

# The Marital Privilege

Attorneys need to know the subtleties of this vital evidentiary rule

BY Crawford Appleby

**P**reserving the integrity of the marital relationship and the confidences exchanged between spouses is an essential part of our evidentiary code. While many are aware of the marital privilege, few understand its nuances. Here is a primer on the contours of this vital evidentiary protection.

## IN THE BEGINNING

Codification of California's marital privilege is as old as the state itself. Once California joined the Union after the Mexican-American War, the Legislature passed the Practice Act of 1851, creating California's first statutory authority. Section 395 of the new law read: "A husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But this exception shall not apply to an action or proceeding by one against the other."

California then adopted its first set of legal codes in 1872, giving the privilege a new

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home. It would apply in civil cases by virtue of section 1881(1) of the nascent Code of Civil Procedure and in criminal cases via Penal Code section 1332. (See Frederick E. Hines, *Privileged Testimony of Husband and Wife in California*, 19 Cal. L.Rev. 390, 391 (1931).)

## ENACTMENT OF THE EVIDENCE CODE

In 1965, California repealed these early sections and replaced them with the Evidence Code. There were three good reasons for reshaping the marital privilege. First, there was no reason to give a party the power to prevent his or her spouse from testifying "for" that party when that party could simply not call the spouse as a witness. (7 Cal. Law

Revision Com. Rep. (1965) p. 1, reprinted in 21 West's Ann. Cal. C.C.P. (2007 ed.) foll. § 1881, p. 6.)

Second, a party's ability to prevent his or her spouse from testifying "against" that party sometimes resulted in great injustices. For example, a husband on trial for the murder of his mother-in-law and sister-in-law prevented his wife, who witnessed the murders, from testifying against him. (*People v. Ward*, 50 Cal.2d 702, 712-13 (1958).)

Third, the new marital privilege expanded both its scope and exceptions with greater clarity, making the privilege more useful.

In fact, when the Legislature revamped the law, it created two separate and distinct types of marital privileges:

- Regarding Testimony: The right not to testify or be called as a witness against one's spouse; and
- Regarding communications: The right not to disclose one's private marital communications

### PREVENTING TESTIMONY

To make marital privilege easier to understand, let's use a hypothetical couple named Whitney and Perry. Whitney ("witness") is the person being asked to testify or provide information against Perry ("party").

The first part of the testimonial component of the marital privilege is the right not to be called as a witness against one's spouse. This part of the privilege only applies in situations where someone wants Whitney to testify against Perry. It does not protect confidential information exchanged between them. Instead, Whitney has a right not to testify against Perry in any proceeding. Whitney may also refuse to be called as a witness by a party adverse to Perry "without the prior express consent of [Whitney] . . . unless the party calling [Whitney] does so in good faith without knowledge of the marital relationship." (Cal. Evid. Code §§ 970 & 971.)

It is important to note that Whitney, not Perry, holds the privilege. Perry cannot prevent Whitney from testifying. Also, Whitney may not refuse to testify *for* Perry but only when Whitney is asked to testify *against* Perry. So while Perry has no power to stop Whitney from testifying against Perry, Perry does have the power to make Whitney testify to help Perry. (Cal. Law Revision Com. com., 29B West's Ann. Cal. Evid. Code (2009 ed.) foll. § 970, p. 404.)

Interestingly, because Perry is not the one who holds the privilege not to be called as a witness against a spouse, opposing counsel may comment on Perry's failure to call Whitney to testify. (*People v. Coleman*, 71 Cal.2d 1159, 1167 (1969) overruled on other grounds by *Garcia v. Superior Court*, 14 Cal.4th 953 (1997).)

An important distinction between Sections 970 and 971 is that in order for the "called as a witness" privilege to apply, Perry must be a party, but not so for the other half of the testimonial component—the right not to testify against one's spouse. "Thus, [Whitney] may be called . . . in a grand jury proceeding because . . . [Perry] is not a party . . . but [Whitney] . . . may [still] claim the privilege under Section 970 to refuse to answer a question that would compel [Whitney] to testify against [Perry]." (Cal. Law Revision Com. com., 29B West's Ann. Cal. Evid. Code (2009 ed.) foll. § 971, p. 413.)

Luckily for Whitney and Perry, these

privileges enjoy a broad application. The word "proceeding" is defined to include "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given." (Cal. Evid. Code § 901.)

