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Confidential Communication Privileges Under Federal and Virginia Law

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CONFIDENTIAL COMMUNICATION PRIVILEGES UNDER FEDERAL AND VIRGINIA LAW

I. INTRODUCTION

This Comment focuses on the confidential communication privileges recognized under federal and Virginia law. The history of rule 501 of the Federal Rules of Evidence is discussed in order to illustrate the policies which Congress intended to further by enacting it and to shed some light on how Congress intended the rule to operate. Discussion includes an examination of various trends or approaches which recent federal decisions have taken in applying rule 501. Finally, specific privileges which have been recognized by federal courts and specific privileges recognized under Virginia law are enumerated.

II. FEDERAL COMMUNICATION PRIVILEGES GENERALLY

A. *The Decision Not to Enumerate Specific Privileges*

Rule 501[1] is the only federal rule dealing with the subject of privileges, and it is substantially different from the rules of privilege contained in Article V of the proposed rules of evidence promulgated by the Supreme Court.[2] Article V of the proposed rules listed nine specific nonconstitutional privileges recognized by the federal courts: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer.[3] Another proposed rule contained in Article V provided that except as otherwise required by the Constiution or provided by act of Congress, only those privileges set forth in Article V would be recognized by federal courts.[4] The remaining rules proposed by

1. Rule 501 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.
2. 56 F.R.D. 183 (1972).
3. Proposed FED. R. EVID. 502-10. *Id.* at 235-56.
4. 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 (3) Refuse to produce any object or writing; or (4)

the Supreme Court in Article V concerned waiver of privilege,[5] disclosure of privileged matter under compulsion,[6] and commenting upon or drawing an inference from a claim of privilege.[7]

Because of strong disagreement as to the content of the proposed privilege rules, and because of fear that this disagreement would prevent the passage of an entire rules package, Congress rejected the specific rules of privilege in favor of the present rule 501.[8] Thus, the federal courts must

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Prevent another from being a witness or disclosing any matter or producing any object or writing.

Proposed FED. R. EVID. 501. *Id.* at 230.

5. Proposed FED. R. EVID. 511, 56 F.R.D. 258 (1972), 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.

6. Proposed FED. R. EVID. 512, 56 F.R.D. 259 (1972) 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."

7. Proposed Fed. R. Evid. 513, 56 F.R.D. 260 (1972), 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.

8. The reasons for the drastic amendment by Congress of the rules of privilege promulgated by the Supreme Court are aptly stated by the Senate Judiciary Committee report:

From the outset it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges, with the nub of the disagreement being whether the rule defining them was merely codifying existing law. In addition, the husband husband-wife privilege drew fire as a result of the conscious decision of the court to narrow its scope from that recognized under present Federal decisions. The partial doctor-patient privilege seemed to satisfy no one, either doctors or patients; and even the attorney-client privilege as drafted came in for its share of criticism because of its failure to define representative of the client, a critical issue for corporations and organizations. Much controversy also attended the failure to include a newsman's privilege . . . . Finally, some commentators questioned the wisdom of promulgating rules of privilege under the rules Enabling Act, on the ground that in their view, the codification of the law of privilege should be left to the regular legislative process.

Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or pre-

deal with the law of privilege, many areas of which are highly controversial, on a case-by-case basis, interpreting the common law "in the light of reason and experience."[9]

B. *Conflict of Laws*

Another source of Congressional dissatisfaction with the rules of privilege proposed by the Supreme Court concerned the extent to which federal courts should or must give effect to state privilege law. Under the proposed Supreme Court rule,[10] federal privilege law would have applied in all cases, including diversity cases in which state law furnished the rule of decision.[11] Congress, on the other hand, felt that in cases in which state law supplied the rule of decision, state privilege law should be applied.[12]

The Advisory Committee[13] offered several reasons for the refusal to recognize state privileges.[14] First, while a privilege usually represents some aspect of a relationship created by a state, the privilege is not ordinarily one of the issues in litigation involving the relationship itself. In fact, when the litigation does involve the relationship which gives rise to the privilege, in many instances the privilege does not apply. For example, many stat-

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vent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule (rule 501) substituted, leaving the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law.

S. REP. NO. 93-1277, 93d Cong., 2d Sess. 6, *reprinted in,* [1974] U.S. CODE. CONG. & AD. NEWS 7051, 7053.

9. FED. R. EVID. 501.

10. Proposed FED. R. EVID. 501, 56 F.R.D. 183, 230 (1972).

11. At the time the proposed Supreme Court rules were drafted, it was well established that in federal criminal prosecutions federal law governed on issues of substance and procedure. Wolfe v. United States, 291 U.S. 7 (1934); Funk v. United States, 290 U.S. 371 (1933). Concerning federal question cases, there were many cases holding that state privileges did not apply. *See, e.g.,* Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953). With respect to diversity cases, the Advisory Committee on Rules of Evidence felt that Erie R. R. v. Tompkins, 304 U.S. 64 (1938), did not require the application of state privilege law. The Advisory Committee believed that under Hanna v. Plumer, 380 U.S. 460 (1965), the question of whether state privilege law applied in diversity cases was one of choice, not necessity. Advisory Committee's Note to proposed FED. R. EVID. 501, 56 F.R.D. 183, 232-33 (1972).

12. *See* H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 9, *reprinted in,* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082.

13. The Advisory Committee on Rules of Evidence of the Judicial Conference of the United States will be referred to throughout this Note as the Advisory Committee. The Advisory Committee drafted the proposed rules which, after some revision by the Standing Committee on Rules of Practice and Procedure, and after approval by the Judicial Conference, were transmitted to the Supreme Court for promulgation.

