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# Evidentiary Privileges

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## EVIDENTIARY PRIVILEGES

DAVID W. LOUISELL\* AND BYRON M. CRIPPIN, JR.\*\*

At the Evidence Institute held at the Northwest Regional Meeting of the American Bar Association in St. Paul on October 14, 1955,<sup>1</sup> it was suggested by several participants that the Enabling Acts,<sup>2</sup> both federal and state, authorizing the promulgation of Rules of Civil Procedure, empower the United States and Minnesota Supreme Courts to enact for their respective jurisdictions the Uniform Rules of Evidence. In support of the suggestion<sup>3</sup> reference was made to Rules of Civil Procedure 43 and 44, federal and state, which concern form and admissibility of evidence, scope of examination and cross-examination, the effect of *res ipsa loquitur* (Minnesota Rule), authentication of copies of official records, and other provisions as to formalities of proof. No distinction was drawn between evidentiary problems which are clearly and perhaps exclusively within the Bar's competence and ken, as "tools of the trade," such as Rules 43 and 44, burden of persuasion, presumptions, judicial notice and the like, and other evidentiary problems which, although of great practical interest to the lawyer, gravely concern the layman too by their reach into philosophical, sociological and political issues.

Perhaps foremost in the latter category of evidentiary problems are those which concern the privileges.<sup>4</sup> It is clear that their recognition constitutes a perpetual threat to the ascertainment of truth in any given litigation. It is also clear that in the judgment of western

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1. Participants in the panel were Hon. Leslie L. Anderson, District Judge Hennepin County, Minnesota, presiding; Hon. Alexander Holtzoff, Judge United States District Court for the District of Columbia, moderator; and Prof. Edmund M. Morgan, Law School, Vanderbilt University; Acting Dean David W. Louisell, Law School, University of Minnesota; Mr. Edwin Conrad, attorney, Madison, Wisconsin, Mr. Frederic M. Miller, attorney, Des Moines, Iowa, Mr. Edwin Cassem, attorney, Omaha, Nebraska, Mr. Harry H. Peterson, attorney, Minneapolis, Minnesota, and Mr. E. M. Hall, Q.C., Saskatoon, Saskatchewan.

2. 28 U. S. C. § 2072 (1952), Minn. Stat. § 480.051 (1953).

3. The suggestion, if valid, could be applicable without further legislation in Minnesota only to civil actions because Minn. Stat. § 480.051 (1953) confers the rule-making power on the Supreme Court only for civil actions, and there is yet no comparable legislation for criminal actions.

4. The principal evidentiary privileges, other than that against self-incrimination, are now stated in Minn. Stat. § 595.02 (1953). In the Uniform Rules of Evidence (1953) the privileges, including that against self-incrimination, are treated in "V. Privileges," Rules 23 through 40.

society, this is not too great a price to pay for the value of secrecy in certain human relationships, notably in the United States those of clergyman-penitent, lawyer-client, doctor-patient and husband-wife.<sup>5</sup> We think it would be difficult indeed to sustain the proposition that the Minnesota Legislature, by its Enabling Act, intended to delegate its power in this area of legislation to the Supreme Court. Nor in our opinion would such a delegation be in accord with basic conceptions of legislative power prevailing in American society. For these privileges are too much a part of the social fabric to be the exclusive preserve of professional expertise. True, they raise problems of legal practice and judicial administration, but also philosophical, psychological and, in the fine sense of the word, political, problems which in a democratic society must at least in the first instance be fought out in legislative halls, unless they are constitutionally foreclosed.

This, of course, is not to say that the Bench and Bar should not provide leadership in the public discussion of the acceptability of the Uniform Rules' provisions on the privileges. Obviously lawyers and judges are generally in the best position to lead and enlighten such discussion. And, while we think they should not under the guise of the Enabling Act preempt decision, we hope they will inform legislative and public opinion on the extent and significance of the changes that would be made in the Minnesota law of privileges by the Uniform Rules. The purpose of this article is to aid performance of that task. Time limitations have restricted us to the husband-wife, lawyer-client and clergyman-penitent relations. But changes resulting from other provisions of the Uniform Rules, principally those on self-incrimination and the physician-patient relation,<sup>6</sup> are also important. For example, Uniform Rule 23(4) would work a great change in existing law by providing "If an accused in a criminal action does not testify, counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom." This change might raise a constitutional question.<sup>7</sup> It is hoped that the privilege problems not discussed here may also be studied and discussed before the Uniform Rules are thrown into the lap of the legislature.

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5. For contrary view see companion article by DeParcq, p. 322.

6. For discussion of physician-patient relationship, see companion article by Geer & Adamson, p. 356.

7. *State v. Wolfe*, 64 S. D. 178, 266 N. W. 116 (1936), *cf.* *Adamson v. California*, 332 U. S. 46 (1947). Minn. Stat. § 611.11 (1953) now provides that the failure of a defendant to testify in a criminal case shall not be alluded to by the prosecuting attorney or the court.

## MARITAL EVIDENTIARY PRIVILEGES

*Comparable Statutory and Rule Provisions.*

The present statutory law of Minnesota on the marital evidentiary privileges appears in Minn. Stat. § 595.02(1) (1953) as follows:

... (1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. This exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to an action or proceeding for abandonment and neglect of the wife or children by the husband; ...

Unlike the foregoing section, the Uniform Rules treat the marital evidentiary privilege in two separate rules. One concerns accused spouses in criminal actions, the other, spouses whether or not parties to actions.

*Rule 23. Privilege of Accused.*

... (2) An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse. . .<sup>8</sup>

*Rule 28. Marital Privilege—Confidential Communications.*

(1) *General Rule.* Subject to Rule 37 and except as otherwise provided in Paragraphs (2) and (3) of this rule, a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.

(2) *Exceptions.* Neither spouse may claim such privilege (a) in an action by one spouse against the other spouse, or (b)

8. The marital evidentiary privilege in the Uniform Rules is stated separately for (i) the accused spouse in a criminal action, and (ii) for spouses generally whether or not parties to an action. Item (i) is combined in Uniform Rule 23 with the privilege of the accused not to be called as a witness and not to testify.

in an action for damages for the alienation of the affections of the other, or for criminal conversation with the other, or (c) in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either, or (d) in a criminal action in which the accused offers evidence of a communication between him and his spouse, or (e) if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.

(3) *Termination.* A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter.

