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Privileges Are Not Just About Excluding Testimony
Focus Column

Evidence Law

By Daniel Lee Jacobson

In 1956, professor David W. Louisell eloquently explained the nature of privileges: "[T]o conceive the privileges merely as exclusionary rules, is to start out on the wrong road and, except by happy accident, to reach the wrong destination. They are, or rather by the chance of litigation may become, exclusionary rules; but this is incidental and secondary. Primarily they are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers ... The privilege is that the confidential matter be not revealed, not that it not be used against the holder of the privilege or any other." David W. Louisell, "Confidentiality, Conformity and Confusion: Privileges in Federal Court Today" 31 Tul. L. Rev. 101 (1956).

Thus, privileges are not fundamentally about excluding testimony but instead about keeping something secret in all sorts of contexts. Understanding this distinction can allow attorneys to better apply the concept of privilege, both as an exclusionary rule and otherwise.

Two types of privileges exist: relation-based privileges and nonrelation-based privileges. Courts seem to treat the exclusionary aspect of a privilege differently depending on whether the privilege is relation-based or nonrelation-based.

John H. Wigmore lists four classic elements of a relation-based 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; and (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." 4 John H. Wigmore, "Evidence in Trials at Common Law," Section 2285, at 3185 (1904).

Obviously, Wigmore's fourth element is aimed at excluding privileged communications from evidence in litigation, but the other three elements involve a confidence that can exist in or outside of litigation.
For instance, one of the oldest privileges recognized by the law is the attorney-client privilege. *Swindler & Berlin v. United States*, 524 U.S. 399 (1998). Business and Professions Code Section 6068(e) states, without reference to litigation or evidentiary rules, that an attorney has a duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

This duty, confidence and privilege exists when an attorney has dinner with her husband and discusses the day's activities, as well as when a court excludes the evidence in litigation.

Evidence Code Section 954 bolsters and, more particularly, specifies the exclusionary aspect of the privilege: "[T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer."

In state court, the starting point for the application of a privilege-based exclusionary ruling is Evidence Code Section 911: "Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness. (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing. (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing."

This apparently is California's codification of the ancient rule that "the public ... has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any

exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *United States v. Bryan*, 339 U.S. 323 (1950) (citing Wigmore). From this starting point, therefore, practitioners must find the specific statutory exception that might apply in a particular case.

Examples of California relation-based privileges include the attorney-client privilege (Business and Professions Code Section 6068(e); Evidence Code Section 950 et seq.), the physician-patient privilege (Business and Professions Code Section 2263; Civil Code Section 56.10; Evidence Code Section 990 et seq.), the psychotherapist-patient privilege (Business and Professions Code Section 2960(h); Evidence Code Section 1010 et seq.), the sexual assault counselor-sexual assault victim privilege (Evidence Code Section 1035 et seq.), the marital privilege not to testify against one's spouse (Evidence Code Section 970) and the martial privilege not to reveal or allow to be revealed confidential communications made during the marriage (Evidence Code Section 980 et seq.).

Practitioners can see most or all of Wigmore's elements that are necessary for a relation-based privilege in these relation-based privileges. Evidence Code Section 351 states that "[e]xcept as otherwise provided by statute, all relevant evidence is admissible." However, as an exclusionary rule, a privilege is necessarily an "obstruction to the search for all relevant information." *People v. Velasquez*, 192 Cal.App.3d 319 (5th Dist. 1987). California exclusionary-rule privileges must be statutorily or constitutionally based. Evidence Code Section 911; *Mitchell v. Superior Court*, 33 Cal.3d 766 (1984). Many courts strictly construe privileges. *Sullivan v. Superior Court*, 29 Cal.App.3d 64 (1st Dist. 1972); *Merritt v. Superior Court*, 9 Cal.App.3d 721 (2nd Dist. 1970) (both strictly construing attorney-client privilege). However, the state Supreme Court has liberally construed the psychotherapist-patient privilege. *In Re Lifschutz*, 2 Cal.3d 415 (1970).

At least one court has held that the law requires a strict construction where the requisite relationship is not clearly established but a liberal construction where the requisite relationship is clearly established. *People v. Velasquez*, 192 Cal.App.3d 319 (5th Dist. 1987) (attorney-client privilege); *People v. Cabral*, 12 Cal.App.4th 820 (5th Dist. 1993) (psychotherapist-patient privilege, relying on *Velasquez*).

Whether the construction of a relation-based privilege is strict or liberal, the basic question remains the same when a court is deciding whether to exclude evidence: Does the particular privilege apply?
The question of whether the privilege applies also is relevant when a court is deciding whether to exclude evidence based on a nonrelation-based privilege. However, many nonrelation-based privileges are not absolute. Thus, if the court finds that the privilege applies, it will go on to balance the interests promoted by the privilege against the interests of the litigation. See generally *Schnabel v. Superior Court*, 5 Cal.4th 704 (1993).

Whereas the societal goal of a relation-based privilege is to "sedulously foster" the relation (Wigmore's third element), fostering a relation is not a goal of a nonrelation-based privilege. Instead, with nonrelation-based privileges, society seems simply to have made a judgment that certain things are privileged.
Some examples of nonrelation-based privileges should make this point apparent: the privilege against self-incrimination (U.S. Constitution, Fifth Amendment; California Constitution, Article I, Section 15), the official-secrets privilege (Evidence Code Section 1040) and the privacy privilege (California Constitution, Article I, Section 1).

People v. McLemore, 166 Cal.App.3d 718 (5th Dist. 1984), illustrates the nonabsolute nature of nonrelation-based privileges. In a criminal prosecution for willful failure to file state income tax returns, the defendant argued that production of the tax returns would violate his right against self-incrimination. The court ruled that the right was not absolute and that it had to be balanced against the government's need for information.

However, one part of California's official-secrets privilege establishes an absolute privilege for matters that a congressional act or California statute forbids to be disclosed. *Shepherd v. Superior Court*, 17 Cal.3d 107 (1976). However, the official-secrets privilege also encompasses "[d]isclosure of ... information [when disclosure] is against the public interest because there is a necessity for preserving the

confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Evidence Code Section 1040(2).

A federal cousin to California's official-secrets privilege is the executive privilege, which protects some presidential communications. The privilege seems to be absolute in matters related to military, diplomatic or national-security secrets. However, other presidential communications related to a criminal case are privileged only presumptively. When dealing with presumptively privileged matters, courts use a balancing test. *United States v. Nixon*, 417 U.S. 683 (1974).

Attorneys should not underestimate the importance of the privilege not to have something revealed. An understanding of the concept of privilege can lead to a more adept application of privileges, both in and outside of litigation.

Daniel Lee Jacobson is an attorney with Veatch, Carlson, Grogan & Nelson in Los Angeles and an adjunct professor at Pacific West College of Law.

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