EVIDENTIARY PRIVILEGE IN NEBRASKA

R. COLLIN MANGRUM*

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* Professor of Law, Creighton University School of Law; B.A., 1972, Harvard
University; J.D., 1975, University of Utah School of Law; B.C.L., 1978, Oxford University;
S.J.D., 1983, Harvard University. The author acknowledges the research assistance of William Ince, Creighton University School of Law, Class of 1991.
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EVIDENTIARY PRIVILEGE IN NEBRASKA

I. INTRODUCTION

The law of evidentiary privilege can be fairly described as complicated, confusing, and controversial. This is unfortunate particularly because of all the evidentiary rules, it is the only one that "applies at all stages of all actions, cases and proceedings."¹ Evidentiary privilege is complicated, in part, because of the multiplicity of rules involved. The United States Supreme Court approved thirteen rules covering privilege, but they were entirely deleted by Congress when the Federal Rules of Evidence were finally enacted into law. Congress in Rule 501 acknowledged that special rules of privilege may be prescribed by Congress or the Supreme Court pursuant to statutory authority, but left the body of evidentiary privilege to "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."² Nebraska essentially adopted, with some modifications, the thirteen rules approved by the Supreme Court but rejected by Congress. Consequently, the rules of privilege are complex, in part, because of their variety of sources and content.

The rules of evidentiary privilege are confusing not only because of their complexity but because the term "privilege" has multiple usages in the law. Constitutional privileges, such as the privilege against self-incrimination, are related to but distinct from evidentiary privilege. Also, the term privilege, most commonly invoked as a shield to exclude evidence, in some instances may be used as a sword to protect speech. For example, an attorney can invoke privilege as a sword in making statements incident to and in the course of judicial proceedings which would otherwise be defamatory.³ This article fo-

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¹ FED. R. EVID. 1101(c). See also NEB. REV. STAT. § 27-1101(3) (1985).
² FED. R. EVID. 501. Rule 501 also prescribes the application of state privilege rules in civil actions to which state law supplies the rule of decision. Id.
³ The court discussed the privilege of attorneys to speak freely in the course of judicial proceedings in Cummings v. Kirby, 216 Neb. 314, 343 N.W.2d 747 (1984). The Kirby case involved a slander action brought against an attorney for remarks made during the course of legal representation. The trial court granted summary judgment
cuses on evidentiary privilege and leaves an explication of other usages of privilege for another day.

Evidentiary privilege, in addition to being complex and confusing, has always been controversial. It is controversial because it "contravene[s] the fundamental principle that 'the public . . . has a right to every man's evidence.'"4 Indeed, controversy over the scope of and policy behind various privileges is one of the primary reasons why Congress decided that the adoption of evidentiary rules, unlike the rules of procedure, were beyond the constitutional competency of the Supreme Court. Ironically, the same controversy made it impossible for Congress to agree upon the scope of specific privileges, thus leaving privilege in federal courts to common-law development.

This article reviews the law of evidentiary privilege presently applicable in both the federal and state courts in Nebraska. The primary focus is on how the Nebraska courts have interpreted the Nebraska Rules of Evidence.5 Because Nebraska's privilege rules rely heavily on the thirteen rules originally adopted by the Supreme Court, the overlap between Nebraska and federal privilege rules is substantial, but variations are noted where they exist.

II. § 27-501: General Rule

The United States Supreme Court, with some modification, recommended the adoption of nine specific privileges, proposed Rules 502-510, and four procedural rules, Rules 501, 511-13. Before Congress rejected the codification approach to evidentiary privilege, Nebraska's Supreme Court Committee on Practice and Procedure recommended adopting, with some modification, the privilege rules recommended by the United States Supreme Court.

Four of the specific privileges deal with communications made in the context of confidential relationships: lawyer-client; physician-pa-
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The common-law conditions essential to the recognition of such privileges were explained by Professor Wigmore that:

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

The remaining five privileges (required reports; political vote; trade secrets; secrets of state; and identity of informers) essentially represent policy determinations that certain information ought not to be compellable in court in the absence of special circumstances.

In any event, Rule 501 provides that no person has a privilege to (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or produce any object or writing, unless the evidentiary privilege rules or other statutes or constitutional provision provide a claim of privilege. Furthermore, section 27-1101(3) of the Nebraska Rules and 1101(c) of the Federal Rules provide that the privilege rules apply to all stages of all actions, cases, and proceedings.

§ 27-502: REQUIRED REPORTS PRIVILEGED BY STATUTE

As originally proposed, the federal rules contained a privilege rule for required reports privileged by statute. It was originally included as part of the proposed federal rules because Rule 501 did not confer on parties making a return or report required by state law any privilege against involuntary disclosure. Because Nebraska's Rule 501 permits the state to provide for such privileges, Rule 502 would have been redundant. The numbering corresponding to the proposed federal rules was retained (despite Nebraska's omission of 502) to avoid confusion in comparing state and federal rules—an effort made less significant because Congress rejected the codification approach. Nonetheless, the thirteen rules proposed by the Supreme Court are useful standards that are commonly referred to, and Nebraska's retention of the original numbering facilitates cross-referencing.

6. 8 J. Wigmore, supra note 5, § 2285 at 531.
§ 27-503: LAWYER-CLIENT PRIVILEGE

The lawyer-client privilege, the only privilege known at English common law, extends only to communications made in confidence by a client to a lawyer for the purpose of obtaining legal advice. In assessing whether a privilege applies to the facts of any case, therefore, the attorney must focus on (1) whether the person or entity communicating qualifies as a client; (2) whether the person to whom the communication is made qualifies as a lawyer; (3) whether the communication was made in confidence; and (4) the purpose for which the communication was made. If the above criteria are satisfied, then the communication is not subject to discovery or compellable at the time of trial, unless either an exception applies or the privilege has been waived.

§ 27-503(1)(a): Is the Declarant a Client?

The “client” issue arises in a limited number of contexts. While the privilege attaches only in the course of professional employment, it applies during a consultation period even if employment does not result, but not to communications made after it is clear that the lawyer has declined representation. Similarly, the fact that no compensation ever was paid to the lawyer does not bar a professional relationship which would be protected by the privilege.

The rule does not define “client” nor does it consider the reach of the privilege as applied to corporate entities. When the federal rules were originally proposed, the federal courts split on whether the privilege applied in a corporate setting only to those statements made by persons with authority to seek and act upon legal advice for the corporation. The Supreme Court resolved the issue at the federal level in Upjohn Co. v. United States. The Court in Upjohn extended “client” to include any corporate employee speaking confidentially to a lawyer or a lawyer’s representative if at the direction of

7. Counsel occasionally argue erroneously that the attorney-client privilege extends beyond communications to trial tactics and other decisions made by the attorney. For example, in State v. Lamb, 213 Neb. 498, 330 N.W.2d 462 (1983), counsel in a first-degree murder case argued on appeal that the trial judge had violated his client’s attorney-client privilege and right of due process by instructing the jury, over his objection, on the defense of intoxication. The court decided that the attorney-client privilege did not cover election of jury instructions on theories of defense. Lamb, 213 Neb. at 507-08, 330 N.W.2d at 468.
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corporate superiors for the purpose of obtaining legal advice.\textsuperscript{13}

An interesting who-is-the-protected-declarant problem may arise whenever a party calls an opposing party's expert to testify as part of its case in chief. The Nebraska Supreme Court in \textit{International Association of Firefighters, Local 831 v. North Platte}\textsuperscript{14} discussed the problem as an issue of first impression. The case involved an appeal from the Commission of Industrial Relations regarding a dispute between the fire fighters' union and the city of North Platte over wage and benefits. At the pretrial conference, counsel for the Union announced that he intended to call the city's expert witness as a witness in its case-in-chief. Counsel for the city objected on the ground of attorney-client privilege. The argument, in effect, was that the expert was a representative of the client and any communications were within the privilege.

The court first observed that it was "unaware of any Nebraska cases involving the compelling of an expert witness to testify."\textsuperscript{15} Citing a South Dakota case, the court reasoned that because the privilege exists only to encourage a client to communicate freely with his attorney, its protective mantle did not extend to opposing expert communications made to either an attorney or a client.\textsuperscript{16} Essentially, the court held that the communication must come from a client, not be addressed to a client, to qualify as a privileged communication.

\textbf{§ 27-503(1)(b): Is the Person to Whom the Communication Is Made a Lawyer?}

A "lawyer" is a person licensed to practice law in any state or nation. The lawyer-client privilege does not apply if the communication is made to someone other than an attorney even if an attorney is present. The Nebraska Supreme Court addressed the issue in \textit{State v. Spidell}.\textsuperscript{17} In Spidell, a burglary case, the defendant took the stand, denied participation in the crime, and explained his innocent presence in the area at the time of the arrest. During a trial recess, the defendant, while walking down a hallway in the courthouse with his counsel and the defendant's father, told his father a different story regarding his presence near the scene of the crime. A deputy sheriff who had been charged with the custody of the defendant during the trial and who had overheard the conversation, thereafter testified over defendant's lawyer-client privilege objection regarding the con-

\textsuperscript{13} Id. at 389-97.
\textsuperscript{14} 215 Neb. 89, 337 N.W.2d 716 (1983).
\textsuperscript{15} Id. at 96, 337 N.W.2d at 721.
\textsuperscript{16} Id. at 96-97, 337 N.W.2d at 721 (citing State Highway Comm'n v. Earl, 82 S.D. 139, 143 N.W.2d 88 (1966)).
\textsuperscript{17} 194 Neb. 494, 233 N.W.2d 900 (1975).
tradictory statement. The court affirmed on appeal reasoning that
the lawyer-client privilege did not extend to conversations with non-
lawyers conducted within the presence of lawyers.\textsuperscript{18}

\textbf{§ 27-503(1)(c): Is the Person to Whom the Communication Is Made
a Representative of a Lawyer?}

Lawyers increasingly rely on the services of "representatives" in
providing legal services. The privilege applies to communications
made by a client to these representatives.

The "representative" issue comes up repeatedly in the context of
investigations undertaken by persons other than the attorney. The
Nebraska Supreme Court in \textit{Curtis v. Millard School District No.
17}\textsuperscript{19} decided a claim involving a "representative of lawyer" privilege
in connection with an insurance investigative report. The \textit{Curtis}
case involved a tort claim against the Millard School District for injuries
sustained by a student while participating in a mandatory physical
education class. Because the injury occurred on the first day the
plaintiff had attended the school, he was unaware of the names of
the associated witnesses. Counsel requested from the insurance
claims representative the names and addresses of the students at-
tending and the teacher supervising the class. When the information
was not forthcoming, plaintiff's counsel served a request for produc-
tion of documents. The defense counsel refused to produce the infor-
mation claiming lawyer-client privilege and work product. In
response to a motion to compel, the defense produced the name of
the supervising teacher, who had moved to Indiana, and the name of
another witness who had moved to Alliance, Nebraska. Plaintiff's
counsel thereafter moved for the production of the statements taken
by the insurance adjustor, reasoning that the delay had deprived him
of access to the witnesses who had moved. The Douglas County Dis-
trict Court sustained the motion to produce. When the defendant re-
fused to comply with the court's order, the court assessed a fine for
contempt and attorneys' fees.

