A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia

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A MODEST PROPOSAL: A PSYCHOTHERAPIST-PATIENT PRIVILEGE FOR WEST VIRGINIA

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That the individual shall have full protection in person and in property is a principle as old as common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.


I. Introduction

In the past decade we have witnessed the emergence of an impressive array of ideas, activities, and problems related to the psychotherapist-patient relationship. One of the more obvious problems has been that this relationship is not as readily discernible as that of a more traditional relationship such as attorney-client, priest-penitent, or husband-wife. In each of these relationships it is not terribly difficult to ascertain the parties involved. However, the psychotherapist-patient relationship requires elucidation or specificity beyond that of its terms in order to accurately determine who is included within its parameters. In the legal setting, “psychotherapist” could refer to a psychiatrist, psychologist, sexual assault counselor, family counselor, guidance counselor, or marriage counselor. For the pur-


pose of this article, "psychotherapist" refers to a psychiatrist or psychologist.3 "Patient" is also an ambiguous term in the legal context. For the purpose of this discussion, "patient" refers to a person engaged in individual consultation with a psychotherapist.4 Thus,


3. It has been observed by one commentator that "[t]he principal problem in establishing a privilege for persons undergoing diagnosis or treatment of a mental or emotional disturbance . . . is one of definition." Comment, A Statute to Provide a Psychotherapist-Patient Privilege, 4 HARV. J. ON LEGIS. 307 (1967).

For an example of how courts narrowly interpret psychotherapist-patient privilege statutes, see Elliott v. Watkins Trucking Co., 406 F.2d 90 (7th Cir. 1969) (court would not extend psychiatrist-patient privilege to communications between a psychologist and patient); Ritt v. Ritt, 98 N.J. Super. 590, 238 A.2d 196 (1967), rev'd on other grounds, 52 N.J. 177, 244 A.2d 497 (court would not extend psychologist-patient privilege to communications between a psychiatrist and patient).

Florida's statutes define a psychotherapist as follows:
1. A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or
2. A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction. FLA. STAT. ANN. § 90.503(a) (West 1979).

Massachusetts defines a psychotherapist as follows:
[A] person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry or a person who is licensed as a psychologist by the board of registration of psychologists; or is a registered nurse licensed by the board of registration in nursing whose certificate of registration has been endorsed authorizing the practice of professional nursing in an expanded role as a psychiatric nurse mental health clinical specialist. MASS. GEN. LAWS ANN. ch. 233 § 20B (West 1989).

4. Statutes vary in the definition of patient. See, e.g., OR. REV. STAT. § 40.230(b) (1989) (A patient is "a person who consults or is examined or interviewed by a psychotherapist."); CAL. EVID. CODE ANN. § 1011 (Deering 1986) (A patient is "a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.").

The point at which an individual is a patient and is protected by the privilege was given a broad interpretation. See State v. Miller, 709 P.2d 225 (Or. 1985) (where the defendant spoke with a psychiatrist over the phone and confessed to a crime and the court held that the psychotherapist-patient privilege applied, even though the defendant and psychiatrist were strangers to each other). But see State v. Beaty, 762 P.2d 519 (Ariz. 1988) (where a defendant was being treated by a county jail psychiatrist and made incriminating statements to the psychiatrist outside of their counseling session-the court held that the privilege did not apply).

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“patient”, when referred to in this article, does not include an individual engaged in group therapy.

A distinction must also be drawn between a communication that is merely confidential and a communication which is privileged. Confidentiality, in the context of a psychotherapist-patient relationship, is determined normally by professional codes of ethics. Breach of confidentiality could subject a psychotherapist to sanctions by the particular profession, as well as civil liability to a patient. Privileged communication is a legal, evidentiary phenomenon.


6. A few commentators have argued that “[p]rivileged communications are a subset of confidentiality.” Knapp, VandeCreek & Zirkel, Privileged Communications for Psychotherapists in Pennsylvania: A Time for Statutory Reform, 60 Temp. L.Q. 267, 269 (1987). Another commentator has suggested that “we may define confidentiality as the right of the patient to expect that she/he can communicate private matters to the therapist and expect that these communications will be kept secret.” Paul, Confidentiality And Patients’ Records: Balancing the Interests of Society and the Individual, 7 J. Psych. L. 49, 51 (1979).


7. “Confidentiality is an ethical obligation of one person not to disclose communications made to him by another.” Comment, A State Statute To Provide A Psychotherapist-Patient Privilege, 4 Harv. J. on Legis. 307 (1967).

In § 4(2) of the Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry, it states that “[a] psychiatrist may release confidential information only with the authorization of the patient or under proper legal compulsion.” Codes of Professional Responsibility, 127-148 (R. Gorlin ed. 1980). Whereas, Principle 5 of the Ethical Principles of Psychologists, states that “[p]sychologists have a primary obligation to respect the confidentiality of information obtained from persons in the course of their work as psychologists.” Id.


9. “A privilege is a legal power to prevent another from disclosing certain communications by him to another.” Comment, A State Statute to Provide a Psychotherapist-Patient Privilege, 4 Harv. J. on Legis. 307 (1967). The word “privilege” has its etymology in the Latin phrase “privata lex” which loosely means a private law applicable to an individual or a specific group of persons. Slovenko, Psychotherapy
Under a psychotherapist-patient privilege, a patient may shield from a court of law relevant information given to a psychotherapist.\textsuperscript{10}

In general, a psychotherapist-patient privilege is applicable to diagnostic communications and communications directly related to treatment for an emotional or mental problem.\textsuperscript{11} The narrow cor-

\textit{and a Second Look at the Medical Privilege, 6 WAYNE L. REV. 175, 181 (1960).}

"Privilege was originally conceived of in England as a judicially recognized point of honor among lawyers, and other gentlemen not to reveal confidential communications." Alfred v. State, 554 P.2d 411, 413 (Alaska 1976).

"[R]ules of privilege are not without a rationale. Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." C. McCormick, \textit{Evidence}, § 72 at 171 (Cleary 1984).

10. "There are some kinds of evidence which the law excludes . . . because greater mischiefs would probably result from requiring or permitting its admission, than from wholly rejecting it." Greenleaf, \textit{A Treatise on the Law of Evidence}, Vol. 1 § 236, at 302 (1883). See, e.g., State v. Munyon, 240 Kan. 53, 726 P.2d 1333 (1986) (where psychotherapist-patient privilege prevented defendant from having access to communication between psychotherapist and victim); People v. Wilkins, 65 N.Y.2d 172, 480 N.E.2d 373, 490 N.Y.S.2d 759, (1985) (where the court held that a psychotherapist could not be compelled to give testimony regarding statements defendant made with respect to self-inflicted wounds); Tiller v. State, 159 Ga. App. 557, 284 S.E.2d 63 (1981) (where they prevented the defendant from having access to mental health record of rape victim); State v. McGautha, 617 S.W.2d 554 (Mo. Ct. App. 1981) (where it was held that the trial court committed prejudicial error by admitting statements defendant made to psychotherapists); Southern Bluecross Mental Health v. Angelucci, 609 S.W.2d 931 (Ky. 1980), aff'd 609 S.W.2d 928 (where the privilege prohibited lower court from enforcing an order compelling the production of defendant's mental health record); State v. Hohman, 136 Vt. 340, 392 A.2d 935 (1978) (where the court held that the privilege protected written materials psychotherapists used during session with defendant); Commonwealth v. Lamb, 365 Mass 265, 311 N.E.2d 47 (1974) (where the court held that conversation between psychotherapist and defendant was privileged because defendant was not informed that the communication would not be privileged); People v. Plummer, 37 Mich. App. 657, 195 N.W.2d 328 (1972) (where it was held to be reversible error in permitting psychotherapist to testify concerning evaluation of defendant).

11. All psychotherapist-patient privilege statutes provide for exceptions which nullify the privilege in particular situations. For example, Hawaii's rule reads:

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness or substance abuse, or in proceedings for the discharge or release of a patient previously hospitalized for mental illness or substance abuse.

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

(3) Condition an element of claim or defense. There is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the client's death in any proceeding in which any party relies upon the
condition as an element of the party’s claim or defense.

(4) Proceedings against physician. There is no privilege under this rule in any administrative or judicial proceeding in which the competency, practitioner’s license, or practice of the psychologist is at issue, provided that the identifying data of the clients whose records are admitted into evidence shall be kept confidential unless waived by the client. The administrative agency, board, or commission may close the proceeding to the public to protect the confidentiality of the client.

HAW. R. EVD. 504(a) (1985).

12. As stated by a commentator:
For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence . . . . From the point of view of society’s right to our testimony, it is to be remembered that the demand comes . . . from justice as an institution and from law and order as indispensable elements of civilized life . . . .
It follows, on the one hand, that all privileges of exemption from this duty are exceptional, and are therefore to be discontenanced . . . . They should be recognized only within the narrowest limits required by principle.

8 J. Wigmore, Evidence, § 2192 (McNaughton rev. 1961).


14. States having a psychiatrist and/or psychologist-patient privilege include:

the psychotherapist-patient privilege was given legal life by the foresight and sensitivity of state legislators. The privilege is a child of statutory origin, not a common law creation.

Although historically there are many reasons why the judiciary failed to develop a psychotherapist-patient privilege, perhaps the primary reason had to do with the judiciary's inability to value and understand the need and importance of the mental health profession in the fabric of society. Recognition of the centrity of the mental health profession in this increasingly complex society was a primary factor in legislative decisions to protect and promote this profession by enacting some form of a psychotherapist-patient privilege throughout the country.

At present, neither the legislature nor judiciary of West Virginia has seen the need and importance of promoting the mental health


15. "[A]ny privilege applicable to psychiatrists or psychologists will, with limited exception, be a legislative creation." D. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE 224 (1986).

16. There have been a few American courts that created a common law psychotherapist-patient privilege. See Note, Confidential Communications to a Psychotherapist a New Testimonial Privilege 47 Nw. U.L Rev. 384 n.1 (1952) (citing Binder v. Ruvell, Civil Docket 52C2535, Circuit Court of Cook County, Illinois, June 24, 1952); Allred v. State, 554 P.2d 411 (Alaska 1976); State v. Evans, 104 Ariz. 434, 454 P.2d 976 (1969) (the court was guided by a privilege statute enacted by the legislature after the defendant's trial ended).

A few courts have based the privilege on state and federal constitutional grounds. See, e.g., Hawaii Psychiatric Society v. Ariyoshi, 481 F. Supp. 1028 (D. Haw. 1979); In re B., 482 Pa. 471, 394 A.2d 419 (1978); Caesar v. Mountainos, 542 F.2d 1064 (9th Cir. 1976).


17. As one commentator put it:

Rapid technical, social, and economic changes in recent decades have produced criminal behavior that threatens to overwhelm our system of criminal justice, producing an epidemic of emotional distress. However, our twin disciplines of law and psychiatry acting together can be responsive to the needs of society. To do this we will have to evolve not only refinements of the existing techniques but entirely new ways of viewing our interactive, complementary roles.

profession by creating a psychotherapist-patient privilege. This article will speak for the mental health profession and the critical need for action in providing a psychotherapist-patient evidentiary privilege in West Virginia. Section II of this article will discuss the development of evidentiary privileges in English and American law. Section III will focus on evidentiary privileges in West Virginia. Section IV will trace the development of the psychotherapist-patient privilege in American law. Section V will provide a proposed model for a psychotherapist-patient privilege for the State of West Virginia.

II. HISTORICAL DEVELOPMENT OF EVIDENTIARY PRIVILEGES

It is easier to understand why a new privilege should be created if we understand why other privileges came about in the past. In every instance the new privilege reflected a deeply held societal belief that a particular aspect of human life must be preserved without intrusion. Privileges are not extralegal but weave as bright threads through society’s legal cloth to border special patterns society has decided to protect. This is not distrust of a legal system but a perfecting of it; a balancing of equally cherished beliefs: the public good through public justice and the private good through public deference. Every society entranced with justice understands its public domain is founded upon an equally great, if not greater, private domain. Privileges are no more than society saying to itself, “Our foundation will disappear if we do not especially protect this particular human activity.”

A. Attorney-Client Privilege

Although a limited number of relationships were recognized as privileged under Roman law, no solid evidence has been found to

18. The state has a general confidentiality statute. See W. Va. Code § 27-3-1. However, the statute has been interpreted as not providing for a psychotherapist-patient privilege. See State v. Simmons, 309 S.E.2d 89 (W. Va. 1983).


suggest that the English common law attorney-client privilege owes its development to Roman jurisprudence. It has been suggested by one commentator that the initial Roman law evidentiary privileges were based upon "the general moral duty not to violate the underlying [structure] on which family was built." That is, early Roman testimonial privileges sought to protect the integrity of the family by exempting a family member from having to reveal information about another family member. It was only a matter of time before the narrow family member testimonial privilege was broadened and extended to attorneys.

It has also been suggested that the legitimacy of the Roman attorney-client privilege was never seriously questioned due to a general belief that, if an attorney was called upon to testify as to communication with a client, the attorney "could not be believed because he had a strong motive for misstatement." This fear that

20. "That the Roman precedent was the origin of the English rule as far as attorneys are concerned, cannot be proved." Radin, supra note 19, at 489.


21. Radin, supra note 19, at 488. It should be borne in mind that in Roman society a slave was considered a member of the family that owned him or her. See infra note 25.

22. "At Rome the public policy which supported the privilege was . . . directed . . . against the corruption of the family or quasi-family relations which would ensue by making uncertain and suspicious what was assumed to demand the fullest confidence . . . ." Id. at 490.

