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Martin I. Kaminsky

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State Evidentiary Privileges in Federal Civil Litigation

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B.A. from Yale University, 1962; LL.B. Harvard University, 1965. Member of the New York Bar.

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STATE EVIDENTIARY PRIVILEGES IN FEDERAL CIVIL LITIGATION
MARTIN I. KAMINSKY*

I. INTRODUCTION

To what extent may a witness successfully invoke a state-created evidentiary privilege as a ground for refusing to answer questions in federal litigation, particularly in federal question cases? The answer to this question has long proven to be a Gordian knot for legal scholars, federal legislators and the courts. Most recently the draftsmen of the proposed Federal Rules of Evidence and the Judiciary Committees of both Houses of Congress found themselves mired in the morass of conflicting views and policy considerations which underlie the patchwork of decisions on the question. The result is that those rules, as adopted by Congress and signed into law, leave the matter where it presently lies under case law and do not decree specific "federal" privileges as the draftsmen had originally proposed.1

To a great extent, the problem involves a selection of the philosophical considerations which one believes most appropriate for our system of federal courts, and, to a lesser extent, our entire federal governmental system. That is, one must choose between uniformity within the federal court system and the right of a citizen to expect the same treatment in the federal courts in his state that he receives from the state courts; and between the interest of full disclosure in the federal courts and a state's interest in fostering selected confidential relationships by encouraging its citizens to rely on the inviolability of their disclosures to doctors, lawyers, spouses, accountants, journalists or others.

This Article will survey the problem and comment on the various solutions, both for diversity and federal question litigation, which have been fashioned or advocated thus far by courts, commentators, and the draftsmen and critics of the Federal Rules of Evidence. Essentially the Article concludes that: (a) in diversity cases, unless contrary to federal substantive public policy, state evidentiary privileges should prevail;2 (b) in federal question cases, the federal courts should be free to fashion their own rules on a case-by-case basis, but should carefully scrutinize state law and defer to strong state public policies on the matter absent overriding federal policy to the contrary or manifest

* B.A. Yale University, 1962; LL.B. Harvard University, 1965. Member of the New York Bar.

1. See Part V infra.
2. See Part III infra.
inequity; and (c) the foregoing conclusions are consistent with the present status of both case law and statutory law. However, caution must be exercised in attempting to follow or flatly state such generalized conclusions, since federal litigation tends to generate unforeseen “sport” situations, as where a deposition is taken in one state for use in a federal trial in another state, but only one of the two states recognizes the claimed privilege.

II. THE PROBLEM IN ITS HISTORICAL AND PHILOSOPHICAL CONTEXT

As early as 300 years ago, the courts in England recognized the right of citizens, in certain circumstances, to refuse to answer questions in court regarding matters learned or divulged in exchange for a promise of confidentiality. The scope of such privileges was never codified by statute and, as the years passed, several evidentiary or testimonial privileges gave way under the English common law to a judicial philosophy in favor of full disclosure designed to insure that justice not be subverted by a constricted court review of all the pertinent evidence.

Our state legislatures and courts have, for more than two centuries, continued to recognize and create specific privileges against disclo-
sure,8 based largely on the concept that such privileges "foster socially desirable confidences."9 With this public policy in mind, a number of commentators have stated that evidentiary privileges are themselves "rights" entitled to full faith and credit or comity.10 The prevailing views in the courts appear to agree,11 although the Supreme Court has not spoken definitively on the subject. Nevertheless, the desirability


9. Weinstein, Recognition in the United States of the Privileges of Another Jurisdiction, 56 Colum. L. Rev. 535, 536 (1956) [hereinafter cited as Weinstein]. There are, of course, other philosophical bases for privileges, such as the protection of the individual's right of privacy. Comment, The Privilege Doctrine and The Proposed Federal Rules of Evidence, 24 Syracuse L. Rev. 1173, 1182 (1973). The philosophical basis for the newsman's privilege is that "the interest in dissemination outweighs an insubstantial state interest in the identity of the source . . . ." 82 Harv. L. Rev. 1384, 1386 (1969); see Guest & Stanzler, The Constitutional Argument For Newsmen Concealing Their Sources, 64 Nw. U.L. Rev. 18, 44 (1969); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317, 329 (1970). But all of these explanations, in essence, hark back to the philosophical conclusion that, for one reason or another, the particular privilege is considered socially desirable.


and appropriate scope of evidentiary privileges has long been debated, with many distinguished advocates on record against them. 12

Prior to the promulgation of the Federal Rules of Civil Procedure (and in particular rule 43(a)) in 1938, evidentiary privileges posed no particular problem to the federal courts. 13 Generally, although the reasoning sometimes varied slightly (e.g., between reliance on the Conformity Act 14 or the Rules of Decision Act 15), the federal courts upheld the applicability of state privileges, without noticeable hesitation. 16

It was only after the adoption of the Federal Rules of Civil Procedure, or more accurately, the decisions in Erie R.R. v. Tompkins 17 and Guaranty Trust Co. v. York, 18 that the question of what effect state privileges should have in federal litigation emerged as an inscrutable and philosophically troublesome one for the federal courts. Basically, the issue is whether rule 43(a), 19 which provides that federal courts

12. For example, Professor Wigmore, who was not a critic of privileges, stated in his oft-cited treatise: “In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. . . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice.” 8 J. Wigmore, Evidence § 2286, at 528 (McNaughton rev. ed. 1961). On the other hand, certain privileges have been justified “as consistent with the goal of accurate fact-finding because they help avoid perjury . . . .” Louisell 109-10.


16. 304 U.S. 64 (1938). Former Supreme Court Justice Hugo Black correctly described Erie as “one of the most important cases at law in American legal history.” Address by Mr. Justice Black, 13 Mo. B.J. 173, 174 (1942).


18. Fed. R. Civ. P. 43(a) provides in pertinent part: “All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court
shall follow the "statute or rule which favors the reception of the evidence," creates an overriding federal policy that all evidence should be admitted if any possible basis for admission exists, to the exclusion of state law evidentiary privileges; or whether there is still room in federal cases for state evidence concepts which exclude, rather than admit, evidence. The matrix of post-Erie theorizing and the gradual development of guideposts for the resolution of federal-state choice of law conflicts has honed the matter into a sharp controversy.

Underlying the controversy is a philosophical debate, frequently not recognized by the practicing bar and the courts, over what role the federal courts must or should assume vis-à-vis state-created rights (and vice versa). Professor Henry M. Hart of Harvard, the dean of theorists on the subject, summarized the controversy as follows:

The complexities thus created [by the increasingly concurrent jurisdiction of state and federal courts] are greatly enhanced by the circumstance, of enormous significance in American federalism, that state courts are regularly employed for the enforcement of federally-created rights having no necessary connection with state substantive law, while federal courts are employed for the enforcement of state-created rights having no necessary connection with federal substantive law. The states have no more conspicuous role as agents of the nation than in the judicial enforcement of federal statutes. And the federal courts, by virtue especially of the much-debated grant of jurisdiction in controversies between citizens of different states, have a major responsibility to enforce state law. In so enforcing substantive rights and duties created by the other system, each of the two systems of courts employs its own rules of procedure and to some extent its own remedial concepts. To the problems of disentangling federal substantive law from state substantive law are thus added problems of disentangling substantive law, state or federal as the case may be, from federal or state procedural and remedial law.

This Article will not attempt to resolve this complex controversy.


22. For purposes of this Article, it will be assumed that Professor Charles Alan Wright's observation regarding the effect of Hanna v. Plumer, 380 U.S. 460 (1965), is correct:

"Thus there no longer is an Erie problem on matters covered by the Civil Rules. If the rule is valid, and if it applies to the case, it is controlling, and no regard need be paid to contrary state provisions."

"The Hanna case contributes needed clarity and simplicity of application to what had been a very confused area of the law. It lightens the burden on the federal courts since they need not
However, as will be seen below, the philosophical undercurrents about which Professor Hart spoke have had a major effect on the lines of decision seeking to define the viability of state-created privileges in the federal courts. For example, if, as suggested by Professor Charles Alan Wright among others, the bottom line of present decisional law on *Erie* is that the federal courts must follow any Federal Rule of Civil Procedure which may appear to touch the issue, regardless of the teachings of state law, then the viability of evidentiary privileges may simply be a question of interpretation and application of rule 43(a) of the Federal Rules of Civil Procedure. But virtually no current scholar or court that has confronted the problem appears willing to reduce the problem to that simple a proposition. Rather, the weight of authority seems to insist that the court at least consult state public policy (as expressed through judicial decision or legislative pronouncement) on the matter of privilege. Such state policy should then be weighed against the federal public policies in favor of uniformity of result (which the Federal Rules of Civil Procedure as a whole embody), admissibility of all evidence (which rule 43(a) in particular appears to mandate) and concern themselves with *Erie* problems if one of the rules is applicable. At the same time Hanna creates an added burden on the Court and those who advise it in the rulemaking process. In formulating a rule the rulemakers must now consider the extent to which application of a proposed rule, in cases where state law is different, is consistent with the proper ordering of our federal system.” C. Wright, Federal Courts § 59, at 245 (2d ed. 1970). See also Wright, Procedural Reform: Its Limitations and Its Future, 1 Ga. L. Rev. 563, 571-74 (1967); Note, Federal Rules of Privilege in Diversity Cases: A Time for Congressional Action, 8 Suffolk L. Rev. 1217, 1224 (1974) [hereinafter cited as Suffolk Note]. 23. See note 22 supra. See also Degnan, The Law of Federal Evidence Reform, 76 Harv. L. Rev. 275 (1962).

24. One leading commentator has thus observed: “The argument that, Rule 43(a) being equivalent to an Act of Congress within the meaning of the Rules of Decision Act, 28 U.S.C. § 1652 (1952), it therefore provides a controlling federal evidence rule, however sound generally, encounters in respect of the privileges the fact that substantive rights are not to be abridged, enlarged or modified by the Federal Rules of Civil Procedure. 28 U.S.C. § 2072 (1952).” Louisell 121 n.91.

