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Privileges: Spousal, Attorney-Client, and Priest-Penitent
United States Tax Court
February 26, 2004

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I. Privileges in General

A. Privileges and Their Underlying Rationale

Even relevant, highly reliable evidence may not be the proper subject of either discovery or proof, because it is protected by a privilege. Some privileges have been recognized by the federal courts as being **constitutionally mandated**. Some, such as the tax practitioner privilege of I.R.C. § 7525, are **statutory**. Otherwise, when federal substantive law applies, Fed. R. Evid. 501 provides that privileges will be governed by the **“principles of the common law” as interpreted by the federal courts “in the light of reason and experience.”**

Privileges fall into two categories: those that protect only **confidential communications** made within the context of a particular type of relationship and those that protect even **non-confidential information**. Among the first are the attorney-client privilege and the husband-wife confidential communications privilege. Among the second are the husband-wife “spousal immunity” or “anti-marital facts” privilege and the privilege against self-incrimination.

Generally, privileges have been recognized in order to **encourage certain types of communications or relationships**, the importance of which is considered greater in the aggregate for the promotion of justice, public health, and social stability than is the cost of excluding important evidence in particular cases.¹ For example, the attorney-client privilege is believed to enable full and frank discussions between attorney and client, which will enhance the likelihood that the client receives adequate representation; the psychotherapist-patient privilege is believed to encourage mentally ill persons to seek psychiatric care; the husband-wife privileges are believed to shore up the institution of marriage.

In expounding on this **traditional “instrumental” rationale** given for privileges, Wigmore states that the following four conditions must be met in order to justify the creation of a privilege:

¹See *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (Privileges are proper “only to the very limited extent that [they have] a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”); 1 MCCORMICK ON EVIDENCE § 72 at 269 (J. Strong, ed., 4th ed. 1992) (hereinafter referred to as “McCormick”). See generally E. Imwinkelreid, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* (2 vols.) (Aspen 2002) (hereinafter referred to as “Imwinkelreid, *THE NEW WIGMORE*”); *Developments in the Law: Privileged Communications*, 98 HARV.L.REV. 1450 (1985).

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.²

Under that “instrumental” rationale, privileges should not be recognized unless the communications would be deterred if there were no privilege. But because it is unlikely, for example, that one spouse considers the availability of a husband-wife privilege before confiding in the other, this traditional rationale alone may not justify the spousal, as well as certain other, privileges.³ If these privileges are to be honored, then they must be supported by a second rationale: perhaps the individual's **right to privacy** or autonomy,⁴ or perhaps the unseemliness of the courts' prying into certain relations that society wishes to encourage.⁵

B. Strict Construction of Privileges Except for the Privilege Against Self-Incrimination

²8 J. Wigmore, WIGMORE ON EVIDENCE § 2285 (rev.1961) (emphasis omitted) (hereinafter referred to as “Wigmore”).

³1 McCormick § 72 at 270.

⁴*Id.* & § 77; Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO.L.J. 61, 85–100 (1973); Imwinkelreid, *THE NEW WIGMORE*, Preface at xlviii–xlix, ch. 5, & § 10.4 (suggesting “autonomy or decisional privacy” as “the preferable basis for a new, humanistic privilege theory”); Louisell, *Privileges in Federal Court*, 31 TULANE L.REV. 101 (1956). *See generally* Note, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 GA. L. REV. 173 (1985).

⁵*See* 2 Louisell & Mueller, *FEDERAL EVIDENCE* § 219 at 892–93 (1985) (“Three reasons, closely related, support the existence of the privilege. One is that human privacy ought to be respected, specifically in the context of the marital relationship, and in the twentieth century this principle has in related contexts attained constitutional status. Another is that it is unseemingly, even offensive to many, to use the power of the state to force revelation of marital confidences. Yet another is that this protected privacy, and the confidence between spouses which it encourages, are utterly essential to the complete fulfillment of marriage. Consequently, it is fair to say that the privilege provides support for the institution of marriage itself—a proposition which is sound even if it be conceded that spouses do not consciously rely upon the privilege of confiding in one another.”).

Because privileges exclude relevant, reliable evidence, as a general matter, they are strictly construed, because they exclude relevant, reliable evidence.⁶ The privilege against self-incrimination, however, must be liberally construed “in favor of the right it was intended to secure.”⁷

C. Invocation, Waiver, and Duration of Privileges

A privilege may be invoked either by its holder or by another person present, including the judge, on the holder's behalf.⁸ The party or person seeking to invoke the privilege has the **burden of proving necessary preliminary facts**, to the trial judge's satisfaction **under Fed. R. Evid. 104(a), by a preponderance of the evidence.**⁹

Only the holder of a privilege may complain on appeal with regard to the violation of the privilege.¹⁰ Therefore, if the holder of the privilege is not a party to the case, the violation of a privilege will not be reversible error, and the holder will not have waived the privilege in any subsequent litigation. For these and other practical reasons, such as the inability to assess foundational facts, trial judges are cautioned against *sua sponte* excluding evidence on the

⁶*E.g.*, *Pierce County v. Guillen*, 537 U.S. 129, (2003); *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, 189 (1990); *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982); *United States v. Nixon*, 418 U.S. 683, 710 (1974) (“Whatever [privileges’] origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”) (footnote omitted). *See United States v. Mandel*, 415 F.Supp. 1025, 1030 (D.Md.1976) (“Since privileges by their very nature take from the trier of fact’s consideration evidence which is frequently relevant, and are therefore considered to be in ‘derogation of the search for truth,’ the law sustains a claim of privilege only when necessary to protect and preserve the interest of significant public importance that the specific privilege is designed to serve.”) (citation omitted), *aff’d in part & vacated in part*, 591 F.2d 1347 (4th Cir.1979), *aff’d on rehearing en banc by equally divided court*, 602 F.2d 653 (4th Cir.1979) (per curiam), *cert. denied*, 445 U.S. 961 (1980); 1 McCormick § 74 at 275 (“Since privileges operate to deny litigants access to every person’s evidence, the courts have generally construed them no more broadly than necessary to accomplish their basic purposes.”).

⁷*E.g.*, *Ullman v. United States*, 350 U.S. 422, 426 (1956); *Emspak v. United States*, 349 U.S. 190, 198 (1955).

⁸1 McCormick § 73.1 at 272-73.

⁹*See United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986) (proponent of a privilege must prove its applicability); *Zaentz v. Comm’r*, 73 T.C. 469, 475 (1979). *Compare, e.g.*, *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992) (de novo review appropriate as to admissibility of evidence allegedly protected by attorney-client privilege, as posing a mixing question of law and fact), *opinion vacated*, 1993 WL 524680 (4th Cir. 1993) with *United States v. Frederick*, 99-1 U.S.T.C. ¶ 50,465 (7th Cir. 1999) (standard of review in Seventh Circuit is one of “clear error”).

¹⁰1 McCormick § 92 at 340. *But see* Cal.Evid.Code § 918 (West 1966) (permitting a party to “predicate error on a ruling disallowing a claim of privilege by his spouse”).

The improper exclusion of evidence, however, in deference to a non-party’s privilege, may be the proper subject of complaint on appeal. 1 McCormick § 73.1 at 272-74.

ground of privilege.¹¹ The question of **appealability of an order to disclose** allegedly privileged matters is somewhat unsettled.¹²

All privileges may be waived, but only by their holder (the person who is sought to be protected by the privilege) **or the holder's agent**.¹³ Once a privilege has been waived, it cannot be resuscitated.¹⁴ The party relying on a waiver of a privilege has the burden to show waiver, by a preponderance of the evidence, to the trial judge's satisfaction under Fed. R. Evid. 104(a).

Waiver will be effected by the holder's **voluntarily disclosing or consenting to disclosure, outside another privileged setting, of any significant part of the privileged communication or matter**.¹⁵ Waiver may be effected by voluntary production of privileged

¹¹Imwinkelreid, THE NEW WIGMORE § 65.3.

¹²*Compare* *Summons v. City of Racine*, 37 F.3d 325 (7th Cir. 1994) (no interlocutory appeal lay under collateral order doctrine regarding order to disclose informant's identity, though mandamus would lie if court's decision were clearly erroneous) *and* *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 857, 860-61 (3d Cir. 1994) (although discovery order denying privilege was not applicable under the collateral order doctrine, mandamus jurisdiction did lie where trial court had committed clear errors of law) *with* *United States v. Philip Morris, Inc.*, 314 F.3d 612 (D.C. Cir. 2003) (finding jurisdiction under collateral order doctrine to review discovery order rejecting claim of attorney-client privilege as to memorandum) (over dissent of Randolph, J.) *and* *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997), *reh'g & reh'g en banc denied* (1997) (distinguishing *Racine* when order is against a non-party). *See generally* Gimbal, *Appellate Review of Orders Compelling the Disclosure of Attorney-Client Communications: Practical Finality, Mandamus, Contempt, and Evidentiary Preclusions*, Trial Evidence (Vol. V, no. 3, Summer 1996).

¹³*See* *United States v. Campbell*, 73 F.3d 44 (5th Cir. 1996) (per curiam) (trustee of a limited partnership in bankruptcy has power to waive partnership's attorney-client privilege).

¹⁴The advisory committee note to Proposed Fed. R. Evid. 511 explains:

By traditional doctrine, waiver is the intentional relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. California Evidence Code § 912; 8 Wigmore § 2327 (McNaughton Rev.1961).

¹⁵*E.g.*, *Rogers v. United States*, 340 U.S. 367 (1951), *reh'g denied*, 341 U.S. 912 (1951); *Hawkins v. Stables*, 148 F.3d 379 (4th Cir. 1998) (waiver by denial that a privileged conversation took place); *United States v. Premises Known as 281 Syosset Woodbury Rd.*, 71 F.3d 1067 (2d Cir. 1995) (marital communications privilege waived as to post-arrest conversations when wife had testified freely to pre-arrest conversations); *United States v. Jones*, 696 F.2d 1069, 1072-73 (4th Cir. 1982) (dissemination of opinion letters defeated attorney-client privilege); *In re Grand Jury Investigation*, 604 F.2d 672, 675 (D.C.Cir. 1979), *cert. denied*, 444 U.S. 915 (1979); *Suburban Sew 'N Sweep Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260-61 (N.D.Ill.1981) (attorney-client privilege waived as to client's drafts of letters to attorney, which client threw in garbage); *United States v. Mierzwicki*, 500 F.Supp. 1331, 1334 (D.Md.1980) (both disclosure by defendant to IRS agents at investigatory interviews and statements made by counsel, acting on defendant's behalf, waived attorney-client privilege); 8 Wigmore § 2276 (rev.1961 & Supp. 1996); *Bernardo v. Comm'r*, 104 T.C. 677, 685 (1995) (attachment to tax return); *Hartz Mountain Indus. v.*

matter during discovery. Although the **cases vary with regard to the effect of inadvertent disclosure**, which often occurs **during discovery**,¹⁶ most cases find waiver to have been effected when disclosure was inadvertent and the holder had taken insufficient precautions against it, or even if the holder had taken reasonable precautions, the holder failed to promptly take appropriate curative action after the disclosure.¹⁷

Waiver will result **if the holder of the privilege puts in issue in a judicial proceeding the subject matter of the privileged information or communications, or otherwise raises a claim or defense which, in fairness, requires that the opposing party be able to inquire into or**

Comm'r, 93 T.C. 521 (1989) (house counsel's sworn summary of internal position).

Proposed Fed. R. Evid. 511, which was not enacted but is declarative of the common law, provided:

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

The advisory committee note to Proposed Fed. R. Evid. 511 explains:

The rule is designed to be read with a view to what it is that the particular privilege protects. For example, the lawyer-client privilege covers only communications, and the fact that a client has discussed a matter with his lawyer does not insulate the client against disclosure of the subject matter discussed, although he is privileged not to disclose the discussion itself. See McCormick § 93. The waiver here provided for is similarly restricted. Therefore a client, merely by disclosing a subject which he had discussed with his attorney, would not waive the applicable privilege; he would have to make disclosure of the communication itself in order to effect a waiver.

Unif.R.Evid. 510, which is identical in substance to Proposed Fed. R. Evid. 511 but more succinct, provides:

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

In **Black & Decker Corp. v. United States**, 2003 TNT 180-15 (D. Md. 2003) (discussed in Raby & Raby, *Catch-22 in "Reasonable Expectations" of Privilege and Confidentiality*, Tax Notes, Feb. 23, 2004, at 1011-12), the magistrate judge upheld the taxpayer's disclosure of a memorandum on which it relied as a defense to any possible claim for penalties, which was conditioned on the fact that that disclosure would not result in a wholesale subject matter waiver).

¹⁶See, e.g., *McCafferty's Inc. v. Bank of Glen Burnie*, 129 F.R.D. 163 (D. Md. 1998); 6 L. McLain, MARYLAND EVIDENCE: STATE AND FEDERAL §§ 503:17 nn.42-45 and 519:2 nn.4-8 and accompanying text (Thompson/West 2d ed. 2001 & Supp. 2003) (hereinafter referred to as "MARYLAND EVIDENCE: STATE AND FEDERAL").

¹⁷See, e.g., *United States v. Rigus*, 281 F.Supp.2d 733 (S.D.N.Y. 2003) (under circumstances, no waiver of attorney work product by government).

prove privileged matters.¹⁸ Failure to produce privileged information so made relevant may preclude that claim or defense.¹⁹

In *Johnston v. Commissioner*, the Tax Court applied the following three-pronged test, which is the approach endorsed both by the United States District Court for the District of Columbia and the Court of Appeals for the Ninth Circuit, to which appeal would have been taken in *Johnston*: **“(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. * * *”**²⁰ The Tax Court noted that several other approaches may be found in the federal case law, including another balancing test (First Circuit), a test resulting in “automatic waiver” by asserting a claim of defense making the privileged information relevant (S.D.N.Y.), and a test finding waiver only if a litigant directly injects the privileged matter into issue (Third Circuit). The Tax Court had previously quoted the District of Columbia case “with positive implication.”²¹

In a 2003 application of this three-pronged test, the United States District Court for the District of New Jersey considered a discovery dispute in an IRS claim for a corporation’s income tax liabilities.²² **The taxpayer raised reliance-on-counsel reasonable cause as an affirmative defense to an accuracy related penalty.** That affirmative act put privileged information at issue, and to apply the privilege would have prejudiced the government. The court held the privilege to have been waived.

¹⁸*Fannon v. Johnson*, 88 F.Supp.2d 753 (E.D.Mich.2000) (police officer defending false arrest action, in which it was alleged that officer entrapped narcotics arrestee in order to supply officer’s own drug habit, testified “pertaining to” content of confidential communications in officer’s past drug abuse treatment, as required to compel disclosure of treatment records under PHSA, by stating that he had been only sporadic user of cocaine at time of alleged false arrest, not addict); *Anderson v. Nixon*, 444 F.Supp. 1195, 1199 (D.D.C.1978) (journalist waived his journalist’s privilege regarding sources by suing with regard to alleged conspiracy that sought to retaliate against his sources); *Truck Ins. Exch. v. St. Paul Fire Co.*, 66 F.R.D. 129, 132–33 (E.D.Pa.1975) (plaintiff waived attorney-client privilege by bringing suit against insurer, who, under facts, must be treated as joint client in original matter); *Johnston v. Comm’r*, 119 T.C. 27 (2002) (applying three-pronged test. *See* *Whatley v. Merit Distribution Servs.*, 191 F.R.D. 655, 660-61 (S.D.Ala.2000) (a party may be equitably estopped from asserting a privilege if the party has made false statements, *e.g.*, in an employment application).

¹⁹*See* *Columbia Pictures Television, Inc. v. Kryphon Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1195-96 (9th Cir. 2001) (defense of reliance on counsel properly precluded when client failed to answer questions regarding relevant communications until the eleventh hour).

²⁰119 T.C. 27 (2002).

²¹*Id.* (citing *Karme v. Comm’r*, 73 T.C. 1163, 1184 (1980), *aff’d*, 673 F.2d 1062 (9th Cir. 1982)). *See also id.* (citing *Bernardo v. Comm’r*, 104 T.C. 677, 691 (1995) as having employed a consistent test).

²²*In re G-I Holdings, Inc.*, 218 F.R.D. 428 (D.N.J. 2003).

In another case, the United States Court of Appeals for the Second Circuit declined to reach the issue of whether a wife's raising the **innocent owner defense** in civil forfeiture proceedings waived her marital communications privilege.²³

Fed. R. Civ. P. 26(b)(5) dictates that a party must notify other parties if it is withholding materials otherwise subject to disclosure, because it is asserting a claim of privilege. Failure to give such notice may be viewed as a waiver of the privilege.

