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Privileges for Confidential Communications in Illinois: Attorney-Client and Husband-Wife

INTRODUCTION

Unlike most rules of evidence, the privilege rules are designed to prevent disclosure of relevant facts. This interference with the fact finding process is justified by society's interest in preserving certain confidential relationships. Critics, however, suggest that this justification often sweeps too broadly, excluding necessary evidence. To remedy this problem, some have urged that privileges be narrowed in number and scope. Nonetheless, in recent years legislatively created privileges have proliferated, and the scope of various privi-

1. Four general requirements must be satisfied in order to establish a privilege:
   (1) The communication must originate in a confidence that they will not be disclosed.
   (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
   (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
   (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 J. Wigmore, Evidence §2285, at 527 (MacNaughton rev. 1961)[hereinafter cited as Wigmore (MacNaughton Rev.).]


leges has been judicially expanded. In Illinois, privileges for confidential communications are governed by both common law and statute. Neither source affords a precise or comprehensive guide to the use of privilege. In addition, despite endeavors to restrict the availability of privilege, neither the courts nor the legislature are currently precluded from expanding their number and scope. Finally, several common law principles regulating procedural aspects fail to ensure the fair exercise of


Other states have enacted statutes safeguarding a variety of relationships and situations: COLO. REV. STAT. §13-90-107 (1973) (attorney-client); COLO. REV. STAT. §7-3-114 (1973) (corporations); N.M. REV. STAT. ANN. R. Evid. Rule 509 (1978) (juvenile probation officers); NEV. REV. STAT. §49.265 (1971) (hospital and medical review committees); COLO. REV. STAT. §13-90-107 (1973) (Psychologista); N.M. REV. STAT. ANN. R. Evid. Rule 509 (1978) (probation officers); NEV. REV. STAT. §49-290 (1973) (school guidance counselors); NEV. REV. STAT. §49.290 (1973) (teachers).

6. See note 20 infra.

7. Privilege for confidential communications must be distinguished from testimonial privileges against self incrimination which are sanctioned by the constitution, see MCCORMICK (2d ed.), supra note 2, §§115-16, at 247-49, as well as rules of incompetency. Privileges for confidential communications suppress relevant evidence in order to preserve certain relationships. In contrast, rules of incompetency are designed to exclude potentially biased or inaccurate testimony.

8. Attorney-client is the only privilege which remains governed solely by common law. See note 14 infra and accompanying text.

9. Statutes authorize privileges for the following relationships: accountants, husband and wife, psychotherapist-patient, priest, reporter's source of information, and social workers. See note 5 infra.

In several limited contexts, statutes create privileges for information submitted to governmental authorities. See, e.g., Unemployment Compensation Act, ILL. REV. STAT. ch. 48, §640 (1977); Motor Vehicle Reports, ILL. REV. STAT. ch. 95 1/2, §§11-408, 11-412 (1977).

10. The Model Code of Evidence, drafted in 1939, was the first attempt to limit the law of privilege. This code was never well received by courts or state legislatures. Curtailment was again undertaken in the Uniform Rules of Evidence, promulgated in 1953. Although the original draft of the Uniform Rules would have drastically limited the availability of privilege, the version adopted by the American Bar Association contained many concessions.

More recently, in 1972, the United States Supreme Court endorsed the proposed Federal Rules of Evidence. Under these rules, the availability of privilege would have been confined to only nine relationships, and no additional privileges could have been created by common law. Congress rejected this multi-rule scheme, opting instead for a generalized privilege rule that leaves privilege free to develop at common law. Compare Proposed (not adopted) Fed. R. Evid. 501-513 with Fed. R. Evid. Rule 501.

Recently the Illinois Supreme Court Committee on Rules of Evidence has similarly attempted to restrict the use of privilege. The drafters proposed a multi-rule scheme that was virtually identical to the proposed federal rules of privilege. See Proposed Ill. R. Evid. 501-507 (Final Draft). Proposed Ill. R. Evid. 501 recognizes only those privileges promulgated by supreme court rule or legislative enactment, thereby halting the common law development of privilege. Since the proposed scheme, however, does not preclude the legislature from creating additional privileges, it is uncertain whether the rules could effectively terminate the growth of privilege.

11. These collateral aspects include the eavesdropper rule, the assertion of privilege, and
Confidential Communications

Confidential Communications. These perceived deficiencies have resulted in calls for reform in the law of privilege.12

This article will examine the law in Illinois currently governing the use of privileges for confidential communications, concentrating on two frequently asserted privileges, attorney-client and husband and wife. In addition, the article will examine recommendations for eliminating the problems inherent in the area.

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege,13 authorized solely by common law,14 is primarily designed to facilitate the free and open communication essential to effective legal counselling.15 Exercise of the privilege shields information revealed by a client from public disclosure. By eliminating the fear of disclosure, the privilege encourages a client to impart all relevant information to his attorney.16 Proponents of this privilege also assert that it engenders confidence in the negative inferences drawn from assertion of privilege. See notes 150-187 infra and accompanying text.


14. Illinois common law has incorporated Wigmore's eight part test setting forth the necessary elements of the attorney-client privilege:

1. Where legal advice of any kind is sought; 2. from a professional legal advisor in his capacity as such; 3. the communication 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 his legal advisor; 8. except the protection be waived.


professional relationship and in the judicial system as a whole. In contrast, critics regard the attorney-client privilege as a sentimental carryover, and suggest that the sole reason for its continued existence is judicial reluctance to compel disclosure of professional communications. Despite the controversy regarding its justification, the attorney-client privilege remains a well established rule excluding otherwise relevant evidence.

**Parties Who May Assert the Privilege**

The attorney-client privilege is available solely for the protection of the client. The broad term "client" includes individuals, corporations, large groups and associations. Parties other than the client may also assert the privilege, provided it is invoked on behalf of the client. Such parties may be a representative of the client, an attorney, or a representative of the attorney.