Compare Pugh, Rule 43(a) and the Communication Privileged Under State Law: An Analysis of Confusion, 7 Vand. L. Rev. 556, 560-61 (1954) arguing by “negative implication that, unless evidence is admissible under some one of the three systems referred to in rule 43(a), it should be excluded by the federal court.” See Courtland v. Walston & Co., 340 F. Supp. 1076, 1091 (S.D.N.Y. 1972); Neff v. Pennsylvania R.R., 7 F.R.D. 353 (E.D. Pa. 1948), aff’d, 173 F.2d 931 (3d Cir. 1949); Franzen v. E.I. Du Pont De Nemours & Co., 51 F. Supp. 578, 584 (D.N.J. 1943), aff’d, 146 F.2d 837 (3d Cir. 1944). Aetna Life Ins. Co. v. McAdoo, 106 F.2d 618, 621 (8th Cir. 1939), did hold that rule 43(a) rendered the claimed doctor-patient privilege under Arkansas law inapplicable in a diversity case, but that case appears outdated and superseded by more modern authority to the contrary.
any other substantive federal policies presented by the particular facts of the case.\textsuperscript{25}

III. STATE PRIVILEGES IN DIVERSITY LITIGATION

Alexander Hamilton perceived the federal courts as the supreme arbiters of all controversies "in which one State or its citizens are opposed to another State or its citizens," so as to guarantee that all citizens are assured of unbiased protection of their rights to all the "privileges and immunities" created under state law.\textsuperscript{26}

In actual practice, as the Constitution was adopted and Congress defined the matter of jurisdiction, the federal courts do not handle all such controversies; rather, they handle only those based on the diversity of citizenship of the litigants in which the amount in controversy exceeds $10,000\textsuperscript{27} and which involve so-called "complete diversity" (where no plaintiff and no defendant in the case are citizens of the same state),\textsuperscript{28} or those which are not initially brought in federal court but which satisfy the somewhat arbitrary requirements for removal to the federal court.\textsuperscript{29} Many controversies involving citizens of different states either cannot be brought in federal court or simply are not brought in federal court. As a result, some question exists as to the proper role of the federal court sitting in a diversity case. Is it merely to act "as an impartial forum in which state law can be enforced,"\textsuperscript{30} or is it to serve as the diligent overseer of the "due administration of


\textsuperscript{26} Hamilton wrote:
"It may be esteemed the basis of the Union that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government ought to possess the means of executing its own provisions, by its own authority, it will follow that in order to [protect] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." The Federalist No. 80, at 440-41 (Colonial Press ed. 1901) (A. Hamilton).


\textsuperscript{30} Weinstein 545.
justice” to all citizens, affirmatively warding off state-created biases which favor or discriminate against nonresidents? The former is the prevailing view and was a cardinal aspect of the Erie decision.

The primary rationale usually offered for holding that the federal courts in diversity cases must follow state law regarding evidentiary privileges is that, in a diversity case, the federal court is dealing only with state-created substantive rights. The federal courts, the argument runs, should apply the same rules of law to those rights which the state itself would apply, so as to deter litigants from forum-shopping between the federal and state courts. Where the state has created the rights involved, it, and not the federal courts, should have the ultimate say as to how those rights will be enforced or applied.

33. See, e.g., Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967); Application of Cepeda, 233 F. Supp. 465, 471 (S.D.N.Y. 1964). Professor Charles Alan Wright has aptly stated: “The state’s effort to encourage these relationships [covered by evidentiary privileges] will be hampered if the secrets of the marriage bed or the attorney’s office can be kept secret in state court but disclosed where, because of the accident of diversity, suit is brought in federal court. Since the litigation is on a state-created right, there is no federal interest that justifies such an interference with the state’s decision that the relation is more important than the litigation.” C. Wright, Federal Courts § 93, at 415 (2d ed. 1970).
34. See C. Wright, Federal Courts § 93, at 412-15 (2d ed. 1970); accord, 2B W. Barron & A. Holtzoff, Federal Practice & Procedure § 967, at 243-44 (Wright ed. 1961) (“Privileges are created in order to foster a relation which the state deems of such importance that it will encourage it even at the price of excluding helpful testimony in litigation. Where the litigation involves rights and duties which the state law creates, it is appropriate that the state, rather than the federal court, should have the last word as to the comparative importance of the relation as against the litigation.”).

The matter is hardly free of confusion. As the court recently stated in Courtland v. Walston & Co., 340 F. Supp. 1076, 1088 (S.D.N.Y. 1972) (dicta) (citation omitted): “The principles of Erie Railroad Co. v. Tompkins . . . have not been held to extend to state exclusionary rules of evidence in diversity cases. Erie did not deal with procedure or concern procedural matters as to which Rule 43(a) applies. Consequently, in many instances, it becomes of importance to determine whether competency of a witness is considered to involve substantive or procedural law. If substantive, the Federal courts under the Erie rule, in diversity litigation, would be required to apply state law, while if it is held a procedural matter, Federal courts must follow
Implicit in this analysis is the assumption that privileges are "substantive" rather than "procedural" in nature, and hence "affect private conduct" and not merely the "processes of litigation."35 This view is not without its critics. For example, Professor Henry Hart once scorned it as "[t]he triviality of this fear of forum-shopping."36 Nevertheless, it stands today as the prevailing view. But the practicing lawyer cannot cease his analysis with the foregoing. Many practical problems still must be confronted in each particular case. Most obviously, the question remains whether, given the existence of an evidentiary privilege in the state, the party asserting it actually satisfies the state's criteria for the privilege.

An interesting example is provided by Car & General Insurance Corp. v. Goldstein,37 a diversity declaratory judgment action brought by an insurer seeking to invalidate an insurance policy on the ground that the insured had refused to cooperate in defending against an auto accident claim involving the defendant's daughter. The defendant sought to exclude all evidence of his conversations with his lawyer in an earlier case involving that claim. Although the district court held that it was bound by New York State's attorney-client privilege, it nevertheless held the attorney's testimony admissible because, under New York law, the lawyer had actually been representing both the insurer and the insured.38 Thus the insured's conversations with him were not properly confidential as to the insurer.39

Rule 43(a) and admit evidence admissible under any of the admission tests expressly set forth in the statute. The distinction is not made without difficulty. Different Federal courts have reached different conclusions. Not all the decisions, however, are based on a finding of either the procedural or substantive nature of the state rule. Some of the decisions simply refer to Rule 43(a) of the FRCP, while others fail to state a basis upon which they reached the result."

35. See Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463, 466 (2d Cir. 1962) and other cases cited in notes 32-33 supra. But cf. Suffolk Note, supra note 22, at 1219. This analysis (i.e., based on the state's creation of the underlying rights in the litigation), while satisfactory for diversity cases, is fraught with complications in federal question cases, especially where "state" issues are being tried simultaneously under the pendent jurisdiction of the federal court. As shown below (see notes 132-37 infra and accompanying text) the Congress, especially its Judiciary Committees, in seeking to disentangle the proposed Federal Rules of Evidence, has found this analysis particularly difficult to apply on an across-the-board basis to all evidentiary privileges.

36. Hart 513.

37. 179 F. Supp. 888 (S.D.N.Y. 1959), aff'd, 277 F.2d 162 (2d Cir. 1960) (per curiam).


39. The court stated: "Wigmore points out that when an attorney acts for two parties having a common interest, communications by the parties to the attorney are not privileged in a controversy between these same two parties because the common interest forbade concealment by either from the other. 8 Wigmore § 2312 p. 603 (3d ed.). Here the insurance company and insured have a common interest in the defense of suits against the insured. Not only was the defendant's statement to Mr. Cornella not privileged from disclosure to the insurance company, it was, in
More challenging problems arise when an evidentiary privilege is claimed in pretrial discovery, especially where discovery is sought under a subpoena of a federal court sitting in a state other than the trial state. Where a deposition of a non-party witness is involved, rule 37(a) of the Federal Rules of Civil Procedure requires that an application to compel disclosure or for sanctions against the witness must be made to the federal court in the district where the refusal to answer occurred. Which state's law (i.e., the deposition state or the trial state) should apply? And, where the two conflict, what policy interest (i.e., the witness's right to the protections of his home state or fact, defendant's duty, imposed by his contract, to make a fair and frank disclosure to the insurance company because of their common interest in knowing the way in which the accident happened") 179 F. Supp. at 891. Thus, while the statement involved may have been "privileged" in an action between the insured and a third party, it was not privileged in the insurer's action against the insured. See Baylor v. Mading-Dungan Drug Co., 57 F.R.D. 509, 512 (N.D. Ill. 1972) (mem.) (reaching a similar result with regard to the Illinois accountant-client privilege).

In Bethel v. Thornbrough, 311 F.2d 201 (10th Cir. 1962), the court held that the plaintiffs had waived their right to claim Colorado doctor-patient privilege in a diversity action involving an auto collision since they had requested a copy of the doctor's report and Fed. R. Civ. P. 35(b)(2) expressly declares such a request a waiver of any privilege involved. The court concluded that it need not pass on the applicability of the state statute since a federal procedural rule rendered it nugatory in the case at hand. 311 F.2d at 204.

Fed. R. Civ. P. 26(b)(1) expressly limits pretrial discovery in federal civil cases to matters "not privileged." The United States Supreme Court has ruled that this language refers to evidentiary privileges. United States v. Reynolds, 345 U.S. 1, 6 (1953) (based on prior rule 34; the discovery rules were amended and largely reorganized and renumbered in 1970). See also Cimijotti v. Paulsen, 219 F. Supp. 621, 623 (N.D. Iowa), appeal dismissed, 323 F.2d 716 (8th Cir. 1963). But see Garland v. Torre, 259 F.2d 545, 550 (2d Cir.), cert. denied, 358 U.S. 910 (1958); Luey v. Sterling Drug, Inc., 240 F. Supp. 632, 636 (W.D. Mich. 1965) (holding that matters merely deemed by the deponent to be confidential but not covered by a statutory privilege do not fall within the limitation of Fed. R. Civ. P. 26(b)).


Fed. R. Civ. P. 37(a)(1) provides: "An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken."

Interestingly, in such a situation, the order of the court is appealable immediately, notwithstanding 28 U.S.C. § 1292 (1970) (interlocutory decisions). Otherwise the party seeking disclosure might have no effective remedy, since to return to the deposition jurisdiction after trial for a separate appeal would be cumbersome at best. See, e.g., Baker v. F & F Inv., 470 F.2d 778, 780 n.3 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 554 (2d Cir. 1967). But see Honig v. E.I. duPont de Nemours & Co., 404 F.2d 410 (5th Cir. 1968) (per curiam); National Nut Co. v. Kelling Nut Co., 134 F.2d 532, 533 (7th Cir. 1943) (per curiam).
the substantive law of the other state which governs the merits) should predominate? Numerous corollary situations can be envisioned: For example, what is the applicable law where the law of State X is the governing law on the merits of a diversity claim between citizens of State X and State Y in the federal court in State Y, but the testimony involved is that of a citizen of State Z, taken in his home state or even some other state?

Some of these situations already have been litigated, with the results generally turning on the choice of law rule which the federal court believes the state courts in its district would apply. A few examples are appropriately illustrative.

