Vanderbilt Law Review

Volume 5
Issue 3 *Issue 3 - April 1952*

Article 16

4-1952

Privileged Communications--Some Recent Developments

Lloyd S. Adams Jr.

Mary E. Polk

NOTES

PRIVILEGED COMMUNICATIONS—SOME RECENT DEVELOPMENTS

INTRODUCTION

It is the purpose of this Note to collect and discuss some of the newer decisions construing and applying the rules of evidence as to certain privileged communications, with a view toward indicating possible trends and developments or limitations, if any, in this field of the law of evidence. It is limited primarily to communications between husband and wife, attorney and client, physician and patient, and priest and penitent, with a short discussion of the so-called "novel privileges." The assumption is made that the reader is familiar with generally accepted definitions of the various privileges, as well as traditional limitations.[1]

The privileges discussed are so well established today, usually by statute,[2] although some came from the common law,[3] that a discussion of their necessity, purpose, usefulness or rational bases would not be profitable. We turn, therefore, to an immediate consideration of recent cases.

I. WHAT COMMUNICATIONS ARE PRIVILEGED?

"A privilege is an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice. . . ."[4] Dean Wigmore

1. Thorough discussions may be found in 8 WIGMORE, EVIDENCE §§ 2227-43 (privilege of husband and wife not to testify), 2290-329 (attorney-client), 2332-41 (privileged communications between husband and wife), 2380-91 (physician-patient), 2394-96 (priest-penitent) (3d ed. 1940). See also MODEL CODE OF EVIDENCE, Rules 209-23, 231 (1942); MORGAN, INTRODUCTION TO EVIDENCE 28-44 (1950). Not discussed herein, but normally privileged, are communications by and to jurors, state secrets, and official documents. 8 WIGMORE, EVIDENCE §§ 2345-64, 2367-79 (3d ed. 1940); MODEL CODE OF EVIDENCE, Rules 227-30 (1942); MORGAN, INTRODUCTION TO EVIDENCE 28-30, 42-44 (1950). For law review discussions see, *e.g.*, Platz, *Various Privileges*, 1945 WIS. L. REV. 239; Welch, *Another Anomaly—The Patient's Privilege*, 13 MISS. L.J 137 (1941); Note, *Privileged Communication—Extension of the Privilege to Communication Involving Agents*, 50 MICH. L. REV. 308 (1951); Note, *Admissibility in Tennessee of Spouses' Testimony Concerning Their Private Affairs*, 3 VAND. L. REV. 298 (1950).

2. The statutes are collected in 2 WIGMORE, EVIDENCE § 488 (3d ed. 1940).

3. Statutes privileging confidential communications between husband and wife and attorney and client are said to be based on the common law. 8 WIGMORE, EVIDENCE §§ 2227, 2290, 2333 (3d ed. 1940).

At early common law one spouse was incompetent as a witness in behalf of the other and could not be compelled to testify against the other. Contrary to the assertion of Dean Wigmore, 8 *id.* § 2227, the English Court of Appeal in Shenton v. Tyler [1939] Ch. 620, held that a spouse was not incompetent to testify against the other and was incompetent only as to testimony in behalf of the other; that the privilege that confidential communications between husband and wife should not be disclosed originated solely in the Evidence Act of 1853. See discussion in MORGAN, INTRODUCTION TO EVIDENCE 34 (1950).

4. 8 WIGMORE, EVIDENCE § 2285 (3d ed. 1940).

argues that a privilege should be recognized only when four fundamental conditions are present:

> "(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."[5]

In raising the question of what communications are within the privileges, we assume an intended confidential communication[6] and ask: when is the element of confidentiality so essential that a privilege ought to be given to the communication? As one aspect of a complicated antitrust action Judge Wyzanski, in *United States v. United Shoe Machinery Corp.*,[7] has recently written a helpful and comprehensive opinion dealing with the attorney-client privilege. The opinion at the outset announces that the privilege, while necessary, should be strictly construed;[8] then proceeds to list the main qualifications necessary for the privilege to apply,[9] some of which are considered in the following paragraphs in connection with other privileges as well as the attorney-client privilege.

According to the *United Shoe* case, only one who is or who sought to become a client may assert the privilege[10] and then only as to communications relating "to a fact of which the attorney was informed . . . by his client . . . for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding. . . ."[11] Other cases agree that to be privileged, a communication from a client to his attorney must have been made for the purpose of securing legal advice,[12] and not

---

5. *Ibid.* See also United States v. Funk, 84 F. Supp. 967 (1949); Scolavino v. State, 187 Misc. 253, 62 N.Y.S.2d 17 (Ct. cl. 1946); State v. Smythe, 25 Wash.2d 161, 169 P.2d 706 (1946), all approving Wigmore's statement.

6. "A *confidential communication* means information voluntarily transmitted in confidence by one to the other." MORGAN, INTRODUCTION TO EVIDENCE 31 (1950).

7. 89 F. Supp. 357 (D. Mass. 1950).

8. *Id.* at 358.

9. *Ibid.*

10. "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client. . . ." Id. at 358. See Keir v. State, 152 Fla. 389, 11 So.2d 886 (1943) (communication in attempting to retain an attorney privileged even though retainer refused). *But cf.* Behrens v. Hironimus, 170 F.2d 627 (4th Cir. 1948); *In re* Koellen's Estate. 167 Kan. 676, 208 P.2d 595 (1949). See MODEL CODE OF EVIDENCE, Rule 210 (1942).

11. 89 F. Supp. at 358.

