

## **Privileged Communications: The Federal Rules of Evidence and Indiana Law; Who's Got a Secret?**

### I. INTRODUCTION

The first statutory rules ever enacted to govern evidentiary questions in federal courts, the Federal Rules of Evidence, became effective July 1, 1975. The rules are the culmination of almost thirteen years of study by distinguished judges, members of Congress, attorneys, academicians, and others interested in the administration of justice.<sup>1</sup> This Note is addressed to Federal Rule of Evidence 501, the single rule comprising Article V: Privileges. More specifically, the Note will examine the right of certain persons to withhold testimony about certain communications they may have with certain other persons.

Evidentiary privileges are exceptions to the general requirement that every witness must give testimony in court about all facts material and relevant.<sup>2</sup> Privileges may be divided into (1) those which directly protect the individual, such as the constitutional privileges excluding evidence obtained through illegal search and seizure and the privilege against self-incrimination;<sup>3</sup> (2) those privileges designed to protect the integrity of government, such as the privilege of a probation officer to protect data received in the discharge of his duties;<sup>4</sup> and (3) those privileges which are designed to protect interests and relationships regarded as having sufficient social importance to justify the sacrifice of facts needed in a judicial inquiry.<sup>5</sup> Relationships to be protected in the third group, the focus of this Note, include, but are not limited to, those between attorney and client, husband and wife, physician and patient, and clergyman and communicant.

An Advisory Committee on Rules of Evidence, appointed by Congress in 1965, compiled a set of rules which the Supreme Court transmitted to Congress in 1972. The proposed rules, popularly known as "the Supreme Court version," included an approach to privilege law which is markedly different from that enacted by

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<sup>1</sup>For a concise history of those years of effort, see H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 2-4 (1973).

<sup>2</sup>8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

<sup>3</sup>U.S. CONST. amends. IV, V.

<sup>4</sup>IND. CODE § 33-12-2-22 (Burns 1975).

<sup>5</sup>MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 72 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

Congress. Although article V of the Supreme Court version, which included thirteen specific rules on privilege, was rejected by Congress, it has been suggested that a study of the proposed rules is a valuable reference in determining the status of the federal common law of privilege.<sup>6</sup>

This Note will examine article V of the Federal Rules of Evidence as enacted by Congress, compare the enacted rule on privilege with the version promulgated by the Supreme Court, review Indiana law of privileged communications, and suggest what influence the new federal rule may have on the development of this area of Indiana law.

## II. FEDERAL RULE OF EVIDENCE 501

Article V: Privileges, of the Federal Rules of Evidence, provides:

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

What does the new rule mean and what changes, if any, will it make in the application of state and federal law in federal courts?

Representative William L. Hungate, chairman of the House subcommittee which held hearings on the rules,<sup>7</sup> reported to Congress that the rule was intended to provide that federal law of privilege will apply in all federal criminal cases. Federal law of

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<sup>6</sup>2 J. WEINSTEIN & M. BERGER, COMMENTARY ON THE RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES ¶ 501[02], at 501-20 (1975). The authors suggest that this version, which is the culmination of seven years of effort by leading jurists, attorneys, and academicians, may be viewed as "Standards" to be consulted when a determination of federal common law is required. Though not binding, the proposed rules are a convenient, comprehensive guide to the present state of federal privilege law.

<sup>7</sup>Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary.

privilege is also intended to apply, he reported, in civil actions and proceedings, unless state law supplies the rule of decision for a claim or defense. Where state law does supply the rule of decision, then state privilege law is intended to apply. The term "element of a claim or a defense" was interpreted by Representative Hungate to mean that the evidence in question must tend to support or defeat a claim or defense. If the evidence does tend to support or defeat a claim or a defense, he explained, then the evidence is "an item of a claim or defense."<sup>8</sup>

The Joint Explanatory Statement of the Committee of Conference gives the following interpretation of the rule:

[S]tate privilege law will usually prevail in diversity cases. There may be diversity cases, however, where a claim or a defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942).<sup>9</sup>

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. . . .

. . . .

In civil actions and proceedings, where the rule of decision as to a claim or defense, or as to an element of a claim or defense is supplied by state law . . . state privilege law [will] apply.<sup>10</sup>

Representative Hungate's presentation of the Conference Report on the Federal Rules of Evidence also included a clear statement that rule 501 is intended to leave the federal law of privilege as it was before the rules were enacted, with federal courts free to develop the law of privilege on a case-by-case basis.<sup>11</sup>

It is thus clear that rule 501 provides for the application of the federal common law of privilege, subject to judicial interpretation, in all federal criminal cases. In civil proceedings, however, there is less clarity, since problems of construction are raised by

<sup>8</sup>120 CONG. REC. H12,253 (daily ed. Dec. 18, 1974). Representative Hungate made these remarks while explaining the report of the Committee of Conference on the bill to establish rules of evidence.

<sup>9</sup>[Author's footnote]. The *Sola* case upheld the doctrine that "the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules." 317 U.S. at 176.

<sup>10</sup>H.R. REP. No. 93-1597, 93d Cong., 2d Sess. 7-8 (1974) (Conference Report).

<sup>11</sup>120 CONG. REC. H12,254 (daily ed. Dec. 18, 1974).

the language of the second sentence of the rule.<sup>12</sup> The Conference Report supports a contention that state law of privilege will govern in federal cases where jurisdiction is based on diversity whenever state law controls the claim or defense in controversy.

Consideration of state privilege law has been recognized by commentators as a primary concern in drafting article V of the Federal Rules of Evidence.<sup>13</sup> Strong support for application of state privilege law in diversity cases includes the observation that some matters affected by these privileges—the marital relationship, for example—fall outside the area of federal legislative competence granted by article I, section 8 of the Constitution. Although recognition of a state privilege not found in the federal rule may defeat federal uniformity and impede the search for truth, the justification for the privilege rules is found in extraneous social policies, which can be effectuated only by permitting certain evidence to be suppressed.<sup>14</sup>

In spite of strong support for the view that state privilege law will continue to apply in diversity cases, the brevity of the rule as adopted may well lead to controversy in construction. The final sentence of rule 501 states that privileges are to be determined in accordance with state law “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision.” The Senate Committee on the Judiciary expressed its concern that this language “is pregnant with litigious mischief,”<sup>15</sup> particularly where a question arises concerning the distinction between an “element” of a claim or defense and an “item of proof” regarding a claim or defense. The Senate committee indicated that where testimony is held to be

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<sup>12</sup> “[I]n civil actions and proceedings, with respect to an element of a claim or a defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.”

<sup>13</sup> See, e.g., *A Discussion of the Proposed Federal Rules of Evidence Before the Annual Judicial Conference, Second Judicial Circuit of the United States*, 48 F.R.D. 39 (1969).

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In federal question litigation and federal criminal cases, it seems to me, there are “affirmative countervailing considerations” sufficient to justify *Erie* policy—namely, the federal interest in correct and just decisions when applying federal law. These considerations aren’t present in diversity and other state cases; in such cases, I believe, it does not lie in the mouths of the federal judiciary to say to the state, We will provide a “juster justice” by sacrificing one of your substantive policies (i.e., that underlying the privilege) in order to effectuate others (i.e., those underlying the state law governing the merits of the controversy.)

*Id.* at 77 (remarks by Professor Harold L. Korn of the New York University School of Law).

<sup>15</sup> S. REP. No. 93-1277, 93d Cong., 2d Sess. 12 (1974).

merely an item of proof rather than an element of a claim, *federal* law on privilege will apply under the language of rule 501, and suggested that definition of an element of a claim or defense may engender considerable litigation.<sup>16</sup> The Senate Report pointed to further confusion possible in a case containing a combination of federal and state claims and defenses, such as an action involving both federal antitrust issues and state unfair competition claims. "Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not to the other."<sup>17</sup>

United States District Judge Jack B. Weinstein's analysis of rule 501 provides a succinct summary of the manner in which the federal judiciary may be expected to apply the law in this area:

[F]ederal privilege law . . . will always apply in federal criminal cases, generally apply in federal question cases, sometimes apply in diversity cases, and usually apply in cases of conflict.<sup>18</sup>

More explicit determination of the relationship between federal and state privilege law must await decisions under article V of the Federal Rules of Evidence.