1. **Representative of the Client.**

To qualify as a representative of the client, the individual must function in a representative capacity such as successor, trustee, guardian, administrator or executor. The representative of the client has traditionally asserted the privilege on behalf of a deceased or incompetent person. Presumably the representative could also

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17. *Lawyer-Client Privilege, supra* note 13, at 257.
18. *Id.*
19. During its early development, however, the privilege belonged solely to the attorney, and was used to preserve "honour among men." *Wigmore (MacNaughton rev.), supra* note 1, §2286 at 530-31. In 1776, the landmark case, *The Duchess of Kingston*, shifted the protection from the lawyer to the client. *Id.* Under present common law, third parties cannot invoke the attorney-client privilege in their own behalf. Thus, where a client has revealed information to his attorney which may incriminate a third party, the third party may not invoke the privilege in order to bar the attorney's testimony. *See In re Langswager*, 392 F. Supp. 783 (N.D. Ill. 1975). Similarly, an attorney cannot assert the privilege on behalf of other clients or family members who are incriminated by his client's communications. *See People v. Doe*, 59 Ill. App. 3d 627, 375 N.E.2d 975 (1978).
assert the privilege on behalf of a defunct organization.24

A corporation, as an impersonal entity, clearly must exercise the privilege through a designated representative. Defining the appropriate representatives of the corporate client has been the subject of much controversy.25 Courts confronted with this issue have generally adopted the "control group" test.26 This test initially permitted an employee to claim the privilege on behalf of the corporation if he had authority to act upon the attorney's advice.27 Courts have subsequently determined this rule should be expanded to include employees presently subject to liability,28 as well as employees who seek advice concerning the performance of their duties at their superior's direction.29

The common law development of this test has resulted in vague and uncertain guidelines. Consequently, corporations lack sufficient guidance to delegate responsibilities and to establish channels of communication in a manner which would preserve the attorney-client privilege.30 Furthermore, the gradual case-by-case extension of the privilege to additional employees has provoked concern about possible abuse of the privilege. Critics fear that corporations will use the privilege to avoid full and fair disclosure31

24. The corporation is regarded as a "client," and is "entitled to the same treatment under the law as any other 'client'-no more and no less." Day v. Illinois Power Co., 50 Ill. App. 2d 952, 955, 199 N.E.2d 802, 804 (1964). Therefore the same rules of privilege should apply to both individual and corporate clients.

25. For a discussion of the problems inherent in the controversy regarding the representative of the client, see 2 J. Weinstein & M. Berger, Weinstein's Evidence §503(b) (04), at 503-38 (1976) [hereinafter cited as Weinstein].

26. The control group test was described in Day v. Illinois Power Co., 50 Ill. App. 2d 52, 59, 199 N.E.2d 802, 806 (1964) as follows:

There is nothing in the record before us to indicate that the employees and agents of the defendant power company, who investigated [the matter] . . . here involved and transmitted reports to Mr. Ducey, Attorney for the power company, had any authority whatsoever, either actual or apparent, to make any judgment or decision as to any action to be taken by the corporation on the advice of its attorney.


rather than to preserve truly confidential communications.

A precise and definite rule would safeguard the public interest and provide guidance for the corporate client. Only the Uniform Rules of Evidence present a rule defining representative of the client, but this provision merely restates the obsolete early interpretation of the control group test. A modern rule, reflecting common law development, would encompass a wider range of employees. In particular, a new rule should delineate types of employees who, by virtue of their rank in the corporation, may assert the privilege. The rule should also specify exceptional circumstances in which additional employees may invoke the privilege.

2. Attorney

In addition to the client and his representative, an attorney may claim the privilege on behalf of his client. Illinois common law has defined an “attorney” for purposes of the privilege to include any person authorized to practice law. Illinois courts have never considered whether the privilege extends to a person who the client reasonably believes to be an attorney. If the privilege does not extend to the imposter, an unsophisticated client may be penalized. Should Illinois elect to establish new rules of privilege, they should clarify the definition of attorney, to specifically include a party reasonably believed by the client to be an attorney.

3. Representative of the Attorney

The lawyer’s representative also falls within the purview of the privilege. Accordingly, an attorney’s critical clerical and auxiliary staff, who are inevitably exposed to confidential communications,
may properly refuse to testify. The Illinois Supreme Court, in People v. Knippenberg, recently extended the privilege to agents of the attorney who are "essential and indispensable" to the attorney's work. Presumably, this language allows virtually all of an attorney's employees, including social workers, paralegals, law students or investigators, to claim the privilege. Courts have not yet broadened the privilege to include independent contractors retained to assist in the preparation of a case. Consequently, experts and outside consultants may not fall within the ambit of the privilege.

Whether or not the privilege should be extended to all personnel involved in the delivery of legal services depends upon the underlying justification of the attorney-client privilege. If its true objective is to render fully informed legal advice based upon complete disclosure by the client, all personnel receiving the confidential information should be permitted to exercise the privilege. If, however, the actual rationale is merely reluctance to pry into the professional attorney-client relationship, the extension may be unwarranted.

Several proposed evidence codes provide that all persons employed to assist the attorney in the rendition of legal services should come within the bounds of the privilege.

4. Insurance Companies

Insurance companies under a contractual duty to defend may also claim the attorney-client privilege. This allows the insurance company to shield information disclosed by its clients in accident reports. The rule, however, has been limited to reports compiled for the purpose of defending the client. Moreover, if the insurer pro-
vides coverage to potentially adverse claimants, the privilege does not protect insurer-client communications until the adversary process begins.44

**Intent for Confidentiality**

To invoke the privilege, the client must intend the particular communications to remain confidential.45 Since there is no presumption of confidentiality accompanying attorney-client communications, the party asserting the privilege must prove that the requisite intent exists.46 This intent may be explicit or inferred from surrounding circumstances.47 Requiring intent for confidentiality distinguishes a concerted effort to secure legal counsel48 from a casual attempt to obtain advice.49 In some instances, the intent requirement may prevent the client's assertion of the privilege even though he possessed the requisite intent. For example, the mere presence of third parties not necessary to the rendition of legal services, even where the client is unaware of their presence, destroys confidentiality and waives the privilege.50

**Scope**

In addition to the intent requirement, the information sought to be shielded must be confidential in nature.51 Illinois common law

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46. See United States v. Tratner, 511 F.2d 248, 252 (7th Cir. 1975); Cox v. Yellow Cab Co., 61 Ill. 2d 416, 419-20, 337 N.E.2d 15, 17 (1975).
47. See Krupp v. Chicago Transit Auth., 8 Ill. 2d 37, 42, 132 N.E.2d 532, 536 (1956); Shere v. Marshall Field & Co., 26 Ill. App. 3d 728, 731, 327 N.E.2d 92, 94 (1975). In Cox v. Yellow Cab Co., 61 Ill. 2d 416, 337 N.E.2d 15, 17-18 (1975), the court lists several factors determinative of intent for confidentiality: "The purpose for which the statement was required, the understanding by its maker as to that purpose, the extent to which its confidentiality was maintained after it was made and in the course of its transmission to counsel. . . ." Other factors may refute the existence of the requisite intent. For example, in People v. Doe, 59 Ill. App. 3d 677, 680, 375 N.E.2d 975, 980 (1978), the court inferred that intent for confidentiality was lacking where the communication was contained in a note not specifically addressed to the attorney.
50. See notes 153 through 168 infra and accompanying text.
51. CALLAGHAN, supra note 22, § 13.13 at 94-95. Information which is not deemed confiden-
lacks a precise definition of "confidential" communication. In making this determination, courts have traditionally weighed the need to safeguard the attorney-client relationship against the public's interest in full disclosure.\textsuperscript{52}

This balancing process has evolved several limitations on the subject matter covered by the privilege. The privilege does not encompass non-legal advice\textsuperscript{53} or the preparation of routine papers.\textsuperscript{54} Although privileged communications can be oral or written,\textsuperscript{55} a written document is not automatically protected by transfer to an attorney.\textsuperscript{56} The underlying facts of the case are not privileged.\textsuperscript{8} Further, absent extenuating circumstances,\textsuperscript{58} the client's identity, address,\textsuperscript{60} the attorney's fee and employment arrangements\textsuperscript{61} are not recognized as privileged communications.

