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## Introduction

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# NOTES AND COMMENTS

## SYMPOSIUM: EVIDENTIARY PRIVILEGES IN ILLINOIS

### INTRODUCTION

The purpose of this symposium is to analyze the evidentiary privileges in Illinois. The articles assume that the evidence sought to be introduced would be admissible except for the application of a privilege.<sup>1</sup> Privileges which limit the use of otherwise competent evidence must be distinguished from statutes which protect communications by prohibiting their being the basis of a cause of action.<sup>2</sup> The latter affect the right to bring a suit, whereas the former affect the evidence available to prove or defend a suit.

Besides those privileges which either had their origin in common law or have become a part of our legal system the legislature has made it clear that sound policy reasons demand that other information should also be removed from judicial inquiry.<sup>3</sup> An understanding of privileged communications is of growing importance because more types of communication are being protected by the legislature.<sup>4</sup>

<sup>1</sup> Many oral communications and written reports would be inadmissible as evidence because of the hearsay evidence rule. This symposium assumes the offered evidence is either not subject to any rule of evidence which would exclude its use or is within one of the exceptions such as the business entry exception, Ill. Rev. Stat. ch. 110A, § 236 and ch. 38, § 115-5 (1967), or the doctrine of *res gestae*. See *A Critical Examination of Some Evidentiary Privileges: A Symposium*, 56 Nw. U.L. Rev. 206, 290 (1961).

<sup>2</sup> Ill. Rev. Stat. ch. 73, § 755.9 (1967), seeks to prevent a cause of action from arising out of certain communications between insurance companies. It is not within the scope of this symposium to discuss the legislature's ability to remove a cause of action. For the general problem created by this type of statute, see *Heck v. Schupp*, 394 Ill. 296, 68 N.E.2d 464 (1946) and *Smith v. Hill*, 13 Ill. 2d 588, 147 N.E.2d 321 & 147 N.E.2d 877 (dissenting opinion) (1958).

<sup>3</sup> In *Bell v. Bankers Life & Cas. Co.*, 327 Ill. App. 321, 64 N.E.2d 204 (1st Dist. 1945) the court interpreted the following wording of Ill. Rev. Stat. ch. 23, § 419 (1943) (repealed): "Except for purposes directly connected with the administration of pensions, . . . no person shall . . . make use of . . . any information concerning, persons applying for or receiving pensions, directly or indirectly derived from the records. . . ." The court said this wording only meant to prohibit the voluntary disclosure of information and did not intend to remove this information from judicial inquiry.

A later statute concerning Unemployment Compensation, Ill. Rev. Stat. ch. 48, § 640 (1957), contained the following limitation: ". . . (I)nformation obtained . . . pursuant to the administration of this Act shall be confidential and shall not . . . be used in any court in any action or proceeding pending therein, nor be admissible in evidence in any action or proceeding other than one arising out of the provisions of the Act." See *Smith v. Illinois Valley Ice Cream Co.*, 20 Ill. App. 2d 312, 156 N.E.2d 361 (2d Dist. 1959).

<sup>4</sup> Unemployment Compensation information, Ill. Rev. Stat. ch. 48, § 640 (1967), enacted 1951; Protection of state militia reports and other information, Ill. Rev. Stat. ch. 129, § 220.92 (1967), enacted 1957; Physician-patient privilege, Ill. Rev. Stat. ch. 51, § 5.1 (1967), enacted 1959; Clergymen-penitent privilege, Ill. Rev. Stat. ch. 51, § 48.1 (1967), enacted 1961; Psychiatrist-patient privilege, Ill. Rev. Stat. ch. 51, § 5.2 (1967), enacted 1963; Psychologist-patient privilege, Ill. Rev. Stat. ch. 91½, § 406 (1967), enacted 1963.

At first glance, it would seem there could be little difficulty in determining when a communication will be protected. If this were true, a discussion of policy considerations and legal theory would be a study of past history. However, in reality, the rules governing privileged communications are fraught with exceptions, and sometimes it is difficult to determine if a communication is within the area of protection at all. An understanding of the various privileges may be essential to persuade a court that a particular communication should or should not be protected against disclosure. This symposium will analyze the various privileges and determine why they exist and what judicial attitudes prevail for their preservation, restriction or possible disregard.

The scope of this symposium is limited to evidentiary privileges in Illinois; however, in some areas there is not sufficient Illinois case law to analyze a particular privilege. Where this problem exists, cases and statutes of foreign jurisdictions will be considered and related to Illinois law.

The privileges will be divided into two main categories. The first division concerns privileges granted to the individual, which include the following privileges: physician-patient, priest-penitent, attorney-client, and husband-wife. The second division concerns privileges which the government may claim and includes the executive privilege, housekeeping statutes, and required report privileges. Each privilege has certain unique problems, but for purposes of analysis a common approach will be used. The basic approach will be to determine (1) who is granted the privilege? (2) what is the basis of the privilege? and (3) when the court must recognize the privilege?