### III. THE SUPREME COURT VERSION OF THE PRIVILEGE RULES

The version of Article V: Privileges, proposed by the Advisory Committee and promulgated by the Supreme Court was rejected by Congress. Nevertheless, the proposed rules on privilege will continue to have an impact on interpretation of the law and may be viewed as one measure of the principles of federal common law which congressionally-enacted rule 501 calls upon the judiciary to interpret "in the light of reason and experience." Since the proposed rules and the Advisory Committee Notes represent an important volume of study by eminent legal experts, it is reasonable to assume that they may be consulted as courts develop concepts of federal common law of privilege.<sup>19</sup>

Three caveats must be noted, however, before examining the proposed rules and committee notes. First, emphasis must be placed on the fact that the proposed rules have no binding effect. Second, Justice William O. Douglas dissented from the Supreme Court Order of November 20, 1972, which transmitted to Congress

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<sup>16</sup>*Id.*

<sup>17</sup>*Id.* In such a case, the report suggests, "it is contemplated that the rule favoring reception of the evidence should be applied." *Id.* at 12 n.17.

<sup>18</sup>J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 501[02], at 501-20.

<sup>19</sup>*Id.*

what is known as the "Supreme Court version" of the rules. In that dissent he pointed out that the Court did not write the rules, nor supervise their writing, nor weigh their merits. "The Court concededly is a mere conduit," Justice Douglas wrote, observing that the authors of the rules were members of a congressional committee named by the Judicial Conference. Acknowledging the eminence of the committee members, Justice Douglas emphasized that the committee alone had studied and judged the proposed rules and the Supreme Court had merely approved them. "Yet the public assumes," he concluded, "that our imprimatur is on the Rules, as of course it is."<sup>20</sup> The third caveat to reliance upon the Supreme Court version of article V is found in Representative Hungate's presentation of the rules to Congress, in which he observed that rule 501 as enacted is a much more flexible approach to privilege law than the Supreme Court version.<sup>21</sup> In spite of these reservations, an examination of what the Advisory Committee proposed and the Supreme Court transmitted to Congress has value as a general guide to the present status of the federal law of privilege.

A. *Privilege Recognized Only as Provided*

Proposed Rule 501 read:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

- (1) Refuse to be a witness; or
- (2) Refuse to disclose any matter; or

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<sup>20</sup>409 U.S. 1132 (1972) (Douglas, J., dissenting from the Supreme Court's order of November 20, 1972).

<sup>21</sup>

Rule 501 [as adopted] is not intended to freeze the law of privilege as it now exists. The phrase "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. For example, the Supreme Court's rules of evidence contained no rule of privilege for a newspaperperson. The language of rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspaperpeople any protection they may have from State newspaperpersons' privilege laws.

120 CONG. REC. H12,254 (daily ed. Dec. 18, 1974).

- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.<sup>22</sup>

Twelve separate rules followed in the Supreme Court version of article V, defining specific privileges to be recognized in federal courts as including *only* protection for required reports, relationships of attorney-client, psychotherapist-patient and husband-wife, communications to clergymen, political vote, trade secrets, secrets of State and other official information, and identity of informers.<sup>23</sup> Thus, this version explicitly denied federal recognition to state laws of privilege.

The Advisory Committee's Note to proposed rule 501<sup>24</sup> explains that the decision to avoid giving effect to state privilege law in diversity cases was based on a reading of two United States Supreme Court cases—*Hanna v. Plumer*<sup>25</sup> and *Erie Railroad Co. v. Tompkins*.<sup>26</sup> While the committee acknowledged *Erie* as providing that substantive questions are to be governed by state law in diversity cases, it read *Hanna v. Plumer* as authority to modify the *Erie* doctrine so that application of state or federal law of privilege in diversity cases is a matter of choice, not necessity.<sup>27</sup> In making such a choice where privileged communications are at issue, the Advisory Committee thought that "all significant policy factors need to be considered in order that the choice may be a wise one."<sup>28</sup> The committee rejected arguments supporting adherence to state law and proposed that federal law of privilege should prevail in federal courts. The basis for this proposal included a finding that the substantive aspect of privileged evidence is frequently tenuous. Since state privilege law has traditionally yielded to federal law in federal criminal prosecutions, the committee concluded that the value of state-created privilege is illusory as protection for the relationship involved. For example, in a state with a statutory accountant's privilege, the fact that the client's communication with his accountant might be protected in some proceedings but not in others—and never in federal criminal cases—was viewed as diminishing the value of the privilege to uphold state interest in the relationship involved. The committee further

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<sup>22</sup>Proposed Fed. R. Evid. 501, 56 F.R.D. 183, 230 (1972).

<sup>23</sup>*Id.* at 230-61.

<sup>24</sup>*Id.* at 230.

<sup>25</sup>380 U.S. 460 (1965).

<sup>26</sup>304 U.S. 64 (1938).

<sup>27</sup>Proposed Fed. R. Evid. 501 (Advisory Committee's Note), 56 F.R.D. 183, 233 (1972).

<sup>28</sup>*Id.*

concluded that choice of forum is affected by many factors and rejected a suggestion that "forum shopping" would be encouraged by denying recognition to state privilege law.

The Advisory Committee noted that its most radical departure from existing state laws was elimination of the physician-patient privilege, but suggested that the privilege had been essentially eliminated in diversity cases by Federal Rule of Civil Procedure 35.<sup>29</sup> Under this rule, the privilege is waived if a party who is physically examined under court order subsequently deposes the examiner or obtains a copy of his report.

An interesting presentation of the Advisory Committee's rationale for ignoring state law of privilege was presented by Professor Edward Cleary, Advisory Committee Reporter, in a talk before the 1973 Federal Bar Association Conference on the proposed rules.<sup>30</sup>

One possibility as to what might be done in the way of treating privilege in a set of federal rules is to leave the matter entirely to state law, but this we have never been willing to do in criminal cases or largely in the federal question cases. A second would be to recognize state-created privileges in diversity cases. A third would be to recognize only federally-created privileges, and the committee opted, as you see from the Rules, in favor of this treatment of privileges.

[T]he only real question area (of the significance of state law on privilege questions) . . . are the diversity cases, and there, of course, you have an initial problem of whether evidentiary privileges are substance or procedure under *Erie*. . . . It seems difficult to say that a rule of privilege governs so-called primary activity when it doesn't apply in criminal cases. Consequently, the committee simply concluded that there was no point in kidding people if state rules were not going to govern in criminal cases in the federal courts.<sup>31</sup>

In addition to this conclusion—that state privilege rules lose their claim of substance in federal courts since they cannot be applied

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<sup>29</sup>Federal Rule of Civil Procedure 35(b) (2) provides:

By requesting and obtaining a report of the examination as 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.

<sup>30</sup>Cleary, *Article V: Privileges*, 33 *FED. B.J.* 62 (1974).

<sup>31</sup>*Id.* at 63-64.

in criminal cases—Professor Cleary's talk dealt summarily with the potential problems of "forum shopping" raised by the Advisory Committee's decision to ignore state privilege law in federal courts. Forum shopping, he pointed out, is the purpose of diversity litigation and should be accepted as its inevitable result.<sup>32</sup>

### B. *Protection of Specific Relationships*

The Advisory Committee-Supreme Court version provided that communications within four specific relationships would be privileged.

1. *Lawyer-Client.*—Proposed rule 503<sup>33</sup> followed the historic common law approach to the privilege of attorneys as presented

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<sup>32</sup>"If you don't like forum shopping, then the answer, I think, is to simply eliminate diversity jurisdiction, a thing the Congress is not prepared to do." *Id.*

<sup>33</sup>Proposed rule 503 provided:

(a) **Definitions.** As used in this rule:

(1) A "client" is a person, public officer or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "lawyer" is a person authorized or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) **Who may claim the privilege.** The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communications may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

by Dean Wigmore and Professor McCormick.<sup>34</sup> Since the rule contained no definition of "representative of the client," the modern problem of who speaks for the client—and thus who may claim the privilege—when the client is a corporation was left unanswered. This omission was explained in the Advisory Committee's Note as based on the assumption that the matter would be better left to resolution by the courts on a case-by-case basis. Recognizing the wide spectrum of definition possible—from holding that any corporate officer or employee speaks for the client and may therefore invoke the privilege, to the "control group" theory, that only those authorized to seek and act upon legal advice are entitled to claim client status—the Advisory Committee elected to include no definition of the persons within a corporation whose communications to an attorney representing the corporation should be protected.

2. *Psychotherapist-Patient*.—Proposed rule 504<sup>35</sup> represented a departure from tradition, substituting protection for the rela-

(1) *Furtherance of crime or fraud*. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) *Claimants through same deceased client*. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) *Breach of duty by lawyer or client*. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4) *Document attested by lawyer*. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients*. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Proposed Fed. R. Evid. 503, 56 F.R.D. 183, 235-37 (1972).

<sup>34</sup>McCORMICK §§ 87-95; WIGMORE §§ 2290-2329.