On appeal, the defendant urged the application of \textit{Brakhage v. Graff},\textsuperscript{20} in which a statement taken from an insured by an insurance
investigator was held within the lawyer-client privilege. The Ne-
braska Supreme Court, in affirming \textit{Curtis} on appeal, distinguished
\textit{Brakhage} on two grounds. First, the court found significant the fact

\textsuperscript{18} The court also noted that the communication, even if with the attorney, was
not privileged because of the presence of the father and the deputy sheriff. \textit{Id.} at 497,
233 N.W.2d at 903.


\textsuperscript{20} 190 Neb. 53, 206 N.W.2d 45 (1973).
that the statement in *Brakhage* had been taken from the insured. Second, the insurance company in *Brakhage* owed to the witness examined a duty to defend through its attorneys. The court in *Curtis* held that the absence of those factors made *Brakhage* inapplicable. The court raised, but did not decide the issue of whether an insurance adjustor is a "representative of the lawyer" within the meaning of Nebraska Revised Statutes section 27-503(1)(c).

The work product claim was rejected more because of the improper tactics employed by defense counsel than because of any analysis of "undue hardship" or showing of "substantial need." The court did not look favorably on the fact that the insurance company inferentially promised to furnish the names initially, then later participated in "delaying games to deny [the plaintiff] that information." The court held that "[s]uch tactics will not be tolerated." Judge Caporale, in dissent, queried whether "substantial need" and "undue hardship" required by Nebraska Court Rule 26(b)(3) had been shown. No one recognized that work product only protects the discovery of statements and does not protect the identification of witnesses or the fact of the existence of documents.

§ 27-503(1)(d): Was the Communication Given in Confidence?

The most important concept that the attorney must continually keep in mind for purposes of preserving the lawyer-client privilege is that confidentiality is at the heart of the privilege. If circumstances rebut confidentiality then the privilege does not attach.

For example, in *State v. Lynch*, the Nebraska Supreme Court on appeal rejected a lawyer-client privilege argument applied to a telephone conversation between the defendant and his attorney conducted at the time of his booking. The police were present when the call was made and secretly recorded the conversation. The court explained that "it has long been the rule that communications between

21. *Curtis*, 217 Neb. at 504, 349 N.W.2d at 381.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 505, 349 N.W.2d at 381 (Caporale, J., dissenting). See *NEB. SUP. CT. R.* 26(b)(3).
client and attorney made in the presence of others do not constitute privileged communications."

The Spidell case, previously discussed, also turned on the lack of confidentiality when the statement was made. The Spidell court stated:

Even if the communication had been between the attorney and client, it would not have been privileged because it was made in the presence of the father and witness [the deputy sheriff who was in charge of the defendant during the trial], neither of whom were eavesdroppers, but were known to be present. . . . Communications between attorney and client made in the presence of others do not constitute "privileged communications" within the meaning of the statute.

The decision in Dunmire v. Cool further illustrates the key factor of confidentiality in preserving the lawyer-client privilege. In Dunmire, the plaintiff brought an action contesting a testator's will, alleging undue influence and breach of contract. The trial court excluded the testimony of two of the decedent's former attorneys based upon attorney-client privilege. Reversing on appeal, the Nebraska Supreme Court held that because non-essential persons were present when the matters were discussed, the presumption of confidentiality had been rebutted and the statements were admissible.

§ 27-503(2): Was the Communication Made for Purposes of Facilitating the Rendition of Legal Services?

Lawyers often give business or technical advice, become involved with special investigations, or are otherwise consulted for purposes other than rendering legal advice. In such cases, the attorney-client privilege does not attach. For example, in United States v. Horvath, in which the attorney's services were obtained to aid an ongoing criminal conspiracy, the United States Court of Appeals for the Eighth Circuit held that the privilege did not attach, in part because no legal advice was being sought and in part because of the crime or fraud exception to the privilege. Similarly, in Simon v. G.D. Searle & Co., the Eighth Circuit held that the privilege was not to extend to communications for business advice.

30. Id. at 376, N.W.2d at 65 (citing Spidell, 194 Neb. at 497-98, 233 N.W.2d at 903).
31. Spidell, 194 Neb. at 497-98, 233 N.W.2d at 903 (citing Beacom v. Daley, 164 Neb. 120, 126-27, 81 N.W.2d 907, 912-13 (1957)).
33. 731 F.2d 557 (8th Cir. 1984).
34. 816 F.2d 397 (8th Cir. 1987).
35. Id. at 403-04; see also In re Grand Jury Proceedings, 655 F.2d 882 (8th Cir. 1982).
Tax services cause special problems for the attorney-client privilege. For example, the preparation of tax returns as an accounting service may not constitute legal advice within the meaning of the privilege.\(^{36}\) Tax planning advice, however, may very well be privileged.\(^{37}\) Information given to an attorney to be incorporated into a tax return is not confidential because it is expected that it will be disclosed in the filing of the return.\(^{38}\) Confidential communications, however, given in regard to the tax return may be privileged.\(^{39}\)

When the services performed are primarily technical rather than legal, the lawyer-client privilege does not apply. The attorney's services in the patent area may not be protected by privilege because the attorney may be relied upon more for technical advice than legal advice.\(^{40}\) Similarly, when an attorney acted primarily as a scrivener in preparing a deed and signing as a witness, the Nebraska Supreme Court in *Short v. Kleppinger*\(^{41}\) held that the privilege did not apply.

Increasingly, the services of law firms are sought for purposes of special investigations. The Supreme Court in *Upjohn Co. v. United States*\(^{42}\) issued an important decision regarding lawyer-client privilege. The Court held that if (1) the communications are about something within the employee's duties, (2) the employees made the statements at the direction of superiors for the purpose of the corporation obtaining legal advice, and (3) the corporation intended that the communications be kept confidential, then investigatory communications are privileged.\(^{43}\) The Court in *Upjohn* rejected an earlier "control-group" limitation on communications by corporate employees to attorneys.

The test adopted by the Court in *Upjohn* paralleled the approach taken by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*.\(^{44}\) The *Diversified Industries* case is interesting because it illustrates the difficulty of drawing lines concerning whether communications are given for "legal" advice in investigation cases. In *Diversified Industries*, a corporate defendant sought to protect from discovery the contents of a certain memorandum and report prepared for its benefit by a law firm. This law firm had been hired to investigate allegations that its employees maintained a "slush" fund to bribe

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41. 163 Neb. 729, 81 N.W.2d 182 (1957).
43. *Id.* at 384-85.
44. 572 F.2d 596 (8th Cir. 1977) (en banc 1978).
purchasing agents of other companies with whom the defendant corporation had dealings. On the initial panel court hearing, Judge Henley for the Eighth Circuit held that the privilege did not extend by stating that:

[the court was] persuaded that Law Firm was not hired by Diversified to provide legal services or advice. It was employed solely for the purpose of making an investigation of facts and to make business recommendations with respect to the future conduct of Diversified in such areas as the results of the investigation might suggest. The work that Law Firm was employed to perform could have been performed just as readily by non-lawyers aided to the extent necessary by a firm or public accountants. Thus Diversified has failed to satisfy one of the requisites of a successful claim of attorney-client privilege.45

Judge Henley, in effect, proposed a did-it-have-to-be-a-lawyer test for the application of the privilege. If the services could be performed by someone other than a lawyer, then the privilege does not apply.

However, on a subsequent hearing en banc, the Eighth Circuit reversed. Judge Heaney held that it was "clear" that "the communications were made for the purpose of securing legal advice for the corporation."46 The reason for the clarity was that because the matter was committed to a lawyer, "it was prima facie committed for the sake of legal advice and was, therefore, within the privilege absent a clear showing to the contrary."47 Writing for the majority, Judge Heaney, in effect, established a presumption favoring the privilege if a lawyer is consulted for advice even if other professionals can perform the task requested. Judge Henley, concurring in part and dissenting in part, disagreed, stating that "[a] communication is not privileged simply because one of the parties to it is a lawyer."48

Accordingly, while the purpose of the communication must be to obtain legal advice, the courts often will vary in resolving this issue.

§ 27-503(3) Who May Claim?

The privilege, of course, belongs to the client not the lawyer. However, the canons of ethics which require that the lawyer maintain the confidences of his or her client suggest that the attorney will normally raise the privilege on behalf of the client as part of his or her professional responsibility. The rule that the client's personal

45. Id. at 603.
46. Id. at 610.
47. Id.
48. Id. at 612 (Henley, J., concurring in part and dissenting in part).
representative may claim the privilege on behalf of the client was recognized early in Nebraska.\footnote{Sharmer v. McIntosh, 43 Neb. 509, 516, 61 N.W. 727, 729 (1895).}

§ 27-503(4) Exceptions:

§ 27-503(4)(a): In Furtherance of Crime or Fraud

At times, an attorney may get caught up with questionable activities undertaken by the client. If the attorney begins to aid and abet unlawful conduct through representational advice, then duties of confidentiality give way to duties to disclose. In such instances, the lawyer-client privilege simply does not attach. Thus, in \textit{In re Watson},\footnote{83 Neb. 211, 119 N.W. 451 (1909).} the Nebraska Supreme Court held that the privilege did not extend to communications consisting of advice on and of wrongdoing.

The Nebraska Supreme Court addressed the same issue in \textit{Doyle v. Union Insurance Co.}\footnote{202 Neb. 599, 277 N.W.2d 36 (1979).} The Doyle case involved an action for breach of fiduciary duty in connection with the sale of all the assets of Old Union Insurance Company. Maurice Gerleman, as President of Union, negotiated for the sale of the corporate assets at a price far less than their net worth. In return he was to receive a twenty percent interest in the new company, an interest valued at $700,000 for a $25,000 investment, plus a guaranteed office and salary in the new corporation to be formed. When Gerleman informed his attorney of the terms of the transaction, his attorney, who was involved in drafting the sales documents, told Gerleman that he would have to disclose the conflict of interest because “it makes, on the surface, questionable the stated reasons for pursuing the affiliation.”\footnote{Id. at 613-14, 277 N.W.2d at 44.} Gerleman, at the time of the trial for breach of fiduciary duty, unsuccessfully sought to protect the communications to his attorney and the response as within the lawyer-client privilege. The court affirmed on appeal, reasoning that “a communication between a lawyer and a client is not privileged if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have known, to be a fraud.”\footnote{Id. at 615, 277 N.W.2d at 44.}

§ 27-503(4)(b): Claimants Through the Same Deceased Client

The privilege survives the client and may be asserted by his or her representative. In a will context in which the identity of the rep-
resentative is in issue, 4(b) provides that both sides may claim the privilege.

§ 27-503(4)(c): The Client Has Put the Lawyer-Client Relationship in Issue

There are many ways a client can put the lawyer-client relationship at issue and thereby make the privilege inapplicable. For example, the Nebraska Supreme Court in *State v. Journey* 54 considered whether a defendant could seek post-conviction relief on the basis of inadequacy of counsel while preserving the lawyer-client privilege regarding the representation. Specifically, the defendant alleged that his counsel unadvisedly failed to allow him to testify in his own behalf. The trial judge demanded that the defendant waive his attorney-client privilege at the post-conviction hearing or suffer dismissal. On appeal, the court held that "defendant had no privilege concerning communications relevant to breach of duty by defense counsel. Hence, there was no waiver problem concerning relevant communication because defendant could not be forced to waive a privilege which he did not have." 55

§ 27-503(4)(d): The Lawyer Has Attested to a Document

The "attested document" exception commonly arises in the context of will contests. While confidential communications to the attorney who drafted the will will be privileged, 56 the privilege does not extend to the attorney who signs the will as an attesting witness. 57 The Nebraska Supreme Court in *Brown v. Brown* 58 explained this exception, stating that by asking the attorney to attest the will, the client impliedly consents to the disclosure of the facts and circumstances of the will signing.

