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"I Will Not Divulge": How to Resolve the "Mass of Legal Confusion" Surrounding the Physician-Patient Relationship in West Virginia

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**“I WILL NOT DIVULGE”: HOW TO RESOLVE THE
“MASS OF LEGAL CONFUSION” SURROUNDING
THE PHYSICIAN-PATIENT RELATIONSHIP
IN WEST VIRGINIA**

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* HIPPOCRATES, THE OATH (Francis Adams, trans., 1994) (400 B.C.E.), available at <http://classics.mit.edu/Hippocrates/hippooath.html>.

** State ex rel. Allen v. Bedell, 454 S.E.2d 77, 81 (W. Va. 1994) (Cleckley, J., concurring).

I. INTRODUCTION

Under current law in West Virginia, whom can you trust with your most confidential information? Who cannot be compelled to reveal such information in a court proceeding? The evolution of evidentiary privileges in the state produces this list: attorney,¹ spouse,² journalist,³ and clergyperson.⁴ However, one trusted professional is left off the list: the general physician. Information you reveal to him or her is not completely protected under the evidentiary laws of West Virginia.

Court systems in every state have struggled with the balancing act that the adoption of evidentiary privileges requires. Courts feel they must adhere to the proposition that the public is entitled to “every man’s evidence,” but simultaneously respect individual privacy rights and personal communications.⁵ The United States Supreme Court has stated that privileges must be “strictly construed” and used only in limited situations such that a “public good transcend[s] the normally predominant principle of utilizing all rational means for ascertaining truth.”⁶ Others would agree with the notion that whatever harm a privilege may do to the judicial process, “it is not too great a price to pay for secrecy in certain communicative relations.”⁷

This balancing test between preservation of patient communications and the preservation of evidence deserves a second look in West Virginia. The state Supreme Court has acknowledged that the physician-patient privilege has never been adopted but has nevertheless ruled in favor of patient confidentiality on countless occasions.⁸ In the absence of a legislative or court-created privilege, however, physicians and patients have little assurance that medical information revealed in the course of an examination will not be regurgitated in a court proceeding.

¹ See *State v. Douglas*, 20 W. Va. 770 (1882).

² See W. Va. Code §§ 57-3-3 to -4 (2006). The statute was enacted in 1849 in Virginia and was subsequently incorporated into West Virginia law, post-statehood.

³ See *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989).

⁴ See W. Va. Code § 57-3-9 (2006). The statute was enacted in 1990. West Virginia laws also protect communications given in the course of the psychiatrist relationship and the social worker relationship. However, these laws do not seem to create a true privilege such that testimony could be excluded in a court proceeding. See respectively W. VA. CODE §§ 27-3-1, 30-30-12 (2006).

⁵ Harvard Law Review Association, *Developments in the Law of Privileged Communications*, 98 HARV. L. REV. 1450, 1454 (1985) (quoting 12 PARL. HIST. ENG. 693 (1812) (Lord Chancellor Hardwick’s speech on May 25, 1742)).

⁶ *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

⁷ David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956).

⁸ See *infra* Part II.

Part II of this Note will address the state of confusion surrounding the physician-patient relationship in West Virginia; Part III will present reasons why the physician-patient privilege should be adopted in West Virginia; Part IV outlines the ways in which the privilege could be adopted; and Part V offers suggestions for the contours of the privilege. The state of confusion surrounding the privilege, increased protection of privacy in the recent past, and the nature of the medical practice in rural areas show that the time is ripe for the West Virginia Legislature or Supreme Court to fashion a general physician-patient privilege.⁹ After all, “[p]olitical, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”¹⁰

II. BACKGROUND: FROM *MOHR* TO *PRICE*, A HISTORY OF THE MASS OF LEGAL CONFUSION

New York was the first state to adopt the physician-patient privilege by statute in 1828, and it did so for two reasons: to ensure proper medical care through open communication and to preserve the physician’s honor, which the legislature believed was stronger than a legal duty to disclose patient communications.¹¹ Thirty-nine other states and the District of Columbia have followed New York’s lead and adopted a general physician-patient privilege.¹² Although West Virginia has not enacted the privilege, state Supreme Court opinions from 1937 to 2005 have given mixed signals about the patient protections that may or may not exist in absence of the privilege.

A. Mohr, Simmons, and King: *The Privilege Doesn’t Exist, Does It?*

Former West Virginia Supreme Court Justice Franklin Cleckley claimed that the court has used “gratuitous dicta” that “[has sent] a mixed message to lawyers and to our lower tribunals” about the existence of the physician-patient

⁹ For a discussion on the ways in which the Supreme Court could adopt such a privilege, see *infra* Part IV.

¹⁰ Franklin D. Cleckley, *A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia*, 93 W. VA. L. REV. 1, 2 (1990) (quoting Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

¹¹ Daniel W. Schuman, *The Origins of the Physician-Patient Privilege and Professional Secrecy*, 39 SW. L.J. 661, 676 (1985). Physician-patient communications were not privileged at common law. For example, in the trial of Elizabeth, Duchess of Kingston, the English court made the duchess’s surgeon reveal whether the duchess told him about a previous marriage, even though the surgeon did not want to testify. John W. Clark, *Confidential Communication in a Professional Context: Attorney, Physician, and Social Worker*, 24 J. LEGAL PROF. 79, 83 (2000).

¹² For an accurate list of states that have enacted the physician-patient privilege and corresponding statutes, see Leslie Ann Reis and Ralph Ruebner, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 564 n.439 (2004). To date, West Virginia, Alabama, Connecticut, Florida, Kentucky, Massachusetts, Maryland, New Mexico, South Carolina, and Tennessee have not enacted the privilege. *Id.*

privilege.¹³ The nascent confusion about the privilege stemmed from three West Virginia Supreme Court cases in which the court moved from a definite statement that the privilege did not exist, to dicta that made this idea less than clear: *Mohr v. Mohr*,¹⁴ *State v. Simmons*,¹⁵ and *King v. Kayak Manufacturing Corp.*¹⁶

In *Mohr v. Mohr*, the West Virginia Supreme Court stated for the first time that no evidentiary privilege existed for communications between a physician and patient.¹⁷ *Mohr*, a divorce proceeding, involved a wife who claimed that her husband committed adultery and as a result gave her a venereal disease.¹⁸ Her husband did not produce his physician as a witness, but the court stated in dicta that information about Clarence's alleged venereal disease could be revealed in the proceeding because "[a]t common law, such evidence would have been available, and is generally considered available in the absence of a statute on the subject."¹⁹ The court's dicta first show the danger of the absence of a privilege: private communications that are potentially embarrassing and degrading could be revealed in a public court proceeding. Furthermore, the statement that the privilege does not exist is one that the court undermined in subsequent cases.

For example, forty-six years later in *State v. Simmons*, the court suggested that the defendant could attempt to show that the privilege existed.²⁰ Simmons was convicted of second-degree murder and mounted an insanity defense upon appointment of new trial counsel.²¹ The court ordered a psychological examination with court-appointed psychiatrist, Dr. Smith.²² Dr. Smith worked in the same clinic as Simmons's personal psychiatrist, Dr. Hill, and therefore had access to and reviewed Simmons's medical records.²³ Simmons

¹³ *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 84 (W. Va. 1994) (Cleckley, J., concurring).

¹⁴ 193 S.E. 121 (W. Va. 1937).

¹⁵ 309 S.E.2d 89 (W. Va. 1983).

¹⁶ 387 S.E.2d 511 (W. Va. 1989).

¹⁷ 193 S.E. at 122.

¹⁸ *Id.* Mohr's husband, Clarence, told "her that he had consulted a physician [in] Fayette County . . . for a disease of the kidneys," but the medicine given to him was "commonly used for venereal disease." *Id.*

¹⁹ *Id.* The court goes on to say that West Virginia has a statute applicable only in certain proceedings "applicable to justice of the peace practice, making a physician or surgeon incompetent to testify concerning any communication made to him by a patient which was necessary to enable him to prescribe and treat the case, without the patient's consent." The court was referring to W. Va. Code § 50-6-10 (now repealed). Still, West Virginia did not have a testimonial statute at this time in circuit court proceedings. *Id.*

²⁰ 309 S.E.2d at 95.

²¹ *Id.* at 93.

²² *Id.* at 93-94.

²³ *Id.* at 95. The *Simmons* court declared that W. Va. Code § 27-3-1, which aimed to protect communications between psychiatrist and patient, did not create a privilege between the two. *Id.* at 96.

claimed that this review of the information in his personal records violated the physician-patient privilege;²⁴ however, the court did not reach the merits of this issue.²⁵ The majority opined that if Simmons wanted to prevail on this point, she would have had to show that the general physician-patient privilege existed in West Virginia, and then determine "if [it] extended to medical records obtained by a third party."²⁶ Because the court did not disclaim the existence of a privilege, but rather indicated that it may have been possible for the defendant to show that one exists,²⁷ *Simmons* began to loosen *Mohr's* seemingly solid statement.²⁸

King v. Kayak Manufacturing Corp. muddied the waters even more by providing a means for a waiver of the privilege after stating the privilege did not exist.²⁹ The plaintiff sued the manufacturer of an aboveground swimming pool after he dove into the pool and was paralyzed.³⁰ The Monongalia County Circuit Court judge prohibited the doctor's testimony about treatment for head lacerations "because of the physician-patient privilege."³¹

When the West Virginia Supreme Court heard the appeal of this decision, the majority stated, in *Mohr*-like fashion, "We have never explicitly recognized the physician-patient privilege in West Virginia."³² The court did not stop there, however, stating, "Even if we assume that such a privilege exists, the plaintiff waived it by offering [the doctor] as a witness and questioning him

²⁴ *Id.* at 93, 95.

²⁵ *Id.* at 95, 97. The court found that Simmons was not prejudiced by the records (since he had introduced the records on direct examination) and he failed to object to this issue at trial. *Id.* at 97.

²⁶ *Id.* at 95 n.6.

²⁷ Because the court left open the idea that Simmons could prove that the privilege existed, the court must have either thought that the privilege could be inferred from another statute, existed at common law, or was part of the zone of privacy that was protected after *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973). See *infra* Part III.A.1. The court, however, does not expand on its dicta, nor does it state how Simmons could have shown that the privilege exists.

²⁸ See also *State v. Cheshire*, 313 S.E.2d 61, 62-63 (W. Va. 1984) (per curiam). The defendant was convicted of two counts of forgery, and on appeal, her competency to enter guilty pleas, to waive constitutional rights, and to confess to a separate arson charge were in question. After the state Supreme Court remanded for a proper competency hearing, Cheshire went *privately* to a psychiatrist for an examination, and the psychiatrist was called to testify. *Id.* at 65. Cheshire claimed that this testimony violated the physician-patient privilege. *Id.* The court did not reach the merits of this claim but, in dicta, cited *Simmons* and brushed aside the issue of whether or not the privilege could be used or proved in this case. *Id.* at 66. Again, the court failed to use *Mohr's* statement that the privilege did not exist.