14. Advisory Committee's Note to proposed FED. R. EVID. 501, 56 F.R.D. 183, 233-34 (1972).

utes make the marital communication privilege inapplicable in cases of divorce. Thus, the privilege usually only applies when the litigation concerns something substantively unrelated to the relationship which gives rise to the privilege. The privilege appears in the case by accident, and impedes the search for information.[15] Secondly, since criminal prosecutions entail more serious consequences than civil litigation, the criminal area has the greatest sensitivity where privileges are concerned. However, state privileges have traditionally not been applied in federal criminal prosecutions.[16] If a privilege is denied in the area of greatest sensitivity, it becomes illusory as a significant aspect of the relationship which gives rise to it. For example, in a state having an accountant's privilege, little force would be added to the privilege by enabling the accountant to assure his client that although communications would not be privileged in federal criminal prosecutions, the accountant could prevent disclosure in diversity cases and state court proceedings. The state interest in privilege thus seems less substantial than might first appear. Further, the federal interest in the quality of federal judicial administration does not appear simply because federal jurisdiction is based on diversity.[17] Thirdly, while it has been argued that refusal to recognize state privileges would encourage forum shopping, a large amount of forum shopping is recognized as legitimate in the American judicial system. In principle, the basis for diversity jurisdiction is the supposed need to escape from local prejudice. If choice of a federal forum was solely confined to this basis, then complete conformity to local procedure and substance would be required. This is not the case, and choice of a federal forum may be influenced by a wide range of strategic factors.[18]

Congress was not persuaded by these arguments. Congress felt that federal law should not supersede state law in such substantive areas as privileges without a compelling reason.[19] In federal civil cases where an element of a claim or defense is not based on a federal question, it was felt that there was no fedral interest strong enough to justify departing from state policy.[20] Further, there was concern that application of federal privilege law in civil cases not based on a federal question would promote forum shopping.[21]

15. *Id.* at 233.
16. *See* note 11 *supra.*
17. Advisory Committee's Note to proposed FED. R. EVID. 501, 56 F.R.D. 183, 233 (1972).
18. *Id.* at 234.
19. H.R. REP. No. 93-650, note 12 *supra.*
20. *Id.*
21. *Id.*

Thus, Congress felt that state law should apply in federal civil cases where state law supplied the rule of decision with respect to an element of a claim or defense.[22] Since the Advisory Committee believed that this result was not mandated by *Erie*,[23] Congress felt it necessary to add the second sentence of rule 501.[24]

It is clear from the language of rule 501 that in all federal criminal prosecutions and in federal question cases in which the evidence is offered to prove an element of a claim or defense for which federal law supplies the rule of decision, federal privilege law will apply. It also is clear that in diversity cases in which the evidence is offered to prove an element of a claim or defense for which state law supplies the rule of decision, state law will apply, and that in diversity cases in which the evidence is offered to prove an element of a claim or defense for which federal law supplies the rule of decision, federal law will apply. A problem arises, however, when federal and state privilege law conflict in cases containing both federal and state claims, and evidence is offered which is relevant to both claims.

One solution to this problem would be to apply the rule which favors the admissibility of the evidence, regardless of whether it was the federal or state rule. This approach would be consistent with the view taken by the Senate Judiciary Committee[25] and with the fundamental need of the adversary system for full disclosure of all relevant facts.[26] Another solution, suggested by some commentators,[27] would be to inquire into the respective federal and state interests involved in the particular case. For example, some state privileges may be so significant that they should be respected when weighed against the need for evidence to prove the federal claim. This approach would be consistent with the case-by-case approach to the law of privilege which Congress intended.[28] Another approach would be an

22. There was some disagreement between the Senate and House of Representatives concerning the language used in rule 501. The Senate Judiciary Committee felt that the question of what is an element of a claim or defense would be likely to cause considerable litigation, since if the matter in question constituted an element of a claim or defense, state law would apply, but if it was merely an item of proof with respect to a claim or defense, federal law would seem to apply even though state law supplied the rule of decision. S. REP. No. 93-1277, 93d Cong., 2d Sess. 12, *reprinted in*, [1974] U.S. CODE CONG. & AD. NEWS 7051, 7058.

23. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *See* note 11 *supra*.

24. H.R. REP. No. 93-650, 93d Cong., 1st Sess. 9, *reprinted in*, (1974) U.S. CODE CONG. & AD. NEWS 7075, 7082.

25. S. REP. No. 93-1277, 93d Cong., 2d Sess. 12 n. 17, *reprinted in*, [1974] U.S. CODE CONG. & AD. NEWS 7051, 7059.

26. United States v. Nixon, 418 U.S. 683, 709 (1974).

27. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 199-200 (2d ed. 1977).

28. S. REP. No. 93-1277, 93d Cong., 2d Sess. 13, *reprinted in*, [1974] U.S. CODE CONG. & AD. NEWS 7051, 7059.

instruction to the jury that the evidence could only be considered as it related to the claim for which it was not privileged. Such a limiting instruction, however, would probably only confuse the jury, and would offer no real protection once the privilege was violated by the introduction of evidence on the unprivileged claim.[29]

A final solution to this dilemma would be for the federal court to refuse to exercise jurisdiction over the pendent state claim. This solution is supported on the ground that jury confusion would result from holding evidence admissible on one claim and inadmissible on the related claim, and jury confusion is a recognized reason for refusing to exercise pendent jurisdiction.[30] It remains to be seen how the federal courts will resolve this problem.

