Federal, State Privilege Proposals Compared

David M. Pedersen

Law Clerk to Judge Warren K. Urbom, dmpedersen@mac.com

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I. INTRODUCTION

Consideration of the Proposed Nebraska Rules of Evidence (hereinafter "Nebraska Rule[s]," "Nebraska proposal" or "Rule[s]") by the Nebraska Legislature probably will not attract much public attention outside the trial bar and bench. If any portion of these rules merits widespread public debate, however, it is Article V on privilege, since this Article arguably will have significant impact outside the courtroom. The various evidentiary privileges granted to communications between attorney and client, husband and wife, doctor and patient, person and clergyman, and the privileges granted for tenor of one's political vote, trade secrets, state secrets and identity of a government informer rest upon the value judgment that ascertainment of the truth in a trial is subordinate to other societal goals. Each value judgment subordinating judicial decision-making to another value in turn rests upon certain assumptions about the connection between the granting of a privilege and the fostering of desired behavior.

Debate about these assumptions is certainly a public matter and should not be limited to minds disciplined by the vagaries of the common law. Yet attorneys who are schooled in the common law have something unique to offer to public debate on such questions. Attorneys have lived most intimately with the day-to-day effects of the rules of privilege on the ascertainment of truth at trial. They also are knowledgeable about what values the common law protects in preference to truth-seeking and what alternatives have been proposed by thoughtful jurists. Since this is a federal system with both state and federal courts, attorneys are aware of the problems that arise when different value judgments are made by state and federal judges with jurisdiction over similar types of societal disputes.

This article is intended to focus the legal debate on issues surrounding evidentiary privileges in the proposed Nebraska Rules, through analysis of these privileges under existing Nebraska law and the corresponding Proposed Federal Rules of Evidence (hereinafter “Federal Rule[s]” or “federal proposal”). Such a discussion is complicated by the fact that the Federal Rules on privilege are undergoing major revisions in the United States Congress. Thus, the comparable Federal Rules on privilege are likely to vary considerably from those which appear in the commentary to the Nebraska proposal.

Part II of this article will discuss the revisions which have been made in the proposed Federal Rules on privilege. It will bring the commentary on federal law accompanying the Nebraska Rules up to date with federal law as now proposed. Parts III through XV will analyze the Nebraska Rules and their counterparts in federal law. To facilitate analysis, the federal case law on the various privileges will be considered in the order in which the privileges are codified in the Nebraska Rules. Such a comparison will point out possible alternatives to the positions taken by the Nebraska proposal and thus promote debate on these rules. Part XVI will discuss the need for uniformity between the federal and state rules of evidence on privilege.

II. EMERGING FEDERAL APPROACH TOWARD PRIVILEGE

The notes accompanying the proposed Nebraska Rules serve as an adequate guide to the rules of privilege under Nebraska common law. But these notes are no longer adequate in comparing the Nebraska proposal to federal law. Such a comparison is a crucial prerequisite to debate on the hard value questions posed by the codification of the law of evidence. The Nebraska Rules were drafted with the federal proposal as a model in those areas where the Nebraska drafters felt the policy judgments of the Federal Rules were correct. Even in areas of disagreement, the Federal Rules play a significant role in understanding the Nebraska Rules since these rules are explained by contrast to the proposed Federal Rules. This concern with contrasting federal law is reasonable since attorneys of this state practice in both courts and in several circumstances may choose between the two forums in filing suit.

The commentary to the Nebraska proposal would be a sufficient examination of the corresponding Federal Rules of privilege if the form of the Federal Rules used as a model would become law. The Federal Rules used as a model by the Nebraska drafters were those rules prepared by the Advisory Committee on Rules of Evidence.
of the Judicial Conference of the United States and approved by the United States Supreme Court on November 20, 1972, before being sent to Congress. Since that time, the Federal Rules in the area of privilege have been radically revised by Congress. The House has passed overwhelmingly and sent to the Senate H.R. 5463 which compresses the original thirteen rules of Article V into one rule:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

The commentary accompanying the revised Article V has been reduced to three paragraphs in the Report of the Committee on the Judiciary, accompanying the bill on the rules of evidence. While

1. The vote was 377 in favor, 13 opposed and 39 not voting. 120 Cong. Rec. H569 (daily ed. Feb. 6, 1974).
4. H.R. Rep. No. 650, 93d Cong., 1st Sess. 8-9 (1973). The relevant paragraphs are as follows:

Article V

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific nonconstitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from Rule 26 of the Federal Rules of Criminal Procedure, mandates the application of the principles of the common law as interpreted by the courts of the United States in the light of reason and experience. The words "person, government, State, or political subdivi-
H.R. 5463 is not yet the governing standard on questions of privilege in the federal courts, it is a reasonable assumption that Article V will be enacted in a form similar to the House-passed bill. The House found the issues surrounding the various privileges too controversial to do anything other than leave the law of privilege where it was before the drafting of the proposed Federal Rules. Even if the Senate should attempt to codify this area of the law of evidence, it is doubtful, given the strong feelings in the House, that such a Senate change would be accepted in conference com-

sion thereof" were added by the Committee to the lone term "witnesses" used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges. The Committee also included in its amendment a proviso modeled after Rule 302 and similar to language added by the Committee to Rule 601 relating to the competency of witnesses. The proviso is designed to require the application of State privilege law in civil actions and proceedings governed by Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), a result in accord with current federal court decisions. See Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555-556 n.2 (2nd Cir. 1967). The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view (see its note to Court Rule 501) that this result is not mandated under Erie.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense, removes the incentive to "shop."

5. This fact is vividly sketched out in the House debate on Pub. L. 93-12 which expanded the time limit for congressional consideration of the proposed federal rules of evidence, 119 Cong. Rec. H1721-29 (daily ed. March 14, 1973), and in the House debate on the passage of H.R. 5463, 120 Cong. Rec. H305-05 (daily ed. Jan. 30, 1974). The debate on H.R. 5463 was handled in a very unusual manner. The House as a whole accepted the Judiciary Committee's recommendation that no amendments be permitted to Article V from the floor of the House. The Judiciary Committee itself was divided on the subject of privilege and realized that the entire House likewise would be divided to such an extent that if amendments were permitted from the floor to Article V, H.R. 5463 would not be passed. Id. H305. The focus of critical comment was on the absence of three privileges: physician-patient, marital communications and newsman-informer, and on the treatment of the governmental information and identity of informer privileges. 119 Cong. Rec. H1721-29 (daily ed. March 14, 1973).
mittee. Thus the law of privilege in the federal courts will probably be that embodied in H.R. 5463, rather than that codified in the federal proposal used as a model by the Nebraska drafters. Therefore, an examination of the federal law of privilege as proposed under H.R. 5463 is necessary so that the debate on the Nebraska Rules can be carried out with full knowledge of the federal privilege rule.

