THE SOCIAL WORKER-CLIENT RELATIONSHIP AND PRIVILEGED COMMUNICATIONS*

In many states confidential communications between certain professionals and their clients or patients are privileged, *i.e.*, shielded from disclosure in a judicial proceeding.[1] But few courts or legislatures have extended the shield of privileged communications to the social worker-client relationship,[2] notwithstanding the useful function performed by the social work profession in our society and the general necessity of confidentiality to the success of its endeavors. The purposes of this note are: (1) to evaluate the arguments for and against a social worker-client privilege in the light of modern concepts of privilege and the needs of the social work profession, and (2) to discuss the factors which must be weighed in granting a privilege to the social work profession.

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* Certain sections of this note are based upon portions of an unpublished paper entitled "Privileged Communications and the Social Worker" which was written during 1965 by Miss Donna Green and Miss Ronda Richardson, graduate students in the George Warren Brown School of Social Work, Washington University, St. Louis, Missouri. In conjunction with their paper, Miss Green and Miss Richardson conducted a survey among social work agencies in the St. Louis area in order to ascertain how frequently lack of privilege presented problems and what policies, if any, were followed to compensate for lack of protection. Twenty agencies were selected for study: four family agencies, two settlement houses, five hospitals (city, state, private, general medical and psychiatric), one child guidance clinic, two child protective agencies, one residential treatment center for children, an agency which frequently dealt with children in the St. Louis city school systems, and four probation and parole departments. These agencies were selected on the assumption that they represented all the kinds of agencies that exist in the city. However, because the sample was neither randomly nor statistically chosen, the results may not be entirely reliable. Both the survey and paper are on file at the George Warren Brown School of Social Work Library, Washington University, St. Louis, Missouri. References to these materials will hereinafter be cited as Green & Richardson (unpublished paper) or (unpublished survey).

1. The policy behind privileged communications differs from that behind the rules of incompetency; the latter exist to keep unreliable, prejudicial or misleading evidence out of court, whereas the rules of privilege exist to protect relationships which are considered socially desirable. McCORMICK, EVIDENCE 151-52 (1954). See generally 8 WIGMORE, EVIDENCE §§ 2285, 2290-329, 2380-91, 2394-96 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

For the purposes of this note it will be assumed that confidential communications do not violate the rule against hearsay evidence or any of the other rules of incompetency.

2. See 8 WIGMORE § 2286; LoGatto, *Privileged Communication and the Social Worker*, 8 CATHOLIC LAW. 5 (1962); Note, 5 VAND. L. REV. 590, 604 (1952). *But see Re* Kryschuk & Zulynik, 14 D.L.R.2d 676 (Sask. Magis. Ct. 1958).

I. A Sketch of the Social Work Profession[3]

The goal of the social work profession is to help people learn to deal with the pressures of life, a task once largely performed by doctors, lawyers and clergymen.[4] There are six major areas of specialization within the social work profession: casework, group work, community organization, welfare research, welfare administration and social action.[5] Most of this discussion will relate to casework, because it is the area which most often involves the social worker-client relationship that allegedly deserves protection.

Casework is practiced in social agencies or social welfare settings. A social agency has been described as "a community-sanctioned organization of resources—money, services, manpower, and man-skills—to deal with certain social problems."[6] Because there is such diversity of problems and needs, there are many specialized agencies: family service agencies, child welfare agencies, child protection and placement agencies, adoption agencies, public welfare agencies, probation and parole agencies, settlement houses and residential treatment centers. Other social agencies concern themselves primarily with problems arising in areas such as schools, hospitals, the armed services or industry. There is also a growing group of private practitioners, such as marriage counselors and child guidance counselors, who supplement the social agencies.

The casework method is essentially a counseling process consisting of three steps: (1) the gathering and recording of factual data, the *study*; (2) the social worker's interpretation of the study, the *diagnosis*; and (3) his suggested *treatment*.[7] The first step, and to some extent the other two as well, is accomplished mainly through interviews with the client and other persons possessing relevant information.

The caseworker keeps very detailed notes of his interviews during which he records his own thoughts and impressions as well as the statements and actions of his client. These records serve primarily as a working tool for the social worker and the professional persons within the agency and in other agencies with whom he consults.

Thus, many persons may eventually have access to the records of a particular social worker-client relationship. But all of these persons have one thing in common—they are engaged in treating the particular client.[8] Social

3. This section is substantially based upon portions of Green & Richardson (unpublished paper).

4. *Id.* at 1.

5. *Ibid.*

6. 15 Encyclopedia of Social Work 704 (Lurie ed. 1965.)

7. Biestek, The Casework Relationship 134 (1957).

8. The social worker's records are not merely a receptacle of information to be dis-

workers do not contend that their records and personal knowledge about a client, gathered through professional contacts, should be privileged, until outsiders, and particularly the courts, seek access to such information for purposes which the social workers feel do not serve their clients' best interests.[9]

II. Development of the Doctrine of Privilege

A. *History of the Attorney-Client Privilege*

The notion of privileged communications originated during the sixteenth century when confidentiality was granted to the attorney-client relationship as "a natural exception to the then novel right of testimonial compulsion."[10] The privilege was based upon "consideration for *the oath and the honor* of the attorney."[11] Contrary to today's law, the privilege was reserved primarily to the lawyer and only incidentally to the client; it could be asserted by the lawyer even though his client desired that he testify.[12] This doctrine began to lose favor during the eighteenth century because "the judicial

carded once the client has been helped. Since they illustrate many of the techniques employed by the caseworker throughout his contact with his client, they are often used as teaching materials. Furthermore, the records may be used for statistical purposes by persons doing research or by the agency as a means of keeping records of its activities. The permission of the client is always obtained before records of his treatment are used as teaching materials or for statistical purposes by persons not employed by the agency. Apparently not all agencies feel that they should obtain the client's permission if the records are used to compile records of the agency's activities, so long as the data do not provide a clue to his identity. Green & Richardson 3 (unpublished paper).

9. Social workers are apparently willing to testify whenever they feel that they can promote their client's interests. Because the information is obtained by the agency to assist it in helping the client, "the release of information is then valid only in the fulfillment of our functions and objective in making the services of the agency most completely available to him." Miller, *The Confidential Relationship in Social Work Administration*, 69 Proceedings of the National Conference of Social Work 574, 578 (1942).

> The essential function of social agencies, both public and private, embodying a confidential relationship between client and case worker, makes it advisable that we work toward the goal of legal protection by obtaining for case material the status of privileged information. It seems both ethical and fitting that professional social workers should seek to safeguard confidences which might operate disadvantageously for their clients in cases of court action brought up by someone outside the agency. Serota, Trubin, Thomas & Beaumont, *The Protection of Case Material*, The Compass, May 1939, p. 8.
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> [T]he scope and purposes of the relationship must at all times constitute the agency's guide in interpreting what use of information is or is not legally and socially justifiable. Like every other privilege it seeks to afford protection against "compulsory" disclosure for purposes unrelated to those for which it was given. Smith, *Reintegrating Our Concepts of Privileged Communications*, 16 Social Service Rev. 191, 205 (1942).

10. 8 Wigmore § 2290, at 543; see *A Critical Examination of Some Evidentiary Privileges: A Symposium*, 56 Nw. U.L. Rev. 206, 235 (1961).

11. 8 Wigmore § 2290, at 543.

12. *Id.* at 544.

search for truth could not endure to be obstructed by a voluntary pledge of secrecy, nor was there any moral delinquency or public odium in breaking one's pledge under force of law."[13]

With the disappearance of the "oath and honor" theory, a new hypothesis was proffered: that assurance of confidentiality was necessary to provide "*subjectively for the client's freedom of apprehension* in consulting his legal adviser."[14] Under this new theory the privilege belonged to the client, and if he did not desire protection, his laywer could not assert it.[15] Furthermore, under the old theory, the privilege was "limited to communications received since the beginning of the *litigation at bar* and for its purposes only," but under the new theory, secrecy was eventually extended to "any consultation for legal advice, wholly irrespective of litigation or even of controversy."[16]

B. *The Modern Theory of Privilege*

The modern theory underlying all professional-client or -patient privileges is that protection from forced disclosures is justified only if the social utility of the professional relationship is so great that it outweighs society's interest in the correct disposition of litigation.[17] Confidentality is protected

13. *Id.* at 543.

14. *Ibid.* Jeremy Bentham disputed this new theory because he thought that a wrongdoer should not be protected at the expense of society. The lawyer was not voluntarily violating the client's confidence but was being compelled by the court to disclose information for the benefit of society. Wigmore criticized Bentham's reasoning with the following arguments: (1) there are in civil cases no hard and fast lines between guilt and innocence; (2) in criminal cases one can apply the reasoning that is behind the fifth amendment; (3) the client will derive more good from his attorney if the attorney knows all the facts; and (4) a privilege brings the lawyer's ethics and the law into harmony. *Id.* § 2291, at 549-53.

15. In the first half of the nineteenth century the courts confused the new and the old theories. Thus, until the new theory was accepted as dominant, confusion existed over who had standing to object to the admission of evidence. *Id.* § 2290, at 543-44.

Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 CALIF. L. REV. 487, 492-93 (1928), points out that the old theory still affects modern reasoning, though it is not admitted by the courts.

16. 8 WIGMORE § 2290, at 544-45.

17. See *id.* § 2291, at 549. Louisell & Crippin, *Evidentiary Privileges,* 40 MINN. L. REV. 413, 414 (1956), states that: "[I]t is . . . clear that in the judgment of western society, this [privileged communication] is not too great a price to pay for the value of secrecy in certain human relationships, notably in the United States those of clergyman-penitent, lawyer-client, doctor-patient, and husband-wife."

> [T]he law of privileged communication is a significant expression of the law's concern or regard for the security of the individual as a participant in relationships which the state considers it important to foster and protect and, it should be added, for the security and sanctity of the relationship itself. Smith, *Reintegrating Our Concepts of Privileged Communications,* 16 SOCIAL SERVICE REV. 191, 193 (1942).

because it is indispensable to the establishment of the particular working relationship. But the primary question is not whether confidentiality is necessary to the relationship, but whether the relationship is necessary to society.

C. *Guidelines of Privilege*

Modern authorities have accepted the four requirements set forth by Wigmore as the conditions which must be satisfied in order to justify a privilege.