A situation could arise in a federal question case where a federal court adopts state law to fill gaps in federal statutes. Here, even though state law is adopted, the federal court is applying federal law, and thus, state law does not furnish the rule for decision, and federal privilege law will apply.[31]

C. *Recent Trends Under Rule 501: A Balancing Approach*

In developing the federal common law of privilege "in the light of reason and experience," as required by rule 501, some recent federal cases have adopted a balancing approach, balancing the policies and interests in favor of recognizing the particular privilege against the policies and interests against recognition.[32] These cases view the rules of privilege as flexible, rather than absolute, and the decision to recognize or deny the particular privilege is made under the facts of the particular case.[33]

The most important and least varible interest against recognizing a particular privilege is the need for full disclosure of all relevant facts.[34] As one recent decision has stated:

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29. S. SALTZBURG & K. REDDEN, *supra* note 27, at 200.

30. This is the approach advocated by Professor Wright. *See* C. WHITE, LAW OF FEDERAL COURTS § 93 (3d ed. 1976).

31. H. R. CONF. REP. No. 93-1597, 93d cong., 2d Sess. 7-8, *reprinted in*, [1974], U.S. CODE CONG. & AD. NEWS 7098, 7101.

32. Ryan v. Commissioner, 568 F.2d 531, 543 (7th Cir. 1977); Lora v. Board of Educ., 74 F.R.D. 565, 577 (E.D.N.Y. 1977); United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976), *aff'd*, 563 F.2d 559 (1977), *cert. denied*, 435 U.S. 918 (1978).

33. Ryan v. Commissioner, 568 F.2d 531, 543 (7th Cir. 1977); Lora v. Board of Educ., 74 F.R.D. 565, 577 (E.D.N.Y. 1977).

34. Lora v. Board of Educ., 74 F.R.D. 565, 578 (E.D.N.Y. 1977); United States v. King 73 F.R.D. 103, 105 (E.D.N.Y. 1976), *aff'd*, 563 F.2d 559 (1977), *cert. denied*, 435 U.S. 918 (1978).

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive . . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.[35]

In addition to this strong need for all relevant evidence in federal litigation generally, another factor which the federal courts have considered in the balancing process is the special need, under the facts of the particular case, for the information sought to be protected.[36] For example, one federal decision has held that when a claim is brought for a violation of civil rights under the Constitution, only strong countervailing public policies should be allowed to prevent disclosure.[37] Similarly, it has been held that the need for information to secure a full and fair enforcement of federal law becomes particularly strong when the information can only be obtained from the source claiming the privilege.[38]

Other factors to be considered in the balancing process are the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege under the facts of the particular case will protect that relationship or policy.[39] For example, since the policy underlying the privilege against adverse spousal testimony is to promote family peace and harmony, the privilege was held not to apply to a husband and wife who had been married for approximately forty years and who could not seriously contend that the denial of the privilege would have any effect on their marriage at all.[40]

Another factor which federal courts have considered in developing federal common law under rule 501 is whether the particular privilege being claimed would be recognized under state law.[41] Recent federal cases have taken the view that because of a strong policy of comity between federal and state sovereignties, federal courts should recognize state privileges when this can be accomplished at no substantial cost to federal substantive and procedural policy.[42] One reason for this view is the awareness that the benefit of a state's promise of protection from disclosure would greatly decrease if persons relying on the privilege in deciding whether or not to

35. United States v. Nixon, 418 U.S. 683, 709 (1974).

36. United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976), *aff'd*, 563 F.2d 559 (1977), *cert. denied*, 435 U.S. 918 (1978).

37. Lora v. Board of Educ., 74 F.R.D. 565, 579 (E.D.N.Y. 1977).

38. Ryan v. Commissioner, 568 F.2d 531, 543 (7th Cir. 1977).

39. *Id.*

40. *Id.*

41. Lora v. Board of Educ., 74 F.R.D. 565, 576 (E.D.N.Y. 1977); United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y 1976), *aff'd*, 563 F.2d 559 (1977), *cert. denied*, 435 U.S. 918 (1978).

42. *Id.*

communicate knew that disclosure could be forced in a federal court.[43] Since a federal court's denial of a state privilege would thus greatly lessen the benefit of the privilege, the citizens of a state which holds out the expectation of protection from disclosure should not be disappointed by a mechanical and unnecessary application of a federal rule which would not recognize the privilege.[44]

In determining whether "the dictates of reason and experience," require that the state privilege be adopted, a balancing test has again been applied.[45] In addition to the general federal need for disclosure of all relevant facts, and the special need for the information sought to be protected in the particular case, factors considered are the importance of the relationship or policy sought to be furthered by the state rule of privilege, the probability that recognition of the privilege would advance that relationship or policy, and the adverse impact on local policy which would result from denying the privilege.[46] For example, in a case declining to recognize a local privilege for city tax returns, the court noted that the primary policy underlying the privilege was not encouraging honesty and candor on city tax returns, but rather inducing other taxing authorities to furnish similar information to the city, since if other authorities would furnish similar information to the city, the city would lift the privilege.[47] Further, the court felt that any adverse impact on the local policy of honest reporting by taxpayers would be small, since it was likely that no one would be affected in the preparation of a city tax return by the knowledge that disclosure of information contained in the return could be forced in a federal tax prosecution.[48]

Another factor considered in determining whether a state privilege should be recognized is whether disclosure can be made in such a manner as to least offend the state policies giving rise to the privilege.[49] For example, in a case seeking discovery of records containing information obtained from communications between students and psychiatrists, which would have been privileged under state law, the court allowed discovery, stating that the adverse impact of the state policy of promoting psychotherapeutic consultation could be reduced to an almost negligible level by deleting all references to the students' identities contained in the reports.[50]

43. United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976), *aff'd* 563 F.2d 559 (1977), *cert. denied,* 435 U.S. 918 (1978).