*Palmer v. Fisher* was a diversity suit pending in the United States District Court for the Southern District of Florida in which one of the issues concerned the accuracy of the financial reports and records of Black Ranches, Inc. The defendant took a pretrial deposition in Illinois of one of the accountants who had audited the books of Black Ranches. At the deposition the accountant refused to answer certain questions, invoking the Illinois statutory privilege attaching to accountant-client communications. The defendant moved to compel a response on the grounds that there is no federally created privilege and that, in any event, Florida law (which also had no such privilege) governed since Florida was the trial forum of the case. The Seventh Circuit held for the accountant in an opinion which announced outright that (a) "since the Judiciary Act of 1789, federal courts have felt bound to follow the rules of evidence of the state in which they sat, except where inconsistent with federal constitutional or statutory provisions" and (b) "since the proceeding to suppress a deposition is an independent action, the law of the forum is the law of Illinois." The decision also contained strong anti-forum shopping overtones.

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43. 228 F.2d 603 (7th Cir. 1955), cert. denied, 351 U.S. 965 (1956).


46. 228 F.2d at 608.

47. Id. at 608-09.

48. Thus Judge Swaim reasoned: "The next question is the applicability of an Illinois statutory privilege to a deposition taken in Illinois for use in Florida. We are unable to find direct
In *Application of Cepeda*, 49 a libel action by baseball star Orlando Cepeda against the publisher of Look Magazine which was pending in the California federal courts, a magazine writer deposed in New York sought to invoke California's journalist privilege in refusing to answer questions. The United States District Court for the Southern District of New York ruled that the law of the trial state (which had a privilege statute) prevailed over the law of the deposition state (which had no such provision), on the theory that the trial state had a more clearly defined and enunciated public policy. 50 In dictum, the court further authority on the point, but conclude that an Illinois court (or a federal court sitting in Illinois) could properly enforce this Illinois statutory privilege no matter where the deposition is to be used. The State Legislature had declared it to be public policy in Illinois that public accountants shall not be required to testify about information obtained in their confidential capacity as accountants. This policy would be defeated if any court, state or federal, sitting in Illinois should require an accountant to testify as to such information. This would be true whether the testimony was to be used in a court sitting in Illinois or in any other state.” Id. at 608. But see Ex Parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953), where, in a libel action pending in the United States District Court for the Southern District of New York, a United States District Judge in Alabama upheld the right of a reporter at his Alabama deposition to refuse to answer questions regarding his source of information for the magazine article involved (an exposé of prison conditions) on the basis of an Alabama privilege statute ( Ala. Code tit. 7, § 370 (1958)), even though New York then had no such statute (New York now has a statute immunizing newsmen from contempt. N.Y. Civ. Rights Law § 79-h (McKinney Supp. 1974)). The Alabama federal court rejected any notion that it was required to apply state evidentiary law but elected to follow it nevertheless so as to uphold the witness's reliance on the Alabama state privilege: “This court is not bound to apply the Alabama law [i.e., an Alabama statute giving journalists a privilege to refuse to reveal their sources] in interpreting the words 'not privileged' as they appear in rule 26 (b) [Fed. R. Civ. P.]. But it would not be justified in ignoring such a clear and unequivocal pronouncement of the public policy of the state in which it sits . . . .” 14 F.R.D. at 353.

Following more traditional Klaxon doctrine and state choice of law concepts, the Eighth Circuit recently reached the opposite conclusion in *Cervantes v. Time, Inc.*, 464 F.2d 986, 989 n.5 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). There, the Mayor of St. Louis was suing Life Magazine and one of its reporters in the federal court in Missouri, alleging libel based on an article which claimed he had associations with organized crime. The Mayor deposed the New York reporter in New York, who claimed the protections of that state's journalists' shield law (which as noted above, had been enacted since the Sparrow case) in refusing to reveal his source information. The Mayor then moved for a contempt order in the federal court in the trial state, rather than in the deposition state—a procedure which would not have been available if the reporter were merely a witness and not a party defendant (cf. note 41 supra). The court of appeals, applying the Missouri state choice of law rule that “the admissibility of evidence is governed by the law of the State where the testimony is to be heard,” determined that the public policy of the deposition state was irrelevant and “entitled [the reporter] to no protection on that ground.” 464 F.2d at 989 n.5. In view of the fact that the reporter was a New York citizen who had written the article there, in claimed reliance on the New York statute, this is a harsh statement to say the least. The only apparent justification for it is that Cervantes was a libel case, not a case involving a clearly "innocent" reporter witness. Cf. *Baker v. F & F Inv.*, 470 F.2d 778, 783-84 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).
The document contains legal text discussing evidentiary privileges in the federal courts. It observes that if the situation were reversed, so that there was a stronger public policy regarding the privilege in the deposition state than in the trial state, it would have deferred to the policy of the deposition state. Since, if a state makes a statement regarding a privilege at all, it is far more likely to do so in favor of the privilege—states usually pass statutes only to create privileges, not to record their decision not to create a privilege—the reasoning of the Cepeda court would appear to suggest that whenever either the deposition or the trial state recognizes a privilege, the federal court should do so also.

A similar conclusion is suggested by R. & J. Dick Co. v. Bass, a diversity action in a Georgia federal court, in which the plaintiff corporation claimed that the defendant, a former director and officer, had surreptitiously misappropriated its rights to a valuable distributorship contract immediately prior to leaving the plaintiff's employ. To prove its case, the plaintiff sought to depose the defendant's former wife, a resident of Pennsylvania, in Pennsylvania, notwithstanding a Pennsylvania statute absolutely prohibiting spouses from testifying against each other in civil cases. Georgia law contained no such provision, but did contain a qualified and limited spousal privilege. In spite of its conclusion that, technically, Georgia law applied and the fact that Georgia had made a public policy pronouncement (through its own statute) on the issue involved, the court resolved to decide whether the deposition should go forward under Pennsylvania law, since that state's public policy appeared to be the more dominant.

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The court, however, then went on to decide that, even under Pennsylvania law, notwithstanding the statutory privilege, the deposition could proceed subject to specific objections and limitations to be raised if and as the deposition proceeded into confidential areas.

In sum, in diversity cases, strong authority exists for the proposition that state evidentiary privileges should be recognized and deferred to in the absence of either extremely unusual circumstances or clear injustice. Where the interests of more than one state are involved (such as where a deposition is conducted under subpoena from a federal court in one state for use at trial in a federal court in another state) the courts should utilize a "center of gravity" approach, similar to that used in traditional state conflicts of law doctrine, to determine which state's law regarding the privilege should be followed. This approach is recommended in all such cases, even though it may depart in some instances from the general rule that a federal court in a diversity case should follow the conflicts of law rules of the state in which it sits. The federal courts should maintain a uniform approach, although not necessarily uniform decisions, as to the treatment of claims of privilege based on state law in diversity cases. While, to a very limited extent, such an approach may encourage forum shopping, it should insure more just results in more cases, which would appear to outweigh any possible harm from such forum shopping. Moreover, in determining whether or not to defer to the claimed privilege in a particular case, the court may consider whether it feels that forum shopping has improperly been a factor in the assertion of the privilege.

Where both states involved have the same public policy, no choice is necessary. But where one state recognizes the privilege and the other does not (as frequently occurs in the case of the journalist's privilege or the accountant-client privilege), the federal court reviewing the claim of privilege should carefully weigh which state, on the facts presented, is most interested in the claim of privilege and, in general, defer to the law of that state. For example, in the case of a non-party witness deposed in State A (his home state) with regard to a diversity case pending in State B between citizens of States A and B, where the conduct in question took place in State A, State A would appear to have a more direct and substantial interest in litigation. On the other hand, if State B has an overriding public policy on the question of the privilege involved, a federal court may determine that justice requires

Id. at 761; see Lowe's of Roanoke, Inc. v. Jefferson Standard Life Ins. Co., 219 F. Supp. 181, 188-89 n.9 (S.D.N.Y. 1963) (an order that a doctor answer certain deposition questions conformed with North Carolina law and thus was "in conformity with the clearly established attitude of the forum where the issue of the admissibility of confidential communications made to the physician will ultimately be in issue.").
IV. STATE PRIVILEGES IN FEDERAL QUESTION LITIGATION

Where Congress has declared a substantive federal policy by enacting specific legislation on a topic, the weight of authority holds that the federal courts should resolve questions of privilege under federal, not state law. On the other hand, several of these cases specifically hold that, in fashioning federal common law on the subject, the federal courts may consider and adopt state law where "substantial state interests" are involved. Thus several reported federal question cases have recognized a witness's right to assert an evidentiary privilege based upon a state privilege statute.


A split of authority also exists as to whether federal government administrative agencies must recognize state created privileges in connection with their subpoenas and other investigative activities. Commentators are likewise divided as to what, if any, rule should prevail regarding the availability of state evidentiary privileges in civil federal question cases.

These conflicting views and decisions cannot be readily reconciled,
and no simple rule has yet emerged from the cases. Judge Jack B. Weinstein provided what appears to be the most rational synthesis, and the most prudent one for the courts to follow:

Where the federal courts are enforcing a national substantive policy, they cannot be bound by state privileges. . . . The problem is complex, however, because non-diversity cases range from those where an all-embracing federal substantive law is applied to situations where . . . the federal courts are explicitly enforcing state tort law. As the spectrum shifts from over-riding federal to over-riding state policy, we can expect the rule on recognition of state privilege to shift.

The proper task for a court, therefore, is to analyze the purpose and force of the particular federal interest involved and balance it against the rationale and comparative strength underlying the particular state evidentiary privilege so as to determine which, in the interest of ultimate justice on the particular facts presented, should predominate. Complicating this task somewhat are the additional federal

62. Some of the different results reflected by the cases are explainable on the basis of factual distinctions, but others, like Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963), and Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), are squarely at loggerheads and cannot be reconciled by mere factual distinctions—they represent different basic theoretical approaches to the problem. Indeed, many learned commentators have simply thrown up their hands and acknowledged that the federal decisions are not consistent and that no single rule has as yet emerged. See, e.g., C. Wright, Federal Courts § 93, at 414 (2d ed. 1970) ("The situation in private federal question cases is quite unclear."); Krattenmaker, supra note 60, at 112 n.213 ("perhaps nothing is more confused and confusing than the case law bearing on the issue of when federal courts will defer to state privileges in civil cases where federal law supplies the rule of decision on the underlying merits.").

63. Weinstein, supra note 9, at 547 (footnote omitted). This type of flexible approach was substantially accepted by the Fifth Circuit in Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971), where the court stated, although holding that the attorney-client privilege should not be recognized in the situation there presented: "This is not to say that state interests play no part. Our discussion below points up that many of the factors to be weighed in the consideration of federal and state interests are predicated on values long embodied in policies of the states rather than federal law. And it goes without saying that a federal court must take full account of the reasons for any asserted privilege including any especially strong policies of the state in which the court sits. But it must take account of federal interests as well." Id. at 1100 (footnote omitted). The court aptly called these factors "[the competing interests in disclosure on the one hand and confidentiality on the other . . . .]" Id.

