense, tension rises. This tension is due to the rights of the accused to confront and to cross examine witnesses and the witness's interest in not having their life opened up like a book, *People v. Grosunor*, Criminal Court of the City of New York, Bronx County (1981). From the reference of *People v. Chamber* (1987), the court held that the defendant was not privileged to view the victim's records. Due to the defendant's pursuit of evidence, the court found that the defendant's fair trial rights through due process were not violated. The issue is the balancing of the defendant's Sixth Amendment's right to the right of both parties to cross-examine adverse witnesses. There is also the issue of the defendant's right to evidence that will help the issue of guilt or innocence set by *Brady*.

However, the public interest is keeping confidential material privileged along with the defendant's Sixth Amendment rights, according to *People v. Ortiz* (1987).

Concurring with this result is the court case *State v. Bruno*, 236 Conn. 514 (1996). The trial court claimed that the defendant failed to show relevancy. The court denied him the request for an *in camera* review of the psychiatric records and medical records of the victim. The trial court must assess its decision in allowing the defendant to review the records. If the defendant is restricted from the confidential records this restricts the defendant from his constitutional right of impeaching the victim's testimony or discrediting state witnesses. As in referencing the court case, *State v. Hufford* (1987), the standards for seeking privileged records involve the witness's right to privacy weighed against the defendant's duty to bring attention to the witness's credibility.

In *Pennsylvania v. Ritchie* (1987), the defendant failed to establish a basis that the records contained material evidence favorable for his defense or any evidence to warrant impeaching the witness's testimony. The trial court denied the defendant's motion for an *in camera* review of the witness's special education records and psychiatric records as evidence. The case referenced *State v. Esposito* (1984), which stated that, for a criminal to have access claiming an *in camera* review of a witness's privileged communication records for the aim of impeachment, the defendant must establish reasonable grounds for the courts to review the records. The following table shows privilege and school records along with other records with privilege communication. Table 30 demonstrates privilege was only waived in three of the following court cases due to inquiry of supervision for a student and two court errors. Table 30 illustrates privilege was asserted for school records, psychiatric records, social worker records and psychologist records.

Table 30

Privileged by School Records and Other Records

Court Case	Privilege by Category	Issue	Outcome	Asserted (A) or Waived (W)
<i>State of Connecticut v. Charles Slimskey</i>	School psychologist and psychiatric records	<i>In camera</i> review of records	Waived due to error	W
<i>In the Matter of Charles R.R.</i>	School psychologist test	Juvenile did not assert privilege	Waived for inquiry into juvenile's supervision	W
<i>State v. Walsh</i>	School records and psychiatric records	<i>In camera</i> review to impeach witness, given records	Subpoenaed records, but had no factual evidence	A
<i>People v. Kukon</i>	School records and psychiatric records	Cross-examine expert witness	Asserted privilege, no school records	A
<i>People v. Devon Howard</i>	School records and privileged communication	<i>In camera</i> review of records	Waived, trial court erred, defendant said might	W
<i>People v. Manzanillo</i>	Psychological records and social worker evaluation	<i>In camera</i> review for victim credibility	Asserted, social worker privilege	A
<i>State of Missouri v. Seiter</i>	Psychologist, social worker, school records	Stopped <i>in camera</i> review, subpoena stopped all records but attendance	Attendance records only records released	A
<i>Zimmer v. Catholic. School St. Mary and St. Paul</i>	Psychiatric records, social worker's records	Claim plaintiff was aggressor, not mental health issue	Asserted privileged	A
<i>State v. Bruno</i>	Medical and psychiatric records	Cross-examine, witness mental health condition interfere	Asserted, no relevancy	A
<i>Matter of Handicapped Child</i>	Psychological and psychiatric records	Special education evaluation	Asserted against agency, wanting records	A
<i>McCormacks v. Board of Education Baltimore County</i>	Psychologist, psychiatric and psychological records	Victim's mental condition used as issue in bus accident	Privileged	A

As a practical matter, the court case *Matter of Handicapped Child*, 118 Misc.2d 137

(1983) involved the school district wanting the psychological records of a student. There was a

conflict of interest between Ryan's parents disclosing confidential information about Ryan's post-accident mental issues in order to recover the cost from Ryan's psychiatric and psychological treatment and in not disclosing confidential sensitive communication. To articulate the relationship, the psychotherapist-patient privilege serves both the interest of the patient and the public's interest. The privilege serves the patient by protecting confidence and trust, and serves the public by facilitating appropriate treatment for individuals having mental health issues. From Maryland's Code, Courts and Judicial Proceedings, Code § 9.109(c), the courts reviewed by reciting the issues without reviewing the decisions rendered, *de novo*, to whether the parents could waive the psychologist-patient privilege.

From *Jaffee v. Redmond* (1996), the psychologist-patient-privilege is rooted in the need for confidence and trust with the psychologist. As stated by the precedential court case *Laznovsky v. Laznovsky* (2000) in the Court of Appeals of Maryland, physicians help effectively with physical ailments and there does not have to be trust of the physician. A psychiatrist's effectiveness depends on the patient's confidence in the doctor (*Taylor v. United States*, 1955) in United States District Court for the Western District of Virginia. Mentioning Maryland's Court of Special Appeals, *Kovacs v. Kovacs*, 1993, then years later, a custody case considered the issue of a parent's right of a psychologist-patient-privilege. The parents do not have a right to surrender the privilege of a minor, even if both parents are in agreement to surrender the privilege, unless an appointed guardian makes the declaration to waive the privilege. *Perry v. Fiumano* (1978) cited, furthermore, the privilege is for the welfare of the child and the child's best interest is the court's paramount concern. The significance is the court giving privilege the proper effect of the law unless the legislature gives other rulings in a different direction.

Outcome of the Caring Professionals' Court Cases

Because state law governs the privilege doctrines, states can readjust privilege doctrines according to each individual state, creating different state laws. In and of itself, this can become an issue of knowing state laws for caring professions. Accordingly, each state's standard of care for clients is different because all states have different protections for caring professionals. Table 31 depicts the outcomes generated from the caring professionals in the researched cases.

Table 31

Outcome of the Caring Professionals' Court Cases

Results of Outcomes of Caring Professionals		
Sexual abuse	No therapeutic relationship	Assert privilege after death
Privilege only for content of the communication	Facts of the treatment are not privileged	Additional attorney-error
Priest supervisory communication asserted	<i>In camera</i> review with speculative theories, no facts	School records prepared for a purpose to share
Use material to impeach and attack victim's credibility	Student's test waived for evidence	<i>In camera</i> review--trial court error

Trends

The research questions drove the inquiry to seek the emerging trends from the data. One trend was the courts recognized the importance of privilege communication with the foundation coming from the United States Court case, *Jaffee v. Redmond* (1966), creating the psychotherapist-patient-privilege in the Federal Rules of Evidence. Courts tend to rule in favor of privileged communication when the privilege is strongly supported by confidential content in a therapeutic setting where confidentiality was established at the onset of the relationship. This concurrence is based on the fact the attorney-client-privilege is deeply rooted in American history with other privileges, as psychotherapist-patient-privilege, following the foundational guidelines. The research trends follow the pattern of caring professionals' authority for privilege

communication. Caring professionals' authority for privilege communication is established in the context of the professional relationships. State statutes govern if privilege is granted to mental health professionals.

The courts are recognizing the importance of privileged communication in our society being an avenue for mental health issues to be evaluated and treated. Mental health patients who seek treatment and therapy can benefit both from the aspects of the individual and society. The courts have been called upon to settle court cases involving mental illness such as the court case *Palm Beach County School Board and Terry Andrews v. Claudia Morrison*, 621 So.2d 464 (Fla.App.1993), the district Court of Appeals of Florida, Fourth Division and also in the court case *Sykes By and Through Sykes v. St. Andrews School*, 619 So.2d 467 (Fla.App.1993), the District Court of Appeals case. In these two court cases, the courts waived for the defendant to review the records.