23. Id. at 488. The privilege "received a statutory regulation in the Acilian law on bribery of 123 B.C." Id.

Extending the privilege to the attorney was probably quite logical to the Roman jurist's mind, because "an attorney for many centuries was considered to be an obedient family servant who managed their affairs. Because of this relationship, the attorney was highly unlikely to betray his master's confidences." McKinney, Proposed Model Rule 1.6-Its Effect on a Lawyer's Moral and Ethical Decisions with Regard to Attorney-Client Confidentiality, 35 BAYLOR L. REV. 561, 564 (1983).

24. Radin, supra note 19, at 488.

It was suggested by another commentator that the privilege "was based on the irrebuttable presumption that an advocate who would testify against his client was a disreputable person and therefore not worthy of belief." Alexander, The Corporate Attorney-Client Privilege-A Study of the Participants, 63 ST. JOHN'S L. REV. 191 (1989).

an attorney’s loyalty to a client would cause the attorney to be less than candid, if called upon to give testimony regarding confidential communications with a client, undoubtedly is traceable to the loyalty that was expected between family members.

The attorney-client privilege is generally recognized as the first English common law privilege. Unlike the justification for the privilege under Roman law, the English privilege was based upon the notion that an attorney would be violating his honor as a gentleman if he was compelled to reveal information conveyed to him in confidence by a client. The English justification for the privilege did not appear to be concerned with the question of an attorney being less than candid in court regarding confidential communication with

25. The foundation of the loyalty concept can be traced to the master-slave relationship that existed in Rome. A slave was said to have unquestionable loyalty to the master. It was this relationship, master-slave, for which the legal system of Rome initially created a testimonial privilege (and of course the testimonial privilege next clothed all family members). See Radin, supra note 19, at 488. The fact that an attorney was considered a servant of the client, probably made it easier for Roman jurists to extend the privilege and the loyalty rationale to the attorney-client relationship.

26. See 1 P. Taylor, Evidence §§ 911-37 (1920); 9 W. Holdsworth, A History of English Law 201-02 (1926); C. McCormick, supra note 9, § 87, at 204; J. Wigmore, supra note 12, § 2290, at 542 n.1 (Dean Wigmore cited as the first judiciary acknowledgement of the privilege, Berd v. Lovelace, 21 Eng. Rep. 33 (1477), wherein it was held that a "Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause . . . yet [he] is a solicitor in this suit . . . Therefore, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed.").

27. That an attorney could not be trusted to reveal the truth regarding communication held with a client.

28. In the 17th century admission to the bar in England was controlled by four societies, collectively called Inns of Court. In 1604 Sir Edward Coke, acting as attorney general, issued an order stipulating that no law student "be hereafter admitted into the Society of any house of Court that is not a gentleman by descent." M. Landon, The Triumph of the Lawyers 14 (1970). An examination of the admission registers of three of the societies, revealed that during the 17th century "law students were recruited, almost without exception, from among the sons of the dominant social and political class of the country, the landed gentry." Id. at 15. See also W. Prest, The Inns of Court Under Elizabeth I and the Early Stuarts 21-46 (1972).

29. Dean Wigmore categorized the privilege as "an objective not a subjective one-consideration for the oath and the honor of the attorney rather than for the apprehensions of his client." J. Wigmore, supra note 12, § 2290, at 543.
a client.\textsuperscript{30} It is plausible to suggest that it is because of the difference in the Roman and English justifications for the privilege that no conclusive link has been found to support the speculative idea that English jurists borrowed the privilege from Roman law.

Aside from being based upon the Elizabethan notion of gentleman's honor,\textsuperscript{31} the English privilege was confined solely to the attorney.\textsuperscript{32} The client, of course, benefited from the privilege, but the client could not invoke the privilege.\textsuperscript{33} This fact also points to another difference between the Roman and English privileges. An underlying idea in the English privilege was that an attorney's "honor" was too important to be sacrificed, by having him testify as to communication with a client. This was especially true if the attorney did not feel a need to reveal such communications. The English privilege was not concerned that the client might object to the attorney revealing information given in confidence should the attorney choose to do so.\textsuperscript{34} The Roman privilege appears to have taken the client into consideration. That is, Roman law recognized an expectation of "loyalty" by the client from the attorney.\textsuperscript{35}

The foundation or justification for the English privilege shifted\textsuperscript{36} when the idea of "gentleman’s honor" lost its appeal or foothold

\begin{itemize}
\item \textsuperscript{30} That is the privilege was not created because of a belief that an attorney would lie to the court about information given in confidence. This point is implicit in the fact that an attorney was accorded the right to waive the privilege and reveal confidential communication. Dean Wigmore stated, regarding the waiver, that "the court would not always attempt to judge its standards or to enforce them if the attorney himself was willing to risk his conscience and his reputation [by revealing confidential communication]." \textit{Id.} at 545.
\item \textsuperscript{31} "The history of this privilege goes back to the reign of Elizabeth I . . . ." \textit{Id.} at 542.
\item \textsuperscript{32} \textit{Id.} at 544.
\end{itemize}

As one commentator said, "the privilege belonged to the attorney entirely . . . . He was thus free to disclose the communication or to decline, as he saw fit." Gardner, \textit{supra} note 20, at 289.

\begin{itemize}
\item \textsuperscript{33} "The pledge of secrecy had not been taken by him [the client], and therefore the 'point of honor' was not his to make." J. \textit{Wigmore}, \textit{supra} note 12, § 2290, at 544.
\item It was further pointed out by another commentator that "[i]f the client could . . . . be required to testify as to such communications . . . ." Gardner, \textit{supra} note 20, at 295.
\item \textsuperscript{34} This proposition was still viable or alive in the early 19th century, as evident in Preston Esq. v. Carr Knit., 148 Eng. Rep. 634 (1826), wherein it was held "that the privilege of an attorney is [not] the privilege of the client, to the extent that the client himself may avail himself of that privilege, to avoid discovering communications which passed between him and his solicitor." \textit{Id.} at 635.
\item \textsuperscript{35} "The attorney was not a gentleman in most cases . . . . and for many centuries was very much the obedient servant of the family or person whose property he managed and whose affairs he directed . . . . The duty of loyalty on the part of servants was an obvious and general one . . . ." Radin, \textit{supra} note 19, at 487.
\item \textsuperscript{36} Eighteenth-century rationalism resulted in the notion that the silence of the attorney was
in England.\textsuperscript{37} When the rationalization for the privilege changed, its holder also changed.\textsuperscript{38} This is to say that the power to invoke the privilege was taken from the attorney and deposited with the client.\textsuperscript{39}

The attorney-client privilege received recognition in the United States during the early nineteenth century.\textsuperscript{40} Although its initial adoption in United States jurisdictions was based upon judicial rulings,\textsuperscript{41} the privilege eventually found statutory\textsuperscript{42} recognition in most jurisdictions.

\begin{tabular}{l}
necessary in order that the client might trust his legal advisor more fully. The attorney's freedom from compulsion, it was believed, would make the client feel more secure in disclosing counsel, freely and without fear, all of his knowledge of the case. \\
Gardner, supra note 20, at 292. \\
Another commentator assessed the change in the following way:
\end{tabular}

\begin{tabular}{l}
The policy of the privilege has been plainly grounded since the latter part of the 1700s on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory. \\
J. WIGMORE, supra note 12, § 2291, at 545. \\
37. "[B]y the eighteenth century in England the emphasis upon the code of honor had lessened and the need of the ascertainment of the truth for the ends of justice loomed larger than the pledge of secrecy." C. MCCORMICK, supra note 9, § 87, at 204. \\
It was suggested elsewhere that "Lord Mansfield, in The Duchess of Kingston's Case, explicitly rejected the honor-based justification because the same rationale might also justify the creation of a privilege for physician-patient relationships." Developments in the Law-Privileged Communications, 98 Harv. L. Rev. 1450, 1502-03 (1985). \\
Lord Mansfield rejected the honor-based rationale using the following language. "If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour [sic] ... but, to give that information in a court of justice ... will never be imputed to him as any indiscretion whatever." Id. at 1503.
38. "The rule is established for the protection of the client, not of the lawyer." S. PHIPSON, PHIPSON ON THE LAW OF EVIDENCE 203 (9th ed. 1952). \\
39. "A client ... cannot be compelled, and a legal adviser ... will not be allowed without the express consent of his client, to disclose oral or documentary communications passing between them in professional confidence." Id. \\
40. "There appear to be no American cases on the attorney-client privilege until the 1820's." Hazard, supra note 20, at 1087. See, e.g., Chirac v. Reinicker, 24 U.S. 280 (1826); Wilson v. Troup, 2 Cow. 195 (1823); Foster v. Hill, 29 Mass. (14 Pick.) 89, 22 A. 400 (1831); Bea v. Quimby, 5 N.H. 94 (1829); Dixon v. Parmelee, 2 Uit. 185 (1829). See generally 97 C.J.S. Witnesses § 276 (1957); 81 Am. Jur. 2d Witnesses § 172 (1976). \\
\end{tabular}
The privilege, as generally recognized in the United


43. Alaska is a state with a typically worded attorney-client privilege statute:

(a) Definitions. As used in this rule:

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

(2) A representative of the client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

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

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

(5) 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 (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

(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, obtained or used 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 action brought by the personal representatives of a deceased client, regardless of whether...
States,\textsuperscript{44} is deposited with the client, though the attorney may invoke the privilege on behalf of the client.\textsuperscript{45} Today’s rationale for the privilege holds that an attorney will only be able to thoroughly represent a client if the client discloses all information relevant to the legal problem presented. Further, a client will confide completely in an attorney only if the client is assured that information disclosed in confidence will remain with the attorney.\textsuperscript{46}

As a general proposition, the elements of the privilege\textsuperscript{47} have been stated as requiring that there be a communication made between privileged persons, in confidence, for the purpose of seeking or providing legal assistance for the client.\textsuperscript{48} It should be borne in mind that the privilege is not absolute. All jurisdictions provide for ex-

\begin{quote}
the claims are by testate or intestate succession or by inter vivos transaction; or
(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or
(4) Document attested by Lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
(5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.
\end{quote}

\textbf{ALASKA R. EVID.} 503.

\begin{quote}

45. See, e.g., N.D. R. EVID. 502(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 or the lawyer’s representative at the time of the communication is presumed to have the authority to claim the privilege but only on behalf of the client.


47. Dean Wigmore put forth the following formula for determining when the privilege should attach:

(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 (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

J. Wigmore, supra note 12, § 2292, at 554.


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ceptions which would permit an attorney to disclose information provided by a client in confidence.\(^49\)

B. **Husband-Wife Communication Privilege**

The marriage relationship of husband and wife, to say the least, is an ancient one. Not so ancient is the effort by courts of law to treat the spousal relationship as unique by according it special recognition in judicial proceedings.\(^50\) Over the passage of time courts have granted the husband-wife relationship three major evidentiary treatments. The three evidentiary recognitions, in order of legal creation, are: prohibiting a spouse from testifying against the other spouse,\(^51\) disqualification of a spouse from testifying on behalf of the other spouse,\(^52\) and privileged marital communication.\(^53\)

Although the primary focus here is privileged marital communication, its offshoot from the other evidentiary doctrines makes it appropriate to briefly consider all three doctrines.

The rule prohibiting a spouse from testifying against the other spouse\(^54\) received its first known legal recognition in England in

\(^{49}\) *Id.* at 82-95.

\(^{50}\) This is with reference only to special treatment in the area of evidence law.


\(^{54}\) In its technical use, the rule prohibiting a spouse from testifying against the other spouse...
the sixteenth century.\textsuperscript{55} Initially, this spousal prohibition was applied only to the wife.\textsuperscript{56} That is, the doctrine was formulated to prohibit only the wife from testifying against the husband.\textsuperscript{57} The precise reason for the initial biased or sexist formulation of the rule is not known.\textsuperscript{58} However, it has been offered as a plausible reason that, during the period the rule was established, a wife was not considered a vital or prominent part of Elizabthan society.\textsuperscript{59} The doctrine, however, became gender-neutral by the 1600s.\textsuperscript{60}

Numerous justifications have been offered for the recognition of a rule which prohibits spouses from testifying against each other.\textsuperscript{61}

is a privilege. Regarding this, Dean Wigmore remarked that "the application of the privilege has tended to be obscured by the use of the term incompetency for both the disqualification to testify on the spouse's behalf and the privilege not to testify against the spouse. The former is plainly an absolute rule of law, not left to the party's option; the latter is a... privilege." J. Wigmore, \textit{supra} note 51, § 2242, at 256.

Further, this particular privilege goes by various names, \textit{e.g.}, privilege anti-marital testimony, adverse testimony privilege, and rule of incompetency.

55. Bent v. Allot, 21 Eng. Rep. 50 (1580). In a commentary on this case it was said that "the wife's testimony on her husband's behalf is treated as receivable, while his privilege to keep her from testifying against him is apparently sanctioned." J. Wigmore, \textit{supra} note 51, § 2227, at 211.

56. \textit{See supra} note 55.

57. In the words of Coke, "it hath been resolved by the justices, that a wife cannot be produced... against... her husband." 1 E. Coke, \textit{Commentary Upon Littleton} 6b (F. Hargrave & C. Butler rev. 3 ed. 1812).

58. One commentator has said, regarding the status of a wife during the Elizabethan period, "Upon marriage the husband and wife became one person in law; that one person was the husband; the wife, for nearly all legal purposes, became on her marriage a nonentity." Lush, \textit{Changes in the Law Affecting the Rights, Status, and Liabilities of Married Women, A CENTURY OF LAW REFORM}, 342-43 (London 1901).

It was noted by another commentator that "[t]he effect of the rule was to give the husband complete freedom to torment and punish his wife as long as he took care to do so only when no one else was present." Note, Modern Trend, \textit{supra} note 51, at 361.