64. There are, of course, many critics of such a case-by-case approach. For example, one commentator remarked: "To adopt a case by case approach evaluating state privileges in the light of a federal program would inevitably confront the courts with the problem of establishing a policy basis for distinguishing between the virtues of an attorney-client privilege and those, for example, of an accountant-client privilege." Comment, Privileged Communications Before Federal Administrative Agencies: The Law Applied in the District Courts, 31 U. Chi. L. Rev. 395, 414 (1964).

Likewise, in Branzburg v. Hayes, 408 U.S. 665 (1972), Mr. Justice White emphasized as one of the reasons for rejecting a qualified journalists' privilege, although many state legislatures had
policy interests of uniformity of decision among the federal courts, especially in construing a particular federal right, and the apparent federal policy underlying rule 43(a) of the Federal Rules of Civil Procedure in favor of the admissibility of all evidence in federal civil cases. These latter two federal interests, albeit deserving of consideration in the court's analysis, would generally appear, however, to be secondary in importance to the other more substantive policy considerations to be analyzed: to wit, those underlying the particular federal substantive right and the particular state evidentiary privilege involved.

created one, that such would enmesh the courts in the time-consuming and complicated task of reviewing the factual context of virtually every instance where a journalist felt he was privileged not to respond. Id. at 704. This view appears to give too little consideration to the valid and often strong policies which underlie state evidentiary privileges. Especially if one agrees that such privileges embody substantive rights for the state's citizenry, those public policies would appear to merit more serious consideration than to be brushed aside merely because some added judicial effort may be required or because some divergent results (based on factual distinctions) may occur in different cases.

55. See, e.g., United States v. Kansas City Lutheran Home and Hosp. Ass'n, 297 F. Supp. 239, 243 (W.D. Mo. 1969) ("It seems clear to us that the policy considerations and the desirability of avoiding inconsistent treatment to federal taxpayers command a uniform federal common law rule in regard to Internal Revenue Service investigations authorized by federal law.").

This type of reasoning is not confined to privilege or evidentiary cases. Other cases have held, in different contexts, that the interest of uniformity in federal decisions under certain federal legislation demands that federal common law be decreed and state law rejected outright (or, at best, if not contrary to the policy of the federal statute, borrowed and redesignated as federal common law in construing the statute). See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943). See also Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 34 (1956); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942); Fahs v. Martin, 224 F. 2d 387, 392 (5th Cir. 1955).

But cf. De Sylva v. Ballentine, 351 U.S. 570 (1956). But this rule does not necessarily apply in every instance; rather only where an overriding federal public concern clearly is involved.

56. See, e.g., Courthand v. Walston & Co., 340 F. Supp. 1076, 1091 (S.D.N.Y. 1972): "While the issue may not be free from doubt, there are certainly strong policy reasons to desire a uniformity of disposition of cases involving a purely federal right granted solely by act of Congress, and which would not exist at all at common law or in the absence of the federal statute. It is unconscionable to assume that, contrary to the clear literal mandate of Rule 43(a), a state statute relating to competency of witnesses could operate so as to give a different result to litigants asserting a federal right in this District, than would be enjoyed in any of the other states which have no dead man's statute at all, or where there are slightly different shades of meaning and interpretation attached to any such exclusionary rule which may exist."

57. The policy interests here emphasized are by no means exclusive. Others have been suggested for general consideration, and still others may become apparent in the context of the individual case. For example, one commentator who has agreed that an "interest analysis" approach is desirable in federal question litigation, has suggested these four criteria: (1) whether the policy underlying a federal statutory scheme requires uniformity of law on the issue in question; (2) whether state interests in the issue outweigh those of the federal government; (3) whether conduct at the primary level of activity was done in reliance on state or federal law; (4)
Of course, critics of this approach exist. Their view is primarily that the interests of full disclosure and truth outweigh any possible interest in favor of the privilege. This view obviously, but provincially, rejects the notion that evidentiary privileges themselves represent a meaningful policy interest which must be balanced against and may predominate over the interest of disclosure. The reliance fostered among the state's citizenry is enough in itself to justify serious consideration of, although not automatic deference to, any assertion of privilege. The general public and, for that matter, many in the legal profession are unaware that a different rule may exist in federal question litigation. Unless a serious federal interest is at stake, one who has made confidential disclosures in reliance on his home state's privileges should not be "entrapped" into disclosure of those confidences and thus penalized for the reliance his state's law has fostered, merely because he finds himself in a federal court. The courts should recognize that, implicit in the assertion of a privilege, is an important issue of what constitutes fair governmental treatment of the individual and his right of privacy, particularly in private civil litigation, since there appears to be no empirical evidence to support the thesis that privileges tend to foster fraud or injustice.

Mere common sense reasoning would appear to suggest that, in view of the broad panoply of factual situations which the federal courts confront, such generalizations, pro and con, regarding the innate justice of a claim of evidentiary privilege are not capable of either proof or complete accuracy; whether, from a practical viewpoint, it is more convenient for a federal court to apply state or federal law." Comment, Evidentiary Privileges in the Federal Courts, 52 Calif. L. Rev. 640, 650-51 (1964). It would appear, however, that the first two criteria represent the predominant policy interests. Factors such as the practical convenience in applying federal or state law, while of value, should be limited to secondary consideration.

68. See notes 64 supra & 123 infra. Professor Richard Degnan wrote: "It seems hard to dispute that the doctor-patient privilege operates primarily as an instrument of fraud, in the sense that it is employed to suppress matter not in any way disgraceful or embarrassing to the patient but which would, if revealed, defeat dishonest claims or defenses. Only a wrong-headed system would retain a rule which does so much demonstrable harm to achieve so little conjectural good. But fraud is only a matter of definition. As shown above, it is no affront to state policy to reach a closer approach to truth than a state feels its processes can attain, but it is a substantial affront to strive for a juster justice than the state wishes to provide. That is permissible when the object is to serve an overriding federal interest, a furtherance of federal policy." Degnan, The Law of Federal Evidence Reform, 76 Harv. L. Rev. 275, 300 (1962) (footnote omitted).

69. Professor David Louisell, who was admittedly as predisposed in favor of state privileges as Professor Degnan was apparently opposed to them, wrote in his seminal article on the matter: "It would be doubtful that the general federal objective of accurate adjudication in federal litigation would per se justify undermining the state recognized privileges, since history seems to attest that the privileges are not so inimical to accurate adjudication as to be an unreasonable burden." Louisell, supra note 10, at 120 (emphasis omitted).
hence, a weighing-of-interests analysis appears to offer the "rule" most likely to achieve justice in the most instances. Here again, a few cases may help to illustrate the problem as it arises in the courts.

_United States v. Becton Dickinson & Co._ presents perhaps an extreme example of the recognition of state privileges in federal question cases. _Becton_ was a government civil antitrust suit in which the government sought to subpoena corporate records which the defendant claimed were privileged. The government argued that no privilege was available because a corporation does not have the right to claim the protections of the attorney-client privilege. Apparently neither side thought to argue whether, in view of the strong federal policies underlying the antitrust laws, state privileges were unavailable anyway. The court reviewed the matter and concluded that it was basically one of construction of rules 34 and 43 of the Federal Rules of Civil Procedure. Although rule 43(a) specifically states that the law which "favors the reception of the evidence governs," the court upheld the claim of privilege on the ground that the New Jersey statute expressed an overriding public policy contrary to reception of the evidence in question. The court concluded that it should not deny to the defendant the protection of that state policy in the absence of a statute or rule specifically "authorizing the disregard of the privilege."
Courtland v. Walston & Co., an action based on the antifraud provisions of the federal securities laws, leans toward the other extreme. The court emphasized that, in a case based on a federal statute, "[i]t is unconscionable to assume that, contrary to the clear literal mandate of Rule 43(a), a state statute . . . could operate so as to give a different result . . ." in one federal jurisdiction (i.e., whose forum state recognizes the privilege) than might occur in another federal jurisdiction (i.e., where the forum state had no such privilege). The court in Courtland was undoubtedly swayed by the fact that, unless the evidentiary privilege (there, based on the Dead Man's Statute) was overruled, the plaintiff would have no other means of proving the substance of her discussions with the allegedly fraudulent securities salesman. The court, however, apparently felt compelled to go to great lengths to justify its holding, and reviewed the history of the Dead Man's Statute in England and America and the conflicting views and considerations posed by the whole question of the applicability of state privileges to federal litigation. In that sense, the court, whether intentionally or inadvertently, followed the type of analysis recommended here, and its conclusion may properly be deemed limited to the privilege. On the contrary, Rule 34 of the Federal Rules of Civil Procedure, without which the plaintiff would be disentitled to inspection or copying of documents, expressly provides that only documents which are not privileged may be subjected to that form of discovery. In sum, the New Jersey Legislature has set at rest any doubt respecting the persistence of the attorney-client privilege, and its availability to a corporate litigant in this State. Since the privilege exists in favor of the defendant corporation under the New Jersey statute, the documents which the plaintiff seeks to examine are protected not only by the provisions of Rule 34, but by those of Rule 43(a) as well.” Id.


78. Id. at 1091; see note 66 supra.


80. 340 F. Supp. at 1085-92. Others insist that the Dead Man's Statute is solely a matter of competency of witnesses, not privilege, thus reviving the spectre of continued confusion over whether the modern version of the Erie doctrine does or does not apply to such matters. In any event, Judge Brieant viewed the question as one not only of competency but also of privilege; moreover, the treatment of issues relating to the competency of witnesses, at least insofar as the Dead Man's Statute is concerned, parallels that of state evidentiary privileges, so that Courtland appears to be an appropriate example to discuss here. See note 123 infra.
the facts brought before it—or, at most, to the applicability of the Dead Man’s Statute.

Another interesting aspect of the Courtland decision is the court’s avoidance of the fact that the case was being brought not only under federal law but also, by virtue of the principle of pendent jurisdiction, under the New York Blue Sky Law.81 Thus, at least to some extent, state-created rights were also involved and were directly affected by the court’s decision to ignore the state evidentiary privilege asserted. On the facts of the case, it is difficult to quarrel with the result, and it may be that the federal public policy underlying the federal securities laws simply outweighed the state interests in Courtland. However, in the many other situations where federal and state rights are simultaneously litigated, it may be appropriate and even necessary for the court to weigh carefully the effect of its rulings on the state aspect of the case. This is not to suggest that the court should make two different rulings on the same point (i.e., one regarding the federal claim and the other for the state claim), although such a situation could occur in an exceptional case (such as where the state claim is being tried before a jury and the federal claim is non-jury and the evidence on it heard out of the presence of the jury). But the existence of pendent state claims does present an additional policy consideration for the court to weigh in its balancing test.