*Privilege against Adverse Testimony of a Spouse, and Privilege of Confidential Communications.*

Undoubtedly the most significant departure of the Uniform Rules from present Minnesota law in the matter of husband and wife evidentiary privileges is the complete abolition, except as to confidential communications, of the privilege of one spouse to prevent the testimony of the other spouse either for or against him.<sup>9</sup> Under the provisions of Uniform Rules 23(2) and 28, one spouse cannot prevent the favorable or adverse testimony, as such, of the other. There can be no doubt that this is a substantial change from the present practice, not only in Minnesota,<sup>10</sup> but in other states as well.<sup>11</sup>

With respect to the other existing Minnesota marital evidentiary privilege, that protecting communications from one spouse to the other, the Uniform Rules retain the privilege with certain modifying and clarifying changes.<sup>12</sup>

*Who May Assert the Privilege of Confidential Communication.*

Rule 28 would permit a spouse to claim the privilege against

9. Uniform Rules of Evidence, Rules 23(2) and 28 (1953). Minnesota presently recognizes the privilege against adverse testimony by one's spouse. Minn. Stat. § 595.02(1) (1953). For a recent survey of the Minnesota law on marital evidentiary privileges see Note, 36 Minn. L. Rev. 251 (1952).

10. Illustrative of situations where the Minnesota courts under present statutory provisions have sustained the privilege against adverse testimony of a spouse are *Ingersoll v. Odendahl*, 136 Minn. 428, 162 N. W. 525 (1917), *State v. Frey*, 76 Minn. 526, 79 N. W. 518 (1899), *Lloyd v. Simons*, 90 Minn. 237, 244, 95 N. W. 903, 905-06 (1903) (dictum), *Wolford v. Farnham*, 44 Minn. 159, 164, 46 N. W. 295, 297 (1890) (dictum).

11. See McCormick, Evidence § 66 n. 3 (1954).

12. Uniform Rules of Evidence, Rules 23(2) and 28 (1953).

disclosure of confidential communications even though that spouse is not a party to the particular action in which the question is raised. Allowing a non-party spouse to assert the privilege against disclosure conforms to prior language of the Minnesota Supreme Court.<sup>13</sup> Conversely, it is doubtful whether a party who is not a spouse holder of the privilege may avail himself of this privilege.<sup>14</sup>

Although the question has not been free from doubt in our state, it appears from the reported decisions that either the spouse who communicates the information (the communicator) or the listening spouse (the communicatee) can assert the privilege against disclosure of communications between them.<sup>15</sup> Rule 23 retains this dual privilege where the claimant spouse is the accused in a criminal action. But under Rule 28 a spouse is accorded the privilege only if he or she was the communicator.<sup>16</sup> We see little to justify this distinction. Granting or withholding the privilege according to whether a spouse talks or listens perhaps results from a fictive assimilation of the position of the spouse-communicatee to that of the professional person in the professional privilege situation. Realistically, both husband and wife in a talk between them are essentially in the same position in respect of need of the privilege whether at a given moment husband or wife is speaker or listener. We think that the privilege should be recognized whether the spouse is communicator or communicatee, and whether or not he is the accused in a criminal proceeding.

#### *Confidentiality of Communications.*

Judged by various earlier expressions of the Court,<sup>17</sup> it appears that the specific requirement of confidentiality imposed by the Uni-

13. Gjesdahl v. Harmon, 175 Minn. 414, 420, 221 N. W. 639, 641 (1928) (dictum).

14. Sommerfeld v. Griffith, 173 Minn. 51, 56, 216 N. W. 311, 313 (1927) (dictum).

15. Beckett v. Northwestern Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923 (1897); Newstrom v. St. Paul & D. R. R., 61 Minn. 78, 63 N. W. 253 (1895); Leppla v. Minnesota Tribune Co., 35 Minn. 310, 312, 29 N. W. 127, 128 (1886) (dictum); accord, Leonard v. Green, 30 Minn. 496, 501, 16 N. W. 399, 400 (1883).

16. Uniform Rules of Evidence, Rule 28(1). This accords with 8 Wigmore, Evidence § 2340 (3d ed. 1940) and apparently McCormick, Evidence § 87 (1954). Note that Rule 28(1) does provide: "The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege."

17. White v. White, 101 Minn. 451, 453, 112 N. W. 627, 628 (1907) (dictum); Newstrom v. St. Paul & D. R. R., 61 Minn. 78, 83, 63 N. W. 253, 254 (1895) (dictum); Leppla v. Minnesota Tribune Co., 35 Minn. 310, 312, 29 N. W. 127, 128 (1886) (dictum); See Note, 32 Minn. L. Rev. 262, 268-69 (1948).

form Rules<sup>18</sup> as a condition of protection of the communication constitutes an important and, in our opinion, beneficial clarification of present Minnesota law. In view of the policy grounds upon which the privilege is said to rest,<sup>19</sup> particularly the encouragement of full disclosure of confidential matters between spouses, it does not seem appropriate or necessary to extend this protection to non-confidential disclosures. That some limitations upon the general protection of all spousal communications might be necessary was recognized as early as 1886 in *Leppla v. Minnesota Tribune Co.*,<sup>20</sup> where the court observed that the protection of communications between spouses might be inapplicable to a situation which by its very nature anticipated public disclosure, as where a wife is told to conduct certain business as agent for her husband. Consistent with other general provisions,<sup>21</sup> Rule 28 specifically places upon the court responsibility for determination of the genuineness of the confidentiality of the communication between husband and wife. Practically speaking, this is another area in which it may be difficult for the court properly to appraise the validity of the asserted privilege without requiring some disclosure of that which the privilege exists to protect. Wigmore would presume the confidentiality of husband-wife communications.<sup>22</sup>

#### *Duration and Scope of the Privilege.*

The communication not only must have been confidential, but also must have been made during the time that the spouses were husband and wife. Only communications between the spouses during the period of the marriage relationship are protected under either the present Minnesota rule<sup>23</sup> or Uniform Rule 28(1). Moreover, Uniform Rule 28(1) also expressly limits the exercise of the privilege to the duration of the marriage, whereas Rule 23(2) does not contain a similar express limitation although its use of "spouse" may mean "spouse at the time of the criminal action." Neither

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18. Uniform Rules of Evidence, Rule 28 (1953).

19. See discussion *infra* on policy bases for marital evidentiary privileges.

20. 35 Minn. 310, 312, 29 N. W. 127, 128 (1886) (dictum).

