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A Survey of the North Carolina Law of Relational Privilege

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system that meets the standards of the municipal and/or county health department;

(f) The tract shall be attractively seeded, landscaped, and shrubbed;

(g) Any garage, utility shed, or other out-building constructed on the tract must conform with the standards applicable to such structures as provided by the (municipality) Building Ordinance or Zoning Ordinance. In the absence of such ordinances, any garage or utility shed or other out-building must be of a design and appearance compatible with the mobile home;

(h) Any single on-lot mobile home must meet the specifications for manufacture of mobile homes as set forth in the regulations promulgated by the North Carolina Department of Insurance and in any subsequent modification or amendment of such regulations.

(2) *Building Permit.* No mobile home shall be erected on a single lot unless a building permit is first obtained in accordance with the municipality's (zoning) (building) ordinance.

(3) *Recreational Trailers.* No travel-trailer, camping trailer, or other similar recreational trailer designed for human occupancy under transient circumstances such as camping, travel, or other recreation shall be erected and maintained for living purposes in this municipality. Unoccupied recreational trailers may be parked or stored in a private garage, carport, or rear or side yard, but they must not be stored or parked on a public street or in the front yard of a residential dwelling.

A Survey of the North Carolina Law of Relational Privilege

Relational privileges are unique in the law of evidence. Most evidentiary rules result from a balancing of probative weight against a possibility of prejudicial effect to determine if a specific item of evidence will expedite or retard the fact-finding process. The law of privilege assumes at least the potential relevance of the evidence excluded.[1] Consequently, the balancing here is between the need to discover truth and the desire to protect relationships that society deems valuable.

North Carolina recognizes six relational privileges. In categorizing these privileges, one particular characteristic is especially useful since it reflects a societal judgment of the importance of the relationship. A privilege may be either absolute or subject to being overridden in the

[1]State v. Smith, 138 N.C. 700, 703, 51 S.E. 1038, 1038 (1905).

interest of justice.[2] Granting a relationship an absolute privilege indicates a policy judgment that protection of the relationship is always to be given priority. Conversely, limiting the privilege reveals an unwillingness to protect the relationship regardless of the costs to the administration of justice. Three privileges in North Carolina are absolute: attorney-client, husband-wife, and clergyman-communicant. Three may in the interest of justice be overriden: physician-patient,[3] psychologist-patient,[4] and school counselor-student.[5]

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the best known and most widely recognized of all the relational privileges. Its origin is in the common law, and the legislature has never felt the need to codify the common law rule.[6] Nor have attorney-client confidences been made subject to disclosure at the discretion of the court.

To use the term "absolute" in reference to the attorney-client privilege is misleading. Not every communication between an attorney and his client is protected. Rather, a series of conditions has grown up around the exercise of the privilege. The relationship of attorney-client must exist at the time of disclosure.[7] Communications made after termination of the attorney-client relationship are unprotected,[8] as are disclosures made prior to commencement of the relationship.[9] Termination normally involves an overt act that puts the client on notice that further confidences carry the risk of ultimate disclosure, so that it is usually easy for an individual to protect himself after termination. On the other hand, admissibility of pre-relationship communications creates a dilemma for the prospective client.

State v. Davenport[10] vividly illustrates this dilemma. The defen-

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[2]*E.g.*, N.C. GEN. STAT. § 8-53 (1969).

[3]*Id.*

[4]*Id.* § 8-53.3.

[5]*Id.* § 8-53.4. (Supp. 1971).

[6]*Id.* § 8-52 (1969) constitutes the only legislative enactment concerning the attorney-client privilege. It provides a minor statutory exception to the privilege in cases involving fraud against the state.

[7]D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 62, at 134 (2d ed. 1963) [hereinafter cited as STANSBURY].

[8]Eekhout v. Cole, 135 N.C. 583, 47 S.E. 655 (1904).

[9]State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947); Setzar v. Wilson, 26 N.C. 501 (1844).

[10]227 N.C. 475, 42 S.E.2d 686 (1947).

dant, under arrest for receiving money under false pretenses, sent one Boyles to employ a Mr. Jones as defendant's counsel. Mr. Jones declined. At trial, Boyles testified to incriminating statements that he made while attempting to employ Jones. At issue was the corroborating testimony of Jones. The court, refusing to recognize a privilege, stated: " '[T]here is no privilege when the relationship had not begun, or the attorney had refused employment . . . . Although the attorney need not have been consulted with a view to actual litigation, the communication must have been made in the course of seeking legal advice for a proper purpose . . . .' "[11]

There are three possible explanations for the decision, all of them disquieting. The presence of a third party could have destroyed the confidentiality of the communications. The court did not mention this aspect of the case, and certainly an incarcerated individual should not be prejudiced by the necessity of engaging counsel through an agent. The opinion referred to the necessity of seeking advice for a "proper purpose,"[12] but surely seeking counsel to defend a criminal prosecution is not improper. The only tenable rationale for the decision is that the attorney-client relationship had not begun. But an intelligent response to an employment offer demands a complete factual discussion of the case. If unfavorable disclosures are not privileged, an individual must either secure counsel willing to take the case without knowing what is really involved or run the risks that employment will be refused and that his statements may become part of his opponent's case. *Stansbury,* the standard treatise on North Carolina evidence, asserts without case authority that the privilege extends to disclosures made with a view to employing an attorney even if employment is refused,[13] but it is difficult to reconcile this position with the *Davenport* case. It is to be hoped that the North Carolina appellate courts will clarify this question by accepting the *Stansbury* view.