III. RULE 501

There is a significant difference in overall treatment of the question of privilege between the Nebraska proposal and H.R. 5463. The Nebraska Rules state that there is no privilege not to give evidence, unless required by the United States Constitution, the Constitution of the State of Nebraska, an act of Congress, an act of the Nebraska Legislature, the proposed rules or other rules adopted by the Supreme Court of Nebraska. H.R. 5463, on the other hand, states that the question of privilege shall be governed by the common law as interpreted by the federal courts, unless otherwise required by the Constitution of the United States, the rules of the United States Supreme Court prescribed pursuant to statutory authority, an act of Congress or state law in civil actions in which state law supplies the rule of decision concerning an element of a claim or defense.

In the proposed Nebraska Rules, the rules themselves are the usual standard for determining questions of privilege. The law of privilege in the federal courts under H.R. 5463, on the other hand, has two primary sources. In cases where state law supplies the rule of decision on the merits, the federal court is to apply the state law concerning privilege. For example, if a Nebraska citizen sued a citizen of Iowa in federal district court in Nebraska for breach of contract, the federal district judge would follow the Nebraska Rules on privilege, if these proposed rules become the law of Nebraska. In cases based on federal questions, the federal district court would apply the rules of privilege as found in the reported decisions of the federal courts. The question of privilege would be a common law question and like any such question would be open to reasoned departure from past decisions. The principle that state law concerning privilege governs in diversity jurisdiction and other similar cases is of critical importance since it will substantially reduce, if not eliminate, forum-shopping based on evidentiary privileges.

The federal law described in the sections to follow is that law which would apply in federal question cases in federal court; the source of that law is reported federal decisions.
IV. RULE 502

There is no Rule 502 in the Nebraska proposal, since Rule 501 allows a privilege where required by statute either by Congress or the state legislature. The Federal Rule 502 raises the interesting question of how in federal question cases the federal courts should treat claims of privilege grounded on a state statute making certain reports privileged matters. There would, of course, be no question in a suit based on diversity of citizenship, since in such cases state law would govern on the question of privilege. In federal question cases, there is no clear answer. There are only two cases decided by the federal courts in the last 35 years that are directly on point. In Carr v. Monroe Manufacturing Co., the United States Court of Appeals for the Fifth Circuit held such state statutes are not binding on federal courts in federal question cases. Just the opposite result was reached in Tollefsen v. Phillips by the United States District Court for the District of Massachusetts. The Tollefsen opinion cites no authority for its position, while the Carr court grounds its opinion in the proposition that enforcement of federal policies demands the federal courts apply their own rules of privilege where substantial state interests are not infringed. This proposition underlying the fifth circuit position has been adopted by the majority of federal courts, but there are dissenting voices. Therefore, under the proposed Ne-

6. H.R. 5463.
7. 431 F.2d 384 (5th Cir. 1970), cert. denied, 400 U.S. 1000 (1971).
braska Rules, privileges created by the Nebraska Legislature will be binding on Nebraska state courts and in particular the privilege granted by statute for reports submitted as required by statute. In federal court, on the other hand, such state statutory privileges will certainly be binding in diversity cases and of doubtful authority in federal question cases.

V. RULE 503

Federal common law is in general agreement with the Nebraska Rules on the existence and nature of the lawyer-client privilege. First, it is clear that there is such a privilege in federal court. No recent federal authority is to the contrary. The only real question is whether the scope of the federal privilege approximates that of the Nebraska Rule. This question can best be answered by examining Rule 503 section by section.

A. Definitions

1. A Client

Federal law, like the proposed Nebraska Rule, extends the definition of client to persons, public officers, and corporations.¹⁴


There is no law on the federal level on the status of associations or other organizations or entities in the private sector. At least one federal court has extended the privilege to cover governmental bodies as clients.\textsuperscript{16} There is, however, little reason to doubt that private sector entities other than corporations would be accorded the same protection as corporations. The rationale of the only federal case that denied status as a client to a corporation was that at common law only natural persons could be afforded the privilege and that no communication with a corporation could possess the degree of confidentiality required by the common law privilege.\textsuperscript{17} This rationale was rejected by the United States Court of Appeals for the Seventh Circuit sitting \textit{en banc}.\textsuperscript{18} The seventh circuit held it was a misconception to view the origin of the privilege in terms of a personal immunity. Rather, the privilege was and is that of a client, whatever sort of entity that client is.\textsuperscript{19} It further held that corporate communications can fulfill the requisite confidentiality despite the necessity of working through several agents.\textsuperscript{20} The reasoning of the seventh circuit is equally applicable to other types of business or charitable entities. Therefore, the privilege would surely be accorded to these entities also. Thus it seems that the proposed Nebraska Rules and federal decisions are in accord on who can be a client.

Federal law also extends the privilege to include persons or entities seeking professional legal services who do not receive such services from the attorney contacted.\textsuperscript{21}

2. A Lawyer

Both federal law and the Nebraska proposal indicate that any person authorized to practice law in any state or nation is a lawyer

\textsuperscript{17} Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.), \textit{cert. denied}, 375 U.S. 929 (1963) (this case cites a large number of federal authorities at 319 n.7).
\textsuperscript{19} Id. at 322.
\textsuperscript{20} Id. at 324.
\textsuperscript{21} See NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965); \textit{In re Bonanno}, 344 F.2d 830 (2d Cir. 1965); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.), \textit{cert. denied}, 375 U.S. 929 (1963); United States v. Goldfarb, 328 F.2d 280 (6th Cir.), \textit{cert. denied}, 377
for purposes of the attorney-client privilege. There is no federal law on the question of whether a person whom the client reasonably believes to be a lawyer qualifies as a lawyer for purposes of this privilege. Both McCormick and Wigmore view the common law as extending the privilege to persons reasonably believed to be lawyers. Given this authority, the absence of any federal authority to the contrary, and the position of the advisory committee which drafted the Federal Rules that the privilege should protect communications with persons reasonably believed to be lawyers, it is probable that the federal courts would so construe the privilege.

3. Representative of the Lawyer

Federal law, like the Nebraska proposal, accords the privilege to communications between the client and persons employed to assist the lawyer in rendering legal services. The precise scope of this aspect of the privilege will be discussed below.

4. Confidential Communication

Federal law is in agreement with the Nebraska Rule that the standard for confidentiality is intent not to disclose to third persons who are not reasonably necessary to carry on the communication or to render the requested legal services.