1. The communications must originate in a *confidence* that they will not be disclosed.
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[18]

Wigmore's requirements have been employed (1) by scholars in determining whether a state legislature should grant a privilege to a new relationship, [19] and (2) by judges in determining whether a privilege should be allowed in the cases before them.[20] His requirements are the basis of much subsequent discussion.

III. Existing Law Pertaining to the Social Worker-Client Relationship

A. *Legislative Enactments and Administrative Rules That Apparently Encompass the Social Worker-Client Relationship*

Despite the fact that communications with such sundry professionals as doctors,[21] psychiatrists,[22] psychologists,[23] registered nurses,[24] and journalists

18. 8 Wigmore § 2285, at 527.

19. The following apply Wigmore's guideposts to determine whether a new professional-client or patient relationship deserves a legislative privilege. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications,* 10 Wayne L. Rev. 609 (1964); Note, 47 Nw. U.L. Rev. 384 (1952) (psychotherapists); Note, 106 U. Pa. L. Rev. 266 (1957) (marriage counsellors); 4 Kan. L. Rev. 597 (1956) (psychotherapists).

20. In the following cases, the courts applied Wigmore's requirements to ascertain if a privilege was justified. Lindsey v. People, 66 Colo. 343, 181 Pac. 531 (1919); State v. Bixby, 27 Wash. 2d 144, 177 P.2d 689 (1947); State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1946); *Re* Kryschuk & Zulynik, 14 D.L.R.2d 676 (Sask. Magis. Ct. 1958).

21. *E.g.,* N.C. Gen. Stat. § 8-53 (1953).

22. *E.g.,* Ga. Code Ann. § 38-418(5) (Supp. 1963).

23. *E.g.,* Wash. Rev. Code § 1883.110 (1961).

24. Ore. Rev. Stat. § 44.040(1)(g) (1963).

and accountants[25] are protected by statutes in some states, no legislature has explicitly granted a privilege for communications to the social worker. However, the relationship is sometimes indirectly afforded protection because it is included within some other grant of privilege.

A few statutes declare that public officers cannot be forced to testify.[26] Certain social workers, such as juvenile, probation or parole officers conceivably come within the scope of such a privilege.

Also many state legislatures, either in conjunction with federal grant-in-aid programs[27] or on their own initiative, have enacted statutes granting a privilege to participants in particular welfare programs. Information may be privileged if it was given to adoption[28] or health and safety agencies,[29] mental institutions,[30] maternity hospitals[31] or departments of unemployment compensation;[32] or if it appears in drug addiction,[33] alcoholism,[34] venereal

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25. See McCORMICK, *op. cit. supra* note 1, at 166.

26. *E.g.*, CAL. CIV. PROC. CODE § 1881(5); COLO. REV. STAT. ANN. §§ 153-1-7(5) (1953); ORE. REV. STAT. § 44.040(1)(e) (1963). The extension of the privilege to "public officers" can be interpreted as covering all branches of the government.

27. See notes 82-96 *infra* and accompanying text for a discussion of these programs and the provisions for the safeguarding of certain information which the states must satisfy before they receive federal funds.

28. FLA. STAT. ANN. § 72.27 (1964) (records and court files); HAWAII REV. LAWS § 57-23(d) (1955) (adoption certificates); ME. REV. STAT. ANN. tit. 19, § 534 (1964) (adoption records); S.C. CODE ANN. § 10-2587.14 (Supp. 1964); WYO. STAT. ANN. § 1-708(b) (Supp. 1965) (records of adoption proceedings).

29. ALASKA STAT. § 09.25.120 (1962) (Department of Health and Safety); MD. ANN. CODE art. 35, § 101, art. 43, § 1-I (Supp. 1965) (State Board of Health and Mental Hygiene); WIS. STAT. § 163.10 (Supp. 1965) (Health Assistance Payments Act).

30. ALASKA STAT. § 47.05.020 (1962); ME. REV. STAT. ANN. tit. 34, § 2256 (1964) (mental hospitals); MD. ANN. CODE art. 35, § 101, art. 43, § 1-I (Supp. 1965) (State Board of Health and Mental Hygiene); N.C. GEN. STAT. § 122-8.1 (1964) (hospitals for mentally disordered); S.C. CODE ANN. § 32-1034.12 (1962) (information received by Mental Health Commission).

31. IOWA CODE § 236.28 (1946); see note 45 *infra*.

32. FLA. STAT. ANN. § 443.16(3) (1952); HAWAII REV. LAWS § 93-94 (1955); ILL. REV. STAT. ch. 48, § 640 (Supp. 1964); NEV. REV. STAT. § 612.265 (1963); N.C. GEN. STAT. § 96-23 (1965); OKLA. STAT. tit. 40, § 221(I) (1951).

33. FLA. STAT. ANN. § 398.18(1) (1960); ME. REV. STAT. ANN. tit. 22, § 2374 (1964); MISS. CODE ANN. § 436-09 (1956).

34. KAN. GEN. STAT. ANN. § 74-4410 (Supp. 1961) (applicable only to voluntary patients); MISS. CODE ANN. § 436-09 (1956).

disease,[35] eye disease,[36] probation and parole,[37] or child welfare records;[38] or in the records of social welfare,[39] vocational rehabilitation,[40] juvenile court,[41] probation and parole,[42] or domestic relations proceedings.[43]

The agency-participant privilege is conferred in one of two ways: (1) directly through a statute enacted by the state legislature[44] or (2) indirectly through a statute which allows a department of the state to set up standards that an agency must meet in order to obtain a license.[45] In the latter case, the department usually requires that the agency maintain confidential records to obtain and to retain its license.

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35. ALA. CODE tit. 22, § 269 (1958) (no privilege for Wasserman test or quarantine); ME. REV. STAT. ANN. tit. 22, §§ 1093, 1094 (1964).

36. ILL. REV. STAT. ch. 91, § 107 (1956).

37. GA. CODE ANN. § 27-2720 (Supp. 1963); IND. ANN. STAT. § 9-3119 (1956); MISS. CODE ANN. § 4004-16 (1956); MO. REV. STAT. § 549.151 (Supp. 1963); NEV. REV. STAT. §§ 62.120, 213.1098 (1963); NEV. REV. STAT. § 176.350 (1959); N.C. GEN. STAT. § 15-207 (1953); S.C. CODE ANN. § 55-579 (1962); WYO. STAT. ANN. § 7-332 (1957).

38. ALA. CODE tit. 49, § 76 (1958) (records of child-care institutions); IOWA CODE § 238.24 (Supp. 1964) (records of child placement agency); IOWA CODE § 239.10 (Supp. 1964) (records of aid to dependent children); MO. REV. STAT. § 201.120 (1959) (records of services to crippled children); N.C. GEN. STAT. § 15-155.3 (Supp. 1963) (records of aid to dependent children); S.C. CODE ANN. § 71-238 (1962) (information of child welfare agency about children and relatives).

39. ME. REV. STAT. ANN. tit. 22, § 42 (1964); N.Y. SOC. WELFARE LAW § 136(2); ORE. REV. STAT. § 411.320 (1963).

40. MINN. STAT. § 121.33 (1960); S.C. CODE ANN. § 71-285 (1962).

41. CONN. GEN. STAT. REV. § 17-67 (1958) (conversation of judge with child whose case is before court); GA. CODE ANN. § 24-2432 (1959) (information obtained and social records prepared by employees); IND. ANN. STAT. § 9-3119 (1956) (records of probation officer submitted to courts); OKLA. STAT. tit. 20, § 795 (1962) (information obtained by court officers or employees); ORE. REV. STAT. § 419.567 (1963); VA. CODE ANN. § 16.1-209 (1960) (not applicable to criminal offense).

42. FLA. STAT. ANN. § 945.10 (Supp. 1964) (parole commission communication); MISS. CODE ANN. § 4004-16 (1956) (parole board information); MO. REV. STAT. § 549.285 (1959) (information from parole officers).

43. OKLA. STAT. tit. 20, § 957 (Supp. 1964); ORE. REV. STAT. § 107.600 (1963) (extends to advice of court or counselors).

44. See notes 28-43 *supra* and accompanying text.

45. See, *e.g.*, MO. REV. STAT. §§ 197.010—.120 (1959). The hospital licensing law gives the Department of Public Health and Welfare of Missouri the right to promulgate rules and regulations for the licensing of hospitals. MO. DEP'T OF PUBLIC HEALTH & WELFARE, REGULATIONS AND CODES FOR MATERNITY HOSPITALS § 3, No. 6(7) (1961) says:

> Case records shall be kept on all cases involving unwed mothers and their infants and shall be deemed confidential and shall be protected from *unauthorized examination.* The case record of the mother shall include the social history, the diagnosis, the formulation of the casework plan, and the implementation of the plan. (Emphasis added.)

The agency-participant privilege statutes differ greatly with respect to (1) the scope of the information protected by the statute and (2) the extent to which the information is protected. As to the scope of the information protected, the legislatures have followed two paths. Some statutes limit the privilege only to records.[46] Other statutes apparently shield all information that is divulged.[47] In limiting the extent to which the information is protected, the legislatures have taken three positions. One type of statute is apparently designed to shield completely the confidential information; it allows the information to be used only for the purpose for which it was obtained.[48] Other statutes will protect confidential information only so long as the detriment to justice is minimal; these confer discretion upon the trial judge to make this decision.[49] A final type of statute prohibits the public from obtaining the privileged information but does not mention any limitations upon disclosure forced by the judiciary.[50]

Another distinction, which appears in a few statutes, is between criminal prosecutions and civil cases, with confidential information being shielded from forced disclosure only in civil cases.[51] These statutes have pre-empted the judge's discretion and predetermined that ascertainment of the truth rather than confidentiality is always more important in a criminal trial.

B. *Judicial Interpretation of the Statutes*

Regardless of what type of statute is being interpreted by the court, a privilege cannot be claimed unless (1) the relationship protected by the statute has been established,[52] (2) the right to claim the privilege has not

46. *E.g.*, FLA. STAT. ANN. § 72.27 (1964); IOWA CODE ANN. § 238.24 (1946); MO. REV. STAT. § 201.120 (1959).

47. *E.g.*, CONN. GEN. STAT. REV. § 17-67 (1958); MO. REV. STAT. § 549.285 (1959); OKLA. STAT. ANN. tit. 20, § 795 (1962).

48. *E.g.*, CONN. GEN. STAT. REV. § 17-67 (1958).