Courts seem to be unfavorable to award privileged communication to other helping professionals, as school counselors. Courts are in a position, not only to adhere to the legislative process, but also to advocate for a client's well-being, such as a child's welfare. Society's legal practice of common law principles, which guide courts to develop privileges, have guided state statutes to support privileges. One example is the physician-patient-privilege. The physician-patient-privilege, however, has not been a privilege viewed as having the right to privacy. The Federal Rules of Evidence has not recognized the physician privilege. Rule 501, a general rule, and common law have both recognized the psychotherapist-patient-privilege. The effectiveness of privileges are that privilege rulings are developed by the United States Courts, and privileges continue to be developed by society's fundamental needs. The purpose of privileges is to provide

a direct avenue of private communication with helping professionals in order to discuss exclusive matters.

With the psychologist, the therapist's trust is of utmost importance in ensuring the client/patient received productive treatment. In effect, the most empirically supported treatment in counseling deals with frank communication. The effectiveness of this approach is enhanced by integrating appropriate interventions so that clients will engage in treatment. Courts apparently continue to be reluctant to follow the doctrine of *Jaffee v. Redmond*, or even see differences in their cases from what was happening in the *Jaffee* decision. It is imperative to understand the Federal Rules of privilege. Professional counseling relationships such as psychotherapist, psychologist, and social workers exist with the holder of the privilege, the client, and the other professional in a specialized expert relationship. Privilege has extended to psychotherapists, psychologists, mental health professionals, and social workers. Only a few states have extended privilege to school counselors. In Federal court cases, state law governs privileged communication. The force of the United States Supreme Court case, *Jaffee v. Redmond* (1966), segmented the psychotherapist-patient privilege under the Federal Rules of Evidence, Rule 501. This privilege was established under the standard for effective evaluation and treatment with the client not being in danger of being embarrassed concerning the communication.

State Statutes

Due to state statutes broadening the definition and scope of psychotherapist this has extended privilege to social workers, school psychologists, and other professionals. One questions who can qualify for the psychotherapist privilege. Under the umbrella of the psychotherapist privilege what other category of professionals are entitled to their confidential communication being eligible for privileged protection. *Jaffee's* ruling was monumental in the

mental health profession for gaining privileged communication and confidentiality protected by the law.

There have been recent challenges to privileged communication with school counselors. Privilege issues with school counselors originates in the confidences that students share with guidance counselors. However, issues of the school setting, the child as a minor, and the rights of the child's parents all dilute the trustworthiness for privileged communication. Society has begun to recognize that counselors, through credentialing and educational programs, are today very aware of the issues students face. Even so, privilege still remains a very limited area. It is the counselor's ethical duty to protect the client's confidential communications. A client has a right for the confidential communication between him and his counselor to be protected. For the client/student to disclose in the first place, they must trust that the counselor is not going to disclose their private and personal information. The Supreme Court's *Jaffee v. Redmond* (1996) forged a way for courts in some states to recognize privilege for some school counselors. However, gaps are occurring in some court case decision where the privileged communication statute could be established within a majority of states. Currently, only an extremely small number of states acknowledge the school counselors privileged communication and confidentiality.

Professional Characteristics of Caring Professionals

The courts consider the physician-patient-privilege in the United States by being addressed in statutory laws. New York was the first state, in 1828, to enact the physician-patient-privilege. The Federal Rules of Evidence does not recognize the physician-patient-privilege. The state statutes that give the privilege to patients against disclosure in courts include being in confidential communication, as with a physician; and if made for purpose of treatment. The

courts pointed out that waivers for physicians include the patient litigant exception where the patient's medical condition is the issue. The other exception is a public safety exception that involves a patient that may be dangerous to others. The physician privilege includes the psychotherapist-patient-privilege. The psychotherapist privilege also includes the psychiatrist. More states recognize the psychotherapist privilege than there are states recognizing the physician-patient-privilege. The psychotherapist-patient-privilege is both a benefit to society and also viewed as a public interest concern. This public interest concern is due to the public's attention to keep seeking the protection of the privilege.

The psychotherapist-patient-privilege, Federal Rules of Evidence 501, extends to licensed social workers. Courts do not refuse to disclose that the patient has received treatment, the parties' identity, nor the dates and extension of the treatment the patient received. From the United States Supreme Court, in the Federal Rules of Evidence 501, the courts give a broad characterization to the holder of the privilege refusing to disclose confidential information, evidentiary privileges, for the psychotherapist. The definition includes a licensed or certified person as a psychologist under state law with confidential communication. The patient claims the privilege and the patient has the right to disclose the privileged information. The patient also has the right to prevent the psychologist from disclosing the privileged confidential information. The general purpose of the privilege is of diagnosis or treatment for the client's mental or emotional condition. The privilege from disclosure also extends to the patient's family. There are exceptions to the privilege. Exceptions to the privilege are defined as if the client is in need of hospitalization, if a judge's orders pertain to examining the patient's mental condition, and if the patient/client uses the mental condition as an element in a claim or as a defense.

Confidence and trust are the bedrock of the psychotherapist-patient relationship. The communication takes place in confidence with the intention of the communication remaining private. The success of the psychotherapist depends on the patient's ability and willingness to trust the psychotherapist through frank communications. This requires a nurturing of the relationship, for the psychotherapist's goal is to explore the patient's inner most feelings and attitudes. The four criteria for the psychotherapist/psychologist-patient-privileges come from Dean Wigmore, known as the Wigmore test. Wigmore's four questions relate to the validity of the privilege. The psychotherapist-patient-privilege establishes the four-questions format: the communication occurs in the original state of confidence with no intention of being disclosed, the inviolability of the confidential communication is essential to achieve the purpose of the confidential relationship, the relationship between the therapist and the client is one that needs to be fostered, and the fear of the disclosed communication is greater toward the patient's injury than the benefit to society or to justice in a court of law than if one obtains the testimony of the patient.

The social worker-client-privilege, included under mental health practitioners, also protects the client's confidential information. *Jaffee* created a federal legal doctrine, under Federal Rules of Evidence 504, to protect social worker's privileged communication. The guidelines involved for social workers are as follows: persons being treated by a licensed professional social worker in whom the client relies on that they are being evaluated and will receive productive treatment, and the client giving written consent to the social worker. Under social worker privileged communication, children are not addressed specifically in the Federal Rules. However, the statutes of Massachusetts stated if children understood the concept of confidentiality, then the child could raise their own confidential rights for themselves. If the child

cannot understand confidentiality, then the privilege goes to their next family member or to a court appointed guardian.

The exceptions for the social worker's privilege includes records waived to give to other professionals to help with the treatment of the client, social worker's communication and records disclosed if the patient is at risk of doing harm to themselves or others, communication and records disclosure due to mandatory reporting of child abuse or neglect, communication and records disclosure due to a court order evaluation resulting from the client's mental condition, communication and records disclosure due to a civil action law suit brought against a client's social worker or the client's mental condition, and the social worker's records disclosure due to the client making a claim against the services they received from the social worker.

The current subject of privilege relevant to counselors focuses on the issues and concerns related to the fluidity in the context of a new perspective for school counselor privilege. Some states have granted the legal right of privileged communication and this is to protect student/clients confidential communications from being disclosed in a court of law. School counselors have an ethical obligation not to disclose confidential information of students. The confidentiality guidelines for school counselors include supports student's privacy rights and protects student's conversations from other students, family, and school staff; explains the limits of confidentiality; and provides informed consent. The waiver reasons that students must be informed of concerns of confidentiality which are as follows: students may be a danger to others or themselves, a court order ruling for disclosure, professional consultation about the student needing additional support services by other professionals or colleges. School counselors must also keep personal notes separate from professional notes. They must seek appropriate legal advice when records are subpoenaed. When school counselors are subpoenaed, they are to state

to the courts the student's records are confidential and the student's records should only be shown with the student's consent. The relationship between school counselor and the students is one of trust and confidentiality and is similar to that of a psychotherapist/patient. The student must trust the school counselor or the student will not reveal their confidences and conversations with the school counselor.