21. Uniform Rules of Evidence, Rule 45 (1953). Subject to contrary provisions of other rules, Rule 45 allows judicial exclusion of evidence if the probative value is "substantially outweighed by the risk" that admitting it will (a) consume too much time, (b) "create substantial danger of undue prejudice" or confusion of issues, or (c) without reasonable notice unfairly and detrimentally surprise a party.

22. 8 Wigmore, Evidence § 2336 (3d ed. 1940).

23. Minn. Stat. § 595.02(1) (1953), *Leppla v. Minnesota Tribune Co.*, 35 Minn. 310, 312, 29 N. W. 127, 128 (1886) (dictum).

death<sup>24</sup> nor divorce<sup>25</sup> presently terminates the right to claim the privilege. The privilege in part is based on the policy of avoiding marital discord that might result from revelations of marital confidence. This policy is satisfied by Rule 28's limitation of the duration of the privilege to the duration of the marriage. But the privilege is also, and we think more importantly, based on the policy of promoting full and frank marital disclosures. This policy requires a protection that continues beyond divorce or death, and we therefore think our present law preferable to that of Uniform Rule 28 on this point.

If a statement is confidential, it seems immaterial whether it be oral or written. Apparently this is the present Minnesota law,<sup>26</sup> and the Uniform Rules would not change it. But there is nothing in the Uniform Rules to clarify the existing uncertainty as to whether acts by one spouse in the presence of the other are "communications" within the privilege.<sup>27</sup> There is certainly nothing in the Uniform Rules to arrest the apparent tendency to restrict the privilege to verbal and written disclosures, as contrasted to physical acts.<sup>28</sup>

#### *Procedural Aspects.*

Little has been said by the Minnesota court on another interesting and important phase of this subject, that of raising on appeal rulings on claimed privileges.<sup>29</sup> According to Wigmore, when the privilege is wrongfully sustained the error should be corrected on appeal, since relevant evidence was wrongfully excluded with the consequence of an adjudication not based on all the facts.<sup>30</sup> Likewise most courts will correct on appeal an erroneous overruling of an asserted privilege, although Wigmore would not, at least not where the claimant of the privilege is a non-party.<sup>31</sup>

Only one entitled to assert the privilege may predicate error on the

24. *In re Estate of Osbon*, 205 Minn. 419, 286 N. W. 306 (1939) (alternative holding); *Beckett v. Northwestern Masonic Aid Ass'n*, 67 Minn. 298, 69 N. W. 923 (1897); *Newstrom v. St. Paul & D. R. R.*, 61 Minn. 78, 63 N. W. 253 (1895); *Gjesdahl v. Harmon*, 175 Minn. 414, 420, 221 N. W. 639, 641 (1928) (dictum); *accord*, *Bunker v. United Order of Foresters*, 97 Minn. 361, 363, 107 N. W. 392, 393 (1906).

25. *In re Estate of Osbon*, 205 Minn. 419, 286 N. W. 306 (1939) (alternative holding).

26. *Accord*, *Bunker v. United Order of Foresters*, 97 Minn. 361, 363, 107 N. W. 392, 393 (1906); see *Chamberlayne*, *Evidence* § 1166 (1919); 5 *Jones*, *Evidence* § 2146 (2d ed. 1926).

27. See *McCormick*, *Evidence* § 83 (1954); 8 *Wigmore*, *Evidence* § 2337 (3d ed. 1940); *Note*, 36 Minn. L. Rev. 251, 254-55 (1952); 34 Minn. L. Rev. 257 (1950).

28. *McCormick*, *Evidence* § 83 (1954).

29. See *Note*, 36 Minn. L. Rev. 251, 260 (1952).

30. See 8 *Wigmore*, *Evidence* § 2196 (3d ed. 1940).

31. *Ibid.*



disallowance of his claim under Uniform Rule 40. This clarification seems reasonable, recognizing, as it impliedly does, that the privilege is limited by the policy reasons which justify it and is not intended for use as an implement of trial and appellate advocacy

In the event that one who possesses a privilege was wrongfully compelled over a proper claim of privilege to disclose that which is privileged, the evidence so obtained would be inadmissible under Rule 38, against the holder of the privilege. This is a desirable sanction practically necessary for the vitality of the privilege.

*Exceptions to the Marital Evidentiary Privileges.*

Both the Minnesota Statute<sup>32</sup> and the Uniform Rules<sup>33</sup> recognize the necessity of excepting certain classes of action from the marital privileges. For example, exceptions have long been deemed necessary to protect one spouse, generally the wife, from being unable to prove personal violence and harm by the other.<sup>34</sup> These injuries are frequently difficult of proof without the injured spouse's testimony. Such an exception seems to assume, however, not only the difficulty of obtaining independent proof of the facts, but also that the family harmony for which the privilege in part exists is already gone or at best weakened.<sup>35</sup>

Common to both the Uniform Rules<sup>36</sup> and the Minnesota Statute<sup>37</sup> is an exception which removes the marital privilege in the case of civil actions between spouses.

Under the Minnesota statutory exceptions marital privileges are inapplicable to criminal actions for a crime committed by one spouse against the other.<sup>38</sup> In applying this exception for purposes of permitting adverse testimony of a spouse, the Minnesota court has largely refused to include within the category of crimes against the other spouse, those offenses not involving personal, physical injury to the spouse, and which for want of more appropriate description may be termed "moral injuries."<sup>39</sup> Adultery is an example of the

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32. Minn. Stat. § 595.02(1) (1953).

33. Uniform Rules of Evidence, Rules 23(2) (a) and 28(2) (1953).

34. See Chamberlayne, Evidence § 1155 (1919), 8 Wigmore, Evidence § 2239 (3d ed. 1940), 48 Mich. L. Rev. 546 n. 2 (1950).

35. State v. Feste, 205 Minn. 73, 75-76, 285 N. W. 85, 87 (1939) (dictum).

36. Uniform Rules of Evidence, Rule 28(2) (a) (1953).

37. Minn. Stat. § 595.02(1) (1953).

38. State v. Feste, 205 Minn. 73, 75, 285 N. W. 85, 87 (1939) (dictum) (exception not applicable to crimes committed prior to marriage).