Only confidential communications between attorney and client are within the privilege. In *Dobias v. White*[14] the court held that communications made for dissemination to a third person are admissible. Similarly, statements made in the presence of an adversary party are non-

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[11] *Id.* at 498, 42 S.E.2d at 702-03.

[12] *Id.*

[13] STANSBURY § 62, at 135 n.46. In support of this assertion Professor Stansbury cites Professors Wigmore and McCormick. *See* 8 J. WIGMORE, EVIDENCE § 2304 (McNaughton rev. 1961); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 92, at 184 (1954).

[14] 240 N.C. 680, 83 S.E.2d 785 (1954).

confidential and thus outside the privilege.[15] An analytically similar case, *Brown v. Green,*[16] held that communications to an attorney acting as counsel for both parties are not privileged in subsequent litigation between them. However, in litigation involving a third party such communications would retain their confidentiality.[17] The absence of a third party—that is, an outsider with respect to the interests that are the subject of the communication—is critical to the confidentiality of a communication. The voluntary inclusion of a third party in conversations will normally forfeit their privileged status.

The scope of the privilege is limited to communications concerning the matter for which the attorney was employed.[18] Although this is the general rule, its force was somewhat undermined by *Guy v. Avery County Bank.*[19] There an attorney who had represented the plaintiff in substantially all his real estate transactions was not retained with respect to the particular conveyance in question. The plaintiff did discuss the transaction with this attorney, however, and the defendant sought to compel testimony related to these discussions. The court held that there was an attorney-client relationship despite the failure actually to employ the attorney. It was thought that against the background of their past dealings the parties retained the capacities of attorney and client during their discussions.[20]

The primary beneficiary of the attorney-client privilege is the client, and he is given the right to assert it or to waive it.[21] Often, when the client is deceased, a third person will contend that he has succeeded to the decedent's right to enforce the privilege. The decedent's administrator or executor clearly succeeds to the right,[22] and persons claiming under a will may assert the privilege against individuals claiming by virtue of a deed, at least insofar as the testimony of the attorney who prepared the will is involved.[23] But *In re Will of Kemp*[24] disqualified

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[15]Allen v. Schiffman, 172 N.C. 578, 90 S.E. 577 (1916); Cary v. Cary, 108 N.C. 267, 12 S.E. 1038 (1891); Hughes v. Boone, 102 N.C. 137, 9 S.E. 286 (1889).

[16]3 N.C. App. 506, 165 S.E.2d 534 (1969).

[17]*See, e.g.,* Michael v. Foil, 100 N.C. 178, 47 S.E. 655 (1888).

[18]Eekhout v. Cole, 135 N.C. 583, 47 S.E. 655 (1904).

[19]206 N.C. 322, 173 S.E. 600 (1934).

[20]*Id.*

[21]STANSBURY § 62, at 136. However, the right to assert the privilege extends only to the substance of the communication and not to the fact that communications took place. United States v. Kendrick, 331 F.2d 110, 113 (4th Cir. 1964) (per curiam).

[22]McNeill v. Thomas, 203 N.C. 219, 165 S.E. 712 (1932).

[23]This seems implicit in the fact that the waiver question was reached in Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

[24]236 N.C. 680, 73 S.E.2d 906 (1953).

any individual claiming under the decedent from invoking the privilege in a caveat proceeding, on the theory that to permit one party to such a proceeding to suppress evidence of communications between the testator and the attorney who drafted his will would amount to an adjudication on the merits of the very issue being contested.

Waiver of the attorney-client privilege may be express or implied. Implied waiver is naturally the more troublesome concept. In a leading case on waiver, *Hayes v. Ricard*,[25] the plaintiffs, who had succeeded to the decedent's attorney-client privilege, permitted decedent's attorney to testify to certain facts surrounding the acquisition of a farm. The defendants, who claimed the farm through a deed from the decedent, wanted to cross-examine the attorney concerning other aspects of the transaction. The plaintiffs contended that the information was privileged. On appeal the court found a waiver as to all aspects of the transaction. It cautioned, though, that the waiver should not be construed to extend to other, independent transactions.[26] The court will not permit a party to use his attorney's testimony as a sword and the privilege as a shield. On the other hand, if the attorney's testimony is narrow in scope, it does not lay open the whole gamut of the attorney-client communications.[27]