44. Lora v. Board of Educ., 74 F.R.D. 565, 576 (E.D.N.Y. 1977).

45. United States v. King, 73 F.R.D. at 105.

46. *Id.*

47. *Id.* at 107.

48. *Id.* at 108-09.

49. Lora v. Board of Educ., 74 F.R.D. at 583.

50. *Id.* at 582-84.

Another factor considered by some federal courts in developing federal privilege law is the treatment afforded the particular privilege under the rules of evidence which were proposed by the Supreme Court.[51] Even though the proposed rules were rejected by Congress, some courts have felt that they still provide a useful standard from which analysis can proceed.[52] In fact, one court has stated that, by promulgating the proposed rules, the Supreme Court has rendered an advisory opinion on their constitutionality.[53] Some commentators, however, warn against placing too much emphasis on the proposed rules since some of the rules represent a departure from federal common law[54] and in many instances the heavily critized proposals were the result of compromises.[55]

III. Privileges Recognized by the Federal Courts

A. *Attorney-client*

The attorney-client privilege is the oldest confidential communication privilege. Originally belonging to the attorney, the privilege allowed him to keep the secrets confided in him by his clients.[56] Now, however, the privilege is based on the desire to encourage clients to make a full disclosure to their attorneys, allowing them to render fully informed legal advice.[57]

Many federal courts consider the essential elements of the privilege to be those enumerated by Wigmore,[58] stated as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[59]

As stated in the first and second requirements, the client must be seeking legal advice from an attorney, and that attorney must have been acting

51. Ryan v. Commissioner, 568 F.2d at 543; Lora v. Board of Educ., 74 F.R.D. at 584-85; United States v. King, 73 F.R.D. at 105.

52. *Id.*

53. United States *ex rel.* Edney v. Smith, 425 F.Supp. 1038, 1046 (E.D.N.Y. 1976), *aff'd mem.*, 556 F.2d 556 (2d cir. 1977).

54. *See* S. Saltzburg & K. Redden, *supra* note 27, at 201.

55. S. Saltzburg & K. Redden, *supra* note 27, at 77 (Supp. 1978).

56. United States *ex rel.* Edney v. Smith, 425 F.Supp. at 1046.

57. Fisher v. United States, 425 U.S. 391, 403 (1976).

58. *In re* Fischel, 447 F.2d 209, 211 (9th Cir. 1977); United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir. 1964), *cert. denied,* 377 U.S. 976 (1964).

59. 8 J. Wigmore, Evidence § 2292 (McNaughton rev. 1961).

in his capacity as a professional legal advisor at the time the communications were made. Thus, if the attorney is acting as a business advisor, collection agent, giving investment advice, or performing services usually rendered by an accountant, the fact that he happens to be an attorney does not make the communications privileged.[60] Documents submitted to an attorney for the preparation of income tax returns have been held not to be covered by the attorney-client privilege if the attorney was not rendering other significant legal services in addition to preparing the returns.[61] However, if a client who is under investigation for federal tax law violations gives information to an attorney in order to obtain legal assistance, this is sufficient to satisfy the requirement that the attorney be acting in his capacity as such.[62]

A somewhat related problem concerns the extent to which the attorney-client privilege covers communications made to a non-lawyer for the purpose of assisting the attorney in effectively representing the client.[63] The extent to which such communications are covered by the attorney-client privilege is determined by balancing the attorney's need for the non-lawyer's assistance in effectively representing the client against the increased potential for inaccuracy in the truth-finding process as depriving the trier of fact of valuable information.[64] The attorney-client privilege has been extended to cover communications to an accountant[65] and a psychiatrist[66] when acting in the capacity of agents of the attorney, if such communications were made by the client in confidence and for the purpose of obtaining legal advice.

Wigmore's third and fifth requirements for the attorney-client privilege are somewhat misleading since they suggest that the privilege only applies to communications made by the client. It is clear, however, that the privilege usually includes the statements made by the attorney in response to the client's communications; otherwise, disclosure of the attorney's state-

60. *In re* Shapiro, 381 F.Supp. 21, 22 (N.D. Ill. 1974).

61. *Id.* at 22-23.

62. Fischer v. United States, 425 U.S. at 405.

63. Under the proposed rules communications made by the client or the attorney to a person employed to assist the attorney in the rendition of professional legal services would be covered by the privilege. Proposed FED. R. EVID. 503, 56 F.R.D. 183, 235-36 (1972).