There are also several well-established exceptions to the exercise of the attorney-client privilege. An attorney who assists in the commission of a crime cannot invoke the privilege.\textsuperscript{52} The privilege is also limited to: non-professional communications, the client's mental capacity, and the client's appearance and demeanor. Id. See \textit{Weinstein}, supra note 25, § 503(b) (03) at 503-37.


53. See, e.g., United States v. Tratner, 511 F.2d 248, 253 (7th Cir. 1975); United States v. Brown, 478 F.2d 1038, 1040 (7th Cir. 1973); \textit{In re} Estate of Busse, 332 Ill. App. 258, 267, 75 N.E.2d 36, 40 (1947).

54. See, e.g., Dickerson v. Dickerson, 322 Ill. 492, 153 N.E. 740 (1926); Gronewold v. Gronewold, 304 Ill. 11, 136 N.E. 489 (1922); Spencer v. Razor, 251 Ill. 278, 96 N.E. 300 (1911); Potter v. Barkinger, 236 Ill. 224, 86 N.E. 233 (1908); Champion v. McCarthy, 228 Ill. 87, 81 N.E. 808 (1907); Pick v. Diecks, 218 Ill. App. 295 (1920).

55. \textit{MCCORMICK} (2d ed.), supra note 2, § 89, at 184.

56. This principle is especially relevant in cases involving information embodied in a tax return. \textit{In re} Shapiro, 381 F. Supp. 21, 23 (N.D. Ill. 1974).


unavailable in litigation concerning professional misconduct, legal
malpractice or attorney fees. Where a deceased client's will is con-
tested, courts will generally deny the privilege to any of the parties
because of the need to ascertain the intention of the testator. Finally,
where joint clients divulge information to an attorney about
a matter of common interest, the communications are not privileged
in any action between these clients. These communications remain
privileged as to all other persons. These exclusions reflect a judicial
determination that society's interest in disclosure outweighs the
putative value of the privilege.

This balancing approach fails to provide a comprehensive scheme
for determining whether material falls within the scope of the privi-
lege. It has resulted in a patchwork of exceptions and exclusions, but
it does not give the practitioner reliable guidance in dealing with
situations not covered by a specific exception. This lack of cer-
tainty poses a major obstacle for the lawyer, but formulation of a
comprehensive, rigid list of privileged topics is neither feasible nor
desirable. Greater predictability could be achieved by clearer ar-
ticulation of the principal factors considered by a court engaging in
the balancing process.

**Duration**

The existence of the attorney-client privilege is not coterminous
with the duration of the confidential relationship. Disclosures made
in anticipation of legal representation are privileged even if the

64. See Norton v. Clark, 253 Ill. 557, 97 N.E. 1079 (1912); Wilkinson v. Service, 249 Ill. 146, 94 N.E. 50 (1911); Mason v. Willis, 326 Ill. App. 481, 62 N.E.2d 135 (1945).
65. See McCormick (2d ed.), supra note 2, § 91, at 189. One of the putative purposes of this exception is to avoid conflicts of interest. Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850 (7th Cir. 1974). This joint client problem frequently arises in shareholder derivative suits where the corporate attorney has been consulted by both management and stockholders. See Note, The Attorney-Client Privilege in Shareholder Litigation: The Need for a Predictable Standard, 9 Loy. Chi. L.J. 731 (1978).
66. See McCormick (2d ed.), supra note 2, § 91, at 189.
67. See notes 83-88 infra and accompanying text. Since principles of privilege have been established through the courts' exercise of discretion in case by case adjudication, there are inevitably some omissions and inconsistencies in the law. It has been noted that "when individual courts are vested with wide discretion, there is a strong possibility that they will reach inconsistent conclusions." Note, Attorney-Client Privilege in Shareholder Litigation: The Need for a Predictable Standard, 9 Loy. Chi. L.J. 731, 739 (1978).
68. In Taylor v. Taylor, 45 Ill. App. 3d 352, 354-55, 359 N.E.2d 820, 823 (1977), the court acknowledged that the attorney-client privilege did not lend itself to "wooden application."
attorney does not accept the case or is rejected by the client. This safeguard encourages a prospective client to impart information necessary to determine whether legal counsel is required. The right to claim the privilege also continues after the attorney-client relationship has terminated.

**Waiver**

Waiver of a privilege claim, unlike typical waiver situations, does not require intentional relinquishment. Waiver can apparently be effectuated even where the holder is unaware of the privilege's availability.

Although other parties may assert the privilege on behalf of the client, the power to waive the privilege rests solely with the client or his representative. Thus, where an attorney erroneously or deliberately discloses confidential information to a third party, the privilege would presumably remain intact, and the third party would be unable to reveal the contents of the communication.

Procedurally, waiver can be explicit or implicit. Where a client consents to testify about a privileged matter, waiver is explicit. An express waiver is also effected where a client authorizes his representative or attorney to testify about confidential communications.

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70. King v. King, 52 Ill. App. 3d 749, 752, 367 N.E.2d 1358, 1360 (1977); see Gronewold v. Gronewold, 304 Ill. 11, 136 N.E. 489 (1922). The privilege is violated where an attorney is exposed to confidential information and subsequently either represents an adverse party, or utilizes privileged information for impeachment of a witness at trial. See People v. Hallium, 36 Ill. App. 3d 556, 344 N.E.2d 579 (1976).


72. See Johnson v. Zerbst, 304 U.S. 458 (1938) (Waiver is the intentional relinquishment of a known right).

73. WIGMORE (MacNaughton rev.) supra note 1, § 2327 at 636.

74. See PROPOSED (not adopted) FED. R. EVID. 511, Advisory Comm. Notes. This result is not very likely to occur in the attorney-client context since despite a client's lack of knowledge, the attorney is aware of the privilege's existence.


76. Disclosure under these circumstances may constitute a breach of the canons of professional responsibility which mandate total confidentiality. It may also be malpractice.

77. Since the attorney cannot effectively waive the privilege without express authorization from his client, this result seems inescapable. See MCCORMICK (2d ed.), supra note 2, §93, at 194.