§ 27-503(4)(e): Joint Clients in Subsequent Actions Between Themselves

The lawyer-client privilege does not apply to statements made in the presence of multiple parties in subsequent litigation between themselves. 59

55. *Id.* at 728, 301 N.W.2d at 89.
58. 77 Neb. 125, 108 N.W. 180 (1906).
WAIVER OF LAWYER-CLIENT PRIVILEGE

A. By Pleading

A client may waive the lawyer-client privilege by putting matters discussed in issue through subsequent litigation. In *League v. Vanice*, for example, the issue was squarely presented when a shareholder-director of a corporation brought a breach of fiduciary duty action against the corporate president. To avoid a four-year limitations period, the shareholder alleged that he neither had knowledge of the transactions nor was he aware of facts relating to such events. In assessing the fairness of waiving the lawyer-client privilege, the Nebraska Supreme Court adopted the following analysis by stating:

The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting the privilege has impliedly waived it through his own affirmative conduct.

The court also explained the rationale for the lawyer-client privilege. The court stated that "the [lawyer-client] privilege exists only to aid in the administration of justice, and when it is shown that the interests of the administration of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed."  

Applied to the facts of the case, the plaintiff could not allege concealment and lack of knowledge and then claim a lawyer-client privilege. The court stated that "such tactic or situation would repudiate the sword-shield maxim" by allowing the client to use as a sword the protection given to him as a shield. The court, in further justification, analogized to *Clark v. Clark*, in which it was held that a mother’s petition requesting child custody as a result of a dissolution

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60. 221 Neb. 34, 374 N.W.2d 849 (1985).
62. *Id.* at 45, 374 N.W.2d at 856 (quoting Cohen v. Jenkintown Cab Co., 238 Pa. Super. 456, 464, 357 A.2d 689, 693-94 (1976)).
63. *Id.* (citing Cerny v. Paxton & Gallagher Co., 83 Neb. 88, 92, 119 N.W. 14, 16 (1908).
64. 220 Neb. 771, 371 N.W.2d 749 (1985).
proceeding waived the physician-patient privilege. The court in League concluded that “[a]ny other holding would be a triumph of form over substance and would lead down a legal cul-de-sac during a quest for truth through judicial proceedings. We find no abuse of discretion by the trial court in admitting communications to [the plaintiff] from his attorney.”

B. DURING DISCOVERY

Generally, once disclosure of privileged matter has occurred, the client cannot thereafter regain the protection of the privilege. Thus, if disclosure is made in the pleadings or during discovery, then the courts are likely to hold that the privilege has been waived.

If documents containing privileged materials are produced during discovery, the privilege has been waived. In Underwater Storage, Inc. v. United States Rubber Co., for example, in which the attorney inadvertently produced for inspection a “privileged” letter, the court held the privilege had been waived. To the same effect, the United States District Court for the Eastern District of Michigan in United States v. Kelsey-Hayes Wheel Co. denied a claim of privilege for “privileged” documents inadvertently produced together with numerous other documents.

An exception to the waiver rule for inadvertently produced documents has occasionally been recognized when court ordered accelerated discovery programs have made it practically impossible to protect privileged matters. An attempt to reserve the privilege even while disclosing the privileged material, however, will generally be ineffectual.

Similarly, by failing to seek a protective order or to do more than raise an objection during a deposition about privileged materials, once the information has been disclosed the client has waived any privilege that may have otherwise been available.

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65. League, 221 Neb. at 46, 374 N.W.2d at 856-57.
67. Id. at 549.
69. Id. at 465.
70. See, e.g., Transamerica Computer Co. v. International Business Machines Corp., 573 F.2d 646, 651 (9th Cir. 1978); Control Data Corp. v. International Business Machines Corp., 16 Fed. R. Serv. 2d (Callaghan) 1233, 1234 (D. Minn. 1972).
C. **At Trial**

Once "privileged" documents have been used to refresh the client's memory for the purpose of testifying, it could be argued that the privilege is waived under Rule 612 of the Federal Rules of Evidence. Similarly, failing to object to answering "privileged" questions obviously constitutes a waiver.

D. **Partial Waivers and Exceptions**

The United States District Court for the District of Delaware in *Hercules, Inc. v. Exxon Corp.* explained the effect of disclosing certain selective documents. The court stated, "[i]n general the voluntary waiver by a client, without limitation, of one or more privileged documents passing between a certain attorney and the client discussing a certain subject waives the privilege as to all communications between the same attorney and the same client on the same subject." This principle operating against partial disclosures is grounded on the unfairness "for a client to disclose those instances which please him and withhold all other occasions." There are special circumstances when public policy favoring full disclosure justifies an exception to the general rule that once privileged communications have been temporarily or partially disclosed the privilege is no longer applicable.

In *Diversified Industries, Inc. v. Meredith,* the United States Court of Appeals for the Eighth Circuit held that materials that had been voluntarily surrendered to the Securities and Exchange Commission (SEC) pursuant to a subpoena were not discoverable under a waiver theory in a subsequent private action. The court stated that because "Diversified disclosed these documents in a separate and non-public SEC investigation, we conclude that only a limited waiver of the privilege occurred." The public policy favoring full disclosure in settlement negotiations favors an exception to the waiver rule for temporary or partial disclosures. Thus, in *Burlington Industries v. Exxon Corp.,* the United States District Court for the District of Maryland held that

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75. Id. at 156.
76. Lee Nat'l Corp. v. Deramus, III, 313 F. Supp. 224, 227 (D. Del. 1970). See also 8 J. WIGMORE, EVIDENCE § 2327 (1940) (supporting such a fairness test on whether a partial waiver ought to constitute a complete waiver).
77. 572 F.2d 596 (8th Cir. 1978) (en banc).
78. Id. at 611.
voluntary disclosure of confidential information during settlement negotiations did not constitute a waiver of the entire privilege, but rather constituted a waiver of only the materials disclosed during the negotiations.

The United States District Court for District of Massachusetts in American Optical Corp. v. Medtronic, Inc. stated the waiver rule in negotiation contexts as follows:

Bargaining, like litigation itself, partakes of the adversary procedure. Negotiated settlements are to be encouraged, and bargaining and argument precede such settlements. Clients and lawyers should not have to fear that positions on legal issues taken during negotiations waive the attorney-client privilege so that the private opinions and reports drafted by an attorney for his client become discoverable.

It should be noted, however, that even when the attorney-client privilege does not exist or has been waived, protection against disclosure may nonetheless be afforded by the work product doctrine.

E. Disclosure Pursuant to Court Order

The question often arises whether to disclose the privileged information upon court order and risk a contempt order for refusing to testify as to the privileged matter, or whether the issue of privilege should be resolved by an interlocutory appeal. Section 27-512 of the Nebraska Revised Statutes clearly provides that disclosure under erroneous court order does not constitute a waiver of privilege.

Nonetheless, some attorneys may want to challenge immediately an erroneous ruling rather than waiting for an appeal of the entire case. The Nebraska Supreme Court discussed the issue in Brozovsky v. Norquest. In Norquest, the trial court found that the plaintiff in an action for division and distribution of corporate assets had waived the lawyer-client privilege by putting the "agreement upon which the action [was] based" at issue by commencing the action.

Plaintiff's counsel sought an immediate appeal on the issue of privilege. The court dismissed the appeal, reasoning that interlocutory appeals in civil cases would place an undue burden on the courts and delay disposition of the litigation. The court, however, left the issue open somewhat by citing authority to the effect that if a client resists and receives a contempt citation then he could appeal that citation as a final order. Nonetheless it seems clear that the court does not sug-
NEBRASKA'S WORK PRODUCT DOCTRINE: NEBRASKA DISCOVERY RULES, RULE 26(b)(3),(4)

While strictly speaking not a privilege, the work product doctrine follows closely the common-law origin of the lawyer-client privilege and shares many of the attributes of an evidentiary privilege. It remains distinct, however, in that it primarily limits the pretrial discovery of documents, rather than excluding in-court testimony. It primarily protects the lawyer, rather than the client, and it can be overridden upon a showing of substantial need and undue hardship, rather than being absolute within the scope of its protection.

The United States Supreme Court in *Hickman v. Taylor* originally recognized the work product doctrine which had readily become necessary given the liberal discovery rules that the Supreme Court instituted in 1938. The Court further established the doctrine by incorporating it into Rule 26(b)(3),(4) of the Federal Rules of Civil Procedure and Rule 16 of the Federal Rules of Criminal Procedure. The Court has since repeatedly reaffirmed the strong public policy rationale supporting the work product doctrine.

The Nebraska Supreme Court first recognized the doctrine as applicable in Nebraska courts in *Haarhues v. Gordon*. The court again followed the Supreme Court's lead by adopting on January 1, 1983, Rule 26(b)(3) and (4) as part of Nebraska's discovery rules. The doctrine, therefore, will presumably operate within the Nebraska courts in a similar fashion as it has been applied in the federal courts.

Generally speaking, the work product doctrine protects (1) documents and tangible things, rather than oral statements; (2) prepared in anticipation of litigation by a lawyer or a lawyer's representative; (3) at the insistence of the lawyer; (4) with specific exceptions and limitations.

85. *In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979).
86. *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977) (citing United States v. Nobles, 422 U.S. 225, 238 n.11 (1975)).
87. The doctrine, may of course be asserted during the trial as well. *Nobles*, 422 U.S. at 239; *In re Grand Jury Proceedings*, 473 F.2d 840, 844 (8th Cir. 1973).
91. 180 Neb. 189, 141 N.W.2d 856 (1966).
1. "DOCUMENTS AND TANGIBLE THINGS"

The Court in Hickman listed private memoranda, personal recollections, declarations of witnesses, correspondence, briefs, mental impressions, personal beliefs, and other tangible and intangible information as protected within the work product doctrine. In tangible information would include, for example, opinion work product that has not been reduced to tangible form. In protecting only tangible objects, the work product doctrine furnishes no "shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery." Thus, the courts have held that the doctrine does not protect the identification of documents or witnesses.

2. "PREPARED IN ANTICIPATION OF LITIGATION OR FOR TRIAL"

Perhaps the most problematic requirement of the work product doctrine is the factual issue of whether the protected documents were prepared in anticipation of litigation. For example, in Abel Investment Co. v. United States, the United States District Court for the District of Nebraska held that Internal Revenue Service (IRS) reports that were routinely prepared in each case did not fall within work product protection. The court explained that because the reports were not prepared at the direction of the attorney in anticipation of litigation, work product did not apply. In comparison, the court in Almaguer v. Chicago, Rock Island & Pacific Railway Co. held that statements taken by a claims agent soon after a railroad accident were protected by work product. The court explained that even though litigation was at most probable, "[t]he anticipation of the filing of a claim against a railroad, when a railroad employee has been injured or claims to have been injured on the job, is undeniable, and the expectation of litigation in such circumstances is a reasonable assumption."

Whether work product will be available, therefore, in any partic-
ular case may be a matter of conjecture. Broad standards can be stated. A remote prospect of future litigation will not be enough. 99 Similarly, documents which merely track litigation costs for business planning purposes rather than for purposes of legal strategy are not protected by the doctrine. 100 If the attorney, however, reasonably assumes that litigation will follow and consequently begins to interview witnesses and prepare documents in formulation of legal strategy, then work product will apply.