64. United States *ex rel.* Edney v. Smith, 425 F.Supp. at 1046.

65. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

66. United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975). The court further stated that while the privilege would cease to exist if the psychiatrist was called as a witness in the client's behalf, the fact that the client asserted an insanity defense did not result in a waiver. *Id.* at 1046-47. It is important to note that in this case the psychiatrist was not consulted for the purpose of treatment or diagnosis, and thus a psychiatrist-patient privilege would not cover the communications. *Id.* at 1046, n. 13.

ments would ordinarily reveal the substance of the client's communications.[67] However, because the privilege only extends to communications, the attorney must usually disclose the client's name, or the fact that a certain person has become a client, unless this would amount to the disclosure of a confidential communication.[68] In the latter case, revealing a client's name would amount to disclosure of a confidential communication if, for example, the substance of the communication was known but its source had not been revealed.[69]

Wigmore's fourth requirement, that the communication must be made in confidence, is probably the most important.[70] If the client intends that the communication be made public or revealed to third persons, the privilege will not apply.[71] The fact that the client has made the same statements to third persons on other occasions is persuasive that the statements made to the attorney were not intended to be confidential.[72]

Another problem which has arisen in connection with the attorney-client privilege is the extent to which the privilege covers communications between an attorney and an employee of a corporate client. Federal courts have developed two tests in order to determine when such communications are privileged.[73] The test most widely used is the "control group" test, under which the communication is privileged if the employee is in a position to control or take a substantial part in a decision concerning any action to be taken on the attorney's advice, or if the employee is a member of a group having such authority.[74] The other test, sometimes called the *Decker* test,[75] provides that the communication is privileged, even though the employee is not a member of the "control group", if the employee made the communication at the direction of his superiors and the subject matter upon which the attorney's advice was sought by the corporation and dealt with in the communication was within the employee's scope of employment.[76]

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67. *In re* Fischel, 557 F.2d at 211.

68. Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied,* 371 U.S. 951 (1963).

69. *Id.*

70. *See In re* Langswager, 392 F.Supp. 783, 786 (N.D. Ill. 1975).

71. *Id.*

72. *Id.*

73. Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975).

74. *Id.*

75. Harper & Rowe Publishers v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by equally divided court,* 400 U.S. 348 (1971).

76. Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock, 68 F.R.D. at 400. The proposed rules promulgated by the Supreme Court did not indicate which test should apply.

With regard to communications between an attorney and client concerning illegal activities in progress or yet to be performed, it is clear that such communications are not covered by the attorney-client privilege.[77] When the attorney himself is allegedly involved in the illegal activities, it has been held that the relationship is not one of attorney-client, thus making the privilege inapplicable.[78]

B. *Newsreporter-source*

At common law there was no privilege authorizing a newsman to refuse to reveal confidential information,[79] and as yet no such privilege has been recognized by the federal courts as a matter of federal common law.[80] However, some federal courts have recognized such a privilege protecting the identity of a confidential source[81] and confidential information obtained from a source[82] based on First Amendment grounds.[83]

While the extent of the First Amendment privilege has not as yet been clearly defined, some guidelines have emerged from several recent cases. First, the privilege will not apply in grand jury proceedings where the information sought to be protected is relevant to an investigation into the commission of a crime.[84] However, the privilege may apply if the grand jury investigation is instituted or conducted other than in good faith,[85] or if the information sought is not relevant to the investigation.[86] In civil proceed-

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The Advisory Committee felt that the matter should be resolved on a case-by-case basis. *See* Advisory Committee's Note to proposed FED. R. EVID. 503, 56 F.R.D. at 237 (1972).

77. United States v. King, 335 F.Supp. 523, 546 (S.D. Cal. 1971), *aff'd in part, rev'd in part,* 478 F.2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974).

78. *Id.*

79. Branzburg v. Hayes, 408 U.S. 665, 685 (1972).

80. The proposed rules promulgated by the Supreme Court did not provide for a newsreporter-source privilege.

81. Baker v. F&F Investment, 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973).

82. Gilbert v. Allied Chem. Corp., 411 F.Supp. 505, 510 (E.D. Va. 1976).

83. It is important to distinguish between a privilege recognized as a matter of federal common law and a privilege based on constitutional grounds. If the privilege is recognized as a matter of federal common law, then under rule 501 the privilege will not apply in federal cases with respect to an element of a claim or defense as to which state law supplies the rule of decision. However, a privilege required by the Constitution would apply regardless of whether or not state law supplies the rule of decision.

84. Branzburg v. Hayes, 408 U.S. at 690-91.

85. *Id.* at 707-08.

86. *Id.* at 699-700. Justice Powell in his concurring opinion in *Branzburg* stated that the claim of privilege should be judged on a case-by-case basis by balancing the interest in freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. *Id.* at 710 (Powell, J., concurring).

ings it has been held that the First Amendment requires that newsmen be given a privilege against revealing confidential sources, which can be abrogated only in rare and compeling circumstances.[87] It has been suggested that one such circumstance in which the privilege would not apply would be where the only access to information necessary for the development of the case is through the newsman's sources, as in libel actions where the truth of what the reporter published is in issue.[88]

C. *Husband-wife*

Federal courts recognize two distinct privileges arising from the husband-wife relationship. The first prevents one spouse from testifying against the other, and the second prevents disclosure of confidential martial communications.[89]

The privilege barring one spouse from testifying against the other does not survive a dissolution of the marriage by divorce, nor can the privilege be invoked in cases where one spouse has committed an offense against the other.[90] Further, the privilege is waived by failure to object when the spouse is called to the stand.[91]

The privilege protecting confidential communications made during the marriage does survive a divorce obtained prior to trial.[92] While the privilege only applies to communications which are intended to be confidential, there is a presumption that marital communications are so intended.[93] This presumption can be rebutted, however, by facts showing the communications were not intended to be confidential, such as the presence of a third party at the time the communications were made, or the intention that the information be conveyed to a third person.[94] Generally, the privilege applies only to utterances, and not to acts.[95]

D. *Physician-patient*

No physician-patient privilege existed at common law, and a physician called as a witness was required to disclose all information obtained from