22. Paper Converting Mach. Co. v. FMC Corp., 215 F. Supp. 249, 251 (E.D. Wis. 1963); cf. Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963). Some language to the contrary is contained in United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950), but the court did not apply a rule that automatically excluded attorneys who were members of some bar but not members of the bar of the state where the privileged communication took place from the scope of the privilege. Rather the court viewed such non-membership as indicative that the attorneys in United Shoe's patent department were not functioning in the role of an attorney and stated that the situation would be different with regard to a visiting attorney from another state.
24. 8 J. Wigmore, EVIDENCE § 2302 at 584 (1961) [hereinafter Wigmore].
26. United States v. Bigos, 459 F.2d 639 (1st Cir.), cert. denied, 409 U.S. 847 (1972); Esposito v. United States, 436 F.2d 603 (9th Cir. 1970);
B. General Rule of Privilege

Under federal law, it is clear that the privilege belongs to the client and he may decline to reveal communications to his lawyer or prevent others from so disclosing. It is also clear that the privilege generally extends only to communications and does not include such things as the fact of the attorney-client relationship, the identity of the client or noncommunicative actions of the attorney or client. Moreover, the communications must be concerned with rendering legal services. Conversations about business or personal nonlegal problems are not privileged. Finally, the communications must be "confidential" in the sense discussed above. In each of these respects the federal law and the proposed Nebraska Rules are identical.


29. United States v. Ponder, 475 F.2d 37 (5th Cir. 1973); In re Semel, 411 F.2d 195 (3d Cir.), cert. denied, 396 U.S. 905 (1969); Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966), overruled on other grounds, 412 F.2d 647 (5th Cir. 1969). There is an exception to this general rule. If the disclosure of the identity of the client would disclose the content of a confidential communication, the identity of the client is privileged. NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965).


31. United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973); Harris v. United States, 413 F.2d 316 (9th Cir. 1969); United States v. Bartone, 400 F.2d 459 (6th Cir. 1968), cert. denied, 393 U.S. 1027 (1969); Canaday v. United States, 354 F.2d 349 (8th Cir. 1966); NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1966); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); Pollock v. United States, 202 F.2d 281 (5th Cir.), cert. denied, 345 U.S. 993 (1953).
The only possible difference between federal law and these Rules is that the Nebraska Rules detail five types of protected communication relationships between five different types of persons. There is no such precise delineation under federal law. Rule 503 defines all persons except the "representative of the client." The commentary accompanying the Rule notes that this failure to define was deliberate, since the committee thought recognition of a representative to speak or listen for the client should be decided on a case-by-case basis. The commentary indicates this problem most often arises in the setting of corporations invoking the privilege. In this setting, there is a split between the two circuits that have considered what the proper standard should be. The tenth circuit has held:

"The test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power."

The seventh circuit, on the other hand, has held:

"An employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."

The seventh circuit decision was upheld by an equally divided Supreme Court. There is apparently no case law in Nebraska on this issue. Hence, the question of which corporate personnel are protected by the privilege is still an open question both under federal law and under the Nebraska proposal.

The ten protected communication relations under the Nebraska Rules are as follows:

32. PROP. NEB. R. EVID. 503, Comment [hereinafter cited as "RULE[S]"]
33. Id.
37. The only communication relations between the specified parties that are not protected are:
(a) representative of the client's attorney and the third party's attorney;
(b) representative of the client's attorney and another representative of the client's attorney;
the client and the client's attorney
the client and the representative of the client's attorney
the representative of the client and the client's attorney
the representative of the client and the representative of the client's attorney
the client's attorney and the representative of the client's attorney
the client and a third person's attorney in a matter of common interest
the client's attorney and a third person's attorney in a matter of common interest
the representative of the client and another representative of the client
the client and the representative of the client
the client's attorney and another attorney for the client

Broad federal authority can be found in support of protecting all of these relationships with the attorney-client privilege.  

It should also be noted that the proposed Nebraska Rule forbids testimony by an intentional or accidental eavesdropper to attorney-client communications intended to be confidential, since the Rule allows the client to prevent any other person from revealing such confidential communications. Federal law on the eavesdropper question is scant and conflicting.  The advisory committee

(c) representative of the client and the third party's attorney.


39. United States v. Fouts, 166 F. Supp. 38 (S.D. Ohio), aff'd, 258 F.2d 402 (6th Cir.), cert. denied, 358 U.S. 884 (1958), held that the fact that a communication was overheard did not necessarily imply that that conversation was not confidential. United States v. Bigos, 459 F.2d 639 (1st Cir.), cert. denied, 409 U.S. 847 (1972), in a general discussion of this privilege implied that a conversation could be
that drafted the Federal Rules takes the same position as the Nebraskan Rule, but this Rule is in derogation of the common law. Thus, it is uncertain what position the federal courts will take.

C. Who May Claim the Privilege

Under federal law, the attorney-client privilege extends beyond the death of the client where the client is a natural person. There is no federal law on the question of whether the privilege may be claimed by the successors, trustee or similar representative of a corporation, association or other organization. The Nebraska Rule does extend the privilege to such successor entities. In so doing, it adopted the identical provision in the federal proposal. What influence the proposed Federal Rules on this particular point would have on federal courts after the adoption of H.R. 5463 is a matter of pure speculation. Hence the question is an open one in federal court.

Federal law, like the proposed Nebraska Rules, does allow the attorney to claim the privilege on behalf of his client. Some cases make this the attorney's duty. There is no recent federal law stating directly that the attorney's authority to claim the privilege is presumed in the absence of evidence to the contrary. But there is authority upholding the proposition by implication. This presumption is an eminently sensible one, since it flows from the very concept of the attorney as the representative of the client in all that pertains to litigation. Moreover, it is the position taken by the Federal Rules. There is sound reason to expect that the federal courts will accept this presumption.

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40. WIGMORE § 2326 (1961).
41. Glover v. Patten, 165 U.S. 394 (1897); Baldwin v. Commissioner, 125 F.2d 812 (9th Cir. 1942).
42. Esposito v. United States, 436 F.2d 603 (9th Cir. 1970); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967); Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966), overruled on other grounds, 412 F.2d 647 (5th Cir. 1969); Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965); Bouscher v. United States, 316 F.2d 451 (8th Cir. 1963); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956).
45. PROPE. FED. R. EVID. 503.
D. Exceptions

1. *Furtherance of Crime or Fraud*

Federal law agrees with the Nebraska Rules that communications made with an attorney for the purpose of furthering a crime or fraud are not privileged.\(^46\) Recent federal decisions have not considered the situation where the person seeking advice did not know, but should have known, that what he was seeking was advice concerning a crime or fraud. The Nebraska Rules do not apply the privilege in these circumstances. The language of the proposed Rule is identical to that of the Federal Rules,\(^47\) but the influence of these proposed Federal Rules on federal court decisions cannot be ascertained at present and the question is an open one in federal court.