3. WHO MAY INVOKE ON BEHALF OF WHOM?

The lawyer who either prepared or directed the preparation of materials in anticipation of litigation is the proper person to invoke work product. 101 The procedures for claiming the benefits of work product during discovery proceedings are set forth in Federal Rules of Civil Procedure, Rule 34(b). If discovery of protected documents is sought through interrogatories, the person claiming the protection must file an objection to disclosure, identifying the disclosure objected to and the reasons for the objection. If disclosure becomes an issue during a deposition, then counsel should proceed in the same manner as if the basis for protection were an evidentiary privilege. 102

The objecting party must specify the general subject of discussion of the materials to which an objection is claimed, 103 and bears the burden of establishing a prima facie basis for showing that the information is within the proper scope of work product. 104 Thus, in First Security Savings v. Kansas Bankers Surety Co., 105 the court refused to place the burden on the party seeking disclosure. 106 Once a prima facie case for work product has been established, the opposing party may move to compel disclosure. 107 If the documents are within the privilege, then the movant has the burden to show substantial need and inability to obtain the substantial equivalent without undue hardship as detailed in the Federal Rules of Civil Procedure and the Nebraska Rules of Discovery, Rule 26(b)(3). The court may require

106. Id. at 183. See also Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 24 (D. Neb. 1985).
107. FED. R. CIV. P. 26(c) and 37(a)(2).
an in camera hearing for inspection and evaluation of the respective claims. The court's exercise of discretion in this regard will be afforded substantial respect on appeal.\textsuperscript{108}

4. EXCEPTIONS AND LIMITATIONS

The codified work product rule has built-in exceptions. Thus, Rule 26(b)(3) excepts a person's own statement. Rule 26(b)(4)(A) also excepts the opinions of experts who are expected to testify at trial. An opinion of a nontestifying expert, in comparison, is only available upon a showing of exceptional circumstances.

The Court in \textit{Hickman} established the limited nature of work product protection by holding that the materials are discoverable if denial of discovery would unduly prejudice the opponent's case or cause undue hardship.\textsuperscript{109} Rule 26 incorporates this limitation.

The overlap between the lawyer-client privilege and work product has caused some courts to extend the crime or fraud exception to work product.\textsuperscript{110} A mere allegation of fraud, however, will not be sufficient, but must be proven by substantial evidence.\textsuperscript{111}

\textit{§ 27-504 Physician-Patient Privilege}

The physician-patient privilege, unknown at common law, has been recognized by statutes in many states, including Nebraska. The privilege protects confidential communications made by a patient to a physician for purposes of diagnosis or treatment. The physician-patient privilege is somewhat distinctive in that it applies not only to communications between patient and physician, but also to facts obtained by the physician by examination or observation. In assessing whether a privilege applies to the facts of the case, therefore, the attorney must focus on (1) whether the person qualifies as a patient; (2) whether the person to whom the communication or observation is made qualifies as a physician; (3) the purpose of the communication or examination; and (4) whether the communication was made in confidence.

\textit{§ 27-504(1)(a): Is the Declarant a Patient?}

The status of a protected patient obviously depends on the scope of the protected professional relationships. When the privilege broadly applies to physicians as well as psychotherapists, then pa-

\textsuperscript{108} In re International Sys. & Controls Corp., 693 F.2d 1235, 1240 (5th Cir. 1982).
\textsuperscript{109} Hickman, 329 U.S. at 509-10.
\textsuperscript{110} In re Grand Jury Proceedings, 604 F.2d 798, 802-03 (3d Cir. 1979); see also In re Murphy, 560 F.2d 326, 337-39 (8th Cir. 1977).
\textsuperscript{111} See In re Grand Jury Proceedings, 604 F.2d at 803-04.
tients of physical as well as mental treatments are protected. A person may be a patient even though the relationship is established while the patient is in an unconscious state.\textsuperscript{112}

\section*{§ 27-504(1)(b): Is the Person to Whom the Communication or Observation Is Made a Physician?}

The physician-patient privilege in Nebraska extends to clinical psychologists as well as medical physicians. Indeed, the Nebraska Supreme Court in \textit{Thynne v. City of Omaha}\textsuperscript{113} used the broad definition of physician in the privilege statute to reason by analogy to the expansion of Discovery Rule 35, which provides that a court-ordered physical or mental examination must be conducted by a "physician." The court reasoned that if privilege extends to clinical psychologists, then the court could order an examination by a clinical psychologist.\textsuperscript{114}

\section*{§ 27-504(1)(c): Was the Communication or Observation Given in Confidence?}

The confidentiality requirement of the physician-patient privilege conforms with the same requirement for the lawyer-client privilege. A communication is confidential if not intended to be disclosed to persons other than those participating in the diagnosis or treatment. The rule specifically acknowledges that disclosure to family members may be necessary for treatment and therefore would not rebut confidentiality. Otherwise the confidentiality analysis previously discussed in connection with the lawyer-client privilege would be applicable.

\section*{§ 27-504(2): Was the Communication or Observation Made for Purposes of Medical Diagnosis or Treatment?}

The physician-patient privilege is unique in that it extends to observations as well as communications, if made for purposes of medical diagnosis or treatment. A good illustration of this point can be found in \textit{Branch v. Wilkinson}.\textsuperscript{115} The facts in \textit{Branch} involved a wrongful death action arising out of an automobile accident in which the plaintiff alleged that the driver had been driving under the influence of alcohol. The defendant successfully moved to suppress blood samples taken from the defendant after the accident on the basis of a physician-patient privilege. On appeal the plaintiff argued that (1)

\begin{itemize}
  \item \textsuperscript{112} Branch v. Wilkinson, 198 Neb. 649, 656, 256 N.W.2d 307, 312 (1977).
  \item \textsuperscript{113} 217 Neb. 654, 351 N.W.2d 54 (1984).
  \item \textsuperscript{114} \textit{id.} at 659-62, 351 N.W.2d at 57-58.
  \item \textsuperscript{115} 198 Neb. 649, 256 N.W.2d 307 (1977).
\end{itemize}
the blood sample taken was not within the privilege and (2) if the
sample was within the privilege the defendant had waived it. The
facts indicate that following the accident the defendant was taken to
the emergency room in an unconscious state. The attending physi-
cian took a blood sample which indicated .011 percent of alcohol in
the defendant’s blood.

In assessing the applicability of the privilege on appeal, the Ne-
braska Supreme Court made several observations generally relevant
to the physician-patient privilege. First, the court stated that because
the physician-patient privilege did not exist at common law, “the
statute granting the privilege should be strictly construed ...”116
Second, the court stated that “[t]he party seeking to exclude evidence
has the burden of proof to show that the information was obtained by
the physician in his professional capacity during his relationship with
the patient.”117 On this issue the plaintiff contended that because the
statute speaks in terms of “communications” it did not extend to
medical observations such as blood samples. The court, however, re-
jected this argument, stating that “[t]he physician-patient privilege
protects not only statements made by the patient to the physician,
but also facts obtained by the physician by observation or
examination.”118

Third, the court found that a physician-patient relationship could
be established though the patient is in an unconscious state.119
Fourth, the court found that the privilege “extend[ed] not only to
physicians but to their agents as well.”120 Hence, even though the
blood sample was taken by the nurse, rather than the physician, it
was taken at the physician’s direction and is within the privilege.
Fifth, the court stated that “[t]o be privileged, information obtained
during the existence of a physician-patient relationship must be nec-
essary to enable the physician to properly discharge his duties.”121

The physician in Branch testified that the blood-alcohol sample
“would have a pertinent and important place in the treatment of

116. Id. at 655, 256 N.W.2d at 312 (citing Culver v. Union Pac. R.R., 112 Neb. 441, 199 N.W. 794 (1924)).
117. Id. at 655, 256 N.W.2d at 312 (citing Stapleton v. Chicago, B. & O. R.R., 101 Neb. 201, 162 N.W. 644 (1917)).
118. Id. at 656, 256 N.W.2d at 312 (citing Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N.W. 621 (1910); Stapleton, 101 Neb. at 205-06, 162 N.W. at 645-46; Freeburg v. State, 92 Neb. 346, 138 N.W. 143 (1912)). In Freeberg, the court held that when a physician dressed the wound of a patient, the physician was incompetent to testify as to his observations of the defendant’s drunken condition during treatment. Freeburg, 92 Neb. at 347-49, 138 N.W. at 144.
119. Branch, 198 Neb. at 656, 256 N.W.2d at 312.
120. Id. at 655, 256 N.W.2d at 312-13.
121. Id. at 658, 256 N.W.2d at 313 (citing Koskovich v. Rodestock, 107 Neb. 116, 185 N.W. 343 (1921)).
Sixth, the court found that Nebraska’s implied consent statute did not provide an exception to the privilege unless the defendant was under arrest or in custody when the blood sample was taken, and even then only in criminal cases. Seventh, the court reasoned that the “condition in issue” exception is not implicated merely because the defendant denied the plaintiff’s allegation of intoxication. Finally, the court found that the fact that many people were aware of the blood-alcohol test results did not constitute a waiver. Rather, the focus was on whether the patient voluntarily disseminated the information. The Branch court noted that the record was “devoid of any indication that the defendant had any control over the dissemination of this information, opportunity to halt or prevent it, or that he approved it. There was no evidence in the record that the defendant ever made the results of the test known to third persons.”

The Branch decision can be contrasted with State v. Irish, which illustrates the importance that the communication be made for purposes of medical diagnosis or treatment. This motor-vehicle homicide case raised the issue of the propriety of admitting certain statements made by the accused to the treating physician at the hospital following the accident. The prosecution laid foundation that the statements “were not in response to questions ‘relevant to diagnosis or treatment of [defendant’s] physical condition’ and that the information imparted by such statements was not a necessary aspect of any treatment which the physician administered to [the defendant] . . . .” Accordingly, the district court overruled the defense counsel’s privilege objection. The physician testified that the defendant had stated that he “had been drinking,” that he ‘had 4 beers,’ and that he ‘had lost control [of his vehicle] and hit the other person head on.’

Affirming on appeal, the Nebraska Supreme Court stated that “[w]here the information provided the physician does not pertain to the treatment or diagnosis of the patient, the policy underlying the physician-patient privilege is not violated by allowing disclosure, and the privilege should not be employed to remove from the jury’s con-

122. Id. at 653, 256 N.W.2d at 311.
124. Branch, 198 Neb. at 657-58, 256 N.W.2d at 313.
126. Branch, 198 Neb. at 661-62, 256 N.W.2d at 315.
127. Id. at 663, 256 N.W.2d at 316.
128. 223 Neb. 578, 391 N.W.2d 137 (1986).
129. Id. at 582, 391 N.W.2d at 140.
130. Id.
sideration otherwise probative and admissible evidence."\textsuperscript{131} Further, the court stated that the opponent has the "burden of proving that the information obtained by the physician falls within the strict ambit of that rule of evidence."\textsuperscript{132} Applied to the facts, because the patient had volunteered information which was unrelated to diagnosis or treatment, the district court had properly allowed the testimony. The \textit{Branch} decision was distinguished because the physician deemed the blood-alcohol test relevant to diagnosis or treatment.