87. Baker v. F&F Investment, 470 F.2d at 783; Gilbert v. Allied Chem. Corp., 411 F.Supp. at 508.

88. Gilbert v. Allied Chem. Corp., 411 F.Supp. at 510.

89. United States v. Lustig, 555 F. 2d 737, 747 (9th Cir. 1977).

90. United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976).

91. United States v. Fisher, 518 F.2d 836, 840 (2d Cir.), *cert. denied,* 423 U.S. 1033 (1975).

92. Pereira v. United States, 347 U.S. 1, 6 (1954).

93. *Id.*

94. *Id.*

95. *Id.*

a patient.[96] While a majority of states have enacted statutes providing for a physician-patient privilege, the privilege has been severely attacked by commentators,[97] and as yet no federal court has recognized the privilege as a matter of federal common law. While there have been attempts to claim a physician-patient privilege on constitutional grounds, based on the right to privacy, the only federal case recognizing such a constitutionally required privilege was reversed by the Supreme Court.[98]

E. *Psychiatrist-patient*

The arguments in favor of granting a psychiatrist-patient privilege, either as a matter of federal common law or based on a constitutional right to privacy, are more persuasive than those in favor of a general physician-patient privilege, and it has been stated that there is a practical need for a privilege covering this relationship.[99] It is generally recognized that the psychiatrist's ability to treat patients depends on the patient's willingness to talk freely, and thus effective treatment depends on the psychiatrist's ability to assure his patients of confidentiality.[100] As yet, however, no case has directly recognized a psychiatrist-patient privilege, either on constitutional grounds or as a matter of federal common law.[101]

F. *Communications to Clergymen*

While there are only several recent cases concerning communications to

96. United states *ex rel.* Edney v. Smith, 425 F.Supp. 1038, 1040 (E.D.N.Y. 1976), *aff'd mem.*, 556 F.2d 556 (2d Cir. 1977). The proposed rules of evidence promulgated by the Supreme Court did not include a general physician-patient privilege.

97. The reason generally advanced for the privilege is that a person might hesitate to get medical aid if he knows his confidences can be disclosed in litigation. Commentators argue that few people have litigation in mind when they consult a doctor for treatment, and even if they did, medical treatment is so valuable that few would avoid it simply because communications made to the doctor could be disclosed in court. *See, e.g.*, Chaffee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 YALE L. J. 607, 609-10 (1943).

98. Roe v. Ingraham, 403 F. Supp. 931 (S.D.N.Y. 1975), *rev'd sub nom* Whalen v. Roe, 429 U.S. 589 (1977).

99. United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1043 (E.D.N.Y. 1976), *aff'd mem.*, 556 F.2d 556 (2d Cir. 1977). Proposed rule 504 of the rules of evidence promulgated by the Supreme Court recognized a psychotherapist-patient privilege. Proposed FED. R. EVID. 504 56 F.R.D. 183, 240-41 (1972).

100. *See generally* Advisory Committee's Note to proposed rule 504, 56 F.R.D. 183, 241-42 (1972).

101. It has been stated that it would be desirable to protect psychotherapist-patient confidences by an evidentiary privilege as a matter of social policy, whether or not such a privilege was required on constitutional grounds. Lora v. Board of Educ., 74 F.R.D. 565, 574 (E.D.N.Y. 1977).

clergymen, the federal courts appear to recognize such a privilege for a confidential confession or other confidential communication made to a clergyman by a penitent seeking spiritual rehabilitation.[102]

G. *Legislator's privilege*

Under the guidelines of rule 501, a recent decision adopted as a matter of federal common law a privilege for legislators.[103] The privilege allows a legislator, in a federal criminal proceeding in which he is involved, to exclude any evidence of his actions performed in a strictly legislative capacity, his motivations for such actions, or any utterances made in the course of his legislative duties.[104] The privilege does not belong to the legislature as an institution, but rather is personal in nature, belonging to the legislator himself.[105]

IV. Privileges Recognized Under Virginia Law

A. *Attorney-client*

Virginia recognizes a privilege for confidential communications between an attorney and his client made because of the relationship and concerning the subject matter of the attorney's employment.[106] The purpose of the privilege is to encourage the client to make a full disclosure of all facts, without fear that the communications will be revealed by legal process.[107] The privilege does not apply, however, to communications made in the contemplation of a crime or the perpetration of a fraud.[108] Further, it has been stated that there is no privilege if the client does not frankly reveal to the attorney his purposes or intentions as well as the facts, since under these circumstances there would be no professional confidence.[109]

B. *Newsreporter-source*

Virginia recognizes a privilege related to the First Amendment which protects a newsman from revealing the identity of a source and confidential

102. United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971); *In re* Verplank, 329 F.Supp. 433, 435 (C.D. Cal. 1971). A clergyman-communicant privilege was recognized in the proposed rules of evidence promulgated by the Supreme Court. Proposed Fed. R. Evid. 506, 56 F.R.D. 183, 247 (1972).

103. *In re* Grand Jury Proceedings, 563 F.2d 577, 585 (3d Cir. 1977).

104. *Id.*

105. *Id.*

106. Grant v. Harris, 116 Va. 642, 648, 82 S.E. 718, 719, (1914).

107. Seventh Dist. Comm. v. Gunter, 212 Va. 278, 286-87, 183 S.E. 2d 713, 719.(1971).

108. *Id.* at 287, 183 S.E. at 719.

