



Love and marriage

Testing the limits of marital privileges in civil plaintiffs' lawsuits

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In the course of a civil lawsuit, plaintiffs' attorneys may determine that the defendant's non-party spouse may possess critical information. The spouse may attempt to invoke certain marital privileges, which may allow the spouse to avoid testifying at all, or to exclude confidential communications between the spouses. This issue is more troublesome for plaintiffs' attorneys, because the spouse of the plaintiff is typically offered voluntarily as a percipient witness to damages, if not a loss of consortium claimant in his or her own right. That waives much of the protections. If the testimony from the defendant's non-party

spouse is important enough, this may be the time to pursue a little-used and under-developed exception to the privilege against testifying adversely to one's spouse, and examine the limits of the privilege against confidential communications between spouses.

The privileges

California recognizes two basic marital privileges. First, under the "spousal testimony privilege," a spouse may refuse to testify against the other spouse and may refuse to be called as a witness by an adverse party. (Evid. Code, §§ 970, 971.) Second, under the "marital communications privilege," a spouse may refuse to disclose or prevent the other spouse from disclosing confidential communications

made between them during the marriage. (Evid. Code, § 980.) The privileges and their exceptions are not joined at the hip. In certain cases the spousal testimony privilege may not apply, but the marital communications privilege may remain intact. In such a case, you will be allowed to take testimony from the non-party spouse about his or her *observations* or other non-communicative information, but you will be precluded from learning what the defendant and spouse said to each other. This still may be worthwhile, for example, in a DUI case or other case where the pre- or post-accident conduct of the defendant bears on liability. There, the non-communicative observations of the non-party spouse may still be critical to your case and worth pursuing.



Medieval origins

The rule prohibiting a spouse from testifying against another has ancient origins. According to the United States Supreme Court, the spousal testimony privilege “sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.” (*Trammel v. United States* (1980) 445 U.S. 40, 44; see also *People v. Simohui* (2002) 28 Cal.4th 205.)

Many jurisdictions recognize some form of spousal privilege, though it has been the subject of intense criticism. (See *Trammel, supra*, 445 U.S. at p. 48, fn. 9 (noting that 33 states recognize some form of marital privilege)). The policy bases behind the privileges vary around antiquated, unsupported assumptions that the spousal privileges “preserve marital harmony,” “protect marital privacy,” and “promote the socially beneficial institution of marriage.” (*People v. Simohui, supra* (citing Frost, *Updating the Marital Privileges: A Witness-Centered Rationale* (1999) 14 Wis. Women’s L.J. 1, at p. 2.) In *Simohui*, the California Supreme Court noted that the privilege has been “sharply criticized,” and many commentators have called for its abolition.” (*Simohui, supra*, citing *Trammel*, at pp. 44-5; and *Young v. Superior Court* (1961) 190 Cal.App.2d 759, 764 (“The whole concept of marital privilege, immunity or competency has been the subject of almost violent criticism by Wigmore . . . and is also damned by most modern writers”).)

Exceptions to marital privileges

In California, all privileges are statutory. (See Evid. Code, § 911(a) (“Except as

otherwise provided by statute . . . [n]o person has a privilege to refuse to be a witness”).) Because privileges “‘prevent the admission of relevant and otherwise admissible evidence,’ they ‘should be narrowly construed.’ Applying this maxim in the marital privileges context, our courts have broadly construed the exceptions to these privileges.” (*People v. Simohui, supra*, 28 Cal.4th at 212; see also *Dunn v. Superior Court* (1993) 21 Cal.App.4th 721, 725.)

Spousal testimony privilege – Evidence Code sections 970, 971

Evidence Code section 970 codifies the spousal testimony privilege. It provides: “[e]xcept as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.” Similarly, Evidence Code section 971 provides: “[e]xcept as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.”

The Legislature has enacted exceptions to the spousal testimony privilege in Evidence Code sections 972 and 973. Section 972 identifies “black and white” categories of proceedings in which the privilege does not apply.¹ This article will focus on the exceptions in section 973, and more thoroughly on section 973(b).

Section 973(a) sets forth the “waiver” exception to the privilege.² This is the reason plaintiffs’ spouses rarely assert the privilege – to do so would require eliminating the plaintiff’s spouse as a percipient witness in support of damages. It is difficult to imagine a plaintiff’s case where asserting the spousal privilege is strategically preferable to having the spouse testify. If so, there may be larger problems with the case that call into question the wisdom of pursuing the case at all.