59. J. Wigmore, \textit{supra} note 51, § 2227, at 212.

60. \textit{See}, \textit{e.g.}, 1- Cobbett's Complete Collection of State Trials, 555 (1811) (\textit{citing} Lady Ivys Trial 31 ch. 2 (1684)) (holding "the husband cannot be a witness against his wife... ").

A more complete formulation of the gender-neutral rule was given by Blackstone in his commentaries, wherein he wrote, "husbands and wives are not admitted to give evidence... against each other...." W. Blackstone, \textit{Commentaries on the Laws of England} 420 (C. Haar 1962).

61. It has been argued "that the values preserved by the exercise of the privilege are more important than any information to be gathered in violation of it during the examination of one spouse about the criminal activities of the other." Note, \textit{Partners in Crime, supra} note 51, at 713.
Two of the more plausible reasons refer to the danger of destroying a family by having a spouse testify against the other, and "that there is a natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation."

The initial recognition of the adverse spousal testimony rule in the United States was by common law. Today, a majority of United States jurisdictions recognize the rule. In spite of the rule's recognition in most jurisdictions, its application or formulation is not consistent in all jurisdictions having the rule. The English case which first recognized the adverse spousal testimony rule was also the case which set forth a relatively short-lived rule which said that a spouse could testify on behalf of the other spouse. It was not until 1628 that recognition was given to the rule disqualifying a spouse from being able to testify on behalf

is sacred and that nothing should be done to endanger this relationship or the attitude of each partner toward the other." Comment, Questioning the Marital Privilege: a Medieval Philosophy In a Modern World, 7 CUM. L. REV. 307, 311 (1976). But see, Lempert, A Right to Every Woman's Evidence, 66 IOWA L. REV. 725 (1981), (where it is argued that many of the justifications for the rule are irrational).

62. J. WIGMORE, supra note 51, § 2228, at 216.

Regarding this rationale, it has been argued that "once a marriage reaches the point where [a spouse] is willing to testify against [the other] there cannot be much of a marriage left to save." Lempert, supra note 61, at 732.

63. J. WIGMORE, supra note 51, § 2228, at 217.

64. See e.g., Moody's Lessee v. Fulmer, 3 Grant's Cas. 17 (Pa. 1814) (where it was held that the trial court was in error in admitting into evidence statements by wife against plaintiff-husband); Tacket v. May 33 Ky. (3 Dana) 79 (1835) (where it was held that the trial court was in error in admitting testimony of wife against husband); Burlen v. Shannon, 80 Mass. (14 Gray) 433 (1860) (where the court affirmed trial court's refusal to let wife be called as a witness against husband).

65. For a listing of state statutory provisions, see J. WIGMORE, supra note 52, § 488.

66. See e.g., COLO. REV. STAT. § 13-90-107 (Supp. 1989) (party-spouse must consent to the testimony); KY. REV. STAT. ANN. § 421.210 (Balduin 1989) (witness-spouse controls the privilege); W. VA. CODE § 57-3-3 (1966) (privilege controlled by either the witness or party-spouse). For further examples, see Medine, supra note 51, at 541-42 n.125.

67. See supra note 55.

68. It should be borne in mind that the rule was short lived in England for the time period in question. It was revived in England during the late 1800's, when the disqualification rule was abolished completely. J. WIGMORE, supra note 52, § 602, at 862.

69. The rule of disqualification is considered a disability and not a privilege. The distinction to kept in mind is that a privilege can be waived, but a disability cannot. Id. § 604, at 863.

There was a second rule of marital disqualification called "Lord Mansfield's Rule", which prohibited a parent from testifying to nonaccess if the testimony would go to bastardize a child born in wedlock. See G. MacRae, supra note 1, at 162.
of the other spouse. The rule, as initially formulated, spoke only of a wife being disqualified from testifying on behalf of her husband.

Various justifications for the disqualification rule have been put forth. It has been offered that the interests of a husband and wife are the same; therefore, neither could be trusted in testifying on behalf of the other. Further, it has been argued that the marriage relationship would be placed in jeopardy by having a spouse choose between perjury and telling the truth in testifying on behalf of the other spouse.

Although the disqualification rule was adopted by the majority of courts in the United States by the 1800s, today, statutes in the majority of jurisdictions have made spouses fully competent to testify on each other's behalf in civil proceedings. "[T]he disqualification of the husband or wife to testify for the accused spouse has been removed" in criminal cases.

The husband-wife communication privilege was first recognized in 1684. However, the privilege was relatively dormant during the

70. See W. Holdsworth, supra note 26, at 197.
71. Coke is credited with having formulated the rule in the same sentence in which he spoke of the rule prohibiting a spouse from testifying against the other spouse. See J. Wigmoré, supra note 52, § 600, at 856. In Coke's words, "it hath been resolved by the justices, that a wife cannot be produced either against or for her husband . . . ." E. Coke, supra note 57.
72. By the time of Blackstone's commentary the rule included both husband and wife. "[H]usbands and wives are not admitted to give evidence for or against each other . . . ." W. Blackstone, supra note 60.
73. Holdsworth agreed with Coke in justifying the rule "partly on the ground that husband and wife are one flesh . . . ." W. Holdsworth, supra note 26, at 197. See also Hill v. Proctor, 10 W. Va. 59, 82 (1877), (where the court stated that the "rule is founded partly on the identity of their legal rights and interests, and partly on principles of public policy.")
74. J. Wigmoré, supra note 52, § 601, at 857.
75. Id.
76. For a listing of early state cases, see C. Chamberlayne, supra note 52, § 3655, at 5211-12.
77. C. McCormick, supra note 52, § 66, at 161.
78. Id.
79. For statutory provisions, see J. Wigmoré, supra note 52.
80. In spite of the formulation and application of the privilege by the court in Lady Ivy's Trial, English courts did not recognize the privilege as a common law creation. Supra note 60, at 628. In Stapleton v. Crofts, 118 Eng. Rep. 137, 140 (1852), the court stated emphatically that no such privilege existed at common law and in Shenton v. Tyler, 1 Ch. 620 (1939) the
first century and a half after its creation because of the privilege’s existence alongside the marital disqualification and adverse spousal testimony rules. Legislative reforms of the marital disqualification and spousal adverse testimony rules between 1840 and 1870, significantly helped the husband-wife communication privilege become a vigorous evidentiary device.

The husband-wife communication privilege has been justified primarily with the proposition that it promotes family tranquility. Although the privilege shares the public policy idea of promoting family unity with the rules regarding marital disqualification and adverse spousal testimony, the privilege is quite distinct from the rules.

In general, the husband-wife communication privilege protects spouses from having to reveal in court confidential communication exchanged during their marriage. The rule regarding adverse spousal testimony protects spouses from having to reveal information

court reaffirmed this proposition and credited the privilege’s creation to “[s]ect. 3 of the Evidence Amendment Act, 1853, [which] provides as follows: “No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.” Notwithstanding the strong English disavowal of a common law basis for the privilege, in adopting the privilege in America our courts have insisted upon attributing the privilege to common law. See e.g., Cook v. Grange, 18 Ohio 526 (1849); Cornell v. Van Artsdalen, 4 Pa. 364 (1864); Brewer v. Ferguson, 30 Tenn. (11 Hum.) 565 (1851); Robin v. King, 29 Va. (2 Leigh) 140 (1830). See also C. Chambers, supra note 52, § 3697, at 5291.

81. J. Wigmore, supra note 51, § 2333, at 644. The next English case in which the privilege was recognized was Monroe v. Twistleton, Pea. Add. Cas. 221 (1802).

82. J. Wigmore, supra note 51, § 2333, at 644.

83. Id. at 645. See also McCormick, supra note 52, § 78, at 188-89.

The reform took place in England and America. However, since the communication privilege was already recognized in many jurisdictions in the U.S., the impact of legislative reforms of the disqualification rule and the rule against adverse spousal testimony probably did not have as prominent an impact on the communication privilege in America, as it did in England—where courts had said as late as 1852 that no such common law privilege existed.

84. See Note, Testimonial Non-Disclosure, supra note 53, at 218; DePrez, supra note 53, at 127.

It was stated by the primary advocate for recognition of the privilege in England, that “[t]he happiness of the married state requires that there should be the most unlimited confidence between husband and wife, and this confidence the law secures by providing that it shall be kept forever inviolable.” 1 S. Greenleaf, A TREATISE ON THE LAW OF EVIDENCE 324-25 (14th ed. 1883). See also White v. Perry, 14 W. Va. 66 (1879).

85. Comment, supra note 61, at 308-12; J. Wigmore, supra note 51, § 2334, at 645-46.

86. J. Wigmore, supra note 51, § 2335.
that is adverse to the other spouse, regardless of how the information was learned, e.g., it did not have to be information revealed in confidence from one spouse to the other.87 Further, the marital disqualification rule prohibited a spouse from testifying on behalf of the other spouse only when one spouse was a party to the action or had a direct interest in the outcome of the proceeding.88

Another prominent difference between the communication privilege and the other two rules is the time frame of termination.89 The death of a spouse or divorce will terminate the disqualification and adverse testimony rules. The communication privilege, however, applies in spite of divorce or death of a spouse.90

The husband-wife communication privilege is acknowledged in some form in all United States jurisdictions either by common law or statute.94

87. Id. at § 2234.
88. J. Wigmore, supra note 52, § 606.
89. "The incompetency of husband or wife to testify for the other, and the privilege of each spouse against testimony are terminated when the marriage ends by death or divorce." C. McCormick, supra note 52, § 85, at 200. However, the communication privilege does not terminate "after the parties are separated, whether it be by divorce or by . . . death . . . ." S. Greenleaf, supra note 84, at 325.
90. J. Wigmore, supra note 52, § 610.
91. J. Wigmore, supra note 51, § 2237.
92. Id. at § 2341.
C. Physician-Patient Privilege

At common law the physician-patient relationship was not given the same special treatment in evidentiary law as was accorded the attorney-client and husband-wife relationships. This is to say that communication between a physician and patient was not accorded the status of privilege under common law. Recognition of the relationship as privileged first occurred in the United States after the passage of a statute in New York in 1828. Today, most states have a statutory physician-patient privilege.


96. The English precedent for the denial of a testimonial privilege for physician-patient communication was Trial of Elizabeth, 20 How. St. Tr. 355, 373 (1776).


98. N.Y. REV. STAT. 1828, II, 406 (Part III c.VII, Art. 9, § 73). As interpreted by the courts, "[i]t is the purpose of this act to protect those who are required to consult physicians from the disclosure of secrets imparted to them, to protect the relationship of patient and physician, and to prevent physicians from disclosing information which might result in humiliation, embarrassment, or disgrace to patients." Steinberg v. New York Life Ins. Co., 263 N.Y. 45, 48, 188 N.E. 152, 153 (1933).

For a discussion of the New York statute, see Note, Privileged Communications: Physician and Patient, 3 BROOKLYN. L. REV. 104 (1933); Note, Privileged Communications Between Physician and Patient, 3 N.Y.U. L. REV. 68 (1926).

Various arguments have been made against the need for a physician-patient privilege.\textsuperscript{100} Perhaps the strongest argument is that the relationship fails to satisfy the first,\textsuperscript{101} second\textsuperscript{102} and fourth\textsuperscript{103} canons of Dean Wigmore’s test for determining whether a relationship merits the status of an evidentiary privilege.\textsuperscript{104} It was said that, regarding the three canons that the relationship failed to satisfy, (1) rarely will information given to a physician necessitate confidentiality,\textsuperscript{105} (2) even though a few instances arise when patient information would require confidentiality, the information would be given to a physician in spite of the absence of a privilege,\textsuperscript{106} and (3) less harm occurs to the physician-patient relationship than


100. See Curd, Privileged Communications Between the Doctor and His Patient, 44 W. Va. L.Q. 165 (1938); Morgan, Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence, 10 U. Cin. L. Rev. 285 (1943); Welch, Another Anomaly: The Patient’s Privilege, 13 Miss. L.J. 137 (1941).

101. ‘‘The communications must originate in a confidence that they will not be disclosed.’’ J. Wigmore, supra note 95, § 2285, at 527.

102. ‘‘This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.’’ Id.

103. ‘‘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.’’ Id.

104. In one scholar’s criticism of the privilege the following observation was made: ‘‘Undoubtedly, there should be a gentleman’s understanding between the physician and the patient that the physician should not go out and voluntarily discuss most intimate matters affecting his patient’s illness, but where the rights of third parties become involved or the rights of the public to the extent of litigation or prosecution for violating the laws, the truth should never be suppressed, which in all these instances either aids in defrauding some individual or infringing on the rights of the public at large.’’ Curd, supra note 100, at 172.

105. J. Wigmore, supra note 95, § 2380a, at 829.
it does to the judicial process in providing a privilege for the relationship.\textsuperscript{107} However, Dean Wigmore did concede that his third canon\textsuperscript{108} was satisfied by the physician-patient relationship.\textsuperscript{109}

The primary justification for the physician-patient privilege "is that the privilege will promote the general health and welfare by engendering certainty on the part of the patient that the intimate details he brings to his physician will not be disclosed to the general public to the patient's humiliation, embarrassment, or disgrace."\textsuperscript{110}

Generally speaking, the physician-patient privilege can be invoked "to protect only those communications which are necessary for . . . enabling the physician to prescribe remedies or relief."\textsuperscript{111} Courts have not been reluctant to admit testimony by physicians when such testimony involves information unrelated to the curative needs of patients.\textsuperscript{112} Moreover, courts have not been hesitant to admit testimony by physicians when criminal activity surrounds the circumstances of patient treatment.\textsuperscript{113}

In keeping with the general rule regarding an evidentiary privilege, the physician-patient privilege remains intact even after the death of the patient.\textsuperscript{114} Furthermore, the privilege belongs to the

\textsuperscript{107} Id. at 830.

\textsuperscript{108} "The relation must be one which in the opinion of the community ought to be sedulously fostered." Id. at 527.