39. State v. Lasher, 131 Minn. 97, 154 N. W. 735 (1915), State v. Marshall, 140 Minn. 363, 365, 168 N. W. 174, 175 (1918) (dictum), State v. Armstrong, 4 Minn. (Gil. 251) 335 (1860) (dictum). Spousal testimony, however, was allowed in an adultery prosecution of a third party. State v. Vollander, 57 Minn. 225, 58 N. W. 878 (1894). See 27 Minn. L. Rev. 205 (1943).

latter class of conduct.<sup>40</sup> Rule 28(2) (c) specifically excepts crimes involving adultery and bigamy from the privilege. Actions by one spouse against third parties charging them with alienating the affections of the other spouse have presented unique problems in the application of the present privilege;<sup>41</sup> under Uniform Rule 28(2) (b) it is clear that the privilege is non-existent in these cases, and in criminal conversation cases.

An action based upon charges that the husband abandoned or neglected his wife or children is excepted under the present Minnesota Statute.<sup>42</sup> The Uniform Rules more comprehensively except from the benefits of the privilege those spouses who are charged with crimes against the marriage relation<sup>43</sup> or with desertion of the other spouse or the child of either.<sup>44</sup>

The Uniform Rules also make it explicit that the concept of crimes committed by one spouse against the other includes property crimes as well as those against the person of the spouse or a child of either.<sup>45</sup> Likewise excepted from the privilege are criminal prosecutions against a spouse who is charged with committing a crime against the person or property of a third person in the course of criminal conduct against the other spouse.<sup>46</sup>

Communications between spouses enabling or aiding criminal or tortious conduct by anyone are similarly non-privileged under Rule 28(2) (e). Comparable principles presently apply to the attorney-client relationship at least as respects criminal and fraudulent conduct.<sup>47</sup> Under Rule 28 the existence of this exception can be determined only from sufficient evidence aside from the communication. It is difficult to think of any valid objection to this clarification of the present law. Certainly communications facilitating a crime or an intentional or wanton tort are not entitled to confidentiality. Requiring the court to base its ruling upon evidence other than the communication itself preserves confidentiality which would otherwise be lost by requiring disclosure of the contents of the communication for purposes of determining the proper ruling upon the claimed privilege.

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40. *Ibid.*

41. See *Gjesdahl v. Harmon*, 175 Minn. 414, 420, 221 N. W. 639, 641 (1928); *Huot v. Wise*, 27 Minn. 68, 69-70, 6 N. W. 425, 426 (1880).

42. Minn. Stat. § 595.02(1) (1953).

43. Uniform Rules of Evidence, Rule 23(2) (a) (i) (1953).

44. *Id.* at Rule 28(2) (c); Rule 23(2) (a) (iii).

45. *Id.* at Rule 28(2) (c).

46. *Ibid.*

47. See McCormick, Evidence § 99 (1954) (crime or fraud), 8 Wigmore, Evidence § 2298 (3d ed. 1940) (criminal or fraudulent transaction). See also note 79 *infra*.

*Waiver of the Privilege.*

Minnesota has previously recognized that one may waive the marital privilege against adverse testimony of a spouse by calling the other spouse as one's own witness.<sup>48</sup> However, the waiver has been restricted to non-communicative aspects unless the spouse in whose favor the privilege runs, elicits testimony relating to communications between them.<sup>49</sup> Termination and waiver are specifically covered by the Uniform Rules. Rule 28(3) provides that the privilege against disclosure is terminated if either spouse "while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter." Thus, under Rule 28 it would be clear that waiver could be effected by testimony by either spouse while holder of the privilege "upon the same subject matter" given prior to the trial at which the privilege is invoked. This is accordant with the philosophy of the Rules against piece-meal waiver of confidentiality

However, with respect to the scope of waiver under Rule 23(2)(b) and Rule 28(2)(d) by an accused spouse who reveals the contents of one confidential spousal communication, it is not entirely clear whether the waiver is confined to the contents of that particular communication, whether it extends to all communications on the same subject as it does in cases under Rule 28(3), or whether it is broad enough to include all communications between the spouses on any subject. Rule 23(2) insofar as pertinent says "An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to *any* confidential communication between them while they were husband and wife, excepting only (b) as to *the* communication, in an action in which the accused offers evidence of *a* communication between himself and his spouse." (emphasis added)

On this the draftsmen have commented "Exception (b) is necessary to prevent the accused from offering evidence of communications favorable to himself and then claiming the privilege as to those which are unfavorable." The language of the comment lends support to the literal interpretation under which this exception to the accused's privilege encompasses *any* spousal communications and is actually broader, in respect of scope of waiver, than the corresponding provision of Rule 28(3). This is hardly consistent with the generally more liberal allowance of confidentiality

48. *State v. Stearns*, 184 Minn. 452, 238 N. W. 895 (1931).

49. *National German-American Bank v. Lawrence*, 77 Minn. 282, 290, 80 N. W. 363, 364 (1899) (dictum).

under Rule 23 than under Rule 28. With at least several interpretations of Rule 23(2) b) and Rule 28(2) (d) possible, it is submitted that clarification of their meaning is desirable.

In addition to the specific waiver provisions, the general provision on waiver in the Uniform Rules, Rule 37, provides for waiver of the privilege whenever the court finds that any person while holder of the privilege has either contracted with anyone else not to claim the privilege or with full knowledge of his right to assert it has made voluntary disclosure of any part of the privileged matter, or consented to the disclosure by anyone of such matter.<sup>50</sup>

*Comments on Assertion of the Privilege.*

From a tactical standpoint, the subject of permissible references to and inferences from the assertion of the privilege is important. In cases where the privilege against adverse testimony by one's spouse has been asserted, the Minnesota court has allowed the other party to call attention to the assertion of the privilege, by asking for the testimony of the other spouse necessitating the exercise of the privilege in the presence of the jury,<sup>51</sup> even where it was known in advance of trial that the privilege would be claimed.<sup>52</sup> By dicta, the Minnesota court has indicated that in an appropriate case the trial court may instruct the jury that it should not weigh against the party claiming the privilege the fact of such claim.<sup>53</sup>

— If Minnesota should adopt the Uniform Rules, this particular subject would be explicitly covered by Rule 39. Rule 39 generally prohibits comment by court or counsel, the raising of presumptions, or the drawing of adverse inferences from the exercise of the privileges protected by the Uniform Rules. Moreover, the court, on request of the party asserting the privilege, may instruct the jury in support of the privilege whenever the circumstances are such that the jury may misunderstand and draw unfavorable inferences. The Commissioners on Uniform State Laws consider this Rule to be substantially contrary to Model Code of Evidence Rule 233 which would allow comment on the exercise of a privilege by either judge or counsel (except that both Rules would permit comment on the

50. *Quaere*, as to the desirability of allowing one spouse to waive the privilege on behalf of both. Assuming that both the communicator and communicatee spouses hold the privilege (compare Rule 23 with Rule 28), we have a dual ownership which contrasts with the professional privileges.