Two recent decisions of the court of appeals focus on the issie of waiver by implication resulting from a disclosure by the client. In *State v. White*[28] the state appealed a superior court judge's finding that the defendant's constitutional rights had been violated by a guilty plea induced by his involuntary confession. The trial judge had excluded as privileged testimony by defendant's trial counsel regarding communications between them relevant to the entry of plea. At the hearing the defendant had related his version of the advice he had received before trial. Predictably, his testimony disparaged his attorney's efforts. The court, citing *Cooper v. United States*,[29] declared that the defendant's decision to testify, especially since his testimony reflected upon his attorney, constituted a waiver.[30]

The second case, *Battle v. State*,[31] could have been resolved on

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[25]244 N.C. 313, 93 S.E.2d 540 (1956).

[26]*Id.* at 323, 93 S.E.2d at 548.

[27]*See also* Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); State v. Artis, 227 N.C. 371, 42 S.E.2d 409 (1947); Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

[28]1 N.C. App. 219, 161 S.E.2d 32 (1968).

[29]5 F.2d 824 (6th Cir. 1925).

[30]1 N.C. App. at 222, 161 S.E.2d at 34.

[31]8 N.C. App. 192, 174 S.E.2d 299 (1970).

rather innocuous grounds. In an appeal from a post-conviction review, the petitioner assigned as error the fact that his attorneys in a previous post-conviction hearing had not been declared incompetent to testify. Since the petitioner had himself called the attorneys as witnesses,[32] the rule set out in *Ricard* would have justified a finding of waiver. But the court, in an exercise of judicial overkill, held that the mere filing of the petition alleging professional incompetence constitutes a waiver. Further, the opinion alluded to *North Carolina General Statutes* section 8-52.[33] This statute, concerning prosecutions for fraud against the state, is the only statutory exception to the attorney-client privilege. This reference was combined with a statement that "[t]o hold otherwise would close the mouth of an officer of the court and thereby allow a fraud to be practiced upon the court in connection with all pleas of guilty where an attorney represented the defendant."[34] The implication is that section 8-52 will be generally applicable to collateral attacks on guilty pleas alleging involuntariness or incompetence of counsel.

The two cases place a criminal defendant in a tactical quandary. A well-pleaded post-conviction petition must on its face constitute a waiver. Effective presentation of this kind of case without a defendant's testimony regarding attorney-client communications is virtually impossible. These difficulties were not touched upon in either opinion. Admittedly, the argument for disclosure is very strong since sustaining the privilege would usually leave the court with only the uncontradicted testiomony of the defendant upon which to make a determination. Consequently, appropriate balancing would probably vindicate the holdings in *White* and *Battle,* but the defendant's predicament is real and warrants consideration.

MARITAL PRIVILEGE

Like the attorney-client privilege, the marital privilege originated in the common law.[35] But unlike the attorney-client privilege, the current marital privilege is based on the statutory provision that "[n]o husband or wife shall be compellable to disclose any confidential com-

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[32]*Id.* at 197, 174 S.E.2d at 302.

[33]N.C. GEN. STAT. § 8-52 (1969); *see* note 6 *supra.*

[34]8 N.C. App. at 197, 174 S.E.2d at 302.

[35]State v. Jolly, 20 N.C. 108, 112 (1838)((per curiam): "[W]hatever is known by reason of [marriage] should be regarded as knowledge confidentially acquired, and . . . neither [husband nor wife] should be allowed to divulge it to the danger or disgrace of the other."

munication made by one to the other during their marriage,"[36] and this privilege has not been circumscribed by *any* provision for discretionary judicial pre-emption. A single statutory exception exempts child-abuse cases.[37] The early common law acceptance and undiluted codification indicate that the privilege has substantial vitality.

Analysis of the marital privilege focuses on three major considerations: (1) what does the phrase "during marriage" mean, (2) who may compel exclusion, and (3) what constitutes confidentiality? Determining whether a communication was made during the marriage is normally quite simple since the marital relationship has an objectively determinable beginning and end. Conversations before marriage and after divorce are not protected.[38] One interesting question, however, arose in *Whitford v. North State Life Insurance Co.*[39] That case included a determination that suicide notes—by nature designed to be read after death—do not meet the "during marriage" requirement.

The question of who may assert the marital privilege has had an unsettled history in North Carolina. A long series of cases appeared firmly to establish the rule that neither spouse could disclose a confidential communication unless permitted to do so by the other.[40] Then, in *Hagedorn v. Hagedorn,*[41] the court reversed itself, permitting, according to the best interpretation, either spouse to waive the privilege for both.[42] A 1960 dictum in *Biggs v. Biggs*[43] seemed to reaffirm the *Hagedorn* rule. Then, in *Hicks v. Hicks,*[44] the court was confronted with a situation requiring a definitive evaluation of *Hagedorn.* A plaintiff husband had attempted to introduce over the objection of his wife a tape recording of a conversation between them. The court excluded the recording, expressly declining to follow either *Hagedorn* or the *Biggs* dictum. Instead, the pre-*Hagedorn* prececent was reaffirmed. Understandably,

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[36]N.C. GEN. STAT. § 8-56 (1969); *id.* § 8-57 (Supp. 1971).

