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Rule 43(a) and the Communication Privileged Understate Law: An Analysis of Confusion

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RULE 43(a) AND THE COMMUNICATION PRIVILEGED UNDER STATE LAW: AN ANALYSIS OF CONFUSION

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What rules govern the admissibility of evidence in federal court? Rule 43(a) purports to provide the answer with respect to cases falling within the ambit of the Federal Rules of Civil Procedure.[1] Is the Rule working satisfactorily, or should it now be abandoned in favor of a new and different solution?

The problem thus presented is broad and pervasive.[2] A definitive answer will not be attempted in this paper. Instead, the writer proposes to give only a general discussion of the broader aspects of the Rule, and to limit analysis of the cases to a very restricted area—the meaning and application of the Rule with respect to the communication privileged under state law. Perhaps this tree approach to the forest of Rule 43(a) will sharpen analysis of the broader problem.

Rule 43(a)[3] makes reference to three separate bodies of law: (1) "the statutes of the United States," (2) "the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity," and (3) "the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court

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1. As to the scope and applicability of the Federal Rules of Civil Procedure, see Rules 1 and 81 thereof. See also the discussion in 2 MOORE, FEDERAL PRACTICE c.1 (2d ed. 1948) *passim.*

For other provisions in the Rules bearing upon evidence, see 5 MOORE, FEDERAL PRACTICE ¶ 43.02[3] (2d ed. 1951).

2. For general discussions of Rule 43(a), see: 5 MOORE, FEDERAL PRACTICE c.43 (2d ed. 1951) *passim*; Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure,* 45 YALE L.J. 622 (1936), 47 Yale L.J. 194 (1937); Green, *The Admissibility of Evidence under the Federal Rules,* 55 HARV. L. REV. 197 (1941); Green, *Federal Civil Procedure Rule 43(a),* 5 VAND. L. REV. 560 (1952); Conrad, *Let's Weigh Rule 43(a),* 38 VA. L. REV. 985 (1952); Note, *Federal Rule 43(A)—A Decadent Decade,* 34 CORNELL L.Q. 238 (1948); Note, *The Admissibility of Evidence in Federal Courts under Rule 43(a),* 46 COL. L. REV. 267 (1946).

3. "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner." FED. R. CIV. P. 43(a).

is held." If the evidence would be admissible under any one of these systems, then under Rule 43(a) it is admissible. And "[t]he competency of a witness to testify shall be determined in like manner."

The seeming simplicity of the approach is deceptive. But before discussing the difficulties inherent in the Rule, let us examine the reasons which prompted the approach.

General Background of Rule 43(a)

Confusion characterized the system in force prior to 1938.[4] In 1936 Dean Wigmore stated in an article[5] appearing in the American Bar Association Journal:

> "The truth is—though some of you may regard this statement as an exaggeration—that the law of evidence in our Federal Courts is in a most deplorable condition. It is *inferior* to that of any of the fifty States and Territories—I say, inferior to *any* of them, and not only inferior but far inferior."[6]

And Dean (now Judge) Dobie considered the federal system of evidence a "veritable hodgepodge."[7] It is unnecessary to describe that confusion here. Suffice it to say that such studies do exist[8] and the point is amply established.

That reform was needed was obvious. But could it be accomplished through the medium of the Federal Rules?

There was serious doubt[9] as to whether the Rule Making Statute[10] authorized the Court to promulgate rules of evidence. That act had stipulated that "said rules shall neither abridge, enlarge, nor modify the *substantive rights* of any litigant."[11] Were rules of evidence to be considered substantive within the meaning of the statute? The Rules of Decisions Act[12] had always been considered as regulating

4. See Moore, Federal Practice ¶ 1.04[1] (2d ed. 1948); 1 Wigmore, Evidence § 6 (3d ed. 1940); and Callahan and Ferguson, *supra* note 2, and 47 Yale L.J. 194 (1937).

5. Wigmore, *A Critique of the Federal Court Rules Draft—Three Larger Aspects of the Work Which Require Further Consideration,* 22 A.B.A.J. 811 (1936).

6. *Id.* at 813.

7. Dobie, Handbook of Federal Jurisdiction and Procedure 623 (1928).

8. See 1 Wigmore, Evidence § 6 (3d ed. 1940); and Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure,* 45 Yale L.J. 622 (1936).

9. See Wickes, *The New Rule-Making Power of the United States Supreme Court,* 13 Texas L. Rev. 1, 23-25 (1934). See also the discussion in 5 Moore, Federal Practice ¶ 43.02[2] (2d ed. 1951); and note, *Federal Rule 43(A)—A Decadent Decade,* 34 Cornell L.Q. 238, 240 (1948).

10. 48 Stat. 1064 (1934), now substantially embodied in 28 U.S.C.A. § 2072 (Supp. 1953).