More closely representative of the view here espoused is Mariner v. Great Lakes Dredge & Dock Co.,82 a Jones Act case where the court concluded that it "should recognize the basic privilege of state statute, while retaining a free hand with which to define its scope and draw its limitations."83 However, the Jones Act does not appear to represent a strong federal substantive policy similar to that embodied by the federal securities, antitrust or labor laws, and thus the force of the decision in Mariner could be questioned in a case involving a more overriding federal policy.84 This is not to say that Mariner is wrong or

83. Id. at 433 (the defendant had moved for production of certain hospital and medical records, to which the plaintiff objected on the basis of the state's physician-patient privilege).
84. Judge Weinstein raised this same point with regard to cases under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. (1970), which (like the Jones Act) essentially creates state-type negligence litigative rights for specific federal situations rather than establishing a federal substantive law to regulate an industry or type of conduct in interstate commerce. See Weinstein, supra note 9, at 547. The fact that the Jones Act confers concurrent jurisdiction on the state courts (46 U.S.C. § 688 (1970)) may in itself be a factor to be considered in favor of giving special weight to state law in Jones Act cases.

Admiralty cases (as to which the federal courts have exclusive jurisdiction pursuant to the Judiciary Act of 1789, 28 U.S.C. § 1333 (1970)), are now subject to the same federal rules of
that it is not generally applicable to other federal question cases, but rather to observe that it may not be conclusive authority for all federal question cases.

The applicability of the balancing approach to disputes arising in connection with a deposition being conducted in a state other than the trial forum is well illustrated in *Baker v. F & F Investment.* The plaintiffs had brought a class suit under the federal Civil Rights Act of 1866, the fourteenth amendment and Illinois statutory law on behalf of Negro homeowners in Chicago, alleging that Chicago real estate developers had engaged in racial "block-busting" to gouge them with excessive purchase prices. A primary potential element of their proof was a magazine article written prior to the case (which had in fact provided the factual basis for the complaint) by a distinguished investigative journalist, Alfred Balk. In the article, entitled *Confes-
sions of a Block-Buster, Mr. Balk had obtained and detailed a full recitation of the modus operandi of a Chicago block-buster whom he identified by the pseudonym “Norris Vitchek.” The article was considered a major investigative breakthrough, and national civil rights groups had reprinted and distributed it to their branches seeking to combat block-busting. Since the publication of the article, Balk had moved from Illinois to New York, where he was teaching at the Columbia University Graduate School of Journalism. When the plaintiffs deposed him in New York as a non-party witness, Balk answered all substantive questions but declined to reveal the identity of Norris Vitchek, claiming a privilege not to reveal his sources (under the first amendment and state law) as a journalist. The plaintiffs moved in New York to compel Balk to reveal his source. Although strongly in sympathy with plaintiffs’ case, Balk resisted, insisting (a) that to reveal his source would destroy his ability to continue to operate as an investigative journalist, since he would lose the confidence of his sources, and (b) that, as a condition of obtaining the article, he and the magazine had guaranteed Vitchek in writing not to reveal his identity and faced a claim for indemnity by the source if they breached that agreement and Vitchek were thereafter held liable for damages (in the civil rights suit) as a result of his revelations to Balk. The court rejected the claim of constitutional privilege, and passed to the claim of state privilege. The plaintiffs argued that, since the underlying litigation was a federal question case based upon the strong federal public policy in favor of civil rights liberalization, the court could not uphold a privilege based upon state law. Balk contended that it would be an inexplicable anomaly of justice to order him to breach his confidence when the plaintiffs’ lawsuit might never have been possible had he not obtained and printed the information in his article, since Vitchek would not have revealed that information but for his reliance

88. Prior law appeared to sustain the conclusion that there was no such constitutional privilege. Garland v. Torre, 259 F.2d 545, 550 (2d Cir.), cert. denied, 358 U.S. 910 (1958). But cf. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970). Thereafter, while the case was on appeal, the United States Supreme Court decided Branzburg v. Hayes, 408 U.S. 665 (1972), which reversed Caldwell and definitively rejected the concept of any such constitutional privilege. But in Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973), Chief Judge Kaufman sought to limit the scope of Branzburg and may have resuscitated the possibility of such a privilege somewhat.

89. Both New York (the deposition forum) and Illinois (the trial forum) had enacted statutory journalists’ privileges after the deposition but before the motion to require Balk to reveal his source. N.Y. Civ. Rights Law § 79-h (McKinney Supp. 1974); Ill. Ann. Stat. ch. 51, §§ 111 et seq. (Smith-Hurd Supp. 1974). The statutes were substantially similar, and hence the court found it unnecessary to decide whether the law of the deposition state or trial state should predominate. 339 F. Supp. at 944.
on Balk's assurance that as a journalist he would keep it confidential. Moreover, Balk was merely a non-party witness and was not personally involved in the allegedly wrongful conduct which supported the plaintiffs' federal question claims. In a well-reasoned opinion, Judge Dudley Bonsal acknowledged that "the issue must be resolved under Federal law," but then sought to balance the competing federal and state interests presented, including the state public policies reflected in the New York and Illinois statutes. He concluded that, on the facts presented, the claim of privilege should be upheld. The Second Circuit affirmed and the United States Supreme Court declined to review the case.

Baker had constitutional overtones and thus may not be entirely representative of federal cases dealing with state evidentiary privileges, but it embodies the correct approach to the problem: namely, a flexible balancing of the competing federal and state public policies, as applied to the facts presented. While it fails to answer some of the problems presented (e.g., whether the law of the deposition state or the trial state is predominant and what effect, if any, the inclusion of state pendent claims should have on the claim of privilege), Baker offers an excellent model for the courts to follow in other federal question litigation.

In sum, the federal courts should adopt a balancing approach in determining what effect to give to claims of state evidentiary privilege in federal question litigation, focusing primarily on the strength and nature of the competing federal and state public policies involved. State evidentiary privileges should be accepted, unless there is an overriding federal policy which would be undermined by deference to the particular state privilege claimed or if it would be manifestly inequitable to uphold the state privilege on the facts presented.

The federal policy will usually be cognizable from the nature of the federal statute or other rights involved and its legislative and judicial history (to the extent available). The state public policy will usually be determinable from similar sources. Other factors which may be examined to determine which of these two policies is predominant and

90. 339 F. Supp. at 944.

91. Id. at 945. "Balancing these interests in this case, and the belief that plaintiffs have other ways of obtaining the information which they seek, the court concludes that Mr. Balk should not be required to disclose his confidential source. This determination is consistent with the First Amendment and the public policy of Illinois and New York." Id. This same type of balancing test was recently applied by Judge Weinstein in a well-reasoned opinion upholding a journalist's claim of privilege. Judge Weinstein's opinion is further noteworthy for its treatment of the problem under the new Federal Rules of Evidence as well as current case law. See Apicella v. McNeil Laboratories, Inc., Civil No. 74-635 (E.D.N.Y., filed Feb. 24, 1975).

92. See note 85 supra.
should control in the particular case are: (a) whether the federal statute affording federal jurisdiction grants the federal courts exclusive or only concurrent jurisdiction; if the former, then a stronger case may exist for disregarding state privileges than if state courts are simultaneously deciphering and decreeing substantive law under the federal statute; (b) whether decisional law on other substantive issues under the federal statute tends to make reference to state law; if so, then recognition of a state privilege may represent a lesser inroad to federal uniformity and supremacy than if not; (c) whether the federal statute is part of an overall federal preemption or regulation of the field involved (e.g., the Federal Communications Act) or merely affords a forum for grievances which are essentially analogous to state law adjudications (e.g., the Federal Tort Claims Act); the massive gray area between those extremes must be sorted out; (d) whether there are pendent state claims in the case (e.g., state unfair competition claims in federal antitrust litigation) and to what extent they are or will be actually involved in the trial; (e) whether deference to the state privilege will necessarily alter the outcome of the litigation (as in Courtland) or is merely one of several avenues available to the discovery or testimony involved (as in Baker); (f) whether the person asserting the state privilege relied on the privilege at the time of the conduct involved (e.g., an attorney-client communication) or whether the claim of privilege is a mere afterthought conjured up or realized for the first time during the litigation (e.g., reliance on the Dead Man's Statute); (g) whether the person asserting the privilege is merely a witness or actually a party to the litigation; more deference should normally be accorded a good faith claim of privilege by a non-party witness, unless he is centrally involved in the merits of the controversy being litigated (e.g., a co-conspirator or the accountant for an alleged wrongdoer in a bankruptcy or securities fraud case). Other factors more directly linked to the particular fact situation will undoubtedly arise as more cases are presented and decided on the point.

While hard and fast rules might make the courts' task easier and more predictable, state evidentiary privileges deserve more in-depth treatment since they involve substantive rights and policies of potentially great importance, not only to the persons involved but to society in general. Neither the mere existence of a state privilege nor the possibly fortuitous circumstance that the conduct involved is being tested in a federal question case should determine the matter once and

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for all. Moreover, a case-by-case analysis may well deter forum shopping, since an ad hoc test should prevent definitive predictability of result for particular courts. In any event, if the ultimate aim of choice of law rules is to provide "a solution which, from the perspective of the legal order in question, is the most appropriate (or 'apt') regulation for the situation that has arisen . . . ,"95 then the balancing approach would appear most likely to achieve justice in the maximum number of instances.

V. STATE PRIVILEGES UNDER THE FEDERAL RULES OF EVIDENCE

As now adopted by Congress and signed into law, the Federal Rules of Evidence leave the question of state evidentiary privileges where it presently stands under the case law.96 The congressional rules do not codify a federal pronouncement of precisely which state privileges are to be "federal" evidentiary privileges as well, available in all federal litigation, as the original draftsmen of the rules, as endorsed by the United States Supreme Court, had proposed.97 The genesis of article V (the portion covering evidentiary privileges) of the Federal Rules of Evidence is interesting and of possible importance to future decisions on the question.

The Judicial Conference of the United States, which is directed by federal statute to "carry on a continuous study" and recommend


96. After much debate and hearings in both houses of Congress, Congress enacted the Federal Rules and President Ford signed them into law in January 1975, to become effective July 1, 1975. Pub. L. No. 93-595 (Jan. 2, 1975) (reprinted in 43 U.S.L.W. 137-44 (U.S. Jan. 14, 1975)). Rule 501, as enacted, is the version proposed by the House Judiciary Committee; it is quoted in note 127 infra. Another provision of the congressional statute (detailed in notes 140-41 infra) provides that no future federal evidence rules may be promulgated regarding evidentiary privileges until Congress has first reviewed them and approved them by specific statute.

