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The History and Nature of Professional Immunity as Related to Guidance Counselors

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THE HISTORY AND NATURE OF PROFESSIONAL IMMUNITY
AS RELATED TO GUIDANCE COUNSELORS

by
Patricia Bernice Kubistal

A Thesis Submitted to the Faculty of the Graduate School of
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LIFE

Patricia Bernice Kubistal was born in Chicago, Illinois, January 19, 1938.

She was graduated from Alvernia High School, Chicago, Illinois, June, 1955, and from Loyola University, June, 1959, with the degree of Bachelor of Arts.

From 1959 to 1962, the author taught history at Von Steuben High School and Upper Grade Center in Chicago, Illinois. From 1962 to the present she has been Acting Guidance Counselor at Von Steuben High School and Upper Grade Center. She began her graduate studies for the degree of Master of Arts in Guidance and Counseling at Loyola University in September, 1961.
The purpose of this paper is to (1) review the concept of privileged communication (2) review the development of the rule of privileged communication (3) present an application of the rule of privileged communication to the guidance counselor for the first time based upon the Wigmore Rules of Evidence. The Wigmore approach is well accepted in legal circles. Since no test case is available on the question of whether or not a guidance counselor is entitled to privileged communication, the purpose here is to determine whether or not the guidance counselor has a legal basis for a claim to that privilege. Also it is hoped that it will be clearly brought out that in the absence of a statute a counselor has no claim to the privilege. Moreover, this study is limited only to the scope of privileged communications and therefore, will not discuss the aspects of possible suits for malpractice or suits for libel and slander.
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CHAPTER I

AN INTRODUCTION

The word, "counselor" with many connotations has been applied to lawyers, clergymen, advisors and basically to any individual whose primary concern has been the aiding of man tormented by problems. Stemming from this development, the fulfillment of this concept has been actualized in educational circles into a position termed the guidance counselor. During the twentieth century the guidance counselor has become very firmly implanted in our school system.¹

The guidance counselor by the very nature of his role gathers data highly personal in character and communicated in a counseling relationship with the student in a very personal and intimate manner.²

However, the legal role of the guidance counselor has never clearly been defined especially in the realm of privilege communication.³ Therefore, the object of this paper will seek to present the complete history and development of professional immunity as it relates to guidance counseling.

The purpose of this paper will to be re-evaluate the role of the guidance counselor.


³Ibid.
counselor in relationship to professional immunity by presenting a complete history and development of professional immunity. From this review this paper will endeavor to investigate what implications on professional immunity can be related to counseling. Professor Carter has succinctly defined the problem thusly:

Immunity in a legal sense, means a form or condition of exemption. Black defines it as 'an exemption from performing duties which the law generally requires other citizens to perform.' Hence a person, under certain prescribed conditions, may be immune from arrest or prosecution. Immunity is not an exemption or privilege merely to be enjoyed; it is a condition which by necessity accompanies certain official acts.

"Privileged communications" are defined by Black as being 'in the law of evidence any communications made to a counselor, solicitor or attorney, in professional confidence, and which he is not permitted to divulge'; otherwise called a "confidential communication."

Modern statutory practice has extended the right of immunity in regard to privileged communications to certain professions, such as theology and medicine, whose practitioners are habitually and inevitably the recipients of confidential communications.

With this nutshell view of the problem we shall commence our study.

The professional immunity of which we speak is probably more aptly termed, privileged communication. The term privileged communication has two meanings within the scope of the law. In one sense it refers to oral or printed utterances which although defamatory are not actionable under the law. In this area the emphasis is upon libel and slander. In the other sense, "privileged communication" refers to communication made in a confidential

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4Ibid.

relationship, that is recognized by law and not competent to be produced in
court during the trial of a case. The rule of privileged communication has
been sought by many groups, but the law has been very slow to extend coverage.
Common law has extended the privilege of privileged communication only to the
attorney-client relationship. The development of statutory law has extended
this privilege to other individuals and the relationships established therein.
Thus, we find a privileged communication relationship existing between husband
and wife, physician and patient priest and penitent and under certain set
relations.

With these preliminary thoughts in mind a nutshell view of the problem,
a general definition, and the breath of the term's application, we shall turn
our attention to the historical development of privileged communication. Only
after we have firmly grasped the historical significance of the term will be
able to fully envision its development and its application to the guidance
counselor.

6 Ibid.

7 Corpus Juris Secundum, op. cit., p. 654.

8 Ibid., p. 823.

9 Ibid., p. 746.

10 Ibid., p. 742.
CHAPTER II

THE HISTORY OF PROFESSIONAL IMMUNITY

The history of the privilege dates back merely four hundred years to the reign of Elizabeth I.\(^\text{11}\) Prior to that time an individual could not be compelled to testify; thus, he could chose to testify or not to testify based upon how he felt.\(^\text{12}\) However, in 1562 by Act of Elizabeth I a provision was established "for the services of process out of any court of record requiring the person served to appear and to testify concerning any cause on the matter pending in the court under penalty of ten pounds besides damages to be recovered by the party aggrieved."\(^\text{13}\) The reason for this delay in development appears to reside in the fact that there was little need for such an act up to this time. It appeared at its conception to be a very natural exception to the then novel right of testimonial compulsion.\(^\text{14}\) The new act was based upon the fundamental principle of government that the administration of justice is a mutual benefit


\(^{12}\) Clinton De Witt, Privileged Communications between Physician and Patient, (Springfield, 1951), p. 4.

\(^{13}\) Ibid.

\(^{14}\) Wigmore, op. cit., p. 543.
to all members of a community and every competent citizen is under an obligation to further it as the matter of public duty; that the personal sacrifice is a part of the necessary contribution for the welfare of the public. After the enactment, the courts were confronted with witnesses who refused to answer questions or testify on the grounds that their testimony would breach a commitment of confidential communication which they had made based either on their personal honor or on public policy. Thus, the theory of exclusion in those days differs from modern time in that the consideration was an objective rather than a subjective one, stemming from the oath of honor of the attorney rather than from the apprehension of the client. The courts were then faced with the problem which still faces us today, namely whether or not justice is truly served by extending the rule of privileged communications. However, as the centuries have passed, the law both in Great Britain and in American jurisprudence has both ironically extended the privilege of non-disclosure in favor of particular persons and at the same time has limited the scope and application of the original privilege. Broadly speaking the matters affected by the doctrine of privilege may be classified as political, judicial, social and professional. The more widely known of these privileges are those which relate to state secrets, political votes, trade secrets, religious beliefs, inter-marital facts and self-incriminating matters. In terms of personal


16 Wigmore, op. cit., pp. 170-74, 113-14; 521.

17 In re Frye (1951) 155 Ohio St. 345; 98 N.W.2d 798.
relations the privilege has been extended to husband wife, grand juries, petit juror, judge, arbitrators, public offices and government informers who furnish the government with evidence of crime and that which is granted to an attorney acting in a professional capacity. In some states the privilege has been extended into other personal relationships such as physician-patient relationships.

Of all of these relationships existing under the law, the attorney-client surely merits this exemption from the law. "The first duty of an attorney," it has been said, "is to keep the secrets of the client." In the beginning, the basis for the exemption rested in the honor of the attorney, and it was not until the 1700's that the concept was switched so as to protect the client and not the attorney.