²⁹ 387 S.E.2d 511 (W. Va. 1989).

³⁰ *Id.* at 513.

³¹ *Id.* at 522. Current Supreme Court Justice Larry Starcher presided over the trial court when he was circuit court judge in Monongalia County. He also presided over *Morris v. Consol. Coal Co.*, *infra* Part II.B.

³² *Id.*

about the plaintiff's injuries and medical treatment."³³ The court's mention of waiver requirements for a privilege, which technically did not exist again undermines the *Mohr* statement, leaving the state of the law ambiguous into the 1990s.

B. Kitzmiller and Morris: Moving Toward Patient Protection

While the West Virginia Supreme Court stayed true to its inclination that the privilege did not exist, it began to carve out special protections for patients so that certain communications to physicians would not be divulged. For example, companion cases *State ex rel. Kitzmiller v. Henning* and *Morris v. Consolidated Coal Co.* created both a fiduciary relationship between physicians and patients in West Virginia and a cause of action for breach of this duty.³⁴ This increased protection is poignant because it shows the court's attention to privacy interests; however, the court stopped short of forbidding disclosure in court proceedings.

In *Kitzmiller*, a widow filed a medical malpractice action on behalf of her husband, alleging that two doctors failed to properly diagnose and treat her him for colon cancer.³⁵ Mrs. Kitzmiller signed a release to provide medical records to the court but would not release information about her husband's condition gathered from an *ex parte* meeting between Davis Memorial Hospital and Mr. Kitzmiller's treating physicians.³⁶ The West Virginia Supreme Court held that only the information relevant to the medical malpractice claim could be discovered through the *ex parte* communications.³⁷ The court stated that although one filing a medical malpractice suit impliedly consents to the release of certain medical information, this does not mean that the patient consents to the physician discussing irrelevant, confidential information with third parties.³⁸

The *Kitzmiller* majority, as that of *Simmons* and *King*, seemed uncertain about the existence of the privilege, stating that "Mrs. Kitzmiller has waived any physician-patient privilege that *might otherwise have existed*" by putting her husband's medical condition at issue.³⁹ However, the court went a step further and stated that although the privilege was not codified, the patient still had a right to protection against disclosure of confidential information.⁴⁰ Seemingly,

³³ *Id.* The court allowed the doctor's testimony about the defendant's treatment and also found that the doctor could testify as to the possible causation of the plaintiff's injury, citing *Serbin v. Newman*, 198 S.E.2d 140 (W. Va. 1973). *Id.*

³⁴ *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648 (W. Va. 1994); *State ex rel. Kitzmiller v. Henning*, 437 S.E.2d 452 (W. Va. 1993).

³⁵ *Kitzmiller*, 437 S.E.2d at 453. Davis Memorial Hospital was also a defendant. *Id.* at 452.

³⁶ *Id.* at 452.

³⁷ *Id.* at 456.

³⁸ *Id.* at Syl. Pt. 2.

³⁹ *Id.* at 454 (emphasis added).

⁴⁰ *Id.*

the court was relying upon a tacitly understood yet unrecognized protection that, for policy reasons, should be honored.⁴¹

This uncodified protection was solidified in *Morris v. Consolidation Coal Co.*, a certified question proceeding a year later, in which the court created a cause of action for breach of the duty created in *Kitzmiller*.⁴² In *Morris*, then-Monongalia County Circuit Judge Larry Starcher certified six questions to the Court, one of which was whether or not West Virginia recognizes a physician-patient privilege when an employee executes a worker's compensation WC-123 medical release and the employee's physician communicates *ex parte* with the employer.⁴³

In this case, the employee, Morris, saw a physician for shoulder and leg pain allegedly caused from injuries at his job with Consolidation Coal.⁴⁴ Subsequently, a representative of Consolidation Coal went to the physician when Morris was not present and showed him videos of Morris working during the time he was allegedly injured.⁴⁵ The physician subsequently wrote a letter to the Workers' Compensation Board stating that he could not certify Morris for a disability.⁴⁶ Like Mrs. Kitzmiller, Morris claimed that this *ex parte* communication violated the physician-patient privilege.⁴⁷ The court, as part of the move toward protecting confidential information provided to a physician, agreed with Morris and held that a fiduciary relationship between physician and patient exists via *Kitzmiller* and created a cause of action for breach of this duty.⁴⁸ This step offers plaintiffs like Morris a remedy for a physician's wrongful communications with a third party; however, it does not go so far as to ban the information gained from such disclosure from a court proceeding. This inconsistency

⁴¹ Though the *Kitzmiller* holding is limited to *ex parte* communications, or "nonadversary interviews of a doctor by adverse counsel," *id.* at 454, this move toward sheltering communications between physicians and patients is one that appears again in subsequent court opinions.

⁴² Syl. Pt. 5, *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648 (W. Va. 1994).

⁴³ *Id.* at 651. A WC-123 is a worker's compensation application, a portion of which is filled out by the treating physician. *Id.* at 650.

⁴⁴ *Id.* at 649-51.

⁴⁵ *Id.* at 650.

⁴⁶ *Id.*

⁴⁷ *Id.* Consolidation Coal argued that the goal of worker's compensation proceedings is expeditious resolution. However, the Court disagreed, stating that preserving the fiduciary relationship between physician and patient in an *ex parte* situation outweighs the goal of expediting claims. *Id.* at 651-52 (citing *Church's Fried Chicken No. 1040 v. Hanson*, 845 P.2d 824 (N.M. Ct. App. 1992), *cert. denied*, 844 P.2d 827 (N.M. 1993)). It also cited W. Va. Code § 23-4-7 and argued that this statute allows for *ex parte* communication between the employer and the treating physician. This section states that in worker's compensation claims, any "physician may release" medical reports to employers "from time to time," and these reports may contain information about treatment and prognosis. W. VA. CODE § 23-4-7 (2006). The court rejected this notion, stating that the statute did not provide for the *ex parte* communication that occurred here. *Morris*, 446 S.E.2d at 652-53.

⁴⁸ *Morris*, 446 S.E.2d at 656-57.

shows the glaring gap in West Virginia's evidence jurisprudence. By not taking the final step and excluding such communication from court proceedings, West Virginia does not totally protect communications between physician and patient.

What is even more striking about the *Morris* opinion is that the court actually tags *Kitzmiller* as the beginning of the state privilege. The majority opinion states, "Before *Kitzmiller*, . . . the physician-patient privilege was not recognized under common law in West Virginia."⁴⁹ The court seems to use the phrases "privilege" and "fiduciary relationship" interchangeably by stating that in *Kitzmiller*, the court found a "fiduciary relationship between a patient and physician which prohibits the physician from divulging confidential information he has acquired while attending to a patient."⁵⁰ This increase in protection of physician-patient communication was brought about, the court notes, by changes in the demands of society, but the court does not explain such changes.⁵¹

The court is careful to limit its holding to *ex parte* communications between a physician and employer in a worker's compensation suit, claiming, "We are merely providing a framework from which attorneys may analyze the issue in the future."⁵² This *Kitzmiller-Morris* framework came a long way from the uncertainty of *Simmons* and *King*, as the answers to the certified questions posed by then-Judge Starcher explicitly show the court's concern for patient confidentiality.⁵³

Some may argue that *Morris*'s creation of a cause of action for breach of fiduciary duty is enough to satisfy the jurisprudential privilege gap, and that a codified physician-patient privilege is not needed. However, this case does not mention a testimonial or communication privilege regarding court proceedings. *Morris* actually makes privilege law more confusing: Patients can now file suit against their physicians for revealing confidential information to others in an *ex parte* setting, but patients cannot stop their physicians from testifying against them on the stand.⁵⁴ While this distinction may seem to be based on fairness, as the plaintiff can actually be present to defend himself or herself in a court proceeding and is not present in an *ex parte* meeting, this does not seem to be the

⁴⁹ *Id.* at 656.

⁵⁰ *Id.* at 656-57.

⁵¹ *Id.* at 656 (quoting *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 884 (W. Va. 1979) ("[T]he history of the common law is one of gradual judicial development and adjustment of the case law to fit the changing conditions of society.")).

⁵² *Id.* at 655-56.

⁵³ *Id.* at 653. The opinion does cite certain times when the welfare of the public outweighs the patient's need for confidentiality: when diseases are required to be reported by the board of health (W. Va. Code § 16-2-1); when child abuse or neglect is involved (§ 49-6A-2); when a gunshot wound, knife wound, or other wound occurs that appears to come from criminal behavior (§ 61-2-27); and when abortion is performed on an unemancipated minor (§ 16-2F-6). *Id.* at 655; *see also infra* Part V.

⁵⁴ *See supra* text accompanying notes 48-49.

reasoning on which the court relies. Rather, the court is concerned that a patient's right to confidentiality will be violated when a physician wrongfully discloses.⁵⁵

C. State ex rel. Allen v. Bedell: *Justice Cleckley Checks the Court*

Justice Franklin Cleckley attempted to put an end to the confusion and quash indications that West Virginia indeed had a physician-patient privilege in his 1994 concurrence in *State ex rel. Allen v. Bedell*.⁵⁶ The case involved a defendant charged with causing death by operating a motor vehicle while under the influence of alcohol.⁵⁷ The defendant, William Allen, was also injured and paramedics took him to the emergency room, where a nurse tested his blood alcohol content (B.A.C.) level and found it to be 0.14%.⁵⁸ About an hour and a half later, when the defendant had been arrested, a state policeman measured his B.A.C., and it was 0.06%.⁵⁹

Allen argued that West Virginia Code § 57-5-4d⁶⁰ applied to his case, and that the first B.A.C. level should not be revealed without his consent.⁶¹ The majority, though it disagreed with Allen's argument and held that § 57-5-4d does not limit the medical records subpoena power of the courts, added to the confusion regarding the physician-patient privilege by offering the proper analysis if the privilege were recognized in West Virginia.⁶² After reiterating the *Mohr* statement that West Virginia has no statutory scheme or judicially recognized privilege, the court claimed that even in those jurisdictions where the privilege is recognized, "only confidential disclosures by the patient have been protected . . . thus permitting [the] introduction of routine blood tests."⁶³ In his concurrence, Justice Cleckley took issue with the majority opinion and claimed that such statements have led to a "mass of legal confusion" in the West Virginia court system.⁶⁴

Justice Cleckley began his concurrence by admonishing the majority and previous opinions for discussing the physician-patient privilege when one

⁵⁵ *Morris*, 446 S.E.2d at 656-57.

⁵⁶ 454 S.E.2d 77 (W. Va. 1994) (Cleckley, J., concurring).