If a party uses privileged material to refresh a witness' recollection, the party waives the privilege with regard to the item or items used.²⁴

Most privileges, including the attorney-client privilege, extend beyond the death of the holder.

D. Possible *In Camera* Review

Whether to undertake an *in camera* review of allegedly privileged documents is, **generally, a matter for the exercise of the trial court's discretion,**²⁵ when a showing has been made, through legally obtained, nonprivileged evidence, **of a sufficient factual basis to support a reasonable person's good faith belief that an *in camera* review may show that an exception to the privilege applies.**²⁶

In *Pennsylvania v. Ritchie*,²⁷ however, the United States Supreme Court held that, although a person accused of a sex crime against a child has no constitutional right to inspect confidential files of a child welfare agency that reflect the victim's statements regarding abuse,

²³United States v. Premises Known as 281 Syosset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995).

²⁴E.g., *Chavis v. North Carolina*, 637 F.2d 213, 223-24 (4th Cir. 1980) (state prosecutor waived work product privilege by having witness testify about "amended" pretrial statement); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 13 (N.D. Ill. 1972). Cf. *Georgou v. Fritzshall*, 1996 WL 73592 (N.D. Ill. Feb. 20, 1996), subsequent proceeding, 178 F.3d 453 (7th Cir. 1999) (if a party discloses privileged material to a testifying expert, the material must be disclosed to opposing parties).

²⁵E.g., *In re Sealed Case*, 737 F.2d 94, 101 n.10 (D.C. Cir. 1984); *Mason C. Day Excavating, Inc. v. Lumbermens Mutual Cas. Co.*, 143 F.R.D. 601, 604 (M.D. N.C. 1992).

²⁶United States v. Zolin, 491 U.S. 554 (1989). See, e.g., **Hartz Mountain Ind. v. Comm'r**, 93 T.C. 521, 524 (1989); **Trafigant v. Comm'r**, 89 T.C. 501, 502 n.3 (1987) (Fifth Amendment); **Branerton Corp. v. Comm'r**, 64 T.C. 191, 201 (1975) (government privilege); **P.T.&L. Constr. Co. v. Comm'r**, 63 T.C. 404, 411 (1975) (executive privilege); **Hospital Corp. of America v. Comm'r**, T.C. Memo 1994-100. Cf. *Love v. Johnson*, 57 F.3d 1305 (4th Cir.1995) (defense made sufficient showing to trigger right to *in camera* examination of *Brady* material).

²⁷*Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

the trial court must review the files *in camera* to determine whether information is "material" to the defense.

II. Federal Rule of Evidence 501: The Flexibility of the Common Law

In cases where federal substantive law applies,²⁸ Fed. R. Evid. 501 provides simply that privileges, except as constitutionally mandated or provided by statute, "shall be governed by the principles of the common law" as interpreted by the federal courts "in the light of reason and experience." Rule 501 is a far cry from the proposed rules regarding privilege drafted by the Advisory Committee and forwarded to Congress by the Supreme Court during the Nixon administration.

A. Rule 501 as a Fail-Safe to Proposed Article V

Proposed Article V would have codified nine privileges: (1) required reports privileged by statute, (2) attorney-client, (3) psychotherapist-patient, (4) husband-wife testimony against a spouse who is a criminal defendant, (5) clergy-penitent, (6) political vote, (7) trade secrets, (8) state secrets and other official information, and (9) informer's identity. It would have done away with the husband-wife confidential communications privilege and codified only a privilege against adverse spousal testimony in a criminal proceeding. **Recognition of other privileges neither required by the Constitution nor enacted by statute would have been precluded.**

Proposed Article V was so controversial that the passage of the Federal Rules of Evidence was threatened. In the wake of the Watergate scandal, critics lambasted the proposed privilege for governmental secrets, which exceeded that extended at common law.

In order to save the Evidence Rules project, proposed Article V was scuttled,²⁹ in favor of the more general Rules 501 (where substantive federal law applies) and 502 (*Erie* cases). Moreover, the **enabling act was amended** on the floor of Congress to single out privilege as the only area in which the Supreme Court cannot promulgate evidentiary rules without the affirmative cooperation of Congress.³⁰

Yet Fed. R. Evid. 501 permits a court so disposed "in the light of reason and experience" to cut back or to destroy privileges traditionally available under the federal common law, so long

²⁸*E.g.*, *In re Rafsky*, 306 B.R. 152 (D. Conn. 2003) (in federal bankruptcy court, federal law regarding marital privilege applied).

²⁹*See* 120 Cong. Rec. 37,084 (1984) (statement of Sen. Taft).

³⁰28 U.S.C.A. § 2074(b). The enabling act, as initially proposed, had provided generally for the Supreme Court's ability to promulgate evidentiary rules and reserved for Congress a veto power.

as they are not based in enacted law. Only privileges found to have such a basis, *e.g.*, the Fifth Amendment privilege to refuse to testify against oneself and any executive privilege inherent in the separation of powers,³¹ would be immune from such treatment.

B. Subsequent Changes in the Federal Common Law of Privilege

Fed. R. Evid. 501 permits case by case balancing and reassessment of social policies in deciding whether and to what extent to recognize a new privilege or expand or retrench an established one. Hand in hand with Fed. R. Evid. 501's **flexibility**, however, come the disadvantages of not having codified rules that give direction to the courts in the area of privilege.

1. Expansion

Fed. R. Evid. 501 permits the federal courts to recognize new common law privileges as they see fit. The federal courts' exercise of this power, which would not have existed under Proposed Article V, has been most notable with regard to a **journalist's privilege**³² and a **psychotherapist-patient** privilege.³³

2. Retrenchment

Proposed Article V would have codified³⁴ the rule of *Hawkins v. United States*,³⁵ the privilege of every criminal defendant to refuse to permit his or her spouse to testify against him or her. But, empowered by Rule 501, the Supreme Court did what it could not have done had Proposed Article V been adopted. The Court overruled *Hawkins* **in 1980 in Trammel v. United States**³⁶ and held that the privilege was waivable by the *testifying* spouse.

III. Spousal Privileges

³¹See *United States v. Nixon*, 418 U.S. 683 (1974).

³²See, *e.g.*, 6 MARYLAND EVIDENCE: STATE AND FEDERAL § 516.2.

³³See *Jaffee v. Redmond*, 518 U.S. (1996) (recognizing a federal common law psychotherapist-patient privilege). See also Proposed Fed. R. Evid. 504; Unif. R. Evid. 503 (1999).

³⁴See Proposed Fed. R. Evid. 501 and 505.

³⁵*Hawkins v. United States*, 358 U.S. 74 (1958).

³⁶*Trammel v. United States*, 445 U.S. 40 (1980).

The federal common law recognizes two distinct spousal evidentiary privileges: (1) the “spousal immunity” or “anti-marital facts” privilege, and (2) the spousal “confidential communications” privilege.

A. The Privilege against “Adverse Spousal Testimony,” The “Anti-Marital Facts” Privilege, or the “Spousal Immunity” Privilege Not to Testify against One’s Spouse who is Charged with a Crime

The “spousal immunity” or “anti-marital facts” privilege applies only as to criminal proceedings against one’s spouse. It is therefore not applicable in **civil tax proceedings** in the United States Tax Court — at least, by way of analogy to the Fifth Amendment, if there is no “reasonable basis for apprehension of the hazards of incrimination.” *Ryan v. Commissioner*, 67 T.C. 212, 217-21 (1976) (Drennan, J.), *aff’d*, 568 F.2d 531, 542-44 (7th Cir. 1977) (finding privilege inapplicable for policy reasons in particular civil tax proceeding where spouses had been granted use immunity as to any criminal proceedings, but declining to rule that privilege is inapplicable in all civil proceedings; court stated that “the privilege should be limited to instances in which it makes the most sense, where a spouse used is neither a victim nor a participant observes evidence of the other spouse’s crime”).

Nonetheless, the evolution of this privilege both demonstrates the elasticity of the federal common law of privilege in light of policy considerations and raises some interesting questions. The case law regarding the issues on which courts are divided as to this privilege also may be used to inform one’s analysis of analogous issues regarding the spousal confidential communications privilege.

1. The Pre-Trammel Common Law Privilege

At early common law, **parties to the case were incompetent to testify, as were the parties’ spouses.**³⁷ The rationale for the exclusion of the spousal testimony was that the identity of interests between the spouses would lead one to commit perjury on behalf of the other.³⁸ Later, the general rules of incompetency were abrogated, so that both parties and their spouses might testify.³⁹

But under the subsequent common law rule, a person who was a **defendant in a criminal case had a privilege to refuse to permit his or her spouse to testify against him or her, and**

³⁷Funk v. United States, 290 U.S. 371, 380-82 (1933).

³⁸*Id.* at 381.

³⁹*Id.* at 381-87; 2 Wigmore § 602 (rev. 1979). *See* Brown v. State, 359 Md. 180, 187-202, 753 A.2d 84 (2000) (thorough discussion of common law).

the spouse being asked to so testify also had a privilege to refuse to do so.⁴⁰ The rule applied to all of the spouse's possible testimony against the accused spouse, regardless of the source of the witness spouse's knowledge of the facts.

The primary rationale for the common law rule was that the social costs of the destruction of marriages that would result from pitting one spouse against the other outweighed the costs of the loss of relevant evidence in each case.⁴¹ The common law rule did not allow for the possibility that, if a spouse was willing to testify against the other, the marriage was beyond saving.

It did recognize an **exception**, however, for **crimes against the testifying spouse by the accused spouse.**⁴² (In effect, the accused spouse there had forfeited the privilege.)

3. After Trammel, the Testifying Spouse May Waive this Privilege

The United States Supreme Court's 1980 decision in *Trammel v. United States* reversed its earlier decisions on the subject. The Court opined that, **if a spouse wishes to voluntarily testify against the other**, the marriage is in such disarray that application of the privilege would not be likely to save it.⁴³ The Court reasoned that in that situation **the privilege would serve only to hinder the truth-finding process and therefore is unavailable.** *Trammel* illustrates the federal courts' ability to perform "a careful balancing of the public's need for disclosure on the one hand against the need to protect the marital relationship on the other."⁴⁴

⁴⁰See generally 8 Wigmore §§ 2227, 2241 (rev. 1961).

⁴¹*Id.* See Comment, *Adverse Spousal Testimony in Maryland and the Fourth Circuit*, 10 U. BALT. L. REV. 338 (1981); 60 N.C. L. REV. 874 (1982). But see 1 Wigmore § 8c at 649 (rev. 1982); 8 Wigmore § 2227-28 (rev. 1961) (positing that anti-marital facts privilege may have been based on repugnance to having one spouse responsible for other's incarceration, terming the privilege a "most curious and entertaining" "error in the law" and praising Bentham's criticism of it); A Critical Examination of Some Evidentiary Privileges: A Symposium, *The Husband-Wife Privilege of Testimonial Non-Disclosure*, 56 NW. U. L. REV. 206, 208 (1961); Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307 (1976) (arguing that privilege should be available only if showing can be made that real damage will result to the particular marriage involved unless privilege is upheld).

⁴²*Hawkins v. United States*, 358 U.S. 74 (1958); McCormick §§ 79 & 85; 8 Wigmore § 2239 (rev. 1961).

⁴³*Trammel v. United States*, 445 U.S. 40, 53 (1980). *Trammel* overruled *Hawkins*. Unif. R. Evid. 504 (1986), *infra* note 50, codified *Trammel*. But see Lempert, *A Right to Every Woman's Evidence*, 66 IOWA L. REV. 725 (1981) (criticizing *Trammel*).

⁴⁴In re Grand Jury Proceedings, 664 F.2d 423, 429 (5th Cir. 1981); *Ryan v. Comm'r*, 568 F.2d 531, 543 (7th Cir. 1977).

Arguably, the *Trammel* Court did not scrutinize the question of voluntariness very closely. It characterized the wife's decision as a voluntary one, even though she had been an unindicted coconspirator who had been given use immunity in return for her agreement to cooperate with the Drug Enforcement Agency.⁴⁵

The result reached in *Trammel* would not have been possible had Congress adopted Proposed Fed. R. Evid. 505. The proposed rule would have retained the adverse spousal testimony privilege, as held by—and therefore waivable by—only the accused spouse.⁴⁶

4. The Rule from 1980 to Date

Under today's federal common law rule then, **one spouse may refuse to testify — or may agree to testify — against the other spouse⁴⁷ who is a defendant in the criminal proceeding or is the target of a grand jury investigation.**⁴⁸ The privilege applies also to

⁴⁵*Trammel v. United States*, 445 U.S. 40, 53 (1980).

⁴⁶Proposed Fed. R. Evid. 505 provided:

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

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

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

See Proposed Fed. R. Evid. 505, Advisory Committee note.

⁴⁷*E.g.*, *United States v. Lilley*, 581 F.2d 182, 189 (8th Cir. 1978). See *United States v. Morris*, 988 F.2d 1335 (4th Cir. 1993), *on remand*, 837 F. Supp. 726 (E.D. Va. 1993).

⁴⁸*E.g.*, *In re Grand Jury Proceedings*, 664 F.2d 423, 429-30 (5th Cir. 1981); *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980); *A.B. v. United States*, 24 F.Supp.2d 488, 492-93 (D. Md. 1998) (husband was believed to be drug trafficker; wife was given use immunity and asked about her financial situation and history). See *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974) (husband could not decline to testify on this ground, when government had agreed not to use his testimony or its fruits against his wife); *United States v. Premises Known as 281 Syosset Woodbury Rd.*, 71 F.3d 1067 (2d Cir. 1995) (declining to reach question whether privilege applies in quasi-criminal forfeiture proceedings, and holding that wife could not invoke this privilege where the forfeiture proceeding was brought against her property, and her husband was not a party to the proceeding); *United States v. George*, 444 F.2d 310 (6th

preclude compulsion of a spouse to testify against third persons, when that testimony is relevant to their common criminal scheme with the nonwitness spouse, whom the government hopes to reach.⁴⁹ The witness spouse alone holds the privilege and is free to waive it.

The privilege applies only during the existence of the marriage.⁵⁰ The party or person seeking to invoke the privilege has the **burden of proving to the trial judge, by a preponderance of the evidence, that the two spouses are legally married to each other at the time of trial.** No privilege is available for a common law marriage if the applicable state law does not recognize the marriage.⁵¹

The privilege applies only to testimonial evidence⁵² and precludes only one's involuntary testimony as to facts that tend to incriminate one's spouse, not to other matters.⁵³ But it extends to all such information, not just to one's spouse's communications and not just to confidential information.

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Q1. Does the “spousal immunity” privilege apply as to events occurring before the marriage? If the marriage was entered into just so that the parties could invoke the privilege?

Cir. 1971) (husband, who had been given immunity to testify before grand jury as to gambling conspiracy, could not decline to testify on ground that he and his wife had filed joint return and that he could not be compelled to testify against his wife; his wife was not being investigated by the grand jury; if somehow his wife were prosecuted, she could then object to the introduction of his testimony).

⁴⁹In re Grand Jury Subpoena to Mrs. C.D., 22 F. Supp. 2d 507 (D. Md. 1998) (quashing subpoena to wife who was asked to testify before grand jury to matters implicating other members of the criminal conspiracy, that would be imputed to her husband as a coconspirator).

⁵⁰E.g., United States v. Marashi, 913 F.2d 724, 729 (9th Cir. 1990). See United States v. Bolzer, 556 F.2d 948, 951 (9th Cir. 1977) (privilege unavailable after spouses are divorced); United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976) (per curiam) (*semble*); United States v. Fisher, 518 F.2d 836, 838 (2d Cir. 1975).

⁵¹E.g., United States v. Rhodes, 569 F.2d 384, 388-89 (5th Cir. 1978); United States v. Lustig, 555 F.2d 737, 747-48 (9th Cir. 1977); United States v. White, 545 F.2d 1129 (8th Cir. 1976) (per curiam).

⁵²United States v. Thomann, 609 F.2d 560, 564 (1st Cir. 1979) (privilege does not preclude taking wife's fingerprints to help make case against accused husband); In re Grand Jury 85-1, 666 F. Supp. 196 (D. Colo. 1987) (privilege does not extend to nontestimonial evidence such as fingerprints and handwriting), dismissed without opinion *sub nom.* United States v. Shelleda, 848 F.2d 200 (10th Cir. 1988).