2. *Claimants Through Same Deceased Client*

As might be expected, little federal law exists on this issue also. What law there is accords with the Nebraska proposal that an attorney for a now-deceased client may not invoke the attorney-client privilege for communications relevant to an issue between parties who claim through the same deceased client.\(^48\)

3. *Breach of Duty by Lawyer or Client*

Here again there is scant federal law, all of it concerning the breach of duty by a lawyer. This law agrees with the Nebraska Rule in forging an exception to the privilege where the client alleges that the attorney has not fulfilled his obligations toward the client.\(^49\) Considerations of equity and the typical lack of intent by the attorney and the client that as between themselves communications relating to the tenor and terms of employment are

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confidential indicate that federal courts would not grant the privilege when the attorney sues the client.

4. Document Attested by Lawyer

There is no federal law at all on this point. The rule as stated in the Nebraska Rules is in accord with the common law and the Federal Rules in allowing testimony from an attorney who attests a document on communications relevant to any issue concerning the attested document.

5. Joint Clients

Federal law conforms with the Nebraska proposal in denying the privilege to communications "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." 

VI. RULE 504

There was no physician-patient privilege at common law. The development has been almost entirely statutory. Since no federal statute grants such a privilege, it could be sensibly argued that no physician-patient privilege exists in federal court on federal question issues. There is, however, a split of authority in the federal courts on what role this state statutory privilege is to play in federal question cases. The fifth circuit has made it clear, at least in criminal cases, that federal courts are not bound to honor state physician-patient privileges. The fourth and tenth circuits have followed these state privileges in federal question cases. The second circuit is apparently in doubt regarding what should be done. The Federal Rules take the position that there should

50. McCormick § 88 at 180.
55. United States v. Mancuso, 444 F.2d 691 (5th Cir. 1971).
56. Anderson v. Reynolds, 476 F.2d 665 (10th Cir. 1972); Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964).
be no general physician-patient privilege and limit the privilege to communications concerning mental or emotional conditions.\textsuperscript{58} This limitation was strongly criticized in the House debate on the federal proposal.\textsuperscript{59} Thus, whatever weight the federal proposal would otherwise have on federal courts has probably been muted. The effect which the House debate will have on those circuits not honoring state physician-patient privileges in federal question cases is unclear. Perhaps the effect will be negligible, since the major House concern was with the effect of these state privileges in diversity cases.\textsuperscript{60} The split of authority in federal decisions and the alternative positions of the House and the Federal Rules do not offer clear direction to the federal courts on the physician-patient privilege in federal question cases.

VII. RULE 505

A. Confidential Communications

Federal law recognizes a privilege for confidential communications between husband and wife during the course of the marriage.\textsuperscript{61} This privilege survives the death of either spouse\textsuperscript{62} and is not extinguished by divorce.\textsuperscript{63} It does not extend to communications made before or after marriage.\textsuperscript{64} For the privilege to obtain, the marriage during which the communications took place must be a valid one.\textsuperscript{65} The privilege clearly extends to utterances, and there is some authority that it also extends to communicative acts.\textsuperscript{66} The communications must be confidential\textsuperscript{67} and have been

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{58} Prop. Fed. R. Evid. 504, Advisory Committee's Note.
\item \textsuperscript{60} Id. H1726. \textit{See also} H.R. Rep. No. 650, \textit{supra} note 4.
\item \textsuperscript{61} Pereira v. United States, 347 U.S. 1 (1954); Blau v. United States, 340 U.S. 332 (1951); Wolfe v. United States, 291 U.S. 7 (1934); United States v. Harper, 450 F.2d 1032 (5th Cir. 1971); Fowler v. United States, 352 F.2d 100 (8th Cir. 1965), \textit{cert. denied}, 383 U.S. 907 (1966); Barsky v. United States, 339 F.2d 180 (9th Cir. 1964); Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), \textit{cert. denied}, 324 U.S. 849 (1945); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).
\item \textsuperscript{62} Hopkins v. Grimshaw, 165 U.S. 342 (1897); United States v. Burks, 470 F.2d 432 (D.C. Cir. 1972).
\item \textsuperscript{63} Pereira v. United States, 347 U.S. 1 (1954); Volianitis v. Immigration & Naturalization Serv., 352 F.2d 766 (9th Cir. 1965); Barsky v. United States, 339 F.2d 180 (9th Cir. 1964); United States v. Termini, 267 F.2d 18 (2d Cir.), \textit{cert. denied}, 361 U.S. 922 (1959).
\item \textsuperscript{64} Volianitis v. Immigration & Naturalization Serv., 352 F.2d 766 (9th Cir. 1965); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).
\item \textsuperscript{65} See United States v. Neeley, 475 F.2d 1136 (4th Cir. 1973); United States v. Boatwright, 446 F.2d 913 (5th Cir. 1971).
\item \textsuperscript{66} See United States v. Burks, 470 F.2d 432 (D.C. Cir. 1972); United States v. Lewis, 433 F.2d 1146 (D.C. Cir. 1970). \textit{Contra} Pereira v.
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held not to be such if made in the presence of children or other third parties if the spouse communicating was aware of the presence of other persons. To this extent, the privilege under federal law is roughly identical to that under the Nebraska proposal.

The Nebraska Rule allows a waiver of the privilege during the period when both spouses are alive only with the consent of both spouses. The federal law is not entirely clear, but it apparently allows a waiver with the consent of the spouse who made the communication in question even though the spouse who heard the communication does not want to have it divulged. The wording of the communication privilege in the Nebraska Rule indicates that the privilege applies only to testimony sought from either the husband or the wife and not to testimony concerning marital communications overheard by third parties. That is, the Nebraska Rule takes the position that eavesdroppers may reveal communications between a husband and wife that were clearly intended by the spouses to be confidential. In taking this position the Nebraska proposal is in accord with the generally accepted common-law view. There are no reported federal cases that have considered this question. But given the clear-cut common-law position and the failure of the Federal Rules advisory committee to include a privilege for marital communications, it is reasonable to assume that federal courts will determine this privilege should be narrowly construed. Hence accidental or intentional eavesdroppers will be allowed to testify concerning communications between husband and wife.

United States, 347 U.S. 1 (1954); Pool v. United States, 260 F.2d 57 (9th Cir. 1958).