109. *Id.*

information obtained from the source.[110] The privilege is not absolute, however, and must yield when the need for the information is essential to a fair trial, based on the requirements of due process.[111] It has been stated that if there are reasonable grounds to believe that the information is material in proving an element of a criminal offense, or in proving a defense, or to a mitigation of the penalty attached to the offense, then a defendant's need to obtain the information is essential to a fair trial.[112] Further, if such information is not otherwise available, a defendant has a due process right to force disclosure of the identity of the source and the information obtained from the source.[113]

C. *Husband-wife*

Virginia recognizes by statute two privileges based on the husband-wife relationship. The first prevents one spouse from being called as a witness against the other in criminal cases.[114] The privilege does not apply, however, in a prosecution for an offense committed by one spouse against the other, or against a minor child of either spouse, or where one spouse is charged with forging the name of the other.[115] In these cases each spouse will be competent to testify as a witness against the other, except as to privileged communications.[116]

In two recent cases, *Stewart v. Commonwealth*[117] and *Jenkins v. Commonwealth,*[118] the Virginia Supreme Court has considered several intricacies of the criminal defendant's privilege to prevent his spouse from being called as a witness against him.

In *Stewart,* the question was whether a decree of divorce *a mensa et thoro*[119] (from bed and board), obtained after the date of the criminal offense but before trial, would terminate the privilege, and thus permit the

110. Brown v. Commonwealth, 214 Va. 755, 757, 204 S.E. 2d 429, 431 (1974), *cert. denied,* 419 U.S. 966 (1974).

111. *Id.*

112. *Id.*

113. *Id.*

114. VA. CODE ANN. § 19-2.271.2 (Cum. Supp. 1978).

115. *Id.*

116. *Id.*

117. No. 780749 (Va. Mar. 2, 1979).

118. No. 771730 (Va. Jan. 12, 1979).

119. The court was concerned with VA. CODE ANN. § 20-116 (Rep. Vol. 1975), which provides that a court, in granting an *a mensa* decree, may decree that the parties be perpetually separated and protected in their persons and property. The statute further provides that such a decree operates upon the personal rights and legal capacities of the parties as a decree for a divorce from the bond of matrimony, except that neither party can marry again during the life of the other. Stewart v. Commonwealth, No. 780749 at 6 (Va. Mar. 2, 1979).

defendant's spouse to testify against him. The court noted that the existence of the privilege is determined at the date of trial and depends upon the couple being validly married at that time. The court held that the *a mensa* decree terminated the defendant's privilege of preventing his wife from testifying against him, stating that the wife's "legal capacity to testify after the divorce from bed and board was no different from what it would have been if she had obtained a divorce from the bond of matrimony."[120] The court further reasoned that since the *a mensa* decree had destroyed any vestige of matrimonial harmony which could be protected by the defendant's assertion of the privilege, the reason for the privilege no longer existed.[121]

In *Jenkins,*[122] the defendant appealed convictions of the murder of one Wilburn and the use of a firearm in the commission of that felony. The evidence showed that the shot fired by the defendant which killed Wilburn was aimed at the defendant's wife, who was seated beside Wilburn in Wilburn's car. The Commonwealth's theory at trial was that the defendant intended to shoot his wife, and the jury was instructed on the doctrine of transferred intent. The trial court allowed the defendant's wife to testify against the defendant, over his objection, on the ground that the evidence disclosed an offense had been committed by the defendant against his wife, and that Wilburn was killed during the commission of this offense. On appeal, the court considered the language of the statute prohibiting one spouse from testifying against the other[123] and reversed the convictions. The court emphasized that the statutory exception was limited to a *prosecution* for an offense committed by one spouse against the other.[124] The court held that since the defendant was tried under indictments charging him with the murder of Wilburn and the use of a firearm in the commission of that felony, neither of which was a prosecution for an offense

120. Stewart v. Commonwealth, No. 780749 at 6 (Va. Mar. 2, 1979). the court acknowledged that VA. CODE ANN. § 20-120 (Repl. Vol. 1975) is an exception to the rule that all marital rights and privileges are terminated by an *a mensa* decree. This section provides that the parties to an *a mensa* decree have the right to make a joint application for revocation of the decree. This revocation would reinstate the marriage with all of its rights and privileges. In *Stewart,* however, the court found no evidence of revocation.

121. Stewart v. Commonwealth, No. 780749 at 7 (Va. Mar. 2, 1979).

122. No. 771730 (Va. Jan. 12, 1979).

123. At the time of defendant's trial this was VA. CODE ANN. § 8-288 (Cum. Supp. 1976), which provided that the privilege did not apply "in the case of a prosecution for an offense committed by one [spouse] against the other." This language is identical to that found in the present statute, VA. CODE ANN. § 19.2-271.2 (Cum. Supp. 1978).

124. Jenkins v. Commonwealth, No. 771730 at 2 (Va. Jan. 12, 1979).

committed against his wife, defendant's wife was incompetent to testify against him.[125]

As a sidelight to the *Jenkins* case, it is interesting to note that while the court reversed the defendant's convictions, the court showed signs of displeasure at the fact that this result was mandated by the statute.[126]

The other privilege based on the husband-wife relationship protects private communications made during the marriage.[127] This privilege survives a divorce obtained prior to trial, but the privilege does not apply in actions brought by one spouse against the other.[128] The privilege is also inapplicable in legal proceedings concerning complaints of child abuse and neglect.[129]

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125. *Id.* at 4.