⁵³In re Grand Jury Matter, 673 F.2d 688, 692 (3d Cir. 1982); In re Grand Jury Proceedings, 664 F.2d 423, 430 (5th Cir. 1981); United States v. Brown, 605 F.2d 389, 396 (8th Cir. 1979).

No: *See United States v. Apodaca*, 522 F.2d 568, 571 (10th Cir. 1975) (no privilege, because marriage three days before trial was fraudulent and spurious); *United States v. Van Drunen*, 501 F.2d 1393, 1396-97 (7th Cir. 1974) (following Proposed Rule 505) (Proposed Fed. R. Evid. 505, advisory committee note (“The second exception [Proposed Rule 505(c)] renders the privilege inapplicable as to matters occurring prior to the marriage. This provision eliminates the possibility of suppressing testimony by marrying the witness.”)); *In re Grand Jury Subpoena of [Witness]*, 884 F. Supp. 188 (D. Md. 1995) (marriage after being served with grand jury subpoena was not a “sham,” but marital privilege would protect only communications and observations made during, not before, marriage).

Yes: *United States v. Lofton*, 957 F.2d 476, 477 (7th Cir. 1992); *United States v. Byrd*, 750 F.2d 585, 590 (7th Cir. 1984); *A.B. v. United States*, 24 F. Supp. 2d 488 (D. Md. 1998); *United States v. Owens*, 424 F. Supp. 421 (E.D. Tenn. 1976); *State v. Chrismore*, 223 Iowa 957, 274 N.W. 3 (1937) (reversible error for prosecution to show that witness had married defendant only a few days before trial, so as to imply that he married her to suppress her testimony).

See Hagez v. State, 110 Md. App. 194, 211 and n.7, 676 A.2d 992 (1996) (setting forth authorities pro and con), *cert. denied*, 359 Md. 669, 755 A.2d 1140 (2000). *See generally*, Annot., *Existence of spousal privilege where marriage was entered into for purpose of barring testimony*, 13 A.L.R. 4th 1305.

Q2. Does the spousal immunity privilege apply at all, when the marriage is a “sham” for any reason?

No: *Lutwak v. United States*, 344 U.S. 604 (1953) (privilege inapplicable when marriage ceremony was “a sham, phony, [and] empty”). *See Brown v. Scafidi*, 839 F. Supp. 342 (E.D. Pa. 1993) (neither Pennsylvania’s spousal immunity privilege nor its confidential communications privilege applies where it would aid in the perpetration of a fraud); Imwinkelreid, *THE NEW WIGMORE* § 6.9.1.

Q3. Does the spousal immunity privilege apply when the parties are separated and the marriage is a shambles at the time of trial?

Maybe: *United States v. Hall*, 989 F.2d 711, 713 n.2, 715 n.6 (4th Cir. 1993) (trial court reserved ruling on whether to permit separated spouse to assert this privilege; trend of cases is to “look to the length of the separation as a guide to determining whether the privilege’s application would promote marital harmony”).

No: *United States v. Brown*, 605 F.2d 389, 396 (8th Cir. 1979) (no injury to privilege-protected values in letting woman, who was with her husband for only two weeks and had not seen him for eight months after he had left her, testify against him); *United States v.*

Cameron, 556 F.2d 752, 756 (5th Cir. 1977) (privilege unavailable when marriage was “no longer viable”).

Q4. Should the parties be able to invoke the spousal immunity privilege when they have been acting jointly, as partners in crime?

No: *United States v. Ramirez*, 145 F.3d 345, 355 (5th Cir. 1998); *United States v. Parker*, 834 F.2d 408, 413 & n.8 (4th Cir. 1987) (citing *Van Drunen* with approval); *United States v. Clark*, 712 F.2d 288, 300-02 (7th Cir. 1983); *United States v. Entrekin*, 624 F.2d 597 (5th Cir. 1980); *Ryan v. Comm’r*, 568 F.2d 531, 544 (7th Cir. 1977); *United States v. Van Drunen*, 501 F.2d 1393, 1396-97 (7th Cir. 1974), *cert. denied*, 419 U.S. 1091 (1974); *United States v. Freeman*, 694 F. Supp. 190 (E.D. Va. 1988) (following Seventh Circuit cases); Unif. R. Evid. 504(c) (1986) (upon a “prima facie showing”); Unif. R. Evid. 504(c) (1999) (“an unrefuted showing”).

Yes: *In re Grand Jury Subpoena United States*, 755 F.2d 1022, 1028 (2d Cir. 1985), *vacated on other grounds sub nom. United States v. Koecher*, 475 U.S. 133 (1986) (no exception); *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980) (no exception to privilege applies); *A.B. v. United States*, 24 F. Supp. 2d 488, 493-94 (D. Md. 1998).

Cf. United States v. Price, 577 F.2d 1356, 1364-65 (9th Cir. 1978) (no error in admitting, against husband, wife’s taped conversations in furtherance of criminal conspiracy). *See also United States v. Hicks*, 420 F. Supp. 533 (N.D. Tex. 1976) (regarding interplay between assertion of privilege and severance of trials of husband and wife).

Q5. “Guess what, Trixie! Ralph just brought home *bags* of money!” If a spouse makes an out-of-court statement against his or her spouse’s penal interest, may a third party testify to it despite the spousal immunity privilege, as long as the statement falls under an exception to the hearsay rule?

Yes: *United States v. Chapman*, 866 F.2d 1326, 1332-33 (11th Cir. 1989) (prior cases to contrary, including *Ivey*, were inconsistent with *Trammel*), *reh’g en banc denied*, 874 F.2d 821 (11th Cir. 1989); *United States v. Tsinnijinnie*, 601 F.2d 1035, 1037-39 (9th Cir. 1979); *United States v. Mackiewicz*, 401 F.2d 219, 225 (2d Cir. 1968); *United States v. James*, 128 F. Supp. 2d 291 (D. Md. 2001), *aff’d*, 164 F. Supp. 2d 718 (D. Md. 2001) (wife’s excited utterance was properly admitted; distinguishing *United States v. Hall*).

No: *Ivey v. United States*, 344 F.2d 770 (5th Cir. 1965); *Peek v. United States*, 321 F.2d 934, 943 (9th Cir. 1963). *See United States v. Hall*, 989 F.2d 711, 715-17 (4th Cir. 1993) (prosecutor’s cross-examination of defendant by reference to defendant’s wife’s out-of-court statements, which were inadmissible hearsay, violated wife’s privilege, which she had asserted pretrial, not to testify against her husband).

Q6. May a spouse be compelled to testify in certain situations, such as spousal or child abuse?

Maybe: See, e.g., *Wyatt v. United States*, 362 U.S. 525, 530-31 (1960) (privilege inapplicable with regard to alleged Mann Act violation by husband against wife, but court “intimate[d] no view on the applicability of the privilege of either a party or a witness similarly circumstanced [*i.e.*, marriage occurred after alleged crime] in other situations”). Proposed Fed. R. Evid. 505(c) would have both made this privilege inapplicable here and also codified *Wyatt*. Unif. R. Evid. 504(d) (1974) would have disallowed the *spousal confidential communications* privilege in this context. Some state laws would compel a spouse’s testimony in this situation. Unif. R. Evid. 504(c) (1986) would disallow both privileges. Mil. R. Evid. 504(c)(2)(A) precludes the confidential communications privilege in the situation of a crime against the other spouse or a child of either spouse. *United States v. Rollins*, 2004 WL 26780 (A.F. Ct. Crim. App. 2003); *United States v. McCollum*, 58 M.J. 323 (A.F. Ct. Crim. App. 2003). See generally Imwinkelreid, *THE NEW WIGMORE* § 6.13.5. See also *United States v. Bahe*, 128 F.3d 1440 (10th Cir. 1997) (exception to confidential communications privilege).

Q7. Who is a spouse?

??: The landscape is changing. . . . This is an issue sure to arise not only as to privileges but also as to joint returns, etc.

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B. Spousal Confidential Communications Privilege

A person who confides in his or her spouse during their marriage has a privilege to refuse to disclose, and to prevent that spouse from testifying to, the content of those confidential communications.⁵⁴

1. Scope: Very Different from “Spousal Immunity” Privilege

As the **Tax Court** recognized in *Ryan*, by stating that no claim as to the spousal confidential communications privilege was before it,⁵⁵ the spousal confidential communications privilege is distinct from and independent of the “spousal immunity” privilege. The confidential

⁵⁴E.g., *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839); *United States v. Lefkowitz*, 618 F.2d 1313, 1318 (9th Cir. 1980); *Smith v. Baltimore & O.R.R.*, 473 F. Supp. 572, 585 (D. Md. 1979) (dictum). See generally Farnham, *The Marital Privilege*, 18 *Litigation* No. 2 at 34 (Winter 1991); Annot., *Marital Privilege under Rule 501 of Federal Rules of Evidence*, 46 A.L.R. Fed. 735.

⁵⁵*Ryan v. Comm’r*, 67 T.C. 212, 217 n.3 (citing *Blau v. United States*, 340 U.S. 332 (1951), *aff’d*, 568 F.2d 531 (7th Cir. 1977)).

communications privilege clearly **may be raised in civil proceedings⁵⁶ and regardless whether**

⁵⁶E.g., *SEC v. Lavin*, 111 F.3d 921 (D.C. Cir. 1997).

Compare Unif.R.Evid. 504 (1974), which provided for the privilege only in criminal cases. That Uniform Rule provided:

(a) Definition. A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

(b) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

(c) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed.

(d) Exceptions. There is no privilege under this rule in a proceeding in which one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of them.

The Uniform Rule was revised in 1986 and 1999.

Unif. R. Evid. 504 (1986) reflects the holding of *Trammel* and includes a broader confidential communication privilege. The rule reads:

(a) Marital communications. An individual has a privilege to refuse to testify or to prevent his or her spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage. The privilege may be waived only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

(b) Marital facts. The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

(c) Exceptions. There is no privilege under this rule in any civil proceeding in which the spouses are adverse parties, in any criminal proceeding in which a prima facie showing is made that the spouses acted jointly in the commission of the crime charged, or in any proceeding in which one spouse is charged with a crime or tort against the person or property of (i) the other, (ii) a minor child of either, (iii) a person residing in the household of either, or (iv) a third person if the crime or tort is committed in the course of committing a crime or tort against any of the persons previously named in this sentence. The court may refuse to allow invocation of the privilege in any other proceeding if the interests of a minor child of either spouse may be adversely affected.

The Commissioners' Comment to the 1986 Rule explains:

The previous rule provided for a "marital communication" privilege, as does the new rule. However, it is sometimes difficult to determine the boundaries of what constitutes a communication (e.g., the spouse who merely is present and sees a crime being committed by the other spouse). Thus, there are times when a privilege against testifying ought to obtain with or without the existence of marital communication. The new rule reiterates the provision with regard to marital communications. However, a

either spouse is a party to the litigation, whenever the testimony sought is that of one spouse, as to the other spouse's confidential communication. Although Congress included no specific privileges in the version of Fed. R. Evid. 501 that it adopted, Congress made clear that

new privilege dealing with spousal testimony in a criminal proceeding has been added. This new rule also works to permit the testifying spouse to assert the marital communication privilege on behalf of an accused spouse, when appropriate, as could be done under the old rule.

Under the marital communication privilege, the communicating spouse holds the privilege. And, the rule is applicable whether or not the communicating spouse is a party to the proceeding. However, this privilege is not limited to criminal cases as under the previous rule. It would also apply in civil cases. The underlying rationale—that of encouraging or at least not discouraging communications between spouses—applies in both types of cases.

Under the spousal testimony privilege, only the spouse of the accused in a criminal case has a privilege to refuse to testify. The rationale—that of not disrupting the marriage—can only be justified in criminal proceedings and then there is no basis for giving the privilege to the accused. This provision codifies the holding of the United States Supreme Court in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

The provision in the previous rule regarding exceptions is also modified. Those exceptions dealt with the situation where a spouse is charged with a crime. The new rule extends the exceptions to include proceedings where a spouse is accused of a tort. It also creates exceptions where the spouses acted jointly in committing a crime, where the spouses are adverse parties, and where the court feels that the interests of a child of either should be given preference. There is no privilege in such situations under Rule 504.

Unif. R. Evid. 504 (1999), which is largely substantively the same as the 1986 Rule, provides:

(a) Confidential communication. A communication is confidential if it is made privately by an individual to the individual's spouse and is not intended for disclosure to any other person.

(b) Marital communications. An individual has a privilege to refuse to testify and to prevent the individual's spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage. The privilege may be waived only by the individual holding the privilege or by the holder's guardian or conservator, or the individual's personal representative if the individual is deceased.

(c) Spousal testimony in criminal proceeding. the spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

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

- (1) in any civil proceeding in which the spouses are adverse parties;
- (2) in any criminal proceeding in which an unrefuted showing is made that the spouses acted jointly in the commission of the crime charged;
- (3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse; or
- (4) in any other proceeding, in the discretion of the court, if the interests of a minor child of either spouse may be adversely affected by the invocation of the privilege.

its intent was to reject the position of Proposed Article V, that would have abolished this privilege for marital confidential communications.⁵⁷

Under the majority view, this spousal communications privilege is held alone by the spouse who made the confidential communications.⁵⁸ The privilege may be waived only by its holder, although another may assert it in that person's absence, on his or her behalf.

The stated rationale underlying this privilege is that confidence is essential to the husband-wife relationship and that disclosure of marital confidences probably would cause great harm to that relationship.⁵⁹ McCormick argues that the real reason for the privilege is that to allow a spouse to disclose the other's confidential communications would offend our feelings of decorum by invading marital privacy.⁶⁰

This privilege protects only confidential spousal communications made during the marriage,⁶¹ while the "spousal communication" privilege protects all information or knowledge possessed by a spouse, regardless of its source.

2. What Qualifies as a "Communication"?

Generally, however, nonverbal, noncommunicative acts committed in the presence of a spouse, even if in reliance on the other's loyalty, are not protected by this privilege, although there is some authority to the contrary.⁶² Communications include verbal communications

⁵⁷See 120 Cong. Rec. 2391 (1974) (remarks of Rep. Holtzman).

⁵⁸SEC v. Lavin, 937 F. Supp. 23, 29 (D. D.C. 1996) (the communicating spouse holds the privilege), *rev'd on other point*, 111 F.3d 921 (D.C. Cir. 1997) (no waiver by spouses was shown); 8 Wigmore § 2340 (rev. 1961). *But see* Imwinkelreid, THE NEW WIGMORE § 6.5.1 (endorsing minority view that both spouses hold this privilege).

⁵⁹E.g., SEC v. Lavin, 111 F.3d 921, 925 (D.C. Cir. 1997).

⁶⁰1 McCormick § 86.

⁶¹S.E.C. v. Lavin, 111 F.3d 921 (D.C. Cir. 1997) (remanding on issue of confidentiality); United States v. Parker, 834 F.2d 408, 411 (4th Cir. 1987) (wife's testimony based on her personal observations, not husband's statements to her, did not breach privilege), *cert. denied*, 485 U.S. 938 (1988); United States v. Bolzer, 556 F.2d 948, 951 (9th Cir. 1977) ("It is well established that this privilege applies only to utterances or expressions intended by one spouse to convey a message to the other"; wife's identification of pants as being like her husband's did not violate privilege); United States v. Cameron, 556 F.2d 752, 757 (5th Cir. 1977) (no privilege when spouse's testimony goes only to "objective facts"); United States v. Smith, 533 F.2d 1077 (8th Cir. 1976) (*per curiam*) (no privilege regarding husband's act of hiding drugs in wife's undergarment); Annot., 46 A.L.R.Fed. 735 at § 12 (1980).