Section 973(b) sets forth an interesting waiver to the spousal testimony privilege for cases where the litigation (or its defense) confers a benefit on the non-party spouse. That section provides:

“There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.” (Evid. Code, § 973(b) (emphasis added).) It is fairly easy to imagine cases that are “brought” for the “immediate benefit” of the non-party spouse. Examples include any case in which the non-party spouse has an immediate personal stake in the outcome, such as a lawsuit involving property jointly owned with the spouse. But even this is unclear in the case law. The more interesting wrinkle in the statute, and one totally undeveloped in case law, is the “defended by” language. “How on earth,” one might ask, “can defending a lawsuit against one spouse be a benefit to the non-party spouse?” Good question.

We know from canons of statutory interpretation that every word in a statute should be read to have meaning. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 18.) So, the Legislature must have envisioned some situation in which the defense of a lawsuit confers a “benefit” on the non-party spouse. No case has interpreted this language, and the issue appears to be one of first impression.

There is a strong argument that a large-exposure tort lawsuit against a married defendant is one such instance, provided there is a showing that community assets of the couple are in jeopardy. In such a case, the spouse’s defense of the lawsuit confers an immediate benefit on the non-party spouse by protecting community assets. Therefore, the “defended” for the “immediate benefit” of the non-party spouse exception in section 973(b) should apply.

This avenue is not for the weak-kneed or where the spouse’s testimony appears peripheral.³ While the issue of under what circumstances a lawsuit is



“defended” for the “immediate benefit” of the non-party spouse appears to be one of first impression, there also appears to be a potential conflict of authority as to whether a lawsuit with a potential benefit to community property is an “immediate benefit” for purposes of section 973(b). (See Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-A (The Rutter Group, 2011)[pp. 8:2343-8:2345] (recognizing conflict between *Hand v. Superior Court* (1982) 134 Cal.App.3d 436 and *Duggan v. Superior Court*, (1981) 127 Cal.App.3d 267); See also Jennifer M. Grange, Defining Immediate Benefit Under California Evidence Code Section 973(b) in Light of Current California Community Property Laws, 29 U.C. Davis L. Rev. 1243, 1251 (1996) (“The California courts have not reached a consensus regarding the meaning of ‘immediate benefit.’”))

Why does the defense of a tort lawsuit confer an immediate benefit?

The basis for arguing that the defense of a tort lawsuit confers a benefit on the non-party spouse requires an examination of California’s community property laws. In California, a couple’s community property is liable for debts incurred by either spouse during the marriage, “regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.” (Fam. Code, § 910.) “Debt” means an obligation incurred by a married person before or during marriage, whether based on contract, **tort**, or otherwise. (Fam. Code, § 902 (emphasis added).) Tort debts are incurred at the time the tort occurs. (*In re Marriage of Feldner* (1995) 40 Cal.App.4th 617, 628.) Family Code section 1000(b)(1)(2) specifies the order in which tort liability of each spouse can be satisfied by community assets.

“Liability of community property is not limited to debts incurred for benefit of community, but extends to debts

incurred by one spouse alone exclusively for his or her own personal benefit.” (Fam. Code, § 910(1); *Lezine v. Security Pacific National Services, Inc.* (1996) 14 Cal.4th 56, 64.) “The community estate remains liable to third party creditors for any debt incurred as a result of one spouse’s misuse of assets.” (*Ibid.*) The nondebtor spouse need not be made a party for the purpose of enforcing a judgment out of the community estate. (Commission Notes on Fam. Code, § 910.) Moreover, a non-wrongdoing spouse is bound by any determinations as to community liability. (*Reynolds and Reynolds Co. v. Universal Forms, Labels & Systems, Inc.* (C.D. Cal. 1997) 965 F.Supp. 1392, 1397.)

In a large exposure tort lawsuit against a married defendant, there usually exists the potential to deplete the non-party spouse’s community property assets. Therefore, the defense of such a lawsuit confers an “immediate benefit” on the non-party spouse within the meaning of Evidence Code section 973(b), and the spousal testimony privilege does not apply.