Implicit waiver occurs when a client speaks in the presence of third parties who are not entitled to invoke the privilege.\textsuperscript{79}

\textit{Proposals for Reform}

In order to insure fair and proper exercise of the attorney-client privilege, more comprehensive guidelines are required. A rule or statute clearly defining relevant terms such as representative of the client and lawyer, and delineating the bounds of the privilege would assist the courts and legal practitioners. Embodying this privilege in a comprehensive rule would aid rather than impinge upon the balancing process employed by the court. Further, concrete guidelines would prevent unwarranted expansion of the privilege without sacrificing its fair assertion.

The federal rule of privilege\textsuperscript{81} does not offer a viable model upon which to pattern a rule governing the attorney-client privilege in Illinois. Rather than providing a separate rule outlining the attorney-client relationship, the federal rule leaves the entire law of privilege free to develop at common law.\textsuperscript{1}

In contrast, a specific lawyer-client rule contained in both the proposed Federal\textsuperscript{83} and Illinois\textsuperscript{84} Evidence Codes provides more pre-

\textsuperscript{80} See McCormick (2d ed.), supra note 2, §93, at 194-95.
\textsuperscript{81} The full text of Fed. R. Evid. 501 reads as follows:

\begin{quote}
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.
\end{quote}

\textsuperscript{82} Fed. R. Evid. 501, Advisory Comm. Notes. The drafting committee's efforts to limit privilege to nine specific situations and relationships were not well received. Assailants of the rules insisted the Advisory Committee had made vast policy judgments by rules that regulate substantive matters under the guise of procedure. Weinstein, supra note 25, § 501.01 at 501-14-15. Justice William O. Douglas's dissent accompanying the final draft of the proposed rules insisted that the proposed rules exceeded "practice and procedure." Comment, The Privilege Doctrine and the Proposed Federal Rules of Evidence, 24 Syracuse Law Rev. 1173, 1174 (1973).
\textsuperscript{83} Proposed (not adopted) Fed. R. Evid. 503 provides:

\begin{quote}
Lawyer—Client Privilege: (a) Definitions.—As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal
cise definitions and parameters of the privilege. In particular, "lawyer" is defined to include any person authorized or reasonably believed by the client to be authorized to practice law. The rule also expressly extends the privilege to all personnel who assist the attorney in the rendition of legal services, without regard to agency status. The provision outlines specific parties and situations covered

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

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

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

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

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

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

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

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

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

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

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

84. PROPOSED ILL. R. EVID. 502. This provision is identical to its federal analogue. See note supra.
85. PROPOSED ILL. R. EVID. 502 (a) (2).
86. PROPOSED ILL. R. EVID. 502 (a) (3).
by the privilege\textsuperscript{87} as well as particular circumstances excepted from its scope.\textsuperscript{88} Although the rule does not represent a radical departure from common law, it concisely restates and supplements the scattered principles which have evolved through ad hoc adjudications.

The major weakness of the rule is its failure to define adequately "representative of the client" and "confidential." The rule evades a controversial issue by omitting any reference to the representative of the client.\textsuperscript{89} Further, while the rule does require that the client intend confidentiality,\textsuperscript{90} it does not attempt to describe what types of communications are truly "confidential" in nature. Despite these deficiencies, the proposed rule presents a viable framework upon which to codify the attorney-client privilege in Illinois.

\textbf{THE HUSBAND AND WIFE PRIVILEGE}

Marital harmony has traditionally been advanced as the underlying justification for the husband and wife privilege.\textsuperscript{91} The privilege ensures that neither partner may be compelled to disclose confidential communications. This protection is thought to encourage open communication between the marital partners,\textsuperscript{92} thereby fortifying the institution of marriage and family stability.\textsuperscript{93}

This reasoning ignores the fact that many husbands and wives are entirely unaware of the existence of the privilege.\textsuperscript{94} Even those who know of the privilege are unlikely to realize that any disclosure made in the presence of third parties waives the privilege. Consequently, critics argue the privilege merely reflects judicial reluct-

\begin{footnotes}
\item[87] Proposed Ill. R. Evid. 502 (b).
\item[88] Proposed Ill. R. Evid. 502 (d).
\item[89] Federal drafters deliberately avoided resolution of this issue, because the Supreme Court was sharply divided as to who constituted the appropriate representative of the client. Weinstein, supra note 25, § 503(b)(04), at 503-44. The Illinois drafters do not explain their omission of this definition.
\item[90] Proposed Ill. R. Evid. 502(a)(4).
\item[92] Husband-Wife Privileges, supra note 91, at 218-19.
\item[93] See, e.g., Wolfe v. United States, 291 U.S. 7, 14 (1934); Note, Marital Privileges, 46 Chi.-Kent L. Rev. 71, 73 (1969) [hereinafter cited as Marital Privileges]; Wigmore (MacNaughton rev.), supra note 1, § 2332, at 642.
\item[94] It has been noted that "[i]n the lives of most people appearance in court as a party or a witness is an exceedingly rare and unusual event, and the anticipation of it is not one of those factors which materially influences in daily life the degree of fullness of marital disclosures." McCormick (2d ed.), supra note 2, § 86 at 173. See Husband-Wife Privileges, supra note 91, at 231.
\end{footnotes}
Confidential Communications

1979

ance to intrude upon the intimacies of marriage. If the privilege furthers marital harmony at all, it is because it protects a spouse from becoming an unwilling informant in court thereby avoiding post-trial marital discord. The United States Supreme Court has expressly endorsed this latter view of marital harmony. Despite the attack on its underlying rationale, the Illinois legislature has sanctioned the husband and wife privilege through civil and criminal

95. See Hawkins v. United States, 358 U.S. 74 (1958); Marital Privileges, supra note 93, at 73; Marital Privileges and the Right to Testify, supra note 91, at 200-01; Wigmore (MacNaughton rev.), supra note 1, § 2228, at 218. For a critique of the marital privilege see Hutchins & Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675 (1929).

96. In Hawkins v. United States the Court stated:

While the rule forbidding testimony of one spouse for the other was supported by reasons which time and changing legal practices had undermined, we are not prepared to say the same about the rule barring testimony of one spouse against the other. The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.