Thus, the oldest of the privileges of communications appears to be unquestioned as far back as the reign of Elizabeth I. The privilege was recognized by Roman law although based upon a different setting than that of the common law. In essence, the privilege, as developed from the courts of common law, is that no attorney is permitted whether during or after the termination of his employment as such, unless with his client's consent, to

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19 Ibid.
22 Max Radin, "The Privilege of Confidential Communications Between Lawyer and Client," XVI (California Law Review (September, 1928), 487.
testify as a witness and disclose any communication, oral or documentary, made to him as such attorney by or on behalf of client in the course and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client, provided however, that any such communication is not made or advice given in furtherance of any criminal or fraudulent purpose. The privilege applies not only to the attorney, but also to his secretary or clerical assistant. Furthermore, the client himself cannot be compelled to disclose any communication between himself and his attorney, which his attorney would not disclose without his consent.23 However, it should be noted that nothing prevents the client from voluntarily giving forth confidential information, if he so desires.

In *Berd v. Lovelace* the solicitor was exempted from examination touching upon the case.24 In *Dennis v. Codrington* the court indicated on a motion to examine one Oldsworth:

> touching a matter in variance, wherein he hath been of counsel, it is ordered he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel either by the indifference choice of both parties or with either of them by reason of any annuity of fee.25

In *Kelway v. Kelway*, the solicitor was permitted to be questioned only upon

23Wigmore, op. cit., p. 542.


those matters which in no way touched upon his role or profession as a solicitor. This same idea is confirmed in Onbie's Case in which the courts stated "a lawyer who was of counsel may be examined upon oath as to the matter of agreement, not to the validity of an assurance, or to matter of counsel. Still upholding this concept in Waldron v. Ward the court declared that the lawyer is "not bound to make answer for things which may disclose the secrets of his client's case." More explicitly in Sparke v. Middleton, they declared that the lawyer could testify only to "such things as he either knew before he was of counsel or that came to his knowledge since by other persons.

From this development with some exception it is conceded that the purpose of the privilege is to encourage the employment of professional advisers by an individual in need of such services and to promote absolute freedom of consultation by removing all fear on the part of the client that his attorney may be compelled to disclose in court the communications or the acquired information in the course of his professional employment. This is an important fact which we shall examine later as we make applications to the role

30_Although generally accepted one need not look too far to find objections. It is not likely that the privilege will be abolished. Legal periodical literature has many such examples._
of the guidance counselor. The essential element here is that the courts have recognized the needs of a client to have secrecy so that the client can best grasp and work through his case in court. We shall reserve implications and inferences upon this fact for later consideration.

Although almost universally approved by both bench and bar this privilege has not escaped criticism and the wrath of many. In England Jeremy Bentham was perhaps the first to denounce it. In America, Chief Justice Appleton, of the Supreme Court of Massachusetts, was equally vehement in denouncing the privilege.

The rule of law by which the confidential communications of the client to his attorney we clothe [sic] inviolable and compulsory secrecy, is dishonorable and degrading to the legal profession--injurious to the public, and entirely unnecessary to the client for any proper and legitimate purpose. Were the rule abolished, the relation between the client and the attorney; wherever it existed, would be conferred within the bounds of integrity and enlightened public policy, as it should be.

However, the courts realized that the privilege was an obstacle in the complete discovery of truth. Thus, the doctrine underwent a change in the 1700's. The courts were faced on the one side with the privilege as an obstacle to the discovery of truth and on the other hand with a new theory which required an amplification of the privilege. "The new theory looked to the necessity of providing subjectively for the client freedom of apprehension in consulting his legal adviser." The new concepts existed side by side for

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32 De Witt, op. cit., p. 8.
33 Wigmore, op. cit., p. 543.
nearly a half a century and then a fuller development of the new concept began. One of the ironic factors of this development is that details of the privilege were still in their formative stages, in the 1800's. Actually, the two struggled side by side so differently and yet merging into one. Perhaps, no rule of evidence had so many unsettled points until the middle of the eighteenth century.

It is perhaps best at this point to sum up the nature of the development of this rule of evidence. First, the privilege did not exempt the client, for the point of honor stemmed not from him but from the attorney. This concept had little practical value except in answering a bill of discovery, for all during that period the party was privileged in common law courts from testifying in the trial of civil cases. However, as the newer theory began to develop the client began to be exempt from making discovery of communications relating to the very case at the bar. However, with the pressure of the older theory, it still had to be insisted from the bar that "the privilege is that of the client and not of the attorney."

The early decision of Justice Buller in 1772 passed unheeded. He proclaimed that "it is the privilege of the client and not of the counsel or the

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34 Ibid.
36 Ibid.
Thus, when in 1801, Lord Eldon declares "the privilege of the client and the public," the new theory begins to bear fruit.  

Under the older theory the attorney exemption was limited to communications received since the beginning of the litigation at the bar and for its purposes only. But this viewpoint was slowly losing disfavor. Chief Baron Borden in 1743 declared:

> When the case is ended, he is then only to be considered with respect to his former employer as one man to another and then the breach of trust does not fall within the jurisdiction of the Court, for the Court cannot determine what is form, but what is law.

Under the newer theory the concept of the privilege was first extended to include communications during other litigation, then in terms of contemplation of litigation, then to a controversy not under litigation and then finally to consultation for legal advice, with or without litigation in sight. The shackles of the older theory were not thrown off until the 1870's when the court commented when a counsel cited the earlier ruling as precedents in Minet v. Morgan: "The law has now attained to a footing which made me a little surprised to hear the matter re-opened."

One other point under the older theory was that the privilege could be

38 Wigmore, op. cit., p. 544.


40 Anseley v. Earl of Anglesea (1793) 17 How St. Tr. 1139, 1140.

41 Minet v. Morgan (1873) 8 L.R. Ch 361, 366.
waived by the attorney if he so desired. The Court would not admonish the attorney if he decided to break the trust. "The court cannot determine what is honor," said Chief Baron Borden in 1743. Although it is safe to assume that such action was not usually taken under the older theory, it retarded the development of the newer theory for several decades. Thus, the feeling aroused in the 1700's based on the rules of the 1500's that a client should have and does need complete confidence in his legal adviser in order for him to secure the best representation without apprehensions became implanted in the theory of the rule of evidence. Thus, Wigmore summarizes the theory before he begins an exhaustive analysis of each component of his summary thusly:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such the communication relating to that purpose made in confidence by a client, is at his instance permanently protected for disclosure by himself or by the legal adviser except the protection be waived.43

With this rather succinct and apt summary of the application of the privilege to the attorney-client relationship, we shall now trace the development of the privilege as it pertains to the physician-patient relationship. We shall note how the application differs. This is important in determining the role of the guidance counselor and his immunity.

Probably contrary to popular conception confidential communication between physician and patient is not privileged under common law.44

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42Anseley v. Earl of Anglesea, supra.