School counselors have written policies. As an example, California state law provides that school counseling records are privileged, and that these privileged records are not categorized under school records. These records are not associated with school records and cannot be viewed without consent from the student/client. The school counselor's guidelines for confidentiality include balancing student's rights with parent's rights with the central focus being on a need to know basis. The guidelines for school counselors include the following: in the position of the parent, in loco parents; need to know basis; and qualified privilege. In loco parents is a legal term where teachers/counselors act in the position of the child's parents. Student's confidential information should only be shared with other educators or professionals on a need to know basis which would benefit the student. Qualified privilege protection happens in defamation actions in a court of law. The person suing for the defamation statement being made must prove the statement was made intentionally, ill willed, or with hatred.

In the Alabama Rules of Evidence, Rule 503A, Counselor-client privilege, the privilege involves a client as one seeking professional counseling services from a licensed professional counselor. The client believes the counseling services rendered are in a confidential communication atmosphere. Disclosure from third parties include exceptions such as when the client is in need of hospitalization, when brought before a court order, when the client uses one's mental condition as a condition of the claim or of the defense, when the counselor-client

relationship in a breach of duty occurs, or when the victim or the victim’s counselor in a civil law case does not have to testify to the content of the communication. The following table demonstrates the similarities and the differences in the characteristics of courts’ decisions of caring professionals. The Table 32 establishes the characteristics for psychotherapist and licensed counselor compared to the similarities of a school counselor.

Table 32

Professional Characteristics

Professional Counselors: Type:	Similarities/Differences in Professional Counselors Characteristics:
Psychotherapist-Patient-Privilege	<p>A patient who is examined or interviewed A person authorized to practice medicine or</p> <p>A person licensed or certified Communication is confidential not intended to share Intention not to share or disclose confidential communication Patient may claim privilege Exceptions: Hospitalize patient for mental health illness Examination ordered by a judge Claim mental or emotional condition as defense</p>
Therapist-Patient-Privilege	<p>Therapist protect patient's confidences Patient establishes privilege Patient intend for comm. To be confidential In group therapy, other patients present is ok Case note and files are privileged Test results are privileged as therapy session notes Test scores privileged only if test are privileged Exceptions: Child abuse Patient's mental health as an issue Disputes between two patients in one setting Patient involved in crime or fraud or future crime Duty to warn, if patient presents a serious danger</p>

(table continues)

Professional Counselors:	Similarities/Differences in Professional Counselors
Type:	Characteristics:
Licensed Counselor-Client Privilege	
Idaho Rule 517	<p>A client renderings licensed counselor services Licensed professional counselor or licensed counselor Confidential communication not disclosed In civil or criminal action client refuse disclosure Client claim the privilege</p> <p>Exceptions:</p> <ul style="list-style-type: none"> Civil action Appointment of guardian or hospitalization Child related communication or injury Licensing board proceedings Contemplating a criminal act or a harmful act
School Counselor's Role (ASCA, 2010)	
	<p>Support student right to privacy and protect confidential information Explain meaning and limits of confidentiality Provide appropriate disclosure and informed consent</p> <p>Limits of confidentiality:</p> <ul style="list-style-type: none"> Student poses danger to self or others Abuse or neglect Court ordered disclosure Consultation with other professionals to support student <p>Privilege comm. Not granted by state laws and local guidelines Keep personal notes separate from educational records Seek guidance from supervisors and legal advice, Records subpoenaed</p> <p>Assert belief information shared by student is confidential Information should not be revealed without student's consent Adhere to laws protecting student records, health information, special services</p>
Psychotherapist-Patient-Privilege	
	<p>A patient who is examined or interviewed A person authorized to practice medicine or A person licensed or certified Communication is confidential not intended to share Intention not to share or disclose confidential communication Patient may claim privilege</p> <p>Exceptions:</p> <ul style="list-style-type: none"> Hospitalize patient for mental health illness Examination ordered by a judge Claim mental or emotional condition as defense

(table continues)

Professional Counselors:	Similarities/Differences in Professional Counselors
Type:	Characteristics:
Psychotherapist-Patient-Privilege	<p>Therapist protect patient's confidences</p> <p>Patient establishes privilege</p> <p>Patient intend for comm. To be confidential</p> <p>In group therapy, other patients present is ok</p> <p>Case note and files are privileged</p> <p>Test results are privileged as therapy session notes</p> <p>Test scores privileged only if test are privileged</p> <p>Exceptions:</p> <p>Child abuse</p> <p>Patient's mental health as an issue</p> <p>Disputes between two patients in one setting</p> <p>Patient involved in crime or fraud or future crime</p> <p>Duty to warn, if patient presents a serious danger</p>
Licensed Counselor-Client Privilege	
Idaho Rule 517	<p>A client renderings licensed counselor services</p> <p>Licensed professional counselor or licensed counselor</p> <p>Confidential communication not disclosed</p> <p>In civil or criminal action client refuse disclosure</p> <p>Client claim the privilege</p> <p>Exceptions:</p> <p> Civil action</p> <p> Appointment of guardian or hospitalization</p> <p> Child related communication or injury</p> <p>Licensing board proceedings</p> <p>Contemplating a criminal act or a harmful act</p>
School Counselor's Role (ASCA, 2010)	<p>Support student right to privacy and protect confidential information</p> <p>Explain meaning and limits of confidentiality</p> <p>Provide appropriate disclosure and informed consent</p> <p>Limits of confidentiality:</p> <p>Student poses danger to self or others</p> <p>Abuse or neglect</p> <p>Court ordered disclosure</p> <p>Consultation with other professionals to support student</p> <p>Privilege communication not granted by state laws and local guidelines</p> <p>Keep personal notes separate from educational records</p> <p>Seek guidance from supervisors and legal advice,</p> <p>Records subpoenaed</p> <p>Assert belief information shared by student is confidential</p> <p>Information should not be revealed without student's consent</p> <p>Adhere to laws protecting student records, health information, and special services</p>

There are high risk practices involved in school counseling. Breaking confidentiality is vital when a counselor recognizes circumstantial evidence to protect the client or to protect others through duty to warn or to protect. These exceptions focus on the public and not on the privacy of the client/student. The public has a right to know of circumstantial evidence such as harm to self to others. With this in mind, however, fear of liability from parents and mandatory reporting, which is essential, have diluted confidentiality. Exceptions of confidentiality for school counselors must include the counselor using professional judgment and being aware of ethical bylaws and standards.

Within the school setting, there are three ethical guidelines: the school, the student, and the student's parents. School counselors must be knowledgeable of ethical, legal, and professional standards. It is a complex task. In many states, school counselors have received certification; however, they have not been licensed. Unless prohibited by a state or federal law, school counselors do not have to have a parent's consent to counsel a student. Students can give informed consent, which details the student and the school counselors agreeing that confidentiality will stand except for the following: The student bringing harm to self or others, the student's records are court ordered, and if the student is the victim or the offender of child abuse or child neglect.

This study determines the issues of other caring professional's privileged communication and confidentiality in light of guidance counselors as caring professionals. Few states have established privilege communication for school counselors. The famous Supreme Court Case, *Tarasoff v. Regents of University of California*, determined therapists have a duty to take reasonable steps to protect others from serious danger and to protect others from harming themselves and others. Not all states are required to unveil the truth from patient's statements

about harming self or others. The Wisconsin Supreme Court in *Johnson v. Rogers Memorial Hospital, Inc.*, 283 Wis.2d 384 (2005) court case, referenced the California Supreme Court case of *Tarasoff v. Regents of Univ. of California* (1976). An exception for privilege can be the decision and the privilege can be waived for the interest of public policy, *Schuster v. Alterberg* (1988) from Wisconsin Supreme Court. Schuster's reasoning comes from *Tarasoff v. Regents of Univ. of California* (1976). In the *Tarasoff* case, the courts imposed liability, and the liability was given to the therapist psychologist, holding the psychologist had a duty to conduct reasonable care to protect an intended victim against danger of violence from his patient. See the collected trends of caring professionals in court cases in Table 33 delineating the characteristics required for caring professionals to have privilege.