12. What is legal advice? A definite test is difficult, and "the most that can be said, by way of generalization, is that a matter committed to a professional legal adviser is *'prima facie' so committed for the sake of the legal advice* which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice." 8 WIGMORE, EVIDENCE § 2296 (3d ed. 1940).

merely to enable the lawyer to draft documents, examine titles or give business advice.[13]

The same principles should apply to the physician-patient and priest-penitent relationships. A patient's communication unnecessary to the treatment to be given him by a doctor would not seem to be privileged, although we find little recent judicial authority.[14] Nor should a statement by a penitent outside the priest-penitent relationship be privileged.[15] The restrictive doctrine of *United Shoe,* however, is not applicable to the privilege covering confidential communications between husband and wife, for all marital communications are presumed to be confidential until the contrary appears.[16]

In the *United Shoe* case, Judge Wyzanski stated that "the [attorney-client] privilege applies only if . . . the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer. . . ."[17] Under this test communications between defendant and its patent department were held not to be privileged, the court saying:

> "Eight of the persons in the patent department are not members of the bar of any court. . . . Thirteen other persons in the department are not members of the bar of this Court or of the courts of this Commonwealth but are members of other judicial bars. The fact that they, though resident in Massachusetts and regularly working here, have never received a license to practice law here shows that these regular employees are not acting as attorneys for United. (The situation would be different with regard to a visiting attorney from another state, for whom the privilege might well be invoked.) . . . All the men in the department . . . are comparable to the employees with legal training who serve in the mortgage or trust departments of a bank or in the claims department of an insurance company. Grist which comes to their mill has a higher percentage of business content than legal content."[18]

Prichard v. United States[19] expresses a similar attitude of strictness in confining the attorney-client privilege to its narrowest limits. There a state circuit court judge had called a grand jury to investigate election frauds.

13. United States v. De Vasto, 52 F.2d 26 (2d Cir. 1931); *In re* Coons' Estate, 154 Neb. 690, 48 N.W.2d 778 (1951) ("factual matters concerning the execution of the will, not gleaned from communications" not privileged); Palatini v. Sarian, 15 N.J Super. 34, 83 A.2d 24 (1951) (communications to lawyer acting as attorney in fact not privileged); *accord,* United States v. Rocco, 99 F. Supp. 746 (W.D. Pa. 1951); *In re* Williams' Will, 256 Wis. 338, 41 N.W.2d 191 (1950) (attorney may testify to observations, circumstances, directions given); Cooley v. Frank, 235 P.2d 446 (Wyo. 1951).

14. United States v. Witbeck, 113 F.2d 185 (D.C. Cir. 1940) (physician personal friend of patient). SEE MODEL CODE OF EVIDENCE, Rule 221 (1942).

15. Buuck v. Kruckeberg, 95 N.E.2d 304 (Ind. 1950); Johnson v. Commonwealth, 310 Ky. 557, 221 S.W.2d 87 (1949).

16. 8 WIGMORE, EVIDENCE § 2336 (3d ed. 1940). The privilege is applied usually to legal marriage only, but as to communications made during marriage it remains after termination of the marriage by death or divorce. 8 *id.* §§ 2335, 2341.

17. 89 F. Supp. at 358.

18. *Id.* at 360.

19. 181 F.2d 326 (6th Cir. 1950), *aff'd mem.,* 339 U.S. 974 (1950).

Defendant was implicated and, being a personal friend of the judge, sought his advice. The court held that the judge was not an "attorney" and that defendant's communications to him were not privileged. Should communications made to a law student in seeking legal advice from him be privileged? Clearly the answer would be no under the "lawyer acting as a lawyer" test of the *United Shoe* case. The Model Code, however, seems somewhat more lenient, allowing a privilege for communications made to a person reasonably believed to be authorized to practice law,[20] a view with which Dean Wigmore is in accord.[21] Judicial authority, however, is scanty.[22]

Who are physicians within the physician-patient privilege? Analogy to the *United Shoe* case would strictly limit the group, as would the Model Code's definition of a physician as "a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the state or jurisdiction in which the consultation or examination takes place. . . ."[23] However, statutes and the decisions interpreting them are so varying and inharmonious that no line of judicial authority can be shown.[24]

United Shoe and the Model Code seem indicative of the trend toward strictly limiting the communications that are to be privileged.

Acts—Husband and Wife.—Competency and privilege, common law and statute, broad policy and legal minutiae are inextricably involved in the effect of the marital relation on admissibility of evidence. Accepting the privilege not to have confidential communications revealed, the corollary question is whether a nonverbal communication, an act, is within the privilege.[25] The preliminary decision must be whether or not the act was the sort of thing the spouse would have done in the presence of an outsider. If not, the fair inference is that the act was done in confidence that it would not be disclosed and a disputant must overcome this inference with other evidence. To depend upon the idea of an attempt to communicate would completely restrict the confidence between husband and wife which is the basis of the privilege.[26]

---

20. MODEL CODE OF EVIDENCE, Rule 210 (1942).
21. 8 WIGMORE, EVIDENCE § 2302 (3d ed. 1940).
22. MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 375 n.52 (3d ed. 1951).
23. MODEL CODE OF EVIDENCE, Rule 220 (1942).
24. *Id.*, Rule 221; MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 389 (3d ed. 1951). The statutes giving the physician-patient privilege are so varied as to the relationships to which they apply that they should be consulted in the individual states. For some suggestions as to the status of nurses, attendants, chiropractors, druggists, dentists and orthopedists see Notes, 39 A.L.R. 1421 (1925), 68 A.L.R. 176 (1930), 169 A.L.R. 678 (1947). See also City and County of San Francisco v. Superior Court, 231 P.2d 26 (Cal. 1951); *Ex parte* Ochse, 238 P.2d 561 (Cal. 1951).
25. For cases discussing this point, see Note, 10 A.L.R.2d 1389 (1950).
26. Dean Wigmore's dichotomy would refuse to admit only verbal communications on the ground that an utterance is intended as a communication and should be privileged,

The broadest phraseology is used in *Menefee v. Commonwealth*,[27] where the court reviewed statutes and opinions from various jurisdictions and came to the conclusion that the Virginia statute bans "all information or knowledge privately imparted . . . by virtue of and in consequence of the martial relation through conduct, acts, signs, and spoken or written words."[28] The New York court made almost the same decision in *People v. Daghita*,[29] in which a wife's testimony that she had seen her husband hiding stolen goods was held inadmissible; the husband's acts were induced by the confidential relationship. The same reasoning is applied in *State v. Robbins*,[30] the Washington court refusing to go further than to exclude testimony as to the husband's acts; the wife may testify to her own acts even though the jury may draw from that testimony an inference as to the husband's acts.