⁵⁷ *Id.* at 78 (majority opinion).

⁵⁸ *Id.* at 78. The legal B.A.C. level in West Virginia in 1994 was 0.10%. Strat Douthat II, *Auto Deaths Down in W. Va.*, CHARLESTON DAILY MAIL, Aug. 4, 1994, at P1A.

⁵⁹ *Allen*, 454 S.E.2d at 78.

⁶⁰ This statute states, in part, that when dealing with sealed hospital records, the patient must "waive[] any privilege of confidence involved" in order for the court to order the contents opened. W. VA. CODE § 57-5-4d (2006).

⁶¹ *Allen*, 454 S.E.2d at 80.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 81 (Cleckley, J., concurring).

did not exist: “To be clear and specific, there is no physician-patient privilege in West Virginia; and unless the legislature in its wisdom sees fit to adopt the privilege, we should not create one indirectly by implication.”⁶⁵ Cleckley attempted to stifle the confusion created in *Morris* by noting the difference between a cause of action for breach of duty and an adoption of the evidentiary privilege: the former cannot preclude physicians from testifying about confidential information divulged by the patient in a court proceeding, but the latter can.⁶⁶ Cleckley’s recognition of this disparity is significant because a patient can never be sure that his or her most confidential information is protected; however, neither the legislature nor the Supreme Court has attempted to correct this disparity.

D. *Keplinger and Price: The Aftermath of Allen*

The court has not yet seen a substantial effect from Cleckley’s concurrence; in fact, two recent cases show that the mass legal confusion is still lingering. In *Keplinger v. Virginia Electric & Power Co.*, Bonnie Keplinger filed an employment discrimination action against Virginia Electric & Power Co. (VEP), claiming that the company failed to provide accommodations for an ankle injury.⁶⁷ VEP, via subpoena *duces tecum*, obtained all of Keplinger’s medical records, including those related to her mental health.⁶⁸

The court was asked to answer several certified questions, including whether an attorney can be held liable for interfering with the fiduciary relationship between a plaintiff and her health care provider, and whether the discovery rules under the state Rules of Civil Procedure allow for sufficient notice to plaintiff that her medical records are being obtained.⁶⁹

Keplinger claimed that VEP and its attorneys tortiously interfered with the fiduciary relationship between her and her physicians and psychiatrist by obtaining her records outside of a court proceeding, and, like *Morris*, based her claim on the Medical Records Act, West Virginia Code §§ 57-5-4(a) through (j).⁷⁰ The Supreme Court held that in the case at hand, a new cause of action

⁶⁵ *Id.* at 84.

⁶⁶ *Id.* at 85 n.10. “The duty of confidentiality is enforced independently of the law of evidence.” *Id.*

⁶⁷ 537 S.E.2d 632, 634 (W. Va. 2000).

⁶⁸ *Id.* at 634-35.

⁶⁹ *Id.* at 633-34.

⁷⁰ *Id.* at 635. The Medical Records Act states, in part,

[W]hen a subpoena *duces tecum* is served upon a custodian of records of any hospital . . . and such subpoena requires the production of all or any part of the records of the hospital relating to the care or treatment of a patient in such hospital, it shall be sufficient compliance therewith if the custodian . . . shall . . . file with the court clerk or the officer, body or tribunal conducting the hearing, a true and correct copy . . . of all records described in such subpoena.

was not appropriate, and it declined to extend *Morris* to cases involving access to medical records in this context.⁷¹ Justice Davis left room, however, for a remedy for future violations of the West Virginia Medical Records Act, stating, "The question of what remedy is appropriate for a violation of [the Act] is better left for another day. . . . [I]n the future there should be no lack of clarity in the law and a party would violate the terms and duties of these statutes at their peril."⁷² Additionally, the court's concern for patient privacy survives as Justice Davis finds that "[a]lthough there is no physician-patient privilege in West Virginia, our Legislature has nevertheless acknowledged the special confidential nature of certain medical records"⁷³ and hints that "at some point, we may deem it appropriate to further extend our holding in *Morris*."⁷⁴

The court also upheld its commitment to protecting patient privacy by stating that the patient should have sufficient notice that her records will be obtained. Because of their confidential nature, the court stated, "[medical records] should be subject to special consideration to assure that, in the process of discovery, there will be no unnecessary disclosure of medical information that is outside the scope of the litigation."⁷⁵ While *Keplinger* did not deal with direct communication between the physician and patient, it shows the court's continuing desire to preserve a patient's privacy. Though the court did not extend the *Morris* rationale to medical records in this particular case, it appears from Justice Davis's dictum that there could be room for a remedy for interfering with the fiduciary relationship between physician and health care provider when medical records are at issue.

Finally, Justice Starcher's dissent in the most recent West Virginia Supreme Court case dealing with the physician-patient relationship adds a final layer of confusion.⁷⁶ In *Price v. Charleston Area Medical Center*, Eccelle Price sued for failure to diagnose his appendicitis, which resulted in permanent injury.⁷⁷ Though the main issue in the case dealt with peremptory challenge, Justice Starcher, in his dissent, felt that the majority failed to discuss other impor-

W. VA. CODE § 57-5-4(b) (2007).

⁷¹ *Keplinger*, 537 S.E.2d at 641.

⁷² *Id.* at 641 n.12.

⁷³ *Id.* at 644.

⁷⁴ *Id.* at 641.

⁷⁵ *Id.* at 644. Much of the *Keplinger* opinion analyzed the case in terms of Rules 34 and 45 of the West Virginia Rules of Civil Procedure. West Virginia Rule of Civil Procedure 34, a discovery rule regarding production of documents, allows for the use of Rule 45, which governs issuance of subpoenas, to compel a non-party to produce documents or be inspected. W. VA. R. CIV. P. 34, 45. The court stated that Rule 45 should only be used as permitted by Rule 34, and only for matters that are relevant to the subject matter of the case. *Keplinger*, 537 S.E.2d at 641-47. Here, the court states that its interpretation of the Medical Records Act "in no way limits the State's subpoena power or creates a physician/patient privilege." *Id.* at 640 n.11.

⁷⁶ *Price v. Charleston Area Med. Ctr.*, 619 S.E.2d 176 (W. Va. 2005).

⁷⁷ *Id.* at 180.

tant errors by the trial court.⁷⁸ Justice Starcher was particularly troubled by Charleston Area Medical Center's (CAMC) use of personal information obtained through *ex parte* communications, as representatives from CAMC spoke with Price's treating physician years before trial about alcoholism, an unrelated problem, and had the physician peruse these medical records with CAMC's counsel.⁷⁹ The physician then testified as an expert witness for CAMC.⁸⁰

Justice Starcher, calling the actions of CAMC's counsel "so outrageous as to shock the conscience," recommended holding CAMC's "feet to the fire" to prevent these "violations of the physician-patient privilege."⁸¹ Looking back to Cleckley's *Bedell* concurrence some 11 years before *Price*, one must ask, has the mass legal confusion surrounding the physician-patient relationship been resolved? Do attorneys and trial courts have clear guidance as to what communications may be submitted into evidence and what may not? More importantly, do West Virginia citizens know what is protected and what is not when they communicate with their physician? The case law in West Virginia has shown that the answer to these questions is a resounding, "No."⁸²

III. PRIVACY, HIPPOCRATES, AND RURAL MEDICINE: WHY THE PRIVILEGE SHOULD BE ADOPTED IN WEST VIRGINIA

The most efficient way to resolve this uncertainty, and to further the privacy the court seems to respect, is for West Virginia to adopt, through statute or court rule, an explicit physician-patient privilege. Doing so will stifle the confusion of attorneys and lower courts, and it will also put the state in accord with the federal and state protection of privacy interests, the regulations of the medical profession, and the nature of rural medicine in the state.

A. *Protection of Privacy Interests*

Former West Virginia Supreme Court Justice Franklin Cleckley expressed his views on privacy and privilege when he advocated the adoption of a psychotherapist-patient privilege in 1990.⁸³ Cleckley stated that such a privilege was necessary to protect a patient's right of privacy and to protect society's in-

⁷⁸ *Id.* at 186 (Starcher, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* It is important to note that in *King*, *Morris*, and *Price*, Justice Starcher, whether in the capacity of a circuit court judge or Supreme Court Justice, seems to indicate that such a privilege implicitly exists in the state's jurisprudence. Similarly, Justice Davis, in *Keplinger*, inserts dictum that arguably leaves room for the adoption of such a privilege. *Keplinger v. Virginia Electric and Power Co.*, 537 S.E.2d 632, 641 n.12 (W. Va. 2000).

⁸² Because of this legal uncertainty, this would be a good issue for the West Virginia Law Institute to discuss.

⁸³ Cleckley, *supra* note 10.

terest in effective psychotherapy.⁸⁴ He stated that the privacy interests that may stem from such a relationship are “just as deserving of legal protection as the other privacy interests which are already protected by West Virginia and federal law.”⁸⁵ (The state legislature passed a law in 1977 that appears to have created a cause of action for violation of confidentiality between a psychiatrist and his or her patient;⁸⁶ however, it is not clear whether these communications are excludable in a court proceeding.⁸⁷) This Note proposes that since the publication of Cleckley’s article almost two decades ago, these same privacy interests have been implicated in the physician-patient relationship and, because of the growing attention to privacy interests on the federal and state level, are just as deserving of protection today.

1. Federal Privacy Interests

The U.S. Supreme Court recognized a general right to privacy in its landmark cases *Griswold v. Connecticut* and *Roe v. Wade*.⁸⁸ In *Griswold*, Justice Douglas, after professing that the Constitution provides for a “zone of privacy,” states that the right to privacy is “older than the Bill of Rights—older than our political parties, older than our school system.”⁸⁹ The Court reaffirms this notion in *Roe*, stating that “[though] the Constitution does not explicitly mention any right of privacy[,] . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”⁹⁰

Along these lines, the Court has also hinted at a right to privacy regarding health care. In *Whalen v. Roe*, the Supreme Court upheld a New York statute that required doctors to report names of patients prescribed a certain narcotic, but suggested in dicta that the patient may have a constitutional right to preserve confidentiality regarding medical treatment.⁹¹ The Court identified

⁸⁴ Cleckley, *supra* note 10, at 46.

⁸⁵ Cleckley, *supra* note 10, at 47.

⁸⁶ W. VA. CODE § 27-3-1 (2007). *See also* Allen v. Smith, 368 S.E.2d 924, Syl. Pt. 1 (W. Va. 1988) (holding that this chapter creates a private cause of action).