⁶²1 McCormick § 79; 8 Wigmore § 2338 (rev. 1961). See *supra* note 60. *Contra, e.g.*, Shepherd v. State, 257 Ind. 229, 277 N.E.2d 165 (1971). *But see* 35 Cornell L.Q. 187 (1949); 34 Minn.L.Rev. 257 (1950); 36 Iowa L.Rev. 154 (1954); Annot., 10 A.L.R.2d 1389 (1950) ("communication" within testimonial privilege of confidential

(whether oral or written) or nonverbal assertive acts, such as nodding to indicate an affirmative or negative response, that are intended as substitutes for particular words.⁶³

3. The Requirement of Confidentiality

Even if a communication between spouses is involved, it is protected by the privilege only if it was made in confidence and in reliance on the marital relationship.⁶⁴ There is a presumption of confidentiality,⁶⁵ but the presumption may be overcome when the nature of the communication or other circumstances under which it was made show that it was not intended to be confidential.⁶⁶

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Husband walks into the house and speaks to Wife, who is in the dining part of the living-dining area, telling her that he made \$1,000 in tips that week. Wife is called to testify on behalf of the Government, to Husband's statement, to prove that Husband underreported his income. Husband objects on the ground of confidential spousal communications. Does that privilege apply:

- Q8. If was made in the presence of their one-year-old son, as Wife was changing his diaper?**
- Q9. If was made in the presence of their sixteen-year-old son, who was sitting at the dining table, doing his homework?**
- Q10. If in (9), the son was lying on a sofa in the living area, and was unseen by the husband, because the back of the sofa faced the dining area?**

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communication between husband and wife includes knowledge derived from observation). *Cf.* 8 Wigmore § 2337 (rev. 1961) (would protect acts if spouse did something to call them to the other's attention).

⁶³*See* United States v. Bahe, 128 F.3d 1440 (10th Cir. 1997) (husband's physical act that indicated his desire for sexual relations was such a communication). *Cf.* Fed. R. Evid. 801(a) for the definition of a statement for purposes of the hearsay rule.

⁶⁴1 McCormick § 80. *See* People v. D'Amato, 105 Misc.2d 1048, 430 N.Y.S.2d 521 (1980) (no privilege when communications were not made in reliance on relationship but as part of threat against wife, so as to induce her loyalty through fear). *See generally* 41 Tenn.L.Rev. 943 (1976).

⁶⁵*Blau v. United States*, 340 U.S. 332, 333 (1951).

⁶⁶*Wolfe v. United States*, 291 U.S. 7, 14 (1934); *United States v. McCollum*, 58 M.J. 323 (A.F. Ct. Crim. App. 2003).

Marital communications are presumptively confidential.⁶⁷ That presumption is defeated in the opponent of the privilege shows that the confider knew that a third person was present or other circumstances show that he or she intended no confidentiality.⁶⁸

Similarly, disclosure to one's spouse with the intent that the spouse reveal one's communication to a third party, outside any other privileged relationship such as attorney-client, also will negate the privilege.⁶⁹ Use of a third party to convey a message to one's spouse has been held to make the privilege unavailable, even when that was the only possible means for communicating with the spouse.⁷⁰

Q11. If a roofer (seen by Husband) making repairs heard Husband's statement through an open window? May Wife testify over Husband's objection? May the roofer/eavesdropper testify?

Wife may not testify, but the jurisdictions are split on whether a third party who eavesdrops on a husband-wife conversation, unbeknownst to the confiding spouse, may testify to it. The common law permitted the third party's testimony.⁷¹

The modern trend recognizes the ease with which eavesdropping may now be accomplished, *e.g.*, through the use of wiretaps, and allows the confiding spouse to invoke the privilege to preclude the third party's testimony.⁷² The Maryland Court of

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⁶⁷Blau v. United States, 340 U.S. 332, 333 (1951); Wolfle v. United States, 291 U.S. 7, 14 (1934).

⁶⁸*E.g.*, Pereira v. United States, 347 U.S. 1, 6 (1954); Wolfle v. United States, 291 U.S. 7, 14 (1934); United States v. Taylor, 92 F.3d 1313, 1331-32 (2d Cir. 1996); United States v. Parker, 834 F.2d 408, 411 (4th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988); United States v. Lefkowitz, 618 F.2d 1313, 1318 (9th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980). *See* Proctor & Gamble Co. v. Bankers Trust Co., 909 F. Supp. 525 (S.D. Ohio 1995) (privilege was applicable when supervisor knew company taped marketers' calls but believed his private telephone was not tapped).

⁶⁹*See* 8 Wigmore § 2336 at 651 (rev. 1961). *But cf.* Coleman v. State, 281 Md. 538, 543-44, 380 A.2d 49, 53-54 (1977) (husband's asking wife to obtain ring from his apartment was confidential communication, even though husband knew wife might require help of third person to gain access to apartment).

⁷⁰*See* Gutridge v. State, 236 Md. 514, 516, 204 A.2d 557, 559 (1964) (message sent by prisoner to wife through a trusty was not privileged).

⁷¹8 Wigmore § 2339 at 667 (rev. 1961) (third person may testify). *See* 1 McCormick § 82. *Cf.* 8 Wigmore § 2339 at 668; Annot., *Applicability of marital privilege to written communications between spouses inadvertently obtained by third person*, 32 A.L.R. 4th 1177 (partially superseded by 51 A.L.R. 5th 603 and 159 A.L.R. Fed. 153 (federal law)).

⁷²*See* Imwinkelreid, THE NEW WIGMORE § 6.6.3; 1 McCormick § 82; 8 Wigmore § 2337 (rev. 1961).

Appeals, for example, has held that, in the case of court-authorized wiretaps, privilege continues to bar admission of privileged information or its fruit.⁷³

Q12. In (10), may the son be compelled to testify?

Parent-Child Privilege. Numerous attempts have been made to have the courts or the legislators⁷⁴ recognize parent-child privileges corollary to both the “spousal immunity” and “spousal confidential communications” privilege.

Most have been unsuccessful.⁷⁵ But a few lower courts have embraced one or both of these privileges.⁷⁶ Even where some form of parent-child privilege has been

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⁷³State v. Mazzone, 336 Md. 379, 390 & n.4, 398 & n.8, 648 A.2d 978, 983 & n.4, 987 & n.8 (1994).

⁷⁴A bill to add a parent-child privilege to the Fed. R. Evid. was introduced in 1999; a similar proposal has been made in Massachusetts. Tebo, *Parent Privilege*, A.B.A. J. 18 (July 2000).

⁷⁵E.g., United States v. Dunford, 148 F.3d 383, 390-91 (4th Cir. 1998); In re Grand Jury, 103 F.3d 1140 (3d Cir. 1997); In re Erato, 2 F.3d 11, 16 (2d Cir. 1993) (no parent-child privilege protected mother from testifying against adult child); United States v. Davies, 768 F.2d 893, 896-900 (7th Cir. 1985), *cert. denied*, 474 U.S. 1008 (1985); Port v. Heard, 764 F.2d 423 (5th Cir. 1985) (Texas's denial to parents of privilege did not violate their federal constitutional rights); United States v. Jones, 683 F.2d 817, 819 (4th Cir. 1982) (no familial privilege protects 29-year-old emancipated child from having to testify with regard to business activities before grand jury that was investigating his father); In re Grand Jury Proceedings, 647 F.2d 511 (5th Cir. 1981) (*per curiam*) (no federal privilege protecting child from having to testify before grand jury investigating parents); United States v. Penn, 647 F.2d 876, 885 (9th Cir. 1980) (“no judicially or legislatively recognized general ‘family’ privilege;” in mother’s trial, no need to suppress drugs which minor child had shown to police in return for promise of five dollars), *cert. denied*, 449 U.S. 903 (1980); In re Kinoy, 326 F.Supp. 400, 406 (S.D.N.Y.1970) (there is no “‘parent-child privilege;” “parent could be compelled to testify about child who was not a target of grand jury investigation but who was sought only as a witness with regard to a third party); In re Terry W., 59 Cal.App.3d 745, 130 Cal.Rptr. 913 (1976) (no constitutional parent-child privilege; to recognize one would be contrary to statute); People v. Sanders, 99 Ill.2d 262, 75 Ill.Dec. 682, 457 N.E.2d 1241 (1983) (holding that presence of minor child when defendant confessed to wife destroyed confidential marital communications privilege and refusing, at least under facts, to recognize parent-child privilege), on remand 127 Ill.App.3d 471, 82 Ill.Dec. 753, 469 N.E.2d 287 (1984); Hunter v. State, 172 Ind.App. 397, 360 N.E.2d 588 (1977) (no parent-child privilege in prosecution of parents for cruelty to child), *cert. denied*, 434 U.S. 906 (1977); Cissna v. State, 170 Ind.App. 437, 352 N.E.2d 793, 795 (1976) (mother may testify against son, because there is no parent-child privilege); Three Juveniles v. Commonwealth, 390 Mass. 357, 455 N.E.2d 1203, 1207 (1983) (refusing to recognize a privilege protecting minor children from having to testify, as to matters that were not confidential communications, before grand jury which was investigating their father with regard to murder), *cert. denied*, 465 U.S. 1068 (1984) (Justice Brennan refused a request to take action to protect the children from having to testify. *High Court Judge Refuses to Block Children’s Testifying in Father’s Case*, Baltimore Evening Sun, Dec. 23, 1983, at A3, col. 4). Cf. United States v. Gray, 71 Fed. Appx. 485, 2003 WL 21774158 (6th Cir. 2003) (unpublished) (adult defendant’s statements to his mother, in telephone conversation, when wife was present with him and overheard his comments, was not privileged by marital confidential communications privilege).

⁷⁶In re Grand Jury Proceedings, 949 F.Supp. 1487 (E.D.Wash. 1996) (but, under facts, privilege was not applicable); In re Agosto, 553 F.Supp. 1298, 1325 (D.Nev.1983) (child has privilege against being compelled to

adopted, the jurisdictions vary as to who holds the privilege — the parent, the child, or both? — and whose communications are protected — the child's, the parent's, or both?.⁷⁷

Q13. If Wife's testimony as to what Husband said, combined with his accompanying statement that "the IRS will never know," compellable, as made in the course of an ongoing or future crime or fraud? Is there such an exception to the spousal communications privilege?

Both Wigmore and McCormick have criticized the privilege as too inflexible. Wigmore would have given the courts discretion with regard to whether it should apply.⁷⁸ McCormick argued that the privilege should be qualified, not absolute.⁷⁹

Q14. If the Government's theory is that both spouses were committing tax fraud, does the spousal communications privilege apply if the Government makes a prima facie showing that the spouses were "partners in crime"?

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testify against parent in any criminal proceeding and child also may claim parent-child privilege for confidential communications between himself and parent; court relied on constitutional right to certain degree of family privacy). *See* Application of A & M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (1978) (protecting confidential communications between minor child and parent); *People v. Fitzgerald*, 101 Misc.2d 712, 422 N.Y.S.2d 309 (Westchester Co. Ct. 1979) (extending privilege to communications made even by children who had reached age of majority). *See generally* Bauer, *Recognition of a Parent-Child Testimonial Privilege*, 23 St. Louis U.L.J. 676 (1979); Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 Dick.L.Rev. 599 (1970); German, *Family Privilege, Broadened*, Nat'l L.J., Jan. 24, 1983 at 3, col. 1; Luhn, *The Child-Parent Testimonial Privilege, The Courts, and a Statutory Alternative*, 15 U.Balt.L. Forum 12 (Spring 1985); Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 St. Mary's L.J. 35 (1987); Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 Fam.L.Q. 1 (1982); Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 W. & M.L.Rev. 583 (1987); Comment, *The Child-Parent Privilege: A Proposal*, 47 Fordham L.Rev. 771 (1979); Note, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 Ga.L.Rev. 173 (1985); Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 Harv.L.Rev. 910 (1987); Note, *The Judicial Development of the Parent-Child Testimonial Privilege: Too Big for Its Britches?*, 26 Wm. & Mary L.Rev. 145 (1984); Note, *Questioning the Recognition of a Parent-Child Testimonial Privilege*, 45 Alb.L.Rev. 142 (1980); *Developments in the Law: Privileged Communications*, 98 Harv.L.Rev. 1450, 1563-92 (1985); 28 S.Tex.L.J. 399 (1986); Comment, 19 Lincoln L.Rev. 123 (1991); Note, 1990 U.Ill.L.Rev. 879; Annot., *Testimonial privilege for confidential communications between relatives other than husband and wife—state cases*, 62 A.L.R.5th 629.

⁷⁷Imwinkelreid, THE NEW WIGMORE § 6.2.2 & § 6.5.1 at 555-57.

⁷⁸1 Wigmore § 8c at 649 (rev. 1983).

⁷⁹1 McCormick § 86.

The federal courts have been divided on whether confidential communications in furtherance of a crime between husband and wife who are criminal conspirators are privileged.⁸⁰ The trend is toward holding the privilege negated.⁸¹

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⁸⁰*Compare, e.g.,* In re Grand Jury Subpoena, 755 F.2d 1022 (2d Cir. 1985) (privilege available), *vacated & remanded for dismissal on ground of mootness*, 475 U.S. 133 (1986) with *United States v. Picciandra*, 788 F.2d 39, 43–44 (1st Cir. 1986) and *United States v. Kahn*, 471 F.2d 191, 194 (7th Cir. 1972) (privilege unavailable), *rev'd on other grounds*, 415 U.S. 143 (1974).

⁸¹*United States v. Gray*, 71 Fed. Appx. 485 (6th Cir. 2003) (unpublished); *United States v. Westmoreland*, 312 F.3d 302 (7th Cir. 2002), *cert. denied*, 2003 WL 1790986 (U.S. 2003) (“The initial disclosure of a crime to one’s spouse, without more, is covered by the marital communications privilege. If the spouse later joins the conspiracy, communications from that point certainly should not be protected.”); *United States v. Parker*, 834 F.2d 408 (4th Cir.1987) (exception to privilege extends to all communications between spouses that are in any way related to a crime and are made in the course of their joint planning or participation in that crime), *cert. denied*, 485 U.S. 938, (1988); *United States v. Sims*, 755 F.2d 239 (6th Cir. 1985) (communications admissible only if they pertain to “joint ongoing or future patently illegal activity”); *United States v. Broome*, 732 F.2d 363, 364–65 (4th Cir. 1984), *cert. denied*, 469 U.S. 855 (1984); Unif. R. Evid. 504(c), *supra* note ___. Judge Hall, writing for the *Broome* court, stated:

In *United States v. Mendoza*, 574 F.2d 1373 (1978), the Fifth Circuit explicitly recognized the propriety of such a finding:

[This ruling] strikes the proper balance between domestic tranquility and the public interest therein, on the one hand, and the revelation of truth and the attainment of justice, which also are in the public interest, on the other. Therefore, we hold that conversations between husband and wife about crimes in which they are jointly participating when the conversations occur are not marital communications for the purpose of the marital privilege, and thus do not fall within the privilege’s protection of confidential marital communications.

Id. at 1381. We agree with the Fifth Circuit’s reasoning, and hold that where marital communications have to do with the commission of a crime in which both spouses are participants, the conversation does not fall within the marital privilege and, consequently, does not limit the applicability of the coconspirator exception to the hearsay rule.

732 F.2d at 365 (footnote omitted). *See also* *United States v. Marashi*, 913 F.2d 724, 730 (9th Cir.1990) (privilege inapplicable to present or future crimes involving both spouses); *United States v. Cooper*, 85 F.Supp.2d 1 (D.D.C. 2000) (evidence of spouse’s participation in criminal activity, required to overcome marital communications privilege, need not be substantial). *But see* *United States v. Premises Known as 281 Syosset Woodbury Rd.*, 71 F.3d 1067, 1073 (2d Cir. 1995) (“joint crime exception” applies only if spouse would testify willingly). *But cf.* *United States v. Foresman*, 63 Fed. Appx. 138, 2003 WL 21129839 (4th Cir. 2003) (per curiam) (unpublished) (fact that husband asked wife to move an “item” for him did not show that she knew it was an illegal item (an unregistered silencer wrapped in a pvc pipe); therefore, error to permit wife to testify to husband’s confidential request.

As to state law in accord with this trend, *see* *State v. Heistand*, 708 S.W.2d 125, 126 (Mo. 1986), transferred to 714 S.W.2d 842 (Mo.App. 1986). McCormick favors this position. 1 McCormick § 79 at 298 & n. 15. *Cf.* *Brown v. Scafidi*, 839 F.Supp. 342 (E.D.Pa. 1993) (neither Pennsylvania’s spousal immunity privilege nor its confidential communications privilege applies where it would aid in the perpetration of a fraud). *See generally* Annot., *Communications between spouses as to joint participation in crime as within privilege of interspousal communications*, 62 A.L.R.4th 1134. *Contra, e.g.,* *State v. Mazzone*, 336 Md. 379, 384, 392, 400–01, 648 A.2d

Q15. Suppose that Wife wants to testify that she told Husband he had “better be sure to report all his tips on their tax return,” that he promised he would and that he again reassured her that he had done so, when she signed their joint return. May she so testify in support of her “innocent spouse” defense?

I.R.C. § 6015(b)(1)(C)-(D) provides in pertinent part: “(C) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement; [and] (D) taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement. . . .”