[37]*Id.* § 8-57.1 (Supp. 1971).

[38]STANSBURY § 60.

[39]163 N.C. 223, 79 S.E. 501 (1913).

[40]State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929); State v. McKinney, 175 N.C. 784, 95 S.E. 162 (1918); State v. Randall, 170 N.C. 757, 87 S.E. 227 (1915); State v. Wallace, 162 N.C. 622, 78 S.E. 1 (1913); Toole v. Toole, 109 N.C. 615, 14 S.E. 57 (1891).

[41]211 N.C. 175, 189 S.E. 507 (1937).

[42]"Thus under this decision where one spouse confides in the other, apparently *both* spouses are given a privilege not to disclose the confidence but *either* can waive it for both." Note, *Evidence—Privileged Communications Between Husband and Wife,* 15 N.C.L. REV. 282, 285 (1937) (emphasis in original).

[43]253 N.C. 10, 16-17, 116 S.E.2d 178, 182-83 (1960).

[44]271 N.C. 204, 155 S.E.2d 799 (1967).

Hagedorn had met with severe criticism.[45] Had it taken root, the marital privilege would have been virtually gutted in litigation between ex-spouses. *Hicks* corrected an unfortunate judicial diversion.[46]

The marital privilege extends only to confidential communications.[47] Statements relating to business matters, which by their nature carry the expectation of disclosure, are not confidential.[48] Nor are communications made in the presence of a third person protected.[49] Significantly, it does not matter whether the married parties were aware of the presence of the third party.[50] The policy of the privilege is protection of the marital relationship, not protection of married persons from surreptitious discoveries of their intimacies. As long as neither spouse is involved in the disclosure, there can be no harm to their relationship. However, if the connivance of either spouse contributes to the third party's becoming privy to the marital confidence, the privilege continues in force.[51] A spouse may not through a third party accomplish what the spouse could not do directly. *Hicks v. Hicks*[52] also dealt with an important confidentiality question. The conversation in issue in *Hicks* took place in the presence of the parties' eight-year-old daughter. Traditionally, members of a family have been considered strangers to the marital relationship.[53] Without adequate explanation the *Hicks* court held that a conversation in front of an eight-year-old is confidential.[54] One commentator criticized the decision for not basing its holding on a determination of the actual competency of the child.[55] The logic of this criticism is appealing, since it is the actual capacity of the child to understand

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[45]" 'Will a husband feel free to confide in his wife if she may disclose his confidence on the witness stand, even over his objections?' " 271 N.C. at 206, 155 S.E.2d at 801, *quoting* Note, 15 N.C.L. REV., *supra* note 42, at 285-86.

[46]*See* Note, *Evidence—Privileged Communications Between Husband and Wife*, 46 N.C.L. REV. 643 (1968).

[47]STANSBURY § 60, at 131.

[48]Whitford v. North State Life Ins. Co., 163 N.C. 223, 79 S.E. 501 (1913).

[49]State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929); State v. McKinney, 175 N.C. 784, 95 S.E. 162 (1918); Toole v. Toole, 109 N.C. 615, 14 S.E. 57 (1891).

[50]State v. Randall, 170 N.C. 757, 87 S.E. 227 (1915); State v. Wallace, 162 N.C. 622, 78 S.E. 1 (1913).

[51]McCoy v. Justice, 199 N.C. 602, 155 S.E. 452 (1930) (letter delivered by wife to third person).

[52]271 N.C. 204, 155 S.E.2d 799 (1967).

[53]*See, e.g.*, Taylor v. Winsted, 74 Ind. App. 511, 129 N.E. 259 (1920), in which a wife was held to be competent to testify to statements made to her husband in the presence of their sixteen-year-old daughter.

[54]271 N.C. at 206, 155 S.E.2d at 801.

[55]Note, 46 N.C.L. REV., *supra* note 46, at 651-52.

that in fact destroys the confidential nature of the conversation. However, the court's approach has the practical virtue of certainty in its application. Acceptance of competence as the decisive criterion would require a case-by-case analysis of the delicate relationship between a child's individual mental capacity and the complexity of a particular conversation,[56] and it would be unrealistic to expect a married couple to go through this mental exercise to determine whether at a given point they could speak freely in front of their child. *Biggs*, at a minimum, sets up an objective criterion permitting individuals and trial courts to act with reasonable assurance.