<sup>35</sup>Proposed rule 504 read:

(a) **Definitions.**

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

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

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or inter-

tionship between psychotherapist and patient for the long-accepted doctor-patient privilege. The proposed rule defined a "psychotherapist" as a person authorized or believed by the patient to be authorized to practice medicine, or a person licensed or certified as a psychologist, while engaged in diagnosis or treatment of a mental or emotional condition, including drug addiction. The Advisory Committee's Note recognized the existence of many state statutes creating a general physician-patient privilege, but concluded that the "exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege."<sup>36</sup>

The Advisory Committee found three instances in which the need for confidentiality in the relation between psychotherapist

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view, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) **General rule of privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

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

(d) **Exceptions.**

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

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

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

Proposed Fed. R. Evid. 504, 56 F.R.D. 183, 240-41 (1972).

<sup>36</sup>*Id.* at 242 (Advisory Committee's Note).

and patient is overcome by the importance of disclosure. These were proceedings for hospitalization, examination by order of a judge, and communications relevant to a condition on which a party relies as an element of his claim or defense in litigation.

3. *Husband-Wife*.—Although retaining the privilege of an accused to prevent his spouse from testifying against him in a criminal proceeding, proposed rule 505<sup>37</sup> departed from traditional modes of expressing the privilege by denying protection for confidential communications within the marital relationship. The Advisory Committee's Note rejected the usual justifications presented for such protection—prevention of marital discord and distaste for required condemnation between spouses.<sup>38</sup> Professor Cleary explained the committee's rationale by suggesting that since the parties are almost certainly unaware of the existence of the privilege, it is unlikely to have a great effect on the marital relationship. "It has been suggested that if this theory of privilege is sound," Professor Cleary observed, "then lawyers' marriages ought to be happier than other people's marriages, because in all of the states they know of the existence of the privilege, but we don't have any evidence to support that view."<sup>39</sup>

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<sup>37</sup>Proposed rule 505 provided:

(a) **General rule of privilege.** An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) **Who may claim the privilege.** The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

(c) **Exceptions.** There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424, or with violation of other similar statutes.

Proposed Fed. R. Evid. 505, 56 F.R.D. 183, 244-45 (1972).

<sup>38</sup>MCCORMICK § 86; WIGMORE § 2228. The Advisory Committee rejected the privilege on this ground:

The other communications privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage.

Proposed Fed. R. Evid. 505 (Advisory Committee's Note), 56 F.R.D. 183, 246 (1972).

<sup>39</sup>Cleary, *Article V: Privileges*, 33 FED. B.J. 62, 67 (1974).

4. *Communications to Clergymen.*—In proposed rule 506,<sup>40</sup> the Advisory Committee recognized the difficulty of defining a clergyman in view of a lack of licensing or certification procedures, and extended the privilege to a person reasonably believed to be a clergyman by the individual consulting him. Both the clergyman and the communicant could invoke the privilege. Also noted in the committee's commentary is the fact that clergymen often participate in marriage counselling and the treatment of personality problems, matters which "fall readily into the realm of the spirit"<sup>41</sup> and involve considerations comparable to those in the psychotherapist-patient relationship.

### C. *Special Provisions*

Three rules designed to affect all privileged relationships were proposed. These were Rule 511: Waiver of Privilege by Voluntary Disclosure;<sup>42</sup> Rule 512: Privileged Matter Disclosed under Compulsion or Without Opportunity to Claim Privilege;<sup>43</sup> and

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<sup>40</sup>Proposed rule 506 provided:

(a) **Definitions.** As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General rule of privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) **Who may claim the privilege.** The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

Proposed Fed. R. Evid. 506, 56 F.R.D. 183, 247 (1972).

<sup>41</sup>*Id.* at 248 (Advisory Committee's Note).

<sup>42</sup>Proposed rule 511 provided:

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

*Id.* at 258.

<sup>43</sup>Proposed rule 512 provided:

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

*Id.* at 259.

Rule 513: Comment Upon or Inference from Claim of Privilege; Instruction.<sup>44</sup> These rules adhered to traditional doctrines,<sup>45</sup> terminating a privilege when the holder destroys the protected confidentiality by his own act, providing the remedy of exclusion when disclosure is erroneously compelled, and emphasizing the danger of destroying privilege by innuendo. The Advisory Committee noted that unanticipated situations involving election of privilege are bound to arise and must be left to judicial discretion and professional responsibility on the part of counsel.

#### D. Reaction to the Proposals

In spite of the Advisory Committee's persuasive commentary and its seven years of preparation, the proposed rules met with swift and vehement reaction, and the privilege section of the rules generated more comment and controversy than any other section. Approximately one-half of the complaints received by the House Criminal Justice Subcommittee related to article V.<sup>46</sup> Scholars questioned the proposed rules on several grounds, including constitutionality, the Advisory Committee's assumption that the value of full disclosure is greater than the social values supported by specific privileges, and relegation of privilege to "procedural" rather than "substantive" status.<sup>47</sup>

Thus rule 501 in its present brief form emerged as the privilege standard of the Federal Rules of Evidence. It differs from the Supreme Court version in that it allows for interpretation of the federal common law on a case-by-case basis, rather than fixing privilege in a statutory codification.<sup>48</sup> The enacted rule also

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<sup>44</sup>Proposed rule 513 provided:

(a) **Comment or inference not permitted.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) **Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Jury Instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

*Id.* at 260.

<sup>45</sup>WIGMORE § 2242. *Cf. id.* §§ 2270, 2337, 2340, 2389.

<sup>46</sup>120 CONG. REC. H12,253 (daily ed. Dec. 18, 1974).

<sup>47</sup>*See, e.g., Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

<sup>48</sup>In a December 1975 case involving the husband-wife privilege, the Eighth Circuit held, under rule 501, that "this court, as well as other federal

differs from the proposed rules in that it will allow application of state law in most, if not all, diversity cases.

#### IV. INDIANA LAW OF PRIVILEGED COMMUNICATIONS

##### A. *Statutory Privileges*

Indiana provides statutory privileges protecting confidential communications of or to attorneys, physicians, clergymen, spouses, accountants, counselors for school systems, newspeople, and psychologists. Indiana Code section 34-1-14-5<sup>49</sup> provides protection for the first four of these. The protection offered to attorneys, physicians, clergy, and spouses is couched in terms of incompetence. An incompetent person is one who is legally ineligible to testify by statutory provision. In spite of the language of section 34-1-14-5, however, Indiana courts have construed the language as conferring privilege, which may be waived.<sup>50</sup> For that reason, the following examination of the specific privileges provided by Indiana law will view these incompetency provisions as privilege.

1. *Attorney-Client*.—The privilege of an attorney to protect the confidential relationship with his client was recognized at common law in England as early as the 16th century,<sup>51</sup> and may

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courts, has the right and responsibility to examine the policies behind the common-law privileges and to alter or amend them when 'reason and experience' so require." *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975). The decision expanded the common law exception to the marital privilege which allows testimony when an alleged crime is an offense against a spouse to include testimony about crimes against a child or step-child of either spouse.

<sup>49</sup>IND. CODE § 34-1-14-5 (Burns 1973) provides:

**Who are incompetent.**—The following persons shall not be competent witnesses:

First. Persons insane at the time they are offered as witnesses, whether they have been so adjudged or not.

Second. Children under ten [10] years of age, unless it appears that they understand the nature and obligation of an oath.

Third. Attorneys, as to confidential information made to them in the course of their professional business, and as to advice given in such cases.

Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases.

Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.

Sixth. Husband and wife, as to communications made to each other.

<sup>50</sup>Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256, 257-59 (1952).

<sup>51</sup>

[A]s testimonial compulsion does not appear to have been generally

have its roots in Roman law, which prohibited an advocate from testifying against his client.<sup>52</sup>

Indiana imposes a statutory duty on an attorney to maintain the confidence of his client,<sup>53</sup> and the Rules for Admission to the Bar and the Discipline of Attorneys provide that upon being admitted to practice law in Indiana an applicant must swear or affirm, "I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself."<sup>54</sup> In addition, the Indiana Code of Professional Responsibility, in Canon 4, provides that a lawyer must preserve the confidences and secrets of his client and this mandate is supported by a number of ethical considerations which explain the policy underlying the canon.<sup>55</sup>

The Indiana Code of Professional Responsibility does not preclude an attorney from revealing: (1) Confidences or secrets with the consent of the client or clients affected, after a full disclosure to them; (2) confidences or secrets when disclosure is permitted under the disciplinary rules or required by law or court order; (3) the intention of his client to commit a crime and the information necessary to prevent the crime; and (4) confidences or

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authorized until the early part of Elizabeth's reign, . . . it would seem that the privilege could hardly have come much earlier into existence.

WIGMORE § 2290. The earliest theory of the attorney's exemption from the duty to testify was based on a consideration of the attorney's honor, rather than concern for the rights of the client.