\textsection{27-504(3): Who May Claim}

The physician-patient privilege belongs to the patient and can be claimed by him or his representatives.\textsuperscript{133}

\textsection{27-504(4) Exceptions:}

\textsection{27-504(4)(a): Proceedings for Hospitalization}

The privilege does not apply to commitment proceedings for obvious policy reasons.

\textsection{27-504(4)(b): Examination by Court Order}

An examination undertaken by a court-appointed expert for purposes of pending litigation is not confidential. The issue and its implications were discussed by the Nebraska Supreme Court in \textit{In re Guardianship \& Conservatorship of Sim}.\textsuperscript{134} The competency of Maude Sim was at issue in this guardianship and conservator case. Because counsel for Maude Sim contested the need for a guardianship appointment, the court appointed a psychiatrist to examine Sim. Her attorneys requested permission to have a court reporter present for the examination; the court responded by instructing the psychiatrist to inform the court prior to the examination so the court could have a reporter present. The psychiatrist, however, failed to do so. Counsel for Sim argued for the exclusion of the examination because of the failure to have the proceedings recorded and a transcript made available. Her counsel also argued that the patient had a right to be warned, on an analogous basis to the \textit{Miranda v. Arizona}\textsuperscript{135} warnings, that the patient-physician privilege of confidentiality did not apply and that anything she said could be used against her in the guardianship proceedings. The court rejected the notice requirement. As a partial explanation, the court reasoned by analogy that "there is

\textsuperscript{131} \textit{Id.} at 585, 391 N.W.2d at 142.
\textsuperscript{132} \textit{Id.} at 586, 391 N.W.2d at 142.
\textsuperscript{133} Thrasher v. State, 92 Neb. 110, 113, 138 N.W. 120, 121 (1912).
\textsuperscript{134} 225 Neb. 181, 403 N.W.2d 721 (1987).
\textsuperscript{135} 384 U.S. 436 (1966).
no requirement that *Miranda* warnings be given prior to requesting a
driver to submit to a chemical test of blood, breath, or urine.\textsuperscript{136}

\section*{§ 27-504(4)(c): Claim or Defense}

The physical or mental condition is often at issue in litigation.
Indeed, the physician-patient privilege was not recognized at federal
common law because the relevancy of physical or mental condition
came up primarily in those cases in which physical or mental condition
was at issue. The federal courts, in effect, determined that a
claim or defense exception would be necessary and would swallow up
the rule.

Under Nebraska's privilege rule, the claim or defense exception
has been recognized in a number of cases. For example, in a domes-
tic case, *Clark v. Clark*\textsuperscript{137} the Nebraska Supreme Court held that the
mother, by placing her fitness to have custody of the child in issue,
had waived any physician-patient privilege that otherwise existed be-
tween herself and her psychiatrist. Accordingly, a psychiatrist, who
had purchased the wife's psychiatrist's practice and who reviewed the
records and interviewed the wife, was allowed to testify over a privi-
lege objection that she was suffering from a psychiatric disorder.

On the related issue of termination of the privilege, the court
held that “purchase of a medical practice by another physician does
not in any way affect the confidential physician-patient privilege that
exists between the patient and the vendor physician.”\textsuperscript{138} Moreover,
the privilege does not terminate with the cessation of the protected
relationship or the death of the client.\textsuperscript{139}

The “claim or defense” exception, however, does not apply to a
victim of a crime. In *State v. Trammell*\textsuperscript{140} a rape case, the court held
that “the victim was a witness, not a party, and thus had not placed
her condition in issue.”\textsuperscript{141}

\section*{§ 27-504(4)(d): Juvenile Proceedings and Injuries to Children}

The inapplicability of the privilege in juvenile proceedings re-

\begin{footnotes}
\footnotetext[136]{222 Neb. 225, 403 N.W.2d at 736 (citing State v.
Bishop, 224 Neb. 522, 399 N.W.2d 271 (1987)).}
\footnotetext[137]{220 Neb. 771, 371 N.W.2d 749 (1985).}
\footnotetext[138]{Id. at 774, 371 N.W.2d at 752.}
\footnotetext[139]{Id.}
\footnotetext[140]{231 Neb. 137, 435 N.W.2d 197 (1989).}
\footnotetext[141]{Id. at 141-42, 435 N.W.2d at 200-01. The court further held, however, that
when the victim refused to waive her privilege regarding past mental illnesses and
hospitalization, she should not have been allowed to testify because invocation of
the privilege had prevented the defendant “from full and, perhaps, effective cross-exami-
nation of the witness.” Id. at 142, 435 N.W.2d at 201.}
\end{footnotes}
Regarding custody was discussed in *In re Interest of Spradlin*. In this juvenile court custody case the parents claimed a physician-patient privilege with regard to the testimony of a psychiatrist who had treated the parents for several years. The Nebraska Supreme Court found the testimony properly admitted under the statutory exception for injuries to children and stated that:

An action to protect a dependent and neglected child necessarily involves a question of impairment of a child's right to parental protection and guidance with consequent loss or destruction of mental and physical health, and the right to a normal and adequate upbringing. . . . This indicates that former section 25-1207 [of the Nebraska Revised Statutes now section 27-504] was intended to be effective when the mental condition of a parent is in issue. In the judgment of this court the neglect of a child is an injury to the child's welfare and rights. It constitutes one of the exceptions referred to in the statute and the evidence was properly admitted.

The "injuries to children" exception applies to the examination of children as well as parents. Thus, in *State v. Lewis*, a termination of parental rights case, the Nebraska Supreme Court allowed a physician to testify concerning his examination and treatment of the child, over the parents' privilege objection. The court further held that "a physician could be required to testify concerning his examination and treatment of the parent of a dependent and neglected child in a proceeding to terminate parental rights."

§ 27-504(4)(e): Drug Proceedings

Section 27-504 was amended to except patient-physician privilege as applied to cases regarding obtaining or attempting to obtain (1) a controlled substance, (2) a prescription for a controlled substance, or (3) the administration of a controlled substance from a practitioner. This new exception reflects a clear policy decision favoring effective legal drug prosecutions as against policy justification favoring confidentiality in medical treatment.

WAIVER OF PHYSICIAN-PATIENT PRIVILEGE

Whether characterized as a special exception or circumstances constituting a waiver, when the physician-patient relationship reveals
facts that endanger third parties, the physician is obligated to reveal the danger. The landmark case of Tarasoff v. Regents of the University of California\textsuperscript{147} sets the standard. In Tarasoff, the California Supreme Court held a psychologist liable to the parents of a murder victim where the murderer had confided to the psychologist that he intended to kill the victim but the psychologist neither warned the victim nor informed the authorities. Based on the authority of Tarasoff, the United States District Court for the District of Nebraska in Lipari v. Sears, Roebuck & Co.\textsuperscript{148} held that under Nebraska law the relationship between psychiatrist and patient gives rise to an affirmative duty to warn third persons foreseeably endangered.

The physician-patient privilege belongs to the patient, not to the physician or to the hospital. In Bishop Clarkson Memorial Hospital v. Reserve Life Insurance Co.,\textsuperscript{149} the United States Court of Appeals for the Eighth Circuit held that when the patient consented to disclosure, neither the physician nor the hospital could refuse disclosure of the medical records. Conversely, without the patient's consent, neither the physician nor the hospital was competent to testify regarding matters observed or recorded in their respective professional capacities.\textsuperscript{150} Similarly, the Nebraska Supreme Court in Garska v. Harris\textsuperscript{151} held that only the patient could waive the physician-patient privilege.

VARIATIONS OF THE PHYSICIAN-PATIENT PRIVILEGE UNDER FEDERAL LAW

The physician-patient privilege has not been recognized by federal common law. When the Supreme Court codified the privilege it dispensed with the physician-patient privilege in general, but recognized a narrow psychotherapist-patient privilege. The Advisory Committee explained that while many states recognize the physician-patient privilege, “the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little basis for the privilege.”\textsuperscript{152}

In support of special recognition of the psychotherapist-patient relationship, the Advisory Committee stated:

Among physicians, the psychiatrist has a special need to

\textsuperscript{147} 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).
\textsuperscript{149} 350 F.2d 1006 (8th Cir. 1965).
\textsuperscript{150} Id. at 1011.
\textsuperscript{151} 172 Neb. 339, 109 N.W.2d 529 (1961).
\textsuperscript{152} FED. R. EVID. 504 (proposed draft by Sup. Ct.) (advisory committee's note).
maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients’ conscious, but their unconscious feelings as well. Therapeutic effectiveness necessitates going beyond a patient’s awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.153

The Supreme Court would have excepted (1) communications relevant to proceedings to hospitalize the patient for mental illness; (2) court-ordered psychiatric examinations; or (3) communications relevant to a mental condition in which the patient relies upon the condition as an element of a claim or defense.

The privilege, however, has not caught on in federal proceedings operating under the federal common law. For example, the United States Court of Appeals for the Eleventh Circuit in *United States v. Corona*,154 in affirming a conviction for purchasing firearms while addicted to controlled substances, held that neither a psychotherapist-patient nor a doctor-patient privilege exists in federal criminal trials.

However, when Congress relegated privilege to the realm of common-law development in “light of reason and experience,”155 the way was opened for the recognition of a general physician-patient privilege. The Supreme Court in dictum in *Trammel v. United States*156 indicated some sympathy for the privilege in stating that “the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.”157 The circuit courts, however, have not rushed to recognize this privilege. The Eighth Circuit, for example, in *United States v. Bercier*,158 affirmed a conviction for involuntary manslaughter while driving when intoxicated and held that a physi-

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153. *Id.* (quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960)).
154. 849 F.2d 562 (11th Cir. 1988).
155. FED. R. EVID. 501.
157. *Id.* at 51.
158. 848 F.2d 917 (8th Cir. 1988).
EVIDENTIARY PRIVILEGE

The physician-patient privilege is not recognized in federal criminal proceedings.

Some federal courts have recognized a psychotherapist-patient privilege as required by "reason and experience" under Rule 501. The United States Court of Appeals for the Sixth Circuit, for example, in In re Zuniga, justified recognition of the privilege on the basis of policy and the Supreme Court's earlier recommendation. Similarly, the United States District Court for the Northern District of Illinois in Jennings v. D.H.L. Airlines held that the effectiveness of psychotherapy required protected confidentiality in the communications. The United States District Court for the Southern District of New York in United States v. Friedman protected highly personal statements made by a patient to a psychotherapist.

Recognizing the precarious position of the physician-patient privilege in federal proceedings, attorneys would be well-advised to hire the physician directly whenever possible with the idea of extending the lawyer-client privilege to the physician relationship. Thus, in United States ex rel. Edney v. Smith, in which the attorney had a psychiatrist interview the defendant prior to trial, the United States District Court for the Eastern District of New York rejected the psychotherapist-patient privilege but extended the lawyer-client privilege to protect the communications from disclosure. Similarly, in United States v. Alvarez, the United States Court of Appeals for the Third Circuit held that a psychiatrist retained by defense counsel was an agent for the attorney and communications made to him were within the attorney-client privilege.

Of course, Rule 501 requires the federal courts to apply state privilege law when state law supplies the rule of decision. This has always been the practice. Also, some courts have held that the right of privacy constitutionally requires confidentiality be upheld in the context of psychotherapeutic sessions.