Table 33

Trends of the Caring Professionals in Court Cases

Trends in Caring Professionals Court Cases	
Importance of <i>Jaffee v. Redmond</i> (1966)	Importance of privileged communication in society for mental health issues
Reluctant for state legislature to award privilege communication to school counselors	Strong court rulings when the confidential relationship is established in a confidential setting
Privilege for content, but facts waived still showing treatment given	Privilege awarded for agency seeking treatment for special education student's behavior
Court error on allowing an <i>in camera</i> review due to speculative theories of relevant evidence	Privilege awarded after death
School reports prepared for sharing without parent consent	Protection of sexual abuse from reoccurring again by professional being mandatory reporters

Commonalities of Caring Professionals and School Counselors

School counselors have many characteristics common to other caring professionals. However, those narrow commonalities are strongly rooted in America's professional specialist practices having the responsibility of its people seeking and obtaining mental health evaluation and treatment if needed. Even though school guidance counselors are linked narrowly to other caring professionals, the profession is designed to provide confidential communication. From the public to each state's State Department of Education and from the students to the parents, the expectation from these are at best, difficult. It is expected that school counselors be excellent caring professionals while being confidential with students and family. School counselors must keep privileged information and must be empowered to accomplish great results to help students and parents make the best decisions regarding education and mental health services. Although three states have school counselor privilege, this seems to not be an issue in a majority of state governments to legislate for school counselor privileged communication. The need for remedy of confidential communication gaps in the privilege knowledge base is evident. Therefore, making innovative procedural rulings for confidential communication procedures and rules is essential. Each State Department of Education should be mindful of providing skills to help equip school counselors face the future of confidential communication. Being responsive to the urgent demands of school counselors' confidential communication with students is vital rather than having to trudge through school board policy or legal judicial privilege.

The commonalties between caring professionals and school counselors include private communication; students' testing results; school records prepared for the purpose of sharing students' evaluations; getting students help; disclosure of personal issues, mental health issues, and behavior issues; and threats of hurting self or others. An understanding of the doctrine of

privilege, and its sister, the doctrine of confidentiality, allows school counselors to govern themselves. Rule of Evidence 501, privilege in general, covers an array of privileges for different state laws. Considerable attention must be given to the common issues of school counselors and other caring professionals. There are limitations to the responsibilities to respect the confidentiality of a student’s communication. Caring professionals have a responsibility and an ethical expectation to protect the privacy rights of their clients/students. The school counselor’s own ethical code stipulates counselors to practice confidentiality.

Common law principles guide courts to develop privileges due to people acting out in ways as being without social norms and breaking the structures of society. Society benefits from mental health patients seeking treatment and therapy. Communities’ benefit from patients with mental illnesses receiving professional help, especially those who may be a threat or a danger to society. Individuals who are mentally fit gain and give back productively in emotional stability. Engaging in rational thought is essential for emotional and physical well-being. The goal is for the client to function as a healthy productive individual. Table 34 shows the commonalities that caring professionals and school counselors share.

Table 34

Commonalities of Caring Professionals and School Counselors

Commonalities in Caring Professional Court Cases	
Private communication	Family disclosure
School records prepared for a purpose of sharing	Student’s testing results
Disclosure of personal issues	Disclosure of behavior issues
Disclosure of mental health issues	Threats to self and to others

Summary

The purpose of this study was to research the issues, outcomes, and trends of other caring professionals. The Supreme Court case of *Jaffee* opened the door for professionals to receive privilege communication and confidentiality. However, individual state case laws have not established a traditional pattern for asserting privilege nor waiving privilege. The striking finding was there was no strong set precedence for caring mental health professionals. The evidence supported that complete privilege communication was offered more than partial privilege. This could be that the defendant's defense has other possible ways of obtaining evidence from other sources. In the case that cited the courts allowing partial privilege, a way was created for the defense to obtain records for a brief moment of time, a month long, to search for more evidence than the evidence that was provided, in the District Court of Appeals case, *Caroline SYKES, a minor, By and Through her parents and next friends, Philip SYKES, and Martha Sykes, and Philip Sykes and Martha Sykes v. St. Andrews School*, 619 So. 2d 467 (Fla.App.1993). Given that there is an exception to the general rule of privileged communication, the court balances the protection of the confidential privileged records with a criminal defendant's constitutional right to obtain evidence necessary to help the defendant with his defense. The challenge to caring mental health professionals is how to provide adequate mental health services while protecting the rights of their client's confidential and privileged information. School counselors are also expected to uphold the ethical, legal, and professional standards of providing adequate student services by protecting student's confidential communications.

CHAPTER V:
SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Introduction

The purpose of this study was to examine matters related to understanding the issues, outcomes, and trends in case law about privilege in communications given to members of the caring professions, including school counselors, and the guarantee of confidentiality that they may give, in turn, to their clients. The research included identifying common topic court cases from Westlaw® from 1956 through 2014. The data were analyzed using court cases about privilege and confidentiality for the caring professions to develop an understanding of how caring professionals have the same guiding principles or do not have the same guiding principles as school counselors. This chapter concentrated on summarizing the research based on the research questions, present findings from the court cases, analysis of the data, guiding principles, and recommendations for future studies for education-school counselors.

Summary

The following research questions were the driving points of the research and were used for the collection of data and analysis:

1. What are the issues in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?

The researcher analyzed the court cases. The analysis of court cases revealed the following issues addressed by the courts rendering a decision regarding privileged

communication and confidentiality: issues involving privileged communication of mental health professionals; issues involving records--mental health records and school records--of caring professionals; states asserting privileged communication; states waiving privileged communication; *Jaffee v. Redmond* (1996); state law precedents; legislation governed by state statutes and doctrines; Fifth Amendment impact; and Sixth Amendment impact on the court cases. In some instances, the issues represent an attempt by legislation to narrow the requirements of asserting privileged communication and confidentiality in the identified court cases. In these cases, the courts decided the lower courts violated their authority in asserting privileged communication and confidentiality. In other instances, the issues represent the courts' attempt to waive privileged communication and confidentiality. The landmark United States Supreme Court case *Jaffee v. Redmond*, and the Fifth and Sixth Amendments of the United States were foundational rulings the courts used in several of the court cases to decide whether privileged communication and confidentiality were kept within the legal statutes. The issues covered a wide spectrum of disputes as statements made in group counseling, students' special education referral and placement, and school records. The analysis of the data revealed several guiding principles to aid school counselors in dealing with confusing ethical issues in the area of privileged communication and confidentiality.

2. What are the outcomes in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?

The cases in this study brought about outcomes in four areas: waived mental health professional privilege, pretrial discovery of evidence, *in camera* review of standards of evidence, and outcomes categorized by Westlaw™. Many of the cases represented the courts' attempts to balance the demands of the United States Constitution, both the Fifth Amendment and the Sixth

Amendment; legislation; and legal precedent. The Supreme Court's hesitancy to create and expand new federal common law privileges has been stifled by the Federal Rules of Evidence, FRE 501. However, *Jaffee*, referenced in three court cases, seems to offer the best possible way for the Supreme Court to recognize a common law procedure of students seeking confidential help. The landmark Supreme Court decision of *Jaffee v. Redmond* (1996) has been a pivotal ruling in the mental health field. The *Jaffee* decision of psychotherapist-patient-privilege was established from a federal common law and respected and recognized as a psychotherapist privilege. The ruling was made so that in federal court proceedings, the patient of the psychotherapist would not have to worry that their frank and honest conversations to the therapist would be made public. The federal court ruling was not narrowed and gave leverage for the lower courts to decide the parameters of the psychotherapist. With privileges, court cases can either begin in a state court or a federal court, and then can be removed to a court in another jurisdiction or appealed to higher courts in either jurisdiction. Privileged communication and confidentiality also have exemptions where the judge can determine the state's need for evidence would outweigh the privilege. The outcomes involved in the court cases were indicators of what the trial courts are contending with in different caring professions. Even though the courts have been hesitant to expand new federal common law privilege the outcomes for caring professionals included no therapeutic relationship, facts of the treatment are not privileged, student's test waived for evidence in a case.