<sup>52</sup>Note, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

<sup>53</sup>IND. CODE § 34-1-60-4 (Burns 1973). "It shall be the duty of an attorney . . . [t]o maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client."

<sup>54</sup>IND. R. ADMISS. & DISCP. 22.

<sup>55</sup>IND. CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 4-1, provides:

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

(Footnotes omitted).

secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.<sup>56</sup>

In addition, Indiana Code section 34-1-14-5 provides that an attorney is not a competent witness as to confidential communications received or advice given in the course of his professional business.<sup>57</sup> However, Indiana courts have rejected this language and have held that an attorney is competent, by construing the statute as giving the *client* the right to object to disclosure of confidential communications to the attorney.<sup>58</sup>

Defeatance of the privilege in regard to matters communicated in furtherance of a continuing or future crime was upheld in *United States v. Aldrich*,<sup>59</sup> a 1973 Seventh Circuit case in which an attorney-defendant was permitted to testify as to conversations he had with three co-defendants as part of his own defense in an action for securities and mail fraud. The court, in denying the contention of the co-defendants that the attorney's testimony violated their privilege, held that this exception may be invoked by an attorney where communications relate to criminal or fraudulent acts contemplated by the client, whether the attorney joined in those acts or was ignorant of them. Thus, once the Government had established a *prima facie* case that the defendants had been involved in frauds, the attorney's testimony regarding communications about those acts was excepted from the privilege.

The principle that a corporation is a client, entitled to the protection of the attorney-client privilege, was established in 1963 by the Seventh Circuit,<sup>60</sup> which held that the privilege is that of the client, regardless of his corporate or noncorporate character, and is "designed to facilitate the administration of justice."<sup>61</sup> A corporation was held to be entitled to the same treatment as any other client, and thus was privileged to protect itself from disclosure of confidential information. Because of the varying and sometimes complex structure of corporate organization, attorneys who are employed by corporate clients may face special problems.

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<sup>56</sup>*Id.*, Disciplinary Rule 4-101(C).

<sup>57</sup>IND. CODE § 34-1-14-5 (Burns 1973).

<sup>58</sup>*Key v. State*, 235 Ind. 172, 132 N.E.2d 143 (1956); *Brown v. Clow*, 158 Ind. 403, 62 N.E. 1006 (1902); *Pence v. Waugh*, 135 Ind. 143, 34 N.E. 860 (1893); *Gorney v. Gorney*, 136 Ind. App. 96, 181 N.E.2d 779 (1962).

<sup>59</sup>484 F.2d 655 (7th Cir. 1973). See also *In re Sawyer*, 229 F.2d 805, 808-09 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956), in which the court said, "[T]he rule accepted by all courts today is that a client's communications to his attorney in pursuit of a criminal or fraudulent act yet to be performed is not privileged in any judicial proceeding."

<sup>60</sup>*Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

<sup>61</sup>*Id.* at 322.

Possible conflicts between an attorney's responsibility to protect client confidentiality and provide maximum legal service on the one hand, and the requirements of scrupulous concern for the law and the rights of the public on the other hand, have been the subject of much analysis in recent years.<sup>62</sup>

In *United States v. Tratner*,<sup>63</sup> the Seventh Circuit held that *in camera* proceedings may be the best method to determine the validity of an attorney's claim to privilege. An attorney-taxpayer in *Tratner* wished to protect the name of the payee on a check drawn on an escrow account kept for his clients. The court held that evidence to support the claim of privilege should be presented *in camera*, before a decision as to the merits of the claim.

Courts and commentators agree that where two parties with a common interest consult the same attorney, their communications are privileged as to third parties.<sup>64</sup> But if a subsequent controversy arises between the original two parties, those communications are not privileged in an action between them.<sup>65</sup> This is in line with the established principle that information shared by third parties is not privileged. Conversations held at the request of the client between an attorney and a third party also fall outside the privilege.<sup>66</sup> As to deceased clients, the privilege may be waived by the decedent's personal representative,<sup>67</sup> and a presumption of waiver allowing an attorney to authenticate a will is drawn from the testator's selection of the attorney as an attesting witness.<sup>68</sup>

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<sup>62</sup>See, e.g., Seitz, *The Attorney-Client Privilege and House Counsel*, 17 IND. ST. B. ASS'N RES GESTAE, Dec. 1973, at 17; Note, *Client Confidentiality and Securities Practice: A Demurrer from the Current Controversy*, 8 IND. L. REV. 549 (1975); Note, *A New Ethic of Disclosure—National Student Marketing and the Attorney-Client Privilege*, 48 NOTRE DAME LAW. 661 (1973).

<sup>63</sup>511 F.2d 248 (7th Cir. 1975).

<sup>64</sup>MCCORMICK § 91.

<sup>65</sup>See *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850 (7th Cir.), cert. denied, 419 U.S. 901 (1974) (communications between a liability insurer and its attorneys in a tort action against an insured were held not privileged in a subsequent action by the insured's assignee against the insurer, where the insurer's attorneys had also been attorneys for the insured in the tort action).

<sup>66</sup>*Webster v. State*, 302 N.E.2d 763 (Ind. 1973). The court held that refusal to admit testimony by counsel for defendant's brother regarding a conversation about leniency for the brother if he would testify against the defendant was harmless error. In *Hineman v. State*, 292 N.E.2d 618 (Ind. Ct. App. 1973), the court held that evidence offered by a defendant relating to plea bargaining is inadmissible unless the defendant enters a plea of guilty which is not withdrawn. The *Webster* case established the distinction that evidence of plea bargaining by witnesses is admissible.

<sup>67</sup>*Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889).

<sup>68</sup>*Pence v. Waugh*, 135 Ind. 143, 34 N.E. 860 (1893). "The testator will be presumed to have acted with a desire to support his sanity and the validity

2. *Physician-Patient*.—Since there is no common law physician-patient privilege,<sup>69</sup> the Indiana statute<sup>70</sup> is in derogation of the common law and therefore is to be strictly construed.<sup>71</sup> The purpose of the privilege is to encourage free communications between the patient and the physician in order to attain proper treatment, but it is not to be invoked in order to suppress truth,<sup>72</sup> and may be effectively waived by the patient.<sup>73</sup> The leading modern case in Indiana is *Collins v. Bair*,<sup>74</sup> in which the court emphasized that the privilege is not to be distorted by “application in circumstances where the policy behind the rule is not served,”<sup>75</sup> declaring that when a litigant places in issue his physical or mental condition by way of complaint, counterclaim, or affirmative defense, he automatically waives the physician-patient privilege. Justice Hunter’s opinion in *Collins* makes clear that where the patient has surrendered his claim to privacy by filing suit, he is held to have waived the physician-patient privilege.<sup>76</sup> In an earlier case, the court had found an implied waiver of the privilege where a patient filed a malpractice suit against a physician and testified as to the nature of the treatment received.<sup>77</sup> The *Collins* decision extended this finding of implied waiver to any party filing a suit

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of his will, and that in choosing a witness he intended to waive every obstacle to his competency.” *Id.* at 155, 34 N.E. at 863.

<sup>69</sup>*Summerlin v. State*, 256 Ind. 652, 271 N.E.2d 411 (1971); *Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95 (1971); *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949); *Meyers v. State*, 192 Ind. 592, 137 N.E. 547 (1922); *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904).

<sup>70</sup>IND. CODE § 34-1-14-5 (Burns 1973).

<sup>71</sup>*Green v. State*, 257 Ind. 244, 274 N.E.2d 267 (1971); *Alder v. State*, 239 Ind. 68, 154 N.E.2d 716 (1958).

<sup>72</sup>*Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95 (1971); *Seifert v. State*, 160 Ind. 464, 67 N.E. 100 (1903); *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92 (1884).

<sup>73</sup>*Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95 (1971); *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949); *Pence v. Myers*, 180 Ind. 282, 101 N.E. 716 (1913); *Lane v. Boicourt*, 128 Ind. 420, 27 N.E. 1111 (1891).

<sup>74</sup>256 Ind. 230, 268 N.E.2d 95 (1971). For a thorough analysis of the case and its implications, see Harvey, *Collins v. Bair—Discovery—Doctor-Patient Privilege—Waiver*, 15 IND. ST. B. ASS’N RES GESTAE, May 1971, at 16.

<sup>75</sup>*Collins v. Bair*, 256 Ind. 230, 236, 268 N.E.2d 95, 98 (1971) (emphasis in original).

<sup>76</sup>

Where a party-patient, of his own, does an act which will require disclosure of a condition otherwise protected from disclosure, there would appear to no longer be a basis upon which to allow that party to selectively suppress relevant medical evidence pertaining to the same specific condition.

*Id.* at 237, 268 N.E.2d at 99.