Statutes privileging husband-wife private communications generally make an exception to the privilege in divorce actions, civil proceedings of one spouse against the other, or wrongs inflicted by one spouse on the other. In the absence of express statutory prohibition, a spouse's testimony as to acts of cruelty is admissible on the grounds that no confidential communication is involved or that the information was not gained as a result of the marital relation.[31] Under common law, certain personal wrongs and crimes against the witness spouse may be testified to by that spouse,[32] and in divorce cases, testimony concerning such acts may come in under an allegation of cruel and inhuman treatment.[33]

Communications in Aid of Crime or Tort.—In *State v. Pizzolotto*,[34] defendant husband, prior to the alleged assault for which he was tried, told his wife that he planned to kill prosecutrix and later attempted to have his wife testify falsely. The court held that the communications were privileged, without considering their purpose, and added that the privilege belonged to defendant, his wife being unable to waive it for him even though she was hostile and eager to testify. The Model Code would not privilege any com-

---

while an act is done for the sake of doing, hence is not necessarily confidential. 8 WIGMORE, EVIDENCE § 2337 (3d ed. 1940). The Model Code describes a confidential communication as "information transmitted by a voluntary act of disclosure." MODEL CODE OF EVIDENCE, Rule 215 (1942).

27. 189 Va. 900, 55 S.E.2d 9 (1949), 36 IOWA L. REV. 154 (1950), 34 MINN. L. REV. 257 (1950), 3 VAND. L. REV. 656 (1950), 35 VA. L. REV. 1111 (1949).

28. 55 S.E.2d at 15.

29. 299 N.Y. 194, 86 N.E.2d 172, 10 A.L.R.2d 1385 (1949).

30. 35 Wash.2d 370, 213 P.2d 310 (1950).

31. Note, 10 A.L.R. 1389, 1411 (1950).

32. Shores v. United States, 174 F.2d 838, 11 A.L.R.2d 635 (1949) and note thereto. See also United States v. Graham, 87 F. Supp. 237 (E.D. Mich. 1949) in which the question was of competency of the spouse, not a confidential communication. 8 WIGMORE, EVIDENCE § 2338 (3d ed. 1940).

33. Note, 70 A.L.R. 499 (1931). But see Jackson v. Jackson, 186 Tenn. 337, 210 S.W.2d 332 (1948), 20 TENN. L. REV. 695 (1949), 2 VAND. L. REV. 130 (1948).

34. 209 La. 644, 25 So.2d 292 (1946).

munication, regardless of the relationship of the parties, made to enable or aid anyone to commit or to plan to commit a crime or tort.[35] Clearly the attorney-client and physician-patient relationships are not sufficiently important to require giving a privilege to such communications.[36] "Certainly no social policy can be said to justify a privilege in such a situation."[37] But is there no social policy making it desirable to privilege such communications between husband and wife? No case can be found applying an "aid of crime or tort" exception to the husband-wife privilege,[38] and the *Pizzolotto* case at least tacitly holds that there is no such exception. Whether or not such an exception to the husband-wife privilege is warranted is a pure question of policy. Would the injury inuring to the relationship by disclosure of the communications be greater than the benefit thereby gained for the correct disposal of litigation?

II. To Whom Does the Privilege Belong?—Waiver

Before deciding whether or not a privilege may be successfully claimed so as to exclude a given communication it is often necessary, as a preliminary question, for the court to ascertain to whom the privilege belongs.[39] Is the privilege that of the witness, the party seeking to invoke it, or a third person? This preliminary decision must also be made when the question of whether a privilege has been waived arises, for normally the rule would be that only the person to whom a privilege belongs may successfully waive it.[40]

The privilege to prohibit disclosure of confidential communications between husband and wife[41] is, by the vast majority of the American cases,

35. Model Code of Evidence, Rules 212, 217, 222 (1942).

36. State v. Johns, 209 La. 244, 24 So.2d 462 (1946) (no privilege when attorney counsels client to commit perjury); Wimberley v. State, 217 Ark. 130, 228 S.W.2d 991 (1950) (physician-patient privilege is to protect patient's confidence, not intended to protect crime; would be in derogation of mandatory statute requiring doctors to report gunshot wounds).

37. Model Code of Evidence, Rule 212, comment (1942).

38. "There is no judicial authority for so wide an exception to the privilege, but there are dicta which would make the privilege inapplicable where the communication was in aid of a fraud by the claimant," citing Fraser v. United States, 145 F.2d 139, 141-44 (6th Cir. 1944). Morgan, Introduction to Evidence 37 (1950).

39. Model Code of Evidence, Rules 210, 215, 219(2), 221 (1942).

40. United States v. Monti, 100 F. Supp. 209 (E.D.N.Y. 1951); People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951); Martin v. State 203 Miss. 187, 33 So.2d 825 (1948); State v. Smith, 354 Mo. 1088, 193 S.W.2d 499 (1946); Vilardi v. Vilardi, 107 N.Y.S.2d 342 (Sup. Ct. 1951); Matison v. Matison, 95 N.Y.S.2d 837 (Sup. Ct. 1950); State v. Karcher, 155 Ohio St. 253, 98 N.E.2d 308 (1951); State v. Clark, 26 Wash.2d 160, 173 P.2d 189 (1946), 22 Wash. L. Rev. 228 (1947). *But cf.* Halloran v. Tousignant, 230 Minn. 399, 41 N.W.2d 874 (1950). See, in general, 8 Wigmore, Evidence §§ 2327-29, 2340, 2387-91 (3d ed. 1940); Model Code of Evidence, Rule 231 (1942).

41. This privilege should always be distinguished from the so-called privilege of husband and wife not to testify against the other nor to be testified against by the other, which is based on the common law incompetency of husband and wife. "[T]he privilege not to testify against the other is broader [than the privilege for communications between husband and wife] in the respect that it excludes testimony to any adverse facts

held to belong to the communicating spouse because it is intended to secure freedom from apprehension in the mind of the one desiring to communicate,[42] and neither death nor divorce terminates the right of the communicating spouse to claim the privilege as to communications made during legal marriage. Recent cases have made no attempt to vary this well-settled rule.[43] The same is true with other privileges. Thus, the attorney-client privilege belongs to the client;[44] physician-patient to the patient;[45] and priest-penitent to the penitent.[46] It should be noted, however, that where the privilege of husband and wife not to testify against the other or be testified against by the other is involved, the implication of the decisions is that the privilege belongs to both spouses.[47] Query if this is a privilege or an incompetency?