The development of, and the alternate proposals for, the privilege portion of the Federal Rules (article V) are detailed below. At the outset, however, it should be noted that the Federal Rules of Evidence do not deal specifically with the added question: which state's law should be applied or referred to as the source of "federal common law" in a multistate situation where the different states have conflicting public policies? Hopefully, in such situations, the courts will adopt the liberal attitudes contained in the discussion and cases in Parts III and IV above. As we have seen, determining whether federal or state law controls is only the threshold question; it is often far more difficult and significant to determine which state's law should control or be the model for federal common law.

proposed "general rules of practice and procedure" to the United States Supreme Court,98 resolved in March 1961 to establish an Advisory Committee on Rules of Evidence.99 In 1962, a Special Committee of the Judicial Conference, which Chief Justice Earl Warren had appointed in 1961, further resolved that it was both feasible and desirable to prescribe uniform rules of evidence for federal litigation.100 Thereafter, in 1965 the Chief Justice appointed a distinguished Advisory Committee on Rules of Evidence, chaired by Chicago attorney Albert Jenner, to draft such rules after soliciting suggestions from the bar, bench and legal scholars.101 The Advisory Committee issued two drafts: one in 1969 and one in 1971.102 Ultimately the United States Supreme Court (by an eight to one vote) approved the second draft of the proposed rules in November of 1972, to become effective on July 1, 1973.103

The Judiciary Committees of both houses of Congress immediately were flooded with a flurry of criticism of the new rules, especially article V.104 In response, Congress passed a hastily drafted bill105 which deferred the rules becoming effective until Congress could study

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101. Rothstein, supra note 61, at 125 n.3. Other distinguished members of the Committee included Federal Judges Jack Weinstein (see note 9 supra) and Charles Joiner (see note 108 infra). The reporter was Professor Edward Cleary.


103. Supreme Court Draft, 56 F.R.D. 183 (1973). Justice William O. Douglas was the lone dissenter, arguing that the rules exceeded the enabling legislation and that the rules had not first been carefully enough thought out by the Court itself. Id. at 185-86.


EVIDENTIARY PRIVILEGES

and possibly amend them. Thereafter the two congressional Judiciary Committees began hearings on the rules.106
Underlying the tempest regarding article V were two principal controversies: first, are privileges merely procedural (as the Advisory Committee assumed)107 or are they substantive (as the weight of other authority has held);108 and secondly, should the Supreme Court have taken it upon itself to propose such sweeping generalized rules?109
The predominant view is that the Supreme Court does have the power to promulgate procedural evidentiary rules, but that Congress has the further power to regulate and amend those rules since the Court's authority itself emanates from a congressional delegation of its own legislative powers.110 However, since most authority supports the view that privileges are substantive rather than procedural in nature, it has been argued that the Court's rule-making power does not extend to the area of evidentiary privileges.111
Article V as proposed by the Advisory Committee sought to detail specifically what privileges would be cognizable in all federal litigation, to the exclusion of all other possible claims of privilege.112 The

109. See note 103 supra. Professor Charles Alan Wright has cautioned: "The Advisory Committee on Rules of Evidence has . . . defined those privileges it thinks should be recognized and has expressly refused to honor broader state privileges. That the Supreme Court has the power to adopt rules to this effect, and that they can be applied even in diversity cases, seems clear from Hanna v. Plumer [380 U.S. 460 (1965)]. That the Court ought to follow a course that will produce such a serious intrusion on state policies is highly doubtful." C. Wright, Federal Courts § 93, at 415 (2d ed. 1970) (footnotes omitted); accord, Weinberg, Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives, 122 U. Pa. L. Rev. 594, 597 (1974) (hereinafter cited as Weinberg).
111. Note, supra note 99, at 1193. Compare Suffolk Note 1219 (arguing that Congress has the power to legislate rules on all aspects of evidentiary matters for the federal courts).
112. Rule 501 of the Advisory Committee rules, as promulgated by the United States Supreme Court, thus provided: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a 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." Supreme Court Draft, 56 F.R.D. at 230.
Advisory Committee insisted that "there are persuasive answers" to the "arguments advanced in favor of recognizing state privileges." In federal question litigation, the Advisory Committee found its "answer" simply in "the supremacy of federal law." In diversity cases, the Advisory Committee argued (1) that privileges are not truly matters of substance since they tend to arise only as an "incident" of a case and are "called into operation, not when the relation giving rise to the privilege is being litigated, but when the litigation involves something substantively devoid of relation to the privilege;" (2) that since state privileges are not recognized in federal criminal litigation, which is more "sensitive" than civil litigation, they should not be recognized in the latter either; (3) that "[t]he demise of conformity and the

113. Supreme Court Draft, 56 F.R.D. at 233-34. Interestingly, the draftsmen did provide for reference to state law in other aspects of their proposed rules of evidence (e.g., rule 302, regarding presumptions in civil diversity cases (56 F.R.D. at 211)).

114. Supreme Court Draft, 56 F.R.D. at 232-33. Without examining the cases in detail, the Advisory Committee flatly stated that: "While a number of the cases [which refused to recognize state evidentiary privileges] arise from administrative income tax investigations, they nevertheless support the broad proposition of the inapplicability of state privileges in federal proceedings. "In view of these considerations . . . to the extent that they accord state privileges standing . . . , the rules go beyond what previously has been thought necessary or proper." Id. at 232.

As shown in detail above, this pronouncement appears to be unjustifiably self-serving and simply fails to grapple with the problem in sufficient detail.

115. Supreme Court Draft, 56 F.R.D. at 233. While the Advisory Committee may be accurate in this statement, it does not follow that privileges are not "substantive" in nature. All it means is that, in most cases, the assertion of the privilege is not the focal issue. But if the witness actually relied on the privilege in his conduct outside of the litigation, to sweep it away because his conduct was tangential to the litigation is simply to close one's eyes to the nature of the policy underlying privileges: namely that the state wishes to recognize and foster the confidential relationship involved. The context of that relationship in the particular case at hand may be a factor to consider (e.g., to see if there is a specific compelling federal interest in conflict with the state policy, or to determine whether the witness is acting in good faith). But it surely should not dictate a black letter disposal of the privilege altogether. Otherwise no one could ever rely upon the state's promise of confidentiality for fear that any communication might (because of what the Advisory Committee calls the "accident of diversity") come under the scrutiny of a federal court and thus have to be disclosed, even if presented in a context related solely to state-created rights and state law issues. If such were or is to be the case, the draftsmen of the Federal Rules of Evidence will have unwittingly countermanded all state privilege policy by making every privileged communication susceptible to disclosure in virtually any type of litigation, regardless of the issue. The fact that privileges may not be available in certain specific federal litigation situations (see note 128 infra), does not mean that they are "illusory" or should be abandoned wholesale in federal cases regardless of the non-criminal and non-fraudulent nature of the privileged communications.

116. Supreme Court Draft, 56 F.R.D. at 233. This reasoning seems to be simply a makeweight. Even in matters of constitutional privilege (e.g., the privilege against self incrimination), major distinctions exist between the availability and nature of the privilege in criminal as opposed to civil litigation. See, e.g., Kaminsky, Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis, 39 Brooklyn L. Rev. 121, 141-55 (1972).
adoption of the Federal Rules of Civil Procedure” represent a paramount federal government “concern in the quality of judicial administration conducted under its aegis,” and (4) that “forum shopping is recognized as legitimate in the American judicial system” so that it is irrelevant that litigants may choose between the federal and state courts based upon the divergent views which would exist on the privilege issue.

None of these arguments is particularly convincing. All seem to have been fashioned to justify a philosophical predisposition that evidentiary privileges are really only procedural in nature and, regardless, are an annoying impediment to full and unfettered testimony and

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117. 56 F.R.D. at 233. This argument appears similar to the one raised in some of the cases, but rejected in most, that the mere existence of rule 43(a), Fed. R. Civ. P., virtually preempts the field as to state evidentiary privileges. Cf. note 24 supra and accompanying text.

118. 56 F.R.D. at 234. The “forum shopping” argument obviously has a double edge and, indeed, is often difficult to articulate. A case-by-case analysis will also foster a certain amount of forum shopping, but elimination of forum shopping is certainly not the paramount concern involved when state privileges are involved. Yet it must be said that the Advisory Committee's undocumented conclusory treatment of this matter smacks of a platitude, not a well reasoned or studied analysis.

119. See notes 115-18 supra. See also Weinstein, The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence, 69 Colum. L. Rev. 353, 361-73 (1969). Judge Weinstein aptly summarized the argument for uniformity which underlies the entire concept of having federal rules of evidence: “[L]ooked at from the vantage point of Washington, the pressure towards uniform rules of evidence in the federal courts is great. It would make it easier to move judges from state to state to meet temporary litigation pressures and thus would accommodate the strong administrative tendency towards a more integrated and efficient federal judicial system. It gives recognition to a growing national bar practicing in the federal courts and the desirability of making it easier for both lawyers and their national clients to find an equal grade of justice administered by familiar procedure in any federal court in the country. Where federal substantive policies are being enforced, a more uniform policy is fairer and more predictable and is likely to strengthen and bind the nation together.” Id. at 359.

Others take serious issue with this position, arguing (a) that a new federal codification of evidence rules will put unfair burdens on the practicing bar (most of whom, as this view maintains, do not practice out of their home states) to distinguish between it and their local state evidence law; (b) that federal trial judges are largely drawn from the local bar anyway and sit elsewhere only infrequently; and (c) that “Judge Weinstein's argument that federal evidentiary law would make uniform the administration of federal substantive law overlooks the extensive concurrent jurisdiction of federal questions exercised by state courts and their sizable exclusive jurisdiction over numerous federal questions” where the amount involved is less than $10,000. Weinberg, Choice of Law and the Proposed Federal Rules of Evidence: New Prospectives, 122 U. Pa. L. Rev. 594, 604 (1974); see Leach, State Law of Evidence in the Federal Courts, 43 Harv. L. Rev. 554, 584 (1930). See also note 124 infra & note 61 supra.

These conflicting views illustrate the substantial and sometimes bitter difference of opinion which exists over whether there should be uniform federal rules of evidence at all. Notwithstanding some persuasive advocacy to the contrary (especially Ms. Weinberg's excellent article), the argument in favor of federal rules on procedural questions appears to be the more persuasive. However, a sharp distinction appears appropriate for substantive matters such as evidentiary privileges, as to which the interest of uniformity appears less persuasive, if persuasive at all.
disclosure. That view, as already noted, appears to be a minority view among the courts, and, in any event, one which has been severely criticized.120

Several critics of the proposed article V sought to persuade the Advisory Committee to correct apparent errors or reinstate stricken privileges (such as the doctor-patient privilege).121 The consensus among the critics was that the draftsmen had simply gone too far in attempting to codify the area and, in doing so, had given too little thought to important substantive questions which were better dealt with under previously existing case law.122 On the other hand, others

120. See notes 33, 35 & 108 supra. For example, Professor Thomas G. Krattenmaker has criticized the Advisory Committee's position regarding diversity litigation as follows: "The decision reflected in the Rules, then, to give no weight in diversity cases to state privileges virtually is unprecedented. Nevertheless, in the course of the hearings in the House, Professor Cleary stated, 'I think we would have to say that the present law is unsettled in the diversity area. The cases are in disagreement as to whether you apply a State-created privilege or not.' [Hearings on Proposed Rules of Evidence Before The Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 64 (1973) [hereinafter cited as House Hearings]]. It is exceedingly hard to believe that such a statement could be uttered with a straight face by anyone who had read the cases in this field with a modicum of care." Krattenmaker, supra note 60, at 105 n.176.

