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Games, swords, shields, lies, and cherries

DEALING WITH CLAIMS OF PRIVILEGE AT TRIAL

The problematic thing about a privilege is that it stands in the way of protecting the things we want. The smoking gun, the juiciest morsel of information, the biggest lie the defendant ever told, that document that sinks the whole defense – all these things lie on the other side of an impenetrable steel door that the defense slams in our face with each discovery request or deposition question.

So, as crafty attorneys who would sacrifice a left arm to win at trial, we have to ask ourselves: What do we do with the *absence* of information? How can we use evasiveness to our advantage by the time we are preparing for trial and presenting our motions in limine?

This article seeks to explore those questions. Its primary aim is to provide legal analysis and citation on why information that is withheld in discovery should be excluded at trial. However, getting to the point of seeking to exclude evidence requires the proper setup – a good discovery plan that fights hard to overcome privilege and threatens exclusion early on.

This process toward exclusion can be broken down into four essential steps: 1) know the limitations to any privilege asserted in discovery; 2) challenge the privilege based on those limitations; 3) threaten to exclude evidence if the defense stands by any privilege claims; and 4) seek to exclude anything withheld based on a claim of privilege in pretrial motions and at trial.

Know the limitations to the privilege asserted

At first blush, the steel door known as privilege seems impenetrable. There are numerous delineated privileges that protect the introduction of information at trial and in discovery, including:

- Self-incrimination (Evid. Code, § 940)
- Attorney-client (Evid. Code, § 950 et seq.)
- Lawyer referral service-client (Evid. Code, § 965 et seq.)
- Spousal – not to testify against spouse (Evid. Code, § 970 et seq.)

- Spousal – protecting marital communications (Evid. Code, § 980 et seq.)
- Physician-patient (Evid. Code, § 990 et seq.)
- Psychotherapist-patient (Evid. Code, § 1010 et seq.)
- Educational psychologist-patient (Evid. Code, § 1010.5 et seq.)
- Clergy-penitent (Evid. Code, § 1030 et seq.)
- Sexual assault counselor-victim (Evid. Code, § 1035 et seq.)
- Domestic violence counselor-victim (Evid. Code, § 1037 et seq.)
- Human trafficking caseworker-victim (Evid. Code, § 1038 et seq.)
- Official records (Evid. Code, § 1040 et seq.)
- Secrecy of political ballot (Evid. Code, § 1050)
- Trade secrets (Evid. Code, § 1060 et seq.)
- Hospital peer review (Evid. Code, § 1157)
- Attorney work product (C.C.P. § 2018.030)
- Constitutional-based privacy
- Official information (Evid. Code, § 1040 Subd.(b))
- Police personnel files (Evid. Code, § 1043)
- Trade secrets (Evid. Code, § 1060)

Adding to the resoluteness, certain privileges are "absolute," meaning that the information they protect is absolutely shielded from discovery and the court is not permitted to engage in any weighing process as to the pros and cons of nondisclosure. In addition, "[a]s a general rule, privileged communications are protected regardless of their relevancy to the issues in the litigation, and despite any private or public interest in disclosure." (*Rittenhouse v. Sup. Ct.* (1991) 235 Cal.App.3d 1584, 1590.)

Yet, it is important to bear in mind that sometimes the privilege barrier can be defeated. There are a few important general principles on privilege to remember. First, the only privileges that may be claimed are the ones delineated in the Evidence Code. They are exclusive, and courts cannot impose privileges beyond those, even if they are recognized in other jurisdictions. (See Evid. Code, § 911 [codifying existing law that privileges are not recognized in the absence of statute]; see also *Chronicle Pub. Co. v. Sup. Ct.* (1960) 54 Cal.2d 548, 565); *Tatkin v. Sup. Ct.* (1958) 160 Cal.App.2d 745, 753; *Whitlow v. Sup. Ct.* (1948) 87 Cal.App.2d 175, 196; *Valley Bank of Nevada v. Sup. Ct.* (1975) 15 Cal.3d 652, 656; *Cloud v. Sup.Ct.*, (1996) 50 Cal.App.4th 1552, 1558-1559.) Even the Law Revision Commission Comments to Evidence Code section 911 states, "This is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme."

Another important principle limiting claims of privilege is that if a privilege is not absolute, then it is "qualified." "Qualified protection" means that the court enters a balancing test to determine whether the interests in disclosing the information outweigh the interests in protecting it, in which case the court will compel it. Importantly, if the party

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seeking the discovery shows that it is relevant to his or her claims or defenses, the burden shifts to the party claiming the qualified privilege to establish the privilege's application. (*Gonzalez v. Sup.Ct.* (1995) 33 Cal.App.4th 1539, 1548.) Examples of qualified privileges include Constitutional- based privacy, official information (Evid. Code, § 1040(b)), police personnel files (Evid. Code, § 1060), and trade secrets (Evid. Code, § 1060.)