11. *Ibid.* (Italics supplied)

12. 1 Stat. 92 (1789), now substantially embodied in 28 U.S.C.A. § 1652 (1950).

substance and not procedure,[13] and most (though not all) regarded evidence as falling within its purview.[14] There was other indication, however, that evidence should be considered as procedural.[15] The matter was called to the attention of the Supreme Court by Chairman Mitchell,[16] but the Rule was nevertheless adopted. This fact alone affords ample testimony that the Court believed Congressional authorization to be present. Be this as it may, the existence of contemporary doubts may well have influenced the Committee in limiting the extent of evidentiary reform.[17] There was another important element, however. The Committee did not consider the formulation of rules of evidence to be its primary function. Indeed the Committee's first impression was that it should not touch upon the rules of evidence.[18] They later found, however, that the union of law and equity necessitated some clarification of evidentiary rules.[19] To embark upon the formulation of a code of evidence would have consumed an enormous

13. See 5 MOORE, FEDERAL PRACTICE ¶ 43.02[2] (2d ed. 1951).

14. *Ibid.*

15. See 5 MOORE, FEDERAL PRACTICE ¶ 43.02[2] (2d ed. 1951), wherein Professor Moore points out that some prior Supreme Court decisions had indicated evidence to be procedural [citing Dravo v. Fabel, 132 U.S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421 (1889), and Thompson v. Missouri, 171 U.S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204 (1898)]; that state practice treated evidence as procedure [citing 3 BEALE, CONFLICT OF LAWS § 597.1 (1953)]; and that a similar treatment of evidence is made by the American Law Institute [citing RESTATEMENT, CONFLICT OF LAWS §§ 585, 595-98 (1934)]. See also the discussion by Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 622, 641-44 (1936).

16. In the letter to Chief Justice Hughes accompanying the third draft of the Rules, Chairman Mitchell stated: "There is some difference of opinion in the Committee as to the extent to which the statute authorizes the Court to make rules dealing wih evidence. We have touched the subject as lightly as possible. We felt it quite essential to go this far. We have preserved the present system in patent and trademark cases, with uniformity of procedure in law and equity actions. Members of the bar have been considerably troubled as to what the rules of evidence would be. Our Rule 50 [which developed into the present Rule 43] is intended only to close the gap and prevent confusion and doubt." PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, *Foreword*, p. xvii (1936).

See also the discussion in Note, *Federal Rule 43(A)—A Decadent Decade*, 34 CORNELL L.Q. 238, 240 (1948); and in 5 MOORE, FEDERAL PRACTICE ¶ 43.02[2] (2d ed. 1951).

17. See Note, *Federal Rule 43(A)—A Decadent Decade*, 34 CORNELL L.Q. 238, 240 (1948).

18. In a note to the Supreme Court, the Committee had stated in 1937: "The first impression of the Committee was against touching the field of evidence. It later became clear that on account of the union of law and equity there would be doubt as to the rules of evidence to be applied. We think it essential to deal with the subject at least to the extent expressed in subdivision (a) of this rule [Rule 44 at that time, present Rule 43]. Having gone that far the Committee made the further provisions in subdivision (b) of this rule and summarized in Rule 45 [present Rule 44] the law on proof of official records now scattered through many Federal statutes." *Committee Note to Rule 44 of April 1937 Draft*, as quoted in 5 MOORE, FEDERAL PRACTICE ¶ 43.02[5] (2d ed. 1951).

19. *Ibid.*

amount of time,[20] and would therefore necessarily have delayed the adoption of the balance of the Rules. In addition, extensive revision of the rules of evidence would probably have engendered some opposition, which might have spilled over to the rest of the Rules.[21] It is quite understandable, therefore, that only stop-gap measures were adopted. It is less understandable why subsequent reforms have not been made. That Rule 43(a) has continued in its original form for sixteen years is of course some indication that it was adequate. Many believe, however, that it is high time that extensive evidentiary reforms be made.[22]

General Approach of Rule 43(a)

It has been seen that Rule 43(a) makes general reference to three bodies of law,[23] and provides that, if evidence would be admissible under any one of these three systems, then it is admissible. No mention is made anywhere in 43(a) of the *exclusion* of evidence; it is phrased entirely in terms of *admissibility*.

Shortly after the Federal Rules were adopted, Judge Caffrey was called upon to rule whether certain evidence which would have been excluded by the courts of New York was admissible in a federal court sitting in that state.[24] After concluding that there were no Supreme Court or second circuit cases directly in point, and that under the case of *Rouse v. Whited*[25] the New York courts would exclude the evidence, Judge Caffrey stated:

> ". . . Rule 43 was invoked by the Government, but it has nothing to do with this question. Rule 43 does not deal with the law as to what testimony should be excluded. It deals only with what is admissible under the law of the United States or the law of the State in which the particular

20. It has been estimated that an attempt to deal adequately with the law of evidence would have doubled the work of the Committee. See Green, *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560, 563 (1952).

21. See Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197 (1941), wherein Mr. Monte Lemann, one of the Committee members, is quoted as follows: "We did not want to precipitate possible objections in Congress from lawyers who might take exception to a particular provision and so delay the adoption of the rules."