49. *E.g.*, KAN. GEN. STAT. ANN. § 62-2233 (Supp. 1961) (privilege waived at discretion of judge if in defendant's interest); MO. REV. STAT. § 549.151 (Supp. 1963) (privilege waived at discretion of judge if in defendant's interest). The *discretionary* statute and *order of the judge* statutes fulfill the same purpose at the trial level in that evidence will be admitted at the discretion of the trial judge. However, at least theoretically, the appellate court may be able to overrule the trial judge if he abuses his discretion under a *discretionary* statute; it may not be able to do so under an *order of the judge* statute. See note 59 *infra* for a statute which confers discretion upon the comissioner of an agency to determine whether information given to that agency should be disclosed.

50. *E.g.*, ILL. ANN. STAT. ch. 91, § 107 (Smith-Hurd 1956).

51. See VA. CODE ANN. § 16.1-209 (1960) (privilege not available in a criminal trial).

52. See Lindsey v. People, 66 Colo. 343, 181 Pac. 531 (1919) (juvenile court never obtained jurisdiction over minor).

been waived[53] and (3) the person who claims the privilege is the individual entitled to it under the statute.[54]

Few cases are on record which interpret the various types of statutes. Two conflicting conclusions can be drawn from this fact: (1) no privilege is needed or (2) the privilege has been so universally accepted that few litigants have chosen to attack it. The first explanation can be refuted because a single application of the privilege might justify its existence; the second conclusion can be disputed in view of the success of the few contestants who have challenged the statutes.

Contestants of the discretionary statutes have been successful in securing the admission of evidence that might have been privileged. In *Lindsey v. People*,[55] a juvenile court judge refused to testify in a murder trial about a conversation which he had had with a juvenile. The judge was cited for contempt and he defended on the ground that he was immune from testifying under a statutory privilege for public officers. The Colorado court noted that the defendant had overlooked the statutory phrase, "in the judgment of the court"[56] and dismissed his argument on the ground that Wigmore's fourth requirement was not met.[57] In *People v. Feuerstein*,[58] the court

53. See People v. Feuerstein, 161 Misc. 426, 293 N.Y. Supp. 239 (Queens County Ct. 1936); State v. Bixby, 27 Wash. 2d 144, 175, 177 P.2d 689, 706 (1947). In the *Feuerstein* case the participants in the agency program tried to claim a privilege to keep a representative of the agency from testifying in court. The court said:

> certain it is that where one takes advantage of the benefits of a governmental agency, and then publicly discloses his relationship with the governmental agency, and a question then arises as to whether or not he has testified truthfully with reference to his relations with the governmental agency, the rule of confidential relationship must be deemed waived. State v. Feuerstein, *supra* at 428, 293 N.Y. Supp. at 241-42.

54. See Lindsey v. People, 66 Colo. 343, 181 Pac. 531 (1919); State v. Bixby, 27 Wash. 2d 144, 174, 177 P.2d 689, 705 (1947). In the *Bixby* case, the judge of a juvenile court was subpoenaed to testify about a conference he had had with a juvenile and her parents. He was convicted of subornation of perjury and on appeal he claimed a privilege by virtue of statutes which said that juvenile court proceedings were confidential. The court would not allow a privilege; it interpreted the statutes as meaning that standing to object to the admission of evidence belonged solely to the juvenile.

55. *Supra* note 54.

56. The statute before the court recites: "A public officer shall not be examined as to communications made to him in official confidence, when the public interests, *in the judgment of the court*, would suffer by the disclosure." *Id.* at 353-54, 181 Pac. at 535. (Emphasis added.)

57. *Id.* at 355-56, 181 Pac. at 586; *accord*, State v. Bixby, 27 Wash. 2d 144, 174-75, 177 P.2d 689, 705-06 (1947). The *Bixby* case involved the testimony of a judge of a juvenile court in a criminal action for subornation of perjury. The court relied upon the *Lindsey* case, even though in this case the judge did not object to testifying, and reached the conclusion that Wigmore's fourth postulate was not satisfied. The statute said, "A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure." State v. Bixby, *supra* at 174, 177 P.2d at 705. The court considered this a *discretionary* statute.

58. 161 Misc. 426, 293 N.Y. Supp. 239 (Queens County Ct. 1936).

allowed a representative of the Home Relief Bureau to testify over the objection of Feuerstein who had received relief from the bureau. Feuerstein had objected that the information which he had given to the Bureau was privileged under a statute which said that information could be disclosed only "to a person or agency considered by the commissioner to be entitled to such information."[59] The court, without inquiring into whether the commissioner had actually given the representative authority to testify, assumed that he had and allowed the evidence to be given.[60]

Finally, although the statutes which restrict the use of the information to the purpose for which it was obtained appear to grant a privilege, the courts have interpreted them as applying only to voluntary disclosures and not to forced disclosures by witnesses subpoenaed to testify in court.[61] Furthermore, in one case it was held that such a statute granted a privilege only if the court felt that the allegedly protected relation satisfied Wigmore's requirements.[62] According to this interpretation, the judge has the discretion to refuse to apply such a statute in each particular case.

One court has liberally construed a statute in order to uphold a privilege. In *Smith v. Illinois Valley Ice Cream Co.*,[63] a litigant attempted to circumvent a statutory privilege applying only to records by trying to compel the representative of an agency to testify from his personal knowledge. The court rejected this distinction, saying, "we cannot distinguish between the use of the records and the 'fruit' of the records."[64]

While an insufficient number of cases exists to characterize as hostile the

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59. The case was based upon the following statute:

> All communications and information relating to a person receiving relief or service from a public welfare district obtained by any public welfare official or employee in the course of his work shall be considered confidential and shall be disclosed only . . . *by authority of the Commissioner, to a person or agency considered by the Commissioner entitled to such information.* *Id.* at 427, 293 N.Y. Supp. at 241.

60. *Id.* at 428, 293 N.Y. Supp. at 242.

61. See Bell v. Bankers Life & Cas. Co., 327 Ill. App. 321, 64 N.E.2d 204 (1945) (voluntary but not involuntary disclosure forbidden); State v. Church, 35 Wash. 2d 170, 211 P.2d 701 (1949) (voluntary but not involuntary disclosure forbidden). Dictum in State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1946) lends support to this interpretation: "It is an inherent power of a court of justice, within the sphere of its jurisdiction, to compel witnesses to appear before it and testify concerning any relevant facts within their knowledge, in a case then pending in that court." *Id.* at 167, 169 P.2d 710.

62. State *ex rel.* Haugland v. Smythe, *supra* note 61.

63. 20 Ill. App. 2d 312, 156 N.E.2d 361 (1959).

64. *Id.* at 320, 156 N.E.2d at 365. The Attorney General of Kansas said that the spirit, if not the letter of the law, would be violated if the sheriff or county attorney were allowed to testify to information in juvenile court records. Letter From John Anderson, Jr., Attorney General of Kansas, Nov. 5, 1957, in 6 KAN. L. REV. 396 (1958).

judiciary's attitude towards a social worker-client privilege, the cases do apparently show a tendency to circumvent a statutory privilege whenever possible. One explanation for this tendency may be the courts' feeling that upholding a privilege will not aid the particular agency-participant relationship involved since the reason for initiation of the relationship may no longer exist or the relationship may have already been terminated. Another possible explanation might be that the trial judge generally weighs only the effect of a privilege in the case before him and not the broader considerations involved. When a court considers the effect that rejecting the privilege may have on other relationships, both present and future, it seems more likely that a statutory privilege will be upheld.[65]

C. *Independent Action by the Judiciary*

In the absence of statutory warrant, very few litigants have claimed a privilege for the social worker-client relationship. As a result, there are not enough reported cases to indicate whether the judiciary feels that it should independently grant a privilege.

Only three cases have granted protection to confidential communications between a social worker and his client in the absence of a statutory provision.[66] Three widely differing approaches were employed: (1) explicitly

65. See Coopersberg v. Taylor, 148 Misc. 824, 266 N.Y. Supp. 359 (Sup. Ct. 1933). The court felt that the purpose of the statute was to protect the identity of persons accepting relief so that others would not be discouraged from applying.

66. The three cases are: Simrin v. Simrin, 43 Cal. Rptr. 376 (Dist. Ct. App. 1965); People v. Quinn, 61 Cal. 2d 551, 39 Cal. Rptr. 393, 393 P.2d 705 (1964); *Re* Kryschuk & Zulynik, 14 D.L.R.2d 676 (Sask. Magis. Ct. 1958). These cases will be discussed in this order in the immediately following text.

Others have attempted unsuccessfully to persuade the judiciary to grant independently of statute a privilege for certain relations. In Lindsey v. People, 66 Colo. 343, 181 Pac. 531 (1919), a juvenile court judge tried to avoid testifying about a conversation he had with a child by arguing that the communications in question were of the same nature as communications between an attorney and client. The Colorado court dismissed this contention because there was a state statute which expressly forbids a juvenile court judge from practicing law. Similarly, the court in Simrin v. Simrin, *supra*, said that communications with a rabbi who practiced marriage counselling were not protected by a statutory privilege covering only confessions in the course of discipline required by the church. See generally 8 WIGMORE §§ 2394-96.

The judiciary could sometimes shield confidential communications between a social worker and his client by considering the social worker as the agent of a professional person, such as a doctor or a lawyer, whose communications with his client are privileged. See 8 WIGMORE § 2301; Note, 58 W. VA. L. REV. 76 (1955). Some states resolve the agency issue by statutory enactment. An example is a New York statute which protects communications made to a doctor, dentist, registered nurse, or licensed practical nurse. N.Y. CIV. PRAC. LAW § 4504; see Note, 56 NW. U.L. REV. 263, 267 (1961).

Another argument presented in favor of the claim of privilege in the *Lindsey* case was

recognizing a social worker-client privilege; (2) upholding the legality of a contract to suppress evidence and (3) expanding the involuntary confession rule.