Subsection (b)(2) provides in pertinent part: “If an individual establishes that in signing the return such individual did not know, and had no reason to know, the extent of such understatement. . . .”

Q16. If Wife so testifies, pointing her finger at Husband, may Husband testify to Wife’s confidential communications to him to the contrary, goading him into not reporting the income?

The privilege is not hers to waive. In a Maryland case, where the privilege is statutory⁸² rather than common law,⁸³ a wife was not allowed to testify to her husband’s communication to her, even to defend herself against her husband’s accusation in his trial for murder that she, not he, had committed the murder of his mistress.⁸⁴

But in our hypo, the federal courts have the flexibility of the common law. The Supreme Court’s willingness to use that flexibility to truncate the spousal privileges is exemplified by *Trammel*.

978, 980, 984, 988 (1994) (reversible error to admit privileged communications obtained by wiretap); *Coleman v. State*, 281 Md. 538, 545–47, 380 A.2d 49, 54–55 (1977).

⁸²MD. CTS. & JUD. PROC. CODE ANN. § 9-105 (1998 Repl. Vol.) provides: “One spouse is not competent to disclose any confidential communication between the spouses during their marriage.”

⁸³Interestingly, although the privilege is often spoken of as having existed as common law, it was statutory in England. 1 McCormick § 78.

⁸⁴*Brown v. State*, 359 Md. 180, 753 A.2d 84 (2000) (accused did not waive confidential marital communications privilege by asserting defense that his wife, not he, killed the victim; reversible error to have admitted wife’s testimony to accused’s confession to her that he murdered victim).

The wife's liability is on the line in the instant proceeding, and the innocent spouse defense was created to aid one in her position.⁸⁵

Additionally, Unif. R. Evid. 504(d)(1) provides that the privilege does not apply "in any civil proceeding in which the spouses are adverse parties. . . ." The Court's receptiveness to considering the trend among states is also demonstrated by its decision in *Jaffee v. Redmond*⁸⁶ to adopt a federal common law psychotherapist (licensed psychiatrist, psychologist or social worker)–patient privilege.

The spouses' positions may be adverse, even though they are not technically adverse parties.⁸⁷ Subsection (d)(3) provides that no privilege applies "in a proceeding where one spouse is charged with a crime or tort against the person or property of the other. . . ." The authors of a respected treatise on federal evidence state:

By tradition, the privilege is inapplicable (i) in suits by one spouse against another, (ii) in a prosecution of one spouse for a crime against the other or the children of either, (iii) in suits to recover in tort for alleged damage to the marital relation itself, and (iv) in a criminal prosecution of a spouse, with respect to communications which that spouse seeks to introduce in his or her own defense.

Though not all of these exceptions have arisen in federal litigation, they are fundamentally sound.⁸⁸

If one spouse is permitted to testify, it seems only equitable that the other may do so.

Q17. In our first example, suppose that Wife, excited by her good fortune, throws open the sash and calls out to Neighbor, "We're rich! Ralph just told me he made \$1,000

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⁸⁵*Cf.* *Raymond v. State ex rel. Younkins*, 195 Md. 126, 128, 72 A.2d 711, 712 (1950) (wife could testify to husband's assault on her, because applicable criminal law was designed to protect her).

⁸⁶518 U.S. 1 (1996).

⁸⁷*See* *People v. Foskey*, 175 Ill.App.3d 638, 125 Ill.Dec. 82, 529 N.E.2d 1158 (1988) (statutory spousal confidential communications privilege (letters written by wife to him while he was in jail) must yield to the criminal defendant's right to confront witnesses against him so that he could use wife's letters written to him in jail in cross-examination. *See also* *United States v. Mazzola*, 217 F.R.D. 84 (D. Mass. 2003) (in tax fraud prosecution, court permitted defendant father to access medical records pertaining to key government witness's mental stability and to his perception that father had abused him). Both of these cases were criminal, however, implicating the defendant's Sixth Amendment confrontation right.

⁸⁸2 Louisell & Mueller, *Federal Evidence* § 219 at 908-09 (1985).

in tips this week!” In Government’s case against Husband Ralph, may Neighbor testify to Wife’s excited utterance, recounting Husband’s admission of a party opponent?

Wife’s statement does not appear to have been authorized by Husband. In this situation, the cases are divided, although the majority would apply the privilege.⁸⁹

A panel of the United States Court of Appeals for the Fourth Circuit has held that a third person may not testify to the confided-in spouse’s disclosure to that person of his or her spouse’s confidences, but that opinion was vacated *per curiam* by the court sitting *en banc*.⁹⁰ Subsequently that court held that the confidant spouse’s out-of-court statements as to those communications could not be used to cross-examine the confiding spouse.⁹¹

On the other hand, the privilege applies only to in-court testimony and not to, *e.g.*, a tip to the IRS.⁹²

- Q18. Government calls Wife and proffers that she will testify that Husband “never said anything to me about any tax shelter” and that (contrary to her husband’s assertions) she never attended any presentation by a tax shelter promoter. Husband objects, citing the spousal confidential communications privilege.**
- Q19. In (18), Wife has raised the innocent spouse defense and would testify that when she asked Husband what a line on their joint return meant, he said threateningly, “None of your business. Shut up and sign it, or ‘to the moon, Alice, to the moon!’”**

In (18), is the absence of communication a communication?

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⁸⁹See Imwinkelreid, *THE NEW WIGMORE* § 6.6.5.

⁹⁰*United States v. Thompson*, 716 F.2d 248, 250 (4th Cir. 1983), *vacated per curiam*, 728 F.2d 654 (4th Cir. 1984) (*en banc*); *United States v. Lea*, 249 F.3d 632, 641-42 (7th Cir. 2001), *reh’g denied* (2001) (if husband had told a third party of his communication to his wife, privilege would have been lost); Annot., *Spouse’s betrayal or connivance as extending marital communications privilege to testimony of third person*, 3 A.L.R. 4th 1104; 1 McCormick § 82; 8 Wigmore § 2339 at 668 (rev. 1961).

⁹¹*United States v. Hall*, 989 F.2d 711, 715-17 (4th Cir. 1993) (prosecutor’s use of defendant’s wife’s out-of-court statements as basis for cross-examining defendant violated husband’s marital communications privilege).

⁹²See *United States v. Lefkowitz*, 618 F.2d 1913, 1318 (9th Cir. 1980) (wife’s statements to police that tax records were fraudulent and that some had been moved were not a breach of the confidential communications privilege).

In (19), if the confider clearly is not relying on the marital relationship for the spouse to maintain the confidence but relies instead, for example, on the threat of violence, there is persuasive authority that the privilege should be held to be unavailable.⁹³ Cf. I.R.C. § 6015(c)(3)(C) (regarding taxpayers who are no longer married, or are legally separated, or not living together, relief is granted if “the individual with actual knowledge establishes that such individual signed the return under duress”).

For similar reasons, the privilege may not apply to protect threats made by one spouse against the other, or against a spouse’s children.⁹⁴ At least one case has held that the privilege does not apply, regarding abuse of any minor child in the household.⁹⁵ Unif. R. Evid. 504(d)(2) and (3) (1999) provide that no privilege applies (“(3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse; or (4) in any other proceeding, in the discretion of the court, if the interests of a minor child of either spouse may be adversely affected by the invocation of the privilege”).

Q20. If the spousal communications privilege is properly invoked, may the court draw an adverse inference against the confider?

Most federal courts agree that there may be no adverse comment on or inference from a criminal defendant's or a criminal defendant's spouse's exercise of a husband-wife privilege.⁹⁶

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⁹³People v. D’Amato, 105 Misc.2d 1048, 430 N.Y.S.2d 521 (1980).

⁹⁴United States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992).

Section 2013 of H.R. 5269, part of which became the Crime Control Act of 1990, P.L. 101-647, would have added a new Fed. R. Evid. 502, to provide that the privilege for confidential communications does not apply in any criminal action or proceeding involving the abuse, neglect, or sexual exploitation of a child under the age of eighteen, but S. 3266 struck the proposed Rule.

⁹⁵United States v. Bahe, 128 F.3d 1440, 1441 (10th Cir. 1997) (spousal confidential communications privilege encompasses husband’s physical act that indicates his desire for sexual relations, but exception applies in a case regarding abuse of a minor child in the household).

⁹⁶Graves v. United States, 150 U.S. 118 (1893); United States v. Golding, 168 F.3d 700 (4th Cir. 1999) (reversible error; prosecutorial misconduct); United States v. Morris, 988 F.2d 1335 (4th Cir. 1993) (reversible error to permit prosecutor to prove on cross-examination of defendant's wife that she had invoked spousal privilege before grand jury), on remand, 837 F.Supp. 726 (E.D.Va. 1993); United States v. Tsinnijinnie, 601 F.2d 1035, 1039–40 (9th Cir. 1979) (no error, however, in instructing jury that accused had invoked his privilege not to have wife testify, when defense attorney had implied that prosecution had not called her because her testimony would have

But differing approaches have emerged among the federal courts with regard to whether comment on the exercise of privileges in non-criminal proceedings is proper. The case law permits an inference to be drawn in a civil case from the invocation of one's privilege against self-incrimination,⁹⁷ but is not developed as to other privileges.⁹⁸ The

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been exculpatory), *cert. denied*, 445 U.S. 966 (1980); *United States v. Tapia-Lopez*, 521 F.2d 582 (9th Cir.1975). *See United States v. Black*, 497 F.2d 1039, 1042 n. 3 (5th Cir. 1974) (no adverse inference could be drawn against accused due to failure of his wife to testify, absent showing that her testimony was peculiarly in his power to produce, when she held privilege not to testify). *Contra Bisno v. United States*, 299 F.2d 711, 721-22 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962). *But see United States v. Hopkins*, 169 F.Supp. 187, 195 (D.Md. 1958) (where defense did not call accused's wife, although she was present in court, court would infer that her testimony would not have helped defense).

⁹⁷*E.g.* *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551 (1976) ("Our conclusion [that an adverse inference may be drawn against a state prison inmate from his silence in disciplinary proceedings] is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'"), *on remand*, 536 F.2d 305 (9th Cir. 1976); *id.* at 334 ("I would have difficulty holding such an inference impermissible in civil cases involving only private parties.") (Brennan, J., concurring in part and dissenting in part); *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 13 (D.Mass. 1991); *Sherrer v. Comm'r, T.C.* Memo 1999-122 at 42-43, 1999 Tax. Ct. Memo LEXIS 108, 77 T.C.M. (CCH) 1795, T.C.M. (RIA) 99122 (1999). *See Morley v. Cohen*, 888 F.2d 1006, 1011-12 (4th Cir.1989) (no abuse of discretion in refusing to shield civil RICO defendant from facing the alternatives of either not testifying, or facing questions regarding a pending criminal investigation and invoking the fifth amendment in the presence of the jury); *Rosebud Sioux Nation v. A & P Steel, Inc.*, 733 F.2d 509 (8th Cir. 1984) (under circumstances, proper for party to have called witness, knowing he would invoke Fifth Amendment privilege), *cert. denied*, 469 U.S. 1072 (1984); *Brinks, Inc. v. New York*, 717 F.2d 700, 707-10 (2d Cir.1983) (*semble*). *Cf. Mammoth Oil Co. v. United States*, 275 U.S. 13, 52 (1927) (in civil suit, "While [principal of defendant's] failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case, it justly may be inferred that he was not in a position to combat or explain away any fact or circumstance so supported by evidence and material to the Government's case.") (citation omitted); *Veranda Beach Club Ltd. Partnership v. Western Surety Co.*, 936 F.2d 1364, 1374 (1st Cir.1991) (in civil case, individual's invocation of Fifth Amendment privilege cannot be used to draw an inference against corporate party). *See generally* 1 McCormick § 121; 2 Weinstein ¶¶ 513.01-513.04; Moxham, *A Comment upon the Effect of Exercise of One's Fifth Amendment Privilege in Civil Litigation*, 12 New Eng.L.Rev. 265 (1976); Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 Minn.L.Rev. 383 (1977).

Regarding the propriety of dismissing a suit when the plaintiff asserts the privilege, see *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979), on petition for rehearing per curiam 611 F.2d 1026 (5th Cir. 1980).

⁹⁸*See United States v. Premises Known as 281 Syosset Woodbury Rd.*, 71 F.3d 1067, 1071 n.3 (2d Cir. 1995) (declining to reach question whether adverse inference from invocation of spousal privileges would be permissible in civil proceedings); *In re Tudor Assocs., Ltd., II v. Rulisa Operating Co.*, 20 F.3d 115, 120 (4th Cir. 1994) (negative inference should not be drawn from proper invocation of attorney-client privilege); *United States v. Jackson*, 384 F.2d 825, 828 (3d Cir. 1967) (adverse inference impermissible from informer's privilege), *cert. denied*, 392 U.S. 932 (1968); *Mueller & Kirkpatrick* § 180 (arguing that inference should not be permitted); *Annot.*, 32 A.L.R.3d 906 (1970) (effect of comment by counsel as to refusal to permit introduction of privileged testimony).

inference, however, cannot constitute the sole basis for the judgment against the invoker, even in a civil case.⁹⁹

Both proposed Fed. R. Evid. 513, which was not enacted, and Unif. R. Evid. 511 provide that no comment or inference would be permitted from the claim of any privilege.¹⁰⁰

Q21. The marriage has been dissolved through divorce. Does the confidential communications privilege still apply as to communications that were made during the marriage? To communications that were made during the period of legal separation?

In order for confidential communications to be privileged, they must have been made during the existence¹⁰¹ of a valid marriage.¹⁰² If so made, they generally are protected by the privilege even after the termination of the marriage by divorce or

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⁹⁹Sherrer v. Comm'r, T.C. Memo 1999-122 at 42-43 (taking petitioner's silence into account, along with all the other evidence of fraud) (Beghe, J.). See Kramer v. Levitt, 79 Md. App. 575, 585-87, 558 A.2d 760, 765-66 (1989) (quoting with approval from sources which state, inter alia, that invocation of the privilege cannot constitute the sole basis for the judgment against the invoker, even in a civil case); 1 McCormick § 74.1 at 277.

¹⁰⁰Proposed FRE 513 provided:

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

* * *

Unif. R. Evid. 511 (1999) is substantially identical to Proposed Fed. R. Evid. 513.

¹⁰¹E.g., Pereira v. United States, 347 U.S. 1 (1954) (communications before marriage not privileged); In re Grand Jury Subpoena of [Witness], 884 F.Supp. 188 (D.Md. 1995) (marriage after being served with grand jury subpoena was not a "sham," but marital privilege would protect only communications and observations made during, not before marriage).

¹⁰²United States v. Acker, 52 F.3d 509, 514-15 (4th Cir. 1995) (defendant failed to prove valid marriage); United States v. Lustig, 555 F.2d 737, 747-48 (9th Cir. 1977) (no privilege regarding testimony by defendant's common law wife, because marriage invalid under applicable state law), *cert. denied*, 434 U.S. 1045 (1978).

death.¹⁰³ Should a distinction be made between marriages that ended in divorce or were terminated by death?

There is substantial authority that communications made after the marriage is “on the rocks,” but before it is terminated, are not privileged.¹⁰⁴ Military R. Evid. 504(b)(1) makes communications unprotected if they were made while the spouses were legally separated. Presumably at this point the confider is aware of the risk that the two are not “on the same page.” Therefore, if Wigmore’s “instrumental” approach to privileges is followed, the parties may need the privilege more than ever in the course of trying to repair their marriage.¹⁰⁵

Q22. Suppose Husband had said nothing, but Wife saw him moving bags of cash around the garage. (i) May Wife tell the F.B.I.? (ii) May she testify?

(i) Yes.¹⁰⁶

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¹⁰³*E.g.*, *Hopkins v. Grimshaw*, 165 U.S. 342 (1897) (common law rule of incompetency remains in effect after death of confiding spouse); *Pereira v. United States*, 347 U.S. 1, 6 (1954) (privilege survived divorce but was inapplicable for other reasons); *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839) (privilege survives spouse's death); *United States v. Bolzer*, 556 F.2d 948, 951 (9th Cir. 1977) (privilege survives divorce); *United States v. Burks*, 470 F.2d 432, 436 (D.C.Cir. 1972) (privilege survived spouse's death but was inapplicable for other reasons). *See* 8 Wigmore § 2341 (rev. 1961); 1 McCormick §§ 81, 85.