43Wigmore, op. cit., p. 554.

communication has been established by the rule of civil law in some jurisdictions.45 Outside the courtroom, the physician is left to the dictates of his conscience, his professional ethics and any other forces which might bear upon him on the question of whether or not he should disclose certain information communicated to him by his patient. However, when called to testify in court, the physician could not refuse to testify nor could the patient object to the physician's testimony in spite of whatever effect the testimony would have upon the rights, reputation or feelings of either the patient or the physician.46 The underlying principle was that the disclosure of the whole truth was essential to the proper administration of justice and that the need for it far outweighed any consideration of professional confidence.47 Although, the Courts of England as we have seen have developed this privilege and have assiduously applied it to the attorney-client relationship, the courts have refused to extend the privilege to the members of the medical profession. The extension in America have been made by statutory law.48 Illinois has no privilege for physicians.49

45 For one such an example see West's Louisiana Statutes Annotated, Section 15: 477 (1951)

46 Boyle v. Northwestern National Relief Association (1897) 70 N.W. 35.

47 De Witt, op. cit., p. 6.

48 Ibid., p. 13.

49 Jackson v. Pillsbury (1878) 44 N.E. ed 537, 380 Ill. 554.
The first epoch-marking case of the common law concerning this privilege occurred in 1716 in the trial of the Duchess of Kingston. The Duchess was tried before the House of Lords on a charge of bigamy. Mr. Caesar Hawkins, an eminent surgeon, who had attended the Duchess, her husband the the child, had been summoned to court. When asked whether the accused had admitted the first marriage the witness replied; "I do not know how far anything that has come before me in a confidential trust in my profession, should be disclosed consistent with my professional honor." 50 The Earl of Mansfield in his office as Lord High Stewart at the trial, ruled that the question must be answered and further commented:

I suppose Mr. Hawkins means to demur to the question upon the ground that it came to his knowledge some way from his being employed as a surgeon for one or both parties.

If all your lordships will acquiesce, Mr. Hawkins will understand that it is your judgment and opinion that a surgeon has no privilege, whether it is a material question, in civil or a criminal case to know whether the parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it. I take it for granted, that if Mr. Hawkins understands that it is a satisfaction to him, and a clear justification to all the world. If a surgeon was voluntarily to reveal these secrets to be saved, he would be guilty of a breach of honor and of a great indiscretion; but to give that information to a court of justice which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever. 51

Thus, the words of Lord Mansfield formulate the basis for continued common law rules. However, several points must be noted in this case. First,

50 Duchess of Kingston Trial (1776) 20 How St.Tr., 355.
51 Ibid.
it was the surgeon, Dr. Hawkins, who objected to giving testimony, not the Duchess. Secondly, the question asked related to the fact of a previous marriage and in no way to a medical concern discoverably by observation or examination, or to any communication by the patient with reference to her condition of health. The question itself was indeed without the scope of medicine. However, the courts have construed and applied the Mansfield decision to compel the physician to disclose all relevant facts of which he has knowledge whether such facts concern the physical imperfections of the patient, his health, or otherwise.

However, the common rule remains in force in England despite the efforts in recent years by the pressure groups of the medical profession to enact a change.

The first privilege on non-disclosure of the physician patient relationship in Anglo-American circles was created by the legislature of the State of New York in 1828. Whatever prompted the lawmakers to enact the statute is not clear. However, it has been contended that the revisers were influenced by a comment of Mr. Justice Buller in Wilson v. Rastall. It appears that there was a compelling pressure to give the medical profession the same cloak of immunity which had been given to the legal profession. The original statute,

54 De Witt, op. cit., p. 12.
56 Wilson v. Rastall supra.
which has served as the basic pattern of other states and other countries, provides that:

No person duly authorized to practice medicine or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. 57

During the century following its enactment a large number of states, and United States possessions enacted similar statutes containing the testimonial privilege. Unfortunately the lawmakers sacrificed clarity for brevity so that ensuing years note that revisions had to be made so that the existing statutes bear little resemblance to the original. 58

The basic principles of the statute are the same, but they differ in their wording, content, scope and limitations. 59 The privilege is extended to licensed physicians and in a few cases it has been extended to nurses and confidential clerical assistants. In New York, the privilege has been accorded to dentists. 60 The extent and scope of the jurisdiction's divergence can be visualized in the fact that in some jurisdictions it may be invoked in civil

57 New York Revised Statutes, op. cit.


59 De Witt, op. cit., p. 17.

60 Ibid.

61 Ibid.
actions; in some areas in both civil and criminal litigation; whereas in Louisiana, it can be claimed only in criminal action.\textsuperscript{62} In most cases the prohibition of disclosure applies only to information which was necessary to enable the physician to prescribe for or treat the patient. In a few states the law excludes any evidence obtained while treating the patient whether it be obtained in conjunction with the treatment of the patient or not.\textsuperscript{63} In Kansas, the statute prohibits a physician from disclosing any information relating to the patient's condition, injury, or the time, manner, or circumstance under which the ailment was incurred.\textsuperscript{64} In Pennsylvania "information" is not protected "only communication" made by the patient to the physician "which shall tend to blacken the character of the patient" are within the scope of the statute.\textsuperscript{65} The privilege in New Mexico, is limited "to any real or supposed venereal or loathsome disease, except in cases involving the Workman's Compensation Law where the scope of the privilege is enlarged."\textsuperscript{66} In Kentucky, the privilege is limited to cases which have to do with the subject of Vital Statistics.\textsuperscript{67}

The early statutes made no provision for the waiver of the privilege. However, the new statutes grant the right of waiver by the person, his

\textsuperscript{62} Ibid.
\textsuperscript{63} Ibid.
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid.
representative or acting in his place. However, there is a tendency in some statutes to withhold the privilege in those cases where the patient or his representative has voluntarily placed the issue of the patient's condition of health in the case. In certain areas, such as abortion or illegitimacy, the physician may be compelled to testify. These examples should suffice to show the divergence of meaning and application of the privilege. It therefore behooves an individual to fully examine and understand the law as it applies to his particular situation in his particular legal jurisdiction.

One final point which needs clarification is that we have not been concerning ourselves with a question of medical or professional ethics outside the courtroom. The statute places its scope only within the confines of the courtroom. Whatever the physician wishes to communicate outside the courtroom is beyond the statute's limitations. The physician is only bound by his medical and professional ethics, and his conscience. It is generally agreed that such a disclosure would be a violation of his medical and professional propriety. If a physician would indiscreetly disclose such information of a confidential nature, he would not violate the statute, however reprehensible his conduct might be. The statute only grants the right to seal the lips of the physician in the courtroom, if the patient so desires. But, the statute does not limit the physician from communicating this idea to any Tom, Dick, or Harry from Coast to Coast.

68 Ibid.

69 Jacobs v. Cedar Rapids (1917) 181 Iowa 407; 164 N.W. 841.
CHAPTER III

THE DEVELOPMENT OF PROFESSIONAL IMMUNITY

Although to some degree we have discussed the development of professional immunity in the preceding chapter. What we shall endeavor here is to show how the privilege generally operates and is generally applied in American jurisprudence. This development has been reached and is still continuing to be defined as litigation arises.

The first factor under consideration is that the principle that certain relations are confidential and certain communications privileged against disclosure by a witness is a rule of evidence public policy. The rule as we know it in American court jurisprudence is founded upon statutory law in cases other than attorney-client. When certain confidential relations exist between two individuals the law will not compel or permit one of the parties to violate the confidence by testifying without the consent of the other party.70 This refers to the communication which was made to the one party by the other party in the confidence in which the relation was inspired. Furthermore, a statute making both parties competent and compellable to testify cannot be construed to open the door to a full inquiry into such privileged communications.72 This

70State v. Flynn 257 S.W. 2d 69, 73; 363 Mo. 106.
72Sawyer v. Stanley 1 S.2d 21, 24; 241 Ala. 39.
rule of evidence only applies to that part of testimony which is deemed privileged. Thus, a witness must testify to all that knowledge relating to the case which does not come under the scope of privilege. In the case In Re Herrnstein, the court declared that the rule was conditional rather than absolute.