1. *Outright Recognition of a Privilege*

No American court has explicitly acknowledged that the social worker-client relationship is privileged, but one Canadian case, *Re Kryschuk & Zulynik*,[67] has been interpreted as doing so.[68] Margaret Brand, an employee of the Department of Social Welfare and Rehabilitation in the Province of Saskatchewan, counseled an unmarried mother and the alleged father in an effort to help them settle their differences. Miss Brand was subpoenaed as a witness by the unwed mother in a suit to determine whether the young man was the father of the child. Every employee in the department, including Miss Brand, had taken an oath of secrecy.[69] Objection to her testifying was made by the defendant on the grounds of hearsay and privilege and by the counsel for the welfare department on the basis of privilege. The court dismissed the department's objection on the ground that the privilege must be claimed by one of the parties concerned.[70]

The court did not compel Miss Brand to testify, but it is somewhat doubtful whether it did so because it recognized a social worker-client privilege. True, the court said that the relationship between Miss Brand and the unwed mother and the alleged father satisfied Wigmore's requirements and thus deserved to be protected;[71] but on the other hand it stated, "the evidence proposed to be given by Margaret Brand in her capacity as an employee of the Department of Social Welfare is disallowed because of being

based upon "the supposed powers and duties conferred by the State, in its capacity of *parens patriae*, upon plaintiff in error, [juvenile court judge] and his assumed position *in loco parentis*." The Colorado court expressed the opinion that this was an interesting argument, but dismissed this contention because no precedent existed for the proposition. It was also questionable whether the claimed privilege existed even for a natural parent. Lindsey v. People, *supra* at 355, 181 Pac. at 536.

67. 14 D.L.R.2d 676 (Sask. Magis. Ct. 1958).

68. 8 WIGMORE § 2286, at 535-36 n.26; Note, 71 YALE L.J. 1226, 1230-31 (1962). In Lindsey v. People, 66 Colo. 343, 349, 181 Pac. 531, 534 (1919), the court implied that it would have granted a privilege if Wigmore's fourth requirement had been satisfied.

69. The report does not contain the text of the oath or a summary of it.

70. *Re* Kryschuk & Zulynik, 14 D.L.R.2d 676, 677-78 (Sask. Magis. Ct. 1958). The court relied upon McTaggart v. McTaggart, [1948] 2 All E.R. 754 (C.A.), where a husband had filed a petition for divorce on the grounds of desertion against his wife. The husband and wife gave conflicting testimony of what had transpired in an interview with a probation officer. The probation officer was called to testify and objected to being forced to testify. The court said that the "privilege, if any, was the privilege of the parties . . . ." *Id.* at 755.

71. *Re* Kryschuk & Zulynik, *supra* note 70, at 677.

hearsay or privileged or both."[72] Also, it did not indicate whether it felt that the privilege belonged to the agency-client relationship or to the social worker-client relationship.[73] Furthermore, because the court felt that there was other evidence sufficient to prove that the child had been fathered by the defendant, the outcome of the case was not affected by the granting of the privilege.[74] For these reasons, it is doubtful whether *Re Kryschuk* stands for the recognition of a social worker-client privilege.

2. *Upholding the Legality of a Contract to Suppress Evidence*

One court has indirectly granted a privilege to the social worker-client relationship by upholding the legality of a contract to suppress evidence. In *Simrin v. Simrin*,[75] a rabbi had undertaken marriage counseling with a couple after they had agreed that their communications with him would be confidential and that neither of them would call him as a witness in the event of a divorce action. The rabbi had imposed these conditions so that the couple would feel free to communicate with him. In a prior proceeding, the husband had been awarded custody of the couple's four minor children; in the case under discussion the wife sought modification of the custody decree. The rabbi was called by the wife as a witness. He refused to testify, not on the ground of privilege, but on the basis of his agreement with the couple. The trial court ruled that he need not reveal the confidential conversations.

On appeal, the wife argued that if the court were to hold her to the agreement, it would be sanctioning "a contract to suppress evidence contrary to public policy."[76] The court answered that this policy was outweighed by the public policy of favoring "procedures designed to preserve marriages, and counseling has become a promising means to that end."[77] It pointed out that the very purpose of counseling would be frustrated if the parties could not speak freely for fear of making an admission that might

72. *Id.* at 679.

73. The following factors possibly indicate that if a privilege was granted, it attached to the agency-client relation: (1) an attorney for the Department of Welfare objected to the admission of the evidence but no attorney objected to the admission of the evidence in the name of the social worker; (2) all employees of the Department of Welfare had taken an oath of secrecy, not just social workers; and (3) the court stated that the privilege attached to communication with Miss Brand in her capacity as an employee of the Department of Welfare. *Id.* at 679-80.

74. *Ibid.* Because the evidence was not needed for the "correct disposal of litigation," it can be argued that the evidence was not omitted because it was protected by a privilege.

75. 43 Cal. Rptr. 376 (Dist. Ct. App. 1965).

76. *Id.* at 379.

77. *Ibid.*

later be used in court. "For the unwary spouse who speaks freely, repudiation would prove a trap; for the wily, a vehicle for making self-serving declarations."[78]

3. *Expanding the Involuntary Confession Concept*

In *People v. Quinn*,[79] defendant was indicted for armed robbery, automobile theft and possession of narcotics. His plea of guilty to the robbery charge was accepted and the other charges were dismissed. Then a probation officer conducted a pre-sentence interview during which he induced defendant to make certain admissions by telling him that if he did not tell the truth, he would not be recommended for probation. Afterwards, the defendant changed his mind and pleaded not guilty to the robbery charge. The court promptly reinstated the other two charges, and the defendant pleaded not guilty to all three. During the trial, the probation officer testified, over objection, that during the interview the defendant had admitted committing the alleged crimes and that his motive had been to get narcotics. The officer also acknowledged that he always told convicted defendants during pre-sentence interviews that probation would not be recommended if they did not tell him the truth. The Supreme Court of California reversed the trial court's decision because the probation officer's statement to the defendant constituted a threat or an implied promise of leniency and therefore his admissions were involuntary and inadmissible.[80]

In several recent California cases, the courts have examined the circumstances surrounding an admission to determine (1) whether a threat or promise of leniency was made to the accused and (2) whether it was the cause of the admission. In *Quinn*, however, the court did not attempt to determine if the probation officer's statement was the cause of the defendant's admission but instead assumed this as a fact. The fact that "the court did not inquire into the issue of actual inducement suggests that the explanation for excluding Quinn's admissions lies not so much in their involuntary character as in the fact that they resulted from a pre-sentence probation interview."[81] If the admission was excluded because it was made during the pre-sentence interview, then the court may have concluded that

78. *Ibid.*

79. 61 Cal. 2d 551, 39 Cal. Rptr. 393, 393 P.2d 705 (1964). For an informative case comment on the *Quinn* case, see 17 STAN. L. REV. 525 (1965).

80. In California an "involuntary confession is not competent evidence of guilt in a criminal action and its admission is a ground for reversal." 17 STAN. L. REV. 525, 526 n.3 (1965). Since the only difference between confessions and admissions is the extent to which they establish the ultimate fact of guilt, the rationale behind the involuntary confession rule also applied to admissions. *Id.* at 526 & n.4.

81. *Id.* at 529.

statements, or at least admissions, made during such interviews are inadmissible because they are protected by privilege.

D. *The Federal Influence*

During the great depression, the federal government created many grant-in-aid programs, most of which are embodied in the Social Security Act.[82] The Act stipulated that a state could not receive aid under some of the programs unless it provided "safeguards" to protect information gained through certain agency-participant relationships.[83] But what "safeguards" are required is unclear, for the Social Security Act provides no explanation.

The Supreme Court of Washington is the only court which has interpreted the safeguard provisions. It has rendered two decisions which seem rather inconsistent with the apparent plain meaning of the federal statute. In *State ex rel. Haugland v. Smythe*,[84] the judge in a juvenile proceeding subpoenaed the records of the Washington Department of Welfare concerning a delinquent minor. The department refused to produce the records on the ground that they were privileged under regulations of the State Department of Social Security; it did, however, submit a summary of its records implying that this would satisfy the "safeguards" language of the relevant federal statute. The judge ruled that he knew on the basis of past experience that such summaries were inadequate and inaccurate[85] and ordered

82. For an informative discussion of the federal influence see LoGatto, *Privileged Communications and the Social Worker*, 8 CATHOLIC LAW. 5 (1962).

83. Social Security Act § 2(a)(8), 53 Stat. 1360 (1939), 42 U.S.C. § 302(a)(7) (1964) (safeguards needed for old age assistance and medical assistance for aged); Social Security Act § 402(a)(8), 53 Stat. 1379 (1939), 42 U.S.C. § 602(a)(8) (1964) (safeguards needed for aid to needy families with children); Social Security Act § 1002(a)(9), 53 Stat. 1397 (1939), 42 U.S.C. § 1202(a)(9) (1964) (safeguards needed for aid to the blind); Social Security Act § 1402(a)(9), 64 Stat. 555 (1950), 42 U.S.C. § 1352(a)(9) (1964) (safeguards needed for aid to permanently and totally disabled); Social Security Act § 1602(a)(7), 76 Stat. 198 (1962), 42 U.S.C. § 1382(a)(7) (1964) (safeguards needed for aid to blind, aged, disabled, and medical assistance for aged). These statutes specify that information can be used only for purposes related to those for which it was obtained. Social Security Act § 404(2), 49 Stat. 628 (1935), 42 U.S.C. § 604(a)(2) (1964) provides that payments to states which do not comply with the federal requirements may be stopped.

84. 25 Wash. 2d 161, 169 P.2d 706 (1946).

85. The judge wanted the original files for the following reasons:

> (1) in at least one prior summary which had been submitted to the court by the welfare department, "gross errors of fact were included, and the conclusions drawn from them were dangerously inaccurate;" (2) such summaries rarely show the source of the information included therein, and hence there is no way to determine the relative weight of the evidence on which the social worker based his or her opinion; (3) partly because of the shortage of qualified help, the county welfare department has been unable to supply such summaries within a reasonable time, whereas the original records could, in every case, be promptly pro-

the welfare administrator to produce the department's original records or be held in contempt. The administrator, nevertheless, refused to obey the court order.

On appeal the Washington Department of Welfare made two arguments. First, it contended that the records were privileged under rules promulgated by the State Department of Social Security pursuant to authority granted it by the state legislature. In answer, the court held that the original records of the welfare department did not constitute privileged communications because Wigmore's second and fourth conditions were not met.[86]

The department also argued that since federal aid might be discontinued if the records were disclosed, Congress must have intended that the state enact a privilege. This contention was based upon a portion of the federal Social Security Act which required that:

> A State plan for aid to dependent children must . . . provide safeguards which restrict the use or disclosure of information concerning applicacants and recipients *to purposes directly connected with the administration of aid to dependent children.*[87] (Emphasis added.)