⁸⁷ The language of W. Va. Code § 27-3-1(a) begins by stating, “Communications and information obtained in the course of treatment or evaluation of any client or patient are confidential information”; however, it also provides situations in which the communications could be disclosed. W. VA. CODE § 27-3-1(b). While this language does not expressly create a privilege, the U.S. Supreme Court and other scholars have tagged it as such. *See, e.g.*, Jaffee v. Redmond, 518 U.S. 1, 13 n.11 (1996); Reis & Ruebner, *supra* note 12, at 562 n.422. *See also supra* note 4. *But see* State v. Simmons, 309 S.E.2d 89, 96 (W. Va. 1983) (declaring that this statute does not create a privilege).

⁸⁸ *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁹ *Griswold*, 381 U.S. at 484, 486.

⁹⁰ *Roe*, 410 U.S. at 152.

⁹¹ 429 U.S. 589, 599-600 (1977).

“the individual interest in avoiding disclosure of personal matters.”⁹² The Second Circuit has gone so far as to say “the right to confidentiality includes the right to protection regarding . . . one’s health”⁹³ and other federal courts have expressed similar notions.⁹⁴

The enactment of the Health Insurance Portability and Accountability Act (HIPAA) is perhaps the most poignant signal that the federal government has moved toward protecting the privacy of patients.⁹⁵ However, the Privacy Rule in HIPAA⁹⁶ is only a “framework for protection” that must be “strengthened by additional necessary state and federal action in the health privacy area.”⁹⁷ The federal court system has responded to HIPAA with an increased respect for patient privacy as well. For example, in *National Abortion Federation v. Ashcroft*, the United States District Court for the Northern District of Illinois would not allow a subpoena of a physician’s abortion records that had already been cleared of patient identification information, emphasizing the “importance of privacy of medical records” under HIPAA.⁹⁸

Some may argue that since HIPAA was enacted, states do not need a codified physician-patient privilege. The opposite is true. HIPAA actually implicitly and explicitly urges states to adopt privacy protections. First, the U.S. Department of Health and Human Services (HHS), under authority given by HIPAA, released new modifications to the Privacy Rule in 2002 under the Bush Administration.⁹⁹ These modifications weakened certain privacy protections intended in the enactment of HIPAA. For example, under the 2002 modification, there is no requirement for mandatory consent for disclosures of health care information given in the course of treatment or for payment or other health

⁹² *Id.* at 599.

⁹³ *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994).

⁹⁴ *See, e.g., In re Search Warrant (Sealed)*, 810 F.2d 67, 71-72 (3d Cir. 1987) (holding that patients have a constitutional privacy interest under the Constitution when it comes to medical records, but this right is not absolute and must be balanced against the interest of the state); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1041-44 (E.D.N.Y. 1976), *aff’d*, 556 F.2d 556 (2d Cir. 1977) (suggesting in dicta that some aspects of the physician-patient relationship are so private that a certain type of medical privilege may be compelled by the Constitution). *But cf. Gilbert v. Med. Econ. Co.*, 665 F.2d 305 (10th Cir. 1981) (holding that, regarding an article revealing failures in the medical profession, the First Amendment freedom of the press trumps the right to privacy when the information is a matter of legitimate public concern). *See also*, RESTATEMENT (SECOND) OF TORTS, § 652C: INVASION OF PRIVACY.

⁹⁵ Pub. L. No. 104-191, 110 Stat. 1936 (1996).

⁹⁶ HIPAA § 164.512(e), 45 C.F.R. § 164.512(e) (2002).

⁹⁷ *Reis & Ruebner, supra* note 12, at 511. Although HIPAA was meant to protect patients’ confidential information, it does not create a state law evidentiary privilege.

⁹⁸ 2004 WL 292079 (N.D. Ill. Feb. 6, 2004).

⁹⁹ 45 C.F.R. §§ 160, 164 (2002).

care operations.¹⁰⁰ Such gaps in privacy protection, and the potential for such modifications to be made with each administration, leaves the responsibility to the states to maintain protection of its citizens.

Second, HIPAA has clear language that defers to state health care privacy protections that are more stringent than its protections. Section 264(c)(2) of the Act states that HIPAA provisions cannot supersede a contrary state law if the state law requirements or standards are more stringent than those imposed under HIPAA.¹⁰¹ Ostensibly, the scheme adopted by HIPAA is a "privacy protective scheme whereby 'more stringent' state laws are an integral part of the federal government's medical privacy policy."¹⁰² The physician-patient privilege then provides the last step in a move toward patient privacy that was initiated by the federal court system and must be completed by that of the states.

2. State Privacy Interests

Former Justice Cleckley stated that "[p]rivacy is not a penumbral emanation of the Constitution[;] it is the very ground of constitutional government."¹⁰³ Many states have individually moved to protect privacy, especially in the medical context. This move is evident in *Barber v. Time, Inc.*, in which Time, Inc., published an article about a woman's illness, along with her picture, without her consent.¹⁰⁴ The Missouri Supreme Court held that Time, Inc., was liable, stating that, "if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital . . . without personal publicity."¹⁰⁵ Likewise, the New York Court of Appeals affirmed an order for damages against a book company that published case histories and information

¹⁰⁰ Reis & Ruebner, *supra* note 12, at 515-16 (citing HEALTH & PRIVACY PROJECT, INST. FOR HEALTH CARE RESEARCH & POLICY: SUMMARY OF HIPAA PRIVACY RULE, at 18 (2002), available at http://www.healthprivacy.org/usr_doc/RegSummary2002.pdf).

¹⁰¹ HIPAA § 264(c)(2), 110 Stat. at 2033-34 (1996), 45 C.F.R. § 160.203(b) (2002), 42 U.S.C. 1320d-2(c)(2) (2006).

¹⁰² Reis & Ruebner, *supra* note 12, at 562. Whether HIPAA preempts a state law involving disclosure of medical records or information depends on whether the HIPAA provision is "contrary to" the state law. See 45 C.F.R. § 160.203 (2002). Although preemption under HIPAA is an involved legal issue that is beyond the scope of this Note, it is important to point out that if the contrary state law "relates to the privacy of individually identifiable health information and is more stringent than [HIPAA]," then the state law is not preempted. 45 C.F.R. § 160.203(b). See also Ted Agniel, Mary L. Reitz, Reiad M. Khouri, & Wendy D. Kasten, *Ex Parte Communications with Treating Health Care Providers: Does HIPAA Change Missouri Law?* 63 J. MO. B. 296 (Nov./Dec. 2007); Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1105-18 (2006) (recognizing the split in authority regarding whether an implied state law waiver of the physician-patient privilege for filing a medical malpractice action is preempted by the HIPAA Privacy Rule).

¹⁰³ Cleckley, *supra* note 10, at 46.

¹⁰⁴ 159 S.W.2d 291, 292 (Mo. 1942).

¹⁰⁵ *Id.* at 295.

that a woman relayed to her psychiatrist.¹⁰⁶ The lower court found that the plaintiff had a cause action because of “the expanding recognition of invasion of privacy actions . . . and in view of the confidentiality accorded the physician-patient relationship.”¹⁰⁷

Similarly, the West Virginia Supreme Court has repeatedly suggested that a patient’s communications should be protected from disclosure.¹⁰⁸ For example, in *Kitzmilller*, the court stated that even though there is no codified privilege, this does not obliterate the confidential protections afforded to patients.¹⁰⁹ The court fashioned a fiduciary relationship unique to physicians and patients: “Information is entrusted to the doctor in the expectation of confidentiality and the doctor has a fiduciary obligation in that regard.”¹¹⁰ The court compared the duty of a physician to that of a trustee, with confidences not to be divulged unless “imperatively required” by state law.¹¹¹

In response to *Kitzmilller*, the West Virginia Supreme Court created a cause of action for breach of fiduciary duty when physicians reveal confidential information about a patient without the patient’s consent in *Morris v. Consolidation Coal Co.*¹¹² In short, West Virginia, like other states, has moved toward a more protective stance when it comes to protecting patient confidentiality. As Cleckley proclaimed eighteen years ago, “Certain avenues of privacy . . . require special protections, and those protections must come in the form of privileges.”¹¹³ Because states, including West Virginia, have become more protective of privacy, creating a privilege to preserve that protection makes sense. Indeed, Cleckley notes that many courts have held that a psychotherapist-patient privilege “falls within the zone of privacy” that the Constitution protects.¹¹⁴ Why can’t the physician-patient privilege do the same?

B. *Regulations in the Medical Profession*

The medical profession has set out certain standards to protect the privacy and confidentiality of patients. These standards are more than just regulations for a certain profession; “they also grant the public, specifically a patient seeking a physician’s help, an *affirmative right* to rely on his physician to faithfully execute those ethical obligations.”¹¹⁵ The medical code of ethics is split

¹⁰⁶ Doe v. Roe, 33 N.Y.2d 902 (N.Y. Ct. App. 1973).

¹⁰⁷ Doe v. Roe, 345 N.Y.S.2d 560, 562 (S. Ct. N.Y. 1973).

¹⁰⁸ See *supra* Part II.B.

¹⁰⁹ State *ex rel.* Kitzmilller v. Henning, 437 S.E.2d 452 (W. Va. 1993).

¹¹⁰ *Id.* at 454.

¹¹¹ *Id.*

¹¹² 446 S.E.2d 648 (1994). See also *supra* Part II.

¹¹³ Cleckley, *supra* note 10, at 46.

¹¹⁴ Cleckley, *supra* note 10, at 48..

¹¹⁵ Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 959 (Ill. App. Ct. 1986) (original emphasis).

into three prongs: (1) the Hippocratic Oath; (2) The American Medical Association (AMA) Principles of Medical Ethics; and (3) The Current Opinions of the Judicial Council of the AMA.¹¹⁶

First, the Hippocratic Oath, conceived in the Fifth Century B.C., shows the deeply rooted history of protecting patient confidentiality: "Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret."¹¹⁷ The AMA Judicial Council has called the Oath a "living statement of ideals," surviving hundreds of years.¹¹⁸

Second, the AMA Principles of Medical Ethics, adopted in 1977, serve to supplement the Hippocratic Oath by stating, "A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law."¹¹⁹

Finally, The Current Opinions of the Judicial Council show how the AMA believes physicians should conduct themselves professionally. For example, the opinions state that information revealed to the physician is confidential "to the greatest possible degree," and "[t]he physician should not reveal confidential communications or information without the *express consent of the patient*."¹²⁰ This too shows that the AMA views confidentiality as integral to the physician-patient relationship.

Physicians may argue, when forced to disclose information revealed by their patients, that any one of these three regulations will preclude disclosure. However, physicians must take notice that oftentimes these regulations contain a phrase that gives deference to the law. For example, Canon 5.05 of the American Medical Association Current Opinions states that information revealed to a physician is "confidential to the greatest possible degree," and "[t]he physician should not" disclose unless the patient waives the privilege, or "unless required to do so by law."¹²¹ This disclaimer is a strong indication that, although the medical profession upholds these ideals, the legal sphere can trump them. While physicians may believe that they are exempt from revealing confidential information in a court proceeding because of their own ethical principles, clearly they are not.