\textsuperscript{109} Id. at 830.

\textsuperscript{110} Note, The Physician-Patient Privilege, supra note 95, at 266.

\textsuperscript{111} J. Wigmore, supra note 95, § 2383, at 842. For example: "Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." N.Y. Prac. L. & R. § 4504(a) (1980).

\textsuperscript{112} See e.g., Cook v. People, 60 Colo. 263, 266-67, 153 P. 214, 215-16 (1915) (physician allowed to testify that patient had bullet wound and refused to tell physician how wound was inflicted); Myers v. State, 192 Ind. 592, 137 N.E. 547, 550 (1922) (physician allowed to testify that he heard patient threaten to kill patient's wife); Soltaniuk v. Metropolitan Life Ins. Co., 133 Pa. Super. 139, 144, 2 A.2d 501, 503 (1938) (privilege extends only to communications, not to information obtained from observation by physician).

\textsuperscript{113} See e.g., Maddox v. State, 173 Miss. 799, 805, 163 So. 449, 450 (1935) (in murder prosecution physician allowed to testify concerning nature of victim's wounds); Cramer v. State, 145 Neb. 88, 96 15 N.W.2d 323, 327-28 (1944) (physician allowed to testify to request to perform criminal abortion).

\textsuperscript{114} See, e.g., Bassil v. Ford Motor Co., 278 Mich. 173, 179, 270 N.W. 258, 260 (1936) (privilege protected consultation decedent had with physician regarding decedent's impotence);
patient; therefore, the physician may not waive it and disclose protected information.\textsuperscript{115}

\section{D. Clergy-Penitent Privilege\textsuperscript{116}}

It is a controversial issue among commentators as to whether the common law of England acknowledged a clergy-penitent privilege before the Restoration.\textsuperscript{117} Notwithstanding this scholarly debate, there is virtually unanimous agreement that after the Restoration no such privilege was recognized in the common law.\textsuperscript{118} Although judicial history or precedent was strongly opposed to a clergy-penitent privilege, the first recognition of the privilege was in fact a judicial decision rendered in a New York trial court.\textsuperscript{119}

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\textsuperscript{115} Davis v. Supreme Lodge, 165 N.Y. 159, 162-71, 58 N.E. 891, 892-95 (1900) (certificate of death excluded on the basis of privilege); Eder v. Cashin, 281 A.D. 456, 461, 120 N.Y.S.2d, 169 (1953) (physician’s knowledge that decedent had suicidal tendency held to be privileged).

\textsuperscript{116} This privilege is also referred to as priest-penitent, priest-communicant, and clergy-communicant.

\textsuperscript{117} Several commentators use the Reformation as the appropriate historical divider regarding the issue of whether a clergy-penitent privilege existed at some point in time in England. See Yellin, supra note 116, at 96; and Developments in the Law, supra note 116, at 1555. Dean Wigmore used the Restoration as the historical divider. See J. Wigmore, supra note 116, \S 2394, at 869.

Notwithstanding this scholarly debate of Reformation and Restoration, there was a judicial decision handed down before the Restoration which denied that a clergy-penitent privilege existed at common law. See Yellin, supra note 116, at 96-101 (supporting the position that a clergy-penitent privilege existed in common law before the Reformation, but citing Garnett’s Case, 2 How. St. Tr. 218 (1606)).


For an extensive compilation of early English cases denying that a clergy-penitent privilege existed, see J. Wigmore, supra note 116, \S 2394, at 869-70 n.4.

\textsuperscript{119} People v. Phillips, N.Y. Ct. Gen. Sess. (1813), \textit{abstracted in} 1 W. L.J. 109 (1843), \textit{cited in} Yellin, supra note 116, at 104-05. In Phillips a priest heard the confession of the defendant regarding stolen goods the defendant received. The priest was called by the prosecution, but refused to disclose the defendant’s confession. The court held “that a priest should not be
Several years after the single\textsuperscript{120} judicial decision was handed down recognizing the privilege, New York enacted the first clergy-penitent privilege statute in the United States.\textsuperscript{121} Today, the privilege is recognized in all states,\textsuperscript{122} with West Virginia\textsuperscript{123} being the last to recognize it.

The clergy-penitent privilege has been justified on various grounds.\textsuperscript{124} However, the most compelling justification is the fact that the relationship satisfies all four canons\textsuperscript{125} of Dean Wigmore's compelled to reveal that which he had heard in the administration of the sacrament of Penance.”\textit{Id.} at 105. \textit{But see} People v. Smith, 2 City Hall Recorder (Rogers) 77 (N.Y. 1817), \textit{cited in} Yellin, supra, at 106. In Smith a minister was called to testify regarding statements the defendant made in reference to a murder. The court distinguished Phillips by pointing out that the clergyman in Phillips was a Catholic priest and bound by the rules of the Catholic church. However, the minister in the case at hand “was Protestant and thus not bound by the seal of the confessional. It then ordered him to testify.” \textit{Id.}, at 106.

120. When the privilege issue was brought before the Massachusetts court, it cited and followed Smith, supra note 119. \textit{See} Commonwealth v. Drake, 15 Mass. 161 (1818).


123. The privilege went into effect June, 1990.

124. For a summary of the rationales, see \textit{Developments in the Law, supra} note 116, at 1560-62.

125. \textit{See}, supra notes 101-03 and 108.

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test for determining whether a relationship merits evidentiary privileges. 126

Although statutes vary in the wording of the privilege, 127 generally speaking the privilege attaches to communications between a clergyperson in his or her professional capacity 128 and the defendant according to the canons of the clergyperson's denomination. 129 Statutes in many jurisdictions differ on who is allowed to invoke the privilege. 130 A few state statutes give the privilege to the

126. J. Wigmore, supra note 116, § 2396, at 878.

For a discussion opposed to the privilege in statutory form see Note, Striking Down the Clergyman-Communicant Privilege Statutes—Let Free Exercise Govern, 62 Ind. L.J. 397 (1987).

127. See, e.g., S.C. Code on the Priest-penitent privilege. In any legal or quasi-legal trial, hearing or proceeding before any county commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred. S.C. Code Ann. § 14-11-90 (Law Co-op. 1985).


(1) Definitions. As used in this section:
   (a) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
   (b) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

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

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


128. See, e.g., Cottrill v. State, 365 So. 2d 450 (Fla. Dist. Ct. App. 1978) (at a marriage counseling session defendant admitted to a minister his guilt in sexual assault charge, and it was held to be reversible error in admitting testimony of minister regarding confession by defendant). But see State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986) (where a minister was allowed to testify regarding defendant's confession of guilt in rape prosecution, because defendant made confession in presence of minister's wife).

129. See, e.g., Ball v. State, 275 Ind. 617, 419 N.E.2d 137 (1981) (where defendant confessed to a pastor that he killed three men, and court allowed pastor to testify because confession was not one of the tenets of the pastor's church). But see Kohloff v. Bronx Savings Bank, 233 N.Y.S.2d 849, 37 Misc.2d 27 (1962) (where it was held that even though a penitent is not a member of the church in which the penitent makes a confession, the privilege is still applicable).

130. Yelling, supra note 116, at 137-38.
clergy rather than the penitent.\textsuperscript{131} Other statutes grant the privilege to the clergy and penitent,\textsuperscript{132} a few other statutes provide that the privilege belongs to the penitent alone.\textsuperscript{133}

Moreover, statutes have differed in the definition given\textsuperscript{134} to the term "clergy".\textsuperscript{135} The lack of precision in some definitions of the term has caused inconsistency in judicial opinions.\textsuperscript{136}

E. Privileged Communications in Federal Courts

Privilege law in particular, and evidentiary law in general, have a remarkable history of inconsistency and confusion prior to congressional enactment of the Federal Rules of Evidence (F.R.E.) in 1975.\textsuperscript{137} Of course, the inconsistency and confusion herein alluded to was based upon the vexing question of whether to apply federal or state evidence law to cases sitting in federal courts.\textsuperscript{138} In attempting to trace the web-like path that led to the F.R.E., it is perhaps best to examine federal evidence law in three distinct

\begin{itemize}
\item \textsuperscript{131} See, e.g., VA. CODE ANN. § 8.01-400 (1984); MD. CTS. & JUD. PROC. ANN. § 9-111 (1989).
\item \textsuperscript{132} See, e.g., ALA. CODE § 12-21-166 (1985); CAL. EVID. CODE ANN. §§ 1030-34.
\item \textsuperscript{133} See, e.g., NEV. REV. STAT. § 49.255 (1985); WIS. STAT. ANN. § 905.06 (1975).
\item \textsuperscript{134} See, e.g., FLA. STAT. ANN. § 90.505 (West 1979) (clergy of any organization or denomination usually referred to as a church); D.C. CODE ANN. § 14-309 (1989) (clergy of a religion authorized to perform a marriage ceremony); MO. ANN. STAT. § 491.060 (other person serving in a similar capacity to that of a clergyperson); KAN. STAT. ANN. § 60-429 (1983) (regular minister of religion).
\item \textsuperscript{135} For a complete listing of the various definitions used, see Yellin, \textit{supra} note 116, at 114-21.
\item \textsuperscript{136} See Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917) (where it was held that elders in a Presbyterian church were included in a statute which gave the privilege to ministers of the gospel). \textit{But see} Knight v. Lee, 80 Ind. 201 (1881) (where it was held that an elder and deacon who had acted on behalf of the pastor were not covered by the privilege statute).
\item \textsuperscript{138} \textit{Developments in the Law—Privileged Communications}, 98 HARV. L. REV. 1450, 1463 (1985).
\end{itemize}
phases:139 (1) Rules of Decision Act,140 *Swift v. Tyson*141 and *United States v. Reid*;142 (2) *Wolfle v. United States*143 and *Erie Railroad Co. v. Tompkins*;144 and (3) Federal Rules of Procedure.145

The admissibility of evidence in federal question and diversity cases was outlined in the Rules of Decision Act.146 Under this Act, federal courts were mandated to apply the evidence law of the state in which they sat.147 However, in *Swift v. Tyson*148 it was held that federal courts sitting in diversity cases had to apply state statutory law, but not state decisional law.149 In *United States v. Reid*150 the Court addressed the issue of evidentiary law in federal criminal cases. It was determined in *Reid* that the admissibility of evidence in federal criminal cases should be based upon the law of the forum state as it existed in 1789.151

The decision in *Reid* was ultimately rejected by the Court’s holding in *Wolfle v. United States*.152 In *Wolfle* it was held that the admissibility of evidence “in criminal trials in the federal courts

141. 41 U.S. (16 Pet.) 1 (1842).
142. 53 U.S. (12 How.) 361 (1851).
143. 291 U.S. 7 (1934).
144. 304 U.S. 64 (1938).
146. The Act provided: The laws of the several states, except where the Constitution, treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (codified as amended at 28 U.S.C. § 1652 (1982)).
149. Id. at 18-19.
150. 53 U.S. (12 How.) 361 (1851).
151. Id. at 389-90. The impact of this ruling was that of locking out state evidentiary statutes in federal criminal cases, which were enacted after 1789 by any of the original thirteen states. See, e.g., *United States v. Perkins*, 221 F. 109 (E.D. S.C. 1915).
152. 291 U.S. 7 (1934) (where the court held admissible confidential communication between spouses which was written by a stenographer in spite of claim of spousal privilege).
are not necessarily restricted to those local rules in force at the
time of the admission into the Union of the particular state where
the trial takes place, but are governed by common law principles
as interpreted and applied by the federal courts in the light of
reason and experience.’’

Several years after Wolfle the Court, by implication, addressed
the issue of evidentiary law in diversity cases in Erie Railroad Co.
v. Tompkins. The Court had to overrule its decision in Swift v. Tyson in order to hold that federal courts had to apply state legislatival and decisional substantive law in diversity cases. One commentator noted that “Federal courts exercising diversity jurisdic-
tion always had followed state evidence law in principle, but . . . the Court in Erie clarified that both statutory and decisional
evidence law of the state applied in diversity cases.’’

Acting under congressional authorization, the Supreme Court
promulgated the Federal Rules of Civil Procedure (F.R.C.P.) in
1939. Until enactment of Rule 501 of the F.R.E., Rule 43(a) of the F.R.C.P. governed privilege questions in virtually all federal
civil cases. This is not to suggest that federal courts never differed

153. Id. at 12.
154. 304 U.S. 64 (1938).
156. 304 U.S. 64, 78 (1938).
157. Krattenmaker, supra note 139, at 624.
159. 308 U.S. 645 (1939).
160. See infra note 187.
161. The rule provided:
   In all trials the testimony of witnesses shall be taken orally in open court, unless
   otherwise provided by these rules. All evidence shall be admitted which is admissible
   under the statutes of the United States, or under the rules of evidence heretofore applied
   in the courts of the United States on the hearing of suits in equity, or under the rules
   of evidence applied in the courts of general jurisdiction of the state in which the United
   States court is held. In any case, the statute or rule which favors the reception of the
   evidence governs and the evidence shall be presented according to the most convenient
   method prescribed in any of the statutes or rules to which reference is herein made.
   The competency of a witness to testify shall be determined in like manner.

162. Krattenmaker, supra note 139, at 625. See also Note, Federal Courts: Evidence State
Privilege Rules Applicable In Diversity Actions: Federal Rule of Civil Procedure 43(a), 44 CALIF.
L. Rev. 949 (1956).
on their interpretation of Rule 43(a) nor were privilege questions in federal civil matters always resolved in harmony with Rule 43(a). However, in spite of varying interpretations of Rule 43(a), "by the mid-1960s all respectable authority pointed to one conclusion: in diversity cases, claims of testimonial privilege were governed by state law."  