It ought to follow that no limitation of such nature should be recognized unless it is clearly demanded by some specific important extrinsic policy and that every intendment should be made against such demand.73

And yet clearly indicated—the statutory privileges are absolute in the sense that even in matters involving public justice, a court may not compel disclosure of confidential communications thus privileged.74

What is clearly accepted is that since privilege is a matter by statute, then an absence of statutes means that no privilege exists.75 The questions of whether or not the statute should be loosely or broadly construed depends upon the authority making the interpretation.76 The rule applies to all testimony including before trial examination and it extends only to the communication.77

The courts have generally upheld the historical concept of the newer theory that the public has the right to know the full truth and as such it

73 In re Herrnstein 6 Ohio Supp. 260, 266.
75 Ibid.
76 Parkhurst v. City of Cleveland 77 NE 29.
77 Weis v. Weis 72 NE 2d 2h5; 147 Ohio St. 41.
often handicaps justice, but the ultimate value of the privilege has been accepted despite this recognition.\textsuperscript{78}

The most important fact is that the privilege is only applicable to those relations which are recognized under the law. Thus, if two individuals enter a relationship which they consider confidential, and if this relationship is not recognized under the law, then no privilege exists and one or both parties must testify to the nature of the communication in that relationship.\textsuperscript{79}

In \textit{In re Albert Lindley Lee Memorial Hospital} indicated that any fact which was plainly observable to anyone could not be held to be privileged.\textsuperscript{80} Following this concept \textit{Ryan v. Industrial Commission of Ohio} held that if a third party, not a member of the privileged relation, overhears by accident or intent, and is not a necessary intermediary, such a person may testify as to the communication, "being absolutely unaffected by the law of privilege."\textsuperscript{81}

The rule does not apply to attesting witnesses.\textsuperscript{82} Moreover, the privilege does not terminate with the cessation of the protected relationship, but continues thereafter.\textsuperscript{83} Whether or not testimony shall be considered privileged will depend upon the law of the state and in the case of federal

\textsuperscript{78}Connecticut Import Co. v. Continental Distilling Corp. D.C. Conn 1 FRD 190.

\textsuperscript{79}Hutckiss v. Ernst 45 S.Ct. 201, 235; 235 U.S. 684; 50 L.Ed. 423.

\textsuperscript{80}In re Albert Lindley Lee Memorial Hospital C.A.NY. 209 F 2d 122.

\textsuperscript{81}Ryan v. Industrial Commission of Ohio App 72 NE 2d 907.

\textsuperscript{82}Jackson v. Pillsbury supra.

\textsuperscript{83}Martin v. Shain 156 P2d 681; 22 Was 2d 505.
courts it will reside upon the law of the state in which the case arose. The rule is to be applied only to those relationships to which the privilege applies, and is explicitly expressed in the statute. 84

Corpus Juris Secundum has aptly summarized the relationships which have been recognized under certain circumstances:

It has been said to be universally conceded that the privileged communications are those made by a person holding a certain confidential relation in particular to that of physician and patient, attorney and client, clergyman or priest and penitent, husband and wife, government and informer, assignors in certain instances and parties when the adverse parties are personal representatives of deceased persons or claim or deferred as heirs, etc. The tendency is not to extend the classes to which the privilege from disclosure is granted, but to restrict that privilege. So a privileged communication statute affords protection only to those relationships specifically named therein. The court may not prescribe such privilege in behalf of any particular class and the legislature alone may do so. The very fact that testimonial privileges are based on specific confidential relations is proof that they do not extend to all such relations. 86

Therefore, unless specifically stated, we may not assume that a privileged relationship exists. Therefore, what an individual may feel is a confidential relationship, is not a confidential relationship unless recognized under the law. Thus, in Illinois there exists no recognition of the physician-patient relationship. 87 Moreover, the communications to a spiritual adviser have privilege only if accorded by statute. The communication among other


85Weis v. Weis supra.

86Corpus Juris Secundum, op. cit., p. 741.

87Jackson v. Pillsbury supra.
stipulations must be made to the clergyman in his professional capacity and in the course of his ecclesiastical functions. Moreover the communication to a spiritual adviser must be made by a person seeking religious or spiritual advice, aid or comfort. The communication must be penitential in character and proper in order to enable the spiritual advisor to discharge the function of his office. Finally the communication must have been made and received in confidence.

In the State of Illinois only the attorney-client privilege is recognized. In general, however, from the decision of Jackson v. Pillsbury, the rule as to confidential communication such as those between attorney and client, does not apply to attesting witnesses. Moreover, the common law rule that no privilege as to communications between physician and patient exists still prevails unless changed by statute was specifically declared in Cronin v. Court of Honor 1st District.

From this analysis of both the history, origin and development, we are able to note that the privilege applies only to the attorney-client relationship under common law. Secondly, the privilege has been extended to other confidential relations by statutory law. In no place has the investigation

88 Johnson v. Commonwealth 221 Ill 2d 87.
89 Ibid.
90 Ibid.
91 Jackson v. Pillsbury supra.
92 Cronin v. Court of Honor 1st District 187 Ill App. 480.
pointed out that the guidance counselor comes under the scope of privileged communication and professional immunity. The courts seem to have been very specific that unless explicitly stated one has no basis upon which to assume that the privilege would be extended to the guidance counselor. Moreover, at the time of the investigation there were no cases pending on this question. Furthermore, if the rule of privilege were to be applied to guidance counselors, the guidance counselor would probably be accorded no more extension than that which exists to other privileged relationships. The most important factor as the history and the development of the privilege have so aptly pointed out is that the public is more concerned with the discovery of the truth than the desire for the privilege and that when the privilege is accepted, it is for the client's benefit. Thus, a guidance counselor could never use the privilege to protect himself or to prevent his comments from being subject to suit. The counselor should be fully aware that the client if he so desires, assuming a privilege under the law to exist, the client may disclose any or all communications made in a counseling relationship.
CHAPTER IV

THE GUIDANCE COUNSELOR AND PROFESSIONAL IMMUNITY

The relationship of the guidance counselor and the law is our immediate concern. While the guidance counselor may find himself involved in litigation for malpractice, a libel and slander suit, for testimony as an expert witness, our concentration has been upon one aspect the counselor's world, namely: privileged communication and the guidance counselor. To date there have been no cases or litigation before the courts which might shed light upon what the nature of privileged communication and the guidance counselor.

Most individuals in counseling look to David W. Louisell, a lawyer, whose specialty concerns psychiatrists and psychologists' rights under the law. His articles directly concern psychologists, but as McGowan and Schmidt state: "its implications for all professional counselors are obvious."93 Although the most direct way would be to examine guidance counselors and their role with the law, it is best to examine the Louisell approach so that we can examine what inferences might apply to guidance counselor in his role of a psychological

or, possessing a Ph.D. in the field of counseling, in his role as a counseling psychologist.

Perhaps one of the most concise and yet comprehensive reviews of the literature on this subject can be found in Volume I Number 1 of the *Counselor Education Supervision*. This Fall, 1961, issue looks at all the major articles concerning the counselor in the legal world. Frank W. Miller and Richard J. Simpson consider the areas of the counselor as an expert witness, the area of privileged communication, and the area of libel and slander. Many readers are quick to note the *Iverson v. Bogust* case in which the parents of a student who committed suicide after terminating counseling interviews with a professor of education, were suing the professor on the basis that the professor should have notified the parents of the girl's condition. For if the professor had notified the parents of the girl's condition, the parents contended, then the parents could have taken preventive measures and the girl would not have committed suicide. The court ruled in favor of the professor indicating that he was not responsible for the girl's suicide and that he had no commitment to notify the girl's parents since he could not pre-determine her actions.

However, most of the articles in this journal follow the same line of

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94Ibid.