CLERGY-COMMUNICANT PRIVILEGE

The present North Carolina clergyman-communicant statute must be viewed in light of its relationship to the leading North Carolina case on clerical privilege, *In re Williams*.[57] That case involved an appeal by a minister from a contempt finding that resulted from the minister's refusal to testify in a rape prosecution. At the time there existed a statutory privilege for confidential spiritual communications to a clergyman, but the statute provided that the presiding judge could compel disclosure if necessary to a proper administration of justice.[58] Additionally, defense counsel stated that he did not object to certain evidence that the solicitor desired to elicit. Nevertheless, the minister refused both to be sworn and to testify. On appeal, the North Carolina Supreme Court found no merit in the minister's assertion that his religious beliefs precluded disclosure of communicant confidences; those beliefs must yield to the "compelling interest" of doing justice between the parties.[59]

Subsequent to the *Williams* case the clergyman-communicant statute was rewritten into its present form.[60] Two significant changes were made. The right of the trial judge to compel testimony in his discretion was eliminated, and a specific provision was included rendering the statute inapplicable "where the communicant in open court waives the privilege conferred." In regard to the second provision, it seems clear

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[56]State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963); McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963); Artesani v. Gritton, 252 N.C. 463, 113 S.E.2d 895 (1960), outline some of the considerations involved in determining the competency of a child.

[57]269 N.C. 68, 152 S.E.2d 317 (1967).

[58]Ch. 646, § 1, [1959] N.C. Sess. L. 537, *as amended*, ch. 200, § 1, [1963] *id.* 293. The statute then in force is set out in *Williams*. 269 N.C. at 77, 152 S.E.2d at 324.

[59]269 N.C. at 81, 152 S.E.2d at 327.

[60]N.C. GEN. STAT. § 8-53.2 (1969).

that the communicant need not be a party to the action. Still, the statute leaves many questions unanswered: Thus it is unclear precisely what will satisfy the requirements that the clergyman or minister be of "an established church" and that the communication be made to him "in his professional capacity" and in the course of seeking "spiritual counsel."[61] Further, what is the effect on the traditional concepts of partial and implied waiver of the statutory provision for open-court waiver? These questions await judicial interpretation of the statute.[62]

PHYSICIAN-PATIENT PRIVILEGE

The physician-patient privilege is the most important of North Carolina's limited privileges. The privilege has been roundly condemned, and indeed its exercise sometimes leads to anomalous results.[63] Yet the underlying policy of frank and complete disclosure by a patient to his doctors has received specific judicial approval.[64] Rather than either completely discarding the physician-patient privilege or choosing total commitment to it, North Carolina has by statute adopted a middle ground.[65] The initial determination of whether the privilege is applicable in a given case is essentially the same as with the attorney-client privilege. However, even if the evidence may be excluded as a confidential communication between a physician and patient, the judge may compel disclosure when he believes it "necessary to the proper administration of justice."[66] This compromise, at least potentially, gives the judge the flexibility to deal effectively with a rule of evidence that has merit but also has potential for abuse.

Judicial discretion arises only if an individual item of evidence is within the legitimate scope of the privilege. Scope is therefore the threshold consideration. Since the protection of the physician-patient

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[61]"No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify . . . concerning any information which was communicated to him . . . in his professional capacity . . . wherein such person so communicating such information . . . is seeking spiritual counsel . . . ." *Id.*

[62]For a full discussion of some of the problems raised by the new clergyman-communicant statute, see Note, *Evidence—Privileged Communications: The New North Carolina Priest-Penitent Statute*, 46 N.C.L. REV. 427 (1968).

[63]*See, e.g.*, Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 38, 125 S.E.2d 326, 331 (1962).

[64]Yow v. Pittman, 214 N.C. 69, 84 S.E.2d 297 (1954).

[65]N.C. GEN. STAT. § 8-53 (1969).

[66]*Id.*

relationship is the purpose of the privilege, it is critical to establish the existence of a valid relationship. In *State v. Hollingsworth*,[67] the defendant's brother sent a doctor to the defendant in jail to see if he was drunk. After concluding that he was, the doctor was told that his services would not be needed. Since the defendant's brother initiated the physician's inquiry, the brother had control over when the physician-patient relationship would commence. Since the brother told the doctor not to treat the defendant if all that ailed him was drunkeness, the relationship never arose. Therefore, even though knowledge obtained through observation of the patient is normally within the privilege,[68] the doctor was permitted to testify as to the defendant's condition.

The doctor too can control the establishment of a confidential relationship. In *State v. Wade*[69] a physician was permitted to testify to statements made by a "patient" after the doctor had informed her that he could not treat her. Statements made by a criminal defendant during the course of a psychiatric examination to determine mental capacity have been denied protection.[70] The rationale for this limitation seems to be not that no relationship exists but that the information is not necessary for treatment and that there is no reliance interest. However, it has been suggested that if in this situation the defendant "made statments in the nature of confessions, in the reliance upon the relationship of physician and patient,"[71] the result would be different. Whether a physician-patient relationship exists is often problematic, especially when a defendant is being examined in custody. If a significant purpose of the examination is treatment, the policy of the privilege dictates its application.