<sup>77</sup>*Lane v. Boicourt*, 128 Ind. 420, 27 N.E. 1111 (1891).

wherein his physical or mental condition is at issue.<sup>78</sup> Similarly, by placing his mental capacity at issue in an affirmative defense of insanity, the defendant in *Summerlin v. State*<sup>79</sup> was held to have waived the physician-patient privilege as to his mental condition.

The question of who is a physician has been raised by a number of cases. The Indiana Supreme Court has held that, for the purpose of the statute, a "physician" is a person who has received a degree of doctor of medicine from an incorporated institution, is lawfully engaged in the practice of medicine and thus is licensed by this state to practice medicine.<sup>80</sup> A chiropractor falls within this standard,<sup>81</sup> but a psychologist does not.<sup>82</sup> Persons who are acting as agents of the physician may be protected by the statute, but not third parties who are unconnected with the physician.<sup>83</sup>

Construction of the statutory terms "matters communicated" and "professional business or advice given" was delineated in *Myers v. State*<sup>84</sup> as "information obtained in the sick room, heard or observed by the physician, or of which he is otherwise informed pertaining to the patient and upon which he is persuaded to do some act or give some direction or advice in the discharge of his professional obligations."<sup>85</sup> A doctor may respond to a hypothetical question, based on facts set forth in earlier testimony in the case. Such a response has been held admissible where it is not shown that the physician considered facts other than those presented in the question.<sup>86</sup>

The trend of Indiana cases has been to interpret the statutory physician-patient privilege restrictively rather than permissively,

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<sup>78</sup>See also *Newkirk v. Rothrock*, 293 N.E.2d 550 (Ind. Ct. App. 1973) (a grantor's executor waived the physician-patient privilege by placing the grantor's physical and mental condition in controversy in a suit to set aside a conveyance of property on an allegation of undue influence).

<sup>79</sup>256 Ind. 652, 271 N.E.2d 411 (1971). See also *Brattain v. State*, 225 Ind. 489, 61 N.E.2d 462 (1945); *Noelke v. State*, 214 Ind. 328, 15 N.E.2d 950 (1938).

<sup>80</sup>*William Laurie Co. v. McCollough*, 174 Ind. 477, 489, 90 N.E. 1014, 1018 (1910) ("The word 'physician' includes only those who are 'lawfully' engaged in the practice of medicine").

<sup>81</sup>*Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95 (1971).

<sup>82</sup>*Elliott v. Watkins Trucking Co.*, 406 F.2d 90 (7th Cir. 1969).

<sup>83</sup>*Green v. State*, 257 Ind. 244, 274 N.E.2d 267 (1971); *Doss v. State*, 256 Ind. 174, 267 N.E.2d 385 (1971). But see *General Accident, Fire & Life Assurance Co. v. Tibbs*, 102 Ind. App. 262, 2 N.E.2d 229 (1936) (holding that the privilege does not extend to nurses).

<sup>84</sup>192 Ind. 592, 137 N.E. 547 (1922).

<sup>85</sup>*Id.* at 600, 137 N.E. at 550. See also *Vaughan v. Martin*, 145 Ind. App. 455, 251 N.E.2d 444 (1969).

<sup>86</sup>*Robertson v. State*, 291 N.E.2d 708 (Ind. Ct. App. 1973); *Hauch v. Fritch*, 99 Ind. App. 65, 189 N.E. 639 (1934).

providing the patient with limited protection against disclosure of his communications to a physician.<sup>87</sup>

3. *Clergyman-Communicant*.—Although there is some argument that a clergyman's privilege was recognized during the period before the Restoration, its existence was consistently denied by English courts for two centuries following the Restoration.<sup>88</sup> A presumption of the privilege, favored by instinctive protection of the "confidence of the confessional," can be found in dicta in numerous American cases.<sup>89</sup>

The Indiana statute<sup>90</sup> narrowly defines the subject and the circumstances surrounding material protected by the clergyman-communicant privilege. Only "confessions or admissions" made to clergymen "in the course of discipline enjoined by their respective churches" is shielded from a compulsion to disclose. The statutory language is not definitive and Indiana cases are few and old. The latest, of 1950 vintage,<sup>91</sup> permitted testimony by a minister concerning the mental capacity of a communicant. The court held that such testimony was not privileged since it was not concerned with matters communicated to the clergyman in his clerical capacity. The decision was in accord with an 1881 case<sup>92</sup> in which the court held that communications unrelated to a religious duty or obligation, made to an elder or deacon rather than a pastor, were admissible. Exclusion of communication to a priest was upheld in 1899,<sup>93</sup> when the court found that the information was received by the clergyman in the course of religious activity.

A suggestion that it is the judge who should interpret statutory language and make the determination whether communications to a clergyman occurred in circumstances making it privileged appeared in a recent Massachusetts case<sup>94</sup> which may be analogous to the issue of such interpretation in Indiana.

It has been suggested that cases involving clergymen are more likely to be decided on the basis of the court's policy in regard to the substantive issue, rather than on application of privilege stat-

<sup>87</sup>See Note, *A Look at Indiana Code 34-1-14-5: Indiana's Physician-Patient Privilege*, 8 VALP. U.L. REV. 37 (1973), for an historical perspective of the state's attitude toward protection of physicians' testimony.

<sup>88</sup>WIGMORE § 2394.

<sup>89</sup>See, e.g., *Totten v. United States*, 92 U.S. 105 (1875); *McMann v. SEC*, 87 F.2d 377 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937).

<sup>90</sup>IND. CODE § 34-1-14-5 (Burns 1973) provides: "The following persons shall not be competent witnesses . . . Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches."

<sup>91</sup>*Buuck v. Kruckeberg*, 121 Ind. App. 262, 95 N.E.2d 304 (1950).

<sup>92</sup>*Knight v. Lee*, 80 Ind. 201 (1881).

<sup>93</sup>*Dehler v. State ex rel. Bierck*, 22 Ind. App. 383, 53 N.E. 850 (1899).

<sup>94</sup>*Commonwealth v. Zezima*, 310 N.E.2d 590 (Mass. 1974).

utes.<sup>95</sup> Other questions raised by the absence of recent cases in this state include consideration of increasing activity by clergy as marriage counselors, youth group advisors, and in other capacities where information of potential legal interest may surface. Consideration of legal privilege for clergymen is further complicated by the strong policy of religious freedom in this country. Roman Catholic clergy are enjoined by ecclesiastical statutes from revealing confessional communications. Other clergy, although not supported by such specific orders, have asserted an allegiance to higher authority and may risk contempt charges rather than testify as to confidential communications.<sup>96</sup>

4. *Husband-Wife*.—The Indiana marital privilege statute<sup>97</sup> protects communications between husband and wife, but courts have found much information passed between spouses to be admissible. For example, in *Richard v. State*,<sup>98</sup> the Indiana Supreme Court held that where the wife refused to answer a question regarding her husband's statement to her, but he failed to object to the question, his failure to object constituted a waiver of his marital privilege. The decision included reference to the fact that the husband had instructed his wife to communicate the statement to a third party, thus negating confidentiality.<sup>99</sup> However, a 1971 Indiana Supreme Court decision<sup>100</sup> relied on the public policy favoring preservation of marital confidences to exclude a husband's testimony that his wife drove the getaway car in a burglary for which the husband was convicted, prompting dissenting Justice Arterburn to question the social purpose of allowing marriage to shield criminals.<sup>101</sup>

Conflicting policies raised by concern for marital confidence, cultural changes in the attitude of society toward both women and the institution of marriage, as well as the need for the fullest possible disclosure in litigation are among considerations which un-

<sup>95</sup>Kuhlmann, *Communications to Clergymen—When Are They Privileged?*, 2 VALP. U.L. REV. 265 (1968).

<sup>96</sup>W. TIEMANN, *THE RIGHT TO SILENCE* (1964); Hogan, *A Modern Problem on the Privilege of the Confessional*, 6 LOYOLA L. REV. 1 (1951).

<sup>97</sup>IND. CODE § 34-1-14-5 (Burns 1973) provides:

The following persons shall not be competent witnesses:

. . . .

Sixth: Husband and wife, as to communications made to each other.

<sup>98</sup>319 N.E.2d 118 (Ind. 1974).

<sup>99</sup>See also *United States v. Moorman*, 358 F.2d 31 (7th Cir.), cert. denied, 385 U.S. 866 (1966) (holding permission by husband of wife's testimony in their joint defense to be waiver of the marital privilege); *Pinkerton v. State*, 258 Ind. 610, 283 N.E.2d 376 (1972) (holding husband's appearance before the grand jury not confidential).

<sup>100</sup>*Shepherd v. State*, 257 Ind. 229, 277 N.E.2d 165 (1971).