The significance of such a departure from case law was aptly emphasized by Mr. Justice Douglas in his dissent from the promulgation of the rules: "[T]his Court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit. Those who write the Rules are members of a Committee named by the Judicial Conference. The members are eminent; but they are the sole judges of the merits of the proposed Rules, our approval being merely perfunctory. In other words, we are merely the conduit to Congress. Yet the public assumes that our imprimatur is on the Rules, as of course it is." Supreme Court Draft, 56 F.R.D. at 185.


122. Not all of the criticism involved the Advisory Committee's apparent bias against privileges. For example, almost paradoxically, the draftsmen provided in rule 513 that:

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

(b) Claiming privilege without knowledge of jury. 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.

(c) Jury instruction. 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." 56 F.R.D. at 260.

This rule might find broad general support in the cases arising from criminal proceedings (see, e.g., Griffin v. California, 380 U.S. 609 (1965); Courtney v. United States, 300 F.2d 521 (9th Cir.), cert. denied, 393 U.S. 857 (1968) and cases involving certain claims of privilege in civil litigation (see, e.g., Pennsylvania R.R. v. Durkee, 147 F. 99 (2d Cir. 1906); A.B. Dick Co. v. Marr, 95 F. Supp. 83, 101-03 (S.D.N.Y. 1950) (Medina, J.), appeal dismissed, 197 F.2d 498 (2d Cir.), cert. denied, 344 U.S. 878 (1952)). But it totally ignores other lines of civil cases, such as
also praised article V of the rules as an enlightened and long overdue expression of uniform federal law on the point.123 Still others, while

those dealing with the privilege against self-incrimination—which was the particular privilege cited by the Advisory Committee as an illustration in its own note to rule 513 (56 F.R.D. at 260). Substantial federal and state authority exists for precisely the opposite rule when a party invokes his privilege against self-incrimination in civil litigation. See, e.g., United States v. Mammoth Oil Co., 14 F.2d 705, 729 (8th Cir. 1926), aff'd, 275 U.S. 13 (1927); United Elec. Radio & Mach. Workers v. General Elec. Co., 127 F. Supp. 934 (D.D.C. 1954), aff'd in part and vacated in part on other grounds, 231 F.2d 259 (D.C. Cir.), cert. denied, 352 U.S. 872 (1956); Kaminsky, supra note 116, at 143-55 and state and federal cases cited therein. By its broad pronouncements in rule 513, the Advisory Committee would have unintentionally, but inexcusably, abrogated that well-settled rule because of its inadvertent failure to review the civil cases dealing with refusals to testify based upon the self incrimination privilege, an area which is fraught with potential abuse by claimants of the privilege. See Kaminsky, supra.

Moreover, the cases actually reflect a substantial difference of opinion as to what comment or inferences can be made regarding a claim of evidentiary privilege based upon state statutory law in civil litigation. See Annot., 32 A.L.R.3d 906, 909-13 (1970) and 34 A.L.R.3d 775 (1970) and cases cited therein. See also 8 J. Wigmore, Evidence § 2322, at 630 (McNaughton rev. ed. 1961). The American Law Institute's Model Code of Evidence (1942) provided in its rule 233 that: "If a privilege to refuse to disclose, or a privilege to prevent another from disclosing, a matter is claimed and allowed, the judge and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom." That rule appears to be the preferable view; but a detailed law review article on this subject would certainly be a benefit to the courts and bar alike.

123. See, e.g., Suffolk Note, supra note 22. Albert Jenner, Chairman of the Advisory Committee, took special issue with rule 601 of the House draft of H.R. 5463, 93d Cong., 2d Sess. (1974), the version eventually enacted into law, which provides: "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." Fed. R. Evid. 601.

The Supreme Court draft of rule 601 had provided merely that: "Every person is competent to be a witness except as otherwise provided in these rules." 56 F.R.D. at 261.

The Advisory Committee Notes show that the draftsmen viewed the Dead Man's Statute as within the purview of rule 601 and not article V. The cases do not appear fully to agree. See note 80 supra and accompanying text. Mr. Jenner argued that the House amendment would reinstate the Dead Man's Statute in diversity cases which he described as a major injustice to "honest litigants":

"Now, exactly what that does in diversity cases is to require the district court sitting in a particular State to apply the Dead Man's Statute if there is one in that State. First the court must find out what the terms of the Dead Man's Statute are in that State. The lawyers have to study and restudy it and reorient themselves as to where it applies and of course, so do the Federal judges. There is no Dead Man's Statute that is the same from State-to-State, not one. There are many States that have no Dead Man's Statute at all, and they have done very, very well.

"This is a destruction of a measure of uniformity; it is an abandonment on the part of the Congress of the United States to allow State Legislatures to pass Dead Man's Statutes under local persuasion. This is really a disservice to the law of evidence. What it does is interpose serious roadblocks in the way of honest litigants. All this issue concerns, Mr. Chairman, is the credibility of witnesses. I have tried many jury cases now in a little over 43 years, and juries are very, very alert about conferences or statements attributed by one who is a live litigant about what some person who is dead said back in the past. The witness is subject to cross-examination.
supporting the notion of uniform rules, recognized that the Supreme Court draft had many problems and urged that the federal privilege rules be amended to be more "in general accord with the policies behind prevailing state privileges where such policies seem at all justifiable."124 In the meantime, relying on the Supreme Court's imprimatur for the proposed draft of the rules, several federal judges proceeded to apply the proposed article V as a matter of comity.125

After conducting its own hearings on the matter,126 the House Judiciary Committee sided with the critics and resolved to strike article V in its entirety and, essentially, to replace it by referring the

“What is done by the rule as submitted by the Court is not what these State Dead Man's Statutes do: they block off relevant evidence that should be admitted. The States can't make up their minds from State-to-State, even from session-to-session of the Legislature what the Dead Man's Statute is going to be." Hearings on the Federal Rules of Evidence before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 208 (1974) [hereinafter cited as Senate Hearings].

Mr. Jenner's view demonstrates the underlying premises on which the Advisory Committee appears to have operated; namely, that uniformity is the paramount concern and that the Advisory Committee would determine once and for all which privileges are just and which are not. The flaw in this reasoning is illustrated in Justice Douglas' dissent, quoted in note 115 supra. This is not to quarrel with the substance of Mr. Jenner's remarks regarding the Dead Man's Statute. Rather it is to say that such ultimate judgments on substantive matters such as privileges should be made by the legislature, if on an overall basis, or the courts, if on an ad hoc basis. These judgments should not be delegated definitely to an ex officio committee, no matter how distinguished and learned its members. Nevertheless, the Senate Judiciary Committee rejected Mr. Jenner's views and proposed amendments to the House's rule 601 only to conform it to the Senate's suggested version of rule 501, so as to read: "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and remanded under 28 U.S.C. § 1441(b), the competency of a witness is determined in accordance with State Law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision." Senate Report, supra note 100, at 13. As already indicated, Congress also rejected Mr. Jenner's view and enacted the House's version of rule 601.

124. Rothstein, supra note 61, at 130-31. Professor Rothstein reasoned that, if the rules could be corrected, uniformity was desirable since "sufficient experience has been accumulated concerning evidence questions to permit definite choices in most areas, including privileges." Id. at 130. Moreover, he argued, "divergence between state and federal law will diminish as states imitate the federal rules." Id. at 131 (footnote omitted). He predicted this on the basis of what had occurred after the Federal Rules of Civil Procedure were adopted and upon the fact that a number of states already had adopted evidence rules patterned after drafts of the proposed federal rules. Id. at n.28. See, e.g., Symposium, Proposed Nebraska Rules of Evidence, 53 Neb. L. Rev. 331 (1974). But cf. Weinberg, supra note 109, arguing that "if the history of state adoption of the Uniform Rules of Evidence and the Model Code of Evidence is any guide, this early showing will not in fact develop into a significant trend" of state adoption of the Federal Rules of Evidence. Id. at 613 (footnote omitted).


126. See House Hearings, supra note 120. The House Judiciary Committee conducted six days of hearings. House Report 5.
courts to the case law. The House Committee draft tracked rule 26 of the Federal Rules of Criminal Procedure for federal question cases, but sought to engraft upon it a new exception that made state law govern claims of privilege asserted regarding any "claim or defense as to which State law supplies the rule of decision . . . ." The new "exception" would apply in diversity cases and also leave state privileges available in federal question cases involving state law issues, to be resolved on a case-by-case basis. As with the Supreme Court draft, the House draft made no attempt to specify which state's law should govern, or be the model for federal common law in multistate situations such as those raised in the Palmer, Cepeda and Baker cases, but rather confined itself to the threshold issue of whether state law will be considered or followed at all.

The House proposal for article V produced its own flurry of criticism and discontent, ranging from those who simply did not like the House's draftsmanship to those who favored the basic concept of the Supreme Court version. Thus the Senate Judiciary Committee

127. Rule 501, as proposed by the House Judiciary Committee (H.R. 5463, 93d Cong., 1st Sess. (1973)) and now adopted into law, reads: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." Fed. R. Evid. 501.

128. Fed. R. Crim. P. 26 provides: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by 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."

The cases hold that federal, not state, law controls under Fed. R. Crim. P. 26, and Bankruptcy Act § 21, 11 U.S.C. § 44 (1970). See, e.g., Funk v. United States, 290 U.S. 371 (1933); cases cited in note 57 supra. Therefore, it may be argued with some force that the protection afforded by state evidentiary privilege statutes is illusory. See, e.g., note 133 infra. However, these limited exceptions involve areas of strong federal interest and do not appear to provide a proper basis for ignoring state privileges altogether in all federal litigation. Cf. note 115 supra.

129. See note 127 supra.

130. The House Committee reasoned: "The rationale underlying the proviso [passed by the House] is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy." House Report 9. As shown in note 137 infra, the Senate Judiciary Committee adopted this same rationale.

131. See Rothstein 128; Suffolk Note 1218-19 n.8.
conducted its own hearings in June of 1974. Professor James Moore, author of the leading multi-volume treatise on federal practice, termed the House proposal meritorious "as an interim statement" but "deficient" as a "long range" rule, primarily since it would "lead to confusion" in cases involving federal and pendent non-federal claims. The United States Judicial Conference's Standing Committee on Rules of Evidence and the Advisory Committee which drafted the Supreme Court version of the rules submitted a joint statement defending the Supreme Court draft and criticizing the House proposal for imprudently injecting "an element of doubt" in federal cases as to whether the privilege would or would not apply. The staff of the Senate Judiciary Committee submitted its own memorandum tracing the history of the House bill and the reasoning of

132. Senate Hearings, supra note 123, at 356, 360. Professor Moore's prepared statement read: "As to a non-federal issue, state law determines privilege under proposed 501, supra. This is workable (although not necessarily the most desirable) rule when the non-federal issue stands by itself or is cleanly separable from federal issues in the case. Very often, however, federal and non-federal issues are intertwined, as, for example, in cases involving pendent jurisdiction or where a federal statute partially incorporates state law such as § 60 of the Bankruptcy Act on preferences. In these situations, I believe the rule proposed by the House will lead to confusion." Id. at 277.