68. Pereira v. United States, 347 U.S. 1 (1954); Wolfle v. United States, 291 U.S. 7 (1934); Fowler v. United States, 352 F.2d 100 (8th Cir. 1965), cert. denied, 383 U.S. 907 (1966); Pool v. United States, 260 F.2d 57 (9th Cir. 1958); Tabbah v. United States, 217 F.2d 528 (5th Cir. 1955); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

69. United States v. Figueroa-Paz, 468 F.2d 1055 (9th Cir. 1972); Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), cert. denied, 324 U.S. 849 (1945). Contra, United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

70. WIGMORE § 2339 at 667.

71. This position was criticized strongly in the House, 119 Cong. Rec. H1724, H1727 (daily ed. March 14, 1973), but the criticism was based in part, at least, on the effect of the proposed Federal Rules in diversity cases. There was no explicit criticism of the common law position.
B. Testimony Against Spouse in Criminal Case

Federal law recognizes a privilege forbidding one spouse to testify against the other spouse in a criminal case. The privilege lasts only as long as the marriage and is extinguished by either divorce or the death of one spouse. The marriage must be a valid one; mere sham marriages are not sufficient to permit assertion of the privilege. In these respects federal law is identical with the Nebraska Rule.

One federal case suggests the privilege applies with equal force in civil cases, but this authority is merely dictum and is the only federal case that could be found supporting the proposition. The Nebraska Rules do not grant the privilege in civil cases.

The Nebraska Rule requires that both spouses must consent before the privilege is waived. In Wyatt v. United States, the United States Supreme Court refused to hold the privilege was that of the party alone. The case involved a Mann Act prosecution in which the wife-prostitute refused to testify against her husband. The Court held the defendant had no privilege to prevent his wife from testifying where the wife was the victim of the Mann Act offense. But the Court did not state that whenever the privilege is unavailable to the defendant, it is automatically unavailable to the witness-spouse. The existence vel non of the witness-spouse's privilege when the defendant has lost the privilege depends upon whether "in light of the reason which has led to a refusal to recognize the party's privilege, the witness should be held compellable." The Court decided that in light of the Con-


73. Vereira v. United States, 347 U.S. 1 (1954); Volianitis v. Immigration & Naturalization Serv., 352 F.2d 766 (9th Cir. 1965).


77. Giles relies on Wigmore as authority for the point, but Wigmore also notes that the application of this privilege in civil cases has been abolished by statute in so many states that it is now the general rule that there is no such privilege in civil cases. Wigmore § 2245 at 263. Accord, McCormick § 66 at 144.


80. 362 U.S. at 529.
gressional policy embodied in the Mann Act, the witness-spouse here could not refuse to testify. Thus Wyatt at least makes it clear the privilege belongs to the witness-spouse. It also implies there are cases in which a non-consenting witness-spouse can be compelled to testify. It is a reasonable extension of Wyatt to hold where the defendant-spouse waives the privilege there are circumstances in which the witness-spouse can be compelled to testify. That is, there could be circumstances in which both spouses need not consent before the privilege is waived. No federal cases have dealt with this type of situation. This is not surprising since few defendants would consent to testimony by their spouse that they knew would be adverse to their criminal defense. As a practical matter, the vesting of the privilege in both spouses rather than the defendant spouse alone makes no difference when the question of waiver is under consideration, since waiver by the defendant-spouse would be extremely rare.

C. Exceptions

1. In Case of Certain Crimes

The federal law agrees with the Nebraska proposal that defendants accused of certain crimes may not invoke the privilege at least insofar as crimes against the wife by the husband are concerned.\(^8\) Presumably in an era of expanding consciousness of sexual equality, crimes by the wife against the husband would also be held to abrogate the privilege. There is no federal case law on the existence of the privilege when crimes against the couple's children are involved.\(^9\) Nor is there any indication from the federal cases that rape of a person other than the spouse or incest would constitute a crime against the nonoffending spouse. Hawkins v. United States\(^8\) notes that in 1887 Congress enabled either spouse to testify in prosecutions against the other for bigamy.\(^8\) This statute is no longer in effect, however,\(^9\) and no federal cases uphold such an exception independently of this statute. Finally, several federal cases imply that crimes against the spouse include crimes against the spouse's property.\(^8\)

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84. Act of March 3, 1887, ch. 397, \$ 1, 24 Stat. 635.
2. In Cases Against Third Persons Relating to the Spouses’ Marriage Relationship

No federal case law exists on this exception, which usually concerns cases of alienation of affection or criminal conversation. The Nebraska Rule states the common law, so there is some basis for arguing that the federal courts will adopt a position similar to Nebraska’s.

3. In Any Case by One Spouse for Divorce or Annulment

Since such cases do not come within the jurisdiction of the federal courts, there is no federal case law on this subject either.

VIII. RULE 506

The two circuits that have considered communications with clergymen have held that there is a privilege in federal question cases. The most recent opinion by the second circuit does not limit the privilege to confidential confessions according to prescribed rubrics of the particular church involved; it extends the privilege to any confidential communications of a penitent seeking spiritual rehabilitation. An earlier opinion by the District of Columbia Circuit took the narrower view. Both decisions indicate that the privilege belongs to the penitent and that it can be waived by him. Neither court deals with the question of who may claim the privilege or whether the privilege survives the death of the penitent. Given the nature of communications to a clergymen and the possibility that the person communicating may not be present in court when the issue of privilege arises, it is likely that federal law would allow the clergymen to claim the privilege on the penitent’s behalf and would presume such authority in the absence of evidence to the contrary. Thus the sole potentially significant difference from the Nebraska proposal is that a federal court might follow the narrower view of the privilege adopted by the District of Columbia Circuit.

IX. RULE 507

There is no federal law on the question of whether there is a privilege not to reveal how one voted in a political election. The

87. Wigmore § 2338 at 666.
89. United States v. Wells, 446 F.2d 2 (2d Cir. 1971).
common law as developed by the state courts is unanimous, however, that there is such a privilege. Thus the federal courts would undoubtedly accord with the Nebraska proposal especially since this position also was adopted by the Federal Rules. The exception for votes cast illegally is similarly rooted in the common law and would probably be followed in federal court.

X. RULE 508

Commentators differ on whether there is a privilege not to reveal trade secrets in federal court. Examination of the cases and the wording of the privilege by those contending there is such a privilege reveals that the dispute is largely a matter of semantics. Older federal authority holds there is such a privilege unless the revelation is necessary for the ascertainment of truth. More recent federal cases have split on this point. The majority holds against such a privilege but permits a trial court to exercise its discretion to avoid unnecessary disclosure of such information, particularly where the action is between competitors. The eighth circuit has held such matters are privileged at least where the material sought is not relevant to the issue before the court. Each of these lines of authority can be reconciled with the Nebraska Rule. In essence, the federal cases indicate there is no absolute privilege not to disclose trade secrets; any disclosure should be necessary to the determination of the truth; and the federal courts can fashion orders protecting a person from the unnecessary disclosure of these secrets and aiding the ascertainment of truth. The Nebraska proposal grants to the state courts the same power that federal courts have been exercising in dealing with trade secrets.