96Iverson *v.* Bogust 10 Wis 2d, 129.
of thinking as previously cited articles in that they do not refer directly to the guidance counselor. In an article entitled, "A Suggested Privilege for Confidential Communications with Marriage Counselor," the author in the Pennsylvania Law Review suggest that the aspect of the privilege of confidential communication should be extended to marriage counselors. The journal also suggests Thomas M. Carter's article which we have mentioned in our paper initially and which we will subsequently mention. Martha Cottle offers an article with a most interesting title, "Witnesses--Privilege Communication to Psychotherapists." At the onset the reader receives the impression that this might be a most exhaustive article on the subject. However, Miss Cottle presents a brief resume of the Taylor case and Bender v. Ruvell. Both of which will be discussed later in the paper. John J. Cusack advocates in his article, "Qualify Your Psychologists," the licensing and defining of the role of the psychologist in the legal world. John L. McCary in, "The Psychologist in Court," in the Chicago Kent Law Review gives a brief and adequate presentation of the role of the psychologist in court. Finally,


98Carter, op. cit.


the article mentions the use of the multi-volume works of *Corpus Juris, Secundum*, Words and Phrases and by now the familiar works of Wigmore. In short, although the article presents many articles for review, each of these articles as suggested by our comment on certain selections present the same type of approach as the Louisell approach. At the present time only six states recognize the confidential relationships existing between psychologist and client. In these states the relationships is placed on the same level as the attorney-client relationship. This is seen in the New York Statute:

> The confidential relations and communications between a psychologist registered under provisions of this act and his client are placed on the same basis as those provided by law between attorney and client, and nothing in this article shall be construed to require any such privileged communications to be disclosed.

Thus, the concept which is sought by the American Psychological Association has not fully reached its objectives. The reason for this cannot be fully determined. One cannot place a point of emphasis on one particular cause for the lack of success in the legal work by the APA. This is somewhat understandable when one realizes that AMA has not reached complete recognition in all states. Needless to say the physician has been functioning in society much longer than the psychologist. Several factors have struck the writer in

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102 The six states are Kentucky, Georgia, Tennessee, Arkansas, Washington and New York.

reviewing the literature on the subject. First, David W. Louisell is the only noteworthy champion of the cause of legal rights of the psychological profession. Secondly, other commentators in the journals present a general re-hash of either Louisell comments or a review of the material in Corpus Juris Secundum or some other encyclopedic source. Thirdly, most of the commentators upon analysis disagree in their approach to the problem so that the reader becomes very often confused. This writer has noticed many errors in misinterpretation of the law and its implications. In the article entitled "Privileged Communication and the Clinical Psychologist," the comment was made that if a law recognizes the profession of psychologists then, the state should simply extend this privilege of privilege communications, without any regard for the complete development of the concept of privileged communication as it has come to us through the centuries. Moreover, the article declares that if the privilege cannot be extended on the basis of medical grounds then it could be extended on the basis that in some areas medical assistants have been given this right; so therefore, a psychologist could be conceived as a medical assistant and therefore invoke this right. A review of chapter twelve of Guttmacher and Weinhoten's book, Psychiatry and the Law presents a surface investigation of the nature of privileged communications. Yet, the book is heralded as the authority in the field. To add to this problem, the role of

the psychologist has not been defined under the law in those states which have not statutes governing psychologists. Moreover, one will find no definition of psychologist, psychotherapist or psychological counselor existing in the accepted legal dictionaries such as Words and Phrases.

Some writers define psychotherapy in terms of the medical field; yet legally, in many areas and states psychotherapy is not within the scope of the medical field. Professor Trout in his article "Why Define counseling in medical terms?" points out that in the state of Michigan that the practice of "psychotherapeutics constitutes the practice of medicine within the meaning of the statute prohibiting the practice of medicine without a license."\(^5\) Thus, in the state of Michigan the practicing of psychotherapeutics falls within the realm of medicine; as such an individual should be licensed by the state or he could be found guilty of practicing medicine without a license.

What then is needed and really what the APA has been suggesting is that we need to define under the law the following items. First, a definition of psychology, and psychotherapy. Secondly, we must determine its relationship, if any, to the medical field. Thirdly, we must determine the role of the state in licensing the psychologist. Fourthly, we must determine what the role of privileged communications should be. In this regard little has been forthcoming from the journals. Most of the articles have simply re-emphasized some of the cases affecting psychologists. Amidst all of this perhaps the profession should more explicitly define their terms and their functions as they see them. Perhaps, no article clearly brings this forth to the reader as Combs comments in his article "Problems and Definitions in Legislation." Combs indicates that the important element of psychotherapy is the relationship which is established between the client and the therapist. He states that the relationship is:

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\(^{5}\)Gordon M. Trout, "Why Define Counseling in Medical Terms?" Personnel and Guidance Journal \(XXII\) (May, 1954), 520.
defined differently by each school, but the emphasis he places is on the
generally accepted fact that good therapists in all schools tend to be alike
in their functions. He points out that psychotherapy is:

essentially a teaching relationship, or if one prefers it so, a
situation designed to help a client learn. Psychotherapy is, then
a learning situation in which a therapist seeks to help his client
to explore and discover a better way of life. Interestingly enough,
this is exactly what education attempts to do too. Education also
seeks through a relationship between teacher and student to assist
the pupil to find a better way of life. It is extremely difficult
to effectively separate individual therapy from group therapy of
group therapy from education.106

From this comment we can immediately see the difficulty which emerges when we
try to determine what the function of psychotherapy should be under the law.

Then Combs correctly concludes:

To do this with the degree of exactitude required for inclusion in
a licensing law seems clearly impossible. Many psychologists feel
it is extremely important that the term 'psychotherapy' should be
written into any licensing law, feeling that this would assure the
right of the psychologist to do psychotherapy. They feel that this
would assure the right of the psychologist to do psychotherapy.
They feel inclusion of psychotherapy as a stated function of a
psychologist and written into a licensing law would be public
acknowledgment that psychotherapy is a legitimate function of
psychology and would at the same time forestall the attempts of
certain other professions to establish psychotherapy as an
exclusive prerogative. This seems like a wise move when it is
possible, but is not really essential in view of the impossibility
of defining psychotherapy. The difficulty of writing a legally
workable definition of psychotherapy is a great frustration, but it
is also our best protection against the possibility of restricting
action by another profession.107

106 A. W. Combs, "Problems and Definitions in Legislation," American
Psychologist VIII (September, 1953), p. 66.

107 Ibid.
So we can easily envision the difficulty which is before us when we try to accomplish our first goal which is simply defining the position of the psychotherapist. From this we can discern how difficult it is to determine its relationship to the medical field especially if the psychologists' training is non-medical in orientation. Moreover, we can grasp the difficulty of the licensing board. Finally we would have to determine what the role would be in regard to privileged communications. Although the first three considerations have made little progress, the last contention concerning the relationship of the psychotherapist and the psychologists and privileged communication has found its way into litigation. The leading case is Taylor v. U.S. The court declared that the admission of testimony of a mental hospital physician and psychiatrists who had treated a defendant in a mental hospital to which the defendant had been committed until he was mentally competent to stand trial was in violation of the statute creating the privilege as to facts learned by a physician in treating a patient. Although this has been termed the leading case it should be noted that although the psychiatrist maintained his right to the privilege, it cannot fully be construed to the realm of the psychologist since the doctor held a M.D. What is important, however, is the commentary made in the opinion:

In regard to mental patients, the policy behind such a statute is particularly clear and strong. Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on the condition...It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns
from what they say--may be revealed to the whole world from a witness stand. 108