97. The marital privilege was preceded by the rule of incompetency and the privilege for anti-marital facts. The rule of incompetency was favored prior to the mid-nineteenth century. It prohibited all spousal testimony in civil and criminal proceedings; incompetency could not be waived by the marital partners. Wigmore (MacNaughton rev.), supra note 1, § 2334, at 645-46. Justification for this broad rule of exclusion was based upon the belief that a spouse was incapable of impartial, honest and accurate testimony, and upon a metaphysical concept of the unity of husband and wife. Husband-Wife Privileges, supra note 91, at 208. The advent of cross-examination at trial, and the increasing regard for the jurors' intelligence led to the decline of the competency rule. In Funk v. United States, 290 U.S. 371 (1933), the Court abolished the federal rule of incompetency. In Illinois the rule of incompetency evolved into the privilege for anti-marital facts. The privilege for anti-marital facts developed contemporaneously with the rule of incompetency. Although the two doctrines were distinct, the rule of anti-marital facts was often referred to as a type of incompetency. Wigmore (MacNaughton rev.), supra note 1, § 2333, at 644. By limiting the privilege to adverse spousal testimony, marital harmony would be promoted. Id. The privilege was only available when a spouse was a litigant. Further, it could only be claimed during the years of the marital relationship and therefore terminated upon the death or divorce. Id., § 2334 at 646. The privilege for anti-marital facts has generally been replaced by the privilege for confidential communications. The United States Supreme Court, however, has suggested that it prefers the former rule. See Hawkins v. United States, 358 U.S. 74 (1958). Based upon the Hawkins decision, the drafters of the proposed Federal Rules of Evidence recreated a limited form of the anti-marital facts privilege for criminal proceedings. Proposed (not adopted) Fed. R. Evid. 505, (Husband-Wife Privilege) and Advisory Comm. Notes. In Illinois, amendments to the Evidence Act in 1935 and to the Criminal Statute in 1937 finally terminated the privilege for anti-marital facts. Ill. Ann. Stat. ch. 55, § 5, History and Practice Note (Smith-Hurd 1977); Ill. Ann. Stat. ch. 38, § 155.1, History and Practice Note (Smith-Hurd 1977).

98. In all civil actions, husband and wife may testify for or against each other, provided that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage.
The civil and criminal statutes authorizing the privilege are virtually identical. The statutes extend the privilege to any communication made within the marital relationship unless it falls within several narrow exceptions. Since both statutory provisions are very general and lack precise definition, the scope of the privilege has been established largely through case by case adjudication. In People v. Palumbo, the Illinois Supreme Court urged that the criminal statute be interpreted in light of the common law development of privileges for confidential communications. Thus, where either statute is silent, Illinois courts rely upon common law principles governing confidential communications.

**Parties Who May Assert the Privilege**

The husband and wife are the only parties entitled to invoke the privilege. Either spouse can claim the privilege on behalf of the speaker. Since the statute does not contemplate the involvement of ancillary parties in spousal communications, the privilege has

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except in actions between such husband and wife, and in actions where the custody or support of their children is directly in issue, and as to matters in which each has acted as agent for the other.


99. In all criminal cases, husband and wife may testify for or against each other; provided, that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage, except in cases where either is charged with an offense against the person or property of the other, or in case of spouse abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent of the other.


100. See notes 118 through 134 infra and accompanying text.

101. 5 Ill. 2d 409, 125 N.E.2d 518 (1955).

102. By relying upon principles governing confidential communications, the court retreated from the former expansive rule of incompetency. This shift terminates the spouse's legal disability from testifying and thus enables the spouse to testify to all non-privileged matters. See note 97 supra.

103. Courts have generally regarded marital privilege statutes as “declaratory of the common law.” McCormick (2d ed.), supra note 2, § 78, at 163.


106. In Wolfe v. United States, 291 U.S. 7, 16-17 (1934), the Court declared that since a husband or wife does not ordinarily require the assistance of stenographers or auxiliary personnel for communications, the involvement of third parties waives the privilege. The Court suggested, however, that the privilege would extend where the use of auxiliary parties was shown to be “reasonably necessary to transmission of the communications.” Id. at 17.

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not been extended to third parties. Thus a spouse who mistakenly reveals confidential information to a third person presumably cannot later bar his testimony.  

**Intent for Confidentiality**

Although the statutes literally reach "any communication," the courts have narrowed the availability of the privilege to "confidential communications." 108 As in the attorney-client privilege, 109 the asserting party must intend his communications to remain undisclosed. 110 This intent may be express or it may be inferred from the surrounding circumstances. 111 Verbal communications between husband and wife are presumed to be confidential, 112 and the party seeking to admit the evidence must rebut this presumption. 113 While the privilege may also encompass acts performed in the spouse's presence, 114 acts carry no corresponding presumption of confidentiality. 115 To satisfy the intent requirement, acts must reflect an intent to communicate to the spouse. 116 Thus, where the

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107. See People v. Burton, 6 Ill. App. 3d 879, 887, 286 N.E.2d 792, 798 (1972), cert. denied, 411 U.S. 937 (1973). The third party's testimony will be excluded, however, where the spouse has colluded with the third party to destroy the speaker's privilege. See note 161 infra and accompanying text.


109. See notes 45-50 supra and accompanying text.


113. See Blau v. United States, 340 U.S. 332 (1951); MCCORMICK (2d ed.), supra note 2, § 80, at 165; WIGMORE (MacNaughton rev.), supra note 1, § 2336, at 648.


115. See generally WIGMORE (MacNaughton rev.), supra note 1, § 2336, at 648.

116. See WIGMORE (MacNaughton rev.), supra note 1, § 2337, at 657.
actor is aware of the spouse’s presence and makes no effort to conceal the activity, the intent requirement may be satisfied.117

Scope

In view of the presumption of confidentiality which attaches to most private marital communications, spouses generally have not been required to demonstrate that their conversations were confidential in nature. Despite this liberal interpretation, courts have mapped out four areas outside the scope of the privilege. These exceptions, derived from simple necessity,118 are criminal or civil litigation between the spouses,119 suits concerning custody, support or interests of their children,120 actions for abandonment,121 and litigation involving a marital partner’s acts as agent for his spouse.122 The first three exceptions involve adversarial proceedings which present a crucial need for all relevant evidence transcending society’s interest in preserving an at best tenuous marital harmony,123 The final exception is designed to preclude a marital partner from using his spouse as an agent merely to shield otherwise non-privileged information.124

Duration

In contrast to the meager attention focused upon the content of confidential communications, courts have dealt extensively with the issue of duration. The privilege does not arise unless the husband

117. See Marital Privileges, supra note 93, at 80; Menefee v. Commonwealth, 189 Va. 900, 55 S.E.2d 9 (1949); Wigmore (MacNaughton rev.), supra note 1, § 2337, at 657-58.

118. See United States v. Mitchell, 137 F.2d 1006, 1008 (2d Cir.), aff’d, 138 F.2d 831 (2d Cir. 1944); cert. denied, 321 U.S. 794, 55 U.S. 557 (1944); CALLAGHAN, supra note 22, § 13.20, at 102; Marital Privileges, supra note 93, at 84; Wigmore (MacNaughton rev.), supra note 1, § 2338, at 665-67.


120. ILL. REV. STAT. ch. 38, § 155-1 (1977); ILL. REV. STAT. ch. 51, § 5 (1977); CALLAGHAN, supra note 23, § 13.21 at 104.