Even if it is undisputed that a physician-patient relationship exists, disclosures made to the doctor still must be necessary for treatment. A delicate problem may arise when the patient relates how an injury occurred. Illustrative is the case of *Smith v. John L. Roper Lumber Co.*,[72] in which an effort was made to suppress testimony by the treating physician that the accident had occurred because the plaintiff had kicked a screw from under the engine that fell on him. The court con-

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[67]263 N.C. 158, 139 S.E.2d 235 (1964).

[68]The privilege "extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination . . . ." Smith v. John L. Roper Lumber Co., 147 N.C. 62, 64, 60 S.E. 717, 718 (1908).

[69]197 N.C. 571, 150 S.E. 32 (1929).

[70]State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928).

[71]*Id.* at 560, 143 S.E. at 191.

[72]147 N.C. 62, 60 S.E. 717 (1908).

ceded that a response to the question "how were you hurt?" could be relevant to treatment and therefore privileged. However, background information of the sort involved here, relating only to the chain of causation previous to the injury, was found to be unnecessary to treatment. Although background information would normally play no part in treatment, it is not difficult to imagine a situation in which it could. For example, if an individual were injured while under the influence of drugs, the information that he had recently taken drugs might be critically important. Whether *Roper* established a rigid rule is not clear, but a case-by-case analysis is obviously desirable.

The privilege is strictly limited to persons "duly authorized to practice physic or surgery."[73] It does not extend to nurses, technicians, or other medical personnal unless they are assisting or acting under the direction of a physician or surgeon.[74] The privilege was extended, over a vigorous dissent, however, in *Sims v. Charlotte Liberty Mutual Insurance Co.*[75] to include hospital records to the extent that entries were made by physicians or surgeons or under their direction.[76]

Waiver is particularly important in the physician-patient context for two significant reasons—the common use of standardized waiver clauses in insurance contracts and the necessity in personal injury cases of introducing evidence concerning the same facts that would have been the subject of the physician's testimony. An old case, *Fuller v. Knights of Pythias,*[77] recognized the validity of a waiver of privilege in an insurance contract provided the waiver is complete. More recently, in *Johnston v. United Insurance Co. of America,*[78] the court reaffirmed the general validity of insurance waivers but refused to state definitively that the ambiguous waiver in the policy before it was sufficient.[79] The existence of a more complete and intelligible post-accident waiver permitted avoidance of that determination, but the decision stands as a warning that ambiguity can be fatal to an insurance waiver.

It is well established that North Carolina recognizes implied as well

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[73]N.C. GEN. STAT. § 8-53 (1969).

[74]Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 38, 125 S.E.2d 326, 331 (1962).

[75]257 N.C. 32, 125 S.E.2d 326 (1962).

[76]*Id.* at 38, 125 S.E.2d at 331.

[77]129 N.C. 318, 40 S.E. 65 (1901).

[78]262 N.C. 253, 136 S.E.2d 587 (1964).

[79]The policy contained the following question which was answered affirmatively: " 'Do you hereby authorize any physician or other person who has attended or may attend you to disclose any information thus acquired unless prohibited by law?' " *Id.* at 255, 136 S.E.2d at 588.

as express waivers of the physician-patient privilege. The leading case is *Capps v. Lynch*,[80] which held that the plaintiff's detailed testimony concerning the result of surgery constituted an implied waiver since it would be anomalous to permit the plaintiff to relate the specifics of his condition and of the doctor's treatment while excluding testimony from the only person capable of intelligent contradiction. The decision went on to establish guidelines for determining when a waiver by implication had occurred. Generally, examining the physician as to the patient's condition, failing to object when the opposing party causes the physician to testify, or testifying as to communications with the physician will waive a patient's privilege.[81] But the court of appeals in *Neese v. Neese*[82] refused to extend application of the *Capps* criteria to the submission of an affidavit signed by the physician pursuant to a motion for a restraining order. The affidavit did not constitute examining the physician *as a witness*. Further, the filing of a complaint alleging the plaintiff's mental condition did not mean the plaintiff had *testified* as to that condition.[83] The affinity of the North Carolina courts for the concept of implied waiver is underscored by *Capps*, but *Neese* makes plain that pretrial pleading and motion practice will normally not substantiate a finding of waiver.[84]

Even if testimony is within the scope of the privilege and there has been no waiver, "the court, either at the trial or prior thereto, may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."[85] The discretion of the judge is virtually unfettered. The exercise of discretion is reviewable only to determine if there has been an abuse, which the appellate courts have been loathe to find.[86] Indeed, some opinions suggest that the policy of the statute is to be implemented at the trial court level if at all.[87] However, the judge is required to exercise his discretion rather than rule as a

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[80]253 N.C. 18, 116 S.E.2d 137 (1960).

[81]*Id.* at 23, 116 S.E.2d at 141. *See also* Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956) (attorney-client context).

[82]1 N.C. App. 426, 161 S.E.2d 841 (1968).