Therefore, what remains is to place this thinking into effect on the level of the psychologist. Louisell suggests that this should be investigated on the basis of the famous Wigmore four conditions of privilege. Yet, no commentary has been forthcoming in this vein from the realm of the psychological journals. However, an article in the Northwestern University Law Review analyzes the situation from this point. It is at the present time the most definitive attempt to justify the right that psychologists should be extended the right of privileged communications. 109

Wigmore does not apply his four criteria to the psychotherapist patient relationship. Therefore, the article endeavors to apply these principles to the psychotherapist-patient relationship as it is currently envisioned. The Wigmore principles are in essence: (1) Does the communication originate in a confidence? (2) Is the inviolability of the confidence vital to the achievement of the purposes of the relationship? (3) Is this relationship one that should be fostered? (4) Is the expected injury to the relation, through the fear of the later discourse greater than the expected benefit to justice in obtaining testimony? 110

Thus, after a review of the history of the privilege, the author points


110 Wigmore, op. cit., p. 527.
out that Wigmore would not grant the privilege to the physician-patient relationship, but he would grant it to the priest-penitant relationship. Therefore, the author applies the four principles to the psychotherapist-client relationship thusly:

Since the very essence of psychotherapy is a confidential personal relationship about matters which the patient is normally reluctant to discuss, any communication to a psychotherapist during the course of a consultation are (1) mostly of a confidential and secret nature, (2) less likely and far more difficult to obtain if the patient knows that they may be revealed during the course of some future lawsuit, (3) the outgrowth of a relationship which should be fostered, (4) the type of information which if revealed would produce far fewer benefits to justice that consequent injury to the entire field of psychotherapy. 111

Thus, we have the first analysis or application under legal evidence of what the role of the psychologist should be in the realm of privileged communication. Yet, the author proposes the problem that what information should be held confidential needs to be clarified. He also maintains that the terms psychotherapist needs to be defined within the words of the statute. He further feels that this immunity would rest only with the professional consultation in psychical or psychotherapeutic treatment. The author clearly distinguishes the point of counseling in that he said privileged communication could be extended to a general practitioner if a counseling relationship had been established. Thus, he admits that privileged communication still is not to be extended to the general practitioner and the counseling relationship by its very nature should merit the right to privileged communication on the same basis as the attorney-client relationship.

The important question seems to be whether or not in litigation such a

111Anonymous, op. cit., p. 388.
stand would be accepted. Although the court does not say that it needs the above reasoning for distinguishing a need for privileged communication to a psychologist over the medical field, there is a case in Illinois (a state which does not recognize the physician-patient relationship as confidential) which accepts the fact that a clinical psychologist had a right to privileged communication. It should be noted, however, that the case was heard in the Circuit Court of Cook County, in Illinois. Thus, such a decision could be appealed and possibly reversed by a higher court. The important point is that now some precedent has been established. And in the law the most important thing is to have the door opened. The door has been opened. In Bender v. Ruvell, an action for alienation of affection, the plaintiff sought to question his wife's psychiatrist concerning information he had revealed during a series of psychiatric consultations. The psychiatrist refused to testify on the grounds that any communications to him in the source of psychotherapy were confidential and could not be divulged without the patient's consent. The trial court upheld the claim of privilege and excused the psychiatrist from testifying.¹¹²

Thus, in what appears to be the first decision of its kind without statutory support, the court recognized what the psychiatrist had a right not as an M.D., but as a psychotherapist to be granted the right of privileged communication. What may or may not develop from this trial court ruling cannot be determined; only time and future litigation can provide the answer.

¹¹²Bender v. Ruvell Civil Dockett 52C 2535 Circuit Court of Cook County, Illinois, June 25, 1952 Judge Harry Fisette presiding.
Our whole purpose in this chapter has been orientated around the notion of what is the role of the guidance counselor and professional immunity. We initiated our remarks by stating that since most of the literature in the field endeavored to draw a parallel between the psychologist and the guidance counselor, it behooved us to examine what this role is. We saw that only six states recognized the right of privileged communication by statute. We have briefly indicated the need for a more thorough study on the part of the psychological journals of this role. We have tried to present some of the difficulties which face the psychological profession in endeavoring to obtain the right of professional immunity. We have seen that the area of privilege communication is perhaps the best developed legal area at this time. Furthermore, we have reviewed the basic guiding rules of evidence and we have seen that the psychotherapist can be granted immunity on the basis of the rules of evidence. Finally, we have seen that it is possible based on the rules of evidence and not statutory law that the privilege could be granted. However, in the interests of the profession, the role would best be defined if placed under statutory law.

This, then, leads us to the essence of our investigation which is the relationship of the guidance counselor and professional immunity. The purpose for our rather lengthy history and development of privileged communication in general is that to date no specific application has been made of this rule to the guidance counselor. Thus, whatever application will be made and what will be inferred will have to be forthcoming from the rule as it has developed during the last five hundred years. To date, under statutory law, the relationship of the guidance counselor to privileged communication is nil. The
only recognized relationship under common law is the attorney-client relationship. Many inferences have been suggested in the journals on the role of the guidance counselor. Most of these comments have been inferred from what has been said about psychologists. At the present time the guidance counselor does not possess professional immunity under statutory law. Moreover, he would be compelled to testify in court or he would face contempt of court charges. Therefore, our final task is to sift, from all available materials, just what the role of the guidance counselor would be in relationship to professional immunity.
CHAPTER V

SOME FUTURE IMPLICATIONS FOR GUIDANCE COUNSELORS

Our purpose here is to try and determine what implications can be inferred for the guidance counselor in relationship to privileged communication. Our approach is somewhat unique in that rather than draw a comparison from the psychological journals on this subject, we shall turn to the correct starting point, namely: the legal aspects based upon the code of evidence. The recognized authority in the field of evidence is Professor Wigmore. To the best of the writer's knowledge that this is the first time that the Wigmore principles will be viewed in relationship to guidance-counselor--client relationship. It is in this application of the Wigmore criteria to the role of the guidance counselor that the writer hopes to shed some new light on the problem of privileged communication and the guidance counselor.

We realize that the role of the guidance counselor is indeed unique. The school guidance counselor's role as a reading of the professional journals will indicate has not yet been completely defined. The journals are filled with commentary on surveys concerning what this role should be.\textsuperscript{113} Our purpose is not to be involved with this quandry over the guidance counselor's role. We only have to accept the fact that one of the functions of the guidance counselor

counselor is counseling. It is the counseling role that we shall consider. For it is fairly obvious that the guidance role of the guidance counselor would not involve a unique one to one relationship with a client which would be person centered.

Our contentions under granting the privilege to psychologists suggest four contentions of investigation for further classification of psychologists so too the same contentions need classification for the guidance counselor. The first step is to define the term counseling. Even Gilbert Wrenn indicates that the distinction between psychotherapy and counseling is baffling.\textsuperscript{114} Secondly, the recognition of the profession under the law would be necessary. Therefore, although the APGA Code of Ethics stipulates counseling as a profession, this is not sufficient in the legal world.\textsuperscript{115} Thirdly, the extension of such a privilege would preclude the right of the state to license the guidance counselor. Thus, the area of state functions in licensing processes and standards would have to be evaluated and undertaken.

All of these areas could indeed be subjects of separate investigations of an extremely exhaustive nature. However, our purpose is to examine only the role of privileged communication as it relates to the guidance counselor in his role as a counselor. Thus, for our purposes, we shall have to leave these areas to others for consideration and we shall have to assume that a clear


answer will be forthcoming.

