

## Parent-Child Privilege

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Must a parent testify against his or her child when called as a witness? Conversely, must a child testify against his or her parent? The answer depends on whether there is a parent-child privilege.

**No North Carolina case, statute, or rule.** I couldn't quickly find a North Carolina case or statute on point. So I don't think that there's a statutory privilege, and I don't think our appellate courts have ruled on whether there is a common law privilege. Evidence Rule 501 concerns privileges, but it just says that questions of privilege should be determined in accordance with state law. It doesn't attempt to list or define the permitted privileges.

**Recent Fourth Circuit case.** Yesterday, the Fourth Circuit decided a case on point. In [Under Seal v. United States](#), \_\_\_ F.3d \_\_\_, 2014 WL 2699722 (4<sup>th</sup> Cir. June 16, 2014), the Government suspected a man of growing drugs in his home and of possessing illegal firearms, including automatic weapons. It subpoenaed his 19-year-old son, who lived with him, to testify before a grand jury. The son moved to quash the subpoena, arguing that he should be allowed to refuse to testify based on the parent-child privilege. Forcing him to testify, he contended, would create the perception that he was responsible for his father's prosecution. He argued that "[t]he damage to the father-son relationship [would be] as certain as it is incalculable." The district court agreed, ruling that a parent-child privilege should be available on a case-by-case basis and that the child in this case should be allowed to claim the privilege because he was relatively young and was financially dependent on his father.

The Fourth Circuit ruled that no such privilege should be recognized in this case. First, it noted that privileges should not be recognized easily, as they conflict with the principle that the law is entitled to every person's evidence. Second, it observed that while a few state courts and federal district courts have recognized such a privilege, no federal court of appeals has done so while several have rejected it. Finally, it pointed out facts of this case that undercut the claim of privilege, including that the witness is an "adult college student" rather than a young child, and that the witness and his siblings might be at risk from the father's allegedly illegal activities. The court left the door open to the possibility of recognizing the privilege in a future case with more favorable facts.

**Further reading.** Those interested in learning more about this issue might consider reading Maureen P. O'Sullivan, *An Examination of the State and Federal Courts' Treatment of the Parent-Child Privilege*, 39 Cath. Lawyer 201 (1999) (collecting authorities; acknowledging that most courts in the United States have not recognized the privilege; noting that some other countries do recognize it; and arguing that the rationale for a such a privilege is at least as strong as that for a priest-penitent privilege and other accepted privileges). [This](#) ABA article suggests that only four states have recognized such a privilege, but it is an older piece so it may or may not be accurate today.

**Additional thoughts.** Based on the foregoing, my guess is that a claim of parent-child privilege would face an uphill battle in North Carolina. The claim would be strongest if the case involved a minor child who lived with and was dependent on the parent, and if the criminal activity under investigation did not pose a threat to the child's safety or well-being. The claim might also be more likely to prevail if the evidence sought concerned a communication between the parent and child that arguably was based on the closeness of the relationship. Communications from the child to the parent might be more likely to be protected than communications from the parent to the child. *Cf.* Minn. Stat. 595.02(j) (providing that "[a] parent or the parent's minor child may not be examined as to any communication made in

confidence by the minor to the minor's parent.").

If you have litigated this issue or have thoughts about whether such a privilege should be recognized, and under what circumstances, please post a comment.