[83]*Id.* at 429, 161 S.E.2d at 843.

[84]*But see* N.C. GEN. STAT. § 1A-1, Rule 35(b)(2) (1969), which provides that by requesting and securing a report of a mental or physical examination ordered pursuant to N.C. GEN. STAT. § 1A-1, Rule 35(a) (1969) or by taking the deposition of the examiner, the party examined waives any privilege.

[85]N.C. GEN. STAT. § 8-53 (1969).

[86]State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

[87]*See, e.g.*, Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Creech v. Woodmen of the World, 211 N.C. 658, 191 S.E. 840 (1937).

matter of law.[88] Simple exclusion of the evidence without explanation will not necessitate remand, since there is a presumption that the decision is discretionary, and only a clear indication in the record that the judge ruled as a matter of law will furnish the basis for a new trial.[89] On the other hand, when the judge does compel disclosure, he should record his finding that the disclosure was necessary.[90] Still, in *State v. Martin*[91] the court held that even in the absence of a record finding the assumption is that the judge believed disclosure was necessary to the proper administration of justice. Consequently, while a record finding is recommended, it is doubtful that its absence is reversible error. In short, the judge has been entrusted with the responsibility of mitigating any potential for abuse of the physician-patient privilege. An appellate court will intervene only if it is clear that the trial judge has completely disregarded his statutory duty.

Recent North Carolina Statutory Privileges

The North Carolina General Assembly has recently created two new relational privileges. The first encompasses communications to "a practicing psychologist or psychological examiner, [and] any of his employees or associates."[92] The second involves certified school counselors employed in the public and private school systems of the state.[93] The obvious policy of both statutes is to encourage full and frank disclosures. Both privileges are limited, however, by a discretion, like that found in the physician-patient statute, of the judge to compel disclosure if necessary to a proper administration of justice. An interpretive body of case law has not yet grown up around either privilege, but presumably the case law of other privileges, where analogous, will be applicable.

One problem of draftsmanship common to both statutes merits some discussion. The psychologist statute provides that "the presiding

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[88]Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

[89]Brittain v. Piedmont Aviation, Inc., 254 N.C. 697, 120 S.E.2d 72 (1961), held that when no reason is assigned by the court for a ruling that may be made as a matter of discretion or from a view of the law, the presumption on appeal is that the court made the ruling in the exercise of its discretion. Similar decisions concerning exercise of discretion outside of the physician-patient privilege may be found in Phelps v. McCotter, 252 N.C. 66, 112 S.E.2d 736 (1960); Ogburn v. Sterchi Bros. Stores, 218 N.C. 507, 11 S.E.2d 460 (1940).

[90]Metropolitan Life Ins. Co. v. Boddie, 194 N.C. 199, 201, 139 S.E. 228, 229 (1927).

[91]182 N.C. 846, 109 S.E. 74 (1921).

[92]N.C. Gen. Stat. § 8-53.3 (1969).

[93]*Id.* § 8-53.4 (Supp. 1971).

judge of a superior court may compel" disclosure.[94] The school counselor enactment varies slightly, stating that "the presiding judge may compel" disclosure.[95] The language selected re-emphasizes a body of precedent originally developed in the physician-patient context. Prior to a 1969 amendment,[96] the limiting proviso of the physician-patient statute was worded exactly like that in the present psychologist statute. Interpreting this language in *Lockwook v. McCaskill*[97] and *Johnston v. United Insurance Co. of America*,[98] the North Carolina Supreme Court reversed pretrial orders compelling disclosure of information within the scope of the physician-patient privilege. The court determined that the statute gave discretion only to the judge actually trying the case and not to a judge hearing pretrial motions. Subsequently, in *Gustafson v. Gustafson*,[99] the rule in *Lockwood* and *Johnson* was extended to preliminary hearings awarding temporary child custody. In unmistakable response to these decisions, the legislature amended the physician-patient statute. The court was empowered to compel disclosure "either at the trial or prior thereto."[100]

Whatever the merits of *Lockwood, Johnston,* and *Gustafson,* the legislature has evidenced a clear desire to overrule them. If the cases were bad law for the physician-patient privilege, no rational distinction warrants their application to these new privileges. Yet as currently drafted the new privilege laws must be controlled by this line of precedent. In addition, the reference in the psychologist statute to the presiding judge of a superior court could mean that the privilege is absolute in district court litigation.[101] The next General Assembly should reword these statutes to reconcile them with the legislative intent articulated by the 1969 amendment to the physician-patient law.

PRIVILEGES NOT RECOGNIZED IN NORTH CAROLINA

Two privileges worthy of mention are not recognized in North Carolina. Perhaps the most currently important is the reportorial privi-

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[94]*Id.* § 8-53.3 (1969).

[95]*Id.* § 8-53.4 (Supp. 1971).

[96]Ch. 914, § 1, [1969] N.C. Sess. L. 1059, *amending* ch. 159, § 1, [1885] N.C. Sess. L. 245 (now N.C. GEN. STAT. § 8-53 (1969)).