Newer cases continue to hold that a third person is not entitled to claim another's privilege,[48] unless, of course, he stands in the shoes of the privilege-holder as a personal representative or guardian, who ordinarily may either claim or waive the privilege.[49]

---

even though they have been learned wholly apart from marital confidence, and is narrower in the respect that it applies only to testimony adverse in its tenor and adverse to a party to the cause or to one in an equivalent position." 8 WIGMORE, EVIDENCE § 2333 (3d ed. 1940). "The two privileges have practically nothing in common, either in policy or in rule; and their complete separation needs repeated emphasis before the possibility of confusion can be cleared away." 8 *id.* § 2334. The privilege not to testify has been omitted from the Model Code.

42. 8 WIGMORE, EVIDENCE §§ 2332, 2340 (3d ed. 1940).

43. *E.g.*, State v. Pizzolotto, 209 La. 644, 25 So.2d 644 (1946); Cain v. Enyon, 331 Mich. 81, 49 N.W.2d 72 (1951); Martin v. State, 203 Miss. 187, 33 So.2d 825 (1948); State v. Smith, 354 Mo. 1088, 193 S.W.2d 499 (1946); Lake v. Lake, 60 N.Y.S.2d 105 (Sup. Ct. 1946); Patterson v. Skoglund, 181 Ore. 167, 180 P.2d 108 (1947). *But cf.* People v. McCormack, 278 App. Div. 191, 104 N.Y.S.2d 139 (Sup. Ct. 1951) (privilege construed to be that of spouse against whom offered).

44. United States v. Monti, 100 F. Supp. 209 (E.D.N.Y. 1951); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950); People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951); Matison v. Matison, 95 N.Y.S.2d 837 (Sup. Ct. 1950); 8 WIGMORE, EVIDENCE § 2321 (3d ed. 1940); MODEL CODE OF EVIDENCE, Rule 210 (1942).

45. Vilardi v. Vilardi, 107 N.Y.S.2d 342 (Sup. Ct. 1951); State v. Karcher, 155 Ohio St. 253, 98 N.E.2d 308 (1951); 8 WIGMORE, EVIDENCE § 2386 (3d ed. 1940); MODEL CODE OF EVIDENCE, Rule 221 (1942). Since the privilege is statutory, the statute, of course, controls.

46. Some statutes privilege the communications of both priest and penitent coming within the privilege. In each case, however, the privilege against disclosure would be that of the speaking party. 8 WIGMORE, EVIDENCE § 2395 (3d ed. 1940). See also, Buuck v. Kruckeberg, 95 N.E.2d 304 (Ind. 1950) (communication held not to have been privileged); Johnson v. Commonwealth, 310 Ky. 557, 221 S.W.2d 87 (1949) (statement not in confidence); MODEL CODE OF EVIDENCE, Rule 219 (1942).

47. "Although there is some basis at least under statutes for the view that the privilege is that of the witness, . . . clearly the better view is that the privilege is that of either spouse who chooses to claim it." United States v. Mitchell, 137 F.2d 1006, 1008 (2d Cir. 1943), citing 8 WIGMORE, EVIDENCE § 2241 (3d ed. 1940).

48. See, *e.g.*, Martin v. State, 203 Miss. 187, 33 So.2d 825 (1948); Patterson v. Skoglund, 181 Ore. 167, 180 P.2d 108 (1947). Cases are collected in Note, 2 A.L.R.2d 645 (1948).

49. Note, 2 A.L.R.2d 645 (1948). *Compare* Empire City Sav. Bank v. Ward, 101 N.Y.S.2d 677 (Sup. Ct. 1950), *with* Stayner v. Nye, 227 Ind. 231, 85 N.E.2d 496 (1949), both concerned with waiver of physician-patient privilege. See also Notes, 23 IND. L.J. 295 (1948), 1 SYRACUSE L. REV. 101 (1949); 2 SYRACUSE L. REV. 370 (1951).

Modern cases and authorities, while recognizing the privileges for confidential communications, rarely exhibit a fondness for them and at times are quick to hold them waived.[50] Nevertheless, on the problem of waiver, few set rules are possible, and when the problem is presented to a judge he must decide, on the facts of the particular case, whether or not a privilege has been waived.

In ruling on defendant's motion to vacate and set aside a judgment of conviction of treason, the court in *United States v. Monti*[51] held that defendant, by alleging that an open court confession had been procured through the coercion of his former counsel, had waived his attorney-client privilege; and that former counsel, as officers of the court, should disclose all they knew. In *Halloran v. Tousignant*,[52] defendant made a written statement to a representative of the insurer of his vehicle which, when offered by plaintiff to impeach defendant, the trial court excluded as being within the attorney-client privilege. On appeal the Minnesota Supreme Court found the attorney-client privilege had been waived by an executed agreement of the insurance companies to exchange the statements of each insured. And the case of *Dumont v. Dinallo*[53] holds that a failure on the stand by the client to claim his privilege renders unobjectionable questions concerning a conversation with his attorney.

A privilege may be waived by extra-judicial conduct. In *State v. Clark*[54] husband and wife were co-defendants in a murder prosecution and the wife, in the presence of her husband, made a voluntary out-of-court admission implicating him. The court held that his silence implied consent and the privilege that one spouse not be examined for or against the other spouse without the latter's consent was found to have been waived.[55] Although the *Clark* case uses the term "waiver," the result could be better explained on the basis of an admission by silence, falling in line with the cases holding that

---

50. "The rule which allows a client to prevent the disclosure of information which he gave to his attorney for the purpose of securing legal assistance is founded upon the belief that it is necessary 'in the interest and administration of justice'. . . . But the privilege should be strictly construed in accordance with its object." Wyzanski, J., in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

"[T]here is nothing to demonstrate any benefit to the public in the [physician-patient] privilege, while the law books are full of instances where its application has prevented the discovery of the truth to the damage of honest litigants." Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. OF CHI. L. REV. 285, 290 (1943).

51. 100 F. Supp. 209 (E.D.N.Y. 1951).

52. 230 Minn. 399, 41 N.W.2d 874 (1950). The error in excluding the evidence because of the supposed privilege was held to have been harmless.