In dispelling the department's fears, the court said that it did not believe that the Social Security Act contemplated a restriction against disclosure under the circumstances presented by the case. Evidently it was referring to facts which it had noted earlier: (1) that the juvenile court would need to consider the financial condition of the child's parents and grandparents and the person or persons to whose custody he would eventually be assigned,[88] and (2) that since the records of the juvenile courts were confidential, the information would not be disclosed to the public.[89] The court concluded that it did not believe that any federal board would terminate assistance "simply because the juvenile courts are given access to the records of the county welfare department for judicial inspection and use in matters vitally affecting those for whom such public assistance is required."[90]

In *State v. Church*,[91] ten defendants were charged with rape. The State Department of Social Security was ordered to deposit certain records with the prosecuting and defense attorneys. The department administrator twice refused to obey the court and was finally directed to show cause why he

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duced; and (4) summaries are usually prepared by persons who are untrained workers and whose summary reports are therefore inadequate. *Id.* at 164, 169, P.2d at 708.

86. See note 62 *supra* and accompanying text.

87. State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 165, 169 P.2d 706, 708 (1946).

88. *Id.* at 169, 169 P.2d at 710.

89. *Id.* at 169, 169 P.2d at 711.

90. *Id.* at 170, 169 P.2d at 711.

91. 35 Wash. 2d 170, 211 P.2d 701 (1949).

should not be held in contempt. Before the Supreme Court of Washington, the administrator argued that the records were privileged under regulations of the State Department of Social Security. The court held that the privilege applied only to voluntary and not involuntary disclosures.[92] Here too, the department had expressed a fear that federal aid might be withheld if the records were admitted into evidence. The court admitted that this case could be distinguished from *Smythe*, since the records of a criminal proceeding are open to public scrutiny. But it concluded that, because its primary duty was to assure accused defendants a fair trial, which includes "the right to have compulsory process to compel the attendance of witnesses in their own behalf . . .",[93] it could not properly consider the possible loss of federal aid.

In 1951, Congress amended the Social Security Act by adding an anti-confidentiality clause:

> No State . . . shall be deprived of any grant-in-aid or other payment to which it otherwise is or has become entitled . . . by reason of the enactment or enforcement by such State of any legislation prescribing any conditions under which *public access may be had to records for the disbursement of any such funds or payments* within such State, if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes.[94] (Emphasis added.)

Thus, it appears that records of payments are not safeguarded unless such information is sought for "commercial or political purposes."[95] But an important unanswered question is what constitutes proper safeguards to protect information other than that pertaining to disbursement of government funds, for instance information which an applicant has given to an agency in order to qualify for aid.

It is impossible to determine the extent to which the federal enactments have encouraged state legislatures to enact privileges for specific agency-

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92. *Id.* at 172, 211 P.2d at 702; see note 61 *supra* and accompanying text.

93. *Id.* at 176, 211 P.2d at 704.

94. Revenue Act of 1951, ch. 521, § 618, 65 Stat. 569.

95. See Coopersberg v. Taylor, 148 Misc. 824, 266 N.Y. Supp. 359 (Sup. Ct. 1933) where a similar state anti-confidentiality statute conflicted with a statutory privilege which made information respecting the receipt of public relief confidential at the discretion of the Commissioner of Relief. The court said that these two statutes should be read in conjunction with each other. It concluded that the public policy expressed by the confidentiality statute was to protect the identity of persons accepting relief so that future applicants would not be discouraged and that the legislature intended that this proscription should include inspection by taxpayers.

participant relations or inspired the agencies themselves to adopt policies of confidentiality, but quite possibly they have exerted considerable influence.[96]

IV. Is a Privilege Needed?[97]

A. *Efforts by the Profession to Compensate for Lack of Privilege*[98]

There is some evidence that agencies and social workers, in response to the present lack of privilege, sometimes practice tactics designed to protect their records, or at least the more confidential aspects of them, from forced disclosure in court. One social welfare administrator stated that

> when actually faced with court orders to produce information contained in agency records, social work administrators have used various devices to avoid relinquishing their material. Pleading a relationship of confidence with the client was a first step; if that failed, they not infrequently used their case record material selectively and submitted only verified fact sheet and other factual material.[99] When the case in question involved a medical or psychiatric social work agency, the administrators sometimes hid behind the doctor-patient privilege, since the social work data could not be extricated from the medical and

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96. That the federal statutes have some influence is demonstrated in State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1946). The court pointed out that the enactment of the state statute which gave the State Department of Social Security the power to promulgate rules to safeguard information was a result of the federal statute.

97. This section is substantially based upon Green & Richardson (unpublished paper) and (unpublished survey).

98. Lack of privileged communications was viewed as a problem by forty-five percent of the agencies interviewed; forty percent replied that lack of privilege had never caused any difficulty; and fifteen percent had no problem because they were privileged by statute. Of the agencies interviewed, those which were most often subpoenaed were ones which dealt with children and family problems.

The policies which were followed in the event an agency was subpoenaed to produce its records or one of its employees was subpoenaed to testify corresponded to those discussed in the text. A special problem arose in hospitals since medical, psychiatric and social work information was often all found on the same record. Thus, a subpoena commanding production of one kind of information would also force disclosure of the other kinds. In one hospital where medical records are frequently subpoenaed, the other kinds of information are removed before the record is taken into court. Although it was not clear from the interview, a similar policy would probably be followed as to the medical and psychiatric information if the social work material was demanded. Another hospital at least partially avoided such problems by suggesting that social workers and psychiatrists judiciously record on the hospital records only that information necessary to the medical staff. Green & Richardson (unpublished survey).

99. In State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1949), the trial judge ruled that he knew from his past experience that such summaries of records are inadequate. For his reasons see note 85 *supra.*

> psychiatric data; or they escaped disclosure because of the fact that their information was largely hearsay.[100]

One writer suggests that "records can easily become mislaid or lost [or] inadvertently destroyed. The caseworker, due to the great number of cases and her heavy work load, can have difficulty in remembering anything particular about this client."[101] Another author suggests that some agencies keep double records; one set for their own use and another for the courts.[102] Finally, when agencies are ordered to produce records they generally attempt to persuade the serving attorney to withdraw the subpoena by telling him that the information in the records would be harmful to his client's case.[103]

When a social worker is subpoenaed to testify in court from his personal knowledge, he may attempt to avoid appearing by explaining to the serving attorney that his testimony might not be beneficial to the attorney's client.[104] There is no evidence as to how frequently social workers who are unable to avoid testifying "have difficulty remembering anything about" their clients but it may be that social workers are often blessed with bad memories or, more accurately, their clients are blessed.

B. *The Profession's Arguments for a Privilege*

The social work profession has advanced two major arguments in support of a privilege: (1) that confidentiality is a prerequisite to establishing the necessary relationship with the client and (2) that there is a serious danger that the court and the jury will incorrectly interpret the information and opinions contained in the records or included in the social worker's testimony.

The profession contends that confidentiality is "necessary for effective casework service"[105] because the social worker must often ascertain his client's innermost feelings about himself, his family and close friends, and the community.[106] In order to obtain such information, the social worker

100. Miller, *The Confidential Relationship in Social Welfare Administration*, 69 NATIONAL CONFERENCE OF SOCIAL WELFARE PROCEEDINGS 574, 575 (1942).

101. Barnett, Confidentiality and Legal Privilege 8 (unpublished paper in possession of Judge Barnett, Judge of the Superior Court of San Jose, California).

102. Green & Richardson 23 (unpublished paper).

103. Green & Richardson 21 (unpublished survey).

104. *Ibid.*

105. BIESTEK, THE CASEWORK RELATIONSHIP 121 (1957).

106. Social work touches human life more intimately in many ways than many of the other helping and healing professions. The caseworker . . . is frequently the observer and regularly the recipient of confidential information concerning the client and his family. . . . This may include, in some cases, his innermost feelings, which he wants no one else to know about. *Id.* at 120-21.

must usually explicitly or impliedly assure his client that his statements will not be revealed for purposes detrimental to his interests.[107] Such information, if revealed to persons other than the social worker, could not only prove embarrassing to the client, but might also seriously harm his reputation[108] and cause his already tenuous relationship with his family[109] or the community to become even more unsatisfactory. In addition, the working relation between the social worker and his client is frequently destroyed by disclosure,[110] and many social workers feel that other social worker-client relations are harmed as well, particularly those with the case worker who testified.[111] Furthermore,

> if a social agency discloses information about individuals without their consent, those needing its services will probably apply for them only under urgent necessity and will give reluctantly the information required by the agency to provide service. . . . Thus, unless a social agency discharges its obligation to confidentiality, it will be prevented from achieving its maximum purposes for the benefit of individuals and of society.[112]

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107. "He communicates this secret information upon the condition, at least implicitly made, that it is necessary for the help that he is seeking. He assumes that the information will not go beyond the persons engaged in helping him." BIESTEK, *op. cit. supra* note 105, at 121. "The establishment of this relationship is dependent on gaining the complete trust of the client [which is attained through] . . . assurance[s] of confidentiality." Green & Richardson 6 (unpublished paper). "In situations which involve marriage counseling, in particular those which may include divorce proceedings, it is very important that the counselor be able to assure the client of confidentiality." *Id.* at 12.

108. "He definitely does not want to exchange his reputation for the casework help he is seeking." BIESTEK, *op. cit. supra* note 105, at 121.

109. If this information is disclosed by the social worker, family relations may deteriorate. Comm. on Psychiatry and Law, *Confidentiality and Privileged Communication in the Practice of Psychiatry,* 45 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY 95 (1960); Goldberg, *Social Work and Law,* 7 CHILDREN 168 (1960).

110. Green & Richardson 19 (unpublished paper).

111. 15 ENCYCLOPEDIA OF SOCIAL WORK 1027 (Lurie ed. 1965).

112. AMERICAN ASS'N OF SOCIAL WORKERS, PRINCIPLES OF CONFIDENTIALITY IN SOCIAL WORK 4 (1964). "Unless people in trouble, coming to a social agency, can feel full faith and confidence and implicit trust in the prudence and integrity of the worker, this institution of civilized society would be severely crippled, if not destroyed." LoGatto, *supra* note 82, at 12.