Privilege issues in federal criminal cases were governed by Rule 26 of the F.R.C.P. from 1946 to the enactment of Rule 501 of F.R.E. Rule 26 did not bring about the uniformity and certainty its drafters expected. Federal courts varied in their interpretation of the rule, which invariably led to inconsistent holdings.

In light of the persistent confusion and inconsistency in federal evidentiary rulings, the Supreme Court, pursuant to the Rules Enabling Acts, promulgated the Proposed Federal Rules of Evidence (Proposed Rules) in 1972. In Article V of the Proposed Rules

163. See, e.g., Aetna Life Ins. Co. v. McAdoo, 106 F.2d 618, 621 (8th Cir. 1939) (where the rule was interpreted as saying that if evidence was admissible under federal law, state law did not have to be followed); Anderson v. Benson, 117 F. Supp. 765, 772 (D. Neb. 1953) (where the rule was interpreted as requiring judges to defer only to state statutory privileges).


165. Krattenmaker, supra note 139, at 627.

166. The rule provided:
In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.


167. 327 U.S. 821 (1945).

168. DEVELOPMENTS IN THE LAW, supra note 138, at 1464.

169. A few courts interpreted the rule to mean that the privilege law of the forum state governed. See, e.g., In re Verplank, 329 F. Supp. 433 (D.C. Cal. 1971) (where the court followed the spirit of Rule 26 and recognized a clergy-communicant privilege in federal criminal matters).

170. See, e.g., United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (where communication with an accountant who was employed by the defendant's attorney was held privileged);
But see, Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) (where communication with an accountant who was employed by the defendant's attorney was held not privileged).


172. 56 F.R.D. 183 (1972). Tentative drafts were published in 46 F.R.D. 161 (1969) and
recognition was given to nine privileges.\textsuperscript{173} These privileges include: statute reports,\textsuperscript{174} attorney-client,\textsuperscript{175} psychotherapist-patient,\textsuperscript{176} husband-wife,\textsuperscript{177} communications to clergymen,\textsuperscript{178} political vote,\textsuperscript{179} trade secrets,\textsuperscript{180} state secrets\textsuperscript{181} and informant's identity.\textsuperscript{182}

Primarily because of Article V of the Proposed Rules, Congress took steps to prevent implementation of the Proposed Rules.\textsuperscript{183} The debate\textsuperscript{184} taken up by opponents of Article V was mounted on three fronts:

[F]irst, that the Erie doctrine rendered the application of federal privilege law in diversity cases unconstitutional (or at least unwise); second, that the promulgation of privilege rules was beyond the scope of the Supreme Court's authority under the Rules Enabling Acts; and, third, that the rules as drafted were incomplete, inconsistent, and incoherent.\textsuperscript{185}

Ultimately Congress enacted its own version of the Federal Rules of Evidence\textsuperscript{186} which did not include Article V of the Proposed Rules.

\begin{footnotesize}
\begin{enumerate}
\item[173.] Actually thirteen rules were provided in Article V, but four of the rules did not create privileges per se. See, F. R. Evid. 511-13 and 501; 56 F.R.D. 230-61 (1972).
\item[174.] Id. at 234 (Rule 502).
\item[175.] Id. at 235 (Rule 503).
\item[176.] Id. at 240 (Rule 504).
\item[177.] Id. at 244 (Rule 505).
\item[178.] Id. at 247 (Rule 506).
\item[179.] Id. at 249 (Rule 507).
\item[180.] Id. at 250 (Rule 508).
\item[181.] Id. at 251 (Rule 509).
\item[182.] Id. at 255 (Rule 510).
\item[185.] Developments in the Law, supra note 138, at 1466.
\end{enumerate}
\end{footnotesize}
Congress adopted a general privilege rule, Rule 501, in place of Article V. Under Rule 501, state privilege law generally applies in diversity cases, but federal question cases are settled under federal law.

III. Privileged Communications in West Virginia

This discussion is not intended to encompass all evidentiary privileges that may be available under statutory or decisional law in West Virginia. The purpose here is simply to provide a historical overview of the state’s position on the privileges thus far discussed.

187. Fed. R. Evid. 501 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.


Under West Virginia Rules of Evidence (W.V.R.E.) a general privilege rule is provided for all state courts. Rule 501 states: "The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law except as modified by this Constitution of the United States or West Virginia, statute or court rule."
A. Attorney-Client Privilege\textsuperscript{191}

The common law attorney-client privilege has long been recognized by the West Virginia Supreme Court.\textsuperscript{192} In State v. Douglass\textsuperscript{193} the court indicated that the attorney-client privilege was justified on the "grounds of public policy, because greater mischiefs would probably result from requiring or permitting . . . [disclosures], than from wholly rejecting them."\textsuperscript{194}

The court has determined that in order for the privilege to be applicable, three elements must be established.\textsuperscript{195} First, the relation of lawyer and client must be contemplated by both parties or actually exist.\textsuperscript{196} Second, the client must be seeking advice from the lawyer in his or her capacity as a legal adviser.\textsuperscript{197} Third, the lawyer and client must intend for their communication to be confidential.\textsuperscript{198}

Aside from having to make determinations on the three essential elements of the privilege, the court has also had opportunities to decide other matters related to the privilege.\textsuperscript{199} The court has made it clear that the identity of a client or former client cannot be withheld from the court,\textsuperscript{200} though the communication may be subject to the privilege. It has also been determined by the court that the fee arrangement between an attorney and client is subject to

\textsuperscript{191} For a more detailed treatment see Note, The Attorney-Client Privilege in West Virginia, 54 W. Va. L. Rev. 297 (1952).
\textsuperscript{192} See State v. Douglass, 20 W. Va. 770 (1882) (where defendant's conversation informing his attorney of the whereabouts of a gun used in defendant's murder trial was held to be privileged communication).
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 780.
\textsuperscript{196} See Woodrum v. Price, 104 W. Va. 382, 140 S.E. 346 (1927) (where the court held that no attorney-client relationship existed or was contemplated). But see Donohoe v. Collett, 87 W. Va. 383, 105 S.E. 265 (1920) (where the court held that an attorney-client relationship existed even though the client did not pay for the advice given); Hodge v. Garten, 116 W. Va. 564, 182 S.E. 582 (1935) (holding same).
\textsuperscript{197} See Woodrum, supra note 196.
\textsuperscript{198} See Burton, supra note 195 (where communication between attorney and client was not confidential because it took place in the presence of others).
\textsuperscript{199} See 20 M.J., Witnesses, § 28.
disclosure. It has also been held that, under certain circumstances, if an attorney discloses confidential information out of court and in the presence of the client, the privilege may still protect the information in court. Further, where a client consults two independent attorneys regarding the same potential litigation, the court has ruled that the privilege attaches to both attorneys. However, where two clients consult the same attorney in drawing up a contract, the privilege is not applicable in subsequent litigation involving the two clients as adversaries.

B. Husband-Wife Privilege

The common law prohibition of a spouse testifying for or against the other spouse was given statutory recognition in the state under the Code of 1868. The court’s first opportunity to interpret this statute came in Hill v. Proctor. In Hill the court held that the statute prohibited the use of a spouse’s deposition on behalf of the other spouse. Several other cases were decided under the statute before it was amended by the Acts of 1882.

201. See Moats v. Rymer, 18 W. Va. 642 (1881).
202. See State v. Dickey, 46 W. Va. 319, 33 S.E. 231 (1899) (where the attorney disclosed information about the client to a prosecutor, while the client was present, but the court felt the client was not in a position to silence the attorney).
204. See Kirchner v. Smith, 61 W. Va. 434, 447, 58 S.E. 614, 619 (1907).
205. See sources cited supra note 52.
206. See sources cited supra note 51.
207. The Code provided: “A husband shall not be examined for or against his wife, nor a wife for or against her husband, except in an action or suit between husband and wife.” W. VA. CODE ch. 130 § 23(5) (1868).
208. 10 W. Va. 59 (1877) (current version at W. VA. CODE §§ 57-3-2, -3).
209. Id. at 82-84.
210. See e.g., Anderson v. Snyder, 21 W. Va. 633 (1883); Zane v. Fink, 18 W. Va. 693 (1881); Campbell Adm’r, White and Janney v. Campbell’s Adm’r, 14 W. Va. 123, 149 (1878); White v. Perry, 14 W. Va. 66 (1878); Rose v. Brown, 11 W. Va. 122 (1877).
211. The Acts abolished disqualification, i.e., making spouses competent to testify for or against each other in civil matters. See The Acts of 1882, ch. 160 § 22 p.544 (codified as amended at W. VA. CODE §§ 57-3-2 (1966)).
212. The Acts also created an adverse spousal testimony privilege in criminal matters. Id. at ch. 151 § 19 p.484 (codified as amended at W. VA. CODE §§ 57-3-3 (1966)).
213. Finally, the Acts created a spousal confidential communication privilege. Id. ch. 160 § 22 p.544 (codified as amended at W. VA. CODE §§ 57-3-4 (1966)).
Under the Acts of 1882\textsuperscript{212} a spouse was permitted to testify for or against the other spouse in civil proceedings.\textsuperscript{213} However, confidential communications made during the marriage were privileged.\textsuperscript{214} Moreover, the Acts created an adverse spousal testimonial privilege in criminal proceedings.\textsuperscript{215}

Although the current statutory formulations of the rules\textsuperscript{216} encompass more than provided in the Acts of 1882,\textsuperscript{217} the central legal concepts of the Acts remain.\textsuperscript{218}

C. \textit{Physician-Patient Privilege}\textsuperscript{219}

The physician-patient privilege is not recognized in the state by statute\textsuperscript{220} or decisional law.\textsuperscript{221} The issue of a physician-patient priv-

\textsuperscript{212} For a judicial discussion of the statutory changes see Kilgore's Adm'r v. Hanley, 27 W. Va. 451 (1886).
\textsuperscript{213} See First Bank of Jefferson v. Harris, 56 W. Va. 345, 49 S.E. 252 (1904).
\textsuperscript{214} See Kilgore's Adm'r v. Hanley, 27 W. Va. 451 (1886).
\textsuperscript{215} See State v. Woodrow, 58 W. Va. 527, 52 S.E. 545 (1905).
\textsuperscript{216} "Husband and wife shall be competent witnesses to testify for or against each other in all cases, civil and criminal, except as otherwise provided." W. Va. Code §§ 57-3-2 (1986). In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them.
\textsuperscript{217} W. Va. Code §§ 57-3-3 (1986).
\textsuperscript{218} Neither husband nor wife shall, without the consent of the other, be examined in any case as to any confidential communication made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage existed.
\textsuperscript{219} W. Va. Code §§ 57-3-4 (1986).
\textsuperscript{221} The relationship was recognized as privileged by statute in justice of the peace courts, from 1863 to 1976, when the provision was repealed. See supra note 190.
ilege was first addressed by the court in *Mohr v. Mohr.*222 In *Mohr* the court had an opportunity to construe W. Va. Code 50-6-10 (now repealed).223 The statute provided for a physician-patient privilege in justice of the peace courts.224 The court did not deem it advisable to extend the provision to courts of record.225 As a consequence, the *Mohr* decision became precedent for the proposition that no physician-patient privilege is recognized in courts of record.226

D. Clergy-Penitent Privilege

The court has never directly or indirectly addressed the relationship of the clergy and penitent. The relationship was accorded a statutory privilege in the justice of the peace courts until the statute was repealed in 1976.227 In spite of the lack of case law on the relationship, the state legislature enacted a clergy-penitent privilege on March 10, 1990.228 The statute provides as follows:

No priest, nun, rabbi or member of the clergy authorized to celebrate the rites of marriage in this state pursuant to the provisions of article one, chapter forty-eight of this code shall be compelled to testify in any criminal or grand jury proceedings or in any domestic relations action in any court of this state:

(1) With respect to any confession or communication, made to such person, in his or her professional capacity in the course of discipline enjoined by the church or other religious body to which he or she belongs, without the consent of the person making such confession or communication; or

(2) With respect to any communication made to such person, in his or her professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication. This subsection is in addition to the protection and privilege afforded pursuant to section ten-a, article two, chapter forty-eight of this code.229

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222. 119 W. Va. 253, 193 S.E. 121 (1937).
223. See sources cited supra note 190.
224. The statute is worded in terms of incompetency, but the term privilege is applicable. See Purbaugh & Burnside, supra note 190, at 325 n. 154.
227. See sources cited supra note 190.
229. Id. The state also has a statute which provides for privileged communications between clergy and spouses in divorce proceedings. See W. Va. Code § 48-2-10a (1986).
. IV. DEVELOPMENT OF PSYCHOTHERAPIST-PATIENT PRIVILEGE

In a very real sense the psychotherapist-patient privilege owes its existence to the New York legislature’s enactment of the first statutory physician-patient privilege in the United States. Judicial recognition of the psychotherapist-patient privilege resulted from the application of loosely defined physician-patient privilege statutes. Pure psychotherapist-patient privilege statutes did not begin to surface until 1948. In spite of the rather short statutory history of the privilege, it is firmly implanted in the codes of every state except West Virginia.

Around the period that pure psychotherapist-patient privilege statutes began to appear, the privilege was accorded its first common law recognition in Binder v. Ruvell. In taking the unprecedented step toward recognizing the privilege by decisional law, the court analyzed the privilege under Dean Wigmore’s test for determining whether to accord a relationship evidentiary privilege and concluded that “the social significance of [a psychotherapist-patient privilege] is probably even greater than that which comes from the protection of the communications between lawyer and client.”

230. For the purpose of this article psychotherapist refers to psychiatrist and psychologist.
231. See sources cited supra note 198.
233. That is, psychotherapist-patient privilege statutes which were independent from physician-patient statutes.
237. Plunkett, supra note 236, at 1242.