¹¹⁶ *Id.* at 957.

¹¹⁷ *Id.* at 957-58 (quoting HIPPOCRATES, *supra* note *).

¹¹⁸ *Id.* at 958.

¹¹⁹ *Id.* AMA CODE OF ETHICS, PRINCIPLE IV, available at <http://www.ama-assn.org/ama/pub/category/2512.html>.

¹²⁰ *Id.* (quoting AMA, COUNCIL FOR ETHICAL AND JUDICIAL AFFAIRS: CURRENT OPINIONS § 5.05 (1989)).

¹²¹ Robert A. Wade, *The Ohio Physician-Patient Privilege: Modified, Revised, and Defined*, 49 OHIO ST. L.J. 1147, 1167 (1989) (quoting AMA, COUNCIL FOR ETHICAL AND JUDICIAL AFFAIRS: CURRENT OPINIONS § 5.05 (1984)).

C. *The Nature of Rural Medicine*

The United States Supreme Court, and, to a certain extent the West Virginia Legislature, have recognized the importance of protecting communications between psychiatrist/psychotherapists and patients because of the intimate nature of such a relationship.¹²² However, because of the nature of health care in West Virginia, the same communications must be fostered between the patient and general physician. In a rural setting, the line between psychotherapy and physical evaluation is blurred, and as a result confidential communications of the patient can fall through legal cracks.

West Virginia is one of the most rural states in the nation, second only to Vermont.¹²³ Over 64% of West Virginia residents live in areas that have fewer than 2,500 occupants.¹²⁴ As a result, a majority of West Virginians live “a considerable distance” from health care services.¹²⁵ According to the Rural Assistance Center, West Virginia has 53 hospitals, 31 of which are operating in rural areas, and 63 Rural Health Clinics.¹²⁶ The geography and economy of West Virginia has made it difficult for residents to obtain the health care they need. In fact, a recent study showed that the federal government considers only three out of seventeen southern West Virginia counties to have “adequate access to primary medical services.”¹²⁷ However, medical professionals have begun to

¹²² See W. VA. CODE § 27-3-1 (2006) and discussion *supra* note 87. The U.S. Supreme Court adopted a psychiatrist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996), but explicitly rejected a physician-patient privilege. Justice Stevens, writing for the majority, stated that if a psychotherapist-patient privilege were rejected, “confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.” The Court also felt that rejection of the general physician privilege is warranted because, while other privileges are “rooted in the imperative need for confidence and trust,” treatment by a physician can be conducted simply with “a physical exam and objective information provided by the patient.” *Id.* at 10-12. The following section shows that these reasons are not sufficient to reject a state privilege in West Virginia.

¹²³ West Virginia Department of Health and Human Resources, West Virginia Healthy People 2010: West Virginia—Specific Focus Area: End of Life (May 2001), available at <http://www.wvdhhr.org/bph/hp2010/objective/29.htm> (last visited Feb. 10, 2008).

¹²⁴ John D. Meyer et al., *The West Virginia Occupational Safety and Health Initiative Practicum*, 16 AM. J. OF PREVENTATIVE MED. 347 (May 1999), available at <http://www.sciencedirect.com/science> (follow “Browse” hyperlink; follow “American Journal of Preventative Medicine” hyperlink; then follow “Volume 16” hyperlink).

¹²⁵ West Virginia Department of Health and Human Resources, *supra* note 123.

¹²⁶ Rural Assistance Center, <http://www.raconline.org/states/westvirginia.php> (last visited Feb. 6, 2008).

¹²⁷ Juliet A. Terry, *Country Roads, West Virginia Hills Hinder Care for Some*, STATE JOURNAL, (Oct. 13, 2005), available at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=5827>.

establish free clinics and rural health care facilities to reach those who are unable to obtain effective health care.¹²⁸

Because of this limited access to specialized medical care, many residents of rural communities visit the nearest general physician for a variety of ailments. Dr. Alvin Moss, Director of the Center for Health Ethics and Law at West Virginia University, stated that in a rural health care system such as West Virginia's, patients will visit their general physicians when they are simply feeling bad, whether the problem is psychological or physical.¹²⁹ Most patients "will come in for stress-related purposes, and many of them will have psychosomatic symptoms."¹³⁰

Additionally, rural physicians not only provide objective diagnosis and treatment, but the vast majority of their work revolves around the subjectivity of the patient. In fact, Dr. Moss claimed that when a patient comes for an examination, "we have access to their sexual history, their psychiatric history, and more. We are privy to intimate details about a patient's background."¹³¹ This access to information and opportunity for divulgence of private information seems similar to what former Justice Cleckley urged the legislature to protect in psychiatrist-patient relationships: "It would be too much to expect [patients] to [undergo treatment] if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from the witness stand."¹³²

Courts in other rural areas have echoed similar notions; for example, Justice Sears of the Georgia Supreme Court believed the line is certainly blurred between physician and psychiatrist. In his concurrence in *Wiles v. Wiles*, a case involving the construction of a psychiatrist-patient privilege, he noted that in rural areas, some physicians cannot afford to practice only psychiatry, and many physicians will treat mental conditions of their patients.¹³³ "When people experience psychological traumas in their lives, the first medical provider to whom many will turn is their personal physician, with whom they have a relationship of trust and confidence."¹³⁴

Justice Sears notes that oftentimes obstetrics/gynecology physicians will treat new mothers with postpartum depression, and internists do the same for drug- or alcohol-addicted patients.¹³⁵ He hints that, regardless of the specialty,

¹²⁸ Id.

¹²⁹ Telephone Interview, Dr. Alvin Moss, Professor of Medicine at West Virginia University School of Medicine and Director of the West Virginia University Center for Health Ethics and Law (Jan. 5, 2007). Dr. Moss earned his medical degree from the University of Pennsylvania, and is currently a professor at the WVU School of Medicine.

¹³⁰ Id.

¹³¹ Id.

¹³² Cleckley, *supra* note 10, at 49.

¹³³ 264 Ga. 594, 598-99 (1994) (Sears, J., concurring).

¹³⁴ Id. at 598.

¹³⁵ Id. at 599.

many physicians will be a confidant and healer for their patients, whether they have mental or physical ailments, or both.¹³⁶ Therefore, because the distinction between psychiatry and general medicine is blurred in rural communities, the general physician-patient privilege is of utmost importance.

D. Antiquated Arguments: A Second Look at Age-Old Opinions

The West Virginia Supreme Court has not explicitly rejected the physician-patient privilege, but scholars of West Virginia law have similarly argued that one is not necessary. In his 1994 concurrence in *State ex rel. Allen v. Bedell*, Justice Cleckley argued that a physician-patient privilege is futile for West Virginia for three reasons: the privilege is significantly limited by its exceptions, patients have a “natural incentive” to disclose all relevant information to a doctor anyway, and physicians could use the privilege to block attempts to counter dishonest or fraudulent claims.¹³⁷ However, these reasons are not as compelling today as they were in 1994.

First, Justice Cleckley states that though the majority of other jurisdictions have adopted the privilege,¹³⁸ they have also adopted several exceptions, to the point that the privilege is “significantly limited.”¹³⁹ Justice Cleckley was correct in noting that states adopting such a privilege have also adopted exceptions;¹⁴⁰ however, other privileges in West Virginia have many exceptions already. For example, the attorney-client privilege has an exception for those communications given in pursuance of crimes or frauds,¹⁴¹ the journalist privilege has an exception for a case in which the journalist is the only person with available and relevant information,¹⁴² and the statute protecting psychiatrist-patient communication has several exceptions, ranging from the existence of “clear and substantial danger” to sharing of information for internal review purposes.¹⁴³

These statutes and exceptions show that while the legal system is concerned with respecting these fiduciary relationships and constitutional protections, “relevant information . . . may still be used for the purposes of litigation under a wide variety of circumstances.”¹⁴⁴ If these privileges can contain excep-

¹³⁶ *Id.*

¹³⁷ 454 S.E.2d 77, 84-87 (W. Va. 1994) (Cleckley, J., concurring).

¹³⁸ For a list of states that have adopted the privilege, see *supra* note 12.

¹³⁹ *Allen*, 454 S.E.2d at 86 (Cleckley, J., concurring).

¹⁴⁰ For example, Illinois has eleven statutory exceptions, including mandatory disclosure of circumstances relating to a homicide and medical malpractice actions. See 735 ILL. COMP. STAT. ANN. 5/8-802 (2006).

¹⁴¹ See, e.g., *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 583 S.E.2d 80, 95 (W. Va. 2003) (Davis, J., concurring).

¹⁴² See *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989).

¹⁴³ See W. VA. CODE § 27-3-1(b) (2006).

¹⁴⁴ Reis & Ruebner, *supra* note 12, at 559.

tions to maintain the proper balance between admitting relevant evidence and protecting privacy, the physician-patient privilege could contain such exceptions as well.

Second, Justice Cleckley argues that the physician-patient privilege was adopted in other jurisdictions "to facilitate the effective rendering of the professional service offered by a physician" and so that the physician can know all there is to know to identify and treat the ailment.¹⁴⁵ But, Cleckley argues, patients have a "natural incentive to disclose all relevant information when seeking medical treatment," so the existence of a privilege makes no difference to a patient.¹⁴⁶

This argument is not as strong in today's medical environment. With the increase of medical records stored in technological databases and the electronic sharing of files from one health care provider to another, and with the spread of sexually transmitted diseases, "[p]atients have strong disincentives to be fully open and candid with their physicians" without full privacy protection.¹⁴⁷ Many patients will either choose not to discuss certain medical conditions that may carry a social stigma, or may simply avoid seeing a physician altogether, to avoid shame or humiliation that may come from disclosure.¹⁴⁸

Finally, Justice Cleckley argues that because the privilege can also be invoked to preclude the patient from revealing information about the physician (in other words, because it can "work both ways"), physicians could use it to block disclosures that could "defeat dishonest claims or defenses."¹⁴⁹ However, other courts have read safeguards into state statutes to prevent such abuse. For example, in *State Medical Board v. Miller*, the Ohio Supreme Court established a limit to the physician-patient privilege.¹⁵⁰ The court held that a physician could not invoke the privilege to avoid a subpoena in an investigation against him and claimed that under some circumstances, "policy considerations underlying [the privilege] are outweighed by other factors."¹⁵¹ Therefore, the statutory exceptions and judicial interpretation are the legislatures' or courts' way of balancing the respect of a fiduciary relationship and privacy while still allowing pertinent evidence to be revealed in a court proceeding.

Critics of the privilege also assert that it fails to satisfy John Henry Wigmore's four-part test for evidentiary privilege. Wigmore stated that in order for a privilege to be adopted, it must meet all four of the following criteria:

¹⁴⁵ *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 86 (W. Va. 1994) (Cleckley, J., concurring).