51. *State v. Roby*, 128 Minn. 187, 150 N. W. 793 (1915), *accord*, *State v. Virgens*, 128 Minn. 422, 151 N. W. 190 (1915).

52. *State v. Roby*, 128 Minn. 187, 150 N. W. 793 (1915).

53. *Id.* at 192, 150 N. W. at 795.

failure of a defendant in a criminal case to testify)<sup>54</sup> However, the Commissioners consider that they have adopted the majority state view<sup>55</sup> Rule 39 is subject to the important exception that the failure of a criminal defendant to take the stand and testify is subject to comment by counsel and inference by the court or jury as triers of fact.<sup>56</sup>

*Should Minnesota Adopt the Uniform Rules of Marital Evidentiary Privilege?*

If Minnesota adopts Rules 23 and 28 in their present form, a drastic change from existing law will result from the abolition of the privilege against adverse testimony of a spouse. This privilege is generally less favorably viewed than that accorded to confidential communications,<sup>57</sup> although both conventionally have been based in part on the same policy grounds, promotion of marital harmony<sup>58</sup> The privilege against adverse spousal testimony is rooted deeply in Minnesota's history and popular acceptance, and its proposed abolition should command the careful deliberation of the Legislature.

Adoption of Rules 23 and 28 would result in desirable clarifications of the marital confidential communications privilege, including greater particularization of the exceptions to the privilege, addition of an express requirement of confidentiality, specific exception from the privilege of communications in aid of illegal conduct, and recognition of the privilege when claimed by its holder even though he is not a party to the action.

However, other provisions of Rules 23 and 28 do not appear to be either necessary or beneficial changes of existing Minnesota law. We do not agree with the provision of Rule 28 that only the communicator has the privilege. Moreover, limiting the duration of the privilege to the duration of the marriage is an undue curtailment, for no adequate reason, of the policy of encouraging full and frank discussion between spouses.<sup>59</sup> Finally, as noted, there is possible

54. Uniform Rules of Evidence, Comment to Rule 39 (1953) Wigmore summarizes argument in favor of permitting comment upon the exercise of the evidentiary privileges. See 8 Wigmore, Evidence §§ 2272, 2272(a) (3d ed. 1940) (privileges against self-incrimination).

55. See note 54 *supra*.

56. Uniform Rules of Evidence, Rule 23(4) (1953), see note 7 *supra*.

57. See McCormick, Evidence § 66 (1954), 30 B. U. L. Rev. 135, 138 (1950). In its criminal aspects the drafters of the Uniform Rules refer to the privileges against adverse spousal testimony as "largely a sentimental relic." Uniform Rules of Evidence, Comment to Rule 23, Subdivision (2) (1953). See Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929).

58. See 8 Wigmore, Evidence § 2332 (3d ed. 1940), 34 Minn. L. Rev. 257 (1950).

59. Chamberlayne, Evidence § 1166 (1919), McCormick, Evidence § 90 (1954) (appraises merit of this policy argument).

ambiguity in Rule 23(2)(b)'s waiver provision applicable to an accused spouse who introduces evidence of "a communication."

#### ATTORNEY-CLIENT CONFIDENTIAL COMMUNICATIONS

##### *Comparison of Statute and Uniform Rules.*

Minn. Stat. § 595.02(2) (1953) sets forth the present privilege accorded to confidential communications between clients and their attorneys. The statute provides:

. . . (2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional duty; nor can any employee of such attorney be examined as to such communication or advice, without the client's consent; . . .

It will be observed that the statute protects both communications by the client and advice from the attorney. It protects both not only from compulsory disclosure by the attorney but by his employees as well.

Provisions comparable to the Minnesota Statute are found in Uniform Rule 26. However, this Rule treats the whole subject of attorney-client evidentiary privilege with greater particularity. It provides:

##### Rule 26. *Lawyer-Client Privilege.*

(1) *General Rule.* Subject to Rule 37 and except as otherwise provided by Paragraph 2 of this rule communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative. The privilege available to a corporation or association terminates upon dissolution.

(2) *Exceptions.* Such privileges shall not extend (a) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort, or (b) to a communication relevant to an issue between

parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction, or (c) 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 (d) to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (e) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.

(3) *Definitions.* As used in this rule (a) "Client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (b) "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship, (c) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.

#### *Who May Assert the Privilege*

At common law the privilege of refusing to disclose confidential communications from an attorney's client belonged to the attorney himself.<sup>60</sup> The quoted Minnesota statute protects the attorney from being examined with respect to professional communications or advice but, in accord with the modern rule, the privilege to allow or prevent disclosure is in the client,<sup>61</sup> as it would be under Uniform Rule 26.

Rule 26(1) specifies those entitled to claim the privilege. Besides the client himself, his attorney, his guardian if he is incompetent, or his personal representative if the client has died, may claim the privilege on his behalf. Although our court has said little on this, probably Uniform Rule 26(1) would only be declaratory of existing law. Its explicitness makes it preferable to the present statute on this point.

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60. See 8 Wigmore, Evidence §§ 2290, 2321 (3d ed. 1940)

61. Struckmeyer v. Lamb, 75 Minn. 366, 77 N. W. 987 (1899), State v. Tall, 43 Minn. 273, 45 N. W. 449 (1890), Knox v. Knox, 222 Minn. 477, 485, 25 N. W. 2d 225, 230 (1946) (dictum), State v. Madden, 161 Minn. 132, 134, 201 N. W. 297, 298 (1924) (dictum), see Note, 16 Minn. L. Rev. 818, 820 (1932)

*Communications to an Attorney.*

Only communications to an actual attorney are protected by the literal language of the Minnesota statute. On the other hand, Rule 26(3) defines "lawyer" to include not only lawyers in fact but also persons "reasonably believed by the client to be authorized to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer."