The first of Wigmore's criteria for the granting of the right of privileged communication is that "the communication must originate in a confidence that will not be disclosed." The ethics of the APGA binds the counselor to hold all such communication as private and confidential and to treat all such information in a professional manner. Thus, the client as he approaches the counselor in a counseling relationship is exhorted by the code of ethics. This statement alone might be sufficient to grant an affirmation to Wigmore's first criteria. Yet, it behooves us to further examine the nature of the communication. Fiedler's studies indicated that of all schools of therapy the most characteristic point of an ideal relationship is that the counselor is able "to participate complete in the patient's communication. It is generally accepted that this communication refers to the construct of the self. Rogers in trying to determine how the counselor can create a helping relationship points out that the first factor which must be communicated is trustworthiness. If the dean of client-center therapy accepts the idea that the first element is trustworthiness of the relationship, then the most characteristic element of the counseling relationship is

116 Wigmore, op. cit. 527.
117 Code of Ethics, op. cit. p. 207.
complete participation in the client communication; it would seem that the communication does originate in a confidence that will not be disclosed. If the individual is going to communicate the secrets of his self, it naturally follows that a secret would imply a confidence which is not to be disclosed. Thus, the communication in all probability is conceived as a confidential one on the part of the client even if he did not know of the APGA Code of Ethics. Therefore, I believe we can safely conclude that the communication must originate in a confidence that will not be disclosed.

The second Wigmore principle is that "this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties." We have to a degree really affirmed this principle as being fulfilled in the counseling relationship in our comment on the application of the first principle. However, let us elaborate upon this point. The nature of the relationship is described by Curran:

Nor can one catch in simple description the most subtle and complex relationship that must exist between counselor and client, between therapist and patient. Here the necessity of mutual involvement in the human condition is most strikingly demonstrated. The therapist or counselor cannot stand apart in an objective unfeeling, Cartesian way. He must be a complete person, psychosomatically committed to a deep, sensitive, and personal communion, a true giving of self.121

Bearing these words in mind let us view this commentary:

"The greatest trust," says Lord Bacon, 'between men and men, is the trust of giving counsel. For in other confidences men commit the parts of life; their lands, their goods, their children, their credit, some practical affair; but to such as the make their counsellors [sic] they commit the whole, by how much the more they are obligated to all faith and integrity.' The condition upon which alone this counsel can be given requires particular attention.

...That the whole will not be told to counsel unless the privilege is confidential is perfectly clear. A man who seeks advice and seeks it because he believes that he may do so safely, he will rarely make disclosures which may be used against him...122

Both quotations bear similarities as to the nature of the counseling relationship. The greatest gift is the gift of self and it demands a confidence and trust above all others. The first quotation by Curran is from the twentieth century. The second quotation is from the seventeenth century and was employed in describing the deep process the client goes through in communicating to his attorney. It was employed in urging the application of the attorney-client privilege. The writer felt it ironic that such an excellent description of the counseling relationship was described almost three hundred years ago. And when one stops to think of the role of the attorney, he probably feels the need of the client to seek his counsel. Perhaps this is why the attorney received the title, counselor. From this evidence, we can safely contend that this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

"The relation must be one which in the opinion of the community ought to be sedulously fostered," comprises the third rule as set forth by Wigmore.123

122 Wigmore, op. cit., p. 547.

123 Ibid., p. 627.
The two important words in this rule appear to be "community" and "sedulously." We might ask ourselves just how the community has reacted to the development of the counseling relationship. We could answer by first citing the fact that the Congress of the United States has responded favorably under Title V of the National Defense Education Act by creating funds for the establishing of Counseling Institutes for secondary school guidance counselors. Although each Institute is unique, the emphasis is upon counseling rather than upon guidance. Evidently the community sees a need for fostering the counseling relationship. The second fact which we cite is the growing number of school counselors throughout the United States. Indeed, the relation is one which the community feels should be fostered.

The word "sedulously" implies the concept diligently pursued. Can we not infer from the extremely avid interest of the community as represented by school boards' desire to employ school counselors and the fact that the Congress considers counseling part of defense that this relationship is considered to be sedulously fostered?

This leaves us with the examination of the last principle. "The injury that would insue to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation." We recognize the fact that purpose of justice is to seek truth. The question presented us to use can be examined ontologically. The question presented for our examination in this last principle is an age old one of ontological and

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124 Jones, op. cit., p. 105.
teleological concepts. More specifically, is the preservation of the secrecy of
the communications more important than the ends or objectives of society. The

crux of the situation resides in the degree to which we hold the sacredness of
the client and the effect that a violation of this trust would have upon all
such future relations both as to this client and the role of all future
relations.

Professor Wigmore in commenting upon the priest-penitent relationship,
after denying application of the privilege to the physician-patient relation-
ship, states that (1) a permanent secrecy is essential to any religious
confessional system (2) many confessions would not be made if there was a
chance that they might later be disclosed in a court of law (3) the priest-
penitent relationship should be fostered (4) to destroy the confessional would
be to weaken the backbone of many religions while the gain would be slight.125

Although this paper has silently criticized the method of drawing inferences
and comparisons, the point to be brought out is that Wigmore considers in the
priest-penitent relationship the effect upon the community if we were to
destroy the confidence in the relationship. Thus, we do not mean to draw an
inference by analogy but merely to see the fact that Wigmore under the law
evidence considers it sufficient to show that by destroying the confidentiallines
of the relation we would destroy the essence of the relationship, and the
resulting destruction would create havoc in the community's participation in the
relationship, then the rule of privilege should be extended; for in reality the

125Wigmore, op. cit., p. 820.
community is benefiting as much as the individual even though complete justice might not be accomplished in a particular litigation.

Our analysis of the first three rules points out the necessity of confidentiality to the relationship. As a matter of fact the relationship probably would not exist if this element of trust did not enter into it. If the community feels that counseling is essential, then it would be safe to assume that the communications of a client should be held confidential; otherwise, clients will not enter into the counseling relationship. Thus, it would appear that it would be far better that justice might not be served in order to protect the general confidence which the community as entrusted to counseling. This is the same confidence with which Lord Bacon cited in the seventeenth century. The same confidence which merited the attorney-client relationship.

With these thoughts in mind, we can safely conclude that the fourth principle can be fulfilled in a counseling relationship. Such would be well and good, if our investigation had not viewed this comment by Warren T. Powell, "all confidential information expressed in an interview should be held sacred. It should be used only with permission of the counselee unless the welfare of the community or school is jeopardized..." Here we find that Powell believes that the confidence should be broken. If we admit this concept, then we no longer can fulfill the fourth contention of Wignor and we must fulfill all four in order to merit the cloak of privilege communication. We cannot determine in what sense Powell makes this comment, perhaps, he advocates this concept so as to warn guidance counselors about their obligations to society especially since they do not have the cloak of privilege communication. The APGA Code, we note, makes no such distinction. Perhaps, this 1939 citation has now been overruled
by the APGA Code.

Let us stop for a moment and look at the counselor's role if it were accorded privileged communication. First, the priest in a confessional who hears a confession of criminal guilt, cannot be cannon law report this crime to the proper authorities. In those areas of statutory recognition of the privilege, he is exempt from testifying in court of this fact. Secondly, it seems evident that if we make one exception, we are putting a hole in the dike of protection. Thus, this point determines the attention of the counselor. From our analysis it appears that the counselor is going to have to give the client full trust in all matters in order to merit professional immunity.

On the other hand it might be possible though probably not desirable for the counseling relationship to make exceptions of the content of certain communications.