¹⁴⁶ *Id.*

¹⁴⁷ Reis & Ruebner, *supra* note 12, at 548.

¹⁴⁸ *Id.* (citing AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 146-48 (1999)).

¹⁴⁹ *Allen*, 454 S.E.2d at 86 (Cleckley, J., concurring) (quoting Ronan E. Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 300 (1962)).

¹⁵⁰ 44 Ohio St. 3d 136 (1989).

¹⁵¹ *Id.* at 140. The court also stated that the opportunity to practice medicine is not an unqualified right, and the state has a right under its police power to regulate the practice of medicine for the benefit of its citizens. *Id.*

(1) The communications must originate in a *confidence* that they 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 *relation* must be one in which in the opinion of the community ought to be sedulously fostered; and (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.¹⁵²

Wigmore stated that the physician-patient privilege fails to meet the second and fourth criteria,¹⁵³ and only barely meets the first.¹⁵⁴ As to the first criteria, Wigmore states that “[b]arring the facts of a venereal disease and criminal abortion,” there is rarely a time when the patient “attempts to preserve any real secrecy.”¹⁵⁵ Many would agree, however, that Wigmore’s reasoning does not hold up in today’s medical climate, where sexually transmitted infections and abortions are more pervasive and less willing to be disclosed.¹⁵⁶

As to the second prong, Wigmore claims that “[p]eople would not be deterred from seeking medical help because of the possibility of disclosure in court.”¹⁵⁷ However, Cleckley, Reis, and Ruebner seem to disagree. Patients will withhold information if they understand that it may be revealed on the witness stand,¹⁵⁸ or if they fear that too many people are seeing their medical records.¹⁵⁹

¹⁵² 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 at 527 (John T. McNaughton rev. 1961).

¹⁵³ *Id.* at 528.

¹⁵⁴ *Id.* at 829.

¹⁵⁵ *Id.*

¹⁵⁶ The Center for Disease Control and Prevention stated in a 2005 report that 19 million new sexually transmitted infections occur each year. The number of chlamydia cases reported increased 5.1% from 2004 to 2005, and while the number of gonorrhea cases declined from 1975 to 1997, the number has increased since 1997. Similarly, the number of primary and secondary syphilis cases has increased 11.1% from 2004 to 2005. The CDC report also stated that these diseases produce dire physical and psychological effects on patients. *National Surveillance Data for Chlamydia, Gonorrhea, and Syphilis: TRENDS IN REPORTABLE SEXUALLY TRANSMITTED DISEASES IN THE UNITED STATES, 2005*, available at <http://cdc.gov/std/stats/pdf/trends2006.pdf>. In 2005, West Virginia saw 2,944 new cases of chlamydia, 770 new cases of gonorrhea, 18 new cases of syphilis, 49 new HIV cases, and 74 new AIDS cases. The Kaiser Foundation, <http://www.statehealthfacts.org> (click on WV; follow “health status” hyperlink; then follow “Chlamydia Cases”) (last visited Feb. 6, 2008).

¹⁵⁷ *Id.*

¹⁵⁸ Cleckley, *supra* note 10, at 49. Although Cleckley was here speaking about only the psychiatrist-patient privilege, see *supra* Part III.C for reasons why in West Virginia, the line between psychiatrist and general physician is blurred.

¹⁵⁹ Reis & Ruebner, *supra* note 12, at 522.

Wigmore concedes that the third requirement is met (“that the relationship of physician and patient should be fostered, no one will deny”); however, the fourth requirement also poses a problem because, he claims, patients are hardly ever injured by disclosure of their ailments.¹⁶⁰ “From asthma to broken ribs, . . . the facts of the disease are not only disclosable without shame, but are in fact publicly known and knowable by everyone.”¹⁶¹ While this may have been the case when Wigmore’s treatise was published in 1961, in a post-*Griswold*, post-*Roe*, and post-HIPAA world, patients expect that whether they come to their doctor for an ankle sprain, postpartum depression, or an HIV test, their communications will be protected.

Advocates of the privilege take issue with Wigmore’s “time-honored, traditional, and less flexible” evidentiary formula.¹⁶² Additionally, “much has changed in the last half-century.”¹⁶³ With the spread of sexually transmitted disease, the growth of easy access to patient files, and the growing importance of the right to privacy, all of Wigmore’s arguments seem to collapse, and each of the four criteria that he created can be satisfied.

IV. HOW THE PRIVILEGE CAN BE ADOPTED IN WEST VIRGINIA

Both the Federal and West Virginia Rules of Evidence state that evidentiary privilege should be “governed by the principles of common law,” but carve out other ways in which privilege may be created.¹⁶⁴ According to West Virginia Rule of Evidence 501, if a privilege did not exist at common law, it can still be created in four different ways: constitutional amendment,¹⁶⁵ from the principles in the United States or West Virginia Constitution, legislative creation of a statute, or court rule.¹⁶⁶ This Note examines how privileges have been adopted through common law, the U.S. and West Virginia Constitutions, and legislative creation. It also shows how the West Virginia Constitution gives the Supreme Court the rule-making power to create a privilege. However, as Jus-

¹⁶⁰ WIGMORE, *supra* note 152, at 830.

¹⁶¹ *Id.*

¹⁶² Reis & Ruebner, *supra* note 12, at 573.

¹⁶³ *Id.* at 574.

¹⁶⁴ FED R. EVID. 501; W. VA. R. EVID. 501.

¹⁶⁵ Because constitutional amendments are formidable and rare, discussion of this option is beyond the scope of this Note.

¹⁶⁶ W. VA. R. EVID. 501. The rule states, in full: “The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law except as modified by the Constitution of the United States or West Virginia, statute or court rule.” *Id.*

tice Cleckley recommended, creation by legislation would be the best method to adopt a privilege.¹⁶⁷

A. *Common Law Privilege: Attorney-Client*

Most of the evidentiary privileges that exist in West Virginia today have been created by statute, but the West Virginia Supreme Court has recognized an uncodified attorney-client privilege since 1882.¹⁶⁸ The attorney-client privilege is usually seen as the first common law privilege under English law.¹⁶⁹ It was based on the idea that an attorney was a gentleman and, upon his honor, could not be forced to reveal confidential information about a client.¹⁷⁰ Similarly, the West Virginia Supreme Court felt that the privilege had roots in public policy, and that a “greater mischief” would arise from allowing attorney disclosures than protecting them.¹⁷¹ Since 1882, the court has contoured the parameters of the privilege, so today it is fairly clear what is protected.¹⁷²

B. *Privileges Created through Principles of the U.S. and West Virginia Constitutions: Journalists*¹⁷³

The West Virginia Supreme Court turned to the First Amendment of the U.S. Constitution and Article 3, section 7 of the West Virginia Constitution in recognizing the journalist privilege in *State ex rel. Hudok v. Henry*.¹⁷⁴

In *Hudok*, Linda Butner was discharged from her job as magistrate clerk allegedly because she told a reporter that a warrant issued by the sheriff was

¹⁶⁷ See Cleckley, *supra* note 10, at 58. Cleckley states that privileges are “expressions of substantial public policy [and] courts should initially defer to legislative wisdom unless the legislative action is irresponsible.” *Id.*

¹⁶⁸ See *State v. Douglas*, 20 W. Va. 770 (1882).

¹⁶⁹ Cleckley, *supra* note 10, at 10.

¹⁷⁰ *Id.*

¹⁷¹ *Douglas*, 20 W. Va. at 780.

¹⁷² See, e.g., *State v. Fisher*, 27 S.E.2d 581 (W. Va. 1943) (holding that the identity of the client cannot be withheld); *Moats v. Rymer*, 18 W. Va. 642 (1881) (holding that a fee arrangement between attorney and client can be disclosed); *State v. Dickey*, 33 S.E. 231 (W. Va. 1899) (holding that an attorney’s revealing of information in the presence of the client, when the client may not feel he or she can object, can be protected); and *Thomas v. Jones*, 141 S.E. 434 (1928) (holding that when a client approaches two attorneys about the same issue, the privilege can attach to both attorneys). *But cf.* *Kirchner v. Smith*, 58 S.E. 614 (1907) (holding that when two clients approach the same attorney about a contract, the privilege does not apply if litigation arises involving the two parties to the contract).

¹⁷³ This privilege is primarily applicable to civil litigation. See *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989). One could argue, however, that if the inquiry is only marginally relevant and there are other, less intrusive means of receiving the information, that a court may invoke the privilege in a criminal case as well.

¹⁷⁴ 389 S.E.2d 188 (W. Va. 1989).

sloppy and was only issued so that the sheriff would divert attention from himself.¹⁷⁵ *The Martinsburg Evening* published two stories revealing these statements, one under Ron Hudok's byline.¹⁷⁶ At Butner's administrative hearing protesting her firing, Hudok declined to answer certain questions regarding his communications with Butner, claiming a First Amendment privilege, but the circuit judge held him in contempt.¹⁷⁷ The Supreme Court granted a writ of prohibition, holding that the protection of sources, especially when anonymity is the only way a source will give information, is tantamount to the court's need for information;¹⁷⁸ additionally, the court pointed out that the "news-gathering function" would be impeded if reporters could be freely subpoenaed.¹⁷⁹

The court recognized that, although the journalist privilege was not part of common law tradition,

[t]o protect the important public interest of reporters in their news-gathering functions under the First Amendment to the United States Constitution, disclosure of a reporter's confidential sources or news-gathering materials may not be compelled except upon a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.¹⁸⁰

Therefore, through Rule 501 the court could turn to guiding constitutional principles to create evidentiary privilege, albeit on a case-by-case basis.

¹⁷⁵ *Id.* at 189. The sheriff had obviously been portrayed in a negative light; however, the case does not explain how. Apparently the journalists would not disclose the reason either.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* The court also looked to W. Va. Const. art. III, § 7, which preserves freedom of the press. *Id.*

¹⁷⁸ It should be noted that the privilege recognized in this case extends also to protecting information gathered from identified sources.

¹⁷⁹ 389 S.E.2d at 192. The court does provide exceptions, however, when the reporter is "the only individual with credible evidence that bears upon an important issue in civil litigation." *Id.* at 193. Still, the court must have a "clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *Id.* at 188.

¹⁸⁰ *Id.* at 188, Syl. Pt. 1.

C. *Legislative Creation of Privilege*¹⁸¹: *Spouse, Clergy, and Psychotherapist Protection*¹⁸²

The privileges now afforded to spouses in West Virginia were actually present at common law in some form, but the legislature also codified the privilege.¹⁸³ The legislature then adjusted the parameters of the privilege, as the court did for the attorney-client privilege, by creating subsequent statutes for separate testimonial and communication privileges.¹⁸⁴ In later court interpretations of the spousal privilege statutes, it becomes clear that the legislature codified this privilege to protect marital harmony and to allow spouses to speak freely with each other without the fear of the communication being revealed in a court proceeding.