Apparently our court has not yet been required to decide whether to enlarge the category of communicatees to whom a client may safely divulge his confidences to include those who, while not licensed to practice law, nevertheless hold themselves out to be attorneys. Jurisdictions in which the problem has arisen have been faced with the difficult choice between protecting the misinformed client or restricting the privilege to communications made to actual attorneys.<sup>62</sup>

Protection against disclosure of the communication by an employee of the attorney is insured by Uniform Rule 26(1)(c)(i) which affords to the client the privilege to prevent disclosure by "any other witness" who has learned of the communication "in the course of its transmittal between the client and the lawyer. . ." Moreover, the definitions of client and communication in paragraph 3 of the rule are framed broadly enough to include disclosures or advice transmitted between attorney and client through authorized representatives of either. Employees of attorneys are presently protected from having to disclose communications between clients and their attorneys<sup>63</sup> and at least one case would even protect communications from a client made directly to an attorney's clerk.<sup>64</sup>

Communications to a lawyer in his special capacity as prosecuting attorney present particular problems. Although Uniform Rule 26 does not specifically discuss communications to prosecutors, nevertheless communications of this type might be included within

62. For a consideration of various aspects of the problem, see 8 Wigmore, Evidence §§ 2300, 2302 (3d ed. 1940), Note, 4 Minn. L. Rev. 227 (1920) (communications to juvenile court judge); 35 Minn. L. Rev. 409 (1951) (communication to state court judge). In the following cases, the privilege was denied: *Sample v. Frost*, 10 Iowa 266 (1859) (student); *Barnes v. Harris*, 7 Cush. 576 (Mass. 1851) (student); *Fountain v. Young*, 6 Esp. 113, 170 Eng. Rep. 846 (C.P. 1807) (clerk). *Contra Calley v. Richards*, 19 Beav. 401, 52 Eng. Rep. 406 (Ch. 1854) (former attorney).

63. Minn. Stat. § 595.02(2) (1953); *Hilary v. Minneapolis Street Ry.*, 104 Minn. 432, 434, 116 N. W. 933, 934 (1908) (dictum), 8 Wigmore, Evidence § 2301 (3d ed. 1940).

64. *Hilary v. Minneapolis Street Ry.*, 104 Minn. 432, 116 N. W. 933 (1908).



the protection by virtue of the broad definition of "lawyer" in Rule 26(3). There is no certainty that such communications are within the present Section 595.02(2). Although the attorney-client privilege as such may be inapplicable to communications between individuals and prosecutors, nevertheless under appropriate circumstances they may still be privileged under present Minnesota law as communications to a public officer, the disclosure of which is contrary to the public interest.<sup>65</sup> The same result may also be reached under Rule 34.<sup>66</sup>

#### *Requirement of Confidentiality.*

Although the Minnesota statute is worded in terms of protecting "any communication" between attorney and client,<sup>67</sup> it is understood that the communication must be made in confidence.<sup>68</sup> Absent special circumstances, the presence of a third party other than a representative of either the client or the attorney negatives the existence of the requisite confidentiality of communications between client and attorney,<sup>69</sup> particularly where the third party is also the opposing party at that time or later.<sup>70</sup> Under Rule 26, if a third party's presence is unknown to the client, there is no loss of privilege by virtue of eavesdropping.

Rule 26 protects not only a communication heard by others "in the course of its transmittal between the client and the lawyer,"<sup>71</sup>

65. Minn. Stat. § 595.02(5) (1953), *State v. McClendon*, 172 Minn. 106, 214 N. W. 782 (1927), *Cole v. Andrews*, 74 Minn. 93, 97-98, 76 N. W. 962, 964 (1898) (dictum), see also 8 Wigmore, *Evidence* §§ 2296, 2375 (3d ed. 1940), 5 Minn. L. Rev. 570 (1921).

66. Rule 34. *Official Information*.

(1) As used in this Rule, "official information" means information not open or theretofore officially disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official of this State or the United States in the course of his duty, or transmitted from one such official to another in the course of duty.

(2) A witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information, and (a) disclosure is forbidden by an Act of the Congress of the United States or a statute of this State, or (b) disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in a governmental capacity.

67. Minn. Stat. § 595.02 (1953).

68. *Brown v. St. Paul City Ry.*, 241 Minn. 15, 34, 62 N. W. 2d 688, 700 (1954) (dictum), *accord*, *Shove v. Martine*, 85 Minn. 29, 88 N. W. 254 (1901), *Eickman v. Troll*, 29 Minn. 124, 12 N. W. 347 (1882), see 8 Wigmore, *Evidence* § 2311 (3d ed. 1940), 22 Minn. L. Rev. 110 (1937).

69. *Accord*, *Davis v. New York, O. & W. Ry.*, 70 Minn. 37, 72 N. W. 823 (1897), see 22 Minn. L. Rev. 110, 111 (1937).

70. *Knox v. Knox*, 222 Minn. 477, 485, 25 N. W. 2d 225, 230 (1946) (dictum) (communication in presence of one who thereafter became an opposing party and sought to exercise the privilege), see 22 Minn. L. Rev. 110, 111 (1937).

71. Uniform Rules of Evidence, Rule 26(1)(c)(i) (1953).

but in addition a third party overhearing the communication may be restrained from disclosure if his knowledge of the communication came about "in a manner not reasonably to be anticipated by the client,"<sup>72</sup> or resulted from a "breach of the lawyer-client relationship."<sup>73</sup>

Where several persons consult one attorney in a professional capacity, the privilege may be curtailed in a later action between them.<sup>74</sup> This is specifically provided for by Rule 26(2) (e).

When an attorney is used as attesting witness to the proper execution by the client of either a will<sup>75</sup> or a deed,<sup>76</sup> our court considers this as clearly indicative of the client's intent that communications pertinent to such functioning by the attorney should not be privileged. Uniform Rule 26(2) (d) is in accord.

#### *Scope of the Privilege.*

The privilege extends only to communications between attorney and client in the course of their professional relationship. Consequently, a communication by which the client has merely retained a particular attorney to represent him is not now within the ambit of the privilege.<sup>77</sup> Similarly, only communications made in the course of the professional relationship would be protected by Uniform Rule 26(1).

Considerations founded in the Canons of Ethics also have a place in discussion of the scope of the attorney-client privilege. Canon 37<sup>78</sup> imposes the following ethical obligation upon attorneys:

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other

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72. *Id.* at Rule 26(1) (c) (ii).

73. *Id.* at Rule 26(1) (c) (iii).

74. *Knox v. Knox*, 222 Minn. 477, 485 n. 9, 25 N. W. 2d 225, 230 n. 9 (1946) (dictum); *accord*, *Shove v. Martine*, 85 Minn. 29, 88 N. W. 254 (1901); *cf.* *Hanson v. Bean*, 51 Minn. 546, 53 N. W. 871 (1892); see Note, 16 Minn. L. Rev. 818, 821 (1932).