22. See Green, *supra* note 21, at 225; Green, *supra* note 20, at 578-80; 5 MOORE, FEDERAL PRACTICE ¶¶ 43.02[3], 43.02[5] (2d ed. 1951); Note, 34 CORNELL L.Q. 238, 246 (1948). The 1946 Committee Note to Rules 43 and 44 states in part: "While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure*, 4 F.R.D. 124, 137-38." (As quoted in 5 MOORE, FEDERAL PRACTICE ¶ 43.01[7] (2d ed. 1951).

23. See note 3 *supra*, and accompanying text.

24. United States v. Aluminum Co. of America, 1 FED. RULES SERV. 43a.3, Case 1 (S.D.N.Y. 1938).

25. 25 N.Y. 170 (1862).

> court sits. It is intended to liberalize admissibility of testimony, but has nothing to do with what should be excluded. The consequence is that the New York decisions, such as Rouse v. Whited, with respect to what shall be excluded, do not by force of Rule 43 control the action of this court, and the question is a perfectly open one, without any governing authority whatsoever for the guidance of the Court."[26]

The writer agrees with Judge Caffrey that the Rule was designed to liberalize the admissibility of evidence.[27] With deference, however, it is submitted that by implication the Rule has much to do with exclusion. By speaking in terms of admissibility and not of exclusion, the liberal approach of the Rule is of course emphasized. But what if it is clear that the evidence in question would be excluded under each of the three systems? May it nevertheless be admitted in federal court? Professor Green points out[28] that in this situation there is nothing in Rule 43(a) which conflicts with the application of the federal exclusionary statute.[29] Since here the statute has not been superseded by the Rule, it should be applied, and the evidence excluded. With this the writer agrees. Professor Green argues in addition,[30] however, that, where there is no federal statute in point, the fact that both federal equity and state systems would definitely exclude the evidence is not controlling. It is his view that here the federal court should admit the evidence if it would be admissible under "the soundest doctrine found in any Anglo-American jurisdiction."[31] He reaches this conclusion by employing the same type of reasoning used by Judge Caffrey—the argument that Rule 43(a) is a rule of admissibility and not of exclusion, and hence inapplicable here. The utilization of the last sentence of Rule 83[32] is then urged, and the general attitude towards admissibility indicated by Rule 43(a) recalled.

It appears to the writer that implicit in the language of Rule 43(a) is the negative implication that, unless evidence is admissible under some one of the three systems referred to, it should be excluded by

26. United States v. Aluminum Co. of America, 1 FED. RULES SERV. 43a.3, Case 1 (S.D.N.Y. 1938).

27. For a study as to the extent to which Rule 43(a) has actually achieved a liberalization of admissibility, see Note, 46 COL. L. REV. 267 (1946). See also the discussion in Green, *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560, 572-74 (1952).

28. Green, *supra* note 27 at 569.

29. The Rule Making Statute, 48 STAT. 1064 (1934), now substantially embodied in 28 U.S.C.A. § 2072 (Supp. 1953), provided that after the promulgation of the Rules, "all laws in conflict therewith shall be of no further force or effect."

30. Green, *supra* note 27 at 570-71.

31. *Id.* at 571. Professor Green concedes, however, that he has found no case adopting this view, and that several cases imply that Rule 43(a) requires that the evidence in this situation be excluded.

32. This sentence of Rule 83 provides: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

the federal court. If there is no federal statute in point, and it is clear that both of the other two systems referred to would exclude the evidence, then again it seems to the writer that the negative implication of the Rule is that the evidence should be excluded. The Rule admittedly seeks liberality of admissibility, but it specifically sets forth the three systems from which the rules of admissibility are to be garnered. If it were intended that, in the absence of a federal exclusionary statute, and in the absence of a rule of admissibility from one or more of the three systems mentioned, the federal court should apply "the soundest doctrine found in any Anglo-American jurisdiction," then the Rule should not have limited its reference to three systems.

Akin to the above problem is that presented where either the federal equity or state system has no clear rule as to whether the evidence in question should be admitted or excluded. Should the federal court determine what the law of that system is or should be? This problem is particularly acute with respect to the federal equity system. As Dean Wigmore commented:

> ". . . What are the rules of Evidence in Federal equity cases? Where are we to look for those rules? On this question, there is a singular dearth of authority."[33]

In elaboration of the point, Dean Wigmore quotes from Mr. Russell Wiles with apparent approval:

> "Our equity practice is supposed to be so uniform that any lawyer can try an equity case anywhere. But on a disputed question of evidence I have no idea what would be a citable authority. Since the Conformity Act does not cover equity trials, a freak local rule should be given no weight in our courts here, although it must be followed on the law side. If the theory of uniform practice established by the Supreme Court rules is to be followed, local authorities should be given no weight whatever. This would seem to relegate us to the English rules of 1842, and it is my personal view that the logic of the situation forces us in that direction.
>
> "But no court has ever said that these rules do govern, nor has any court ever told us what rules govern or where they can be found. For obvious reasons, these matters are ordinarily not adjudicated; because the Appellate Courts in equity are supposed to ignore incompetent evidence, and they almost never say what they have considered and what they have not. If the District Court improperly admits evidence, it is silently ignored in the Appellate Court. If it improperly excludes evidence,