Case law interpreting whether a case is “brought” for the immediate benefit of the non-party spouse

The facts of *Hand v. Superior Court* offer the best analogy to the argument that the defense of a tort lawsuit confers an “immediate benefit” to a non-party spouse whose community property is at risk. In *Hand*, a husband sued his doctor for malpractice. (*Id.* at 438.) Defendant attempted to depose husband’s wife, who asserted a privilege not to testify pursuant to Evidence Code sections 970 and 971. (*Ibid.*) The Court held that the wife waived her privilege pursuant to section 973(b), because she was an immediate beneficiary of her husband’s suit and any damage award that resulted. (*Id.*) at 442. The Court found that “whether community property personal injury damages are for the “immediate benefit” of the

noninjured spouse turns upon the status of the marriage.” (*Ibid.*) “[D]amages to be received from a cause of action arising during the marriage, i.e., unliquidated claims, are community property.” (*Ibid.* (internal quotations omitted).)

Just as the husband in *Hand* “brought” the suit for the immediate benefit of his community property, a married defendant “defends” the suit “for the immediate benefit of...[her]self and [her] spouse.” (*Id.*, Evid. Code, § 973(b).) Arguments supporting this interpretation include:

- A civil tort suit in which there is a right to attorneys’ fees, punitive damages, or any amount of damages in excess of the liability insurance policy limits, directly threatens community property because it will not be paid by the couple’s insurance.⁴
- Defending a lawsuit that threatens community assets confers an “immediate benefit” to both spouses, because a successful defense will protect and preserve community property assets. Protection and preservation of wealth is a “benefit.” As an example, married couples often enlist investment management firms not only to grow wealth, but to preserve wealth. Similarly, insurance policies that protect personal assets and provide for a legal defense unquestionably confer a “benefit” on the insured. Certainly the risk to community property would be greater if plaintiff obtained a default judgment against the spouse if he or she chose not to defend the lawsuit.
- The preservation of community property assets benefits both spouses just as any decrease in community wealth would be a detriment.
- A “benefit” is not defined within section 973(b) as only applying to lawsuits that increase assets for the non-party spouse.

Thus, a married defendant’s defense of the lawsuit confers an “immediate benefit” to the non-party spouse within the meaning of section 973(b) because it is a “civil proceeding . . . defended by a married person for the immediate benefit of



[her] spouse or of [her]self and [her] spouse.” (Evid. Code, § 973(b) (emphasis added).)

Further, the facts of *Duggan v. Superior Court*, (1981) 127 Cal.App.3d 267, 272 (decided before *Hand*) are not analogous to tort lawsuits against a married defendant. In *Duggan*, the plaintiff spouse brought an action against a partnership for part ownership of real property. (*Id.* at 269.) The court held that the non-party spouse could claim marital privilege against testifying because her community interest in the proceeds of the lawsuit was not a direct or immediate benefit. (*Id.* at 272.) The court emphasized that pursuant to the Corporations Code, the proceeds of the lawsuit would not become community property and therefore the witness spouse’s property rights would not be affected by the outcome of the lawsuit. (*Ibid.*)

Contrary to *Duggan*, a personal injury judgment against the spouse of a witness would be satisfied by community property, as discussed above. The defense of a lawsuit therefore confers an immediate benefit on the non-party spouse, unlike the spouse’s prosecution of a lawsuit for partnership rights in *Duggan*.

Confidential Marital Communication Privilege – Evidence Code section 980

Now that you have successfully defeated the spousal testimony privilege and have compelled the defendant spouse to testify at deposition or trial, it is time to explore the limits of the confidential marital communication privilege. Evidence Code section 980 provides: “Subject to Section 912⁵ and except as otherwise provided in this article, a spouse . . . , whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.” (Evid. Code, § 980.) Each spouse

holds the privilege and can preclude the other from testifying, and the privilege continues even after divorce or death.

However, the privilege is not without limits. First, the privilege only applies to communications that are intended to be confidential. (*People v. Bogle* (1995) 41 Cal.App.4th 770 (suicide note found in trash by spouse was not meant to be a confidential communication, act of throwing note away is evidence husband did not intend his spouse to see the note); *People v. Gomez* (1982) 134 Cal.App.3d 874 (threats made to a spouse in the presence of others were not intended to be confidential).) Counsel should be allowed to explore in-depth all communications that were not intended to be confidential between the spouses, and at least given latitude to examine the predicate of confidential intent.

Second, the acts of a spouse are not covered by the confidential communications privilege. Acts convey ideas and thoughts to the other spouse, but they are not considered communications. (*People v. Dorsey* (1975) 46 Cal.App.3d 706; *People v. Keller* (1958) 15 Cal.App.2d 419.) Thus, the conduct of the defendant (e.g., drinking, erratic behavior, whether or not safety checks were performed, amount of sleep) are all fair game.