91. WIGMORE § 2214 at 163.
92. PROP. FED. R. EVID. 507.
93. WIGMORE § 2214 at 163.
94. The fact that this is in accord with the Federal Rules of evidence lends weight to this conclusion. See PROP. FED. R. EVID. 507.
95. WIGMORE § 2212 at 155-56, states that there is such a privilege. 5 J. MOORE, FEDERAL PRACTICE ¶ 43.07 at 1358 n.15 (2d ed. 1971), states that there is no such privilege.
96. WIGMORE § 2212 at 157.
XI. RULE 509

A. The General Rule

The proposed Nebraska Rule granting a privilege to communications made by or to a public officer in official confidence when the public interest would suffer by the disclosure differs in several respects from the privilege as articulated by the federal courts. First, the Nebraska Rule states the privilege in broad terms, rather than delineating the specific types of governmental information that are privileged. Federal law is reasonably clear that diplomatic and military secrets are privileged per se. The government does not have the burden to show the public interest would be hurt by revealing the secret in any particular case. Under the Nebraska proposal, should such a case ever arise in state court, presumably the government would have to show that revelation would harm the public interest. Such a showing could merely be perfunctory, depending upon what standard the Nebraska courts would set in cases involving these types of secrets.

Federal law also creates a privilege for intragovernmental opinions or recommendations submitted for consideration in decision and policy-making, when the divulgence would be contrary to the public interest. There is no broad federal privilege for third-party communications with government officials. Such communications are privileged only if they come within the informer privilege discussed below or if a specific statute confers a privileged status upon them. By contrast, the Nebraska Rule grants such a broad third party-government privilege if disclosure would be contrary to the public interest. This area of federal law is also affected by the Freedom of Information Act which amended the Administrative Procedure Act. The Freedom of Information Act


does not purport to set up rules governing the introduction of evidence in federal court. It does, however, give an indication of the areas which Congress considers sensitive and thus worthy of protection by an evidentiary privilege.

B. Procedures

The federal courts have generally followed the procedures detailed in United States v. Reynolds. The privilege belongs to the government and may be claimed only upon formal request by the head of the department which has control over the matter after actual personal consideration by that officer. The Nebraska proposal differs from federal law in that the privilege may be claimed not only by the chief officers of the relevant governmental department but also by the public officer sought to be examined. Whether a showing that the disclosure is contrary to the public interest may be made in writing does not appear to have been raised in the federal courts. There is no reason such a showing would not be acceptable in appropriate circumstances.

Federal courts traditionally have resorted to in camera proceedings to resolve questions of privilege in this sensitive area. No rule requires that all counsel be entitled to inspect the showing, at least where the showing itself will divulge the matter the government wishes to keep secret. Under usual federal procedures the nongovernmental party(s) would be advised of the government's claim of privilege at the discovery stage, at the pretrial conference, or at trial itself, and usually would have an opportunity to argue to the court concerning the invocation of the privilege. The Nebraska Rule sets forth different procedure, entitling all counsel to inspect the showing and the claim and to argue the existence of the privilege to the judge. Finally, federal law parallels the Nebraska Rule in granting the judge broad discretion to fashion protective orders in making his determinations of privilege for state secrets.


C. Notice to the Government

No federal cases have considered what a judge should do if there is a substantial possibility that a claim of privilege would be appropriate and such claim is not made because of oversight or lack of knowledge. *Reynolds* is clear authority for the proposition that the appropriate public officer must make formal demand before the privilege can be invoked. This does not mean that the court is forbidden to call to that officer's attention the possibility of invoking the privilege. But stating that the court may give such notice is quite different from stating that the court is required to do so. The Nebraska proposal requires the court to give this notice. Any such requirement in federal court must come from future decisions or an act of Congress.

D. Effect of Sustaining Claim

The Nebraska Rule grants the court the power to make any further orders in support of its determination that the interests of justice require. In this respect, federal law is similar to the Nebraska proposal, although there are certain limitations on what the federal court can do when the federal government is a defendant. For example, if sued under the Federal Tort Claims Act, the federal government may not be found liable for damages sought in the case in chief simply because it insists on asserting an evidentiary privilege. Congress has not consented to the government being subjected to liability in this instance.

XII. RULE 510

A. Rule of Privilege

The federal law is in general agreement with the Nebraska proposal that the government has a privilege not to reveal the identity of a person who acts as an informer to government investigators. The privilege belongs to the government and is limited simply to not revealing the identity of the informer. It does not protect communications with the informer unless revealing the commu-
communications would disclose his identity.\textsuperscript{112} There is considerable authority that the privilege extends beyond criminal investigations to investigations of administrative bodies in civil cases.\textsuperscript{113} No federal cases have granted the privilege where a person gives information to a member of a legislative committee or its staff conducting an investigation. But the extension of the privilege by federal courts beyond strictly criminal investigations indicates that they would probably extend the privilege to cover informers to legislative bodies.

B. Who May Claim the Privilege

Few federal cases have considered who may claim the privilege. No one would quarrel with the formulation in the proposed Nebraska Rule that the appropriate representative of the government is the person who may claim the privilege. Normally the appropriate person is the attorney for the government. The case law reveals, however, that the appropriate person is not always the attorney for the government.\textsuperscript{114}

As noted in the introduction, the tenor of this article is meant to be expository rather than critical. This section of Rule 510, however, requires a departure from exposition on the statement of the rule regarding relationships between the various governmental entities. The proposed Rule 510(b) is a verbatim reproduction of the Federal Rule 510(b). In the transition to a state setting this rule did not receive sufficient attention. The proposed Nebraska Rule grants to the federal government the final decision on whether the privilege will be invoked in state criminal cases where an agent of the federal government is involved.\textsuperscript{115} In such

\begin{itemize}
\item \textsuperscript{112} Roviaro v. United States, 353 U.S. 53 (1957).
\item \textsuperscript{113} Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972); Wirtz v. Rosenthal, 388 F.2d 290 (9th Cir. 1967); Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762 (D.C. Cir. 1965); Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958).
\item \textsuperscript{114} See Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa. 1962), in which a local police officer claimed the privilege.
\item \textsuperscript{115} Most likely the federal agent would be involved as a witness in a prosecution in which both state and federal authorities had conducted a preliminary investigation. The Rule grants the decision to the federal government since the term "government" as used in Rule 510(b) is contrasted with the term "appropriate representative of a state or subdivision." In the proposed Federal Rules, the term "government" clearly applies to the federal government and the proposed Nebraska Rule is taken word for word from those Federal Rules. This fact together with the contrasting usage of the terms "state" and "government" means that the only reasonable referent of the term "government" in Rule 510(b) is the federal government. This problem of
cases it would be acceptable for an agent of the federal government to claim the privilege if he were the person with whom the informer conversed. But the final decision on whether to assert the privilege should rest with the state authorities prosecuting the case.