53. 4 N.J. Super. 371, 67 A.2d 334 (1949).

54. 26 Wash.2d 160, 173 P.2d 189 (1946), 22 WASH. L. REV. 228 (1947).

55. A voluntary disclosure to a third person of a written communication likewise has the effect of waiving any privilege. State v. Smith, 354 Mo. 1088, 193 S.W.2d 499 (1946). This situation, however, is perhaps more nearly analogous to that where a third person overhears an otherwise confidential communieation, discussed below.

the husband-wife privilege not to testify is not violated by requiring a witness to testify to a tacit admission resulting when a husband or wife makes a statement in the presence of, and not denied by, his spouse.[56]

The waiver cases present no uniform pattern, each case turning on its own particular set of facts, and recent cases have had no noticeable effect on prior adjudications. It seems reasonable, however, to generalize that today a privilege will be found to have been waived when the holder asserts a claim based on the privilege, when he expressly or impliedly consents to its disclosure by the other party to the communication, or when he himself has voluntarily made a disclosure of the communication.

Perhaps the best indication of the trend of the waiver decisions is Rule 231 of the American Law Institute's Model Code, which is applied broadly to all privileges.

> "A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has
>
> (a) contracted with anyone not to claim the privilege or,
>
> (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by anyone."[57]

Clause (a) "goes further than any known case."[58] Once a contract to waive a privilege is made with anyone, a party to the action or not, the privilege with respect to the particular matter is gone "completely and forever."[59] "The theory underlying this clause is that a personal privilege to suppress the truth is not the subject of piecemeal waiver by bargain or otherwise."[60] The principle announced by clause (b) is generally recognized, although there is some conflict in its application.[61]

III. "EAVESDROPPING CASES"—EFFECT OF THE OVERHEARING BY THIRD PERSONS OF OTHERWISE PRIVILEGED COMMUNICATIONS

Where an otherwise privileged communication is overheard by a third person, either surreptitiously or openly, the cases have always allowed the third person to testify to what he heard, in spite of the fact that the communication remains privileged as between the communicants themselves.[62]

---

56. These cases are discussed below in dealing with the "eavesdropper rule."
57. MODEL CODE OF EVIDENCE, Rule 231 (1942).
58. *Id.*, Rule 231, comment *a* (1942).
59. *Ibid.*
60. *Ibid.*
61. MODEL CODE OF EVIDENCE, Rule 231, comment *b* (1942).
62. We have assumed throughout that except for the question of privilege the evidence is otherwise admissible, without reaching any problem of relevancy, hearsay, etc.

In affirming but distinguishing this general rule, the Pennsylvania Superior Court, in *Hunter v. Hunter,* [63] held in an action by a husband for divorce that wire recordings of conversations between plaintiff and defendant in their bedroom, made by his son in an adjoining room, were privileged and therefore inadmissible against the wife.[64] The court reasons that admitting the recordings under the "eavesdropping rule" would enable plaintiff, by repeating his wife's words through mechanical means, to accomplish indirectly what he could not do directly. Plaintiff had procured his son to make the recordings, and being a party to their making, "the recorded conversations when read into the record [at the trial], in effect, became his testimony of privileged communications which the law holds inviolate."[65] Compare the case of *Erlich v. Erlich,*[66] an action by a husband for separation on the ground of abandonment. There the court held admissible, under the "eavesdropper rule," voice recordings of a telephone conversation between the wife and her attorney, the latter dictating over the telephone a letter of reconciliation to the husband to be used at the trial.[67] A distinction between the two cases is that in the *Hunter* case the husband, a party to the privileged conversations, was aware that they were being recorded; whereas, in the *Erlich* case neither party to the conversation was aware that it was being transcribed. Certainly the *Erlich* case is an extension of the "eavesdropper rule." The *Hunter* case, which easily could have been decided on other grounds,[68] uses language which is, in application, a strict limitation of the rule. Although no other cases precisely in point have been found, the rule of the *Erlich* case seems justifiable and desirable, considering its resulting disclosure of the truth.

When parties consult an attorney for their mutual benefit, their communications with the attorney are not privileged as between themselves, because not intended to be secret; but each may assert a privilege against strangers to the conference.[69] *Vance v. State,*[70] a recent decision of the Ten-

63. 83 A.2d 401 (Pa. 1951).

64. The decision on the basis of a violation of the privilege is not as forceful as it might be in view of the fact that the court points out that the records were partially unintelligible, 83 A.2d at 403, and that the parties were not on an even footing when the records were being made, plaintiff being conscious that a record was being made of the conversation. *Id.* at 402. "During the course of the discussions not only did plaintiff urge the defendant to 'speak up, I can't hear you' but he goaded her into making derogatory aspersions and he deliberately prolonged the discussions when she indicated that she wanted to go to sleep." *Id.* at 403.

65. 83 A.2d at 404.

66. 278 App. Div. 244, 104 N.Y.S.2d 531 (1st Dep't 1951).

67. The court points out that "no crime is established where such a wire-tap is made by the subscriber to his own telephone service connection," citing People v. Applebaum, 277 App. Div. 43, 97 N.Y.S.2d 807 (2d Dep't 1950), *aff'd mem.,* 301 N.Y. 738, 95 N.E.2d 410 (1950). 104 N.Y.S.2d at 533.

68. *I.e.,* the facts that the recordings were imperfect and that the circumstances of making the recordings were basically unfair to the wife. See note 64, *supra.*

69. Luthy v. Seaburn, 46 N.W.2d 44 (Iowa 1951); Jenkins v. Jenkins, 151 Neb. 113, 36 N.W.2d 637 (1949); Note, 141 A.L.R. 553 (1942).

70. 190 Tenn. 521, 230 S.W.2d 987, *cert. denied,* 339 U.S. 988 (1950).

nessee Supreme Court, presents an interesting fact situation involving the presence of third persons during conversations claimed to be privileged. A conference was held between defendant, co-defendant and their respective attorneys, at the instance of defendant's attorneys, to enable them to prepare his defense and not for the purpose of preparing a joint defense. The co-defendant made no defense, and the trial court allowed his attorney to testify to admissions made by defendant at the conference. In affirming this action, the court held that as to defendant the attorney of his co-defendant was merely a third party in whom defendant had placed no confidence; that communications between attorney and client are not privileged when made in the presence of others, distinguishing the situation where such a conference is held for the purpose of preparing a joint defense.