33. 1 WIGMORE, EVIDENCE § 6 (3d ed. 1940). Dean Wigmore recognized that in chancery proceedings the local state rule controlled as to the "competency of witnesses," but states that "this provision was ignored or narrowly construed in the Federal decisions." The Competency of Witnesses Act, embodied in 28 U.S.C. § 631 (1940), was repealed in the 1948 revision of Title 28 for the stated reason that the subject matter is governed by Rule 43. See 5 MOORE, FEDERAL PRACTICE ¶ 43.01[3] (2d ed. 1951).

> under the equity practice the testimony is taken under the rule and certified to as excluded. If the Appellate Court thinks this testimony should have been received, it reads it and follows it without comment. But in the actual handling of equity trials it is a very serious problem to be always at sea as to what authority you can cite with any certainty that it will be respected."[34]

Some[35] took hope in the very fact that equity had no fully integrated system of evidentiary rules. Equity had been bound neither by the Conformity Act[36] nor by the Rules of Decisions Act.[37] In an article appearing in December, 1937, Messrs. Callahan and Ferguson stated their position as follows:

> "It is not intended to present a dark picture of the operation of this part of Rule 44 [present Rule 43]; indeed its virtue seems to lie in the fact that it does not restrict courts to a particularized body of rules. As to general questions of admissibility, therefore, the federal courts will have complete freedom to develop their own rules. This may be somewhat of an overstatement. The fact that certain evidence, such as flagrant hearsay or opinion, is not admissible in any court, coupled with the judicial dislike for sudden change, point to the prediction that, although the federal courts will be starting practically with a clean slate so far as rules of admissibility are concerned, the new body of precedent will be much the same as the old in general outline. But the rule of admissibility as proposed by the Advisory Committee does give the courts a free hand in applying reforms to individual rules, thus keeping them abreast of the times. This is all that can be asked of such a general rule and it is believed likely that the federal courts will so administer the rule that the results will be much more satisfactory than those which might be expected under a conformity requirement."[38]

Professor Green denied[39] that the federal courts would start with a "clean slate," but states:

> "If gaps are left by an absence of decisions in the particular jurisdiction the federal courts can decide for themselves what the law is. Unfortunately when the opportunity presents itself they do not take advantage of it."[40]

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34. 1 WIGMORE, EVIDENCE § 6 (3d ed. 1940).

35. See Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure: 2*, 47 YALE L.J. 194, 197-98 (1937). But see 1 WIGMORE, EVIDENCE § 6c (3d ed. 1940), wherein Professor Wigmore says of the equity provision in Rule 43(a), "This part of Rule 43 seems to have little prospect of service."

36. REV. STAT. § 914 (1878).

37. 1 STAT. 92 (1789), now substantially embodied in 28 U.S.C.A. § 1652 (1950).

38. Callahan and Ferguson, *supra* note 35, at 197-98.

39. Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197, 217 (1941).

40. Green, *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560, 565 (1952). In a very recent case, Atlantic Coast Line R.R. v. Dixon, 19 FED. RULES SERV. 43a.2, Case 1 (5th Cir. 1953), Judge Rives stated with respect to Rule

Application of the Rule to Communications Privileged under State Law

The broad general problems that have been thus far discussed take on added meaning and emphasis when they are considered in the restricted context of the communication privileged under state law.

Is the privileged communication within the purview of Rule 43(a)?

The privileged communication is a peculiar thing. It means that the legislature or the courts have seen fit to protect certain persons from the compelled disclosure of certain communications.[41] Evidence as to a privileged communication is normally admissible if the protection afforded by the privilege is waived (or not claimed) by the person in whose favor the privilege was created.

It seems that rules governing privileged communications would not normally be characterized as rules of admissibility—nor, for that matter, as rules of exclusion. If the reader will pardon the allusion to Gertrude Stein, they are what they are—rules governing privileged communications. Since Rule 43(a) speaks only in terms of *admissibility*, it may be questioned whether or not rules concerning privileged communications fall within its purview.[42] It will be remembered that Judge Caffrey said that Rule 43(a) deals only with admissibility and has nothing to do with exclusion.[43] If this type of analysis be carried to its logical conclusion,[44] then it would appear that Rule 43(a) has nothing to do with the privileged communica-