> [Because] our social institutions do not work perfectly . . . society has set up social agencies. If these agencies should put rules and regulations of other institutions ahead of everything else, [*e.g.*, the right to compel testimony] they could not serve the purposes for which they are called into being and thus they would fail not only individuals but society as well. American Ass'n of Social Workers, *The Use of Case Records,* The Compass, Nov. 1942, p. 9, 16.

"Obviously, without a basis of confidence, important details that are intimately related to the client's problems and their solution may remain undisclosed." FAMILY SERVICE ASS'N OF AMERICA, THE LAWYER AND THE SOCIAL WORKER 17-18 (1959).

The profession feels so strongly about the necessity for confidentiality that each member of the National Association of Social Workers is bound by this oath:

> I respect the privacy of the people I serve.
>
> I use in a responsible manner information gained in professional relationships.[113]

"The Working Definition of Social Work Practice" further spells out the manner in which information is to be used by advocating "the strict observance of confidentiality"[114] as the first step in setting the stage for competent social work practice. Thus if a social worker is subpoenaed to testify against his client or to produce records prejudicial to him, he finds himself in a dilemma[115] arising from the conflict between his professional code of ethics and his loyalty to his client and the judicial search for truth to which he is bound as a member of society. His predicament is concisely summed up in the following: "The duty to keep matters confidential is governed by ethics. The right to refuse to disclose them is governed by law."[116]

The second argument which has been advanced is that the social worker's testimony or records will be incorrectly interpreted. Of course, if the social worker is allowed to testify as an expert witness, he can probably reduce this danger to a minimum. If not, then it is likely that a misunderstanding may arise because of (1) the technical nature of the information and (2) the client's statements were made neither in court nor under oath; therefore, his statements may not be applicable to the court situation.[117]

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113. 15 ENCYCLOPEDIA OF SOCIAL WORK 1027 (Lurie ed. 1965).

"Respect for the confidential nature of information obtained through professional contact is a cardinal principle of practice in religion, medicine, law, as well as in social case work." Goldberg, *The Confidential Relationship in Public Relief Administration,* Social Work Today, June-July 1941, p. 25. "Ethical standards in social work administration have long required that the confidential relationship of client and social worker be protected." Miller, *supra* note 100, at 574.

114. 15 ENCYCLOPEDIA OF SOCIAL WORK 1030 (Lurie ed. 1965).

115. [C]ommunications between social workers and their clients, in the absence of statute, are not confidential—that is, a social worker may be compelled to tell or, by refusing, may suffer the punishment of contempt of court or otherwise, which may be applied in the particular case. This is an entirely different question from the one as to whether a social worker is morally obligated to tell. BRADWAY, LAW AND SOCIAL WORK 100 (1929).

"The fear of subpoena . . . is ever present in social work practice and has created conflicts of an ethical nature both for agencies and individual workers." Sprafkin, *A New Look at Confidentiality,* 40 SOCIAL CASEWORK 87, 88 (1959); see Green & Richardson 6-7 (unpublished paper).

116. Barnett, *op. cit. supra* note 101, at 3.

117. Whitebrook, *The Professional Confidence in the Casework Relationship,* 26 THE FAMILY 256 (1945). It has also been suggested that perhaps the:

> greatest peril [of allowing records to be examined is] the fact that it might be possible for an attorney to examine them for information, without ever intend-

The first reason is more applicable to examinations of records than testimony given in court, since a testifying social worker will probably attempt to explain himself in a manner understandable to laymen. Records, however, contain not only a client's actions and statements, but also impressions of a client which the social worker gains during the interview, tentative conclusions which he draws, and techniques which he feels might be advisable in the future. These materials, often written in technical terms, are nothing more than working aids which help the social worker to serve his client. However, the layman upon reading these materials or hearing them recited might well conclude that they represent final conclusions and uncontroverted facts.

The gist of the second reason is simply that a candid answer given to a question in one context is not necessarily the answer that would be given to the same question or a similar one if asked in a different context; yet both answers can be equally honest and accurate because they were elicited under different circumstances.[118]

The thrust of the second argument, the danger that the information in the records or the social worker's testimony may be misinterpreted, is essentially that such information should be excluded because it is unreliable or apt to be prejudicial or misleading. This argument is irrelevant to the question of whether a privilege should be granted, for a privilege is justified because the social utility and desirability of a particular relationship is so great that it outweighs society's interest in determining the truth, not because the information shielded is unreliable or prejudicial.

The argument proffered that confidentiality is necessary for effective casework does go to the question of whether a privilege is justified. How-

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ing to present the records in court. This could provide an excellent basis for cross-examination of the client and enable the opposition to the client to be prepared to present damaging matters. Barnett, *op. cit. supra* note 101, at 6.

118. For example, suppose that a social worker undertaking marriage counseling asks a husband what it is about his wife that makes it so difficult for him to continue living with her. The man answers that he once found her physically attractive but not so any longer, that he has not achieved sexual satisfaction with her for several years and has often contemplated relations with other women, that he is unwilling to confide in her anymore and that he has in recent months frequently been tempted to leave her. It is an understatement to say that he has indicated that he is unsatisfied with his marriage and is likely to commit adultery, desert his wife or seek a divorce. Yet these statements made in a moment of candid release are thoughts which many men may feel at one time or another during marriage. Such feelings are not grounds for divorce unless carried into action, and the same client, if asked the same question in the sober and restraining atmosphere of a courtroom, might say that he still loves his wife, intends to be faithful to her and would not think of leaving her. And who can say that he is not being equally as truthful at that moment?

ever, this contention concerns only one of the four tests which must be satisfied before a privilege is granted—whether the element of confidentiality is essential "to the full and satisfactory maintenance of the relation between the parties."[119]

C. *An Examination and Application of the Requirements for Privilege*

Wigmore's four fundamental conditions have been accepted "as necessary to the establishment of a privilege against the disclosure of communications."[120] These requirements can be criticized as ambiguous.[121] However, this ambiguity may partially explain their universal acceptance since it allows the requirements to be used as a flexible framework within which the law of privilege can be expanded or contracted.

1. *"The communications must originate in a confidence that they will not be disclosed."*

Wigmore makes no attempt to define "in a *confidence*." For purposes of this note "in a *confidence*" is defined as applying to a relationship in which the anticipation is that information will not be disclosed to persons not involved in the treatment of a client. This definition permits the information to be given to persons not employed by the agency who must be consulted during diagnosis and treatment.

When anyone reveals his innermost feelings about himself, his family and his closest friends, he naturally *desires* that his statements be kept secret; but it is a different thing to say that he *is confident* that they will be. Thus it is arguable whether the *expectancy of confidentiality* in the social worker-client relationship is inherent or emanates from the social worker's explicit or implicit assurances of secrecy.[122] If evidence were uncovered which re-

119. 8 WIGMORE § 2285, at 527.

120. *Ibid.*

121. For a criticism of these guideposts see Note, 71 YALE L.J. 1226 (1962).

Does injury to the relation, for example, mean injury to a particular attorney-client relationship or to all such relationships? What is an injury? How is it to be measured? Will denying the privilege necessarily increase the chances of correctly disposing of litigation? Does it mean this piece of litigation or all litigation? By what standard is benefit to be measured and how is it to be weighed against injury? Who makes up the community whose opinion is to be looked to in order to find out if the relation is to be "sedulously fostered" (and what does that phrase mean)? Do you look to the "moral sense" of the community or ask the "ethical leaders" of the community you choose? Is that community the nation, state, or locality? These questions, and they are illustrative rather than exhaustive, show how ambiguous the Wigmore criteria are.

These four pillars for privilege neither explain nor justify the rule. If these four guideposts were the sole determinants of privilege, a corollary would be the finding that any relationship not privileged lacked these talismanic attributes. *Id.* at 1230.

122. See note 107 *supra* and accompanying text.

vealed that the majority of clients do not go to a social worker expecting confidentiality but only desiring it, then some doubt would exist as to whether the social work profession fulfills Wigmore's first requirement. However, the answer may be that because the social worker probably assures his client of confidentiality at the outset of an interview, most communications are made after a "confidence that they will not be disclosed" has been established, thus satisfying the requirement.

But it may be that at least some clients come to the social workers knowing that they have no privilege, because they have consulted a lawyer in contemplation of litigation or are already experienced in such matters. Communications made under such circumstances could never originate "in a *confidence* that they will not be disclosed."

2. *"This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties."*

The social work profession contends that confidentiality is necessary to effective casework because of the personal information that must be gained about the client. Two basic assumptions allegedly compel this position. If there is a chance that information about a client may later be disclosed, a client (1) will not seek help except out of absolute necessity, and (2) even if he does seek help, he will conceal relevant information which will prevent the social worker from fully serving his client. No statistical evidence was uncovered which supported or weakened these assumptions, but common sense apparently supports them. Because many persons who seek the aid of social workers are on the verge of running afoul of the law or becoming involved in litigation, they would naturally be reluctant to reveal information that might later prove damaging in court, if they knew that the social worker could be compelled to disclose such facts.[123] If such information were essential to treatment of the client, the social worker would be thwarted.

3. *"This relation must be one which in the opinion of the community ought to be sedulously fostered."*

Perhaps the phrase "because it is socially useful and desirable" ought to be added to this requirement, as it actually demands an examination of the role of the particular relation in the community. Some of the people who seek the services of social caseworkers are

> married couples, torn by discord or temporarily in conflict with each other; parents baffled by their child's behavior or distressed over their

123. Green & Richardson 2 (unpublished paper); *id.* at 26-27 (unpublished survey).

> relationship with him; childless couples who want to complete their family through adoption; unmarried mothers who need help in planning for their own and their child's future; persons of all ages who, owing to unemployment, chronic illness, or desertion require public assistance funds in order to maintain a normal life; industrial workers beset by difficulties that are endangering their capacity to hold a job; persons whose lives have been disrupted by long or severe illnesses or incapacity and who need help in regaining their place in society; adolescents who need guidance in choice of a vocation or in making healthy social relations and whose ties with their parents are strained [and] aging persons who need to readjust their lives following retirement or who are incapacitated by illness.[124]

If the social work profession is capable of helping such persons learn to make their lives more useful to themselves and society, then there is little doubt that the social worker-client relationship "ought to be sedulously fostered." If it is not able to help them, then no privilege should be granted.