Even though a waiver is clearly not intended, when communications are voluntarily made in the presence of third parties, or are later disclosed to them, the tendency is to admit evidence of such communications on the ground that they were not intended to be confidential.[71] This holds true regardless of which alleged confidential relationship it is argued that the evidence violated. If, however, during a privileged conversation, a third person is present as a confidential agent of either of the parties, his presence will not revoke the privilege.[72] Thus, a client may safely speak in front of his attorney's secretary or law clerk; a patient in the presence of his physician's private nurse.

A privilege has sometimes been claimed where a third person is offered as a witness to testify to a statement made by one spouse in the presence of the other, resulting in an admission by silence, and the older cases were in hopeless confusion.[73] Typical of the more modern cases is *Ross v. Hayes*.[74] Defendant's wife, in the presence of her husband, told a third person that defendant at the time of the automobile accident in question was driving on the wrong side of the road; that she had cautioned him about his excessive speed. Defendant remained silent, failing to dissent from his wife's statement. The Oregon Supreme Court held that testimony of the third person concerning defendant's silence was properly received. The husband and wife relationship did not destroy the inference from silence which is the basis of the rule that evidence may be given of a declaration or act of another in the presence and within observation of a party and of his conduct in relation thereto. The case expressly rejects the theory that silence in the presence of a statement by one's

71. See, *e.g.*, Batchelor v. State, 217 Ark. 340, 230 S.W.2d 23 (1950); Luthy v. Seaburn, 46 N.W.2d 44 (Iowa 1951); Jenkins v. Jenkins, 151 Neb. 113, 36 N.W.2d 637 (1949); Hazlett v. Bryant, 241 S.W.2d 121 (Tenn. 1951); Note, 141 A.L.R. 553 (1942).
72. Baldwin v. Commissioner, 125 F.2d 812, 141 A.L.R. 548 (9th Cir. 1942); *In re* Busse's Estate, 332 Ill. App. 258, 75 N.E.2d 36 (1947), 15 U. OF CHI. L. REV. 989 (1948).
73. Note, 158 A.L.R. 465 (1945).
74. 176 Ore. 225, 157 P.2d 517 (1945).

spouse is so consistent with a reluctance to open a dispute between them in public, or to make a flat contradiction before others, as to be in fact no evidence whatever of an admission.

The "eavesdropper rule" illustrates the tendency of most courts to limit strictly any privilege which, when invoked, imposes a limitation upon ascertaining the facts of the controversy. Declarations made before third persons clearly have no element of confidence and should furnish no basis for asserting a privilege. In each case involving a privilege, however, conflicting considerations of public policy necessarily require a decision as to whether it is more important to discover the truth or to foster a given relationship.

IV. "Novel Privileges"—Journalist, Accountant, Governmental

"[T]he very fact that testimonal privileges are based upon specified confidential relations, is proof that they do not extend to all, and it hardly needs to be said that nobody by contract, express or implied, can abridge public duties."[75]

In absence of statute, courts rarely extend a privilege beyond the common law protection to private communications of husband and wife and attorney and client.[76] The "novel privileges" granted by some states are ignored by the Model Code and roundly condemned by Wigmore.[77] They are for the most part mere expansions of a business duty not to disclose a customer's affairs. In *Tournier v. National Provincial and Union Bank of England*[78] the court held that the duty of a bank to a customer not to disclose his affairs is a contractual legal duty qualified by a requirement to disclose under compulsion of law, where there is a duty to the public, where the bank's interests require disclosure, or when the customer consents. It is obvious that this qualified privilege is the logical rationale for claims of journalists, accountants, bankers, brokers, agents and all other pressure groups attempting to secure their business interests behind a legal barrier of secrecy.[79]

Journalists.—Twelve states have privileged the right of a newspaper reporter to withhold the source of information obtained by him,[80] and recently radio and television employees have been added in a few statutes.[81] The

75. Learned Hand, J., in McMann v. Securities and Exchange Commission, 87 F.2d 377 (2d Cir. 1937).

76. See Note, 109 A.L.R. 1450 (1937).

77. 8 Wigmore, Evidence § 2286 (3d ed. 1940).

78. [1924] 1 K.B. 461 (C.A.).

79. *Id.* at 473.

80. Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio, and Pennsylvania. See Vanderbilt, Minimum Standards of Judicial Administration 344-46 (1949); 8 Wigmore, Evidence § 2286 n.13 (Supp. 1951).

81. Alabama, Arkansas, Indiana and Maryland.

paucity of cases interpreting the statutes may indicate either that the problem rarely arises or that, as in *Rosenberg v. Carroll*[82] (no statutory privilege involved), the information is not relevant. Or it may be that the reporter simply accepts his contempt citation without appeal.[83] Proponents of legislation privileging reporters rely on a concept of newspapers as guardians of public interest with a duty to expose waste and corruption,[84] but it has been pointed out that a privilege, based on journalistic canons of professional ethics, is primarily motivated by the fact that economic survival of newspapers depends on preservation of confidential sources of information.[85] Hence, contrary to other privileges which assign the right of non-disclosure to the communicator for his protection, the newspaper privilege is entirely within the discretion of the reporter. The statutes range from absolute privilege[86] to those qualified by such requirements as proof that the witness is a bona fide reporter[87] or that the story was published in good faith, without malice and in the interest of public welfare.[88]

The hostility of courts to this extension of privilege is indicated by the decision in *State v. Donovan*,[89] in which the New Jersey statute was narrowly construed to require disclosure, not of the source (which was already public) but of the *transmitter* of the information. The court based its holding on the concept that all statutes in derogation of the common law are to be

82. 99 F. Supp. 629 (S.D.N.Y. 1951).

83. For an exhaustive and well-documented discussion of the journalist privilege, see Note, 36 VA. L. REV. 61 (1950).

84. Desmond, *The Newsmen's Privilege Bill,* 13 ALBANY L. REV. [No. 2] 1 (1949).

85. Note, 36 VA. L. REV. 61 (1950).

86. "No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribuual or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with, or employed." ALA. CODE ANN. tit. 7 § 370 (1940) (Supp. 1949).