¹⁰⁴*United States v. Singleton*, 260 F.3d 1295, 1301 (11th Cir. 2001) (per curiam) (marital communications privilege inapplicable to communication made when couple was permanently separated; in determining whether permanent separation has occurred, “A district court should focus upon the following three objective factors as especially important: (1) Was the couple cohabiting?; (2) if they were not cohabiting, how long had they been living apart?; and (3) had either spouse filed for divorce?”); *United States v. Jackson*, 939 F.2d 625 (8th Cir. 1991) (no confidential communications privilege for communications made after the couple has permanently separated); *United States v. Roberson*, 859 F.2d 1376 (9th Cir. 1988) (marital privilege was properly held inapplicable when an action for dissolution of the marriage had been filed two months prior to the communication, the defendant was no longer living with his wife at the time of the communication, and wife testified that marriage had failed prior to the communication); *United States v. Fulk*, 816 F.2d 1202, 1205 (7th Cir. 1987) (marital communications privilege inapplicable to communications made when spouses are permanently separated); *In re Witness Before the Grand Jury*, 791 F.2d 234 (2d Cir. 1986) (no confidential communication privilege when spouses are estranged). *See* *Holyoke v. Holyoke's Estate*, 110 Me. 469, 87 A. 40, 43–44 (1913); *McEntire v. McEntire*, 107 Ohio St. 510, 140 N.E. 328 (1923); *People v. D'Amato*, 105 Misc.2d 1048, 430 N.Y.S.2d 521, 524 (1980) (privilege unavailable when parties had separated numerous times and marriage was “in utter shambles”). *See* Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, Pt. 2, 8 Vill.L.Rev. 447, 490 (1963) (arguing that court should have power to allow disclosure of confidential communications, upon showing of good cause, after marriage is over). *Contra* *Coleman v. State*, 281 Md. 538, 544, 380 A.2d 49, 53 (1977). *See* McCormick § 81.

¹⁰⁵*See* Imwinkelreid, THE NEW WIGMORE § 6.9.1 (discussing split of authority, as well as difference in results under instrumental and humanistic models).

¹⁰⁶*See* *United States v. Foresman*, 63 Fed. Appx. 13, 2003 WL 21129839 (4th Cir. 2003) (per curiam) (unpublished). *See* also note 42 *supra*.

(ii) Yes.¹⁰⁷

Q23. Suppose Husband was in jail and asked a prison trusty to take a note to Wife. Privilege?

Generally, no.¹⁰⁸

IV. Attorney-Client Privilege

Although not enacted, Proposed Fed. R. Evid. 503 sets out the general framework of the common law attorney-client privilege recognized in the federal courts.¹⁰⁹ Proposed Rule 503 provides:

(a) Definitions. As used in this rule:

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

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

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

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

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

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¹⁰⁷See *United States v. Foresman*, 63 Fed. Appx. 13, 2003 WL 21129839 (4th Cir. 2003) (per curiam) (unpublished). See Imwinkelreid, *THE NEW WIGMORE* §§ 6.7.1 & 6.7.3. See also notes 53-55 *supra*.

¹⁰⁸See Imwinkelreid, *THE NEW WIGMORE* § 6.10.1.

¹⁰⁹See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (applying the privilege to coproate client).

lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and representative of the client, or (5) between lawyers representing the client.

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

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

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

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

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

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

(5) *Joint clients.* As to 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.

With modern technology, an attorney-client relationship may possibly be formed even by an attorney's giving legal advice in an online "chat room."¹¹⁰

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¹¹⁰D.C. Bar Legal Ethics Committee Opinion No. 316 (Sept. 2002), www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm (cited in Barber, *Chat Room Advice May Create Attorney-Client Relationship*, 28 *Litigation News* 12 (No. 4, May 2003)). See also Maher, *Uncertain Duty: Prospective Clients' E-Mail Queries May Not Be Entitled to Confidentiality*, 89 *A.B.A.J.* 38 (June 2003).

Some interesting and difficult questions continue as to when a client's identity might be privileged; who may properly be considered an agent of the lawyer (or an agent of the client) for purposes of the attorney-client privilege; waiver of the privilege by inadvertent disclosure of privileged materials; sufficiency of a corporate client's privilege log; and to what extent government officials enjoy the privilege as clients.

A. Who Qualifies as an Attorney's Agent

Confidential communications between the client and the lawyer, or a person employed by the lawyer to aid in the provision of legal services, will be covered by the privilege. But communications with such persons who are not providing that type of assistance will not fall within the attorney-client privilege. This line is not facily drawn.

An attorneys' secretary, clerk, etc., will be covered.¹¹¹ But when an attorney hires non-legal experts to aid the attorney, a more difficult question arises. If the expert, such as a psychiatrist, is hired by the lawyer to talk confidentially with the client, or to study the client's confidential communications to the lawyer, so as to assist the attorney in providing legal services, the communications among expert, client, and lawyer will be privileged.¹¹²

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¹¹¹See *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 40 (D.Md. 1974) (while attorney-client privilege extends to the agents and immediate subordinates of the attorney, such as the attorney's secretary, who are essential to the attorney's performance of legal services, it "was not intended to permit the attorney to dub all persons with whom he has contact as his agents, thereby cloaking all such communications with protection").

¹¹²E.g., *United States v. Salamanca*, 244 F.Supp.2d 1023 (D.S.D. 2003) (privilege applies as to court-appointed interpreter for defendant, who was a necessary component of defendant's communications with his attorney; interpreter could not testify as expert for government); *In re Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188 (4th Cir.1991) (communications between client and accountant en route to and at meeting with attorney, when client intended to hire attorney, were privileged, even though client never hired attorney; prior communications between client and accountant were not privileged); *United States v. Alvarez*, 519 F.2d 1036, 1045-46 (3d Cir.1975) (psychiatrist); *United States v. Kovel*, 296 F.2d 918 (2d Cir.1961) (accountant, under circumstances similar to *In re Grand Jury*); *Bernardo v. Comm'r*, 104 T.C. 677, 686 (1995) (appraiser assisting lawyer in providing legal advice). See *United States v. Toledo*, 25 M.J. 270, 275-76 (C.M.A. 1987) (psychotherapist), *reaff'd on rehearing*, 26 M.J. 104 (C.M.A. 1988).

As the advisory committee note explains:

The definition of "representative of the lawyer" recognizes that the lawyer may, in rendering legal services, utilize the services of assistants in addition to those employed in the process of communicating. Thus the definition includes an expert employed to assist in rendering legal advice. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (accountant). Cf. *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949). It also includes an expert employed to assist in the planning and conduct of litigation, though not one employed to testify as a witness. *Lalanc & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 F. 563 (S.D.N.Y. 1898), and see revised Civil Rule 26(b)(4). The definition does not, however, limit "representative of the lawyer" to experts. Whether his compensation is derived immediately from the lawyer or the client is not material.

When an accountant was hired for his tax advice alone, to advise client's lawyers, rather than to improve communications with the client, communications between the accountant's and client were not privileged.¹¹³

On the other hand, communications between the attorney and third parties whom the lawyer has employed to perform objective tasks without needing to analyze the client's communications will not be protected by the attorney-client privilege, nor will third persons providing only nonlegal advice.¹¹⁴ They may receive some protection, however, under the attorney work product doctrine. Communications with third parties consulted by the client, not hired by the attorney, would not be protected under either privilege.

The cases regarding communications with a public relations firm hired by the attorney to represent the client as to a legal matter are divided.¹¹⁵

B. What Qualifies as Legal Advice?

The attorney-client privilege applies only when legal advice or legal services are sought.¹¹⁶ Business advice, for example, is not privileged.¹¹⁷

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¹¹³In re G-I Holdings, Inc., 218 F.R.D. 428 (D.N.J. 2003).

¹¹⁴*But see* Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002) (documents created by or disclosed to accountants, with regard to meeting with client and attorney, were not protected by attorney-client privilege, when accountants provided only accounting advice and were not hired to assist attorneys in providing legal advice); Bernardo v. Comm'r, 104 T.C. 677, 686 (1995) (accountant).

¹¹⁵*Compare* Federal Trade Comm'n v. GlaxoSmithKline, 294 F.3d 141, 147-48 (D.C. Cir. 2002) (citations omitted) ("Our conclusion that the documents are protected by the attorney-client privilege extends also to those communications that GSK shared with its public relations and government affairs consultants. The Kinzig affidavit notes that GSK's corporate counsel 'worked with these consultants in the same manner as they did with full-time employees; indeed, the consultants acted as part of a team with full-time employees regarding their particular assignments' and, as a result, the consultants 'became integral members of the team assigned to deal with issues [that] ... were completely intertwined with [GSK's] litigation and legal strategies.' In these circumstances, 'there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice.'") *with* Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000).

¹¹⁶*E.g.*, Diversified Group, Inc. v. Daugerdas, 2003 WL 22077466 (S.D.N.Y. 2003) (memoranda not prepared in response to any client's specific request for legal advice, but were educational materials intended to lure new clients to sell them tax strategies, were not protected by attorney-client privilege). *See* Proposed FRE 503, advisory committee note ("The services must be professional legal services; purely business or personal matters do not qualify.") (citing McCormick); In re Allen, 106 F.3d 582, 601-05 (4th Cir.1997) (attorney was hired to do investigative work in her capacity as an attorney); In re Feldberg, 862 F.2d 622, 626-28 (7th Cir.1988) (entrusting

Where tax advice falls may be a challenging question.¹¹⁸ The new tax practitioner privilege, I.R.C. § 7525, applies only when communications made after July 22, 1998 would have been privileged under the attorney-client privilege (not attorney work product) if the preparer had been an attorney,¹¹⁹ *i.e.*, when they are pertinent to “legal advice.” Mere preparation of a tax return does not qualify as the provision of “legal services”; accompanying worksheets are as unprivileged in the hands of a lawyer as in the hands of an accountant.¹²⁰ That fact does not change even if the documents are “dual purpose” documents that are also relevant to

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documents to a lawyer rather than to a file clerk did not make privileged communications dealing only with mechanically searching corporate records files); *In re Grand Jury Subpoenas*, 803 F.2d 493 (9th Cir.1986) (using attorneys as mere conduits for payments of funds did not qualify as seeking legal advice), footnote corrected 817 F.2d 64 (9th Cir.1987); *United States v. Tedder*, 801 F.2d 1437, 1441–43 (4th Cir.1986) (privilege inapplicable when defendant spoke to colleague as a friend rather than as a legal advisor), cert. denied 480 U.S. 938, 107 S.Ct. 1585, 94 L.Ed.2d 775 (1987); *United States v. Huberts*, 637 F.2d 630, 640 (9th Cir.1980) (no privilege when attorney performs only ministerial or clerical privileges or acts as business agent; no privilege when attorney merely oversaw sale of equipment), cert. denied 451 U.S. 975, 101 S.Ct. 2058, 68 L.Ed.2d 356 (1981); *Diversified Indus. v. Meredith*, on reh'g en banc 572 F.2d 606, 610 (8th Cir.1978) (rejecting panel's finding, at 572 F.2d 596, 602–03 (8th Cir.1977), that no privilege existed regarding reports of attorney's investigation and recommendations, on theory that non-lawyers could have performed same services); *F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 71-72 (D.Md. 1998) (part of documents relating only to business advice was not privileged, but parts relating to legal advice were privileged).

¹¹⁷*See Clinton Pardon Files Ordered Given to Jury*, The Baltimore Sun, 6A, col. 6 (Dec. 14, 2001) (New York federal judge ordered Marc Rich's attorneys to turn over their files, as “The Marc Rich lawyers were acting principally as lobbyists, working with public relations specialists and individuals-foreign government officials, prominent citizens and personal friends of the president-who had access to the White House. They were not acting as lawyers or providing legal advice in the traditional sense.”).

¹¹⁸*United States v. Bollin*, 264 F.3d 391, 412 n.15, 57 Fed. R. Evid. Serv. 429 (4th Cir. 2001), cert. denied, 534 U.S. 935, & cert. denied, 535 U.S. 989 (2002). *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984) (“[T]he privilege is triggered only by a client's request for legal, as contrasted with business, advice.” “Tax advice rendered by an attorney is legal advice within the ambit of the privilege.”); *United States v. Jones*, 696 F.2d 1069, 1072-73 (4th Cir. 1982) (per curiam) (doubtful that there was a privilege with regard to communications with attorneys hired primarily to write tax opinions to be used in commercial brochures promoting tax shelters, not to guide clients themselves, but assuming there was privilege, it was waived); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981), reh'd denied, 645 F.2d 71 (5th Cir. 1981); *Marshall v. Hendricks*, 103 F. Supp. 2d 749, 786 (N.D.J. 2000), aff'd in part & rev'd in part on other grounds, 307 F.3d 36 (3d Cir. 2002); *United States v. Willis*, 565 F. Supp. 1186 (S.D. Iowa 1983); Orkin, *The Attorney-Client Privilege in Tax Matters*, 49 A.B.A. J. 794 (1963); Peterson, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 Minn. L. Rev. 67 (1969).

¹¹⁹26 U.S.C. § 7525(a)(1). The new “tax practitioner” privilege applies only in either a “noncriminal tax matter before the Internal Revenue Service” or “any noncriminal tax proceeding in Federal court brought by or against the United States.” *Id.* § 7525(a)(2)(A) & (B). *See United States v. BDO Seidman, LLP*, 337 F.3d 802 (7th Cir. 2003); *United States v. KPMG LLP*, 237 F. Supp. 2d 35 (D.D.C. 2002). It is inapplicable in other civil proceedings and in any criminal proceeding.

¹²⁰*E.g.*, *United States v. Frederick*, 99-1 U.S.T.C. (CCH) ¶ 56,465 (7th Cir. 1999) (Posner, J.) (preparer was both an accountant and clients' lawyer).

contemplated or pending litigation: they are not protected by the work product doctrine either. Although a lawyer's cover construing statutory or case law in preparation for representation of a client during an audit could be so protected.¹²¹

C. Identity of Client

Because the attorney-client privilege protects only confidential communications,¹²² generally it is held not to protect such facts as the client's identity, the fact that the client hired the attorney, and that the client paid a fee.¹²³ Those parts of bills that contain privileged information, regarding the nature of the legal work performed, however, will be properly redacted.¹²⁴

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¹²¹ *Id.*

¹²² *E.g.*, *Karme v. Comm'r*, 73 T.C. 1163 (1980), *aff'd*, 673 F.2d 1062 (9th Cir. 1982) (system accountings not protected).

¹²³ *E.g.*, *In re Grand Jury Subpoena*, 204 F.3d 516 (4th Cir. 2000) (client's identity is not privileged); *In re Grand Jury Proceedings*, 33 F.3d 342, 353–54 (4th Cir. 1994); *Tornay v. United States*, 840 F.2d 1424, 1426–29 (9th Cir. 1988). *See Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294–95 (1826) (possibly, attorney might properly be asked whether he or she had been retained by a person in a matter, but not as to client's title, claim, or defense); *In re Grand Jury Proceedings 88–9 (MIA)*, 899 F.2d 1039 (11th Cir. 1990) (affirming contempt order against attorney who refused to testify before a grand jury as to client's identity and to attorney's receipt of fees); *United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980) (referring to "the long established proposition that the identity of the client is not a confidential communication"); *United States v. Jeffers*, 532 F.2d 1101, 1114–15 (7th Cir. 1976) (payment and amount of fees not privileged), *aff'd in part & vacated in part on other grounds*, 432 U.S. 137 (1977); *United States v. Stewart*, 287 F. Supp. 2d 461 (2203) (Martha Stewart waived privilege by sending her daughter a copy of an e-mail she had sent to her attorney); *United States v. Grand Jury Matter*, 789 F.Supp. 693 (D.Md. 1992) (privilege inapplicable: attorney failed to show that government's attempt to obtain, by subpoena, fee arrangement information—regarding dates and amounts of payments and identity of persons making them—would violate privilege); *In re Grand Jury Subpoena c/d 91R0052–11*, 142 F.R.D. 122 (M.D.N.C. 1992) (denying attorneys' motions to quash subpoenas directed at their records regarding fees from certain clients, but granting one attorney's motion in part, as to documents that reveal fee-payer-client's payment of other person's fees, which are integral to fee-payer's confidential communication of his involvement with drug conspiracy); *Payden v. United States*, 605 F.Supp. 839, 846–47 (S.D.N.Y. 1985) (attorney must disclose to grand jury fees he has received from client indicted for selling drugs; if fees are from illegal source, government may confiscate them), *rev'd on other grounds*, 767 F.2d 26 (2d Cir.), *subsequent proceeding*, 775 F.2d 499 (2d Cir. 1985); *United States v. Osborn*, 409 F.Supp. 406, 411 (D.Or. 1975) (fees charged and general nature of legal services provided are not privileged, but more specific descriptions of services provided are privileged), *aff'd in part & rev'd in part*, 561 F.2d 1334 (9th Cir. 1977). *But see In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984) (no abuse of discretion in quashing subpoenas directed at obtaining attorney fee records). *See generally* Imwinkelreid, *THE NEW WIGMORE* § 6.7.2 (interesting discussion of, *inter alia*, 28 U.S.C. § 60501) (copy of § 6.7.2 is attached to this handout).