4. *"The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."*

Application of this requirement necessitates a value judgment—balancing the injury that will be done to the relationship by disclosure plus the frequency with which disclosures may occur, against the benefit gained by the correct disposal of litigation. Naturally, the working relation between a social worker and his client is destroyed whenever the social worker testifies against his client. Also, many social workers feel that other social worker-client relationships will also be harmed, especially relations with the caseworker who testified.[125]

Judging by the scarcity of reported cases in which a social worker-client privilege was at issue, it can be assumed that caseworkers are not frequently compelled to testify.[126] However, since many clients come from the lower economic stratum, it may be that they simply cannot afford the expense of an appeal.[127] It is also possible that social workers have become so inured to the absence of privilege that they simply plead bad memories and lost records without bothering to assert confidentiality.[128]

Against these facts and speculations as to the harm that results from forced disclosure and the frequency with which disclosure occurs, society's

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124. FAMILY SERVICE ASS'N OF AMERICA, *op. cit. supra* note 112, at 14-15.
125. See notes 108-11 *supra* and accompanying text.
126. See note 98 *supra*.
127. See Green & Richardson 2 (unpublished paper).
128. See notes 100-04 *supra* and accompanying text.

interest in the correct disposal of litigation must be balanced. That interest is obviously great, but does not seem to have a constant value, *i.e.*, society as a whole has a greater interest in the correct disposal of a charge of murder than it has in a charge of peace disturbance arising from a marital quarrel. Thus the answer to Wigmore's fourth requirement can be viewed as depending upon the facts of the particular case rather than a predetermined evaluation. For example, the correct disposal of the murder charge probably outweighs any injury that would inure to the social worker-client relation. But the desirability of preserving a marriage of thirty years seems to override the benefit which would be gained by the correct disposal of the charge of peace disturbance.

It should also be noted that permitting a privilege will not hinder a determination of the truth whenever there exists enough evidence from other sources. Society's interests will be satisfied regardless of whether the privilege is allowed, and this fact seems to support granting a privilege in such cases.

V. Considerations in Drafting a Statute

In extending protection to a new professional relationship, the courts and legislatures have generally failed to examine the characteristics and needs of the particular relation and have instead, granted substantially the same protection as afforded by the attorney-client privilege.[129] Such an approach

129. The statutes granting a privilege to the psychologist-client relation are a good example of this. All of the following specifically place the privilege on the same basis as the attorney-client privilege: Ark. Stat. Ann. § 72-1516 (1947); Cal. Bus. & Prof. Code § 2904; Ga. Code Ann. § 84-3118 (1955); N.H. Rev. Stat. Ann. § 330-A:19 (Supp. 1963); N.Y. Educ. Law § 7611; Tenn. Code Ann. § 63-1117 (1955); Wash. Rev. Code Ann. § 18.83.110 (1961). Also, Kentucky has enacted a new statute putting the psychologist-client relationship on the same basis as an attorney-client relationship. Ky. Acts 1964, ch. 155, § 13.

Statutes giving substantially the same privilege to the relationship, though not specifically equating it to the attorney-client privilege, include: Colo. Rev. Stat. Ann. § 153-1-7(7) (Supp. 1961); Mich. Stat. Ann. § 14.677(18) (Supp. 1963); Utah Code Ann. § 58-25-9 (1953).

The typical lawyer-client privilege, either by statute or through the common law, includes the following factors:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. 8 Wigmore § 2292, at 554.

Fisher, *The Psychotherapeutic Profession and the Law of Privileged Communications*, 10 Wayne L. Rev. 609, 654 (1964), thinks that these new statutes which do not consider the need of a particular profession "will have in the long run a harmful rather than beneficial effect." See generally Louisell, *The Psychologists in Today's Legal World*, 41 Minn. L. Rev. 731 (1957).

seems highly undesirable because the needs of each relationship and the problems of adequate protection differ. Therefore, the following sections of this note will attempt to determine what aspects of the social worker-client relationship should be protected and what safeguards are required to protect them.

A. *What Relationship?*

In determining what relationship should be protected, the legislature[130] has several choices: the social worker-client relation, the agency-client relation or some combination of the two, such as the relation between a social worker who practices exclusively through an agency and his client.

If the privilege is granted to the social worker-client relationship, then it is necessary to determine who qualifies as a social worker. The standard could be based upon (1) the professional training and experience of the individual or (2) the function which a social worker performs. The first alternative appears to be the more desirable because it could be drafted in such a way as to guarantee a minimum standard of competency. The National Association of Social Workers has defined the minimum requirements for a professional social worker as the attainment of a bachelor's degree and a master's degree in social work plus two years of professional experience in one agency.[131] Another alternative is to license social workers through the state and permit only communications with licensed social workers to be privileged.[132]

A few attempts have been made to draft a statute or administrative rule tailored to a particular profession. For example, a North Carolina statute granting a privilege to the doctor-patient relationship apparently reflects the criticism of the doctor-patient privilege and grants the privilege only at the discretion of the trial judge. See N.C. GEN. STAT. § 8-53 (1953). For a criticism of the doctor-patient privilege see 8 WIGMORE § 2380(a); Note, 58 W. VA. L. REV. 76 (1955). Also MO. DEP'T OF PUBLIC HEALTH & WELFARE, REGULATIONS AND CODES FOR MATERNITY HOSPITALS § 3, No. 6(7) (1961) apparently considers the particular needs of the social worker-unwed mother relation. See note 45 *supra*.

130. It is assumed that the extension of a privilege to a new relationship is more properly the function of the legislature than the courts because of the political, social, economic and philosophical considerations presented. For a discussion of this point by the leading authorities in the field see Louisell & Crippin, *Evidentiary Privileges,* 40 MINN. L. REV. 413 (1956).

131. 15 ENCYCLOPEDIA OF SOCIAL WORK 15 (Lurie ed. 1965).

132. At least three jurisdictions have licensed social workers. CAL. BUS. & PROF. CODE §§ 9000-30; P.R. LAWS ANN. tit. 20, §§ 821-50 (1961); R.I. GEN. LAWS ANN. §§ 5-39-1 to -25 (Supp. 1964).

Lawyers, doctors, and psychologists who have been granted the advantages of privileged communications are licensed, and therefore the enactment of a licensing statute for social workers might be a prerequisite to obtaining a privilege.

New York upheld the licensing of psychologists in National Psychological Ass'n for

Any effort to define social workers according to their function alone presents problems which may be insurmountable, since other groups such as lawyers, clergymen and teachers often perform similar functions.[133] Furthermore, such an approach makes it difficult to establish a distinction between the competent and the incompetent, since individuals could easily purport to perform the requisite functions without possessing the necessary professional training and experience. Still, it might be proposed that a privilege be granted to all psychotherapist-client relations with psychotherapy being viewed as a function performed by psychologists, psychiatrists and social workers, although there is some debate as to whether the social work profession has gained acceptance as a psychotherapeutic profession.[134]

Granting protection to the agency-client relationship[135] avoids many of the problems discussed above, because it restricts the privilege to fewer and more specific relationships. But this approach naturally presents the question of which agencies deserve to be privileged, since it can be argued that confidentiality is more necessary in some areas than others. For example, it is not necessary that a man applying for job retraining reveal as much confidential and potentially embarrassing or prejudicial information as a woman applying for monetary assistance under an Aid to Dependent Chil-

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Psychoanalysis v. University of the State, 8 N.Y.2d 197, 168 N.E.2d 649, 203 N.Y.S.2d 821 (1960).

133. The only jurisdiction that has attempted to define the practice of social work is Puerto Rico:

> For the purposes of sections 821-850 of this title, "social worker" shall be any person who, after meeting the academic and professional requirements set forth herein, is engaged in employing the social resources at his disposal for the benefit of a person, family, or community having specific needs, in order to assist in solving its problems of health, education, poverty, delinquency, neglect, want of protection, mental defects or diseases, physical disability, and social or environmental deficiencies. P.R. LAWS ANN. tit. 20, § 848 (1961).

134. In fact, one proposed statute giving a privilege to the psychotherapist-client relation granted protection only to psychologists and medical doctors who practice psychotherapy. 6 CAL. LAW REVISION COMM., REPORTS, RECOMMENDATIONS, AND STUDIES 237 (1964). Fisher, *supra* note 129, at 643, defines a psychotherapist as "a person skilled in the diagnosis and treatment of problems as the result of professional training in the behavioral sciences for that purpose. 'Psychotherapist' shall also be interpreted to include a person reasonably believed by a patient to be so qualified."

All of the functions performed by a social worker are not psychotherapeutic. For example, a social worker who investigates an applicant for welfare payments is not performing a psychotherapeutic function. The privilege should be limited to social workers undertaking psychotherapeutic tasks. This could be accomplished by two different means: (1) giving the privilege to all licensed social workers who practice psychotherapy; or (2) licensing particular kinds of social workers engaged in psychotherapy. See Rosenheim, *Privilege, Confidentiality, and Juvenile Offenders*, 11 WAYNE L. REV. 660, 670 (1965); Note, 106 U. PA. L. REV. 266 (1957).

135. See notes 27-43 *supra* and accompanying text.

dren program or for information about contraceptives under a birth control program. Furthermore, granting a privilege to only certain types of agencies might prove to be an unduly time consuming process which could leave many deserving agencies without protection because the legislature did not have time to consider their plight. Finally, worthy agencies might be unable to muster sufficient support to induce legislation. But by this approach the state could readily establish a minimum level of competency among agencies, if it required that certain conditions be met before a privilege is available. Another possibility, of course, is to expand licensing requirements for agencies.

B. *Whose Privilege?*

Under the present conception of professional-client privilege, the privilege or right to object to the admission of evidence belongs to the client or patient, not the professional.[136] Because the admission of evidence might violate a policy of the agency which employs the social worker or decrease a social worker's capacity to aid other clients, it has been suggested that the social worker also be allowed to object to the admission of evidence.[137] This is probably justifiable so long as the client also wishes to object. But whose interests are paramount if the client wishes to waive his privilege, but the agency or social worker does not?[138] Another problem which must be resolved is who has the right to object to the admission in evidence of information given to the social worker by the client's family or friends. Should the privilege belong to the client, friends or family, or both?