43(a), "As has been often noted, that rule is slanted toward admissibility rather than toward rejection of evidence. However, if state law excludes the evidence and no federal statute or rule admits it, then, the evidence must be rejected. 5 Moore's Federal Practice (2d ed.), p. 1320, ¶ 43.04. The Federal Employers' Liability Act is not such a statute of the United States as is referred to in Rule 43(a), for it was not the intention of that statute to govern rules of evidence. Central Vermont Railway v. White, supra. We get no help from the reference in Rule 43 to 'rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity.' As noted by Professor Wigmore, the search for such rules will usually be in vain. 1 Wigmore on Evidence (3rd ed.), p. 201, Sec. 6(c); or as Professor Moore notes, 'Relatively few equity cases discussed points of evidence, since those cases were generally tried without a jury.' 5 Moore's Federal Practice (2d ed.), p. 1328, ¶ 43.04. It has been suggested that 'federal decisions in actions at law are precedents for determining the rules of evidence applied in equity.' 55 Harvard Law Review 224 [an earlier article by Professor Green]."

41. See note 59 *infra*.

42. Professor Wigmore has queried: "And the whole group of privileged topics and privileged persons,—their evidence if they could and would give it might be admissible, but are they *compellable* under a Rule which says merely that evidence 'shall be admitted'?" 1 Wigmore, Evidence § 6c (3d ed. 1940). See also the discussion in Green, *The Admissibility of Evidence under the Federal Rules*, 55 Harv. L. Rev. 197, 208 *et seq.* (1941).

43. United States v. Aluminum Co. of America, 1 Fed. Rules Serv. 43a.3, Case 1 (S.D.N.Y. 1938), discussed *supra*.

44. For more detailed discussion of the logical ramifications of Judge Caffrey's reasoning, see *supra* pp. 560-61.

tion, for certainly a rule of privilege is not a rule of *admissibility* within Judge Caffrey's approach to the term. It would seem to the writer, however, that the draftsmen of the broadly phrased Rule 43(a) intended that it should govern such areas.[45] Despite its possible semantic frailties, it is believed that the Rule should be so interpreted. It is true that some cases have decided questions as to privileged communications without mentioning Rule 43(a),[46] but other cases have specifically cited it as controlling.[47]

Does Rule 43(a) govern the extent of the "privilege" referred to in Rules 26, 34, and 36?

Rule 26 (Depositions Pending Action) provides in part:[48]

> "Unless otherwise ordered by the court as provided by Rule 30(b)[49] or (d)[50] the deponent may be examined regarding any matter, not *privileged,* which is relevant to the subject matter involved. . . ."[51]

And Rule 34 (Discovery and Production of Documents and Things for Inspection, Copying, or Photographing) provides *inter alia:*

> "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not *privileged. . . .*" (italics added)

Similar protection of things privileged is given in Rule 36 (Admission of Facts and of Genuineness of Documents).[52] What interpretation

45. See the discussion in Green, *The Admissibility of Evidence under the Federal Rules,* 55 HARV. L. REV. 197, 208 *et seq.* (1941).

46. See note 57 *infra.*

47. See for example: United States v. Brunner, 200 F.2d 276 (6th Cir. 1952); Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953); Rediker v. Warfield, 11 F.R.D. 125 (S.D.N.Y. 1951); Stiles v. Clifton Springs Sanitarium Co., 74 F. Supp. 907 (W.D.N.Y. 1947).

Professor Moore treats privileges as governed by Rule 43(a). 5 MOORE, FEDERAL PRACTICE ¶ 43.07 (2d ed. 1951). See also the discussion in Green, *supra* note 45, at 208 *et seq.*, and Note 34 CORNELL L.Q. 238, 243 (1948).

48. FED. R. CIV. P. 26(b).

49. The provision referred to bears the subtitle "Orders for the Protection of Parties and Deponents."

50. The provision referred to bears the subtitle "Motion to Terminate or Limit Examination."

51. Italics added.

52. Rule 36(a) provides in part: "Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an

is to be given here to the word "privileged"? Do the Rules refer to matter which is privileged under state law? Or do they refer to matter privileged under federal law? If the latter be the case, are federal statutes or federal decisions the controlling factor? . . . If federal decisions, then those at law or those in equity? . . . Or is the word "privileged" to be interpreted as a reference forward to Rule 43(a)?

It has been seen[53] that, although the matter is not without difficulty and doubt, the privileged communication is probably included within the purview of the broadly phrased Rule 43(a). If this be correct, and the cases and authorities seem to indicate that it is,[54] then it would appear that the word "privileged" as used in Rules 26, 34, and 36 should be interpreted to mean that which is privileged under a proper application of Rule 43(a).[55] Such questions as this are not much discussed in the cases, but several have definitely indicated that Rule 43(a) controls.[56] Many cases, however, do not mention the

admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are *privileged* or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time." (Italics added). See also Rule 35, discussed in note 55 *infra.*

53. See *supra* pp. 563-64.

54. *Ibid.*

55. Otherwise, matter might be deemed privileged in a deposition and discovery proceeding, but not privileged upon the trial of the case—or vice versa. That such a situation was intended seems remote.