§ 27-505: Husband-Wife Privilege

The husband-wife privilege is more controversial and confused at present than any other established privilege. This confusion arises

159. FED. R. EVID. 501.
160. 714 F.2d 632 (6th Cir. 1983).
164. 519 F.2d 1036 (3d Cir. 1975).
165. See, e.g., Gardner v. Meyers, 491 F.2d 1184, 1188 (8th Cir. 1974); Union Pac. R.R. v. Thomas, 152 F. 365, 367-71, (8th Cir. 1907); Bishop Clarkson Memorial Hosp. v. Reserve Life Ins. Co., 350 F.2d 1006, 1011-12 (8th Cir. 1965).
from the fact that the privilege rule historically had multiple roots in (1) the common-law rule of incompetency of interested parties; (2) the common-law spousal disqualification privilege; and (3) the common-law privilege prohibiting the disclosure of confidential communications between spouses. Nebraska Evidence Rule 601 abolishes previously existing general incompetency rules.\textsuperscript{167} Section 27-505, however, retains both a confidentiality component\textsuperscript{168} and a modified disqualification element.\textsuperscript{169}

\textbf{§ 27-505(1): Spousal Confidentiality}

The spousal confidentiality privilege precludes the testimony of a spouse relating to confidential communications made by one spouse to the other. It is related to, but distinguishable from, the spousal disqualification privilege. Unlike the spousal disqualification privilege, the spousal confidentiality privilege does not protect statements between the spouses made prior to their marriage.\textsuperscript{170} Conversely, spousal confidentiality protects communications made during the marriage even after the marriage has terminated; spousal disqualification does not continue after the termination of the marriage.\textsuperscript{171} Spousal confidentiality, unlike spousal disqualification, applies in civil as well as criminal cases. Spousal confidentiality protects only communications made in furtherance of and reliance on the marital relationship. Spousal disqualification makes the spouse ineligible as a witness against the other party. Thus, communications between spouses relating to business transactions would not be protected under spousal confidentiality.\textsuperscript{172}

Intended confidentiality, then, rather than the mere marital relationship, is the key to the spousal confidentiality privilege. If the communication was made privately between the spouses, there is a presumption of confidentiality which the opponent bears the burden of rebutting.\textsuperscript{173} If the statement is made knowingly in the presence of third persons, the presumption of confidentiality will be rebutted.\textsuperscript{174} Similarly, if made by the spouses to third persons, confidentiality will normally be rebutted.\textsuperscript{175} The spousal confidentiality privilege may be waived if the communicating spouse knowingly con-

\begin{itemize}
\item\textsuperscript{167} See Neb. Rev. Stat. § 25-1201 to -1204 (1943) (repealed 1975) (dealing with spousal incompetency).
\item\textsuperscript{170} United States v. Pensinger, 549 F.2d 1150, 1151 (8th Cir. 1977).
\item\textsuperscript{171} Id. at 1152.
\item\textsuperscript{172} Fowler v. United States, 352 F.2d 100, 113 (8th Cir. 1965).
\item\textsuperscript{173} United States v. Long, 468 F.2d 755, 757 (8th Cir. 1972).
\item\textsuperscript{174} Pensinger, 549 F.2d at 1152.
\item\textsuperscript{175} Fowler, 352 F.2d at 113.
\end{itemize}
The spousal disqualification privilege applies only to criminal cases. It disqualifies a spouse from testifying against the other spouse without the consent of both spouses. It operates much more broadly than other testimonial privileges because it disqualifies a witness at the election of the non-testifying spouse rather than merely excluding confidential communications. The most significant spousal disqualification case in Nebraska is *State v. Palmer*,\(^\text{177}\) which came before the Nebraska Supreme Court three separate times.\(^\text{178}\) The case involved the robbery of a coin shop in Grand Island and the murder of its operator. Mr. Palmer's wife witnessed the robbery and murder. At the time of the first trial, the Palmers were married and the prosecution was barred from calling Mrs. Palmer because of the spousal disqualification privilege.\(^\text{179}\) Following defendant's conviction in the first trial, Mrs. Palmer filed for divorce in Austin, Texas; a decree of divorce was entered by the Travis County District Court in Austin on May 12, 1982. Because Mr. Palmer's second trial was pending and he was planning on appealing the divorce decree for purposes of extending the spousal disqualification privilege, the prosecutors filed for a continuance. The Hall County District Court denied the continuance and Mrs. Palmer was allowed to testify in the second trial.

On appeal of the second conviction, Mr. Palmer urged reversal based upon the violation of the spousal disqualification privilege. The prosecutor argued that the purpose behind the spousal disqualification privilege, marital harmony, did not apply when one of the spouses had filed and obtained a divorce decree. The prosecutor, in support of his argument, referenced the common-law modification of the spousal disqualification privilege recognized by the Supreme Court in *Trammel*.\(^\text{180}\) In *Trammel*, the Court judicially noticed as a matter of legislative fact that the basis for the spousal disqualification privilege, previously recognized in *Hawkins v. United States*\(^\text{181}\) to be one of fostering family peace,\(^\text{182}\) was no longer persuasive. The

\(^{176}\) United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978).


\(^{178}\) *Id.*

\(^{179}\) *See* NEB. REV. STAT. § 27-505(2) (1989).

\(^{180}\) *See Palmer*, 215 Neb. at 280-81, 338 N.W.2d at 285-86 (Boslaugh, J., dissenting).

\(^{181}\) 358 U.S. 74 (1958).

\(^{182}\) Conversely, the court in *Creason v. Myers*, 217 Neb. 551, 350 N.W.2d 526 (1984), relied upon the continued existence of the husband-wife privilege as a reason for continuing to recognize the tort of alienation of affection, defined by the court to
Trammel Court noted:

The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems more likely to frustrate justice than to foster family peace. Indeed, there is reason to believe that vesting the privilege in the accused could actually undermine the marital relationship.183

The Nebraska Supreme Court, however, with three justices dissenting, rejected the prosecutor's Trammel-based argument. Upon finding that the divorce decree appeal had extended the length of the Palmer marriage, and upon determining that the language of section 27-505(2) was specific and mandatory in barring the testimony of one spouse against another in a criminal case during the pendency of the marriage, the court reversed the conviction. The court stated that "[i]t would appear that we have no choice but to determine that Cheri Palmer was still the wife of Charles Jess Palmer on June 8, 1982, and as such was barred from testifying against him."184

§ 27-505(3) Exceptions:

The Nebraska Rules of Evidence section 27-505(3) enumerates several categories of exceptions where the husband-wife privilege does not apply.

§ 27-505(3)(a): Crimes of violence, crimes against the marriage, or crimes involving the children of either husband or wife.

The common law recognized an exception to the husband-wife privilege if a crime was deemed to be against the marriage (rape, bigamy, adultery, or incest) or against the children of either spouse. The Nebraska legislature incorporated this exception in section 27-505(3)(a). The Nebraska Supreme Court applied this exception in

be "a third person's wrongful conduct intruding upon or interfering with the marital relationship between husband and wife and causing a loss of consortium." Id. at 553, 350 N.W.2d at 527. The court reasoned that the husband-wife privilege "permits only one conclusion—the people of Nebraska still recognize the relationship of husband and wife as something of value to be protected by and in the courts." Id. at 558, 350 N.W.2d at 530. Subsequent to Creason, the tort of alienation of affection was prohibited by statute in 1986. See Neb. Rev. Stat. § 25-21, 188 (1989).

183. Trammel, 445 U.S. at 52.
State v. Vicars. The Vicars case involved a charge against the husband of first-degree sexual assault of a baby-sitter. The wife, over a privilege objection, testified to the husband's admissions and to incriminating observations that she had made. On appeal, the husband urged reversal on the basis of the spousal disqualification privilege, arguing that the exception covered rape but not the crime charged: first degree sexual assault. Rejecting the argument, the court held that the rationale for the husband-wife privilege was that it fostered marital harmony and sanctity. Conversely, the court noted that a reading of the statutory exceptions to the husband-wife privilege "shows that [the exceptions] deal with situations in which the harmony and sanctity of the marriage relationship have been breached or probably have been breached." The court held that sexual crimes generally had "the same effect on the harmony and sanctity of the marriage relationship" and were excepted from the privilege.

The Nebraska Unicameral, however, in reaction to Palmer, substantially expanded this category exception to cover all crimes of violence. The constitutionality of a "crimes of violence" categorization was tested in State v. Hunt. The Hunt case involved an appeal of a murder conviction, partially on the basis of the husband-wife privilege. After Mr. Hunt was arrested, Mrs. Hunt disclosed to the police that "a few months prior to the crime Mr. Hunt had told her that he fantasized about murdering a woman and then masturbating on her." In rejecting Mr. Hunt's constitutional challenge to the "crimes of violence" exception, the court held that the legislature could legitimately "strike a balance between the societal interests in the sanctity of the marital relationship and the need of society to protect itself from and to prosecute violent crime." Accordingly, evidence concerning communications between Hunt and his wife was allowed on the reasoning that a murder prosecution constituted a "crime of violence." The "crimes of violence" exception was also addressed in State v. Burchett; Burchett was decided the same day with the same result.

185. 207 Neb. 325, 299 N.W.2d 421 (1980).
186. Id. at 333, 299 N.W.2d at 427.
187. Id.
190. Id. at 713, 371 N.W.2d at 714.
191. Id. at 721, 371 N.W.2d at 719 (citing Floor Debate on L.B. 696, Neb. Unicameral, 88th Leg., 2d Sess. (Feb. 10, 1984)).
192. See id. at 714-15, 371 N.W.2d at 715.
193. 224 Neb. 444, 399 N.W.2d 258 (1986).
as Palmer. Burchett’s attorney argued that prior to the amendment of section 27-505(3), “he had a reasonable expectation of privacy not only in confidential communications with his wife but also in family activities which took place in confidential surroundings. Burchett maintains that his wife should not have been called to testify against him at all.” On the authority of Palmer, the Nebraska Supreme Court rejected Burchett’s privilege argument and affirmed on appeal.

An even more extreme application of the modern rule to an earlier incident is demonstrated in State v. Keithley. The Keithley case involved a second-degree murder prosecution for a 1959 stabbing death of a pawnshop owner. The prosecutor called Mrs. Keithley, who had implicated her husband in the murder in statements made to the police in 1971 and then again in statements made at the preliminary hearing in 1986. When the wife, shortly before trial, repudiated the earlier statements, the prosecutor was allowed to call her, over a privilege objection, and to introduce the prior statements for impeachment purposes. The court, again on the authority of Palmer, rejected the ex post facto argument and affirmed on the basis of the “crimes of violence” exception.

§ 27-505(3)(b): Cases of Alienation of Affection

Until 1986, Nebraska continued to recognize the tort of alienation of affection and criminal conversation. This exception allowed spousal communications relevant to this tort. Section 25-21,188 of the Nebraska Revised Statutes barred such actions. Accordingly, this exception no longer has any apparent relevancy.

§ 27-505(3)(c): Divorce Cases

In cases of divorce, the spousal privileges, justified in preserving the sanctity of the marriage and marital confidences, are no longer applicable. This exception, in effect, permits disclosure of spousal communications relevant to the circumstances of divorce.

VARIATIONS IN THE FEDERAL LAW OF HUSBAND-WIFE PRIVILEGE

The United States Supreme Court in Trammel v. United States substantially modified the husband-wife privilege under the

194. The Palmer case came before the Nebraska Supreme Court on three different occasions. See supra note 177-78 and accompanying text.
195. Burchett, 224 Neb. at 454, 399 N.W.2d at 265.
federal common law. First, the Court modified the spousal disqualification privilege "so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." Second, the Court recognized the viability of the spousal confidentiality privilege. Thus, the Court pruned back the exclusionary effect of the broad disqualification rule, but preserved the privilege if premised on the confidentiality of the marriage relationship.