The court went on to say, in part:

Psychiatry is a relatively new science. Its function is to study the operation of the
Although Dean Wigmore did not provide an analysis of the psychotherapist-patient relationship,\textsuperscript{238} commentators have acknowledged that the relationship satisfies the four canons\textsuperscript{239} of his test.\textsuperscript{240} Further, it has been argued that "[r]eason indicates that the absence of a privilege would make it doubtful whether either psychotherapists or their patients could communicate effectively if it were thought that what they said could be disclosed compulsorily in a court of law."\textsuperscript{241} The unquestioned need for confidentiality in psychotherapy has been the central rationale for legislative action in bringing forth psychotherapist-patient privilege statutes.\textsuperscript{242}

mind and to apply methods of healing where the mind is disturbed . . . .

It is conceivable that courts in a situation such as is presented here today would say, true, you are engaged in the profession of healing the mentally disturbed, the maladjusted members of our society. We know that you cannot do it successfully without probing into the inner recesses of the mind. We know that you cannot do it without obtaining the confidence of your patient and getting the information from him. Nevertheless, it is our job to get all information we can in order to correctly dispose of a case. Therefore, we are going to compel you to disclose those matters which came to you as a result of your confidential relationship and thereby run the risk of such a disservice to society. . . . My understanding of the law is otherwise. I am persuaded that the courts will guard the secrets which come to the psychiatrist and will not permit him to disclose them . . . .

The fact that there is no precedent for it is really of no moment. There cannot be a precedent until the question is presented to the courts for decision. And if evidence of changing conditions or changing knowledge is presented to the court, the court must in some way seek to ascertain what the general community interest demands and what the customs and practices of the people in that respect are and from that pronounce its understanding of the public policy. Accordingly, I shall hold that all confidential communication between [the patient and psychiatrist] are privileged and may not be inquired into.

\textit{Id.} (The case was not appealed and the trial court decision stood.)

\textsuperscript{238} No doubt this is due to the fact that psychotherapy was in its infancy stage during the period that Dean Wigmore wrote.

\textsuperscript{239} See sources cited supra notes 101-03 and 108.


\textsuperscript{242} \textit{Developments in the Law, supra} note 240, at 1542-44. See also Rudder v. Universal Communications Corp. 507 So. 2d 411 (Ala. 1987); Grey v. Superior Court, 62 C.A.3d 698, 133 Cal. Rptr. (1976); People v. District Court, 719 P.2d 722 (Colo. 1986).
Along with the idea of confidentiality, the privilege has been justified on the grounds that it safeguards society's interest in the mental health profession "by encouraging patients to communicate necessary information to health professionals." It has been further maintained that the privilege is necessary to insure an individual's right to privacy, which "is a fundamental tenet of the American legal tradition, protected by common law, statutory provisions, and the Constitution."

Although psychotherapist-patient privilege statutes are not consistent in the details of their coverage, some generalizations can

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246. For example Missouri's statute reads:
Any communication made by any person to a licensed psychologist in the course of professional services rendered by the licensed psychologist shall be deemed a privileged communication and the licensed psychologist shall not be examined or be made to testify to any privileged communication without the prior consent of the person who received his professional services.

(1) For purposes of this section:
(a) A "psychotherapist" is:
1. A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or
2. A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.
(b) A "patient" is a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.
(c) A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:
1. Those persons present to further the interest of the patient in the consultation, examination, or interview.
2. Those persons necessary for the transmission of the communication.
3. Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.
(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of di-
be made regarding them.\textsuperscript{247} First, a prerequisite for claiming the privilege is that a professional relationship must exist.\textsuperscript{248} Second, the privilege only protects confidential information necessary for diagnosis or treatment of the patient.\textsuperscript{249} Third, the patient usually controls the privilege\textsuperscript{250} and has the exclusive power to waive it\textsuperscript{251}

agnosis or treatment of his mental or emotional condition, including alcoholism and other drug addiction, between himself and his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

(3) The privilege may be claimed by:
(a) The patient or his attorney on his behalf.
(b) A guardian or conservator of the patient.
(c) The personal representative of a deceased patient.
(d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.

(4) There is no privilege under this section:
(a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
(b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.
(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.


247. Statutes should be examined directly for specific provisional coverage.
248. \textit{See}, e.g., State v. Sands, 145 Ariz. 269, 700 P.2d 1369 (1985) (where the relationship was held not to exist between defendant and psychotherapist who was hostage negotiator for the police); \textit{In re Alvarez}, 342 So. 2d 492 (Fla. 1977) (where relationship held not to exist when patient was informed by psychotherapist that communication was not confidential and that patient did not have to communicate); State v. Gullekson, 383 N.W.2d 338 (Minn. App. 1986) (where relationship did not exist because psychotherapist informed defendant communication was subject to being disclosed).

249. \textit{See}, e.g., Elliot v. Watkins Trucking Co., 406 F.2d 90 (7th Cir. 1969) (Applying Illinois law where court held that patient's communication with psychotherapist was made during routine admissions interview and therefore not privileged); Henson v. State, 239 Ark. 727, 393 S.W.2d 856 (1965) (where it was held that psychotherapist did not provide treatment or diagnosis); State v. Jensen, 286 Minn. 65, 174 N.W.2d 226 (1970) (where court held that psychotherapist's purpose in examining defendant was not that of diagnosis or treatment).


PSYCHOTHERAPIST-PATIENT PRIVILEGE

unless an authorized representative is appointed. 252 Finally, if the privilege is waived 253 by the patient or an authorized representative, the psychotherapist may not withhold confidential information obtained from the patient. 254

Statutes usually provide specific exceptions to the privilege, which require testimony from a psychotherapist, notwithstanding any objection by the patient. 255 Further, courts have displayed great reluctance to extend the privilege to cover communications with individuals not specified in the statutes. 256 Moreover, in child custody proceedings courts appear to be willing to deny the privilege to litigant-parents, if it is in the best interest of the child to do so. 257 Also, in child abuse or neglect proceedings the privilege is usually abrogated by statute. 258


253. Aside from a patient being able to expressly waive the privilege (In re Hochmuth, 251 N.W.2d 484 (Iowa 1977)), a patient may waive the privilege by calling the psychotherapist as a witness (Pouncy v. State, 353 So. 2d 640 (Fla. App. 1977)), or failing to assert the privilege upon notice of a subpoena duces tecum compelling production of mental health records (Inabnit v. Berkson, 199 Cal. App. 3d 1230, 245 Cal. Rptr. 525 (1988)), or by asserting insanity as a defense (Post v. State, 580 P.2d 304 (Alaska 1978)) or placing mental condition into case as a basis for the action (Bond v. Dist. Ct., 682 P.2d 33 (Colo. 1984)).


255. See, e.g., Harbin v. Harbin, 495 So. 2d 72 (Ala. 1986) (where mental condition of a party in a child custody action is an issue the privilege must yield); State v. Ortiz, 144 Ariz. 582, 698 P.2d 1301 (1985) (no privilege when defendant requests mental health examination pursuant to law); See also OKLA. STAT. ANN. tit. 12, § 2503(4)(D) (West 1990); ARK. R. EVID. 503(d); LA. REV. STAT. ANN. § 13.3734(c).


V. PROPOSED PSYCHOTHERAPIST-PATIENT PRIVILEGE MODEL

A. Confidentiality and W. Va. Code 27-3-1

Before presenting the proposed model, we should first consider the scope of protection granted to communications between mental health professionals and patients under the "confidentiality" provision of W. Va. Code 27-3-1. Under section 27-3-1 communications between patients and mental health professionals are considered confidential and may only be disclosed under specified and enumerated circumstances. Although this general statement regarding section 27-3-1 may sound as though it is a psychotherapist-patient privilege, the state supreme court has ruled otherwise.

The West Virginia Supreme Court of Appeals' first opportunity to interpret section 27-3-1 came in State v. Simmons. The defen-

259. The section provides as follows:
§ 27-3-1 Definition of confidential information; disclosure.
(a) Communications and information obtained in the course of treatment or evaluation of any client or patient shall be deemed to be "confidential information" and shall include the fact that a person is or has been a client or patient, information transmitted by a patient or client or family thereof for purposes relating to diagnosis or treatment, information transmitted by persons participating in the accomplishment of the objectives of diagnosis or treatment, all diagnoses or opinions formed regarding a client's or patient's physical, mental or emotional condition; any advice, instructions or prescriptions issued in the course of diagnosis or treatment, and any record or characterization of the matters hereinbefore described. It does not include information which does not identify a client or patient, information from which a person acquainted with a client or patient would not recognize such client or patient, and uncoded information from which there is no possible means to identify a client or patient.

(b) Confidential information may be disclosed:
(1) In a proceeding under section four [§ 27-5-4], article five of this chapter to disclose the results of an involuntary examination made pursuant to sections two, three [§§ 27-5-2, 27-5-3] or four, article five of this chapter;
(2) In a proceeding under article six-A [§ 27-6A-1 et seq.] of this chapter to disclose the results of an involuntary examination made pursuant thereto;
(3) Pursuant to an order of any court based upon a finding that said information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section;
(4) To protect against a clear and substantial danger of imminent injury by a patient or client to himself or another; and
(5) For treatment or internal review purposes, to staff of the mental health facility where the patient is being cared for or to other health professionals involved in treatment of the patient.


260. 309 S.E.2d 89 (W. Va. 1983). The defendant in Simmons argued that a court appointed psychiatrist violated § 27-3-1(a), by reviewing the defendant's medical record without authori-

https://researchrepository.wvu.edu/wvlr/vol93/iss1/2
dant in Simmons was convicted of second-degree murder. On appeal the defendant assigned as error the admission of testimony by a court-appointed psychiatrist. One of the issues raised on appeal, regarding the psychiatrist's testimony, involved section 27-3-1. The defendant contended that the psychiatrist violated the section by examining prior medical records of the defendant. The court first noted that the issue was not objected to at trial. Further, the court pointed out that the defendant opened up the issue of his mental health by raising an insanity defense. The court then went on to make a determination of whether or not the statute created a psychotherapist-patient privilege. The court concluded that the statute did not create a psychotherapist-patient privilege, based upon its finding that the statute "does not define the relationship it is intended to protect, identifies only one party, i.e., the client or patient, and is written so broadly that the confidentiality is not limited to information essential to any confidential relationship." 261 While we agree with the court that the statute is written broadly and that it does not create "any sort of a general psychotherapist-patient privilege," 262 we believe the court could have used the Simmons case as an opportunity to create a common law psychotherapist-patient privilege under the authority given to the court in Rule 501 of the West Virginia Rules of Evidence. 263 Our observation here is not without precedent. The circumstances that the court confronted in Simmons were quite similar to the situation facing the Alaska Supreme Court in Allred v. State. 264

The defendant in Allred was indicted for first degree murder. Prior to the indictment, the defendant confessed to a psychiatric social worker that he committed the murder the police had been questioning him about. Immediately after the confession to the psychiatric social worker, the defendant was indicted for murder.

261. Id. at 96.
262. Id.
263. Rule 501 provides: "The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law except as modified by the Constitution of the United States or West Virginia, statute or court rule." W.V.R.E. 501.
At trial the defense attempted unsuccessfully to suppress the confession made to the psychiatric social worker by asserting that all communications made to the psychiatric social worker were privileged under a confidentiality statute which protected communication between psychotherapists and patients. Although the trial court allowed the psychiatric social worker to testify concerning the communication with the defendant, the case ended in mistrial after the jury was unable to reach a verdict. The Alaska Supreme Court granted review with respect to the issue of whether a psychotherapist-patient privilege had been created by the confidentiality statute.

The court in Allred was not hesitant in finding that the confidentiality statute was not intended to provide an evidentiary privilege. The court stated that "[t]he provision nowhere states that it was intended as creating a privilege. It does not refer to courtroom testimony. The general thrust of its language seems to point towards 'anti-gossip' considerations. . . . It is only as an 'anti-gossip' measure that [the statute] makes sense."265

After dispensing with the confidentiality statute as a mere "anti-gossip" provision, the court addressed the issue of whether a psychotherapist-patient privilege should be created. In doing this, the court analyzed the issue using Dean Wigmore's four canons.266 Upon concluding its analysis, the court held that it would "recognize a common law privilege, belonging to the patient, which protects communications made to psychotherapists in the course of treatment."267 The court also formulated a test to be used in determining when its common law psychotherapist-patient privilege should apply.268

Although the court in Allred was not unanimous as to whether or not its new common law privilege protected the communication made by the defendant to the psychiatric social worker, nevertheless the privilege was held to apply.269
The facts of the Simmons case suggest that if the West Virginia Supreme Court of Appeals had created a common law privilege, its scope probably would not have protected the information the defendant sought to suppress. More than likely, the defendant's introduction of his mental condition into the case and the fact that the psychiatrist's access to his confidential records was pursuant to a court-ordered examination, probably would have been construed as sufficient cause to preclude application of the privilege.\textsuperscript{270} Notwithstanding the strong possibility that the privilege would not have applied in Simmons, it would have been applicable in State v. Allman.\textsuperscript{271}

In Allman the defendant was convicted of six counts of first degree sexual assault. The victim in the case was the granddaughter of the defendant. The victim was not older than fifteen at the time of the sexual assaults. On appeal, the defense argued as error the trial court's refusal to allow the victim's psychological records to be reviewed by the defense. The court held that it was reversible error not to allow the defense an opportunity to review the psychological records of the victim. The court based its decision on one of the exceptions to confidentiality under section 27-3-1 of the Code.\textsuperscript{272}

The facts of Allman, as given in the opinion, strongly suggest that the court would not have ordered that the victim's psychological records be disclosed if a common law psychotherapist-patient privilege had been in existence. The way that the opinion reads, it appears that the defense wanted to examine the victim's past psychological records as well as have the trial court order the victim to undergo a psychological examination. The victim, it appears, did not make her mental health an issue. The defense made the matter an issue. If a psychotherapist-patient privilege was in existence, the proper ruling in this case would have upheld the trial court's decision not to allow the defense to look at the victim's past psychological record.