3. What are the trends in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014?

In practical terms, the data from the court cases revealed that the courts recognize the importance of privileged communication and confidentiality among caring professionals. In

several of the cases reviewed, the courts were reluctant to reference the *Jaffee* decision. The courts were unwilling to overstep the power entrusted to caring professionals and the mental health records used for the court's decision. The state statutes were guiding principles for the courts. The courts did not vary from the guidelines, but if they did, it was viewed as a court error. Because of this, in cases involving the caring professionals' power to assert privilege communication and confidentiality, the courts overwhelmingly ruled in favor of them. The decisions of the courts followed the narrow guidelines of the state statutes that each state has defined. Because protected privileged records are not normally addressed to be disclosed to the defense, the United States Supreme Court established a pretrial discovery rule in *Brady v. Maryland* (1963). The rule emphasized that the prosecution in a criminal case has the duty to turn over evidence that may vindicate the defendant. The courts granted *in camera* reviews of mental health records, psychological records, and/or school records when establishing a balance for the defendant. As these decisions were reached, the *Brady* standard and the *in camera* review standard set guidelines for mental health records and school records being reviewed by both parties in the suit. The trends from the research included the courts recognizing the importance of privileged communication and confidentiality among caring professionals, the courts did not exceed the privilege entrusted to caring professionals and mental health records, and the courts were reluctant to reference *Jaffee*, citing the psychotherapist-patient-privilege. States have little standardization concerning privilege statutes and policies; however, society values persons seeking mental health treatment and privacy of mental health records.

4. How do the issues, outcomes, and trends in court cases about privilege and confidentiality for caring professionals and their clients in the timeframe of 1956 to 2014 inform the development of privilege and confidentiality for school counselors and school children?

These substantial issues and outcomes were similar to the issues that school counselors face within the school setting. The issues, outcomes, and trends inform the development of privilege and confidentiality for school counselors and school children by stating the argument that school counselors carry out the same professional duties as other caring professions. School counselors are not at the educational level of other caring professionals who hold licensure. However, licensures have elevated the counseling profession for school psychologists and social workers. Other caring professionals have ethical codes and processes to implement, offer professional integrity, and are mandatory reporters, just like school counselors. Because other caring professionals have reached society's value of being accorded privilege in communication, school counseling is in a position to increase their value to society through licensure. School counselors share the same duties as other caring professionals in which states have awarded privilege and run parallel to other caring professionals, except for licensure.

Ethical Standards

The discussion of ethical standards is a way to inform the development of privilege and confidentiality for school counselors. School counselors face the unclear challenge of ethical standards required by their professional organization regarding privileged communication and confidentiality. Meeting ethical standards is a complex area where simple and concise answers sometimes do not exist. Ethical standards are about choices or the challenging gray areas of a professional. The standards provide guidelines for action. School counselors can be active participants exploring the district's ethical standards of what other caring professionals do or should do. No longer can school counselors just discuss what other caring professionals do that school counselors do not do. Ethical standards are placed in a position of importance, and student confidentiality is vital and should be protected. With ethical standards developing over time and

being shaped from society's influence, looking at other caring professionals' state statutes gives educators room to develop and change with the times. The American Counseling Professional Organization is on the cutting edge of providing training programs for the counseling profession. This professional organization communicates an overall caliber of counselors' professional information that can be tremendously helpful in helping them draw closer in their profession and be a learning trajectory for future standards and goals. Guidance counselors can then become advocates and activists in the field of caring professionals.

Throughout this research, mental health record privacy was shown to be a vital issue to society and individual values. The medical record value can override the judicial value when it is privileged. Mental health professionals and providers are required to keep records confidential. As an example, there is not an automatic right for a parent to view their child's mental health records. The parent must be acting in the child's best interest and on the child's behalf. Parents can also act for the child's best interest by protecting professionals and providers from disclosing their child's mental health records.

It is not an overall societal priority for school counselors to have privileged communication and confidentiality. Even when situations between people bring about the same value, society often disagrees with a school counselor's choice. Pivotal is the societal value of the psychologist-patient-privilege. The privilege is viewed as an individual seeking professional help from an outside source. This is different from a student seeking professional help from a professional school counselor inside a school setting. Society's priority of placing important value on school counselor professional services has not reached the level of priority as other caring professionals.

Caring professionals have ethical codes and processes to implement when counseling clients, as do school counselors. Caring professionals have their own defined appropriate ethical behaviors. Concerning school records, the research has shown medical records were waived in a court of law due to the school records and psychologist records being prepared for the specific purpose of being shared. This is the same for school counselors. Along with, professional integrity, commitment, and responsibility to the client, caring professionals offer these same practices of commitment. Concurrently, school counselors act accordingly. To raise the standard of practice for school counselors, professional school counselors could work under the general guidance of university professors. As a helping occupation, there should be continual development, implementation, and fostering of educational programs designed to further school counselors' credentials.

Privileged communications between mental health professionals and patients are confidential. The protected communication is not disclosed to other parties without the consent of the patient. However, there are exceptions to the privileges. The exceptions include child abuse and/or neglect; a judge's order for one or both of the parties to participate in a mental health evaluation; one party claiming the other party is unfit due to a mental health illness; and/or the dispute of a child's mental health condition. Most states have laws requiring mental health professionals to disclose patient information when violence or the threat of violence is a concern. This disclosure of information, due to a threat, is called a mandatory duty to warn. A patient's confidential communication between licensed psychotherapists and psychologists are placed on the same level of privilege as the law provides for attorney-client privilege.

Privileged communication and confidentiality ethical laws, professional standards, and legal mandates are constantly changing. This can be an ongoing challenge for the caring

professional. School counselors must stay abreast of Alabama's ethic laws, counselor professional standards, and school counselor professional qualifications in their specific school system. State and federal laws, district policies concerning the care of students, and school counselor's ethical standards from the counseling professional organization also can help keep school counselors in compliance. These help to continually lead and develop strong ethical standards for school counselors. Legal protection for school counselors under Alabama law has not been provided nor defined. However, this has not stopped school counselors from making ethical judgment decisions concerning students.

Licensures have elevated the counseling profession. Licensures have identified other caring professionals as social workers and school psychologists. Since the *Jaffee* decision, the psychotherapist, the psychologist, the social worker, and the school psychologist are no longer viewed as occupations, but as professionals. Society still continues to view school counselors as a vocation. School counselors can become aware of the issues specific to the licensure process and the skills they need. The licensure process of school counselors becoming licensed professional counselors (LPC) could be designed to reinforce the educators' efforts of meeting the students' educational needs and welfare. The Alabama Board of Examiners in Counseling is a regulatory agency to evaluate the qualification standards of licensure.

Understanding the ever-widening definition of a student's social and emotional needs and understanding of the spectrum of school counseling can have a positive effect on students. This understanding can help address some of the most pressing issues school counselors, teachers, and administrators are facing in today's schools--students' poor attendance and truancy. It is important in helping students grasp the importance of their social and emotional needs and how those needs impact their future. By aligning the licensed professional counselors' educational

requirements with the Alabama Standards for Professional Development, the educational arena could implement face-to-face course hours, on-line course hours, mentoring by university professors, and approved professional development studies that address counselor/professor meetings and internships. Evaluating the competency of school counselors begins with the counseling administrators and supervisors having purpose-driven continuing educational opportunities. Requirements of training and professional development need accountability standards. This is the gateway for relational and consequential definitive answers for credibility in the counseling profession. The American Counseling Association's goal, along with each state's local school counseling association, is to protect students from unethical and unlawful school counseling practices.