121. ILL. REV. STAT. ch. 38, § 155-1 (1977); CALLAGHAN, supra note 22, § 13.22 at 107.


123. See Hunter, TRIAL HANDBOOK FOR ILLINOIS LAWYERS ch. 45, § 45.6 (1972). For example, courts have been unwilling to extend the privilege to spousal communications which are in furtherance of a joint crime. United States v. VanDrunen, 501 F.2d 1393, 1396-97 (7th Cir.), cert. denied, 419 U.S. 1091 (1974).

124. Marital Privileges, supra note 93, at 85, citing Robertson v. Brost, 81 Ill. 116 (1876).
Confidential Communications

and wife relationship has been formalized. Only communications which occur during the marital relationship are privileged, so that conversations taking place prior to the marriage or after a final divorce decree are beyond the purview of the privilege. However, termination of the marriage, whether by death or divorce, does not defeat the right of privilege for communications which took place during the marriage.

125. See Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1884) (privilege does not extend to second wife where marriage to first wife has not been severed legally). See also Lutwak v. United States, 344 U.S. 604 (1953) (privilege does not extend to sham marriages). Proposed (not adopted) Federal Rule 505(c) also would not extend the privilege to 'sham' marriages.

126. For example, where a spouse learns of her husband's involvement in a crime from a third party, this information is derived from outside the marital relationship and thus is not privileged. See, e.g., United States v. Mitchell, 137 F.2d 1006, 1008 (2d Cir.), aff'd, 138 F.2d 831 (2d Cir. 1943), cert. denied, 321 U.S. 794 (1944), rehearing denied, 322 U.S. 768 (1944); Zarembe v. Skurdialis, 395 Ill. 437, 770 N.E.2d 617 (1947); People v. Bartell, 386 Ill. 483, 54 N.E.2d 700, 703 (1944). See Heineman v. Herman, 385 Ill. 191, 52 N.E.2d 263 (1944); People v. Rogers, 348 Ill. 322, 180 N.E. 856 (1932); Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, 110 N.E. 795 (1915); Donnan v. Donnan, 256 Ill. 244, 99 N.E. 931 (1912).

127. People v. Borchelt, 46 Ill. App. 3d 286, 290, 360 N.E.2d 1187, 1189 (1977). In United States v. VanDrunen, 501 F.2d 1393, 1397 (7th Cir.), cert. denied, 419 U.S. 1091 (1974), the court noted that this rule was necessary to prevent collusive marriages. See, e.g., United States v. Mitchell, 137 F.2d 1006, 1009 (2d Cir.), aff'd, 138 F.2d 831 (2d Cir. 1943), cert. denied, 321 U.S. 794, rehearing denied, 322 U.S. 768 (1944); Knights v. Knights, 300 Ill. 618, 621, 133 N.E. 377 (1921); Wigmore (MacNaughton rev.), supra note 1, § 2334, at 646.

128. See Callaghan, supra note 22, § 13.20 at 102, citing Crose v. Rutledge, 81 Ill. 266 (1876).


130. See, e.g., Heineman v. Hermann, 385 Ill. 191, 198, 52 N.E.2d 263, 265 (1944); People v. Rogers, 348 Ill. 322, 324-25, 180 N.E. 856, 857 (1932); Ohio Oil Co. v. Industrial Comm'n, 293 Ill. 461, 465, 127 N.E. 743, 744-45 (1920); Mahlstedt v. Ideal Lighting, 271 Ill. 154, 165-66, 110 N.E. 795-96 (1915); Monaghan v. Green, 265 Ill. 233, 244, 106 N.E. 792, 796 (1914); Griffeth v. Griffeth, 162 Ill. 368, 386, 44 N.E. 820, 822 (1896).

131. An unsettled question is whether the privilege will shield communications made while the marital partners are separated. In other jurisdictions, resolution of this issue is contingent upon whether or not a legal separation decree has been obtained. This disparity in treatment is predicated upon the presupposition that couples pursuing legal action have become adversaries for whom the privilege no longer serves any meaningful purpose. This distinction further presumes that reconciliation is no longer possible. Should the couple actually reconcile after a legal separation decree, an anomalous situation arises. The privilege would shield communications made after reconciliation was accomplished, but would not protect communications leading to restoration of the marital unit. By making conciliatory discussions vulnerable to public disclosure, the privilege's underlying purpose of fostering marital harmony would clearly be frustrated. Therefore, it is more efficacious to permit the privilege to be available at least until the parties secure a divorce. See McCormick (2d ed.), supra note 2, § 81, at 167, citing Holyoke v. Holyoke Estate, 110 Me. 469, 87 A. 40 (1913); McCoy v. Justice, 199 N.C. 637, 155 S.E. 452 (1930).
Waiver

As in the attorney-client context, an effective waiver is not contingent upon the spouse's intent to relinquish the right or knowledge that the privilege even exists. Although either spouse may assert the privilege, only the speaker can waive the privilege. The listening spouse can neither effect nor object to the waiver.

Waivers can be explicit or implicit. Waiver is explicit where the speaker consents to testify or authorizes his spouse to testify. The presence of any third party during spousal communications negates any inference of confidentiality and implicitly waives the privilege. Thus, even the presence of siblings, parents, or children capable of comprehending will destroy the privilege. As a consequence, marital partners often lose the privilege inadvertently by speaking in the presence of members of their family.

Proposals for Reform

The existing husband and wife privilege has been attacked as an overbroad rule of exclusion which does not further marital harmony. Despite its questionable justification, judicial construction of the statutes has produced a broad presumption of confidentiality for most marital communications. At the same time, exercise of

133. Marital Privileges, supra note 22, at 82.
134. In view of the broad privilege accorded marital partners, a special problem arises when the husband and wife are co-defendants. The efforts of one defendant to free himself of charges can be frustrated by his spouse's assertion of the privilege. To preclude a spouse from establishing a valid defense through his testimony, a prosecutor might be tempted to indict both marital partners without regard to each spouse's involvement. A viable solution to this problem is to request a trial severance. Marital Privileges of Testimonial Non-Disclosure, supra note 91.
138. See notes 91-97 supra and accompanying text.
139. Consequently, the only realistic means through which to rebut the privilege is to introduce a third party who was present during the spousal communications. See notes 138-139 supra and accompanying text.
this apparently broad privilege is often unduly constricted by inadvertent disclosures in the presence of third parties or family members. There is a need to achieve a reasonable balance between this broad presumption and the often unfair denial of the privilege. Reform should strive to confine the interspousal privilege to communications that are intended to be confidential and that are truly commensurate with the underlying justification.