C. Exceptions

1. Voluntary Disclosure: Informer a Witness

   Federal law, like the Nebraska Rule, holds that there is no privilege where the identity of the informer has been revealed to those who would have cause to resent the informing. The privilege is lost in such circumstances whether the revelation of the identity is by the government or by the informer himself. In Smith v. Illinois, the United States Supreme Court held the government may not suppress the informer's true name and address, where the informant was the principal prosecution witness. The seventh circuit has distinguished Smith as not applicable to a case where the informant was not a principal or crucial prosecution witness. Thus it is questionable whether in federal court the use of the informer as a witness automatically implies that his true identity must be revealed. The Nebraska Rule makes disclosure of identity mandatory if the informer appears as a witness, however insignificant a witness he may be.

2. Testimony on Merits

   In Roviaro v. United States, the United States Supreme Court held that where disclosure of the identity of the informer or the contents of his communication is relevant to the defense of an accused or is essential to a fair determination of a cause, the privilege not to disclose the identity of the informer is not applicable. If the government refuses to give the identity, the court may dismiss the action. In Rugendorf v. United States, the petitioner

   \footnotesize{terminology extends throughout Rule 510. Therefore, the Rule should be redrafted to make clear the relative roles of the state and federal governments in proceedings in Nebraska courts where the privilege for identity of an informer is at issue.}

118. 390 U.S. 129 (1968).
120. 353 U.S. 53 (1957).
121. 376 U.S. 528 (1964).
argued for an extension of *Roviaro* to cases where the issue was probable cause for search. The court held that where probable cause existed without disclosure of the identity of the informer, the identity need not be divulged unless the defendant could show that the informer’s testimony would help prove the defendant’s innocence. This same position was upheld in *McCray v. Illinois*.122 Thus under federal law there are two sets of circumstances in which the identity of the informer is not privileged: First, where disclosure is relevant to establishing the innocence of the defendant; and second, where disclosure is necessary to establish probable cause for search or arrest. More will be said about this second set of circumstances below.

Under the Nebraska Rule, the privilege not to disclose is abrogated only if the testimony of the informer is necessary to a fair determination of guilt or innocence. This standard differs from *Roviaro* in two significant respects. First, the Nebraska proposal is concerned with the relevance of the informer to determination of the issue of guilt or innocence by the fact-finder. Under the Nebraska Rule, it is possible for a judge to hold the privilege inapplicable in cases where his testimony would clearly help establish the truth, but the testimony might aid or hinder the defense. The federal standard announced in *Roviaro* is open to dispute. In the same sentence, the court speaks of relevance to aiding the defense and to a fair determination of the cause. The majority of lower federal courts which have applied *Roviaro* have taken the position that relevance to the defense is controlling in criminal cases.123 This formulation of the *Roviaro* rule is understandable, since it is the defendant who seeks disclosure of the identity of the informer. But federal courts also have indicated fair determination of the issue of guilt or innocence is the ultimate concern. Federal authority is unanimous that mere defense speculation that disclosure will be helpful is not sufficient to abrogate the privilege.124 In cases where the testimony of the informer would

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122. 386 U.S. 300 (1967).
124. United States v. Alvarez, 469 F.2d 1065 (9th Cir. 1972); United States v. Picard, 464 F.2d 215 (1st Cir. 1972); United States v. Waters, 461
clearly help determine the truth of the matter but might not aid the defense, one cannot predict the federal court's response if the defendant pressed for disclosure. Such cases would be rare in any event. Second, the Nebraska proposal adopts a stringent standard for relevance. The testimony of the informer must be necessary for the ascertainment of truth. In the federal courts, on the other hand, there is a split of authority on what showing a criminal defendant must make to abrogate the privilege. Some courts hold disclosure is required if the informer's testimony might be relevant to the defense and it is made to appear on balance that justice would best be served by disclosure. Other courts hold the defendant has a heavy burden to establish the identity of the informant is necessary to his defense. The split of authority is fairly even, with conflicting formulations within circuits. It is impossible to predict whether the federal courts will adopt the latter approach and thus approximate the proposed Nebraska Rule.

The few federal courts that have considered the problem in the context of a civil case have adopted that part of the Roviaro standard which approximates the Nebraska Rule, holding the privilege will be abrogated if necessary for a fair determination of the cause.

Federal courts have used the in camera procedure for deciding whether the privilege must be denied, but there is no requirement that this procedure be used. Nor is there any requirement that all counsel be present at any stage at which counsel for any party is permitted to be present. The remedy in a criminal case where the judge determines that disclosure is necessary and the government refuses to disclose is dismissal of the charges. In civil

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127. See note 113 and cases cited therein supra.


129. At least no such requirement was discussed in any of the cases examined in researching this article.

cases the federal courts, like the Nebraska courts under the Nebraska proposal, have the power to make any order that justice requires.\textsuperscript{131} The practice of sealing evidence for disclosure only for purposes of appellate review is followed in the federal courts.

3. \textit{Legality of Obtaining Evidence}

Where the issue is the legality of the means by which evidence was obtained, federal law is in general accord with the proposed Nebraska Rule. The judge may require the disclosure of the informer's identity, if he is not satisfied that the information upon which the affidavit seeking the warrant is based is reliable.\textsuperscript{132} As noted above, the disclosure is not necessary if the judge determines that there was probable cause for the issuance of the warrant without the disclosure. The federal courts have used the in camera proceeding required under the Nebraska Rule at the government's request, but no court has yet held this to be required procedure in federal court.\textsuperscript{133} Nor are there cases detailing the procedure for preserving a record of the in camera disclosure for possible appeal. Finally, there is no federal authority providing contents of the in camera proceeding may only be revealed to third persons other than the court of appeals with the consent of the government. These procedures detailed in the Nebraska Rule are reasonable ones and may well be followed in the federal courts.

XIII. RULE 511

Federal law, like the Nebraska Rule, holds any of the above-mentioned privileges may be waived by voluntary disclosure of the privileged matter.\textsuperscript{134} Federal law also agrees with the Nebraska proposal that voluntary disclosure of any significant part of the privileged matter waives the privilege as to all of the matter.\textsuperscript{135}

\textsuperscript{131} See note 113 and cases cited therein \textit{supra}.
\textsuperscript{133} United States v. Hurse, 453 F.2d 128 (8th Cir. 1972).
\textsuperscript{134} United States ex rel. Touhy v. Ragan, 340 U.S. 462 (1951); Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762 (D.C. Cir. 1965); McGlothlan v. Pennsylvania R. Co., 170 F.2d 121 (3d Cir. 1948); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944).
No federal case has considered the effect of a voluntary disclosure which is itself a privileged communication. The proposed Nebraska Rule providing for a waiver in this situation follows logically from the very concept of a privileged communication. That is, the voluntary disclosure in a privileged setting could not itself be put in evidence. Therefore it could not be known that what transpired in the privileged setting was in fact a disclosure of otherwise privileged matter.