School counselors provide an array of guidance to students to help them understand problems affecting their educational situations. Students are given personal, social, behavioral, and academic guidance by school counselors to persevere through challenging issues. School counselors also provide students with crisis intervention when difficult situations occur at home, school, or in the community. Counselors complete student records to comply with special education laws, district policies, and administrative guidelines. While assisting students, school counselors confer with parents/guardians, teachers, administration, and/or other caring professionals concerning the needs of students' behavioral or academic success. For that reason, school counselors must have knowledge and skills in the areas of psychology, therapy, counseling, and education. School counselors must also have interpersonal relationships where they establish, maintain, and communicate decision making and problem solving for students concerning academic achievement and mental health issues to others.

In the United States, children of abuse and neglect attend schools, and each year these students interact regularly with school counselors. The school counselor's role is to be an advocate for their students. They are mandatory reporters, as are other caring professionals. School districts' educational expectations of school counselors as caring professionals are moving at a slow pace; however, they can fulfill their professional and ethical responsibility for students at a more accelerated rate. A strong theoretical foundation and ethical process empowers school counselors as well as having solid school policies on reporting procedures.

As mandatory reporters for child abuse and neglect, school counselors are often the first line of defense for children. Early reporting can improve the chance of a student receiving necessary mental health services and reducing the chance of the abuse happening again. The goal is for the students to have academic success and to be a productive citizen. Intervention gives the student hope for short-term and long-term recovery while living life to their highest potential. The strength of a school counselors' role is to decrease a student's short-term and long-term negative behaviors and damaging psychological consequences. Also, the goal is to reduce family and students' relationship consequences from the incident. Because child abuse is a huge society issue, legislation addresses child abuse at the state and federal level. This continues to be a needed commitment for our society. The issue at hand is identifying professionals that come in contact with children on a regular basis to assist students to survive the initial onset of the attack and recover from the abuse. One of those flagship professional resources is a school counselor. The research data yielded several guiding principles regarding privileged communication and confidentiality to benefit educators in circumnavigating this entwined issue of privilege and confidentiality among school counselors.

Guiding Principles

The following guiding principles were developed using the data gathered from the case briefs in the study.

1. Courts were narrow on asserting privilege communication and confidentiality among caring professionals (*City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11 (Iowa, 2000); *Johnson v. Rogers Memorial Hospital, Inc.*, 283 Wis.2d 384, 2005; *Child C. v. Fleming School*, 179 N.Y.S.2d 460 (N.Y.App. 1992); *People v. Plummer*, 37 Mich.App. 657, 1972; *Ramsey v. State*, 56 P.3d 675 (Alaska 2002); *Caroline SYKES, a minor, By and Through her parents and next friends, Philip SYKES, and Martha Sykes, and Philip Sykes and Martha Sykes v. St. Andrews School*, 619 So. 2d 467 (Fla.App.1993); *Correia v. Sherry*, 335 N.J. Super. 60, 2000; *Krystal G. v. Roman Catholic Diocese of Brooklyn*, 34 Misc.3d 531, 2011; *Sauter v. Mount Vernon School District*, 58 Wash.App. 121 (1990); and *State in the Interest of L.P.*, 593 A.2d 393 (N.J.App. 1991)).

2. The court cases' decisions brought clarity to complex events with students as victims (*State in the Interest of L.P.*, 593 A.2d 393 (N.J.App. 1991); *City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11 (Iowa 2000); and *J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wash. App. 49, 1994)).

3. When parents are viewed as being not for the benefit of the child, the courts issue a guardian ad litem (*J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wash. App. 49, 1994; *McCormack v. Board of Education of Baltimore County*, 158 Md.App. 292, 2004; *State in the Interest of L.P.*, 593 A.2d 393 (N.J.App. 1991)).

4. The guardian ad litem is the holder of the privilege (*State in the Interest of L.P.*, 593 A.2d 393 (N.J.App. 1991)).

5. Psychotherapist-patient-privilege is asserted through the *Jaffee v. Redmond* (1996) decision (*Norskog v. Pfiel*, 197 Ill.2d 60, 2001; *Correia v. Sherry*, 335 N.J. Super. 60 (2000); and *Johnson v. Rogers Memorial Hospital, Inc. Inc.*, 283 Wis.2d 384 (2005)).

6. The United States Supreme Court ruling of *Jaffee v. Redmond* opened an avenue for school counselors to be privileged and to gain some authority (*People v. Gutkaiss*, 84 N.Y.S.2d 936 (N.Y.App. 1994); *State v. Walsh*, 52 Conn.App. 708 (1999); *People v. Kukon*, 275 N.Y.App.2d 478 (2000)).

7. There is no blanket privilege for psychotherapist-patient privilege (*Palm Beach County School Board and Terry Andrews v. Claudia Morrison*, 621 So.2d 464 (Fla.App.1993)).

8. There is no complete immunity to school districts involving harm to students (*City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11 (Iowa, 2000)).

9. Alleged sexual offenders must be given a fair trial, can view evidence, and have the legal right to question the victims (*State v. Robert Scott R., Jr.*, 233 W.Va. 12 754 S.E. 2d. 588, 2014; *People v. Gutkaiss*, 84 N.Y.S.2d 936 (N.Y.App. 1994); *State of Connecticut v. Charles Slimskey*, 779 A.2d 723 (Conn. 2001); *Krystal G. v. Roman Catholic Diocese of Brooklyn*, 34 Misc.3d 531, 2011; *Sauter v. Mount Vernon School District*, 58 Wash.App. 121 (1990); *People v. Meza*, Not Reported in Cal. Rptr.2d (Cal.App. 2002)).

10. The courts will look at the written fieldtrip policy of a school district and determine the actual practice that was carried out by the school administration (*City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11 (Iowa 2000)).

11. Privilege is asserted even after death (*Correia v. Sherry*, 335 N.J. Super. 60, 2000).

12. The denial of access to privileged communication records is waived due to a court error (*In re Sippy*, 97 A.2d 455 (D.C.App. 1953); *State of Connecticut v. Slimskey*, 779 A.2d 723 (Conn. 2001)).

13. Asserting privilege communication and confidentiality to some caring professionals does not open privilege for other groups of a similar privilege (*People v. Meza*, Not Reported in Cal.Rptr.2d (Cal.App. 2002)).

14. Exemptions are allowed on some state statutes (*In re Sippy*, 97 A.2d 455 (D.C.App. 1953); *People v. Meza*, Not Reported in Cal.Rptr.2d (Cal.App. 2002); *Palm Beach County School Board and Terry Andrews v. Claudia Morrison*, 621 So.2d 464 (Fla.App.1993); *Goral v. Illinois State Board of Education*, 2013 IL App (1st) 130752 (Ill.App. 2013); *J.N. by Hagger v. Bellington School District No. 501*, 74 Wash. App. 49, 1994; *Humberstone v. Wheaton*, 801 N.Y.S. 2d 868 (2005) (slip opinion)).

15. School personal are responsible for student supervision when there is foreseeability of harm to a student (*City of Cedar Falls v. Cedar Falls Community School Dist.*, 617 N.W.2d 11 (Iowa 2000); *J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wash.App. 49 (1994)).

16. School counselor's notes are not covered under privileged communication and confidentiality (*J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wash.App. 49 (1994)).

17. Privileged communication and confidentiality was not awarded to the school counselor's notes because the school counselor was not licensed (*People v. Meza*, Not Reported, Cal.Rptr.2d (Cal.App. 2002)).