Since it is dubious whether the Illinois Supreme Court has the power to promulgate a rule which would supersede the two existing statutes, reform probably must be accomplished by the legislature. This statutory revision may take two distinct approaches. First, the legislature could amend the statutes to include more precise and definitive criteria for exercise of the privilege. In lieu of a broad presumption, such a formulation would delineate what types of communications are confidential. Further, the provision should specify which parties may invoke the privilege, and over what span of time the privilege will extend. Finally, the amendment should guarantee exercise of the privilege where, despite reasonable precautions taken by the spouses, third parties or family members overhear spousal communications intended to be confidential.

Second, the privilege could be drastically curtailed by confining its exercise solely to criminal proceedings. This approach, endorsed by the United States Supreme Court, was embodied in a proposed federal rule of evidence. The proposed federal rule would have

140. PROPOSED ILL. R. EVID. 501, Committee Comments (Final Draft). After examining the law of several jurisdictions, the Illinois drafters concluded that the supreme court could have only concurrent authority with the legislature in the area of privilege. Id.

141. MCCORMICK (2d ed.), supra note 2, § 82, at 167-68. See note 162 infra and accompanying text.


143. PROPOSED (not adopted) FED. R. EVID. 505:
   Rule 505. Husband-Wife Privilege
   (a) General Rule of Privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.
   (b) Who May Claim the Privilege. The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.
   (c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424, or with violation of other similar statutes.

The proposed Illinois evidence code did not contain a similar provision.
permitted the criminal defendant to prevent his spouse from testifying against him. The formulation authorizes the defendant to bar *any* testimony of his spouse, without regard to its content. Further, the presence of third persons or the intent for confidentiality are irrelevant. Unlike a rule of competency which completely bars a witness from testifying, the spouse is permitted to testify if the defendant waives the privilege. Underlying this avenue of reform is the belief that the only valid purpose for the privilege is to avoid compelling marital partners to assume adversarial roles.

**Collateral Issues of Privilege**

Three collateral issues impinge upon the exercise of any common law or statutory privilege for confidential communications: interception by an eavesdropper, means of invoking the privilege, and comments or inferences made at trial. The common law principles governing these issues tend to frustrate legitimate claims of privilege and deprecate the value of any privilege actually exercised. Accordingly, to ensure fair and proper assertion of both the attorney-client and husband and wife privileges, revision in these three areas is mandatory. While the Federal Rules of Evidence afford no guidance for this reform, both the proposed federal and Illinois evidence codes prescribe specific rules which would remedy the problems inherent in these ancillary laws of privilege.

**The Eavesdropper Rule**

Under the common law "eavesdropper rule," any third party present at the exchange of confidential communication can testify

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145. See note 97, supra.
147. See Hawkins v. United States, 358 U.S. 74 (1958); Weinstein, supra note 25, § 505(02), at 505-09, Wigmore (MacNaughton rev.), supra note 1, § 2228, at 216.
148. See Weinstein, supra note 25, §§ 511(01) through 513 (02), at 512-2—513-2; Wigmore (MacNaughton rev.), supra note 1, § 2327 at 636; McCormick (2d ed.), supra note 2, §§ 75, 76 at 154-56.
149. PROPOSED (not adopted) Fed. R. Evid. 511, 512, 513.
150. PROPOSED ILL. R. Evid. 505, 506, 507.
151. The scope of this common law rule has been described as follows: "[a]n eavesdropper might testify to privileged confidential communications, and that a letter, confidential and privileged, was not protected if it was purloined or intercepted before reaching the addressee, or otherwise secured without the addressee's connivance." McCormick (2d ed.), supra note 2, § 75, at 154.
152. As used here, "third party" excludes any party who is entitled by virtue of his relationship or position to assert a claim of privilege on behalf of a client or spouse. See notes 19-44 supra and accompanying text.
about the conversation. Although the parties to the communication can still invoke the privilege as to each other's testimony, they cannot bar the eavesdropper's testimony. Thus, in effect, the presence of the eavesdropper operates as an implicit waiver.

The rule applies whether or not the communicators discover the third party's presence. Accordingly, the privilege can be frustrated by an eavesdropper who surreptitiously intercepts communications through electronic surveillance devices or other means. The privilege is lost even where the eavesdropper has not overheard the incriminating portion of the conversation. The sole exception to this rule is that the eavesdropper will be barred from testifying where he has acted in collusion with one of the parties to the confidential communications.

The eavesdropper rule is predicated upon the dubious assumption that parties who wish to retain the privilege will take all necessary precautions against third party intrusions. Several factors suggest that this premise is untenable, or at best an anachronism. First, in view of the widespread unfamiliarity with the existence of the husband and wife privilege, it is unrealistic to assume that spouses will guard against intrusions upon their conversations. At least one critic, therefore, has advocated that spouses should only be required


157. See Proposed (not adopted) Fed. R. Evid. 512, Advisory Comm. Notes, where other sources of interception were suggested: family members undergoing psychotherapy, information improperly obtained from a computer bank, or a party involved in the transmission of a communication.


160. See McCormick (2d ed.), supra note 2, § 82, at 168, citing Commonwealth v. Everso, 123 Ky. 330, 96 S.W. 460, 461 (1906); Wigmore (MacNaughton rev.), §§ 2326, 2339, at 633, 667. The "eavesdropper rule" is less likely to pose a problem in the context of the attorney-client privilege. Even though the client may not be aware of the privilege, the attorney is aware not only of the privilege, but of his ethical and professional duty to ensure confidentiality. In contrast a husband and wife are unaware of the privilege, and the need to take precautions against eavesdroppers.
to take "reasonable" precautionary measures. This approach would properly confine implicit waiver to circumstances in which the holder knew, or reasonably should have known, of the third party's presence. Second, and perhaps more importantly, the rule's formulation did not contemplate the existence of surveillance techniques which rarely can be circumvented or detected by laymen.

Critics have justifiably denounced the eavesdropper rule as an unjust and overly harsh doctrine. The principal deficiency of the eavesdropper rule is that the holder can lose the benefits of the privilege involuntarily and without knowledge. Depriving the holder of a legitimate claim, where voluntary disclosure or consent to disclosure is wholly lacking is patently unfair.

In view of the injustice inherent in the eavesdropper rule, the common law doctrine should be abolished. In its stead, relinquishment of the privilege should be made contingent upon voluntary and knowing disclosure by the holder. Surreptitious entries and seizures of confidential communications should no longer frustrate exercise of the privilege. Rules embodied in the proposed federal and Illinois evidence codes would effect these reforms. One provision recognizes waiver only where the holder has voluntarily disclosed or consented to the disclosure of the privileged communication. Another provision, addressed specifically to the eavesdropper problem, precludes admission of evidence against the holder where the information has been obtained without affording him an opportunity to claim the privilege. These rules would eliminate

161. See McCormick (2d ed.), supra note 2, § 82 at 168.
164. Proposed Ill. R. Evid. 506, 507 (Final Draft).
165. Proposed (not adopted) Fed. R. Evid. 511 reads:
Waiver of Privilege by Voluntary Disclosure

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.