\textsuperscript{270} Of course, this is sheer speculation. It is possible that the court could have created a privilege whose scope would have embraced the issues of the case.

\textsuperscript{271} 352 S.E.2d 116 (W. Va. 1986).

\textsuperscript{272} The decision was based on § 27-3-1(b)(3). See supra note 259.
B. Proposed Psychotherapist-Patient Privilege

Privacy is not a penumbral emanation of the Constitution, it is the very ground of constitutional government. Privacy preexists all constitutions and fingers the rights humankind hold with authority beyond the reach of constitutional forums. Certain avenues of privacy in our society require special protections, and those protections must come in the form of privileges. For some time the growth of the mental health sciences has outstripped society's ability in general to comprehend it. In the past, the father (sometimes mother), the priest or equivalent was the first and final aid to mental disorders. Mental illness was the last bastion of spiritual demons in medical history.

Today, we know very differently. It is much less a stigma today to see a psychiatrist, or talk about your therapy to your co-workers and family. Businesses do not scurry you out the door for fear that a sudden cosmic event will destroy their welfare. But in the West Virginia legal system, we still do not fully appreciate what mental health therapists do. We have not recognized the crucial and critical value of psychiatrists and psychologists. This we need to do. Our people require a better understanding from our legislature and courts because in so many ways that are ultimately tangible in the expression of a human life the psychologist and psychiatrist have taken the place of priest and even family. The purpose of this privilege is not to let mentally ill criminals free. It is to recognize the fundamental value of mental health in our society and keep government away from that ground of privacy modern medicine has unearthed: an avenue of privacy which in the past we gave other names.

The psychotherapist-patient privilege is necessary both as a means of protecting the patient's right of privacy and as a means of protecting society's important interest in fostering effective psychotherapy. Except in those cases where the patient's right to privacy is outweighed by important competing interests, the patient who consults a psychotherapist has a right, which the law should protect, to prevent the public disclosure in the courtroom of private information provided to the therapist in confidence during therapy. The psychotherapist-patient privilege is needed to prevent such disclosure from occurring without the patient's consent. Society also has an
interest in encouraging persons who need psychotherapy to divulge to therapists whatever information the therapists must have in order to render effective treatment. Unless the state adopts a psychotherapist-patient privilege, patients might hesitate to seek treatment for fear that private and personal information divulged to the therapist during psychotherapy may be disclosed to others during courtroom proceedings.

"An individual’s right of privacy is a fundamental tenet of the American legal tradition protected by common law, statutory provisions, and the Constitution."273 The common law of torts, for example, may impose liability for invasion of privacy in cases where embarrassing private facts that are not of legitimate public concern have been disclosed to the public.274 The Privacy Act of 1974275 provides for the establishment by federal agencies of special procedures for the disclosure of medical records. The Fourth Amendment to the Constitution, which protects the individual’s right of privacy against unreasonable search and seizure, has also been held to prohibit the government from making unauthorized recordings of private conversations.276 The constitutional protection extends to those areas within which the individual has justifiably relied upon an "expectation[] of privacy."277 These are just a few of the many ways in which American law protects various aspects of the individual’s right to privacy.

The privacy interests that are implicated in the psychotherapist-patient relationship are similar to and just as deserving of legal protection as the other privacy interests which are already protected by West Virginia and federal law:

Patients entering a psychotherapeutic relationship ... have a reasonable expectation of privacy in the communications they make to their psychotherapists. Psychotherapy requires that patients fully disclose extremely personal and sensitive information. Compelled disclosure of information communicated by a patient to

a psychotherapist will therefore often threaten the privacy of the patient's most intimate thoughts.\textsuperscript{278}

Quoting from a leading treatise on law and psychiatry, the United States Court of Appeals for the District of Columbia explained what is at stake for the patient as follows: "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame."\textsuperscript{279} Accordingly, some courts have held that the psychotherapist-patient relationship falls within the zone of privacy that is protected by the Constitution.\textsuperscript{280} Even if the psychotherapist-patient privilege is not understood to have constitutional underpinnings, however, the right of privacy that it protects is surely deserving of statutory protection.

The second justification for the psychotherapist-patient privilege is utilitarian. The privilege is "necessary to protect society's interest in . . . counseling relationships by encouraging patients to communicate necessary information" to psychotherapists.\textsuperscript{281} In many types of psychotherapy, patients must fully disclose highly personal information in order for treatment to be effective. Also, persons who consult a psychotherapist face the prospect of social stigmatization or discrimination.

\[\text{[B]ecause the information divulged during treatment is so personal and because there is still some stigma attached to seeking psychotherapeutic treatment, a patient might hesitate to seek treatment and disclose information about herself if there were any danger that the information could be disclosed outside the bounds of the psychotherapist-patient relationship.}\textsuperscript{282}  

\textsuperscript{278} Developments in the Law, supra note 273, at 1547.

\textsuperscript{279} Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting M. GUTTMACHER & H. WEHOFEN, PSYCHIATRY AND THE LAW 272 (1952)).

\textsuperscript{280} See \textit{In re} Lifschultz, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970) ("In Griswold v. Connecticut . . . the United States Supreme Court declared that 'various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone."); \textit{In re} B, 482 Pa. 471, 484, 394 A.2d 419, 425 (1978) ("[I]n Pennsylvania, an individual's interest in preventing the disclosure of information revealed in the context of a psychotherapist-patient relationship has deeper roots than the . . . privilege statute, and . . . the patient's right to prevent disclosure of such information is constitutionally based.").

\textsuperscript{281} Developments in the Law, supra note 273, at 1542.

\textsuperscript{282} Id. at 1543 (footnotes omitted).
Most patients know that if they undergo psychotherapy, they will be expected to divulge very private information and that they cannot obtain therapeutic help except on that condition. "It would be too much to expect them to [undergo treatment] if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand." In addition, "psychotherapy depends on the patient's trust in the therapist built up slowly in a secure context. In the absence of a strong feeling of security, the patient will not even be able to recall past experiences, much less respond fully to treatment."

The public benefits in two ways from "encouraging the psychologically handicapped to seek and fully cooperate in psychotherapeutic counseling." The community obviously benefits from the successful treatment of mentally ill persons who pose a possible danger to society. Furthermore, mentally fit individuals have greater capacities for economic, emotional, and political productivity than mentally disabled persons.

A state can protect its interest in psychotherapy by adopting the psychotherapist-patient privilege, which reassures those who might be considering psychotherapy that they can have confidence in their therapist and that any private information they might divulge to the therapist during the treatment will not be disclosed in courtroom proceedings except in certain specified circumstances in which it is reasonable to allow such disclosure.

Historically, the psychotherapist-patient privilege is an outgrowth of the physician-patient privilege, and most of the states that have enacted the former have also enacted the latter. But it does not follow from the fact that a state has established a psychotherapist-patient privilege that it must also adopt a physician-patient privilege.

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283. Taylor, 222 F.2d at 401 (quoting M. Guttmacher & H. Weihofen, supra note 277, at 272).
As of 1989, at least eight states had enacted either a psychotherapist-patient privilege or a psychiatrist-patient privilege without also having enacted a physician-patient privilege.288 Moreover, "some courts, commentators, and legislatures have found the psychotherapist-patient privilege more defensible than the physician-patient privilege."289 Both the right-to-privacy and the utilitarian justifications are stronger when applied to the psychotherapist-patient relationship than when applied to the physician-patient relationship. Thus, there are ample grounds on which a state might decide to adopt the psychotherapist-patient privilege while at the same time reject the physician-patient privilege.

As to the right of privacy, this right would be much less endangered if there were no physician-patient privilege than if there were no psychotherapist-patient privilege. In the first place, "[t]he patient . . . has a legitimate interest in protecting information about psychiatric treatment because of the social stigma attached to such treatment . . . . This social stigma is not attached to the physically ill, or at least not to the same degree."290 Second, whereas "[i]nformation from psychotherapy is among the most highly personal information imaginable . . . [m]edical treatment deals less frequently with highly personal information."291

The utilitarian case for a physician-patient privilege is also much weaker than the utilitarian case for a psychotherapist-patient privilege. Whereas the unavailability of the psychotherapist-patient privilege would almost certainly deter patients from undertaking psychotherapy, the unavailability of the physician-patient privilege would be very unlikely to deter patients from obtaining medical treatment. Dean Wigmore explains why this is so:

(1) In only a few instances, out of the thousands daily occurring, is the fact communicated to a physician confidential in any real sense. . . . Most of one's ailments are immediately disclosed and discussed. . . .

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288. The eight states are Alabama, Connecticut, Florida, Kentucky, Maryland, Massachusetts, New Mexico and Tennessee. See id.
289. Developments in the Law, supra note 240, at 1548 (footnote omitted).
In addition, "[m]ore than a century of experience with the statutes has demonstrated that the [physician-patient] privilege in the main operates not as the shield of privacy but as the protector of fraud."\(^{293}\) Persuaded by such arguments as these, a number of courts have recognized that the case for a psychotherapist-patient privilege is much more compelling than the case for a physician-patient privilege.\(^{294}\)

Although Dean Wigmore did not apply his four canons for determining an evidentiary privilege to the psychotherapist-patient relationship, we contend the relationship satisfies his canons. First, the average patient enters the relationship with an expectation that communication with a psychotherapist will not be disclosed.\(^{295}\) It is common knowledge that a psychotherapist probes at aspects of an individual’s life that are sensitively private, that is, experiences a patient has had which he or she may not have ever revealed to anyone. The average patient goes into this relationship knowing that he or she must confess what he or she once thought was unconfessable. In pouring out, laying bare the flesh of his or her soul, the patient’s only connection with certainty is the expectation that the psychotherapist will be the only person who knows the mental or emotional problems that plagued him or her.

\(^{292}\) 8 J. Wigmore, Evidence in Trials at Common Law § 2380a, at 829 (J. McNaughton rev. ed. 1961); see also Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor’s Mouth on the Witness Stand?, 52 Yale L.J. 607, 609 (1943) ("[M]edical treatment is so valuable that few would lose it to prevent facts from coming to light in court. Indeed, it may be doubted whether, except for a small range of disgraceful or peculiarly private matters, patients worry much about having a doctor keep their private affairs concealed from the world.").

\(^{293}\) C. McCormick, Evidence § 105, at 228 (E. Cleary 2d ed. 1972).

\(^{294}\) See Lora v. Board of Educ., 74 F.R.D. 565, 575 (E.D.N.Y. 1977) ("[I]t is desirable as a matter of social policy to protect psychotherapist-patient confidences by an evidentiary privilege . . . . In this respect, the specialized psychotherapist-patient relationship is significantly distinguishable from the relation between physicians and patients generally."); State v. Aucoin, 362 So. 2d 503, 505 (La. 1978) (physician-patient privilege “has been severely criticized,” but “[i]n the case of communications to psychiatrists . . . the need for the privilege is clear”).

\(^{295}\) 8 J. Wigmore, supra note 95, at 101.
Second, the element of confidentiality is essential to the complete and satisfactory maintenance of the relationship.\textsuperscript{296} It is extremely doubtful that any patient would maintain an honest and open relationship with a psychotherapist if he or she knew that his or her honesty and openness was subject to disclosure. The average patient, if he or she did not terminate or refuse to enter the relationship, would probably lie or conceal pertinent information from the psychotherapist.

Third, the relationship is one that society believes is worth fostering.\textsuperscript{297} Evidence of the value placed on the relationship by society is readily apparent in the fact that forty-nine states have enacted statutes making the relationship privileged. Society’s approval of the relationship could not be expressed any stronger.

Lastly, the injury to the relationship from compelled disclosure far outweighs the benefit a court would gain from receiving the communication as evidence.\textsuperscript{298} Information that psychotherapists solicit from patients has unquestioned value and relevancy in the context of psychotherapy. The oftentimes vague, unconnected and surreal data that psychotherapists extract from patients become real and hard facts for psychotherapists. Such information is little understood by laypersons. Placing psychotherapy data in front of a trier of fact is often a meaningless exercise. However, compelling disclosure of a patient’s communication with a psychotherapist can lead to the destruction of the relationship and could cause potential patients to refrain from seeking out needed psychotherapeutic help.

It will be noted here that the proposed psychotherapist-patient privilege model excludes a physician who is not engaged in the diagnosis or treatment of a patient for a mental or emotional condition. That is, the model does not propose a physician-patient privilege be created.\textsuperscript{299} The physician-patient privilege satisfies only

\textsuperscript{296} Id.

\textsuperscript{297} Id.

\textsuperscript{298} Id.

\textsuperscript{299} For a general discussion contrasting the psychotherapist-patient privilege and physician-patient privilege, see Gellman, Prescribing Privacy: The Uncertain Role of the Physician of Patient Privacy, 62 N.C.L. Rev. 255 (1984); Guttmacher & Weihofen, Privileged Commun-
two of Dean Wigmore's four canons: confidentiality is expected by the patient, and the relationship is one that society should foster.\textsuperscript{300}

As previously stated, it is doubtful that confidentiality is necessary for the maintenance of most physician-patient relationships. A patient is not likely to terminate his or her relationship with a physician because of evidentiary testimony regarding a physical injury. Any harm that would occur to the relationship would be greater than the benefit gained by disclosure in a courtroom. Common sense dictates that the general public would not stop going to physicians because of the possibility that their physical injuries would be made known in a court of law. With rare exceptions, physical injuries have never carried stigmatism or caused irreparable embarrassment due to disclosure.