Rule 35(b)(2) (Physical and Mental Examination of Persons) provides in part: "By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any *privilege* he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition." (Italics added). This provision does not create a privilege; it merely provides that certain conduct will constitute a waiver of any privilege that might otherwise exist. To this extent it may be considered a federal rule of admissibility, and thus be controlling under the first system of law referred to in Rule 43(a).

56. In Stiles v. Clifton Springs Sanitarium Co., 74 F. Supp. 907, 908 (W.D.N.Y. 1947), on a motion under Rule 30(b) to limit examination, the court stated, "Privileged communications are controlled principally by state statutes which, under Rule 43(a), clearly govern."

In Rediker v. Warfield, 11 F.R.D. 125, 127 (S.D.N.Y. 1951), a case involving written interrogatories under Rule 33, the court stated that Rule 33 is circumscribed by Rule 26(b), and went on to say, "Since attorney and client relationship did not exist between the attorneys representing their respective clients, the conversations and communications are not privileged. Section 353 of the New York Civil Practice Act, which is applicable under Rule 43(a) of the Federal Rules of Civil Procedure, provides that an attorney may not 'disclose a communication, made by his client to him.'"

In Wild v. Payson, 7 F.R.D. 495, 499 (S.D.N.Y. 1946), Judge Leibell stated, "The word 'privileged' as used in Rule 26(b) relating to depositions and in Rule 34 dealing with discovery and production of documents etc. should be interpreted as it is in the law of evidence. 'Privilege is determined by the rules of evidence applicable to the trial of an action.' Moore on Federal Practice, Vol. 2, p. 2641, § 34.05." Also *see* Kirshner v. Palmer, 7 F.R.D. 252 (S.D.N.Y. 1945).

problem.[57] In *Hickman v. Taylor,* the Supreme Court discussed the attorney-client privilege with respect to the problem without citing either state law or Federal Rule 43(a). The Court stated:

> "We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories."[58]

Is it desirable for a communication privileged under state law to be similarly protected in a federal court sitting in that state?

A privilege is a device by which the sanctity of certain relationships is protected and fostered. The creation of a privilege and the determination of its scope involve a balancing process:[59] Will the protection afforded by the privilege be of greater benefit to society than the harm that would result from its consequent limitation upon the power of the court to ascertain relevant facts? The determination of this question involves an evaluation of values, a problem of policy. Certain communications may be privileged in one state and not in another, for the policy determinations may be different.

See 4 MOORE, FEDERAL PRACTICE ¶ 26.22 (2d ed. 1950).

57. See for example: Hickman v. Taylor, 329 U.S. 495, 67 Sup. Ct. 385, 91 L. Ed. 451 (1947); Fraser v. United States (two cases), 145 F.2d 139 (6th Cir. 1944); Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1943); *Ex parte* Sparrow, 18 FED. RULES SERV. 26b.43, Case 1 (N.D. Ala. 1953); Mills Music, Inc. v. Cromwell Music, Inc., 18 FED. RULES SERV. 26b.41, Case 1 (S.D.N.Y. 1953); Federal Deposit Ins. Corp. v. Alter, 106 F. Supp. 316 (W.D. Pa. 1952); Holbert v. Chase, 12 F.R.D. 171 (E.D.S.C. 1952); Salamon v. Indemnity Ins. Co. of North America, 10 F.R.D. 232 (S.D.N.Y. 1950); Reeves v. Pennsylvania R.R., 8 F.R.D. 616 (D. Del. 1949); Matthies v. Peter F. Connolly Co., 2 F.R.D. 277 (E.D.N.Y. 1941); Munzer v. Swedish American Line, 35 F. Supp. 493 (S.D.N.Y. 1940); Bough v. Lee, 29 F. Supp. 498 (S.D.N.Y. 1939).

58. Hickman v. Taylor, 329 U.S. 495, 508, 67 Sup. Ct. 385, 91 L. Ed. 451 (1947).

59. Professor Wigmore has stated: "Looking back upon the principle of Privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception . . . four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation: (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 relation between the parties; (3) The *relation* must be one 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 communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." 8 WIGMORE, EVIDENCE § 2285 (3d ed. 1940).

If the state wherein a federal court is sitting would treat a particular communication as privileged, should the federal court likewise protect it? From the standpoint of desirability, it would seem that it should.[60] The following relationships are the ones most frequently protected by the states: attorney-client, husband-wife, priest-penitent, and doctor-patient. The extent to which this type of relationship should be protected would seem generally to be much more closely related to state interest than federal. In most instances the communication in question will have been made within the state wherein the federal court is sitting. It is of course questionable whether or not the rules of privilege have much effect upon the extent to which individuals in these situations freely communicate. But to the extent that they do, it would seem that the communications are normally made in the light of state law. If a man knows that what a patient says to his physician in his professional capacity will be protected from disclosure in state court, and is thus induced to tell all to his doctor, then it would seem most unjust for a federal court sitting in that state to refuse to afford the same protection to the communication that the state court would have granted. For these reasons it seems desirable for federal courts to apply state rules of privilege to this type of communication.