75. *Hanefeld v. Fairbrother*, 191 Minn. 547, 254 N. W. 821 (1934); *In re Estate of Wunsch*, 177 Minn. 169, 225 N. W. 109 (1929); *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217 (1901); *accord*, *In re Estate of Dorey*, 210 Minn. 136, 297 N. W. 561 (1941); *In the Matter of Layman*, 40 Minn. 371, 42 N. W. 286 (1889); see Note, 16 Minn. L. Rev. 818, 828 (1932).

76. *Larson v. Dahlstrom*, 214 Minn. 304, 8 N. W. 2d 48 (1943).

77. *Eickman v. Troll*, 29 Minn. 124, 12 N. W. 347 (1882), see McCormick, Evidence § 94 (1954).

78. Canons of Professional Ethics (1951).

available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

Writers in the field hold that communications made by the client relative to plans to commit a future crime or accomplish a fraudulent purpose should not be privileged.<sup>79</sup> McCormick questions whether this exception to the privilege is broad enough or whether other forms of tortious conduct should not also be included.<sup>80</sup> Uniform Rule 26(2)(a) enlarges this exception and removes from the privilege "a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort." Of course there must be kept in mind the elementary distinction between situations where the client discloses plans for future wrongdoing and cases where the communications relate to past illegal conduct.

Another present exception to the privilege is where the client charges the attorney with breach of duty.<sup>81</sup> Rule 26(2)(c) broadens this to except also situations where the client is charged with breach of duty to his lawyer.

#### *Termination of the Privilege.*

Even after the relationship of attorney and client has ended, the privilege continues to protect confidential communications made during the course of the professional relationship.<sup>82</sup> Presumably the privilege continues even after death,<sup>83</sup> although our court has allowed communications to be disclosed where an attorney acted as attesting witness to the testator's will.<sup>84</sup>

79. See McCormick, Evidence § 99 (1954) (communications in furtherance of crime or fraud), 8 Wigmore, Evidence § 2298 (3d ed. 1940) (criminal or fraudulent transaction).

80. See McCormick, Evidence § 99 (1954), see also 8 Wigmore, Evidence § 2298 (3d ed. 1940).

81. Canons of Professional Ethics, Canon 37 (1951); see Note, 16 Minn. L. Rev. 818, 827 (1932).

82. Struckmeyer v. Lamb, 75 Minn. 366, 77 N. W. 987 (1899).

83. See McCormick, Evidence § 98 (1954).

84. See note 75 *supra*.

Rule 26(1) recognizes the privilege even after the client has become incompetent or has died, by providing for exercise of the privilege by the incompetent's guardian or the decedent's personal representative. Corporate and association privileges are lost on their dissolution.

Rule 26(2) (b) withdraws the privilege from communications in controversies between parties all of whom claim through the client by *inter vivos* transaction or by succession. In these situations recognition of the privilege is deemed of insufficient value to outweigh potential injustice to parties claiming title to property through a common source. As the Minnesota court observed in an early will contest case<sup>85</sup> the purpose of the privilege is to protect the client and his estate and when preventing disclosure of confidential communications between testator and his attorney will not accomplish this purpose there is no need to recognize the privilege. In that situation the testimony may be vital to the protection of the estate against contests.

Obviously, the privilege of a client may be terminated by the client's waiver of the benefits of the privilege.<sup>86</sup> Merely taking the witness stand without testifying to the content of communications should not forfeit the privilege.<sup>87</sup> Rule 26 does not specifically prescribe the manner in which the privilege may be waived other than by a general reference in its first sentence to Rule 37. Rule 37 provides for loss of evidentiary privilege by contracting with anyone that the privilege will not be claimed, or by making voluntary and knowing disclosure of any part of the privileged matter to *anyone*. This second form of waiver bears close scrutiny, in that it might be construed to forfeit the privilege of any client who knowingly reveals even a small portion of his legal problems to a person other than an attorney or an employee or representative of one. There is in Rule 37 a definite intent to prevent later exercise of the privilege when advantageous to the client's interests after he has waived it when his interests seemed to be benefited by waiver.<sup>88</sup>

#### *Comparison and Evaluation of Rule 26.*

Rule 26 represents an improvement over existing Minnesota law, chiefly because it is more explicit. To the degree that the fol-

85. In the Matter of Layman, 40 Minn. 371, 372-73, 42 N. W. 286, 287 (1889).

86. State v. Madden, 161 Minn. 132, 134, 201 N. W. 297, 298 (1924) (dictum); 8 Wigmore, Evidence §§ 2327-2329; see Note, 16 Minn. L. Rev. 818 (1932) (an extensive consideration of various aspects of waiver of the attorney-client privilege), 36 Minn. L. Rev. 408 (1952) (waiver by guardian of incompetent).

87. See Note, 16 Minn. L. Rev. 818, 823-24 (1932).

88. *Id.* at 825.

lowing provisions of Rule 26 represent extensions of the privilege, we consider them improvements (i) a communication to one reasonably believed to be an attorney would be privileged even though the communicatee was not an attorney, (ii) a communication may be privileged even though transmitted through the employees of either attorney or client,<sup>89</sup> and (iii) the privilege is not lost when overheard by an eavesdropper, improperly revealed by the attorney, or otherwise disclosed in a manner not reasonably to be anticipated by the client. However, Rule 26 works a narrowing of the scope of the privilege by extending the exception applicable to communications in aid of future wrongful conduct, to include all types of contemplated tortious conduct.

#### CLERGYMAN-PENITENT CONFIDENTIAL COMMUNICATIONS

The present Minnesota statutory provision is in Minn. Stat. § 595.02(3) (1953)

A clergyman or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, nor shall a clergyman or other minister of any religion be examined as to any communication made to him by any person seeking religious or spiritual advice, aid, or comfort or his advice given thereon in the course of his professional character, without the consent of such person.

Minnesota lawyers will recall that the part of the foregoing sentence after the semicolon and beginning with the words "nor shall a clergyman" was added by the legislature in 1931 during the pendency of *In re Contempt of Emil Swenson*,<sup>90</sup> hereinafter discussed.