<sup>101</sup>*Id.* at 235, 277 N.E.2d at 169.

derlie the evolution of marital privilege law. Early Indiana courts recognized the common law doctrine that the wife's identity merged with her husband. Thus, before 1881, one spouse could testify for or against the other only in a case of assault and battery, or similar offense, committed against the witness spouse.<sup>102</sup> In 1914 an Indiana court held that only communications having a necessary relation to or dependent on the mutual trust and confidence of a husband and wife would be protected,<sup>103</sup> and in 1926, "Husbands and wives, in this jurisdiction, may testify for or against each other in all cases, except as to confidential communications."<sup>104</sup>

The difficulty in deciding when the privilege will attach lies in determining what is a "confidential communication" worthy of protection in order to protect the institution of marriage. Indiana courts have not held that every act in the presence of the spouse is confidential, and a clear definition of marital confidentiality does not emerge.<sup>105</sup> This lack of clarity may be further complicated by continuing changes in the value placed upon the relationship of marriage.<sup>106</sup>

5. *Accountant-Client*.—There is no common law privilege shielding either an accountant or his client from a demand to reveal confidential information in court;<sup>107</sup> the privilege is a recent legislative creation. The Indiana statute<sup>108</sup> granting an accountant

<sup>102</sup>For the historical development from total incompetency of spouse to marital privilege in Indiana, see Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256, 269 (1952); Note, *Spouse as Complaining Witness in Non-Violence Criminal Actions*, 26 NOTRE DAME LAW. 90 (1950).

<sup>103</sup>*Gifford v. Gifford*, 58 Ind. App. 665, 107 N.E. 308 (1914).

<sup>104</sup>*Vukodonovich v. State*, 197 Ind. 169, 150 N.E. 56 (1926).

<sup>105</sup>*Smith v. State*, 198 Ind. 156, 152 N.E. 803 (1926); *Beyerline v. State*, 147 Ind. 125, 45 N.E. 772 (1897).

<sup>106</sup>For a discussion of competency in filiation and bastardy proceedings in Indiana, see Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256, 270-71 (1952).

<sup>107</sup>WIGMORE § 2286, at 530 n.13.

<sup>108</sup>IND. CODE § 25-2-1-23 (Burns 1974) provides:

**Privileged communications between accountant and client.**—A certified public accountant or a public accountant or an accounting practitioner, or any employee, shall not be required to disclose or divulge information of which he may have become possessed, relative to and in connection with any professional service as a certified public accountant or a public accountant or accounting practitioner. The information derived from or as the result of such professional services shall be deemed confidential and privileged: Provided, That nothing herein shall be construed as prohibiting a certified public accountant or a public accountant from disclosing any data required to be disclosed by the standards of the profession in rendering an opinion on the presentation of financial statements, or in making disclosure where said financial statements, or the professional services of the accountant pertaining thereto are contested.

privilege is one of seventeen such statutes now in effect in United States jurisdictions.<sup>109</sup> Justification of statutory testimonial privilege for accountants is sparse,<sup>110</sup> and criticism of such legislation includes assertions that the benefits to be gained from the privilege are minimal in relation to the consequential injury to effective administration of justice.<sup>111</sup>

The privilege in Indiana is limited to communications made to the accountant in the course of his professional service, and the privilege is waived when the information is material to the defense of an action against an accountant.

No Indiana cases applying the privilege have been reported. Cases from other jurisdictions, however, indicate a tendency to construe the accountant's privilege narrowly.<sup>112</sup> Where federal law is at issue, the existence of a state privilege has not controlled.<sup>113</sup> This denial of recognition to state law was emphasized in regard to records relevant to federal income tax returns by the United States Supreme Court in *Couch v. United States*,<sup>114</sup> in which the Court stated explicitly that there is no justification for invocation

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IND. CODE § 25-2-1-22 (Burns 1974) provides:

**Work product of accountant—Ownership—Restrictions on transfer.**—All statements, records, schedules, working papers and memoranda made by a certified public accountant or public accountant or accounting practitioner incident to or in the course of professional service to clients by such accountant, except reports submitted by a certified public accountant or public accountant or accounting practitioner to a client, shall be and remain the property of such accountant, in the absence of an express agreement between such accountant and client to the contrary. No such statement, record, schedule, working paper or memorandum shall be sold, transferred, or bequeathed, without the consent of the client or his personal representative or assignee, to anyone other than one or more surviving partners or new partners of such accountant.

<sup>109</sup>See Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, 66 MICH. L. REV. 1264 (1968). The author presents a comparative analysis of the extent of the privilege granted by each jurisdiction's statute.

<sup>110</sup>WIGMORE § 2286.

<sup>111</sup>Note, *Evidence—Privileged Communications—Accountant and Client*, 46 N.C.L. REV. 419, 427 (1968).

<sup>112</sup>*United States v. Bowman*, 358 F.2d 421 (3d Cir. 1966); *Rubin v. Katz*, 347 F. Supp. 322 (E.D. Pa. 1972). Both cases strictly construe the Pennsylvania statute, focusing on exceptions to the privilege contained in the statutory language and holding that no extension beyond that language need be made.

<sup>113</sup>*Baylor v. Mading-Dugan Drug Co.*, 57 F.R.D. 509, 511 (N.D. Ill. 1972). The court stated, "It is this court's opinion that, as a matter of policy, states should not be permitted to decide for federal courts when they must refrain from hearing useful testimony in matters involving federal law."

<sup>114</sup>409 U.S. 322 (1973).

of an accountant privilege.<sup>115</sup> *Couch* involved a plaintiff who gave business records to an accountant for preparation of tax returns. The Internal Revenue Service summoned those records and the plaintiff asserted fourth and fifth amendment protection. The Court held that when the plaintiff surrendered possession of the records, she was aware that the accountant would disclose information in those records when he prepared the tax return, and there could be no legitimate expectation of constitutional protection. The Court did not preclude a claim of privilege by an accountant's client if the client himself can claim constructive possession of records *temporarily* held by the accountant.<sup>116</sup> Justice Douglas, dissenting, supported the concept of an accountant-client privilege,<sup>117</sup> and Justice Marshall, also dissenting, suggested that a state statute granting an accountant privilege would have been relevant.<sup>118</sup>

Where an accountant is also an attorney, he must show that the matters he seeks to protect were communicated to him in his capacity as a legal advisor<sup>119</sup> if he wishes to claim the attorney-client privilege. Such an assertion may be made only where the attorney-accountant is providing legal advice, rather than merely rendering accounting services.<sup>120</sup> The burden of proof to establish

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<sup>115</sup>*Id.* at 335. The Court noted that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases." *See also* United States v. House, 380 F. Supp. 1403 (M.D. Pa. 1974).

<sup>116</sup>*Couch v. United States*, 409 U.S. 322, 333 (1973).

<sup>117</sup>

The accountant, an agent for a specified purpose—*i.e.*, completing the petitioner's tax returns—bore certain fiduciary responsibilities to petitioner. One of these responsibilities was not to use the records given him for any purpose other than completing these returns. Under these circumstances, it hardly can be said that by giving the records to the accountant, the petitioner committed them to the public domain.

*Id.* at 340.

<sup>118</sup>

It would be relevant to a decision about the expectation of privacy that an accountant-client privilege existed under local law, but not determinative. Petitioner disclaimed reliance on such a privilege . . . . But I would think that, privileged or not, a disclosure to an accountant is rather close to disclosure to an attorney.

*Id.* at 350-51.

<sup>119</sup>*United States v. Brown*, 349 F. Supp. 420 (N.D. Ill. 1972).

<sup>120</sup>*United States v. Schmidt*, 360 F. Supp. 339 (M.D. Pa. 1973). "[W]hat is vital to the assertion of the privilege by an accountant employed by an attorney is that he assist in providing legal advice rather than merely rendering accounting services, and the specific nature of the proponent's role is to establish that the accountant's role is essentially consultive." *Id.* at 347 (footnote omitted).

an attorney-client rather than an accountant-client relationship is on the party who resists disclosure.<sup>121</sup>

The sparseness of diversity cases involving the accountant privilege leaves this area of the law unsettled. Only in one case of diversity jurisdiction has a federal court recognized a state statute as controlling, and the court failed to give the basis of its holding.<sup>122</sup>

Federal Rule of Civil Procedure 26(b)(4)(B)<sup>123</sup> is, of course, available to an accountant who is retained as an expert for litigation.<sup>124</sup> The rule requires a showing of exceptional circumstances to compel discovery from an expert who is not expected to be called as a witness at trial.

6. *School Counselors*.—Indiana school counselors are privileged by statute<sup>125</sup> from revealing confidential communications with pupils. No similar privilege is granted to teachers.