For the purpose of statutory enactment, it is recommended that the below proposed privilege be placed at section ten, article three, chapter fifty-seven of the West Virginia Code:\textsuperscript{301}

Section 57-3-10. Psychotherapist-Patient Privilege

A. Definitions. For the purposes of this section:

1. A "psychotherapist" is:

   (a) A person authorized to practice medicine in any state or nation [or reasonably believed by the patient so to be] who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

   (b) A person licensed or certified as a psychologist under the laws of any state or nation [or reasonably believed by the patient so to be] who is engaged


\textsuperscript{301} This recommendation is being made primarily because the privilege includes psychiatrists and psychologists. It is therefore, perhaps, more appropriate to place the privilege in the neutral "Competency of Witnesses" section of the Code, as opposed to placing it in the sections dealing with psychologists or physicians.
in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.\textsuperscript{302}

2. A "patient" is a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.\textsuperscript{303}

3. "Communications" includes conversations, correspondence, actions, and occurrences relating to diagnosis or treatment, regardless of the patient's awareness of such conversations, correspondence, actions, and occurrences, and any records, memoranda, or notes of the foregoing.\textsuperscript{304}

4. A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:

   (a) Those persons present; including family members, to further the interest of the patient in the consultation, examination, or interview.

   (b) Those persons necessary for the transmission of the communication.

   (c) Those persons who are participating in the diagnosis and treatment of the patient under the direction of the psychotherapist or reasonably believed to be so by the patient.\textsuperscript{305}

B. \textit{General Rule of Privilege}. In civil and criminal cases, in proceedings preliminary thereto, and in legislative and administrative proceedings, a patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications, wherever made, relating to diagnosis or treatment

\textsuperscript{302} The definition of psychotherapist includes a medical doctor who is involved in diagnosing or treating mental or emotional conditions, including alcoholism and other drug addiction, so as not to exclude the general practitioner and to avoid making unnecessary distinctions about what is and is not the practice of psychiatry. The requirement that a psychologist be licensed or certified is in keeping with the current standard of the state of West Virginia. It is also deemed necessary and fair to extend the privilege to a patient who has been misled as to the qualifications of the psychotherapist. That is, if the patient reasonably believes the psychotherapist has met the qualifications to perform the services needed, the patient should not be deprived of the privilege if it is later discovered that the psychotherapist was not authorized, licensed or certified to perform the services needed.

\textsuperscript{303} The definition of patient is meant to include a person seeking diagnosis or treatment for a mental or emotional condition, including alcoholism and other drug addiction, but is not meant to include the individual who consults a psychotherapist for business or other professional purposes. This exclusion would also extend to the individual who is submitting to an examination for scientific purposes.

\textsuperscript{304} The definition of communication is meant to include all information, regardless of how it is gathered, and irrespective of whether it comes from words or actions of an active patient or from a patient who is unconscious.

\textsuperscript{305} Communication which would be considered confidential is that which is made in the interest of diagnosis or treatment by the psychotherapist and not intended for general dissemination. This subsection also permits a psychotherapist to engage the services of individuals who are necessary for adequate diagnosis or treatment without destroying the concept of confidentiality.
of the patient’s mental or emotional condition between patient and psychotherapist, or between members of the patient’s family and the psychotherapist, or between any of the foregoing and such persons who participate, under the supervision of, or in cooperation with, the psychotherapist in the accomplishment of the objectives of diagnosis or treatment.306

C. Who May Claim the Privilege. The patient or the patient’s attorney on behalf of the patient; a guardian or conservator of the patient; the personal representative of a deceased patient; the psychotherapist, but only on behalf of the patient; further, the authority of a psychotherapist to claim the privilege is presumed in absence of evidence to the contrary.307

D. Exceptions to a Claim of Privilege.308

1. Condition an Element of Claim or Defense. There is no privilege under this section as to a communication relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense, or, after the patient’s death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense.309

2. Examination by Order of Court. If the court orders an examination of the mental or emotional condition of a patient, whether a party or witness, communications made in the course thereof are not privileged under this section with

306. This subsection is meant to convey that the privilege extends to all proceedings. It is also the intent here to prevent the “eavesdropper” exception, which some courts acknowledge, from destroying the privilege. That is, preventing the testimony of someone who secretly obtained information revealed confidentially between patient and psychotherapist. Further, this subsection makes privileged communication that takes place anywhere that would not be considered patently public. It is further intended that the privilege be extended to communications between the psychotherapist and members of the patient’s family, when such communication is necessary for the diagnosis or treatment of the patient. Where the psychotherapist finds it necessary to communicate with other professionals in diagnosing or treating the patient, such communication, however transmitted, is intended to be privileged by this subsection.

307. The privilege is intended to be controlled by the patient and for the benefit of the patient. If circumstances arise and the patient is unable to assert the privilege, this subsection makes it clear that a guardian, conservator, or the patient’s attorney may assert the privilege on behalf of the patient. Where a patient is deceased, it is intended that the deceased patient’s personal representative be allowed to assert the privilege in a manner reasonably to be expected by the patient if he or she lived. The psychotherapist is also intended to be able to assert the privilege on behalf of the patient in any proceeding.

308. The exceptions to the privilege are intended to be narrowly interpreted and where doubt arises as to whether or not an exception applies, it is intended that the privilege be given greater weight to exclude the doubtful exception.

309. This subsection is intended to prevent a patient from introducing his or her mental or emotional condition into a proceeding, and then invoking the privilege to preclude the other side from having access to communication regarding his or her mental or emotional condition. It is intended that the judge or presiding officer make a preliminary investigation as to whether or not a just resolution of the case demands that the communication in whole or in part be disclosed.
respect to the particular purpose for which the examination is ordered, but this excludes any admissions of guilt.\textsuperscript{310}

3. \textit{Proceedings for Hospitalization.} When a psychotherapist, in the course of diagnosis or treatment of the patient, finds it necessary to disclose such communication either for the purpose of placing the patient in a hospital for mental illness or for the purpose of retaining the patient in a hospital for mental illness, the privilege is not applicable.\textsuperscript{311}

4. \textit{Imminent Danger.} When a psychotherapist, in the course of diagnosis or treatment of the patient, finds it necessary to disclose such communication either for the purpose of placing the patient under arrest or under the supervision of law enforcement authorities because of the threat of imminently dangerous activity by the patient against him/herself or another person, the privilege is not applicable.\textsuperscript{312}

5. \textit{Crime or Fraud.} The privilege afforded by this section is not applicable if the services of the psychotherapist were sought, obtained or used to enable or aid anyone to commit or plan a crime or fraud, or to escape detection or apprehension after the commission of a crime or fraud.\textsuperscript{313}

6. \textit{Psychotherapist-Patient Litigation.} The privilege afforded by this section is not applicable in any proceeding between the patient and the psychotherapist in which disclosure is reasonably necessary to a defense of the psychotherapist.\textsuperscript{314}

E. This section is in addition to the protection afforded pursuant to section one, article three, chapter twenty-seven of this Code.

Historically, the West Virginia Supreme Court of Appeals has refused to recognize privileges that did not exist under common law, a statute or the West Virginia Constitution.\textsuperscript{315} But the Judicial Reorganization Amendment and Rule 501 of the West Virginia Rules

\textsuperscript{310} An exception to the privilege is present when a judge orders an evaluation of the mental or emotional condition of the patient. However, the privilege remains and protects those communications which are made during a court-ordered evaluation, but are not relevant to the purpose for which the evaluation was ordered. It is also intended that the privilege remain and protect communication made during the evaluation which is self-incriminating.

\textsuperscript{311} This exception to the privilege is applicable only when involuntary commitment is reasonably believed to be necessary to protect the patient or others. Further, where involuntary retention is reasonably believed to be necessary, this exception applies.

\textsuperscript{312} Where a patient presents imminent danger to him/herself or to others, and it is reasonably believed that intervention by law enforcement officials is necessary to prevent the said danger, the privilege does not apply.

\textsuperscript{313} This exception is intended to prevent the services of a psychotherapist from being utilized for the purpose of planning or committing a crime or fraud, or shielding crime or fraud after the fact.

\textsuperscript{314} This exception permits the psychotherapist to reveal confidential communication in defense of him/herself, in a proceeding between the psychotherapist and patient.

\textsuperscript{315} Mohr v. Mohr, 119 W. Va. 253, 256, 193 S.E. 121, 122 (1937).
of Evidence (W.V.R.E.) have rendered prior legal precedent obsolete.

There are four ways to create new privileges. First, there can be a constitutional amendment. Second, a privilege may be found in a statute from the legislature. Third, the Supreme Court of Appeals can judicially legislate a new privilege under its constitutional authority. Here, the court would act with the same authority by which it creates and amends the Rules of Evidence. Fourth, Rule 501 of the W.V.R.E. gives both the court of appeals and the circuit courts case-by-case authority to create and apply privileges. And while one might argue that Rule 501 of the W.V.R.E. merely restates prior existing common law on privileges, a fair and reasonable approach to Rule 501 clearly shows it does not restrict privileges to their existence under common law. Rather, the creation of a new privilege is "governed by the principles of the common law." Federal courts in the past have used similar language to substantially expand or restrict common law privileges.

W.V.R.E. 501 and F.R.E. 501 differ but not to the extent their meanings negate one another. Like its federal counterpart, W.V.R.E. 501 manifests a desire not to freeze the law of privilege but rather to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. Clearly, the liberal creation of new privileges is not always desirable, but where the legislature has failed to create privileges and confidential statutes in particularly sensitive areas, a court should have little reluctance to act.

316. The West Virginia Rules of Evidence contain the following:

Rule 101. Scope. These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101. Rules of evidence set forth in any West Virginia statute not in conflict with any of these rules or any other rules adopted by the Supreme Court of Appeals shall be deemed to be in effect until superseded by rule or decision of the Supreme Court of Appeals.

W.V.R.E. 101.

Clearly, this rule demonstrates the paramount role of the West Virginia Supreme Court of Appeals in establishing rules of evidence.


318. But see, University of Penn. v. EEOC, 110 S. Ct. 577, 582, (1990) the Court was asked to create a new privilege under Rule 501. The University argued that an "academic freedom" privilege should be declared to protect information submitted in peer review cases. The
In the power to create privileges, the independence of the West Virginia Supreme Court of Appeals exceeds that of most state and federal courts. Article 8 of the West Virginia Constitution gives the Supreme Court of Appeals the power to create rules of procedure/evidence without giving the executive or legislative branches powers to appeal or review. Should the Supreme Court of Appeals create a privilege, it would require a constitutional amendment to erase its effect. The court has recently exercised that authority in the case of *State ex rel. Hudok v. Henry.*

Since privileges are expressions of substantial public policy, courts should initially defer to legislative wisdom unless the legislative inaction is irresponsible. The psychotherapist-patient privilege is a

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Court rejected the invitation:

We do not create and apply an evidentiary privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence..." Tramel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 912, 63 L.Ed.2d 186 (1980). Inasmuch as [t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public... has a right to every man's evidence,' *id.,* at 50, 100 S. Ct. at 912, quoting United States v. Bryan, 339 U.S. 323, 331, 70 S. Ct. 724, 730, 94 L.Ed. 884 (1950), any such privilege must be strictly construed. 445 U.S., at 50, 100 S. Ct. at 912.

Moreover, although Rule 501 manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, *id. at* 47, 100 S. Ct. at 910, we are disinclined to exercise this authority expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. Cf. Branzburg v. Hayes, 408 U.S. 665, 706, 92 S. Ct. 2646, 2669, 33 L.Ed.2d 626 (1972). The balancing of conflicting interests of this type is particularly a legislative function.

With all this in mind, we cannot accept the University's invitation to create a new privilege against the disclosure of peer review materials. We begin by noting that Congress, in extending Title VII to educational institutions and in providing for broad EEOC subpoena powers, did not see fit to create a privilege for peer review documents. 319. Without citing its recent source of authority for the creation of new privileges (WVRE 501), the West Virginia Supreme Court of Appeals, relying upon the First Amendment and the West Virginia Constitution, Article III, § 7, extended a qualified privilege to media reporters:

To protect the important public interest of reporters in their news-gathering functions under the First Amendment to the United States Constitution, disclosure of a reporter's confidential sources or news-gathering materials may not be compelled except upon a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.


The court makes it clear that where the reporter is not engaged in a news-gathering function, he is subject to giving testimony as to what he observed to the same extent as any other witness.
gravely important one. It embraces the progressive wisdom of a society, and thus we believe it is best expressed by the legislature. The legislature has specifically created privileges for professional counselors and social workers. In contrast to psychotherapy, these fields do not have the depth of contact with people nor require the depth of education and training. These points were distinguished by the Alaska Supreme Court when it stated, “It appears to us that there is a substantial difference between the activities comprehended under the term ‘psychotherapy’ and those covered by the fields of counseling and psychiatric social work... counseling is aimed not primarily at uncovering deep psychological processes but at enabling the client to make more effective use of his present resources.”

Although it is recommended that this new privilege be approved by the legislature, the role of the court will remain critical. It has shown its capacity to identify and dramatize problems in the evidence area; this role is an essential catalyst for continued reform. The courts will have to make the ultimate decisions of how this newly created privilege will be interpreted and applied. Nevertheless, its role is better adapted to review than to initiation. As in this instance, where categorical rules involving substantial public policy are needed, it is better for the legislature to formulate them.

This is a privilege which protects the place in our people’s psyche where they dream. It is the primal font of social health and individual happiness. That area mandates protection, and to achieve that protection mandates the attention and direction of the legislature.

322. At the same time, it is clear that communications made to professionals who are not psychotherapists but provide similar counseling services, such as social workers, marriage counselors, and rap counselors, should remain privileged. The problems people bring to these professional counselors are often the same problems brought to psychotherapists; the need for trust and full disclosure is the same, and an identical privacy interest is involved. Furthermore, denying a privilege to communications made to these professional counselors while granting a privilege to psychotherapist-patient communications harms only those who cannot afford the services of a psychotherapist.