The exceptions, of course, will vary between state and federal law. At common law, the "crimes" exception was limited to crimes against the witness-spouse or crimes against the tranquility of the marriage relationship.

OTHER NEBRASKA EVIDENCE RULES RELATING TO PRIVILEGE

§ 27-506: COMMUNICATIONS TO CLERGYMEN

The clergyman privilege did not exist at English common law. Interestingly, however, Jeremy Bentham, an adamant critic of evidentiary privileges generally, recommended recognition of a penitent-priest privilege. He stated:

[W]ith any idea of [religious] toleration, a coercion [of testimony] of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion ... [and to the clergymen, it] would be an order to violate what by them is numbered amongst the most sacred of religious duties. ... The advantage to be gained by the coercion-gained in the shape of assistance to justice-would be casual, and even rare. ...

The clergyman privilege was adopted either by statute or common-law reasoning in most American jurisdictions as analogous to other testimonial privileges. Judge Fahy in Mullen v. United States justified common-law recognition of the privilege as follows:

Sound policy—reason and experience—concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession

198. Id. at 53.
199. Id. at 51.
200. United States v. Allery, 526 F.2d 1362, 1365 (8th Cir. 1975); Shores v. United States, 174 F.2d 838, 841 (8th Cir. 1949).
201. Allery, 526 F.2d at 1365.
202. 4 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 588 (1827).
203. 263 F.2d 275 (D.C. Cir. 1958).
to him, at least absent the penitent's consent. . . . As Wigmore points out, such a confidential communication meets all the requirements that have rendered communications between husband and wife and attorney and client privileged and incompetent.204

In *Trammel*, the Supreme Court in dictum expressed a favorable attitude toward the clergyman privilege. The Court stated that "[t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."205

The clergyman privilege as presently recognized protects statements made (1) to a clergyman (2) in confidence (3) for purposes of obtaining spiritual advice. Nebraska adopted verbatim the Supreme Court's originally proposed version of the clergyman privilege in Rule 506. Rule 506 is in accord with Nebraska law as previously provided for in Section 25-1206 Nebraska Revised Statutes.206

The clergyman or other similar functionary requirement is not without its problems. For example, the position of a nun was deemed sufficient to uphold the privilege in *Eckmann v. Board of Education*.207 In comparison, a communication to a non-natural person was held not within the privilege in *United States v. Luther*.208

As with other privileges, the element of confidentiality is critical. For example, in *United States v. Webb*,209 the United States Court of Appeals for the Ninth Circuit held that a confession made to a priest that was made in the presence of a prison security officer was not privileged. Similarly, a letter to a priest which requested assistance in contacting an FBI agent was held not privileged in *United States v. Wells*210 because no hint of confidentiality was involved.

The purpose of the communication must be for obtaining spiritual advice. Thus, in *United States v. Gordon*,211 in which the communication was to a priest on leave from the priesthood and was made for purposes of merely conveying business information, the United States Court of Appeals for the Second Circuit held that the

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204. *Id.* at 280.
206. *See also* Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901) (discussing the privilege under prior Nebraska law).
207. 106 F.R.D. 70, 72 (E.D. Mo. 1985).
208. 481 F.2d 429 (9th Cir. 1973). In *Luther*, the communication was to the Bible Institute of the Air, Inc., a corporation and thus a non-natural person. *Id.* at 432.
209. 615 F.2d 828 (9th Cir. 1980).
210. 446 F.2d 2 (2d Cir. 1971).
211. 655 F.2d 478 (2d Cir. 1981).
privilege did not apply.\textsuperscript{212}

\section*{§ 27-507: Political Vote}

Although the political vote privilege seldom arises, there is no question of its legitimacy. Confidentiality in voting has long been protected in this country. The Supreme Court in \textit{Ex Parte Yarbrough}\textsuperscript{213} justified the right to vote as an essential aspect of free government.\textsuperscript{214} In \textit{United States v. Executive Committee of the Democratic Party,}\textsuperscript{215} the United States District Court for the District of Alabama further explained that "[t]he secrecy of the ballot is one of the fundamental civil liberties upon which a democracy must rely most heavily in order for it to survive. The compulsory compromise of that secrecy will not be tolerated. ..."\textsuperscript{216}

No reported Nebraska cases have cited this rule.

\section*{§ 27-508: Trade Secrets}

The trade secret privilege arises in response to the substantive law of fair trade practices. The privilege differs from most privileges in that it is limited, allowing the need for the evidence to be balanced against the importance of maintaining secrecy.

The Supreme Court broadly described the scope of the privilege in \textit{Kewanee Oil Co. v. Bicron Corp.}\textsuperscript{217} The Court explained that "'[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.'"\textsuperscript{218}

The scope and weight to be given the trade secret privilege depends on the facts of the case. The privilege was discussed in \textit{In re Application of Northwestern Bell Telephone Co.}\textsuperscript{219} This case involved an application by Northwestern Bell with the Public Service Commission for an increase in tariffs for phone services which was opposed by another business protesting the rate increase. When Bell's two witnesses were questioned regarding the profitability and accompanying costs of the subject services, Bell claimed a trade secret priv-

\begin{itemize}
\item 212. \textit{Id.} at 486. \textit{See also} United States v. Dube, 820 F.2d 886, 889-90 (7th Cir. 1987).
\item 213. 110 U.S. 651 (1884).
\item 214. \textit{Id.} at 662.
\item 216. \textit{Id.} at 546.
\item 217. 416 U.S. 470 (1974).
\item 218. \textit{Id.} at 474-75 (quoting \textit{RESTATEMENT (FIRST) OF TORTS} § 757 comment b (1939)).
\item 219. 223 Neb. 415, 390 N.W.2d 495 (1986).
\end{itemize}
ilege. On appeal, the Nebraska Supreme Court outlined the contours of the trade secret exception by stating:

An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one’s trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.220

The common practice followed in protecting trade secrets as qualified privileges is the taking of testimony in camera with a requirement for the court records to be sealed.221 Nebraska Supreme Court Discovery Rule 26(c)(7), patterned after the same federal rule, permits the issuance of a protective order to protect a party to ensure "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."222

§ 27-509: STATE SECRETS

The Supreme Court in United States v. Reynolds223 characterized the privilege protecting military, state secrets, and official communications as "well established in the law of evidence."224 The most important case discussing the privilege is United States v. Nixon,225 in which the Court explained that it has the constitutional power to "construe and delineate" claims of executive privilege. In the area of communications between high government officials, a "presumptive privilege" applies but is not absolute.226 The Nebraska rule omits the definitional distinction between "secrets of state" and "official information" which the Supreme Court’s proposed Rule 509 would have included. Apparently, the distinction was omitted in order to conform with the provisions of Section 25-1208 of the Nebraska

220. Id. at 421, 390 N.W.2d at 499 (quoting Henkle & Joyce Hardware Co. v. Maco, Inc., 185 Neb. 565, 571, 239 N.W.2d 772, 776 (1976)).
223. 345 U.S. 1 (1953).
224. Id. at 6-7.
226. Id. at 708, 713.
Revised Statutes, which is the previous statutory privilege dealing with public officers.

The "state secrets" privilege was invoked by the prosecution in *State v. Parks*. In *Parks*, a paid police informant whose name was revealed, James Louden, helped set up the defendant for a drug sale. Louden was under contract with the Nebraska State Patrol as a paid informant and was involved in other outstanding cases. The defendant sought disclosure of the other ongoing investigations involving Louden and the state opposed on the basis of state secrets. In affirming on appeal, the Nebraska Supreme Court held that information about other cases would be irrelevant and collateral to the pending case, especially because Louden was never even called as a witness. Accordingly, the state could properly keep other investigations secret. Although not discussed, section 27-510 of the Nebraska Revised Statutes would have allowed the state to refuse to disclose even the identity of the informer if it had been unknown to the defendant.

§ 27-510: Identity of Informers

The identity of informant privilege, established at federal common law, differs from the other evidentiary privileges in many important respects. First, the privilege protects the identity of the informers rather than their communications, a reversal of the normal scope of evidentiary privileges. Second, the privilege belongs to the government rather than the informer. Third, once the informant becomes a witness for the government, the privilege no longer applies. Fourth, the privilege is limited and will give way if disclosure is "necessary to a fair determination of guilt or innocence in a criminal case, or of a material issue in a civil case to which the government is a party."

The "fair determination" exception was discussed by the Nebraska Supreme Court in *State v. Wenzel*. In *Wenzel*, the defendant, who had been convicted for the sale of a controlled substance, appealed on the ground that the trial court had abused its discretion in refusing to require a police undercover agent to disclose the name

227. 212 Neb. 635, 324 N.W.2d 673 (1982).
231. *See* NEB. REV. STAT. § 27-510(3)(a) (1989) (providing exception in which informant appears as a witness). For a common-law recognition of this exception see, Hanes v. United States, 37 F.2d 365 (9th Cir. 1935).
of the informant who had introduced her to the defendant. The defendant argued that the identity of the informant was essential to a “fair determination” of the defendant’s case. The informant had introduced the undercover officer to the defendant, but had not been an active participant in the transaction and had not witnessed the transaction. Moreover, the court found that the defendant knew the name of the informant. Finally, the defendant failed to “make a sufficient showing that disclosure [was] required.”234 Under such facts, the court held that “[t]he disclosure of the name of the informant was within the discretion of the trial judge.”235

The “fair determination” exception does not require the prosecution to call an informant as a witness rather than relying on the informant’s out-of-court statement. In State v. Ege,236 for example, a motorist who was convicted of second-offense drunk driving complained on appeal that his rights had been violated when a police officer, in establishing a probable cause basis for stopping the defendant, testified that a citizen informant by the name of Tim Blankenship had called the officer’s attention to the fact that the defendant had just driven over the curb and had a strong odor of alcohol on his breath. The Nebraska Supreme Court held that “[t]his is not a case where the State attempted to withhold the identity of the informant pursuant to . . . [section] 27-510.”237

The “fair determination” exception also does not apply if the Nebraska Supreme Court determines that the informant would not be able to give testimony in any event. The Nebraska Supreme Court addressed the issue in State v. Hankins.238 In Hankins, the defendant was convicted of three counts of murder. Before trial, the prosecution moved in limine to exclude from evidence certain information from a confidential informant related to alleged drug activities on the part of one of the victims. The court held an in camera hearing and denied the state’s invocation of the “informant identity” privilege, but also denied the defendant’s request to have the informer’s identity disclosed pursuant to section 27-510. On appeal, the court explained that the trial court had implicitly determined that although the alleged evidence of the victim’s drug involvement might have been relevant, there had not been sufficient showing that the informant had first-hand knowledge of drug involvement. Because the informant did not have first-hand knowledge and would be unable to testify, the

234. Id. at 259-60, 242 N.W.2d at 123.
235. Id. at 260, 242 N.W.2d at 123.
236. 227 Neb. 824, 420 N.W.2d 305 (1988).
237. Id. at 828, 420 N.W.2d at 309.
prosecution did not have to disclose her identity.\textsuperscript{239} The court denied the defendant's argument that the exclusion violated the section 27-510 "fair determination" exception to the informer privilege.