It has been suggested that four questions which a model statute on counselor-student privilege should answer are: (1) Who is a counselor? (2) What communications are privileged? (3) Who may waive the privilege? (4) In what proceedings does the privilege apply?<sup>126</sup> The Indiana statute does not meet these standards. The statute defines a counselor as one so appointed or designated by the "proper officers" of a school system. In the absence of

<sup>121</sup>United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973).

<sup>122</sup>Lukee Enterprises v. New York Life Ins. Co., 52 F.R.D. 21 (D.N.M. 1971).

<sup>123</sup>FED. R. CIV. P. 26(b)(4)(B) provides:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Rule 35(b) pertains to examination by a physician pursuant to court order.

<sup>124</sup>See, e.g., Inspiration Consol. Copper Co. v. Lumberman's Mut. Cas. Co., 60 F.R.D. 205 (S.D.N.Y. 1973)

<sup>125</sup>IND. CODE § 20-6-20-2 (Burns 1975) provides:

**Immunity of counselors from disclosing privileged or confidential communications.**—Any counselor duly appointed or designated a counselor for the school system by its proper officers and for the purpose of counseling pupils in such school system shall be immune from disclosing any privileged or confidential communication made to such counselor as such by any pupil herein referred to. Such matters so communicated shall be privileged and protected against disclosure.

<sup>126</sup>Note, *Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools*, 56 IOWA L. REV. 1323, 1345 (1971). For a further study of the questions raised by such a statute, see Note, *An Analysis of the 1972 South Dakota Counselor-Student Privilege Statute*, 19 S.D.L. REV. 378 (1974).

case law, one may only speculate about the definition of "proper officers." No court has determined if a teacher assigned to discuss problems with students is a "designated" counselor, or if information revealed in such a discussion is privileged.<sup>127</sup> The Indiana statute does not deal with the types of communications to be protected, the right of waiver, nor the proceedings covered.

Since testimonial privileges are designed to protect the confidentiality of a particular relationship and should be invoked by the person intended to be protected,<sup>128</sup> it might be concluded that the right to waiver should adhere to the student. However, since students may well be minors, questions of legal capacity and parental rights arise. Also to be considered is the possibility that disclosure, or threat of disclosure, to parents may be a breach of confidentiality sufficient to impair the relationship the privilege is designed to protect.

7. *Journalists*.—Although no common law privilege for newsmen exists,<sup>129</sup> the professional reporter has proclaimed the right to protect his sources,<sup>130</sup> and a number of jurisdictions, including Indiana, have passed statutes conferring such a privilege.<sup>131</sup> Indiana's statutory provision protecting newsmen's sources of information<sup>132</sup> has been tested in two cases involving the same occur-

<sup>127</sup>For a discussion of privileged communications to a social worker, see Annot., 50 A.L.R.3d 563 (1973).

<sup>128</sup>WIGMORE § 2196.

<sup>129</sup>*Id.* § 2286; *People v. Sheriff of New York County*, 269 N.Y. 281, 199 N.E. 415 (1936).

<sup>130</sup>*See, e.g.,* Beaver, *The Newsmen's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243, 244 n.2 (1968).

<sup>131</sup>Note, *The "Shield" Statute: Solution to the Newsmen's Dilemma?*, 7 VALP. U.L. REV. 235, 237 n.22 (1973).

<sup>132</sup>IND. CODE § 34-3-5-1 (Burns Supp. 1975) provides:

Newspapers, television and radio stations—Press associations—Employees and representatives—Immunity.—Any person connected with, or any person who has been so connected with or employed by, a newspaper or other periodical issued at regular intervals and having a general circulation, or a recognized press association or wire service, as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news, and any person connected with a licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives or has received 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, periodical, press association, radio station, television station, or wire service, whether published or not published in the newspaper or periodical, or by the press association or wire

rence.<sup>133</sup> The court held in both cases that the privilege protects only the newsman and cannot be invoked by the person who communicated with the reporter. Thus, the defendant could not bar an admission he made to a newspaper reporter he had summoned to his cell.

Existence of a journalists' privilege under the first amendment was assumed by many until the 1972 United States Supreme Court decision in *Branzburg v. Hayes*.<sup>134</sup> In a 5-4 decision, the Court held that newsmen are not exempt under the first amendment from the normal duty to appear and testify before a grand jury and to answer questions relevant to a criminal investigation. Jurisdictions with so-called "shield statutes" have construed the protection provided both restrictively and liberally,<sup>135</sup> and some journalists have questioned the adequacy of such statutes to protect freedom of the press.<sup>136</sup>

8. *Psychologists*.—A privilege for communications between psychologists and their clients was enacted in Indiana in 1969,<sup>137</sup> after the court in *Elliott v. Watkins Trucking Co.*<sup>138</sup> made it clear that a psychologist does not qualify for privilege as a "physician." No cases have been reported under the statute.

Little common law protection for psychologists' communications can be documented,<sup>139</sup> but the American Psychology Association endorses Ethical Standards for Psychologists which are clear in their demand for protection of the client's confidentiality.<sup>140</sup> Overlap between the professional pursuits of psychiatrists, who

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service or broadcast or not broadcast by the radio station or television station by which he is employed.

<sup>133</sup>Hestand v. State, 257 Ind. 191, 273 N.E.2d 282 (1971); Lipps v. State, 254 Ind. 141, 258 N.E.2d 622 (1970).

<sup>134</sup>408 U.S. 665 (1972).

<sup>135</sup>See Note, *supra* note 131, at 244.

<sup>136</sup>See, e.g., NEWSWEEK, Jan. 15, 1973, at 47.

<sup>137</sup>IND. CODE § 25-33-1-17 (Burns 1974) provides:

**Privileged communications between psychologists and clients.**—No psychologist certified under the provisions of this act [25-33-1-1—25-33-1-17] shall disclose any information he may have acquired from persons with whom he has dealt in his professional capacity, except under the following circumstances: (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of said homicide; (2) in proceedings the purpose of which is to determine mental competency, or in which a defense of mental incompetency is raised; (3) in actions, civil or criminal, against a psychologist for malpractice; (4) upon an issue as to the validity of a document as a will of a client; and (5) with the expressed consent of the client or subject, or in the case of his death or disability, of his legal representative.

<sup>138</sup>Elliott v. Watkins Trucking Co., 406 F.2d 90 (7th Cir. 1969).

<sup>139</sup>But see State v. Evans, 104 Ariz. 434, 454 P.2d 976 (1969).

<sup>140</sup>AMERICAN PSYCHOLOGY ASS'N, ETHICAL STANDARDS FOR PSYCHOLOGISTS

are physicians, and psychologists, who are not, has been blamed for some confusion about the function of psychologists and for their rare appearance in legal proceedings.<sup>141</sup> As this confusion is dissipated in both the public and the lawyers' view, more cases arising from this statute may be reported.<sup>142</sup>

An interesting problem, which has not yet been litigated, concerns the difficulty of applying protection to information revealed in group therapy sessions.<sup>143</sup> Since the presence of third parties has been construed as waiver and thus a bar to assertion of privilege for communications with professionals, justification of privilege for fellow members of a group therapy session would require that each member of the group be viewed as "professionalized" during therapy sessions. Another difficulty seen with statutes such as Indiana's is that the grant of privilege to psychologists and psychiatrists does not extend the privilege to all bona fide psychotherapists.<sup>144</sup> Psychiatric social workers, for example, are not protected by testimonial privilege in this state.<sup>145</sup>

### B. *The Future: A Proposal*

The refusal of Congress to pass a version of article V for the Federal Rules of Evidence which included a list of carefully defined privileges, and the enactment, instead, of a rule on privileges which calls on the courts to interpret principles of the common law "in the light of reason and experience," is a significant signpost for one seeking the directions in which state law of privileged communications is likely to develop. The Federal Rules of Evidence were intended to provide a model to be copied by the states, as were the Federal Rules of Civil Procedure.<sup>146</sup> Thus Indi-

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(1975). Principle 6 provides: "Safeguarding information about an individual that has been obtained by the psychologist in the course of his teaching, practice, or investigation is a primary obligation of the psychologist." *Id.* at 4.

<sup>141</sup>Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L.J. 82 (1969).

<sup>142</sup>For a survey of this privilege in all jurisdictions, see Annot., 44 A.L.R.3d 24 (1972).

<sup>143</sup>Note, *Group Therapy and Privileged Communication*, 43 IND. L.J. 93 (1967).

<sup>144</sup>Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731 (1957); Note, *The Psychotherapists' Privilege*, 12 WASHBURN L.J. 297 (1973).

<sup>145</sup>A bill which would have created a state board of examiners in social work and, *inter alia*, provided a privilege for communications with social workers, was introduced in the 1976 General Assembly, but died in the Committee on Public Health, Welfare and Pensions.