¹²⁴ *Chaudhry v. Callerizzo*, 174 F.3d 394, 402–03 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 215 181 (U.S. 1999); *Brennan v. Western Nat. Mut. Ins. Co.*, 199 F.R.D. 660 (D.S.D. 2001) ("In a legal bill, 'the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege.' *Clarke v. American Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992). On the other hand, billing statements 'which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services performed, such as

But several cases have held a client's identity privileged when "the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very [past] criminal activity for which legal advice was sought,"¹²⁵ i.e., it would disclose those clients' confidences.¹²⁶ This approach has not been universally endorsed, however.¹²⁷

No privilege will apply, of course, unless legal services are sought or performed by the attorney; a lawyer's acting merely as a courier or a scrivener will not suffice.¹²⁸

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researching particular areas of the law, fall within the privilege.'"). *But see* Valenti v. Allstate Ins. Co., 243 F.Supp.2d 200, 217-220 (M.D. Pa. 2003) (defendant's claims of privileges as to various words in billing statement "perplexing" and unreasonable).

¹²⁵Tillotson v. Boughner, 350 F.2d 663, 666 (7th Cir.1965). *Accord* In re Special Grand Jury No. 81-1, 676 F.2d 1005, 1008-09, 1011 (4th Cir.1982) ("Payment of fees and expenses generally is not privileged information because such payments ordinarily are not communications made for the purpose of obtaining legal advice. An exception to the no privilege rule is recognized 'where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very [past] criminal activity for which legal advice was sought.' *** [Therefore, u]ntil the government discloses the relevance of the subpoenaed documents to the grand jury's investigation, proper ruling on the privilege issue cannot be made." "When a grand jury subpoena undermines an ongoing attorney-client relationship [between the target of the grand jury investigation and his or her counsel], the United States attorney should [not only show that the subpoena is regular but] also show by affidavit an important need for the information sought.") (citations and footnote omitted), *opinion vacated*, 697 F.2d 112 (4th Cir. 1982); In re Grand Jury Proceedings, 600 F.2d 215, 218 (9th Cir. 1979); United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977); In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975), *reh'g denied*, 521 F.2d 815 (5th Cir. 1975); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (applying California law). *See* Liew v. Breen, 640 F.2d 1046, 1049-50 (9th Cir. 1981) (applying California law; privilege inapplicable when no showing that disclosure of identity would lead to disclosure of client's confidences). *Cf.* In re Grand Jury Empanelled, Feb. 14, 1978, 603 F.2d 469 (3d Cir. 1979) (client's identity not privileged, but attorney could invoke Fifth Amendment privilege).

¹²⁶*See* In re Grand Jury Subpoena, 204 F.3d 516 (4th Cir.2000) (client's identity is within the attorney-client privilege only when the client has not authorized the disclosure of confidential information or of a confidential communication, and the compelled disclosure of client's identity is tantamount to revealing his or her confidences; those circumstances were not met here); United States v. Braun, 2003 WL 21791231 (N.D. Cal. 2003) (privilege applied where attorney who had been hired to pay second attorney to represent client's apparent co-conspirator presented affidavit that her client had consulted him regarding legal advice potentially related to conduct for which apparent coconspirator was being investigated; crime-fraud exception not applicable where insufficient proof of agreement to further conspiracy in such a way).

¹²⁷Gannet v. First Nat'l St. Bank, 410 F.Supp. 585 (D.N.J. 1976) (attorney, in whose trust account cashier's checks were deposited by client for payment of back taxes, may be required to disclose client's identity), *aff'd in part & rev'd in part on other grounds sub nom.* United States v. First Nat'l St. Bank, 540 F.2d 619 (3d Cir.1976), *aff'd*, 546 F.2d 1072 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

¹²⁸*See* In re Keeper of the Records v. United States, 348 F.3d 16 (1st Cir. 2003); Baird v. Koerner, 279 F.2d 623, 626 (9th Cir. 1960) (apparently, counsel gave clients legal advice to pay taxes).

D. Client List Disclosure Cases

Client lists are sought in tax shelter abuse cases such as *United States v. KPMG LLP*.¹²⁹ A trio of conflicting opinions issued between June 24 and July 23, 2003 is informative.

1. *Doe v. Wachovia Corp.*

In the first, *Doe v. Wachovia Corp.*, the United States District Court for the Western District of North Carolina, the IRS sought investor lists, from a bank, with regard to potentially abusive tax shelters as defined by 26 C.F.R. § 301.6112-11. The bank was required by that regulation to maintain such lists.

Clients of the bank sought to enjoin the bank from complying with the IRS summons. The clients alleged that they received legal advice from a law firm (J&G), accounting advice from KPMG, and that the bank “facilitat[ed] and implement[ed] tax advice concerning investment strategies.”¹³⁰ The clients relied on § 7525.

The letter of engagement between the clients and the bank made clear, in so many words, that the bank was not providing legal advice. The agreement between the clients and the law firm referred not to confidences by the clients, but required the clients to keep confidential the law firm’s “confidential proprietary information [regarding] certain financing structures . . . developed by” the law firm.¹³¹ The agreement disavowed any agency or fiduciary relationship between the law firm and the clients. The court found that no attorney-client relationship existed. The court quoted with approval IRS Chief Counsel B. John Williams’ June 6, 2002 speech on similar arrangements.¹³²

It therefore did not reach the question whether the clients’ identities would have been protected, had there been such a relationship.¹³³

The court further concluded that there was no fiduciary or agency relationship between the taxpayers and the bank.¹³⁴

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¹²⁹237 F. Supp. 2d 35 (D.D.C. 2002).

¹³⁰*Doe v. Wachovia Corp.*, 268 F. Supp. 2d 627, 629 (W.D.N.C. 2003).

¹³¹*Id.* at 631.

¹³²*Id.* at 635 (citing 70 Prac. Tax Strategies 324, 328-32 (June 2003)).

¹³³*Id.* at 632.

¹³⁴*Id.* at 636.

It found § 7525 inapplicable for several reasons, including (1) by virtue of § 7525(b), on the ground that the transaction required the participation of a corporation in promotion of a tax shelter; and (2) that the issuance of an IRS summons to the bank was not a “tax proceeding” before the IRS, nor was the instant proceeding one “brought by or against the United States.”¹³⁵ Additionally, the court found, relying on *United States v. KPMG* KPMG had not provided _____ tax advice, but only accounting advice.¹³⁶ Even if it had provided tax advice, the IRS was seeking the clients’ identities from the bank, not from the tax preparer.¹³⁷ Injunctive relief was denied.

2. *United States v. Arthur Andersen*

In *United States v. Arthur Andersen*,¹³⁸ the United States sought to enforce nineteen IRS summonses against the accounting firm Arthur Andersen. The accounting firm notified the investors of the subsequent court order to supply the information, and two groups of investors intervened under fictitious names. The United States District Court for the Northern District of Illinois granted relief to the intervenors on the ground that their identities were protected under § 7525.

The court found that the United States, by seeking to investigate Andersen as a promoter of tax shelters, had shot itself in the foot:

[I]n the current matter it is Petitioner itself that has fixed Andersen’s capacity as tax advisor and not as tax preparer. Petitioner is seeking to obtain documents relating to Andersen’s activities as a promoter of tax shelters, an activity that necessarily involves dispensing tax advice to potential investors. While it is certainly true that the Does’ and the Poes’ tax returns were likely impacted by the advice that they received, whether and how Andersen prepared those returns is irrelevant for the purposes of Petitioner’s investigation and has no bearing on their motivations in seeking Andersen’s advice on the tax shelters. Given this fact, and the very nature of Petitioner’s investigation, we cannot say that the Does and the Poes have failed to meet their burden; in fact, Petitioner has met it for them.¹³⁹

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¹³⁵ *Id.* at 637.

¹³⁶ *Id.*

¹³⁷ *Id.* at 638.

¹³⁸ 273 F. Supp. 2d 955 (N.D. Ill. 2003).

¹³⁹ *Id.* at 960 n.4.

The regulation requiring the maintenance of the investor list was of no assistance to the IRS, because § 301.61112-IT Q&A 17(b) (2000) provides:

in any case in which an organizer or a seller of a potentially abusive tax shelter believes that information required to be maintained as part of the list for that tax shelter . . . constitutes confidential tax advice protected under Section 7525(a), such information may be withheld from the Service.¹⁴⁰

The fact that the IRS suspected Andersen of fraud did not prove that fraud; nor did it make the crime-fraud exception applicable as to the investors.¹⁴¹ The client's identities were held to be protected, on the ground that revealing them would "perforce [reveal] a confidential communication. . . ."¹⁴²

The continued viability of this conclusion is placed in doubt by the United States Court of Appeals' subsequent holding in a similar case.

3. *United States v. BDO Seidman*

The Seventh Circuit issued an opinion three weeks later in *United States v. BDO Seidman*,¹⁴³ a similar case, the earlier opinions as to which the *Andersen* court had relied. In *BDO Seidman*, the IRS sought enforcement of twenty summonses against accounting firm BDO Seidman ("BDO"), which it suspected of failing to keep required records of shelters. Several of BDO's clients sought to intervene, to protect their identities, relying on § 7525. the district court had denied the motion, and the court of appeals had remanded for in camera inspection of the documents at issue.

On remand, the district court concluded that the clients had not met their burden of making a colorable claim of privilege by proving that they sought legal advice from BDO. As to some, no documents had been provided for review. As to the others, many of the confidentiality agreements between them and BDO established that they hired BDO, in part, to prepare income tax returns. Some agreements explicitly stated that BDO provided no "legal and/or tax opinions."¹⁴⁴

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¹⁴⁰ *Id.* at 960.

¹⁴¹ *Id.* at 961.

¹⁴² *Id.* at 959.

¹⁴³ 337 F.3d 802 (7th Cir. 2003), *reh'g & reh'g en banc denied*.

¹⁴⁴ *Id.* at 807.

The court of appeals affirmed the district court's denial of the clients' motion to intervene. In an opinion by Judge Ripple, the Seventh Circuit found that clients' identities are in any event not privileged, except "in the rare circumstance when so much of an actual confidential communication has been disclosed already that merely identifying the client will effectively disclose that communication."¹⁴⁵ That exception was inapplicable here:

Disclosure of the identities of the Does will disclose to the IRS that the Does participated in one of the 20 types of tax shelters described in its summonses. It is less than clear, however, as to what motive, or other confidential communication of tax advice, can be inferred from that information alone. Compared to the situations in the *Tillotson* and *Cherney* cases, where the Government already knew much about the substance of the communications between the attorney and his unidentified client, in this case the IRS knows relatively little about the interactions between BDO and the Does, the nature of their relationship, or the substance of their conversations.¹⁴⁶

The court also reasoned that, "[M]ore fundamentally," the requirement that organizers or sellers of tax shelters keep a list prevent the clients "from establishing an *expectation of confidentiality* in their communications with BDO, an essential element of the attorney-client privilege and, by extension, the § 7525 privilege."¹⁴⁷ This rationale alone will preclude the application of either privilege to persons listed on these required investor lists.

E. Sufficiency of Privilege Log

The courts have some flexibility to assess the sufficiency of a privilege logging the light of whether it would be unduly burdensome to require more,¹⁴⁸ as long as the log provides sufficient information for the court to ascertain whether a privilege applies.¹⁴⁹

In an interesting 2002 opinion, the United States Court of Appeals for the District of Columbia addressing the sufficiency of a corporate client's privilege log, reversed the trial court's decision and held that the corporation had made a sufficient showing that dissemination

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¹⁴⁵ *Id.* at 811.

¹⁴⁶ *Id.* at 812.

¹⁴⁷ *Id.*

¹⁴⁸ *See, e.g.,* Public Serv. Co. v. Portland Natural Gas, 218 F.R.D. 361 (D.N.H. 2003).

¹⁴⁹ *See* United States v. KPMG LLP, 237 F.Supp.2d 35 (D.D.C. 2002) (categorical log was insufficient there).

of the privileged documents was only to those who "needed to know."¹⁵⁰ The appellate court held that the district court had erred in finding that the corporate defendant had waived its attorney-client privilege.

The district court had imposed a burden on the corporation to explain why each employee, or public relations or governmental affairs consultant, who had received privileged information, had needed it. The Court of Appeals rejected this allocation of the burden:

The applicable standard is, as the district court recognized, whether "the documents were distributed on a 'need to know' basis or to employees that were 'authorized to speak or act' for the company." The Company's privilege log and the affidavit of Charles Kinzig establish that GSK circulated the documents in question only to specifically named employees and contractors, most of whom were attorneys or managers and all of whom "needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel." The affidavit also states that each intended recipient was bound by corporate policy or, in the case of the contractors, by a separate understanding, to keep confidential the contents of the documents. The Company's submission thus leads ineluctably to the conclusion that no document was "disseminated beyond those persons who, because of the corporate structure, needed to know its contents."

The district court faulted GSK for not having explained "why any, let alone all, of the employees received copies of certain documents," and the Commission likewise claims on brief that GSK should have shown why each individual in possession of a confidential document "needed the information [therein] to carry out his/her work." These demands are overreaching. The Company's burden is to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein. Not only would that task be Herculean -- especially when the sender and the recipient are no longer with the Company -- but it is wholly unnecessary. After all, *when a corporation provides a confidential document to certain specified employees or contractors with the admonition not to disseminate further its contents and the contents of the documents are related generally to the employees' corporate duties, absent evidence to the contrary we may reasonably infer that the information was deemed necessary for the employees' or contractors' work. Compare Coastal States*, 617 F.2d at 863 (confidentiality lost when organization "admitted that it does not know who has had access to the documents, and there is undisputed testimony that ... copies of the memoranda were circulated to all area offices"). We do not presume, therefore, that any business would include in a restricted

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¹⁵⁰Federal Trade Comm'n v. Glaxosmithkline, 294 F.3d 141, 147-48 (D.C. Cir. 2002).

circulation list a person with no reason to have access to the confidential document--that is, one who has no "need to know."

Moreover, we can imagine no useful purpose in having a court review the business judgment of each corporate official who deemed it necessary or desirable for a particular employee or contractor to have access to a corporate secret. It suffices instead that the corporation limited dissemination to specific individuals whose corporate duties relate generally to the contents of the documents. As we have seen in this case, the privilege log and the Kinzig Declaration together establish that GSK did just that, and the Company thereby demonstrated its entitlement to the attorney-client privilege. The FTC has proffered nothing to the contrary.¹⁵¹

F. Government Lawyers

Government lawyers, like other lawyers, enjoy the qualified privilege of the attorney work product doctrine.¹⁵² But the attorney-client privilege, on the other hand, is likely inapplicable to communications between a government lawyer and a public official, when criminal proceedings are involved.

The United States Court of Appeals for the Seventh Circuit, in an important decision regarding the attorney-client privilege as it applies with regard to government lawyers, has held that in criminal proceedings, no attorney-client privilege exists for confidential communications between government officials and government lawyers.¹⁵³

Federal prosecutors investigating a bribery scandal in the Illinois Secretary of State's Office during the previous gubernatorial administration sought to interview the attorney who had been Chief Legal Counsel to that office, during former Secretary of State Ryan's tenure. Ryan asserted his attorney-client privilege.

The federal district court granted the U.S. Attorney's motion to compel the attorney to testify about conversations he had had with Ryan in his official capacity as General Counsel. In a thoughtful opinion by Judge Diane Wood, the United States Court of Appeals for the Seventh Circuit affirmed:

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¹⁵¹Federal Trade Comm'n v. GlaxoSmithKline, 294 F.3d 141, 147-48 (D.C. Cir. 2002) (emphasis added) (citations omitted).

¹⁵²*E.g.*, Audio Investments v. Robertson, 67 Fed. Appx. 795, 2003 WL 21387196 (4th Cir. 2003) (per curiam) (IRS lawyers' theory of the case was protected from discovery).

¹⁵³*In Re: A Witness before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002).