XIV. RULE 512

Scant federal law exists on both of the areas covered by this Nebraska proposal. If the matter has previously been disclosed under compulsion, one case has held such disclosure waives the privilege. The Nebraska Rule, on the other hand, states that such disclosure does not waive the privilege. The authority of the federal case is dubious since the advisory committee for the Federal Rules adopted a rule identical to that of the Nebraska proposal.

There is no federal law on the existence of the privilege if the matter had been previously disclosed in circumstances where the holder of the privilege had no opportunity to claim the privilege. The Federal Rules are in accord with the proposed Nebraska Rules, but this is of uncertain significance in future federal decisions.

XV. RULE 513

A. Comment on Inference Not Permitted

The Nebraska proposal prohibits comment upon the exercise of any privilege and states that no inference may be drawn from that exercise. Federal authority is split on the question. Since a sizeable body of federal law is lacking, it may well be that future decisions...


138. Cases permitting the inference in allowing the comment are United States v. Costello, 221 F.2d 668, 674-75 (2d Cir. 1955), aff'd, 350 U.S. 359 (1956); United States v. Fox, 97 F.2d 913 (2d Cir. 1938). Cases forbidding any such comment are Courtney v. United States, 390 F.2d 521 (6th Cir.), cert. denied, 393 U.S. 837 (1968); A.B. Dick Co. v. Marr, 95 F. Supp. 83 (S.D.N.Y. 1950). McConnell § 76 at 156 states that the law of these latter cases is the law that should be followed.
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federal courts will be influenced by the advisory committee's stance that no comment should be permitted.¹³⁹ This is at best a hypothesis and the question remains an open one in the federal courts.

B. Claiming the Privilege Without Knowledge of the Jury

Federal law is in accord with the Nebraska proposal requiring that, where practicable, claims of privilege be made outside the presence of the jury.¹⁴⁰

C. Jury Instruction

The Nebraska proposal requires an instruction be given to the jury that no adverse inference may be drawn from the exercise of a privilege if the attorney for the party against whom the inference might run requests it. As noted above, there is a split of authority in the federal courts on whether such an inference is permissible. Thus, there would be a split of authority on whether such a requested instruction must be given.

XVI. CONCLUSION

This article is intended as a commentary on Article V of the Nebraska Rules, updated to reflect the differences between these rules and the federal law of evidence as it would be if H.R. 5463 becomes law. This commentary has revealed some marked differences between these rules and federal law. On balance, however, the differences are far outweighed by the similarities. With the exception of the physician-patient privilege, federal law recognizes the same types of privilege specifically recognized by the Nebraska proposal. Minor differences exist in the details of the individual privileges. A substantial number of these differences are attributable to the specificity inherent in codifying common law rules and the fact that several positions taken by the Nebraska Rules have not yet been raised for federal decision in published opinions.

A substantial question remains concerning the applicability of state statutory privileges, aside from those specifically mentioned

¹³⁹. PROP. FED. R. OF EVID. 513, Advisory Committee's Note.
¹⁴⁰. Courtney v. United States, 390 F.2d 521 (9th Cir.) cert. denied, 393 U.S. 857 (1968); Tallow v. United States, 344 F.2d 467 (1st Cir. 1965); San Fratello v. United States, 343 F.2d 711 (5th Cir. 1965); United States v. Tomaio, 449 F.2d 693 (2d Cir. 1977); McClanahan v. United States, 230 F.2d 919 (5th Cir.), cert. denied, 352 U.S. 824 (1956); United States v. Cotter, 60 F.2d 689, 691 (2d Cir. 1956), cert. denied, 287 U.S. 656 (1932).
in these rules, in federal-question cases in federal court. Thus, there could be a large number of communication relationships privileged by state statute that would not be privileged in federal court in federal-question cases. This would depend upon state statutes other than these proposed rules, the position federal courts would take on the applicability of these state statutory privileges, and the existence of a federal statutory privilege for these types of communication relationships. While federal law generally recognizes the types of privilege specifically mentioned in the Nebraska proposal, it might not recognize other types of privilege created by state statute that are not specifically mentioned in the Nebraska Rules.141

Placed in this perspective, the differences between the Nebraska Rules and the federal law under H.R. 5463 do not require alteration of the Nebraska Rules.

First, eliminating a codification of federal law on privilege should not discourage the enactment of such a code for Nebraska law. Article V will aid the state bar and bench in making the rapid determinations called for by evidentiary questions. It will provide sure guidance to federal courts in cases founded on diversity of citizenship and in other cases where state law provides the rule of decision on the merits. Moreover, the common law of Nebraska and the statutory elaboration of that law by the Unicameral provides a cohesive basis for codification. Finally, codification presents an opportunity for the elected representatives of the people to make policy decisions having extensive ramifications outside the courtroom. Such decisions otherwise would be made piecemeal by judges who might not be as responsive as the legislators to collective insight on these important social questions.

Second, the differences in substance are not so numerous that they could not be readily learned by a neophyte litigator.

Third, there is no guarantee that over time the federal law will remain as it is now. The common law is not static. Modeling the Nebraska Rules on the federal proposal made good sense, since federal codification of the law of privilege would have given that

141. One helpful addition to the codification of the law of privilege in Nebraska would be an appendix that included a reference to all evidentiary privileges granted by state statute that are not specifically mentioned in the Nebraska proposal. Such privileges as those covering the content of certain reports to the government and the recently enacted privilege for newsmen would thus be easily ascertainable. This would make the Nebraska Rules a complete codification of the rules regarding privilege. Such an appendix should be updated whenever the legislature alters these statutory privileges in any way.
body of law more stability than proposed under H.R. 5463. Altering these Nebraska Rules to coincide detail for detail with the federal law on privilege under H.R. 5463 invites constant amendment to the Nebraska Rules as the federal law is developed by the federal courts. Such an alteration is unnecessary particularly since the differences generally involve details.

The really difficult value judgments remain. The Nebraska proposal could require substantial alteration if examined from the perspective of ultimate social purposes. For example, revisions may be required to reflect a changing balance between judicial truth-seeking and family harmony or executive decision-making. Revisions are also in order if the new rules are based on faulty factual assumptions about the relationship between evidentiary privileges and the fostering of such goals as full disclosure of significant facts by a patient to a physician or by a client to an attorney. But revisions are not necessary to effectuate closer harmony with federal law.

Examination of the federal law on privilege can aid in the resolution of the questions that remain. Federal law is a fertile source of reasoned balancing between other societal goals and judicial truth-seeking. The wisdom and insight contained in federal decisions, much of which is only barely hinted at in this article, should not be neglected in answering the hard value questions posed by the Nebraska Rules.