<sup>146</sup>Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125 (1973).

ana law of privilege may soon be reconsidered and a proposal for new Indiana rules of evidence is not unlikely.

Indiana's privilege law needs reorganization and clarification. The language of the present statute covering attorneys, physicians, clergymen, and husband-wife relationships is not in consonance with judicial interpretations that it is a privilege, rather than a competency, statute. Although the statute speaks of "who is incompetent," courts have held that it provides protection for confidential communications rather than a prohibition of testimony by those who are termed incompetent. The privilege statutes, covering accountants, counselors, journalists, and school counselors, are scattered throughout the Code and thus are difficult to find.<sup>147</sup> One method of reorganization would be recodification, compiling a list of specific privileges to be established and including definitions of who may claim and who may waive privileges, as well as a description of the communications to be protected.

Examination of the federal rule of privilege may suggest a different path, however. The approach taken by the federal rule—reliance on constitutional provisions and judicial discretion to protect testimony which should not be compelled in court—provides a statutory model which Indiana and other states should study before embarking on recodification of evidence rules.

Reliance upon judicial discretion in determining whose testimony should be privileged, rather than attempting to codify a series of special professional privileges, is supported by Professor McCormick:

Privilege paints with a broad brush. Reconciling interests in privacy and confidentiality with the needs of litigants is not readily achieved in terms of broad categories; it calls for the finer touch of the specific solution. A tool already at hand, though perhaps largely unrecognized, consists of recognizing standing on the part of the possessor of information to question the legitimacy of need for it in litigation, i.e., to raise issues of relevancy in the broad sense . . . Relevancy itself, of course, contemplates a process of weighing, and inevitably the judge must be accorded a substantial measure of discretion.<sup>148</sup>

This judicial discretion has been called for on the federal level by rule 501, and there are good reasons why the standard should be uniform in all proceedings, both federal and state. The need for

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<sup>147</sup>See WIGMORE § 2286, at 64 (Supp. 1975) (Indiana is not listed as having an accountant's privilege, presumably because the editors did not find it).

<sup>148</sup>McCORMICK § 77, at 159-60 (footnotes omitted).

uniformity in all courts is manifest if one reviews the reason for the existence of privileges:

Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.<sup>149</sup>

If laws of privilege are intended to foster those relationships which society wishes to protect, it is clear that only uniform laws can accomplish that purpose.<sup>150</sup>

Privilege law that differs from one jurisdiction to another or from one proceeding to another may foster misleading assumptions. Confidentiality is often assumed in a professional relationship.<sup>151</sup> This expectation may be based on custom, a general concept of professional ethics, or ephemeral beliefs in the honor and integrity of the professional viewed as confidant. The public, as well as many professionals, is often unaware that the law may require testimony in which confidences will be divulged. Many professionals, including attorneys, physicians, school counselors, and others—some of whom are and some of whom are not covered by protective statutes in this or other states—assert that they cannot establish the kind of relationship they need to help their patients, clients, students, and congregants unless they can assure confidentiality to those with whom they communicate. Yet, in fact, virtually no professional can be certain that the law will protect his confidence in any judicial proceeding in which he may be called upon to testify. Even in jurisdictions where statutory protections exist, exceptions poke holes in the umbrella under which the professional and those who communicate with him are standing; the umbrella may disappear entirely if they find themselves subject to the jurisdiction of a court which does not recognize the statute.

Because statutory protection of confidentiality is not uniform, a professional may be called upon to assure his client that he can guard the confidence of their communications in most state courts, in some federal civil proceedings, but never in a federal criminal case. It is doubtful that the client will find much comfort in such qualified assurance. One may also question whether clients or patients would find comfort if informed that their confidences will

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<sup>149</sup>*Id.* § 72. *Cf.* *McMann v. SEC*, 87 F.2d 377 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937); WIGMORE § 2192.

<sup>150</sup>"If a journalist's privilege is to encourage prospective informants in this day of multi-jurisdictional events and media, it must assure confidentiality in all jurisdictions." Rothstein, *supra* note 146, at 135.

<sup>151</sup>*See generally* R. SLOVENKO, *PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION* (1966).

no longer be privileged if they should elect to bring a malpractice action against the attorney, psychologist, or physician in whom they have placed their trust.

Do relationships between professionals and their clientele really depend upon the protection of law? Is freedom of the press, for example, dependent on the protection of journalists' sources afforded by statutes such as Indiana Code section 34-3-5-1? One observer has noted little proof that the *New York Times*, published in a state where the journalists' privilege is not recognized, is less successful in getting news than newspapers in states where journalists are protected by law.<sup>152</sup>

The case for establishment of relationships based on legal protection of confidentiality is weak. Relationships are more likely to be based on confidence in the professional consulted and reliance on the ethical standards of the group to which he belongs. Most clergymen know little about their legal rights,<sup>153</sup> and few laymen question them on the matter. Those who seek clerical counsel rely on a clergyman's adherence to ethical and religious standards of integrity. Similar reliance—on personal and professional standards of integrity—supports the trust a patient places in his physician, the client in his attorney, or any person seeking help from a professional trained to give such aid.<sup>154</sup> In the husband-wife relationship, as pointed out by Professor Cleary,<sup>155</sup> there is little or no evidence to suggest that familiarity with the law of marital privilege breeds wedded bliss.

The need for confidentiality in the psychotherapeutic relationship is apparent. It is based on two principles: (1) the interests of society are served when persons with mental problems are encouraged to seek help, and (2) persons *will* be deterred from seeking help unless they are assured of confidentiality.<sup>156</sup> Statu-

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<sup>152</sup>DeParcq, *The Uniform Rules of Evidence: A Plaintiff's View*, 40 MINN. L. REV. 301, 323 n.77 (1956).

<sup>153</sup>See generally W. TIEMANN, *THE RIGHT TO SILENCE* (1964).

<sup>154</sup>Physicians are bound by the Oath of Hippocrates:

Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.

Rules of conduct and codes of professional responsibility are also promulgated by professional organizations such as the American News Guild, the American Institute of Certified Public Accountants, the American Personnel and Guidance Association and other professional associations. *E.g.*, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, *CODE OF PROFESSIONAL ETHICS* (1974).

<sup>155</sup>Cleary, *Article V: Privileges*, 33 FED. B.J. 62, 67 (1974).

<sup>156</sup>Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 618 (1964).

tory protection for authorized physicians and licensed psychologists does not, however, protect all bona fide professionals engaged in psychotherapy. Certified social workers, teachers, and others engaged in counselling must also establish environments of trust if they are to be effective.

Privilege law based on basic concepts of the values to be fostered is best suited to protect important relationships. More than half a century ago, Professor Wigmore set out four fundamental conditions necessary to establish a privilege against disclosure of communications:

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*.

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.<sup>157</sup>

These conditions, along with considerations of relevancy, offer a foundation on which to build specific claims of privilege. It is not necessary to grant privileges to certain named interests in order to insure the rights and values society wishes to protect.

A proposal that Indiana avoid codifying privileges for specific professional groups is certain to meet with strong reaction. Speaking of the proposed federal rules, Advisory Committee Reporter Cleary said:

If you want to get into a difficult undertaking sometime, try to draft a set of rules on privileges. It has, I think, more emotion wrapped up in it than all the rest of the law of evidence put together.

. . . [M]any of the people who are interested in having privileges are extraordinarily well organized.

. . . This is where questions of prestige and convenience are laid on the line, frequently involving organizations which are very effective in dealing with legislatures.<sup>158</sup>

<sup>157</sup>WIGMORE § 2285. For a modern case relying on this text, see *Humphrey v. Norden*, 79 Misc. 2d 192, 359 N.Y.S.2d 733 (Family Ct., Queens Cty. 1974), in which the court found that a claim of privilege involving communications to a social worker failed to meet the fourth test.

<sup>158</sup>Cleary, *supra* note 155, at 62.

It is important to bear in mind, however, that considerations of privilege law involve a balancing of interests—the rights of one party balanced against the rights of another party, the rights of the public balanced against the rights of individuals, and the value of protecting privacy weighed against the need for disclosure in a judicial proceeding.

The difficulty with codification of privilege for certain specific groups is not that too many are protected, but that too many may *not* be protected. Present Indiana statutes protect the relationship between husband and wife, for instance, but provide no privilege between parent and child. Such a distinction is difficult to justify, as are omissions of protection for other significant relationships. A functional approach, considering relevancy and the four Wigmore standards, can protect essential confidences better than grants of privilege to certain named relationships.

Indiana should discard its attempt to codify those relationships which it wishes to protect and consider, instead, a single rule of privilege based on judicial discretion exercised “in the light of reason and experience.”

AUDREY GROSSMAN