Of course Whitney and Perry must have a valid marriage—or domestic partnership (see Cal. Fam. Code § 297.5)—for these privileges to apply. These privileges die with divorce, but not if Whitney and Perry are merely estranged from one another and their marriage is still valid. (*Jurcoane v. Superior Court*, 93 Cal.App.4th 886, 897 (Ct. App. 2001).) But, Whitney and Perry generally cannot take advantage of these privileges in a criminal action by simply getting married after Perry is charged with a crime. (Cal. Evid. Code § 972(f).)

### PREVENTING DISCLOSURE

The second half of the marital privilege protects information shared between spouses from being disclosed during and after the marital relationship. In contrast to the testimonial component, this part of the privilege is held by *both* Whitney and Perry and it allows them to refuse to disclose—and prevent someone else from disclosing—a confidential communication made during marriage. (Cal. Evid. Code § 980.) Again, a valid marriage (or domestic partnership) is required. (*People v. Catlin*, 26 Cal.4th 81, 130 (2001).)

Interestingly, while a guardian or conservator for either spouse may claim the privilege for them, no one may claim the privilege for Whitney or Perry after they die. (Cal. Law Revision Com. com., 29B West's Ann. Cal. Evid. Code (2009 ed.) foll. § 980, p. 428.) If both spouses are deceased, there is no one left to claim the privilege. A loophole like this could matter if, for example, a handwritten note from Perry to Whitney surfaces after their death and leads to a libel action against Perry's estate. (See Cal. Civ. Proc. Code § 377.40.)

The definition of "communication" is just as broad as the definition of "proceeding" and includes all oral, written, and electronic forms of sharing information, including anything listed in the definition of a "writing" under Evidence Code section 250. The fact that the contents of an electronic communication may be seen by service providers does not waive the privilege, so Whitney and Perry can text one another without worry. (Cal. Evid. Code § 917.)

But, the physical acts of Perry seen by Whitney are not "communications." (*P*

*people v. Cleveland*, 32 Cal.4th 704, 743 (2004).) One can imagine the wealth of information an ex-spouse like Whitney could provide while testifying against Perry in a criminal proceeding (where Sections 970 and 971 no longer apply) based only on observations of Perry's physical acts. (*Id.*)

To illustrate the distinction between "acts" and "communications," assume there is a private sex tape featuring Whitney and Perry. The tape itself is a "writing" whose contents are protected by Evidence Code section 980. However, the physical acts themselves are not protected. (*Rubio v. Superior Court*, 202 Cal.App.3d 1343, 1347-48 (1988).) Thus, the sex tape itself may not be used as evidence, but it is possible that either Whitney or Perry—or a third party who viewed the tape—could testify as to the sex acts that were performed during filming.

### CONFIDENTIALITY REQUIRED

In order for a "communication" to be protected, it must have been made "in confidence" meaning that Perry had a reasonable expectation of privacy and did not intend anyone except Whitney to receive the communication. (*Cleveland*, 32 Cal.4th at 744.) While the privilege may be used to prevent an eavesdropper from testifying, some forms of eavesdropping are exempt. For example, if Perry is in prison and Whitney comes to visit or speaks to Perry over the phone, they should be careful what they say to each other as those statements are usually either recorded or overheard by guards. (*People v. Von Villas*, 11 Cal.App.4th 175, 222 (1992).)

Communications made when other people could easily overhear Whitney and Perry (com. Assem. Com. on Judiciary, 29B West's Ann. Cal. Evid. Code (2009 ed.) foll. § 917, p. 266) or made with the intent that they be shared with others will not be considered confidential. For example, if Perry tells Whitney that Perry is going to kill Whitney's lover, the purpose of the threat would be to cause Whitney to tell the lover so that they break up. (*People v. Bryant*, 60 Cal.4th 335, 420 (2014).) The threat is not protected.

One advantage Whitney and Perry have is that Evidence Code section 917 creates a presumption that their marital communications are made in confidence. But, spouses still carry the initial burden of showing, by a preponderance of the evidence that the communication they seek to protect was made in confidence. (*Bryant*, 60 Cal.4th at 420.) A declaration from either Whitney or Perry explaining the circumstances (but not the contents) of the communication should suffice. Once the spouses meet their initial burden, the opponent of the privilege has the burden to rebut the presumption. (Cal. Evid.

Code § 917(a).)