For example, in *State v. Robinson*, the court saw that the purpose of the marital privilege was to “insure subjectively the free and unrestrained secrecy of communication” in the marriage.¹⁸⁵ More importantly, it protects the “continued tranquility, integrity and confidence” of the relationship such that communications would be “protected by the inviolate veil of the marital sanctuary.”¹⁸⁶ Other cases in West Virginia have interpreted the testimonial privilege to only survive if the couple is still married, but communications are protected even after the marriage is over.¹⁸⁷

¹⁸¹ See *State v. Evans*, 287 S.E.2d 922, 924 (W. Va. 1982) (“Should ‘reason and experience’ dictate a change in [a] statute, it is up to our legislature to draft and pass appropriate modifications”) (quoting FED. R. EVID. 501).

¹⁸² One other class of professionals has some privacy protection. W. VA. CODE § 30-30-12 (2006) protects communication between social workers and clients, but it does not necessarily create a true privilege. The statute states that no licensed social worker may disclose confidential information acquired from persons consulting him/her in his/her professional capacity, subject to certain exceptions: with written consent, when communication is in furtherance of a crime or harmful act, when person consulting him/her waives by initiating formal charges, when person consulting him/her is a minor and has been the victim of a crime, and where otherwise required by law. *Id.*

¹⁸³ When first codified, the privilege appeared as W. VA. CODE ch. 130 § 23(5) (1868) (“A husband shall not be examined for or against his wife, nor a wife for or against her husband, except in an action or suit between husband and wife.”).

¹⁸⁴ See W. VA. CODE § 57-3-3 (2006) (states that both spouses are holders of the testimonial privilege in a criminal case, meaning that either one may refuse to testify or prevent the other from testifying) and § 57-3-4 (states that communications between husband and wife during the marriage are protected, even after the marriage ends).

¹⁸⁵ 376 S.E.2d 606, 608 (W. Va. 1988).

¹⁸⁶ *Id.* at 609 (quoting *Menefee v. Commonwealth*, 55 S.E.2d 9, 15 (Va. 1949)).

¹⁸⁷ See *State v. Evans (Evans I)*, 287 S.E.2d 922 (W. Va. 1982) (defendant’s second-degree murder conviction reversed because of error in allowing defendant’s wife to testify) and *State v. Evans (Evans II)*, 310 S.E.2d 877 (W. Va. 1983) (court did not utilize the testimonial privilege because the defendant and his wife were no longer married at the time of the appeal).

The legislature enacted a clergy-penitent privilege in 1990, although case law is lacking.¹⁸⁸ The rationale behind such a privilege “seems to be the demands of religious liberty, the need for individuals to be able to disclose ‘sinful’ acts to a spiritual counselor, and the desire to avoid confrontation with clergy who refuse to divulge communications they feel ethically and religiously obligated to keep secret.”¹⁸⁹ The statute in West Virginia serves to protect the relationship between a clergyperson and a confessor by making the former a “secure depository” for the confidences of the latter.¹⁹⁰ The court states that this privilege’s construction should exhibit the public policy of “encourag[ing] uninhibited communication between persons standing in a relation of confidence and trust.”¹⁹¹ The court sees the creation of this statute as a result of legislative concern for protection of confidential communications, and emphasizes that a clergyperson should have a trustee-like role.

Under Chapter 27 of the West Virginia Code (“Mentally Ill Persons”), the legislature adopted a law that protects communications and information learned during psychiatric treatment or evaluation and includes “all diagnoses or opinions formed regarding a client’s or patient’s physical, mental or emotional condition.”¹⁹² The policy behind protecting confidences of a patient seeking mental evaluation or treatment is “to enhance communications and effective

¹⁸⁸ See W. VA. CODE § 57-3-9 (2006), which states, in part,

No priest, nun, rabbi, . . . or member of the clergy authorized to celebrate the rites of marriage in this state . . . shall be compelled to testify in any criminal or grand jury proceedings or in any domestic relations action in any court in this state: (1) with respect to any confession or communication, made to such person, in his or her professional capacity . . . or (2) with respect to any communication made to such person . . . by either spouse, in connection with any effort to reconcile estranged spouses.

As with the attorney-client, physician-patient, and spousal privileges, the Acts of 1863 created such privileges in justice of the peace courts, but these privileges were repealed by the Acts of 1976 and codified generally for formerly named justice of the peace courts in W. VA. CODE § 50-5-5. See Acts of 1863, c. 122 § 157 (codified subsequently as W. VA. CODE c. 50 §108 (1868) and W. VA. CODE § 50-6-10 (1976) (physician-patient added)); repealed by Acts of 1976, c. 33.

¹⁸⁹ State v. Potter, 478 S.E.2d 742, 753 (W. Va. 1996) (holding that in order to constitute privileged communication under the clergyman-penitent statute, “(1) the communication must be made to a clergyman, (2) the communication may be in the form of a confidential confession or a communication, (3) the confession or communication must be made to the clergyman in his professional capacity, and (4) the communication must have been made in the course of discipline enjoined by the rules of practice of the clergyman’s denomination.”). *Id.* at 755.

¹⁹⁰ *Id.* at 754.

¹⁹¹ *Id.* at 755 (quoting People v. Shapiro, 126 N.E.2d 559, 561-62 (N.Y. 1955)).

¹⁹² See W. VA. CODE § 27-3-1 (2006). See also *supra* notes 4, 87, and 122 and accompanying text. As this Note points out, the statute does not seem to create an evidentiary privilege, but others have tagged it as such.

treatment and diagnosis” by shielding the patient from the embarrassment that can stem from divulgence of the information.¹⁹³

The statute does, however, provide for situations in which communications can be compelled. For example, one can be compelled to disclose results of an involuntary examination conducted pursuant to West Virginia Code Sections 27-5-2 through 4¹⁹⁴ or Sections 27-6A-1 through 10,¹⁹⁵ or pursuant to a court order if the court finds the relevance outweighs the importance of maintaining confidentiality. Information may also be compelled to protect against danger of imminent injury, and for treatment or internal review purposes for all those treating the patient.¹⁹⁶ Here, the legislature has set forth a balance between its concern for protecting confidences of the patient and its concern for admitting relevant evidence in a court proceeding.

D. *Court Rule: The Supreme Court's Rule-Making Power*

The U.S. Supreme Court adopted the psychiatrist-patient privilege through the “reason and experience” touchstones of Federal Rule of Evidence 501.¹⁹⁷ West Virginia Rule of Evidence 501, the counterpart to the federal rule, does not contain a “reason and experience” outlet for court-made evidentiary law; however, its language does leave room for “court rule.”¹⁹⁸ It is unclear whether “court rule” pertains to common law development on a case-by-case basis or the other powers inherent in the Supreme Court’s authority. Because the phrase “common law” is already mentioned in the state Rule of Evidence 501, however, it is likely the phrase refers to other powers bestowed upon the court.

¹⁹³ State *ex rel.* McMahon v. Hamilton, 482 S.E.2d 192, 203 (W. Va. 1996) (quoting State v. Roy, 460 S.E.2d 277 (W. Va. 1995)) (holding that the circuit court must weigh the relevance of a psychiatrist’s report with the threat to confidentiality before disclosing its contents in court).

¹⁹⁴ These statutes concern proceedings for involuntary custody, involuntary hospitalization, and commitment.

¹⁹⁵ This subsection deals with determination of competency to stand trial.

¹⁹⁶ See W. VA. CODE § 27-3-1(b)(1)-(5) (2006).

¹⁹⁷ See *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996). FED. R. EVID. 501 states, in part, that “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” (emphasis added). The Court also looked to the fact that all 50 states had adopted some form of the psychotherapist privilege, and this confirmed the appropriateness of the adoption. Additionally, the Court reiterated the importance that the participant in a confidential conversation know whether the particular conversation will be protected. *Id.* at 12, 18 (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

¹⁹⁸ W. VA. R. EVID. 501. “The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law except as modified by the Constitution of the United States or West Virginia, statute or *court rule*.” *Id.* (emphasis added).

The court has unique rule-making power, bestowed in Article VIII of the West Virginia Constitution. Article VIII, Section 3 states that the court has power "to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law,"¹⁹⁹ and Section 8 states that when such rules are adopted or promulgated, "they shall supersede all laws . . . in conflict therewith."²⁰⁰

In interpreting this statement and statutes to this effect, the West Virginia Supreme Court has held that "the exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals."²⁰¹ This power is exemplified in terms of the Rules of Evidence in *Teter v. Old Colony Co.*, a case in which a real estate broker corporation and a civil engineering firm appealed a judgment finding them liable to home purchasers for a landslide on the back of their property.²⁰² The defendants urged that West Virginia Code Sections 37-14-1 through 45²⁰³ precluded a licensed real estate appraiser from testifying under West Virginia Rule of Evidence 702.²⁰⁴

The court found that the statute was not specific enough to have that effect, but explained more fully its Article VIII, Sections 3 and 8 powers under the West Virginia Constitution.²⁰⁵ Even if the statute had been specific enough as to bar a real estate appraiser from testifying, the court states that this would be contrary to West Virginia Rule of Evidence 402, which provides that all relevant evidence is admissible, subject to the federal or state constitutions, the Rules of Evidence, or other rules adopted by the court.²⁰⁶ Pursuant to its constitutional authority, the Supreme Court has promulgated "uniform rules relating to civil and criminal procedure and evidence . . ."²⁰⁷

The court also points to other jurisdictions that have struck down statutes that were contrary to court evidentiary rules. For example, the Arizona

¹⁹⁹ W. VA. CONST. art. VIII, § 3.

²⁰⁰ W. VA. CONST. art. VIII, § 8. *See also* Bennett v. Warner, 372 S.E.2d 920, 923 (W. Va. 1988); Stern Brothers, Inc., v. McClure, 236 S.E.2d 222 (W. Va. 1977).

²⁰¹ State *ex rel.* Quelch v. Daugherty, 306 S.E.2d 233, 235 (W. Va. 1983) (citing State *ex rel.* Frieson v. Isner, 285 S.E.2d 641 (W. Va. 1981)).

²⁰² 441 S.E.2d 728, 732 (W. Va. 1994).

²⁰³ These provisions were repealed in 2001.

²⁰⁴ *Id.* at 741. Rule 702 states,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

²⁰⁵ Section 8 is commonly known as the Judicial Reorganization Amendment. *See* Stern Brothers, Inc., v. McClure, 236 S.E.2d 222, 225 (W. Va. 1977).

²⁰⁶ *Teter*, 441 S.E.2d at 741 n.21.

²⁰⁷ *Id.* at 741.