Thus, in seeking testimony from a spouse about marital communications, explore the foundational facts of whether the communication was one intended to be “confidential,” and whether the testimony sought in fact involves “communications” as opposed to acts or observations.⁶

Conclusion

Marital privileges are stronger for defendants in civil cases, but are not absolute. If the testimony from the defendant spouse is important enough in a case involving exposure beyond the defendant’s insurance limits, seek to eliminate the spousal testimony privilege by arguing that California’s community property law scheme places the non-party spouse’s assets in jeopardy, and therefore the defendant’s defense of the lawsuit

confers an “immediate benefit” on the non-party spouse. Where marital communications privilege is asserted, examine closely whether the testimony sought meets the preliminary requirements of a “confidential” “communication.”



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Endnotes: *The extensive endnotes for this article will be found on the pdf version at www.plaintiffmagazine.com.*

Endnotes

¹ Evidence Code section 972 provides: A married person does not have a privilege under this article in:

- (a) A proceeding brought by or on behalf of one spouse against the other spouse.
- (b) A proceeding to commit or otherwise place his or her spouse or his or her spouse’s property, or both, under the control of another because of the spouse’s alleged mental or physical condition.
- (c) A proceeding brought by or on behalf of a spouse to establish his or her competence.
- (d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.
- (e) A criminal proceeding in which one spouse is charged with:
 - (1) A crime against the person or property of the other spouse or of a child, parent, relative, or cohabitant of either, whether committed before or during marriage.
 - (2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.
 - (3) Bigamy.
 - (4) A crime defined by Section 270 or 270a of the Penal Code.



(f) A proceeding resulting from a criminal act which occurred prior to legal marriage of the spouses to each other regarding knowledge acquired prior to that marriage if prior to the legal marriage the witness spouse was aware that his or her spouse had been arrested for or had been formally charged with the crime or crimes about which the spouse is called to testify.

(g) A proceeding brought against the spouse by a former spouse

² Evidence Code section 973(a) provides: "Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given."

³ We were recently ruled against on this issue at the trial court level. The issue is currently on appeal.

⁴ For example, Code of Civil Procedure section 1021.4 allows plaintiffs to seek attorneys' fees in an action arising out of an event for which the defendant was convicted of a felony offense. Insurance Code section 533 precludes coverage for attorney fees awarded under Code of Civil Procedure section 1021.4. *Baker v. Mid-Century Ins. Co.*, 20 Cal.App.4th 921 (4th Dist. 1993) *Vaillette v. Fireman's Fund Ins. Co.*, 18 Cal.App.4th 680 (4th Dist. 1993). Statutory attorneys' fees are not "damages" within the meaning of a comprehensive

general liability policy. *Cutler-Orosi Unified School Dist. v. Tulare County School etc. Authority*, 31 Cal.App.4th 617, 629-630 (5th Dist. 1994).

⁵ Evid. Code § 912: (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by . . . Section 980 (privilege for confidential marital communications) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege. (b) Where two or more persons are joint holders of a privilege provided . . . **In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.** . . . (emphasis added).

⁶ Additional exceptions to marital communications privilege that are not pertinent here include:

- Crime/fraud. If the defendant is charged with a fraud, you may be allowed to examine spousal communications if the non-party spouse was complicit in the fraud. (Ev. Code § 981.)

- Communication was in aid of a crime: No privilege claim for a communication made for the illicit purpose of enabling or aiding someone to commit or plan to commit a crime or fraud. (Ev. Code § 981.)

- Communications revealing that a crime is going to be or has been committed is still privileged. (*People v. Von Villas* (1992) 11 Cal. App. 4th 175.)

- Communication in competency, guardianship, or conservatorship action involving spouse: No privilege for communications disclosed in a guardianship or conservatorship proceeding to have spouse who was a party to the communication declared incompetent to manage his or her personal or property, or to have competency established. (Evid. Code, § 982-983.)

- No privilege in litigation between spouses: (Evid. Code, § 984.)

No privilege in certain criminal actions involving spouses: (Ev. Code § 985.)

- No privilege for communication offered in evidence in criminal action by defendant-spouse: (Evid. Code, § 987.)

No privilege in certain juvenile court proceedings: (Evid. Code, § 972.)

- No privilege in law enforcement administrative investigations and hearings: (Evid. Code, § 980.)