There are areas, however, where federal courts should be controlled only by federal rules of privilege—as, for example, communications between federal officials concerning pending international negotiations.[61] And here the state courts themselves should apply the federal rule, for obviously the matter is peculiarly within the federal sphere.

The foregoing discussion is not an argument that federal courts are obliged by the Constitution to apply state rules of privilege in the designated area. But it is believed that the suggested approach is in keeping with the spirit of our federal system. Let us discuss briefly whether *Erie R.R. v. Tompkins*[62] obliges federal courts to apply state rules of privilege in cases falling within its purview.

Do communications privileged under state law fall within the ambit of the Erie *doctrine?*[63]

Rules of privilege may have great effect upon the outcome of particular litigation; they may effectively prevent a party from proving

60. But see Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure: 2*, 47 YALE L.J. 194, 210 (1937).

61. See 8 WIGMORE, EVIDENCE §§ 2378, 2379, (3d ed. 1940).

62. 304 U.S. 64, 80, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). In this case the Court stated that, in applying the doctrine of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842), the federal courts had invaded the rights reserved to the states by the Constitution.

63. For an excellent discussion of the meaning and application of the *Erie* doctrine, see MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE ¶ 0.03(45) (1949).

his case. It is possible to argue, therefore, that rules of privilege fall within the ambit of the *Erie* doctrine. In *Reeves v. Pennsylvania R.R.*,[64] plaintiff counsel had conceded for the purposes of the motion that state law governed, and the court so assumed. There is language in the opinion[65] which might indicate that the court believed that the *Erie* doctrine controlled. In Ex parte *Sparrow*,[66] however, the court definitely took the position that rules of privilege are not substantive within the meaning of *Erie*.

It seems to the writer that the determination of whether or not a witness may be compelled to disclose certain information to a federal court is a matter properly falling within the regulatory power of the federal system.[67] It is submitted that the *Erie* doctrine does not compel a contrary conclusion with respect to cases falling within its purview.[68] It has been seen that the writer believes that normally it is desirable for federal courts to honor and apply state privileges, but this is a matter of "rathers" and not of compulsion.

What law governs?

The writer has argued above that Rule 43(a) was intended to govern in this area, and should be so interpreted.[69] But since 43(a) is phrased only in terms of admissibility, how is it to be applied with respect to rules which are not, technically speaking, rules of admissibility? The problem is fraught with difficulty. Let us consider some of the possibilities, without attempting, however, to be exhaustive.

No federal statutes have been found which run contra to the en-

64. 8 F.R.D. 616 (D. Del. 1949), criticized in 5 MOORE, FEDERAL PRACTICE ¶ 43.02[4] (2d ed. 1951).

65. The court stated, "The case presents the anomalous feature that certain applications of discovery process may be available under Hickman v. Taylor in cases arising under the general federal jurisdiction of a district court, and may not be available in cases arising solely by reason of diversity of citizenship. This result is accomplished by reason of the fact that the law of privilege as applied to communications or documents may not be uniform in the federal jurisdiction and under the law of the several states, and the law of the several states must be applied if Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, is applicable. For the purpose of the present motion the relevancy of Erie v. Tompkins and the consequent application of the Delaware law of privilege is conceded and assumed." *Id.* at 619.

66. 18 FED. RULES SERV. 26b.43, Case 1 (N.D. Ala. 1953); see also Fraser v. United States, 145 F.2d 139 (6th Cir. 1944).

67. See the discussion *supra*, as to the power of the Court to promulgate Rule 43(a), and see also Herron v. Southern Pacific Co., 283 U.S. 91, 51 Sup. Ct. 51, 75 L. Ed. 857 (1931), and Sibbach v. Wilson & Co., 312 U.S. 1, 61 Sup. Ct. 422, 85 L. Ed. 479 (1941).

68. See 4 MOORE, FEDERAL PRACTICE ¶ 26.23[9] (2d ed. 1950).

For a general discussion of Rule 43(a) and the *Erie* doctrine, see Note, *Erie v. Tompkins and Evidentiary Matters*, 7 N.Y.U. INTRA. L. REV. 1 (1951); and Note, *Evidence: Effect of Erie Railway Co. vs. Tompkins on the Admissibility of Evidence and the Competency of Witnesses in Federal Courts*, 31 MARQ. L. REV. 167 (1947).

69. See *supra* pp. 000.

forcement of state created privileges, and thus the utility of the first system referred to in Rule 43(a) is practically nil.[70] But what of the federal equity system?