The provision of the Uniform Rules corresponding to Section 595.02(3) is

Rule 29 *Priest-Penitent Privileges, Definition, Penitential Communications.*

(1) As used in this rule, (a) "priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a

89. In connection with the problem of transmission of the communication by the client's agents to the attorney, rather than directly by client to attorney, see *Schmitt v. Emery*, 211 Minn. 547, 2 N. W. 2d 413 (1942). It must be remembered that in Minnesota we have not only the problem of privileged confidential communication, but also the problem of limitation on discovery by reason of the last sentence of Minn. R. Civ. P. 26.02. See *Brown v. St. Paul City Ry.*, 241 Minn. 15, 32-37, 62 N. W. 2d 688 (1954), *Louise, Discovery and Pre-Trial under Minnesota Rules*, 36 Minn. L. Rev. 633, 635-638 (1952).

90. 183 Minn. 602, 237 N. W. 589 (1931).

religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization; (b) "penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof; (c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member.

(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent.

It will be noted that the present Minnesota statute affirmatively imposes the obligation of silence on the clergyman by way of disallowing any right in him to disclose the communication, and only implies the correlative privilege in the penitent by making his consent a condition of legal disclosure. Uniform Rule 29, on the other hand, affirmatively states the privilege in the penitent and allows him to prevent a disclosure, but imposes no duty of silence on the clergyman in the absence of an act of prevention by the penitent. Although this difference may not be of great practical significance inasmuch as Uniform Rule 29(2) (c) allows the clergyman to make the claim on behalf of an absent penitent, and clergymen historically have displayed great fidelity to their obligation of secrecy, nevertheless from the theoretical viewpoint at least it would seem that the present Minnesota statute is preferable insofar as it imposes on the clergyman the affirmative duty of silence.

Perhaps a more serious defect in Uniform Rule 29 is its limitation of the privilege to situations where the witness is the penitent or the clergyman. Uniform Rule 26 accords the lawyer's client not only the right to refuse to disclose a professional communication himself and to prevent his lawyer from disclosing it, but also "to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of the breach of the lawyer-client relationship." This has the salutary effect in the attorney-client relationship of protecting the privilege against intrusions offensive to normal ethical standards, such as

those of eavesdroppers, and of clarifying an area now beclouded by cases disallowing the privilege where confidentiality in fact was lacking although the lack resulted from improper conduct by the eavesdropper or other infringer.<sup>91</sup> Rule 29, we submit, should similarly protect against the eavesdropper or like infringer.

Perhaps, however, the Minnesota Legislature in considering Uniform Rule 29 will be most concerned with the fact that its enactment would in substance effect a repeal of the aforequoted portion of Section 595.02 which was enacted in 1931. Discussion of this invokes consideration of the celebrated case of *In re Contempt of Emil Swenson*.<sup>92</sup> A wife was seeking a divorce from her husband on the ground of adultery. The husband telephoned a relator, a Lutheran minister and pastor of the church where the husband and wife had worshipped, and asked permission to see and talk with the minister. The request was granted and the husband came immediately. He was received in the sitting room wherein others were present. The husband said "I want to see you in your private office." In order that the conversation might be secret, the two went to the minister's study and there behind closed doors the husband said to the minister "I have something that I want to tell you, and under the circumstances it is very hard for me to face my pastor." In the divorce suit the minister testified that on the described occasion they had discussed the husband's intimate affairs. The wife sought to prove by the minister that her husband had stated to the minister that he, the husband, had had adulterous relations with a named woman. The minister refused to testify as to the communication made on the ground that the statements so made to him were privileged as communications to a clergyman. The Minnesota statute in force at the time provided

"A clergyman or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs."<sup>93</sup>

The district court disallowed the claimed privilege and adjudged the minister in contempt for refusal to answer. The Supreme Court of Minnesota on certiorari reversed, holding that the communication was within the statute and privileged. It was a confidential peni-

91. *Commonwealth v. Everson*, 123 Ky. 330, 96 S. W. 460 (1906) (husband-wife privilege analogized to that of lawyer-client), *Hammons v. State*, 73 Ark. 495, 84 S. W. 718 (1905) (letter of husband who was in jail to wife, misdelivered).

92. 183 Minn. 602, 237 N. W. 589 (1931).

93. 2 Mason Minn. Stat. 1927, Sec. 9814(3).

tential communication made in the course of discipline of the minister's church. Any other conclusion, the court reasoned, would have restricted applicability of the statute to Catholic confessions, an interpretation deemed absurd by the court in our religiously pluralistic society. The court disregarded as inapplicable the amendment to the foregoing statute which had become a law during the pendency of the case. The amendment provides:

. . . nor shall a clergyman or other minister of any religion be examined as to any communication made to him by any person seeking religious or spiritual advice, aid, or comfort or his advice given thereon in the course of his professional character, without the consent of such person.<sup>94</sup>

There seems to be no helpful case applying this amendment. *Christensen v. Pestorous*<sup>95</sup> involved only social conversation between an injured person and her pastor; the communication was not penitential nor in confidence, nor did it involve spiritual advice or comfort. It therefore was not privileged.

The quoted amendment of 1931, while unconstrued, clearly on its face carries the privilege of confidential communication between pastor and "any person seeking religious or spiritual advice, aid, or comfort" far beyond the limits of the penitential confession privileged by our statute prior to the 1931 amendment. Uniform Rule 29 would in substance effect a repeal of the amendment, and cause the law to revert, in respect of communications covered by the privilege, to its pre-1931 amendment status. This would seem to be the intention of Uniform Rule 29, for in the Comment to it it is stated: "The privilege is intentionally limited to communications by communicants within the sanctity and under the necessity of their own disciplinary requirements. Any broader treatment would open the door to abuse and would clearly not be in the public interest." In view of the Minnesota experience it is clear that this conclusion is at least open to argument and should receive full consideration before the rule is adopted.

#### CONCLUSION

As is indicated by the above discussion, the provisions of the Uniform Rules as to the privileges dealt with are in some respects an improvement over the present Minnesota law, either by way of substance or as a matter of clarification. But it is equally clear that there are areas where the Uniform Rules do not provide some

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94. Minn. Laws 1931, ch. 206; Minn. Stat. § 595.02(3) (1953).

95. 189 Minn. 548, 250 N. W. 363 (1933).



protection now existing, which seems to be necessary or desirable to accomplish the policies behind the existence of the privilege.

In any event, the kind of argument one must get into in evaluating the privileges shows that alteration of them involves that type of weighing of policy considerations which is normally a legislative function subject only to constitutional inhibitions, if any. Consequently, it would be a real mistake to attempt to introduce the Uniform Rules' privilege provisions other than by legislative action. It is hoped that this treatment will help to point out some of the problems to be resolved as part of such a legislative process.