Professor Paul F. Rothstein, a prominent authority and author on evidence (see, e.g., note 61 supra), argued in a prepared statement: "Art. V (in common with the provisions in Rule 302 and 601) renders litigation involving mixed federal and state issues much too complex respecting evidentiary matters. Evidence on state issues is made subject to state evidence law; evidence on federal issues is made subject to federal evidence law. But more than that, evidence on state issues is subject to state evidence law only when an ultimate fact is sought to be proved (i.e., when an "element" is sought to be proved), as opposed to a mediate fact (a mediate fact is a step along the way and is not an "element"). Thus, two bodies of privilege law (or competency law or presumption law) must be applied and mastered, in the same case: federal and state law; and indeed, if a witness' statement is relevant on both a federal and a state issue, e.g. in a joined antitrust and unfair competition claim, the evidence may be allowed to be considered on one but not the other." Senate Hearings 265 (footnote omitted).

133. Senate Hearings 60. The Joint Committee stated: "Believing that privileges in the federal courts should be uniform and governed by federal law, the Joint Committees are unable to concur with the treatment given privilege by H.R. 5463. While Rules 502-513 if enacted as prescribed by the Court would give a strong thrust in the direction of uniformity in criminal prosecutions, federal question cases, and generally in bankruptcy, the proposed amendment injects an element of doubt. Experience under Rule 26 of the Criminal Rules offers small encouragement for the evolution of a comprehensive and uniform scheme of privileges through the decision-making process. . . . [T]he House's Rule 501 would leave privileges created by State law in the peculiar posture of being effective in diversity cases but ineffective in all other federal cases, notably in criminal cases, which undoubtedly lie in the area of greatest sensitivity. With these privileges thus rendered largely illusory, their limited recognition is explainable only in terms of possible impact on the outcome of litigation, a result that has been rejected generally elsewhere in the federal procedural field." Id.

Somewhat surprisingly, U.S. District Court Judge Charles W. Joiner submitted a prepared statement essentially supporting this view. Senate Hearings 73.
the House Judiciary Committee staff, with which it concurred. It explained that "since it was clear [to the House staff] that no agreement was likely to be possible as to the content of specific privilege rules," it was better to leave the law in "its current condition to be developed by the courts" on an ad hoc basis, rather than to bog down the entire package of evidentiary rules.\textsuperscript{134}

As a result of its hearings, the Senate Judiciary Committee suggested several amendments to the House bill including some in the new rule 501.\textsuperscript{135} The Senate version of rule 501 sought merely to minimize the confusion of which Professor Moore and others had warned was likely to be created by the House's reference to a "claim or defense" governed by state law, especially where pendent state claims are tried with federal question claims.\textsuperscript{136} In other respects, the Senate Committee

\textsuperscript{134} Senate Hearings 343. The Senate Staff Memorandum stated: "Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire Rules package, the Subcommittee unanimously determined that the specific privilege Rules proposed by the Court should be eliminated and a single Rule (Rule 501) substituted, leaving the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law. In addition, a proviso was approved requiring Federal courts to recognize and apply state privilege law in civil cases governed by Erie R. Co. v. Tompkins, [304 U. S. 64 (1938),] as under present Federal case law." Id. at 356-57; accord, House Report 8-9.

\textsuperscript{135} The Senate version of rule 501 would have read: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, State, or political subdivision thereof [sic] is determined in accordance with State law, unless with respect to the particular claim of [sic] defense, Federal law supplies the rule of decision." Senate Report, supra note 104, at 15-16.

The House bill was slightly different, as noted in the Senate Report; indeed, the Senate Report described the proposed Senate amendment to rule 501 as merely "technical." Id. at 7. Both versions provided for essentially the same case-by-case analysis. See also House Report, supra note 104, at 8-9.

\textsuperscript{136} "The committee is concerned that the language used in the House amendment could be difficult to apply. It provides that 'in civil actions ... with respect to an element of a claim or defense as to which State law supplies the rule of decision,' State law on privilege applies. The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law. Is a claim (or defense) based on such a reference a claim or defense as to which federal or State law supplies the rule of decision?"

"Another problem not entirely avoidable is the complexity or difficulty the rule introduces into
expressed its agreement "with the main thrust of the House amendment" and explained its proposed rule (which it described as only a "technical amendment" of the House rule) as follows:

The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced. Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise).

Regarding article V, the Senate Committee in conclusion emphasized that its proposal and that of the House "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."

The Senate Committee also accepted the basic tenet of the House Committee's proposed section 2 to H.R. 5463, which specifically empowers the Supreme Court to "prescribe amendments to the Federal Rules of Evidence, such amendments not to take effect however until they have been reported to Congress," so that Congress will have an opportunity to pass upon and disapprove them. But the Senate Committee suggested (without stating its reasons) deletion of the proviso in the House Committee's section 2 which requires that any such amendment of the Federal Rules of Evidence which deals with article V cannot become effective until or unless passed by an act of Congress. As passed by Congress this particular House provision remains the trial of a Federal case containing a combination of Federal and State claims and defenses, e.g. an action involving Federal antitrust and State unfair competition claims. Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other." Senate Report 12 (footnotes omitted).

137. Id. at 11. The Senate Committee explained the "thrust" of the House proposal, with which it specifically expressed its agreement, as follows: "[T]he proviso as passed by the House . . . reflects the view that in civil cases in the Federal courts, where a claim or defense asserted is not grounded upon a Federal question, there is no Federal interest in the application, or in its resolution, of a uniform law of Federal privilege strong enough to justify departure from State policy. Another rationale for the proviso is that the Court's proposal would have prompted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and Federal courts. The House provision, on the other hand, under which the Federal court is bound to apply the State's privilege law in actions founded on a State-created right, might limit the incentive to shop." Id. at 7 (footnote omitted).

138. Id. at 12 (footnote omitted).

139. Id. at 13.

140. The new provision will be codified as 28 U.S.C. § 2076. Its last sentence, which was
As already indicated, the Senate Judiciary Committee's suggestions regarding rule 501 apparently fell on deaf ears, for Congress ultimately adopted the House version. The Federal Rules of Evidence, as passed by Congress, were signed into law by President Gerald Ford under date of January 2, 1975, to become effective 180 days later. Thus, although Congress has now officially passed upon the question whether state evidentiary privileges should be given effect in federal litigation, it has merely adopted the majority lines of current

proposed by New York Congresswoman Elizabeth Holtzman and is included in § 2 of H.R. 5463, as enacted into law, provides that: "Any such amendment [to the Federal Rules of Evidence prescribed by the U.S. Supreme Court] creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress." Senate Hearings 360. See also House Report 27-29 (Separate Views of Representative Holtzman).


The rules also provide that: "The rule with respect to privileges applies at all stages of all actions, cases and proceedings." Fed. R. Evid. 1101(c). This provides the same scope for rule 501 as the draftsmen of the Federal Rules had proposed for their own article V. See Supreme Court Draft, 56 F.R.D. at 347; Revised Draft, 51 F.R.D. at 462.

142. See note 96 supra.

143. As occurs when the two Houses of Congress pass amendments to, or slightly different versions of the same bill, a joint legislative conference was held in December 1974, after the Senate passed the Senate Judiciary Committee version in November of 1974 (120 Cong. Rec. S. 19896, S. 19908-17 (daily ed. Nov. 22, 1974)). Following the conference, some of the Senate proposals were accepted (e.g., rule 301), some reamended to create compromise positions (e.g., rule 803(24)) and some (e.g., rules 501 & 601) rejected and abandoned. See Conference Report which is the official joint conference report on the bill as passed. The Conference Report explained its conclusion as follows:

"The rule in the House bill applies to evidence that relates to 'an element of a claim or defense.' If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

"Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense. See Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942).

"In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. . . . When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law." Conference Report 7-8.

As already observed (note 96 supra), no attempt was made to codify guidelines to deal with the specific choice of law (as among different states) necessary where multistate fact situations are presented, as discussed in Parts III and IV supra.

144. See notes 96 & 143 supra.
decisional law, leaving future cases to be decided on a case-by-case basis with careful attention given to the countervailing federal and state public policies involved. Rule 501 thus appears essentially to have codified the same balancing test recommended hereinabove.  

VI. CONCLUSION

State evidentiary privileges are matters of substantive law which should not be discarded or blithely ignored by the federal courts absent a countervailing federal public policy or manifest inequity on the facts presented. In diversity cases, federal courts should apply and defer to state evidentiary privileges, as they do with other state substantive law. In federal question cases, federal courts should determine their own federal common law regarding evidentiary privileges; but in doing so, they should give weight to, carefully consider and, where not inappropriate in the light of the federal policy involved, defer to the state public policy and interests (as indicated by the factors outlined above) which underlie the claim of privilege. The ultimate determination in federal question litigation should be made by applying an interest balancing test on a case-by-case basis. Where more than one state’s public policy is involved, in determining which state’s public policy should predominate, the federal courts should utilize a center-of-gravity analysis to determine which state has the greater interest in the situation presented.

Article V of the Federal Rules of Evidence, as now adopted by Congress, appears to accord with these conclusions. Although the Senate version of H.R. 5463 appears to have been better reasoned, the House version which was adopted is not substantially different and is a positive legislative development. The Supreme Court version of article V, although virtually conceived and painstakingly drafted, appears to have been ill-considered and was correctly rejected.

145. Although the Senate Judiciary Committee’s version may be the better drafted of the two, the House version is workable and represents a positive legislative statement on the matter. The Joint Conference specifically contemplated continued judicial interpretation and case-by-case development of the scope of rule 501. Thus, upon presenting the Official Conference Report into the Congressional Record, the Chairman of the House Judiciary Subcommittee on Criminal Justice stated: “Rule 501 is not intended to freeze the law of privilege as it now exists. . . . [It] is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.” 120 Cong. Rec. H. 12,254 (daily ed. Dec. 18, 1974) (remarks of Rep. Hungate).

Hopefully the courts will give credence to the views expressed by Professor Moore and the Senate Judiciary Committee regarding the potentially confusing aspects of new rule 501, and will construe rule 501 so as to prevent or resolve such confusion—in accordance with their suggestions. If not, Congress should correct the confusion promptly by amending the rule along the lines suggested in the Senate Judiciary Committee’s Hearings and Report, as noted above.