[97]261 N.C. 754, 136 S.E.2d 67 (1964).

[98]262 N.C. 253, 136 S.E.2d 587 (1964).

[99]272 N.C. 452, 158 S.E.2d 619 (1968).

[100]N.C. GEN. STAT. § 8-53 (1969).

[101]*See* Note, *Domestic Relations—Custody—Evidence—Has the Polar Star Been Obscured by Statute in North Carolina?*, 46 N.C.L. REV. 956, 959 (1968).

lege, which is purely a statutory creation.[102] It has been contended, however, that recognition of the reportorial privilege is required by the first amendment on the ground that compelling a reporter to disclose his source of information is an impermissible infringement on freedom of the press.[103] So far, this argument has been uniformly rejected in both the state[104] and federal[105] courts.

Judicial interpretation of the reportorial privilege laws has been for the most part quite restrictive. Illustrative are cases refusing to protect the identity of messengers of information sources,[106] excluding magazine writers from the scope of the privilege,[107] and finding implied waivers on tenuous grounds.[108] A notable exception to this trend is *In re Taylor*,[109] in which the privilege was extended even to documents the source of which had been revealed. Nevertheless, the generally unfavorable reception accorded this privilege by the courts may presage a limited future.

The usual rationale for a reportorial privilege is the protection of the public's right to information.[110] This justification makes the privilege analytically dissimilar to all other relational privileges. Normally, a privilege attempts to shelter a relationship that society affirmatively wants to preserve. In the reportorial context the product of the relationship, rather than the relationship itself, is considered valuable, and the quality and significance of the product of the reporter-informant relationship varies greatly. Many newspapers and magazines are accurate and responsible, but the field is also crowded with scandal sheets and purveyors of reckless sensationalism. If there is no constitutional requirement for the privilege, it seems unnecessary to provide irresponsible journalism with an effective device for concealing the full measure of its irresponsibility.

Another privilege deserving mention is that between an accountant

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[102]Annot., 7 A.L.R.3d 591 (1970); *see, e.g.*, CAL. EVID. CODE § 1070 (1966); PENN. STAT. ANN. tit. 28, § 330 (1958).

[103]Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[104]*In re* Appeal of Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961); *Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897).

[105]*In re* Wayne, 4 U.S. District Court Hawaii 475 (1914).

[106]State v. Donovan, 129 N.J. 478, 30 A.2d 421 (1943).

[107]Application of Cepeda, 233 F. Supp. 465, 473 (D.C.N.Y. 1964).

[108]Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956), held in a libel suit that a newspaper waived its reportorial privilege by (1) testifying that the information had been received from a reliable source, (2) revealing the substance of the information, and (3) disclosing some sources.

[109]412 Pa. 32, 193 A.2d 181 (1963).

[110]*In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

and his client. The justification offered for this privilege is the similarity between the accountant-client and the attorney-client relationships. Many states have accepted this analogy and have created the privilege by statute.[111] The impact of these statutes is undercut, however, by the absence of the privilege in the federal judicial system.[112] No accountant or client in any state may assert the privilege in federal tax investigations or litigation. Further, in some states, the privilege may be invoked only by the accountant.[113] The concern that this privilege offers little benefit to the honest citizen but is a particularly useful device for the perpetration of fraud may retard its development.[114] In any event, given the critical importance of federal fax laws in the professional activity of any accountant, only acceptance in the federal courts can give the privilege any real vitality.

CONCLUSION

To contend that the North Carolina law of privilege is perfect would be unrealistic. Nevertheless, consistent patterns and trends are discernible. All of the more traditional relational privileges are accepted. Communications must occur during the pendency of the privileged relationship. The tendency has been to resolve close cases against finding that a relationship existed. Confidentiality is a uniformly recognized requirement. In this respect, the presence of any third person is dangerous and usually fatal to an exercise of the privilege. Discretionary power to compel disclosure, when given, is virtually unfettered. Finally, the introduction of any evidence relating to the privileged communications gives rise to a strong inclination on the part of the court to imply waiver. While it is possible to take issue with individual decisions, the evolution of the North Carolina law of privilege has generally followed a predictable pattern consistent with the policy of the law.

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[111]For reference to a list of states with accountant-client privilege statutes, see Note, *Evidence—Privileged Communications—Accountant and Client*, 46 N.C.L. REV. 419, 420-22 n.7 (1968).

[112]United States v. Bowman, 236 F. Supp. 548, 550 (M.D. Pa. 1964); United States v. Culver, 224 F. Supp. 419, 434 (D. Md. 1963). The accountant-client privilege has also been excluded from the proposed federal rules of evidence. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES § 5.01, 46 F.R.D. 243 (1969).

[113]Dorfman v. Rombs, 218 F. Supp. 905 (N.D. Ill. 1963).

[114]Note, 46 N.C.L. REV., *supra* note 111, at 425.