126. The court stated that while the statute (VA. CODE ANN. § 19.2-271.2 (CUM. SUPP. 1978)) required that the convictions be reversed, the following language from an earlier Virginia case seemed particularly appropriate:

> Professor Wigmore in his excellent work on Evidence . . . vigorously attacks the privileges granted by the common law rule and the reasons upon which the rule is based. We are not, however, called upon to pass upon the reasons for the rule, or the wisdom of the law. A lack of good reason may be ground for the legislature to change the law; but we must construe the law as it is.

Jenkins v. Commonwealth, No. 771730 at 4 (Va. Jan. 12, 1979) (quoting Meade v. Commonwealth, 186 Va. 775, 784, 43 S.E. 2d 858, 862 (1947)).

It should be noted that the court in *Jenkins* left open the question of whether the defendant's wife would be able to testify against the defendant if he also had been charged with the commission of an offense against her, either in the same trial or a separate one. Since the Commonwealth elected not to prosecute the defendant for any offense committed against his wife, this precise question was not raised. This question has been raised in New Jersey, under N. J. STAT. ANN. § 2A:84A-17(2) (West 1960), which provides that the privilege does not apply if the accused is charged with an offense against his spouse. The New Jersey Supreme Court held that if there is a single criminal event in which the spouse and others are targets or victims of the defendant's criminal conduct, and the defendant is charged with some or all of the offenses committed, one of the charges being an offense committed against the spouse, the spouse is a competent and compellable witness against the defendant at the trial of all the cases. The court stated that the spouse would be competent to testify against the defendant regardless of whether the cases were tried separately or all in one proceeding. State v. Briley, 53 N.J. 498, 251 A.2d 442, 446 (1969).

In view of the displeasure which the Virginia Supreme Court seemed to express with the result reached in *Jenkins*, the court might follow the New Jersey approach if this question is raised in Virginia.

127. VA. CODE ANN. § 8.01-398 (Repl. Vol. 1977). While this section states that the communications privilege applies only in civil actions, § 19.2-271.2 recognizes the privilege as applicable in criminal proceedings. *See* VA. CODE ANN. § 19.2-271.2 (Cum. Supp. 1978).

128. VA. CODE ANN. § 8.01.398 (Repl. Vol. 1977).

129. VA. CODE ANN. § 63.1-248.11 (Cum. Supp. 1978).

D. *Physician-patient*

Virginia recognizes a physician-patient privilege by statute.[130] Unless the patient has given his consent, a physician is not required to testify concerning any information obtained from the patient which was necessary to enable the physician to furnish professional care to the patient.[131] The privilege also applies to communications between a patient and a duly licensed clinical psychologist.[132] This privilege only applies in civil actions, and does not apply if the physical or mental condition of the patient is in issue, or if the court deems disclosure necessary to the proper administration of justice.[133] The privilege also is inapplicable in legal proceedings concerning complaints of child abuse or neglect.[134]

E. *Ministers of Religion*

By statute Virginia recognizes a privilege protecting communications between ministers of religion and persons they counsel or advise.[135] A minister is not required to disclose confidential information which is communicated to him in his professional capacity and which is necessary to enable him to perform the usual functions of his office, if the person communicating is seeking spiritual counsel and advice.[136] The privilege applies whether the information concerns the person who is communicating or someone else.[137]

V. CONCLUSION

Federal law and Virginia law offer two contrasting approaches to privileged communications. Federal law, as embodied in rule 501, provides a flexible approach, allowing the federal courts to develop the law of privilege on a case-by-case basis. In Virginia, the law of privilege is largely statutory, providing the courts with much less freedom to deal with the subject of privileged communications as it arises under the facts of a particular case.

In view of the various competing interests which arise in the law of privilege, such as the need for full disclosure of all relevant evidence, the expectations of parties relying on the privilege, and the policies underlying

130. VA. CODE ANN. § 8.01-399 (Repl. Vol. 1977).
131. *Id.*
132. *Id.*
133. *Id.*
134. VA. CODE ANN. § 63.1-248.11 (Cum. Supp. 1978).
135. VA. CODE ANN. § 8.01-400 (Repl. Vol. 1977).
136. *Id.*
137. *Id.*

the privilege, there is an advantage in having a flexible, case-by-case approach. Certainly cases can be imagined in which the recognition of a privilege would not further its underlying policies, and would defeat rather than serve the ends of justice by excluding needed information. The flexible approach of rule 501 allows federal courts to consider whether, under the facts of the particular case, the need for disclosure of all relevant evidence outweighs the claim for the privilege, or whether the information can be disclosed in such a manner as to least offend the policies on which the privilege is based. This approach seems superior to merely applying a fixed rule which would exclude relevant evidence, but would not further the policies on which the rule is based under the facts of a particular case.

There are, however, disadvantages to a flexible rule. The flexible approach will introduce a large amount of uncertainty into the law. The ability to rely on a particular privilege will be lessened, since it will be difficult to determine whether the privilege exists until after a suit has been filed and the circumstances of the case have been considered. Another disadvantage of the flexible approach is that it will be more difficult for the courts to apply. Rather than applying a fixed rule, the courts will be required to balance important and often controversial interests, at the expense of judicial economy.

Thus, the choice between a flexible approach to the law of privilege, as exemplified by rule 501, and a more rigid approach, as taken by Virginia, is a difficult decision to make. The answer may depend in part on one's view as to whether rules of privilege should be determined by the legislature or left to the courts. However, because of the importance of the conflicting interests involved, the need for disclosure against the need to protect certain relationships, the flexible case-by-case approach seems better reasoned, and better suited to take these interests into account as they arise in particular cases.

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