A special problem arises when the client is a juvenile. Should the child or the parent or both have the right to claim a privilege? In some situations it might be desirable to protect the communications between the social worker and client against disclosure to the parents. In order for parents to be precluded from acquiring information about their children, the value of the social worker-juvenile relation must overshadow the right of a parent to have all relevant information to rear his child.[139]

C. *When Privileged?*

The granting of a privilege to clients of social workers may be limited only to certain types of proceedings. One statute has restricted the privilege

136. See note 15 *supra* and accompanying text.

137. See Fisher, *supra* note 129, at 643-44.

138. 6 CAL. LAW REVISION COMM., *op. cit. supra* note 134, at 238, gives a privilege to the psychotherapists, but the patient has the right to waive it.

139. *Cf.* Van Allen v. McCleary, 27 Misc. 2d 81, 211 N.Y.S.2d 501 (Sup. Ct. 1961). See generally LoGatto, *Privileged Communications and the Social Worker*, 8 CATHOLIC LAW. 5 (1962).

to civil suits as opposed to criminal prosecutions.[140] The justification for this distinction appears to be that in a criminal case society's interests in retribution, rehabilitation, detention and prevention are at stake and the correct disposal of litigation is of overriding significance. Therefore, a privilege should not be permitted to obstruct the introduction of relevant facts into evidence. However, in civil suits other considerations, such as the values comprehended by the social worker-client relation, may outweigh the impediments to the correct disposal of litigation caused by a privilege.

Another possibility may be to allow a privilege in a public trial but to deny it in a closed proceeding such as a juvenile court hearing.[141] In a public proceeding, disclosure of confidential information may result in public embarrassment and loss of reputation as well as the imposition of some sort of criminal penalty or civil judgment. But in a closed proceeding, only the latter danger is present. But if the purpose of a privilege is to encourage individuals to communicate freely with social workers, this distinction between open and closed hearings does not seem valid in cases in which the client may fear a civil judgment or a criminal penalty. However, if the only possible harm to the client is public humiliation or loss of reputation, this distinction is sound.

D. *What Information?*

Under all other professional privileges only certain types of information are protected. But it might be suggested that the social worker-client privilege should encompass all information about the client, including his identity, regardless of whether it is recorded or part of the social worker's unrecorded knowledge. This approach would shield all information gathered from the client as well as from his family and close friends so long as it was gathered in an atmosphere of confidentiality; also the impressions of and conclusions about the client arrived at by the social worker would be protected.

Such protection seems far too broad. Such a degree of confidentiality has not been extended to any other professional relation. Even the attorney-client relationship, which presents at least as great a need for secrecy, is not deemed to merit such protection.[142] The attorney-client privilege has been so frequently and closely evaluated during its long existence that if such sweeping confidentiality were necessary, it surely would have been recognized and granted by now.

140. See note 51 *supra*. Of course no privilege exists if social work was not being practiced.

141. See State *ex rel.* Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1946).

142. See Hickman v. Taylor, 329 U.S. 495, 508 (1947).

Thus, it is necessary to examine in detail the various kinds of information which a social worker might obtain and to discuss the desirability of shielding each type. It is repetitious, but worth repeating at this point, that information not given in an atmosphere of confidentiality should not be privileged. But an exception might be the identity of the client. It is not included in any professional-client privilege, but because there may sometimes be a social stigma attached to visiting a social worker, it might be desirable to shield the identity of clients.[143] Another problem is whether the privilege should be limited to the records of the interview or should also extend to personal knowledge about a client which the social worker gains during interviews. To distinguish between the two would violate the spirit of confidentiality in which the information was given. Furthermore, to compel the social worker to testify about facts which he remembers while protecting such information if it is recorded, would render the privilege an illusion.[144] It is submitted that this problem is best analyzed on the basis of reliability of evidence rather than privilege.[145]

Another problem is whether information gained from the client's family or friends should be privileged. This depends upon what constitutes the social worker-client relationship. If a narrow view is adopted, *i.e.*, the relationship is defined as encompassing only communications between the social worker and his client, then this information is not privileged. However, if the social worker-client relationship is defined as including all persons who can help solve the client's problem, then a privilege should exist for this information.

Statements of intent to commit future crimes and torts have been excluded from privileges in the past,[146] but in certain situations it might be desirable to include such information in the social worker-client privilege.[147] The situations which might arise fall into two broad categories: (1) where the social worker voluntarily or involuntarily discloses information about the future crime in order to prevent its commission, and (2) where the information was given about a proposed crime which was subsequently committed.

One possible factual situation within the first category is where X and Y

143. See 8 WIGMORE § 2313. In adoption proceedings the names of children are falsified for their protection. See *In re* Adoption of Stowe, 16 Fla. Supp. 91 (Cir. Ct. 1960); *In re* Adoption of Helm, 6 Fla. Supp. 38 (Cir. Ct. 1953).

144. See note 64 *supra* and accompanying text.

145. See notes 117-19 *supra* and accompanying text.

146. See UNIFORM RULES OF EVIDENCE 26, 27 which state that future crimes and torts disclosed to doctors and lawyers should not be privileged.

147. See Fisher, *supra* note 129, at 631-34.

conspire to commit a murder. Then X goes to a social worker and tells him what he and Y are planning. If the social worker reports this to the police, an attempt may be made to prosecute X and Y for conspiracy. If the only evidence that is available is the testimony of the social worker and he is not allowed to testify, X and Y are still free to commit the murder. In this case, it seems that there should be no privilege. Another situation that could arise under category (1) is where a social worker feels that a man should be committed to a mental institution because he has professed a desire to commit a certain crime. If the only evidence available to support the commitment is his testimony, then it might be desirable to allow the social worker to testify.

A possible situation in the second category is where a social worker does not report a client's intention to commit a crime, but instead attempts unsuccessfully to treat the client.[148] Since the crime has already been committed before the social worker is subpoenaed to testify, perhaps a privilege should be allowed. However, it can be argued that if a privilege is granted, social workers will not be encouraged to report information of future crimes.

E. *Waiver*

An individual who otherwise would have standing to object to the admission of evidence loses his right if he waives the privilege.[149] The simplest way that one can waive the privilege is by contracting it away. If a client does this with knowledge that the social worker is thus free to testify against him in court, the contract should be upheld and the privilege considered waived.

But situations may arise in which a client who had no intention of waiving his privilege apparently has done so.[150] One of the basic requirements of privilege is that the communications be given with the expectation of present and future confidentiality. Thus, communications voluntarily made in the presence of a third party or those not expected to be kept secret are usually not protected.[151] A possible exception to this rule should be for statements made during a group therapy session. If confidentiality is essential to treatment of those present and they expect that secrecy will be forever maintained, it would seem that a privilege should still exist. A

148. *Ibid.* Fisher points out that a psychotherapist should have the discretion to divulge or keep confidential disclosures of future crimes or torts.

149. 8 WIGMORE §2327.

150. See People v. Feuerstein, 161 Misc. 426, 293 N.Y. Supp. 239 (Queens County Ct. 1936); State v. Bixby, 27 Wash. 2d 144, 174-75, 177 P.2d 689, 705-06 (1947).

151. 8 WIGMORE § 2311.

similar problem is presented when a social worker in the course of treating his client reveals, with his permission, confidential information to other individuals in the agency. Since such intra-agency disclosures are often necessary for the treatment of a client and since everyone in the agency is pledged to secrecy, it does not appear justifiable to consider this a waiver of privilege. If the client's permission was not obtained, then the social worker and not the client has broken confidentiality, and the client's privilege should still be upheld. But if inter-agency disclosures are made with the client's consent, is the privilege still retained? It would seem so despite the fact that the other agency is much like a third party, for agreement to such practices is often a condition which must be met before treatment. Here also, all persons who receive the information are sworn to secrecy. If inter-agency disclosures are made without permission, then the situation is substantially like an unauthorized intra-agency disclosure and the privilege should not be considered waived.

Finally, questions of waiver may arise when a client testifies in court. The general rule is that if one testifies about privileged matters he has waived his privilege.[152] Objection must be made when the question is asked and before the testimony is given. Furthermore, if one inadvertently divulges confidential information, he has nevertheless waived his privilege. There seems to be no reason for not following these rules when a client testifies, unless he appears without proper legal representation in an informal proceeding, such as a juvenile proceeding or probation hearings. In these cases, safeguards should be devised if a privilege is deemed desirable.

Conclusion

If a legislature should decide to protect the social worker-client relationship, there are two basic types of statutes which it can enact: (1) a general or discretionary statute which grants a privilege in broad terms and confers a great degree of discretion upon the trial judge to determine the scope and limitations of the privilege, or (2) a statute which specifically spells out whose privilege, when privileged, etc., and limits the judge's discretion to deciding whether these standards have been met. The effect of the latter type of statute is to pre-empt the courts' judgment in certain areas. It seems to be the more desirable approach in view of (1) the likelihood that the courts will apply the law of the attorney-client privilege without considering the needs of the social worker-client relationship, and (2) the tendency of the courts to circumvent the privilege through fine legal distinc-

152. *Id.* § 2328.

tions and by concluding that, on the facts of the individual case, Wigmore's requirements are not satisfied. In summary, this approach would deter judicial circumvention of legislative intent.

The most feasible approach to drafting a statute with specific provisions is for the legislature to apply Wigmore's requirements in the following manner. (Of course, the legislature must have already decided that the social worker-client relationship "ought to be sedulously fostered.") The legislature should first determine when confidentiality is necessary to the full and satisfactory maintenance of the relationship. It is from this perspective that the specific problems of what relations, what information, and whose privilege, should be approached.

Next, the fourth requirement should be considered to determine when the injury to the relationship outweighs society's interest in the correct disposal of litigation. This step involves questions such as whether a privilege should be allowed in a civil suit but not in a criminal prosecution. At first glance Wigmore's first requirement seems to be best answered by the court on the basis of the facts of the case before it. But in view of the tendency of the courts to disallow a privilege, the legislature might be justified in assuming that, whenever the prescribed relation is established, any and all communications are made in a confidence that they will not be disclosed.

The problem of whether the privilege should be extended to the social worker-client relationship and, if so, what form it should take may admit of no simple solution. It seems clear that the solution, whatever it may be, should reflect the combined thinking of the professions of law and social work, because, although the issue is of major importance to the general public, it is of special concern to these two professional groups. The problem is both legal and non-legal and its solution requires detailed knowledge of the requirements of law and the needs of social work. Until such a joint effort is undertaken on a major scale, a satisfactory solution to the problem is unlikely to be forthcoming.