### EXCEPTIONS

There are numerous exceptions to both privileges, and many of them overlap. Neither marital privilege applies:

- in civil or criminal cases between spouses;
- in a proceeding to commit a spouse or establish that spouse's competence;
- in juvenile court;
- or when one spouse is criminally charged with bigamy, child neglect, failure to provide spousal support, or a crime against a third party while simultaneously committing a crime against one's own spouse

(See Cal. Evid. Code §§ 972(a)-(e), 982, 983, 985 & 986.)

For example, if Perry carried out the earlier threat and killed Whitney's lover while simultaneously falsely imprisoning Whitney, Whitney could testify against Perry in Perry's criminal case. (*People v. Sinohui*, 28 Cal.4th 205, 220 (2002).)

It should be noted that the exceptions to these two distinct privileges do not completely overlap. For example, there is a distinction between these two privileges based on who the victim of a crime is. The "communication" privilege does not apply when the victim is Whitney or the child of Perry or Whitney. (Cal. Evid. Code § 985.) But the "testify" privilege is more expansive and does not apply when the victim is Whitney, or the child, parent, relative or cohabitant of Whitney or Perry. (Cal. Evid. Code § 972(e).) Cohabitant means "two people who live or dwell together in the same household." (*People v. Siravo*, 17 Cal.App.4th 555, 562 (1993).)

Also, the "communication" part of the marital privilege does not protect communi-

cations made "in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud." (Cal. Evid. Code § 981.) For example, if Perry is in jail and tells Whitney to throw away some of Perry's incriminating letters sent to Whitney, that communication would not be privileged because it is an attempt to obstruct justice. (*Von Villas*, 11 Cal.App.4th at 222-23.)

But, unlike the testimonial part of the privilege where Whitney holds the power to decide whether to testify, the "communication" portion privilege may be invoked by either spouse—for example by Perry if Perry is a defendant in a criminal matter. This means that only Perry, not Whitney, has the power to submit the communication as evidence when it is material to Perry's defense. (Cal. Evid. Code § 987.)

The testimonial component of the marital privilege also has unique exceptions that apply in civil proceedings. The privilege does not apply in proceedings "to establish, modify, or enforce a child, family or spousal support obligation" or when a proceeding is for the "immediate benefit" of Whitney and/or Perry. (Cal. Evid. Code §§ 972(g) & 973(b).) There is a split of authority over what "immediate benefit" means. While one court found Perry's personal injury claims were for the immediate benefit of Whitney as community property, another court held that Perry's claims involving the dissolution of a business partnership were mere potential community property interests that are insufficient to trigger the exception. (Compare *Hand v. Superior Court*, 134 Cal.App.3d 436, 442 (1982) with *Duggan v. Superior Court*, 127 Cal.App.3d 267, 272 (1981).)

### WAIVER

Exceptions aside, the "testify" privilege can still be waived if Whitney testifies (1) against

Perry in any proceeding, or (2) in a proceeding where Perry is a party, unless Whitney is erroneously compelled to testify. (Evid. Code § 973(a).) But it is also not the responsibility of the court or the parties to inform Whitney of the privilege. (*People v. Resendez*, 12 Cal.App.4th 98, 108-09 (1993).)

The "communication" privilege can be waived by either Whitney or Perry if they disclose "a significant part of the communication" or consent "to disclosure made by anyone" so long as there was no coercion. Failure to claim the privilege in any proceeding where the spouse has standing and the opportunity to claim it constitutes consent. (Cal. Evid. Code § 912; com. Sen. Com. on Judiciary, 29B West's Ann. Cal. Evid. Code (2009 ed.) foll. § 912, pp. 227-28.) Fortunately, a waiver by one spouse does not waive the other spouse's right to claim the privilege. Nor is it a waiver for a spouse to share a marital communication in the context of another privileged conversation (such as an attorney-client relationship) so long as it is revealed in the scope of that relationship. (*Id.*)

### KNOWLEDGE IS POWER

The complexity of the marital privilege certainly keeps attorneys on their toes. But, once the nuances of the marital privilege are fully mastered, an advocate is armed with important knowledge when going into a deposition or court proceeding involving the testimony of a client's spouse. While all of the intricacies and exceptions are a lot to remember, at least the parameters of California's marital privilege are limited in one final, and important, way: exceptions can only be created by the Legislature. They cannot be created by the courts. (*Jurcoane*, 93 Cal.App.4th at 895.)