87. "Any person connected with a weekly, semi-weekly, tri-weekly or daily newspaper that conforms to postal regulations, which shall have been published for five consecutive years in the same city or town and which has a paid circulation of two per cent of the population of the country in which it is published, or a recognized press association, as a bona fide owner, editorial or reportorial employee, who receives his or her principal income from legitimate gathering, writing, editing and interpretation of news, and any person connected with a commercially licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives his or her principal income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of his employment or representation of such newspaper, press association, radio station or television station, whether published or not published. . . ." IND. STAT. ANN. § 1733 (Burns 1951 Supp.).

88. "Before any editor, reporter, or other writer for any newspaper or periodical, or radio station, or publisher of any newspaper, or periodical, shall be equired to disclose to any Grand Jury or to any other authority, the source of information used as the basis for any article he may have written, published or broadcast it must be shown that such article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare." ARK. STAT. ANN. tit. 43, § 917 (Supp. 1951).

89. 129 N.J.L. 478, 30 A.2d 421 (1943).

strictly construed and that a statute which leaves the choice of whether or not to speak with the witness is a situation "fraught with serious consequences."[90]

When there is no statutory privilege, the cases uniformly hold that there is no right to refuse to disclose a communication,[91] the interest of the public in due administration of law is superior to any private consideration.

Accountants.—Nine states have statutes purporting to privilege communications to accountants,[92] three containing a provision that the statute does not affect criminal and bankruptcy proceedings.[93] Thus in *Gariepy v. United States,*[94] an income tax evasion case, the Michigan privilege statute was not mentioned in the opinion, although the defendant attempted to claim privilege, the court citing *Himmelfarb v. United States,*[95] which states the flat common law rule that there is no accountant-client privilege. And in *United States v. Stoehr,*[96] the court not only brushes off any claim of privilege, but implies an affirmative duty of a Certified Public Accountant to report improper tax returns. Nor does a Certified Public Accountant have any right to refuse to give a deposition, either by claiming that it includes privileged communications, or by insisting that papers demanded by subpoena *duces tecum* were the personal property of an accountant who is an independent contractor and not a party to the suit.[97]

Attempts to claim a privilege as to communications made by banks[98] and brokers or their clients,[99] have failed. The Missouri Supreme Court struck down as unconstitutional a statute forbidding the state bank commissioner to disclose information in civil suits as a violation of the equal protection clause;

---

90. 30 A.2d at 426.

91. People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415, 102 A.L.R. 769 (1936) is the leading case; *accord,* Clein v. State, 52 So.2d 117 (Fla. 1951).

92. Colorado, Georgia, Florida, Illinois, Iowa, Kentucky, Louisiana, Michigan, New Mexico. For a horrible example, consider the Georgia statute: "Any communications to any practicing certified public accountant transmitted to such accountant in anticipation of, or pending, the employment of such accountant shall be treated as confidential and not disclosed nor divulged by said accountant in any proceedings of any nature whatsoever. This rule shall not exclude the accountant as a witness to any facts which may transpire in connection with his employment." GA. CODE ANN. § 84-216 (Supp. 1951). See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 345-46 (1949); 8 WIGMORE, EVIDENCE § 2286 (3d ed. 1940).

93. Louisiana, Iowa, Michigan. The Florida statute provides that the accountant shall not be *permitted* to testify without the consent of the client.

94. 189 F.2d 459 (6th Cir. 1951).

95. 175 F.2d 924 (9th Cir. 1949).

96. 100 F. Supp. 143 (M.D. Pa. 1951).

97. *Ex parte* Frye, 155 Ohio St. 345, 98 N.E.2d 798 (1951).

98. State v. Crookston Trust Co., 222 Minn. 17, 22 N.W.2d 911 (1946); Tournier v. National Provincial and Union Bank of England, [1924] 1 K.B. 461 (C.A.); Note, 109 A.L.R. 1450 (1937).

99. McMann v. Securities and Exchange Commission, 87 F.2d 377 (2d Cir. 1937).

the statute was an unwarranted interference with the function of courts in that it would prevent procuring evidence in a trial.[100]

Government Privileges.—This question of the right to evidence arises in the governmental privileges—*i.e.*, the privilege of an official not to be compelled to name an informer,[101] the privilege of government departments to forbid disclosure of official records without authority of the department head,[102] and the statutory secrecy accorded state records.[103] The limited scope of this Note and the broad policy questions involved preclude discussion of these questions.

Other Privileges.—There has been some effort to privilege groups such as social workers (an outgrowth of the statutory secrecy of state relief rolls?), so far unsuccessful,[104] and a few states have accorded privilege to communications to a public official,[105] a secretary of an attorney,[106] and registered nurses.[107]

V. STATE LAWS OF EVIDENCE AND THE FEDERAL RULES OF CIVIL AND CRIMINAL PROCEDURE

Criminal Procedure.—The advisory committee note on Rule 26[108] of the Federal Rules of Criminal Procedure states, "This rule contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal Courts,"[109] citing *Funk v. United States*[110] and

100. *Ex parte* French, 315 Mo. 75, 285 S.W. 513, 47 A.L.R. 688 (1926). See also, Commonwealth v. Mellon Nat. Bank & Trust Co., 360 Pa. 103, 61 A.2d 430 (1948).

101. Parsons v. State, 251 Ala. 467, 38 So.2d 209 (1948); *c.f.* Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940); Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments,* 3 VAND. L. REV. 73 (1949).

102. United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 71 Sup. Ct. 416, 95 L. Ed. 417 (1951). See also Lobel v. American Airlines, 192 F.2d 217 (2d Cir. 1951) (CAB reports inadmissible but investigator may make personal deposition); Foltz v. Moore-McCormack Lines, Inc., 189 F.2d 537 (2d Cir. 1951) (in libel action against communicator, records are not privileged, but this decision is not to be construed as infringing on the F.B.I.'s right to withhold identity of informers, or confidential reports); United States v. Grayson, 166 F.2d 863 (2d Cir. 1948) (government must produce "privileged" records for use by defendant or drop prosecution); Sanford, *supra,* note 101.