If it can be said that equity actually had an ascertainable practice in this regard, then it may well be argued that under Rule 43(a) the court is directed to apply in each instance that rule in either system with respect to privileged communications which would deny the availability of a privilege. This would be in keeping with the spirit of liberality of admissibility implicit in the Rule.[71]

What was equity practice with respect to privileged communications? Professor Moore takes the position[72] that state statutes on privilege were followed under the prior federal equity practice, but Professor Green states that, "this is, to say the least, a doubtful premise."[73] The latter authority suggests instead[74] that federal equity followed state statutes on privilege only where they denied a privilege, and not where they granted one. Needless to say, it is exceedingly difficult to ascertain what was equity practice on this point. If federal equity actually would have applied state rules of privilege, then there is little difficulty, for then the federal courts under Rule 43(a) should likewise normally apply them.

If it is impossible to ascertain federal equity practice on this point, then we are thrown back to the problem of whether or not the federal courts are free to determine an appropriate rule.[75] It would seem to the writer that it is desirable for federal courts to apply state rules of privilege with respect to relationships which are more closely related to state than federal interests.[76] It is suggested therefore that it is seldom if ever *in this area* that the federal courts should take it unto themselves to mould different rules of privilege.

The decisions dealing with the communication privileged under state law are utterly confused, and the writer has not found within them the seeds of predictability. Some cases[77] say that state rules of

70. See note 30 supra. With respect to federal statutes providing for the admissibility of evidence, Professor Moore states: "Here the practitioner will receive little aid except from the statutes prescribing how proof of public records may be made, and the federal 'shop-book' statute, 28 USC § 1732." 5 MOORE, FEDERAL PRACTICE ¶ 43.04 (2d ed. 1951).

71. See 3 MOORE, FEDERAL PRACTICE ¶ 43.02[3] (2d ed. 1951).

72. *Id.* ¶ 43.07.

73. Green, *The Admissibility of Evidence under the Federal Rules,* 55 HARV. L. REV. 197, 208 (1941).

74. *Id.* at 208-09.

75. See discussion *supra* pp. 561-62.

76. See discussion *supra* pp. 566-67.

77. See *e.g.:* Munzer v. Swedish American Line, 35 F. Supp. 493 (S.D.N.Y. 1940), and the several cases therein cited.

In a very recent case, Anderson v. Benson, 117 F. Supp. 765, 772 (D. Neb. 1953), Judge Donohoe stated, "A fair interpretation of Rule 43(a), Federal Rules of Civil Procedure, 28 U.S.C.A., insofar as it relates to the admissibility of privileged communications between persons involved in a confidential relationship is this: a state statute, if there is one, should control though it

privilege control; others[78] deny this. The famed *Hickman v. Taylor* relied exclusively upon its own reasoning. Some cases[79] cite Rule 43(a); others[80] do not mention it. This may be a confusing analysis; it is certainly an analysis of confusion.

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is more restrictive than federal precedents, but if there is no state statute and the Rule is doubtful as to the particular situation, the more liberal federal precedents may be followed. 8 Cyclopedia of Federal Procedure (3rd Ed.) § 26.31, p. 44; 5 Moore's Federal Practice (2nd Ed.) ¶ 43.07, p. 1332; since there is, in this jurisdiction a state statute on the point, this court will adhere to it." Despite its theoretical difficulties, Judge Donohoe's approach has much to commend it.

See also Stiles v. Clifton Springs Sanitarium Co., 74 F. Supp. 907, 908 (W.D.N.Y. 1947), wherein the court stated, "Privileged communications are controlled principally by state statutes which, under Rule 43(a), clearly govern."

78. See for example: United States v. Brunner, 200 F.2d 276 (6th Cir. 1952); and *Ex parte* Sparrow, 18 FED. RULES SERV. 26b.43, Case 1 (N.D. Ala. 1953). See also Fraser v. United States (two cases), 145 F.2d 139 (6th Cir. 1944). After reviewing the Tennessee law on the subject and concluding that under its decisions the husband-wife privilege did not "necessarily extend to those communications and acts which are in furtherance of a fraud, particularly when the purpose of the fraud includes depriving the government of opportunity to collect lawfully imposed revenue or statutory penalties," the court stated, "So much for the law of Tennessee. The case, however, arises in a federal court of equity jurisdiction, and the problem presently discussed involves remedial rights as distinguished from substantive rights, and equitable powers which, having their source in the Constitution, were conferred upon the courts of the United States by § 11 of the Judiciary Act, 1 Stat. 78, 28 U.S.C.A. § 41. So we have recently been reminded in York v. Guaranty Trust Co. of New York, 2 Cir., 143 F.2d 503, 523, that the Supreme Court in Kirby v. Lake Shore & M.S.R. Co., 120 U.S. 130, 7 S. Ct. 430, 30 L. Ed. 569, declared, 'the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit.' This judgment, in both of the cited cases, involved state statutes of limitation. If, however, the rationalization in the York case, supra, supported as it is by copious annotation, is sound, and the rule of the Kirby case prevails, notwithstanding Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, we must conclude that a federal equity court is not necessarily bound to apply a state statute giving added breadth to an evidentiary rule of privilege, when clearly it is inequitable to do so." *Id.* at 144.

79. See note 47 *supra*.

80. See note 57 *supra*.