Evidence for Privilege and Confidentiality for School Counselors

The research's evidence has proven an avenue for privileged communication and confidentiality for school counselors. The Supreme Court decision formed the landmark case of *Jaffee v. Redmond* (1996) by opening a passageway for state departments of education to tackle privilege and communication for professional school counselors. However, from the research, only three court cases cited the *Jaffee* decision. With an ever-changing accountability, school counselors promote both academic achievement and mental health success for all students. The school counselor's ethical and legal responsibility is to protect students/clients from harm to themselves or to other students. Every day, school counselors are faced with challenging decisions concerning risk to students. These risks involve social risks, or risks of family circumstances and social standing from friend groups, school, and/or community. Risks also include troubled students being allowed to continue staying in the academic setting, as well as, being allowed to attend the school. Lastly, legal risks, such as circumstances involving students or student's family members or illegal activity of students or student's friends who are underage drop-outs. These are only a few examples of when students under the care of school counselors disclose confidential information to the school counselor. The *Jaffee* decision broadens the privilege to psychologist, school psychologist, and to some state statutes granting privilege to school counselors.

There are confidentiality rules in both federal and state laws for the school counselor to consider. One federal law which could encompass privileged communication of school counselors is the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) of 1974. As an example, FERPA protects student's educational records. Educational records are the threshold of the FERPA rule of parents and students. These include

records, documents, testing results, and other transcripts that schools obtain. However, school counselor records do not fall under this definition, known as private notes or “sole possession” notes from educational personnel. FERPA gives parents and students authority to review all students’ records. FERPA provides a protection for “sole possession” of educational records of school personnel who are not shared with other personnel. School counselors, not sharing their records with other school personnel, could be this exception. If this was enacted, then parents would not have access to the school counselor’s private notes. This could become a federal mandate under FERPA. FERPA limits the release of educational records. With federal laws taking the lead, states’ public schools comply with federal regulations. Some states have granted confidentiality to school counselors. Other states, as Alabama, could award privileged communication and confidentiality through the avenue of the federal mandate of FERPA under educational records. Also, privileges have outweighed child custody cases involving Health Insurance Portability and Accountability Act of 1996 (HIPPA) regulations, according to New York Superior Court, *Liberatore v. Liberatore* (2012).

State laws also follow federal laws. Federal laws governing privilege could be adopted in state statutes, state codes, or by common law precedence. States could adopt the whole Federal Rules of Evidence 503 from the Jaffee decision or states could adopt part of the law. States’ privilege statutes are problematic and complicated because state statutes have little standardization across states. State statutes vary from state to state; however, the *Jaffee* decision could launch a broader opportunity for more state-specific statutes for school counselors’ privilege.

Another avenue for recognizing privilege for school counselors could be the avenue of school psychologist-privileged communication. An example of that is in the Supreme Court of

the State of Washington Court case, *J.N. By and Through Hager v. Bellingham School Dist.* No. 501, 74 Wash.App. 49 (1994). Under professional-client-privilege, found in some states, state statutes establish codes for mental health services. These laws protect a client's right for professionals not to disclose confidential information which has been shared to them by students. Psychologists, under these state law codes cannot share a client's privileged communication. If the psychologist does share confidential information, they can be held liable for breaching the client's confidentiality. Therefore, if legislature continues to restrict privilege and confidentiality for school counselors, another avenue to help protect students' emotional and mental health is placing school psychologists in the school setting.

Changes in legislative mandates often occur when and if school counselors speak out about it. Strengthening the safety net for students/clients can help prevent a tragedy, and this is an ongoing concern for school districts. School counselors must speak out about the impact of school counselors and must observe the whole spectrum of the counseling relationships. They must be the mouth piece for the urgency of culture change. Legislation challenges without compassion is like a butcher. Compassion is a major key to the movement, for without compassion it just leaves privilege and communication out of the school setting. Lest we get caught up in all that it should not be, educational and societal momentum will continue to divide the field of caring professionals. It is obvious there is an urgency for a different perspective for change in the culture of professional counselors. Privilege and confidentiality could be ventured as either way of common law or civil law. Common law, known as uncodified law, has no historical mapping of legal rules, codes, or statutes. Common law, where society values privacy and confidentiality, can be established by precedence of historical records of courts' case law.

Civil law, known as codified law, is established by criminal or civil law enforced through the judicial law system of upholding legal rules, codes, and statutes.

Therefore, school counselors run not with questionability to promote their effectiveness in protecting a student's confidentiality by intensifying ethical decisions in school counselors' professionalism. It is optimal communication with students and parents that is required to make a difference in a student's life as to mental health issues. A school counselors' choice of words and the power of their words often deliver difficult and intense information to students and parents. However, it is these powerful words that can help bring a family to embrace giving a student an opportunity to move forward toward worthy and often blameless resolutions. Students have a precise story they often grow into wanting to tell; however, occasionally the students are the story. Privilege communication allows protection from unflattering information a student is unwilling to disclose. Referencing Table 34 in Chapter IV, school counselors share the same duties as other caring professionals in which states have awarded privilege. Those duties include family disclosure, students' testing results, disclosure of behavior issues, disclosure of mental health issues, and threats made to the student themselves and to others. School counselors have an opportunity and an ethical and legal obligation to change the future for students as their clients.

Implications

One can make the argument that school counselors' autonomy has not been recognized by educators and the legislature. The profession of school counselors is defined as being in a middle ground position of mental health professionals and educators. In this middle area, school counselors do not hold the credentials as other caring professionals such as school psychologists and social workers; however, school counselors are given mental health duties to perform that

are not the responsibility of educators. Similar to this middle ground area is the example of the hair braiders in New York State. Hair braiders share the same problem of autonomy between licensed hair dressers as those between dentist and hygienists and doctors and nurse practitioners. School counselors also share the same autonomy issue where their profession is known as an educator; however, parents and schools place them in the position of a mental health assistant. School counselors live in an awkward and insecure middle area, and are receiving no autonomy in the field of counseling. If school counselors would seek autonomy, this could increase the value society gives to the profession. This would then move school counselors forward receiving privilege from the judicial system. Once school counselors obtain substantial autonomy they could reach for and obtain privilege communication and confidentiality.

School counselors are not mental health professionals, they are educators. However, family dysfunction, mental health issues of students, ethical guidelines for school counselors, challenging students, coaching versus counseling, and adolescent issues are all areas school counselors must inform themselves of to increase their marketability. Ethics are important and emphasis is placed on the cautions of the ethics of remaining an educator and not a mental health assistant. However, the potential of school counselors is concealed under the program of education. If school counselors are to maintain as educators and stop addressing the mental health issues of students, legislation must address the challenge. Optimum in this situation, school counseling provides a promising avenue to support student academic growth for school counselors who are often the front-line when it comes to identifying students' mental health needs. Therefore, school counselors are in an ideal position to engage in certification or licensure to attack mental health issues of students through protecting the student's confidential communication.

Because school counselors are not at the same level of treatment as other caring professionals, one way to elevate the profession is by requiring school counselors to seek licensure. There is a shift, for focus has only been on teaching classroom guidance lessons, toward school counselors remaining as educators. The school counselors' role has been that of in loco parentis rather than a therapeutic role. The role has been one of supporting the parent or as acting in the place of the parent. School counselors and educators have the legal right to protect the safety of all students as well as approve medical care for the student when the parent is not available. Along with legal rights, the legal climate places the responsibility of schools preventing student injury. Therefore, school counselors are on the front line of defense using observation to help students. With the changing current of times with the unstable family unit, school counselors are at a juncture where parents do not always act in the best interest of the child. Therefore, emphasis should move from the school counselors' support of the parent to emphasis on the child, the student.