103. Commonwealth v. Mellon Nat. Bank & Trust Co., 360 Pa. 103, 61 A.2d 430 (1948); Powers *ex rel.* Dep't of Employment Security v. Superior Court, 82 A.2d 885 (R.I. 1951). See Note, 165 A.L.R. 1302, 1327 (1946).

104. See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 346 (1949); 8 WIGMORE, EVIDENCE § 2286 (3d ed. 1940).

105. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 346 (1949).

106. *Ibid.*

107. *Ibid.* For decision on this question in absence of clear statutory privilege, see Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245, 169 A.L.R. 668 (1947).

108. ". . . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, 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."

109. FED. R. CRIM. P. 26, Advisory Committee Note.

110. 290 U.S. 371, 54 Sup. Ct. 212, 78 L. Ed. 369, 93 A.L.R. 1136 (1933).

Wolfle v. United States.[111] Rule 26 codifies the reasoning of the *Funk* case, that rules of evidence in the federal courts shall be, in the absence of statute, governed by the common law in the light of reason and experience. Since at common law the only privileged communications were between husband and wife and attorney and client, the federal courts have refused to recognize state privilege statutes. In *Petition of Borden,*[112] the district court held that the Illinois statute bestowing an absolute privilege on accountants was not applicable in federal courts in view of Rule 26. In *Himmelfarb v. United States,*[113] an appeal from a district court in California which has no accountant-privilege statute, the court, without qualification or discussion, eliminated any question of a privilege unknown to common law and was followed in *Gariepy v. United States.*[114] The Sixth Circuit did not need to consider the Michigan privilege statute since it cuts off the privilege in criminal and bankruptcy cases. *Behrens v. Hironimus,*[115] a petition for habeas corpus, turned on interpretation of a West Virginia statute privileging a client's confidential communications to his attorney and of Rule 26, under both of which such communications would be privileged. The court called the testimony of the attorney consulted by petitioner admissible by finding no attorney-client relation (the lawyer refused the case) and by finding that the information revealed (apparently advice to the client) was not really confidential as prescribed by the *state* statute.

Civil Procedure.[116]—A much more complicated problem arises under Rule 43(a) of the Federal Rules of Civil Procedure.[117] In spite of the liberal wording of the Rule, both courts[118] and authorities[119] seem inclined to believe that state statutes will govern in the absence of a federal statute to the contrary. In *Lake Shore Nat. Bank v. Bellanca Aircraft Corporation,*[120] a witness was held to be incompetent under the Delaware dead-man statute; and the court, discussing Rule 43(a) said "When, as by Rule 43(a), federal

111. 291 U.S. 7, 54 Sup. Ct. 279, 78 L. Ed. 617 (1934).

112. 75 F. Supp. 857 (N.D. Ill. 1948).

113. 175 F.2d 924 (9th Cir. 1949) (income tax evasion).

114. 189 F.2d 459 (6th Cir. 1951) (income tax evasion).

115. 170 F.2d 627 (4th Cir. 1948).

116. See Green, *Federal Civil Procedure Rule 43(a), supra,* p. 560.

117. ". . . . 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. . . ."

118. First Trust Co. of St. Paul v. Kansas City Life Ins. Co., 79 F.2d 48 (8th Cir. 1935) (construing Minnesota privilege statute narrowly to admit nurses' testimony); Stiles v. Clifton Springs Sanatorium Co., 74 F. Supp. 907 (W.D.N.Y. 1947) (physician-patient privilege may be waived by personal representative if beneficial to memory of deceased).

119. 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 967 (1950).

120. 83 F. Supp. 795 (D. Del. 1949).

statutes are again to be considered as well as state rules of evidence in connection with admissibility of evidence or competency of witnesses, federal decisions must be based solely on state rules of evidence or procedure until some federal legislation again comes into being."[121] But in *Firemen's Mutual Ins. Co. v. Aponaug Mfg. Co.*,[122] the court refused to apply the Mississippi statute making perjurers incompetent, since the old federal criminal statute to that effect had been repealed. In *Rhodes v. Metropolitan Life Ins. Co.*,[123] a physician's testimony was admitted, because such testimony was privileged only by the Louisiana Criminal Code and the court refused to apply its prohibition to a civil case.

In the absence of statute, the federal courts have refused to follow state exclusionary rules in a number of instances,[124] or if the state decisions appeared to be more liberal, have disregarded federal decisions in order to admit the evidence.[125]

CONCLUSION

Since the latest edition of Dean Wigmore's treatise on evidence appeared in 1940, the cases have effected little, if any, change in the rules of evidence governing privileged communications. The policy continues to be one of strict limitation. Some "novel privileges" remain in existence, but only because of the efforts of pressure groups, and their expansion seems doubtful. What was said by Professors Morgan and Maguire in 1937 holds true today:

> "The time has come to make a searching inquiry into the policy of preserving the recognized privileges, and to subject the orthodox assumptions and assertions by which they are ordinarily justified to an impartial analysis. . . . What is needed is a well-designed and well-constructed code built upon the two leading principles, enunciated by Thayer . . . , (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."[126]

---

121. *Id.* at 797. See also United States v. Witbeck, 113 F.2d 185 (D.C. Cir. 1940).

122. 149 F.2d 359 (5th Cir. 1945); *cf.* Franzen v. E.I. Du Pont de Nemours & Co., 146 F.2d 837 (3d Cir. 1944) (deposition of deceased witness admitted, although inadmissible under New Jersey rule).

123. 172 F.2d 183 (5th Cir. 1949).

124. See Peoples Loan & Investment Co. v. Travelers Ins. Co., 151 F.2d 437 (8th Cir. 1945) (Arkansas rule as to evidence of reputation does not control); Newman v. Clayton F. Summy Co., 133 F.2d 465 (2d Cir. 1943) (judicial notice); Boerner v. United States, 117 F.2d 387 (2d Cir. 1941) (strict New York rulings on "assent by silence" do not control).

125. United States v. Aluminum Co. of America, 1 F.R.D. 1 (S.D.N.Y. 1939) (evidence admitted under New York common law rule); Mutual Life Ins. Co. v. Green, 37 F. Supp. 949 (W.D. Ky. 1941) (construes state decisions on waiver of privilege to admit testimony).

126. Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 922 (1937).