At the present time the guidance counselor is not covered by the privilege of professional immunity. Therefore, the counselor should be aware of this and the client should be made aware of this fact unless the counselor decides to accept the possibility of facing a contempt of court charge. Thus, in contrasting our investigation with the comments of the article by Carter, we can agree with him that guidance counseling does not come within the scope of activities to which professional immunity has been granted. Carter rightfully maintains that counseling qualifies as a profession. We agree but add that such a definition should be forthcoming from the courts or established by definition under statutory law. We can agree that counseling is suffering from a lack of such acceptance as granted to other professions. We agree with him that the counselor is ethically bound to his professional philosophy to consider the
clients communication as confidential, but we believe that investigation cannot agree with his comment that the client is bound by the legal statutes of all the states since statutory law does not exist on this point. We further agree that counselors should know their role under the cloak of privilege communication; however, we did not endeavor to investigate the area of libel and slander. We can agree with his contention that immunity should be given to the counselor. However, we cannot agree with his comment that he believes that if a case presents itself the guidance counselor will receive the right of privileged communication. We think that our considerations which have not been previously presented indicate that the courts might be reluctant to extend this privilege. We state this fact looking back on the five hundred years that were needed to develop the attorney-client relationship; we look to the fact that the physician-patient relationship is not fully recognized under statutory law nor is the priest-penitent relationship fully recognized. We realize that throughout the ages the three professions were law, medicine and the Church. If the law has been slow to recognize the rights of these professions, then we can somewhat envision how slowly they might act in other professions. The best example is seen in the drive of the American Psychological Association. They only have the right of privileged communication under statutory law in six states. Yet, we cannot forget the trial court decision in Illinois. It is indeed possible that it could act as a catalytic agent and stimulate the extension of the privilege to the guidance counselor. Carter might be alluding to this concept. In this sense, we could concur with him. We must also bear in mind the comment cited early by Corpus Juris Secundum that the tendency "is not to extend the classes to which the privilege from
disclosure is granted, but to restrict the privilege.126

The further implications for guidance counselors is that it is possible to argue under the rules of evidence for the extension of the rule of privileged communications for guidance counselors. It is also assumed that the counselor will be aware that if the privileged is accorded to him that the privilege exists for the client and not for the counselor. Also all of the commentaries made under the discussion for the development of the privilege would be applicable to the counselor. For example, it is assumed that if the communication is overheard by a third party the third party could testify. Moreover, it is urged that under further implications for guidance counselors, that consideration should be given by the profession and the courts in defining counseling and the counseling profession along with defining the role of licensing the profession. These three factors play a very important role in the future implications for guidance counselors in the privileged communication area.

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126 Corpus Juris Secundum, op. cit., p. 741.
CHAPTER VI

SUMMARY AND CONCLUSIONS

At the onset of this paper we set our goal as two-fold—first to examine the historical significance and development of the privilege and secondly to apply this knowledge to the role of the guidance counselor and professional immunity. Our investigation pointed out that the origin of the privilege was rooted in the Elizabethian period where the privilege originally stemmed from the honor of the gentleman. As time progressed the courts sought to seek justice and wished to destroy the privilege. But a new theory based on the need of the client for the privilege arose. The new theory envisioned the needs of the client to be so great as to seal the lips of the attorney. These two movements grew side by side until we see the emergence of the rule as we know it today. We see that the privilege was not accorded to the medical profession except under statutory law in the United States and then with various limitations, applications and significances. We have seen that the lips of the physician are sealed only in the courtroom. What he says outside of the courtroom is governed only by his ethics. Our concern also has been with the guidance counselor's role in litigation.

We then viewed the development of privileged communication through the decisions and opinions of the court. We noted that the law cannot compel a person to testify once the privilege has been accorded to him. The rule applies only to that which is privileged and therefore the rule is conditional.
not absolute. A person must testify to that which is either common or observable knowledge. Unless there is an expressed statute no privilege exists. The interpretation of the statute rests upon the opinion of the courts. Moreover, the privilege only applies to those relationships recognized under the law even if two individuals feel that their relationship is confidential; it is not accorded the privilege without statutory recognition. If a third party overhears the conversation the third party may testify to what he hears. The important fact is that the privilege does not terminate with the termination of the relationship. We have seen that the state of Illinois recognizes no privilege except that of attorney-client. Finally, we realize that the privilege under existing law does not apply to the guidance counselor.

We have then viewed the relationship of the guidance counselor and professional immunity. In order to more fully understand this role, we reviewed the work of the APA in endeavoring to obtain immunity for psychologists. Since most of the literature has been applied to the counseling field, we saw a need to examine the material. Our investigation pointed out a need for additional research and clarification in the field. We concluded that there was a need to define the term, "psychology" under the law. Secondly, there exists a need to define the relationship of psychology to the medical field. Thirdly, the role of state licensing must be clearly defined. Finally, the role of the psychologist and privileged communication needs to be clarified. The crux of the problem in the field of psychology has been captured by Combs. We, then reviewed the leading case, Taylor v. U.S. on the relation of the psychiatrist and the communication between him and his patient. We, then, reviewed the role of the psychologist in view of the famous Wigmore principles. Our investigation
indicated that psychologists should come under the scope of privileged communication such as six states have already conferred the privilege. A trial court in Illinois has set a small but very important precedent when it recognized the right of a psychiatrist to be entitled to privileged communication on the basis of his psychological background rather than upon his medical degree. Our final commentary was that under common law and existing statutory law, no privilege can be applied to guidance counselors.

This commentary brought us to the fact that we should endeavor to define the role of the guidance counselor in relation to privileged communications. The general purpose of this paper was to analyze this role not by the comparison method as has previously been endeavored, but to develop the role on the Wigmore conditions. We have endeavored to demonstrate that based upon the rules of evidence the guidance counselor should be granted privileged communication. We found, however, that in order to merit this recognition under the law the counselor would have to admit to the fact that all information must be kept confidential even if it would jeopardize the community. If the counselor did not do this, he would weaken his chances for receiving the cloak of protection. However, it has been suggested that under statutory law the legislature could relieve counselor anxiety by excluding certain types of information. We also saw that the privilege as extended would carry with it all the limitations and clarifications which have developed throughout the past five hundred years.

We have seen that the guidance counselor today does not fall under the realm of privileged communications. The chance that immunity would be granted is rather doubtful since the courts have no desire to extend the privilege.
However, we have pointed out that under the rules of evidence there exists no legal obstacle for its application.

We may, thus, conclude that the history and the development of the rule of privileged communications has indeed been long. We can conclude that under the current American jurisprudence the right of privileged communication does not apply to the guidance counselor. We have concluded that under our analysis and application of the Wigmore rules of evidence that such an immunity could be granted. We finally concluded that in order for the courts to realize a need for establishing such an extension and for legislatures to enact such legislation the profession and the professional association should endeavor to assist and promote the cause as much as possible especially by paving the way in the areas of establishing a definition of counseling, clarifying the role of the counseling profession and defining the role of the state in licensing the profession. While our investigation has indicated that (1) the relationship of privilege communication to the guidance counselor is nil (2) such a privilege could, as indicated in our investigation by applying the Wigmore rules for the first time to the guidance counselor-client relationship, and (3) should be extended to the guidance counselor-client relationship; (4) certain preliminary steps as indicated would be helpful in initiating and continuing the drive for extending this privilege to guidance counselors who function as counselors.
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APPROVAL SHEET

The thesis submitted by Patricia Bernice Kubistal has been read and approved by three members of the Department of Education.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

Oct. 7, 1963
Date

Signature of Adviser