[H]ere, we have a special case: the client is neither a private individual nor a private corporation. It is instead the State of Illinois itself, represented through one of its agencies. There is surprisingly little case law on whether a government agency may also be a client for purposes of this [attorney-client] privilege, but both parties here concede that, at least in the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client.

* * *

While we recognize the need for full and frank communication between government officials, we are more persuaded by the serious arguments against extending the attorney-client privilege to protect communications between government lawyers and the public officials they serve when criminal proceedings are at issue. First, government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients -- even those engaged in wrongdoing -- from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest.

* * *

Individuals and corporations are both subject to criminal liability for their transgressions. Individuals will not talk and corporations will have no incentive to conduct or cooperate in internal investigations if they know that any information disclosed may be turned over to authorities. A state agency, however, cannot be held criminally liable by either the state itself or the federal government. There is thus no need to offer the attorney-client privilege as an incentive to increase compliance with the laws.

In the final analysis, reason and experience dictate that the lack of criminal liability for government agencies and the duty of public lawyers to uphold the law and foster an open and accountable government outweigh any need for a privilege in this context. An officeholder wary of becoming enmeshed in illegal acts may always consult with a private attorney, and there the privilege unquestionably would apply. While Ryan fears that our refusal to recognize a privilege will cause even the most trivial of matters to be taken to outside counsel, this strikes us as unduly alarmist.

In fact, analogous rules apply in the corporate realm, where attorneys are repeatedly admonished to advise corporate officials that they are not personal clients of the attorney and may wish to retain other counsel. These rules do not

appear to have stifled corporate discussion or proved impossible to administer, and we see no reason why a similar result cannot be countenanced here.¹⁵⁴

V. Priest-Penitent Privilege

Q24. The Government subpoenas Taxpayer's Priest to testify that Taxpayer confessed to Priest that she had cheated on her taxes. Taxpayer moves to quash on the ground of priest-penitent privilege. What result? Is there a federal priest-penitent privilege? If so, who holds it?

The existence at the common law, after the Reformation, of a privilege protecting confidential communications between priest and penitent is dubious.¹⁵⁵ Many states have adopted statutes codifying such a privilege. Maryland's statute, for example, provides: "A minister of the gospel, priest, or member of the clergy of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation."¹⁵⁶

The rationale for the privilege is that it is in the interest of society to encourage individuals to confess their wrongs to and to seek help from their spiritual leaders; it also may be that compulsion by the courts of a minister to disclose such a person's confidences smacks of governmental interference in matters of religion.¹⁵⁷

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¹⁵⁴*In Re: A Witness before the Special Grand Jury 2000-2*, 288 F.3d 289, 291-94 (7th Cir. 2002) (citations omitted).

¹⁵⁵*Cox v. Miller*, 296 F.3d 89, 102 (2d Cir. 2002), *cert. denied*, 123 S.Ct. 1273 (U.S. 2003); *Mullen v. United States*, 263 F.2d 275, 278 (D.C. Cir. 1958) (Fahy & Edgerton, J.J., concurring); 1 McCormick § 76.2 at 286; 8 Wigmore § 2394. *See Seidman v. Fishburne-Judgins Educ. Foundation, Inc.*, 724 F.2d 413, 415 (4th Cir. 1984) ("The priest-penitent or clergyman-communicant privilege has no firm foundation in common law."); Proposed Fed. R. Evid. 506, advisory committee note ("The considerations which dictate the recognition of privileges generally seem strongly to favor a privilege for confidential communications to clergymen. During the period when most of the common law privileges were taking shape, no clear-cut privilege for communications between priest and penitent emerged."); Callahan, *Historical Inquiry into the Priest-Penitent Privilege*, 36 Jurist 328 (1976). *Cf. Pagano v. Hadley*, 100 F.R.D. 758 (D. Del. 1984) (no First Amendment priest-penitent privilege, but Del. R. Evid. 505 applies in civil rights defamation suit to protect confidential communications from plaintiff priest to his bishop).

¹⁵⁶Md.Cts. & Jud.Proc.Code Ann. § 9-111 (1998 Repl.Vol.). *See also* Note, *The Clergy-Communicant Privilege: Blessed are the Meek, for They Shall Remain Silent*, 65 N.C.L.Rev. 1390 (1987).

¹⁵⁷4 J. Bentham, *RATIONALE OF JUDICIAL EVIDENCE* 588 (J.S. Mill ed. 1827) ("[W]ith any idea of toleration, a coercion of this nature is altogether inconsistent ***"); Bocker, *Sacred Secrets: A Call for the Expansive Application and Interpretation of the Clergy-Communicant Privilege*, 37 N.Y.L.Sch.L.Rev. 455 (1991). *See generally* 8 Wigmore § 2396; Blaes, *Penitent Privilege Under the New Code*, 33 Kan. B.J. 279 (1964); Hogan, *A Modern Problem on the Privilege of the Confessional*, 6 Loy.L.Rev. 1 (1951); Kuhlman, *Communications to Clergymen—When Are They Privileged?*, 2 Val.U.L.Rev. 265 (1968); Reese, *Confidential Communications to the*

It has been argued that the privilege itself is unconstitutional as an establishment of religion.¹⁵⁸ In light of Supreme Court decisions construing the establishment clause,¹⁵⁹ that argument seems unlikely to succeed.

Fed. R. Evid. 501 permits federal courts to recognize privileges at common law "in the light of reason and experience." **Prior to the Federal Rules of Evidence, several federal courts, including the Supreme Court, had alluded to a priest-penitent privilege under common law principles pertaining to confidentiality.**¹⁶⁰

Proposed Fed. R. Evid. 506 would have codified a "clergyman" privilege, under which a person making confidential communications¹⁶¹ to a cleric in his or her professional

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Clergy, 24 Ohio St. L.J. 55 (1963); Shetreet, *Exemptions and Privileges on the Grounds of Religion and Conscience*, 62 Ky.L.J. 377 (1974); Note, *Catholic Sisters, Irregularly Ordained Women and the Clergy-Penitent Privilege*, 9 U.C.D.L.Rev. 523 (1976); Annots., 71 A.L.R.3d 794 (1976); 49 A.L.R.3d 1205 (1973); 22 A.L.R.2d 1152 (1952).

¹⁵⁸1 McCormick § 76.2 at 287 & n. 11; Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise Govern*, 62 Ind.L.J. 397 (1987). Cf. *Cox v. Miller*, 296 F.3d 89 (2d Cir. 2002), *cert. denied*, 123 S.Ct. 1273 (U.S. 2003) (rejecting habeas claim that New York violated Establishment Clause in not protecting defendant's statements to other AA members; federal court of appeals resolved case based on finding that defendant was not seeking "spiritual guidance," as required by New York statute).

¹⁵⁹E.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984), *reh'g denied*, 466 U.S. 994 (1984).

¹⁶⁰*United States v. Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974) ("[G]enerally, *** a priest may not be required to disclose what has been revealed in professional confidence.") (dictum); *Totten v. United States*, 92 U.S. (2 Otto) 105, 107, 23 L.Ed. 605 (1875) ("[S]uits cannot be maintained which would require a disclosure of the confidences of the confessional ***.") (dictum); *Mullen v. United States*, 263 F.2d 275, 277-80 (D.C.Cir.1958) (Fahy & Edgerton, JJ., concurring); *In re Verplank*, 329 F.Supp. 433, 434-36 (C.D.Cal.1971). See *United States v. Wells*, 446 F.2d 2, 4 (2d Cir.1971) (privilege unavailable when letter to priest contained no hint that its contents were to be kept secret and was not written "to obtain religious or other counsel, advice, solace, absolution or ministration"); Orfield, *Privileges in Federal Criminal Evidence*, 40 U. Detroit L.J. 403, 414-15 (1963). See generally Annot., 118 A.L.R. Fed. 449 (1994).

¹⁶¹The advisory committee note to Proposed Fed. R. Evid. 506 explains:

The definition of "confidential" communication is consistent with the use of the term in Rule 503(a)(5) for lawyer-client and in Rule 504(a)(3) for psychotherapist-patient, suitably adapted to communications to clergymen.

*** The choice between a privilege narrowly restricted to doctrinally required confessions and a privilege broadly applicable to all confidential communications with a clergyman in his professional character as spiritual adviser has been exercised in favor of the latter. Many clergymen now receive training in marriage counseling and the handling of personality problems. Matters of this kind fall readily into the realm of the spirit. The same considerations which underlie the psychotherapist-patient privilege of Rule 504 suggest a broad application of the privilege for communications to clergymen.

character as spiritual adviser¹⁶² would have a privilege to refuse to disclose and to prevent another from disclosing those communications.¹⁶³

The privilege, as proposed, **would have survived the confider's death.**¹⁶⁴ It could be claimed by the confider, if alive, or on the confider's behalf by the confider's guardian, conservator, or personal representative.¹⁶⁵

See United States v. Webb, 615 F.2d 828 (9th Cir. 1980) (per curiam) (confession to prison chaplain in presence of guard not confidential).

¹⁶²*See* United States v. Dube, 820 F.2d 886 (7th Cir. 1987) (**communications were not privileged when clergyman was sought out only for income tax avoidance**); United States v. Gordon, 493 F.Supp. 822 (N.D.N.Y. 1980) (communications regarding business matters, with person on leave from priesthood, not privileged), *aff'd*, 655 F.2d 478, 486 (2d Cir. 1981).

¹⁶³Proposed Fed. R. Evid. 506 provides:

(a) Definitions. As used in this rule:

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

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

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

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

Unif. R. Evid. 505 (1999) is substantially identical, except that it also specifically lists "Christian Science practitioner" in (a)(1). *See* Ellis v. United States, 922 F.Supp. 539 (D.Utah 1996) (church officials' communications to church leaders about church members' drowning during trip were not made for spiritual purposes and were not protected communications); United States v. Mohanlal, 867 F.Supp. 199 (S.D.N.Y.1994) (privilege does not extend to minister's conclusion that communicant knows right from wrong).

Unif.R.Evid. 505 is identical to Proposed Fed. R. Evid. 506, except for the last sentence of subsection (c). In the Uniform Rule, that sentence reads: "The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant."

¹⁶⁴Proposed Fed. R. Evid. 506(c).

¹⁶⁵*Id.* The advisory committee note to Proposed Fed. R. Evid. 506 explains:

Subdivision (c) makes clear that the privilege belongs to the communicating person. However, a prima facie authority on the part of the clergyman to claim the privilege on behalf of the person is recognized.

Although it was not enacted, proposed Fed. R. Evid. 506 has influenced post-rules federal decisions recognizing a priest-penitent privilege.¹⁶⁶

Proposed Fed. R. Evid. 506 differs from statutes such as Maryland's in several significant ways. The proposed federal privilege is held by the confider or confessor, not by the cleric; under the federal approach, the priest may assert the privilege on behalf of the confider but cannot waive the privilege.¹⁶⁷

"Clergyman" is defined more broadly in the proposed federal rule, as "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."¹⁶⁸ **The proposed rule provides¹⁶⁹—and the**

The discipline of the particular church and the discreetness of the clergyman are believed to constitute sufficient safeguards for the absent communicating person.

¹⁶⁶E.g., *In re Grand Jury Investigation*, 918 F.2d 374, 380–81 (3d Cir.1990). Cf. *In re Verplank*, 329 F.Supp. 433, 435–36 (C.D.Cal.1971) (influenced by early draft). See generally *Developments in the Law: Privileged Communications*, 98 Harv.L.Rev. 1450, 1552–63 (1985).

¹⁶⁷See Proposed Fed. R. Evid. 506(b) & Advisory Committee note. See also *Mockaitis v. Harclerod*, 938 F.Supp. 1516, 1521 (D.Ore. 1996) (under Oregon law, privilege belongs to the penitent; tape recording jailhouse confession infringed priest's free exercise of religion), *rev'd*, 104 F.3d 1522 (9th Cir. 1997); *De'Udy v. De'Udy*, 130 Misc.2d 168, 495 N.Y.S.2d 616 (1985) (under New York law, the priest-penitent privilege belongs to the communicant, not the clergyman; the communicant may waive it). See generally Imwinkelreid, *THE NEW WIGMORE* §§ 6.23 & 6.5.1 at 553-55.

¹⁶⁸Proposed Fed. R. Evid. 506(a)(1). The advisory committee note to Proposed Fed. R. Evid. 506 explains:

Subdivision (a). Paragraph (1) defines a clergyman as a "minister, priest, rabbi, or other similar functionary of a religious organization." The concept is necessarily broader than that inherent in the ministerial exemption for purposes of Selective Service. See *United States v. Jackson*, 369 F.2d 936 (4th Cir.1966). However, **it is not so broad as to include all self-denominated "ministers."** A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis. No further specification seems possible in view of the lack of licensing and certification procedures for clergymen. However, this lack seems to have occasioned no particular difficulties in connection with the solemnization of marriages, which suggests that none may be anticipated here. For similar definitions of "clergyman" see California Evidence Code § 1030; New Jersey Evidence Rule 29.

The "reasonable belief" provision finds support in similar provisions for lawyer-client in Rule 503 and for psychotherapist-patient in Rule 504. A parallel is also found in the recognition of the validity of marriages performed by unauthorized persons if the parties reasonably believed them legally qualified. Harper and Skolnick, *Problems of the Family* 153 (Rev. Ed. 1962).

¹⁶⁹Proposed Fed. R. Evid. 506(a)(2).

United States Court of Appeals for the Third Circuit has held¹⁷⁰—that the privilege extends to communications made in the presence of “other persons present in furtherance of the purpose of the communication.” Under the proposed federal rule, the confider can prevent disclosure, even by an eavesdropper whom the confider did not know to be present during the communication.¹⁷¹

The **advisory committee** note to Proposed Fed. R. Evid. 506 makes plain the drafters' **intent to exclude from the protection of the privilege any communications made in furtherance of fraud or crime.**¹⁷² Whether to require a cleric's reporting of suspected **child abuse** is a topical issue in America and abroad.¹⁷³

The proposed federal privilege explicitly provides that it survives the confider's death. But in a dramatic federal case in New York, a Catholic priest testified — after his parishioner's death — that the parishioner had confided to the priest that he — not his two friends who had been convicted — was guilty of murder.¹⁷⁴ At least one of the friends was then released.¹⁷⁵

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¹⁷⁰In re Grand Jury Investigation, 918 F.2d 374, 386 (3d Cir.1990) (privilege may extend even to communications made during a group counseling session, as long as the presence of any third parties was both "essential to *and* in furtherance of a communication to a member of the clergy.") (emphasis in original) (remanding case for further factual findings). See In re Grand Jury Investigation (Knoche), 918 F.2d 374 (3d Cir.1990) (finding federal common law privilege but remanding as to whether, *e.g.*, confidentiality was expected in group session). See also Scott v. Hammock, 133 F.R.D. 610 (D.Utah 1990) (in diversity case, applicable Utah statutory clergy-penitent privilege was construed to embrace more than confessions and to include communications that are confidential under the religious teachings of a particular faith; court recognized free exercise and establishment issues; privilege protected both (1) child abuse defendant's communications made to Mormon bishop and another for purpose of receiving church counseling and ecclesiastical advice and (2) intra-faith communications from one ecclesiastical officer to another for the purpose of carrying out church discipline).

¹⁷¹Proposed FRE 506, advisory committee note ("Under the privilege as phrased, the communicating person is entitled to prevent disclosure not only by himself but also by the clergyman and by eavesdroppers."). See Mockaitis v. Harclerod, 938 F.Supp. 1516 (D.Ore. 1996) (declining to reach the question).

¹⁷²Proposed FRE 506, advisory committee note ("The nature of what may reasonably be considered spiritual advice makes it unnecessary to include in the rule a specific exception for communications in furtherance of crime or fraud, as in Rule 503(d)(1).").

¹⁷³See Bonthron, *Clergy "May Be Urged to Reveal Secrets"*, London Daily Telegraph, Feb. 19, 2002 (draft document of Church of England may require disclosure of information where necessary to protect children).

¹⁷⁴*Priest Reveals Murder Confession, Raising Legal and Ethical Questions*, The Baltimore Sun, 4A, col. 4, Jul. 24, 2001.

¹⁷⁵Morales v. Portuondo, 154 F.Supp.2d 706 (S.D. N.Y. 2001) (granting writ of habeas corpus); *Man Convicted of Murder Freed on Priest's Testimony*, The Baltimore Sun, 2A, col. 6, Jul. 25, 2001); N.Y.L.J. 3, col. 1, Aug. 10, 2001; Morvillo & Anello, *The Clergy-Communicant Privilege*, N.Y.L.J. 3 (Oct. 2, 2001).