\textsection{27-511: Waiver}

Standards for the waiver of evidentiary privilege are similar for all privileges. A privilege based on confidential relationships protects against compelled disclosure unless the holder voluntarily discloses or consents to disclosure of any significant part of the privileged communication. Privileges based upon other considerations, such as the spousal disqualification privilege which is based on the sanctity of marriage, may be waivered only if the holder consents or fails to assert the privilege at trial. Failure to assert the privilege at any stage of the proceeding constitutes a waiver. Thus, once confidentiality is destroyed it cannot be restored by a subsequent claim of privilege.

Because the matters protected by the various privileges vary, waiver is discussed in connection with the separate privileges.

\textsection{27-512: Involuntary Disclosure}

Nebraska Rule 512 adopts the Supreme Court's recommended Rule 512. Rule 512 provides that a privilege will not be deemed to have been waived if either compelled erroneously or made without an opportunity to claim the privilege. The rule, in effect, makes it clear that once a court has ruled, the person claiming the privilege does not have to risk a judgment for contempt by continuing to refuse to testify. Similarly, if a nonholder of a privilege discloses the privileged matter unknowingly or without authority, the holder may reassert the privilege later on. For example, the fact that an electronic eavesdropper overhears privileged matters will not be deemed a waiver. However, when the parties know that another person is in a position to hear, no privilege will attach because confidentiality has been rebutted.

\textsection{27-513: Comment on Invocation of Privilege}

Nebraska Rule 513 adopts the Supreme Court's recommended Rule 513. Rule 513, in effect, instructs the judge on the inappropriateness of commenting on the privilege and on jury instructions regarding the inappropriateness of drawing an adverse inference from a claim of privilege.

The rule against commenting on the invocation of the privilege

\textsuperscript{239} Id. at 626-27, 441 N.W.2d at 870.
follows, in part, from *Miranda v. Arizona*. In *Miranda*, the Supreme Court stated that once a criminal defendant was in custody and had claimed his fifth amendment privilege, he could no longer be questioned by the police and his claim of that right could not be commented upon at trial. This same rationale, without the constitutional underpinnings, applies to the invocation of evidentiary privilege.

III. OTHER STATUTORY PRIVILEGES

§ 25-1210: THE PRIVILEGE PROTECTING AGAINST PUBLIC IGNOMINY

Nebraska not only has a privilege against self-incrimination in its constitution, it also has a companion statutory privilege excusing a witness from answering any question “[w]hen the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy. . . .”

The “public ignominy” privilege has been successfully invoked to prohibit cross-examination into sexual matters related purely to credibility. Thus, for example, in *Dagget v. State* and *State v. Bittner*, the defendants were prohibited from cross-examining for purposes of credibility on whether the witness was a prostitute. Similarly, the Nebraska Supreme Court in *Ritchey v. Ritchey* stated that the public ignominy privilege could be invoked as a basis for refusing to answer interrogatories in a domestic dispute regarding the wife’s relationship with her alleged paramour. This same privilege was relied upon in *State v. Ellis* to bar cross-examination on prior sexual relations with the defendant when the testifying witness was married to another man and the testimony would tend to expose the witness to public ignominy.

The Nebraska Supreme Court in *State v. Lush*, an unauthorized practice of law case, made it clear that the privilege is waived if no timely objection is made. The court noted that “to avoid waiver thereof, objections based on this statute must be made when the wit-
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ness is confronted with a question or interrogatory" that is seeking information that would expose the party to public ignominy.\textsuperscript{249}

\section*{§ 25-12,122: THE PRIVILEGE INVOLVING PEER EVALUATIONS OF HEALTH PRACTITIONERS}

Section 25-12,122 of the Nebraska Revised Statutes provides that the proceedings and records of a peer review committee of health practitioners are neither subject to discovery or introduction into evidence in any civil action arising out of the matters which are the subject of evaluation or review by such committee.

\section*{IV. CONCLUSION}

The law of evidentiary privilege provides the largest category of evidence excluded from the fact-finding process because of policy constraints favoring in limited contexts, confidentiality, secrecy, and privacy. Consistent with formal canons of ethics and traditional moral sensitivities favoring confidentiality in certain personal and professional relationships, privilege rules facilitate confidential communication within relationships deemed special for policy reasons. Primarily of statutory origin, the scope of these privileges will likely continue only insofar as the perceived benefits they secure are not outweighed by the social costs of excluding such evidence.

As the statutory curtailment in response to the \textit{State v. Palmer}\textsuperscript{250} case of the husband-wife privilege to exclude crimes of evidence illustrates, when the legislature becomes convinced that privilege rules cost society too much they will be limited. Conversely, as the need for confidentiality in new settings arises, such as confidentiality in medical peer evaluations, then the legislature will step in and expand the privilege rules. In the federal courts, this gradual expansion and contraction of privilege rules will take place largely under the auspices of common-law reasoning in light of reason and experience. In any event, evidentiary privilege will likely remain a controversial issue in the courts' balancing of the strong public policy favoring the production of evidence against the seminal importance of confidentiality in limited relationships.

\section*{V. APPENDIX}

1. \textsc{Neb. Rev. Stat.} § 27-501 to -513 (Reissue 1989) provides: Privileges recognized only as provided. Except as otherwise required by the Constitution of the United States or the State of Nebraska or

\textsuperscript{249} \textit{Id.} at 373, 95 N.W.2d at 699.
\textsuperscript{250} 224 Neb. 282, 399 N.W.2d 706 (1986).
provided by Act of Congress, or the Legislature of the State of Nebraska, by these rules or by other rules adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters, no person has the privilege to:

(1) Refuse to be a witness; or
(2) Refuse to disclose any matter; or
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

§ 27-503. Rule 503. Lawyer-client privilege; definitions; general rule of privilege; who may claim privilege; exceptions to the privilege.

(1) As used in this rule:

(a) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;
(b) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;
(c) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services; and
(d) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.

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

(4) There is no privilege under this rule:

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

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

(c) As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

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

§ 27-504. Rule 504. Physician-patient privilege; definitions; general rule of privilege; who may claim privilege; exceptions to the privilege. (1) As used in this rule:

(a) A patient is a person who consults or is interviewed by a physician for purposes of diagnosis or treatment of his or her physical, mental, or emotional condition;

(b) A physician is (i) a person authorized to practice medicine in any state or nation or who is reasonably believed by the patient so to be or (ii) a person licensed or certified as a psychologist under the laws of any state or nation, who devotes all or a part of his or her time to the practice of clinical psychology; and

(c) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his or her physical, mental, or emotional condition among himself or herself, his or her physician, or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(3) The privilege may be claimed by the patient, by his or her guardian or conservator, or by the personal representative of a deceased patient.

The person who was the physician may claim the privilege but
only on behalf of the patient. His or her authority so to do is presumed in the absence of evidence to the contrary.

(4)(a) There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for physical, mental, or emotional illness, if the physician, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.

(b) If the judge orders an examination of the physical, mental, or emotional condition of the patient, communications made in this course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) There is no privilege under this rule as to communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense.

(d) There is no privilege under this rule in any judicial proceedings under the Nebraska Juvenile Code regarding injuries to children, incompetents, or disabled persons or in any criminal prosecution involving injury to any such person or the willful failure to report any such injuries.

(e) There is no privilege under this rule in any judicial proceeding regarding unlawfully obtaining or attempting to obtain (i) a controlled substance, (ii) a written or oral prescription for a controlled substance, or (iii) the administration of a controlled substance from a practitioner. For purposes of this subdivision, the definitions found in section 28-401 shall apply.

§ 27-505. Rule 505. Husband-wife privilege; general rule of privilege; definitions; waiver; criminal cases; exceptions to the privilege.

(1) Neither husband nor wife can be examined in any case as to any confidential communication made by one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication while the marriage subsisted except as otherwise provided by law. This privilege may be waived only with the consent of both spouses. After the death of one, it may be waived by the survivor.

For purposes of this section (a) a confidential communication shall mean a communication which is made privately by any person to his or her spouse with no intention that such communication be disclosed to any other person and (b) communication shall include any action on the part of a spouse if the action reasonably appears to
have been intended to communicate a message from one spouse to the other.

(2) During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.

(3) These privileges may not be claimed:

(a) In any criminal case where the crime charged is a crime of violence, bigamy, incest, or any crime committed by one against the person or property of the other or of a child of either or in any criminal prosecution against the husband for wife or child abandonment;

(b) In any case brought by either husband or wife against a third person relating to their marriage relationship or the interruption of or interference with such relationship; or

(c) In any case brought by either husband or wife against the other for divorce or annulment of the marriage or for support.

§ 27-506. Rule 506. Communications to clergyman; definitions; general rule of privilege; who may claim privilege. (1) As used in this rule:

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

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

(2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

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

§ 27-507. Rule 507. Political vote; privilege. Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

§ 27-508. Rule 508. Trade secrets; privilege; protective measures. A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.
§ 27-509. Rule 509. Secrets of state and other official information; general rule of privilege; who may claim privilege; procedure; effect of sustaining claim. (1) The government has a privilege to refuse to give evidence and to prevent any public officer from giving evidence as to communications made by or to such public officer in official confidence when the public interest would suffer by the disclosure.

(2) The privilege may be claimed by the public officer sought to be examined, or by the chief officer of the department of government administering the subject matter which the evidence concerned. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and be heard thereon. The judge may take any protective measure which the interest of the government and the furtherance of justice may require.

(3) If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(4) If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

§ 27-510. Rule 510. Identity of informer; rule of privilege; who may claim; exceptions; informer a witness; procedure; orders; legality of obtaining evidence. (1) The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(2) The privilege may be claimed by an appropriate representative of the government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an
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officer thereof, except that in criminal cases the privilege shall not be allowed if the government objects.

(3)(a) No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness.

(b) If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing may be in the form of affidavits or testimony, as the judge directs. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without an order of court. All counsel shall be permitted to be present at any stage at which counsel for any party is permitted to be present.

(c) If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

§ 27-511. Rule 511. Waiver of privilege by voluntary disclosure. A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if he
or his predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

§ 27-512. Rule 512. Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

§ 27-513. Rule 513. Comment on or inference from claim of privilege improper; jury instruction. (1) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

2. NEB. REV. STAT. § 25-1210 (Reissue 1989) provides: Witnesses; answer subjecting to criminal liability; disgracing answer; privilege. When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in section 25-1214.

3. NEB. REV. STAT. § 25-12, 123 provides: Peer review committee; proceedings and records; testimony; use in civil actions; limitation. The proceedings and records of a peer review committee of a state or local association or society composed of health practitioners licensed pursuant to the provisions of Chapter 71, article 1, shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a person licensed pursuant to section 71-102 arising out of the matters which are the subject of evaluation and review by such committee. No person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof, except that information, documents, or records otherwise available from original sources are not to be construed as immune from discovery of use in any such civil action merely because they were presented dur-
Any documents or records which have been presented to the review committee by any witness shall be returned to the witness, if requested by him or her or if ordered to be produced by a court in any action, with copies thereof to be retained by the committee at its discretion. Any person who testifies before such committee or who is a member of such committee shall not be prevented from testifying as to matters within his or her knowledge, but such witness cannot be asked about his or her testimony before such a committee or opinions formed as a result of such committee hearings. Nothing in this section shall prohibit a court of record, after a hearing and for good cause arising from extraordinary circumstances being shown, from ordering the disclosure of such proceedings, minutes, records, reports, or communications.