Proposed Ill. R. Evid. 506 (Final Draft) is identical.

166. Proposed (not adopted) Fed. R. Evid. 512 reads: "Privileged Matter Disclosed Under Compulsion or Without Opportunity To Claim Privilege. 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."
potential injustice to spouses or clients where they have been the unwitting victims of a third party intrusion.

**Invoking The Privilege**

Theoretically, absent waiver, both the attorney-client and husband and wife privileges may be asserted during discovery,\(^{167}\) depositions, grand jury investigations, and trial.\(^{168}\) Whether or not the claim of privilege can ultimately be invoked is a matter of judicial discretion.\(^{169}\) In deciding whether to authorize exercise of a privilege, the court balances the need for the evidence against the need to sustain the confidential relationship.\(^{170}\) An asserting party faces a major dilemma when the court declines to permit his claim of privilege.

Where the court denies the claim and orders the witness to testify, the asserting party encounters two unattractive alternatives: risk contempt or waive the privilege. The first course of action is to refuse to testify and reserve the right to appeal the adverse ruling.\(^{171}\) In declining to testify, however, the holder incurs the risk of being cited for contempt of court.\(^{172}\) Consequently, this option may require greater fortitude than that possessed by the ordinary spouse or client.\(^{173}\) The second alternative is to abide by the court’s order and reveal the confidential communication.\(^{174}\) The election to testify, however, constitutes a waiver of the privilege. Moreover, after the confidential information has been revealed, appeal of the court’s ruling may be fruitless. Appeal presents the litigant with the difficult task of demonstrating that the court’s ruling was not harmless error.\(^{175}\) Even if the asserting party prevails on appeal, it may be

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170. See note 1, supra.


175. See Chapman v. California, 386 U.S. 18 (1967); People v. Knippering, 66 Ill. 2d 276,
impossible to redress fully the injury incurred through the compelled disclosures. In essence, where the court has erred in denying the privilege, the holder appears to have no adequate legal recourse.

A rule contained in both the proposed federal and Illinois evidence codes offers a possible remedy for this problem. Under the rule, evidence of a disclosure that has been compelled erroneously by the court is inadmissible against the holder in subsequent proceedings. Accordingly, the provision establishes a record free of potentially incriminating information. Further, this rule would procedurally elevate the privilege for confidential communications to the status accorded the constitutional privilege against self-incrimination. Finally, this provision successfully accommodates two competing interests: the court’s power to exercise discretion over the admission of evidence and the holder’s right to safeguard confidential matters.

Comments or Inferences at Trial

The final collateral issue, comments or inferences, arises subsequent to successful invocation of a privilege. Comments upon or inferences drawn from the exercise of a privilege can undermine the potential benefits of the privilege. Under existing common law, comment upon a claim of privilege is not permitted. Yet the same effect can be achieved indirectly by placing the witness on the stand and compelling him to claim the privilege in the presence of the jury. Although this procedure creates the danger of negative inferences, the holder of the privilege has no absolute right to a limiting jury instruction. Ideally, to avoid any possibility of negative inferences, the claim of privilege should be made outside the presence


176. In Maness v. Meyers, 419 U.S. 449, 460 (1975), the Court acknowledged that it is virtually impossible for appellate courts to “unring the bell” after compelled disclosure. See also PROPOSED (not adopted) Fed. R. Evid. 512, Advisory Comm. Notes. Even if the adverse ruling is overturned, the same parties may be forced to relitigate the case. Although the privileged information could not be disclosed in the subsequent court proceedings, the earlier disclosure may nevertheless benefit the holder’s adversary during the relitigation.

177. See note 166 supra.


179. Id.


182. See Biano v. United States, 299 F.2d 711 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962).
of the jury.

A proposed rule of evidence\textsuperscript{183} attempts to circumvent the problem of negative inferences. First, the rule expressly forbids the court or counsel to comment upon or draw an inference from a witness's exercise of privilege.\textsuperscript{184} The provision also urges that, to the extent practicable, claims of privilege be made without the jury's knowledge.\textsuperscript{185} Finally, the rule provides that, upon request, any party who might be the target of an adverse inference has the right to a jury instruction directing that no inference be drawn.\textsuperscript{186}

Negative inferences can be totally precluded only where the invocation of privilege is unknown to the jury. Unfortunately, as a practical matter, it is not always possible to prevent the jury from learning of the claim. Consequently, by forbidding comment upon exercise of the privilege and guaranteeing the right to a jury instruction, the rule provides the most expedient remedy.

**CONCLUSION**

Reform is necessary in order to foster appropriate and fair exercise of privileges in Illinois. This reform can best be accomplished through adoption of comprehensive rules or statutes which promote uniformity and predictability. The attorney-client and husband and wife privileges should be revised so as to further their underlying justifications. Additionally, reform in the collateral aspects should safeguard the fair assertion and maximum benefit of available privileges. The proposed federal and Illinois evidence codes contain use-

\textsuperscript{183} Proposed (not adopted) Fed. R. Evid. 513 reads as follows:

\textbf{Rule 513. Comment Upon or Inference from Claim of Privilege; Instruction}

(a) Comment or Inference Not Permitted. The claim of 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.

An identical Provision is embodied in Proposed Ill. R. Evid. 507 (Final Draft).

\textsuperscript{184} Proposed (not adopted) Fed. R. Evid. 513(a); Proposed Ill. R. Evid. 507(a). But see Model Code of Evidence, Rule 233 (1953) (comment by judge and counsel, and drawing of any inferences are permitted).

\textsuperscript{185} Proposed (not adopted) Fed. R. Evid. 513(b); Proposed Ill. R. Evid. 507(b) (Final Draft).

\textsuperscript{186} It appears that a party other than the litigant who may suffer from a negative inference can request a jury instruction. Id.

\textsuperscript{187} Proposed (not adopted) Fed. R. Evid. 513(c); Proposed Ill. R. Evid. 507(c) (Final Draft).
ful guidelines for achieving these reforms.

Yet, because the legislature has concurrent authority to enact and amend statutory privileges, reform cannot be effected merely by adopting a compendium of supreme court rules patterned after these proposed evidence rules. Further, promulgation of supreme court rules which supplement rather than supersede legislative enactments merely perpetuates a bifurcated system of privilege law. Drafters should thus consider embodying necessary reforms in statutory enactments rather than supreme court rules. In view of the substantive overtones of evidentiary privileges for confidential communications and the legislature’s active stance in creating new privileges, it may be wiser to leave reform to the legislative branch of government.

There may be ongoing dispute as to whether reform is best undertaken by the Illinois Supreme Court or legislature. This controversy should not leave the problems in the law of privilege long unattended.

SARA ELWOOD COOK