Ethical codes bring an ethical balance to the profession. School counselors and other caring professionals use ethical decision-making processes when faced with ethical dilemmas. One way for school counselors to upsurge their ethical responsibility is by requiring school counselors to seek licensure. Licensure gives permission through competent authority that allows the professional the right to act in a way that would otherwise be considered illegal. Another avenue would be school counselors reaching certification to a doctoral level of school counseling. Certification would indicate school counselors have met the national requirements of education, training, and experience to counsel students on mental health issues.

To articulate the importance of school counselors' ethical duties to educators and legislation to increase societal value, there must be a leader shift directly related to school

counselors aiding students on mental health issues. As being a member of a professional organization, Alabama School Counseling Association, it is important for school counselors to lobby for legislation concerning confidentiality for school children. The future hold a position for school counselors to receive privilege communication and confidentiality. However, first school counselors must address the educational standards of the duties of school counselors and address the mental health issues school children bring with them to school. Society does not require for every student to have a 4-year college degree; however, society does aim for all students to be productive citizens. School counselors can seek becoming a professional licensed caring professional to help with students' mental health issues arising from the contained and confined prison areas students live in, as dysfunctional families and at-risk youth view schools as a prison. These are ethical decision for school counselors to address family issues and the mental health issues of students in school. However, allowing school counselors to achieve educational certification or licensure to aid students in those mental health areas that students, teachers, and parent place on school counselors is a productive way for school counselors to achieve autonomy. The education field must change the skills and education needed for school counselors to achieve autonomy to increase society value, or otherwise just let school counselors be teachers.

Recommendations for Further Study

Based upon the findings and conclusion in this study, the following recommendations for further study are suggested for others to benefit in the future.

1. Research should be conducted to examine decisions from school districts that never made it to court; how those decisions were settled out of court and why.

2. Research should be conducted to further clarify issues regarding privileged communication and confidentiality through new court case decisions as they are reached.
3. Research should be conducted to further clarify ethical issues that other caring professionals face, as well as guidance counselors.
4. Research should be conducted to further clarify the pursuit of professional training and proper accountability and evaluation to become licensed professional school counselors.
5. Research should be conducted to further clarify ethical implications associated with counseling clients who have experienced sexual abuse.
6. Research should be conducted to further clarify the value of confidential services to students.
7. Research should be conducted to further clarify the value of school counselors on providing family-focused intervention groups.
8. Research should be conducted to further clarify the leadership of school counselors on intervention practices for depression and suicidal thoughts/attempts of their patients/clients.
9. Research should be conducted to further clarify state statutes and the exemptions that are allowed for the state statutes.
10. Research should be conducted to further clarify lawsuits against schools after student suicides.
11. Research should be conducted to further clarify what led up to the *Jaffee v. Redmond*, (1996) court decision, as for caring professions.
12. Research should be conducted to further clarify the progression of court cases from 1956 to the present arriving at privilege and communication decisions.

Conclusion

The purpose of this study was to examine matters related to understanding the issues, outcomes, and trends in case law about privilege in communications for caring professionals to determine and understand why other caring professionals have been awarded privilege and confidentiality to their clients and school counselors have not. Court cases from the West Reporter System allow the researcher, in a sense, to interview the person who wrote the decision; to ask questions about why the decision came out the way it did, and then reduce interview notes to data, which was treated qualitatively. The data revealed caring professionals are guided by privileged communication and confidentiality statutes similar to school counselors' ethical standards. A paradox exists in the literature, where school counselors are included among those professions identified ethically as the caring professions, but have generally not been accorded privilege in their communications with their clients, school children.

Privilege or privilege in communication is extended to certain professionals, to know that the communication between them and those entrusted with their care are private. Privilege is given to the professional for the benefit of the client. The meaningful benefit for the client is the privilege, granted by state and federal statutes, which allows an exclusion of the client's conversations from being used as evidence in a court of law. This exclusion often makes privileged communication controversial due to the client being able to legally leave relevant facts out of court proceedings. Privilege affects the truth-seeking procedures of the law.

The American School Counseling Association (ASCA) code of ethics, the school counselors' own professional association, identifies them as caring professionals, and places a duty upon them to extend the promise of confidentiality to their clients, the school children they serve. As an ethical term, the duty of confidentiality is important and should be absolutely

binding. Confidentiality is reinforced in society because society views it as important. There is a challenge faced by school counselors navigating through state legislation and the professional's ethical guidelines and principles governing privileged communication and confidentiality.

School counselors must balance the rights of students with the rights of parents. However, when parents are viewed by the courts as being not for the child's benefit, the courts issue a guardian ad litem. The guardian ad litem then becomes the holder of the privilege. This delicate balance is initiated by not breaching confidentiality. The promise by ethical codes to keep information confidential, may be breached when a client/student references harm to themselves or to others, or when required by court order.

Following the passage of the United States Supreme Court decision of *Jaffee v. Redmond*, the courts have been called upon to add other professional guidelines for caring professionals such as school psychologists, social workers, and school counselors. The narrow decision of *Jaffee* has left it up to the state courts and federal courts to assert or waive privileges among these caring professionals. The school counselor's privileged communication and confidentiality is viewed, at this time as being at the threshold of expansion if state courts take the initiative to broaden the *Jaffee* decision. Some states have awarded privileged communication and confidentiality to school counselors. The state statute of Oregon has awarded full privilege to school counselors since 2012. The state statute of North Dakota has awarded unconditional privilege effective March 2014 from North Dakota Rule of Evidence 503. When state statutes award privilege for school counselors, the statutes often contain exceptions or caveats created by judges. The following state statutes have awarded privilege with exceptions: Indiana, Idaho, Maine, and Ohio. The majority of state statutes have remained mute on privilege for counselors. School counselors are occasionally called upon to testify regarding a student's information.

School counselors cannot refuse giving testimony unless the state statute has awarded privilege to the student. The school counselor may try to explain to the judge their ethical obligation to their student and cite their ethical standards to the judge. The ethical standards supports and safeguards the student's confidentiality. Also, the school counselor can explain to the judge that no new or additional knowledge or evidence will be gained from the testimony, but that the testimony will only bring more harm to the student. If this procedure does not work, school counselors must testify unless the state statute provides privileged communication and confidentiality.

School counselors share accountability for student achievement as well as all other educators. Accountability is an area that requires a systematic collection of data and analysis of the data to understand students' academic success. School counselors support students' success, and they are successful contributors to students' academic success stories. Working in an accountability-driven environment, school counselors are vital to the academic success and mental health success of students. School counselors have an ethical responsibility and sometimes legal duty to protect a student's privacy. There is a need to protect confidential information received through a counseling relationship with a student, viewed as their client. Usually for a school counselor, emphasis is placed on not sharing a student's confidential information unless the student gives consent or there is a clear and imminent danger to the student and/or to other people. School counselors have to balance the legal and political positions of authority while attempting to protect a student's sensitive confidential information. One questions where is the balancing between educational training with mental health training? School counselors may be required to navigate through continuous professional development or college courses. More professional development with

supervision may have to be completed for school counselors to be awarded privilege and confidentiality for their clients. While counselors appear to be members of the caring professions, they apparently do not fully share in the privilege of their communications to the same extent as similar professions. To articulate the important relationship between school counselors and students/clients, in leadership of school counselors there must be a “leader shift.” As advocates of students/clients, school counselors hold a direct relationship in meeting the mental health needs of students.

As an ethical mandate for student/client care, counselors have a principled responsibility to advocate for clients. Counselors must encourage legislative involvement at different community levels to address barriers for student/client care and mental health wellness. Legislations have attempted to raise barriers with state statutes and federal laws and ethical considerations affecting counselors. School counselors must have an understanding of the latest research while learning about field-tested strategies to implement to use effectively with students. Often as the result of the efforts of survivors, numerous states have enacted legislation to address the role of school and school counselors in suicide prevention. Propelling and advancing the ways in which we meet the needs of our students/clients is vital for increasing student’s mental health wellness for issues that occur in schools.

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