Supreme Court held that the Rules of Evidence it created were procedural in nature, and therefore it had the power to promulgate them.²⁰⁸ However, the statute in question in that case did not interfere with the Rules of Evidence; therefore, the statute was valid: “That we possess the rule-making power does not imply that we will never recognize a statutory rule.”²⁰⁹ The *Teter* Court refers to this, other cases, and West Virginia Rule of Evidence 101 to show that a statute that is “substantially contrary” to the Rules of Evidence must be declared invalid.²¹⁰

E. Putting it Together: What is the Best Way to Create the Privilege?

Former Justice Cleckley argues that legislative adoption is the best way for the state to adopt a privilege, and I agree. Privileges are important because they “embrace[] the progressive wisdom of society,” and as such, should be left to those who represent the people.²¹¹ However, the courts remain integral to the process. The courts will have a significant role in interpreting and applying the new privilege, should the legislature create one. Additionally, the inherent power of the West Virginia Supreme Court to fashion rules that deal with court procedure shows that, should the legislature fail to create a physician-patient privilege, or should it create a statute precluding such privilege, the Supreme Court may overrule it by its constitutional powers. In the same way, if the legislature should create the privilege, pursuant to West Virginia Rule of Evidence 101, the privilege would remain in effect because it would not conflict with any court-made rule or law currently in existence.²¹²

There are other ways to bring the privilege to enactment as well; for example, the West Virginia Law Institute could propose enactment to bring it to the attention of the Legislature. Also, the Supreme Court could, through its rule-making power under Article 7, Section 3 of the West Virginia Constitution, issue “rules orders” at any time and call for public comment upon proposed court rules or amendments to court rules.²¹³ The stage is now set for creation of

²⁰⁸ *Id.* at 742 (citing *State ex rel. Collins v. Seidel*, 691 P.2d 678, 681 (Ariz. 1984)).

²⁰⁹ *Id.* (citing *Collins*, 691 P.2d at 682).

²¹⁰ *Id.* at 743. *See, e.g.,* *People v. McDonald*, 505 N.W.2d 903 (Mich. App. 1993) (holding that a statutory provision about a breathalyzer test was not in conflict with court-made law, while still recognizing its constitutional power to create rules of evidence); *Amerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354 (N.M. 1976) (suggesting that the state legislature has attempted to prescribe rules of practice and procedure in the court system, but these are not binding because the power to prescribe such rules is in the hands of the state Supreme Court). *See also* W. VA. R. EVID. 101, which states that any other evidentiary rules set forth by statute will be valid “until superseded by rule or decision of the Supreme Court of Appeals.”

²¹¹ Cleckley, *supra* note 10, at 59.

²¹² *See supra* Part IV.D.

²¹³ For a list of recent rules orders, see *Recent Rules Orders of the Supreme Court of Appeals of West Virginia*, <http://www.state.wv.us/wvscs/Clerk/recentrulesorders.htm> (last visited Feb. 10, 2008).

the privilege, and to do so, the state can gather much guidance, as an overwhelming majority of the states in America have enacted the privilege.²¹⁴

V. SUGGESTIONS FOR FASHIONING A PRIVILEGE: COMMON ELEMENTS AND FORMATS

In fashioning a new privilege, several possibilities will arise. First, to what would the privilege apply? Generally, the physician-patient privilege applies not only to oral communication, but also to "information obtained from observation of the patient's appearance and symptoms, unless the facts observed would be obvious to laymen."²¹⁵ Therefore, it is important that a new statute makes this distinction.

Second, what is the general rule? Common elements of the privilege include the following: 1) the patient holds the privilege, although the court and physician may also invoke it, 2) it protects only those communications made in confidence, but if a third person is present for purposes of diagnosis, the communication is still confidential, 3) it only applies when the patient consults the physician for medical treatment or diagnosis, 4) it usually covers verbal and nonverbal communications, as well as observations, unless a lay person could have observed the same.²¹⁶ Most states, in enacting the privilege, have also followed the model of many of the Federal Rules of Evidence by beginning with a general rule and then providing enumerated exceptions.

For example, Vermont's physician-patient privilege statute states,

Unless the patient waives the privilege or unless the privilege is waived by an express provision of law, a person authorized to practice medicine . . . shall not be allowed to disclose any information acquired in attending a patient in a professional capacity, . . . and which was necessary to enable the provider to act in that capacity.²¹⁷

The first subsection is then followed by two exceptions: the privilege cannot be invoked in a proceeding that involves a crime committed against a patient under the age of sixteen, or when the previous mental or physical condition of a deceased patient is at issue, except if the information "would tend to disgrace the memory of the decedent."²¹⁸

²¹⁴ For a list of states that have enacted the privilege, see *supra* note 12.

²¹⁵ David Paul Horowitz, *Is There a Doctor in the House? The Physician-Patient Privilege May Need One!*, N.Y. ST. B.J. 15 (July/Aug. 2007); Clark, *supra* note 11, at 84 (stating that the privilege covers "information the physician gathers from test results, diagnosis, and medical advice").

²¹⁶ WEINSTEIN, FEDERAL EVIDENCE 3-514, § 514.12 [1].

²¹⁷ 12 VT. STAT. ANN. § 1612(a) (2006).

²¹⁸ 12 VT. STAT. ANN. § 1612(b)-(c) (2006).

Third, what are the common exceptions? Physician-patient privilege statutes take many forms across the country, and many provide enumerated exceptions.²¹⁹ The state courts have adjusted the contours of the privilege as well.²²⁰ For example, the Illinois Supreme Court held that *ex parte* communications between opposing counsel and a patient's physician violates the physician-patient privilege,²²¹ stating: "[W]e believe . . . that *ex parte* conferences between defense counsel and a plaintiff's treating physician jeopardize the sanctity of the physician-patient relationship and, therefore, are prohibited as against public policy."²²² Additionally, the North Carolina Supreme Court held that North Carolina General Statute Sections 8-53.1 and 7A-551 made the privilege unavailable in cases involving abuse or neglect of the child,²²³ and the Maryland legislature has a similar provision regarding abuse or neglect of elders.²²⁴

In following with the pattern of other states, then, a West Virginia statute could first provide a general provision barring disclosure of confidential communications in court proceedings. Subsequently, the statute could provide exceptions like those in most other privilege statutes in the West Virginia Code.²²⁵

Because West Virginia already has exceptions to the privilege built into its Code, some cross referencing would be advisable. For example, the Code mandates disclosure when the welfare of the public outweighs the patient's need for confidentiality: when diseases are required to be reported by the board of health,²²⁶ when child abuse or neglect is involved;²²⁷ when a gunshot wound, knife wound, or other wound occurs that appears to come from criminal behavior;²²⁸ and when abortion is performed on an unemancipated minor.²²⁹ Addi-

²¹⁹ See, e.g., OHIO REV. CODE ANN. § 2317.02 (B)(1)(a)-(e) (2006) (providing exceptions to the privilege when the patient gives consent, when a patient files a wrongful death suit, when a court-ordered physician was appointed, when a blood alcohol test is used in a criminal case, when a criminal action is in effect against a physician, or when a proceeding is instituted against an estate for undue influence or fraud on the part of the testator); *State v. Eldrenkamp*, 541 N.W.2d 877 (Iowa 1995) (interpreting Iowa Code § 622.10 and holding that three elements must exist for the privilege to be applicable: "(1) the relationship of physician-patient; (2) the acquisition of information during the relationship; and (3) the necessity and propriety of the information to enable the physician to treat the patient skillfully").

²²⁰ See, e.g., *State v. Nowlin*, 244 N.W.2d 596 (Iowa 1976) (holding that the privilege does not arise when a patient attends a court-appointed physician).

²²¹ See *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581 (1986); *Karsten v. McCray*, 157 Ill. App. 3d 1 (1987).

²²² *Petrillo*, 148 Ill. App. 3d at 588.

²²³ *State v. Efird*, 309 N.C. 802 (1983).

²²⁴ Md. Code Ann. Fam. Law § 14-302(a) (2007).

²²⁵ See e.g., *supra* notes 1-4.

²²⁶ W. VA. CODE § 16-2-1 (2006).

²²⁷ W. VA. CODE § 49-6A-2 (2006).

²²⁸ W. VA. CODE § 61-2-27 (2006).

²²⁹ W. VA. CODE § 16-2F-6 (2006); see also *supra* note 53.

tionally, the statute could indicate the times when the West Virginia Supreme Court has recognized a waiver of privilege, such as when a plaintiff brings a medical malpractice suit and the medical records bear on the issue at hand, as held in *Keplinger v. Virginia Electric and Power Co.*²³⁰ The statute may also make specific mention that *ex parte* communications that fall outside the scope of litigation are protected, as evidenced in *State ex rel. Kitzmiller v. Henning*.²³¹ Clearly West Virginia has the exceptions; now it is time to enact the rule.

VI. CONCLUSION

West Virginia does not recognize an evidentiary privilege for communications between a patient and his or her physician. This statement may come as a surprise to many residents of the state who turn to their general physicians for any physical or psychological ailment they may have and who confide in their physicians with utmost trust. Even though forty states and the District of Columbia have enacted the privilege to protect confidential communications and foster unrestrained communication in the physician's office, West Virginia has not yet done so.

The time is ripe for West Virginia to adopt the physician-patient privilege. First, over the course of seventy years the state Supreme Court has sent mixed messages to lower tribunals and attorneys about what safeguards exist to protect patient confidentiality. Adopting the privilege would cure this uncertainty and clear up what former Justice Franklin Cleckley called a "mass of legal confusion" in the state's jurisprudence.²³²

Second, since the advent of *Griswold v. Connecticut*²³³ and *Roe v. Wade*,²³⁴ nascent privacy rights have grown tremendously, and in the medical field, have culminated with the enactment of the Health Insurance Portability Accountability Act (HIPAA). Adopting the privilege would allow West Virginia to fill the gaps left by HIPAA and align state privacy protections with those of the federal government. Third, the medical profession has adopted its own standards of professional conduct that disallow any divulgence of confidential information unless required by law. Adopting the privilege would allow the legal profession to honor and mirror the medical field's commitment to maintaining patient privacy.

Finally, because West Virginia is a rural state with sparse health care facilities, residents will often turn to their general physician for physical and psychological ailments, making protection of communication even more poignant. Adopting the privilege would preserve the general physician's role of con-

²³⁰ 537 S.E.2d 632 (W. Va. 2000).

²³¹ 437 S.E.2d 452 (W. Va. 1993).

²³² *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 81 (W. Va. 1994) (Cleckley, J., concurring).

²³³ 381 U.S. 479 (1965).

²³⁴ 410 U.S. 113 (1973).

fidant, as well as that of healer. Most importantly, however, adopting the privilege will ease patient concerns about divulgence of their most private information so that patients will never feel apprehensive about seeking treatment from a West Virginia physician.

Mary Claire Johnson ***

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