Privileges also can be waived. Waiver typically occurs when the information protected by the privilege is conveyed beyond those who hold the privilege. For waiver to apply in the disclosure context, the holder of the privilege must voluntarily disclose a "significant" part of the communication to a third party, which means that enough substantive information must be revealed so that the specific content has been disclosed. (See *Southern Calif. Gas Co. v. Public Utilities Comm'n* (1990) 50 Cal.3d 31, 49.) Waiver can also occur when the holder of the privilege "consents" to disclosure, including when the holder fails to timely claim privilege or object. (Evid. Code, § 912(a); see also *People v. Hayes* (1991) 21 Cal.4th 1211, 1265.) Finally, the failure to object timely to discovery waives any privilege claims for that discovery. (Evid. Code, § 912(a); see also C.C.P. § 2025.460(a) (depositions); C.C.P. § 2030.290(a) (interrogatories); C.C.P. § 2031.300(a) (inspection demands); and C.C.P. § 2033.280(a) (request for admissions).)

Each privilege (whether absolute or qualified), has certain boundaries. The attorney-client privilege, for example, does not protect communications made between a pastor and a penitent, just as the clergy-penitent privilege does not protect communications made between an attorney and client. These are obvious examples, but each privilege must be researched and scrutinized closely for each challenge that is raised. It is beyond the scope of this paper to set forth those challenges, but look at the way appellate decisions interpret the statute that sets forth the privilege. Argue the nuances in detail and the details with nuance to establish that whatever communication is at issue falls outside the actual scope of the privilege.

Challenge the privilege's application in discovery

Once you have determined the limitations to the asserted privilege, challenge it for issues that are important to your case. If you have successfully analyzed the privilege, you can win motions to compel and have the information or documents produced. If the privilege arguably applies but there is any waffling by the defense, consider proposing a stipulation or protective order limiting the use of the information or documents produced as a concession to getting the documents or information.

Also, demand privilege logs for any privilege claimed. The opposing party has an obligation in asserting any claim of privilege to provide "sufficient factual information" to enable other parties to evaluate the merits of the claim, "including, if necessary, a privilege log." (C.C.P. §2031.240(c)(1).) Courts have defined a "privilege log" as something that "identifies each document for which a privilege is claimed, with its author, date of preparation, all recipients, and the specific privilege claimed." (*Hernandez v. Sup.Ct.* (2003) 112 Cal.App.4th 285, 291-292.) Even if you never see the privileged documents, such logs can help you better understand what documents actually exist, which will lead to more effective arguments toward exclusion closer to trial.

Not only are these challenges beneficial to obtaining information, they are also crucial to setting up the case to have evidence excluded at trial. By challenging any privilege claims in discovery and early in the litigation, the opposing party will have a much harder time to produce the privileged information or documents at a time later in the case that disadvantages your side. You can more effectively set up a motion to exclude evidence (based on the arguments below) by showing how the defense has been evasive throughout the litigation process and how subsequent discovery was affected by their withholding documents and information by claiming privilege. For example, let's say you are seeking to compel documents that would be useful for an upcoming deposition, the defendant claims privilege and refuses to produce the documents, you challenge the claim and lose, and you are forced to go forward with the deposition without the documents. At the time of trial, it will be helpful to show how the deposition was disadvantaged at the time of trial to show how information is thwarted, how the dynamics are unfair, how the truth is being stifled, and how the jury will be misled if other related evidence that is harmful and non-privileged were allowed.

Threaten to exclude evidence as part of confronting the privilege

As part of your challenges to privilege in discovery, be sure to give the defendant a choice: Produce it or risk having related evidence that is favorable to them excluded at trial. Do so at every opportunity to be sure that they know they are putting favorable, non-privileged evidence at risk. Put it in your meet and confer letter, and let the judge know you will be seeking that relief at trial by putting the same argument in your motions to compel.

Also put the threat of exclusion on record at deposition and give defense counsel and the witness the option of answering the question or face exclusion at trial. For example, in medical depositions, a medical defendant will often claim peer-review privilege under Evidence Code section 1157 for information stemming from investigative activities of protected medical committees. When this occurs, if the attorney will not allow the witness to testify as to whether an investigation occurred at all, consider saying on the record, "Your objection is without merit. The fact of whether a hospital does an investigation into medical care provided by its medical staff is discoverable per *Brown v. Sup. Ct.* (1985) 168 Cal.App.3d 489. If you instruct the witness not to answer, we will seek to preclude you from presenting any evidence that an investigation was done."

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If the attorney does not allow the witness to testify about what investigation was done, consider responding, "Counsel, if you instruct the witness not to answer, we will seek to preclude you from presenting any evidence on any hospital investigation, including whether the hospital did an investigation or the extent of any investigative attempts. You cannot suggest to a jury that the hospital did an investigation and then use privilege to hide the ball as to what alleged investigation was done. Once you open that door by suggesting that an investigation was done, information about what investigation was done either becomes discoverable, or any defense evidence about any alleged investigation becomes inadmissible as more prejudicial and misleading under Evidence Code section 352, among other authority." By doing this, the defense has been warned of the risks they face at trial in withholding the evidence in discovery.

Seek to exclude at trial non-privileged evidence that is unfavorable to you and that relates to what defendant withheld in discovery based on privilege

Emphasize connections between discovery and evidence to expose gamesmanship

Motions in limine are one of the best weapons to raise privilege issues with the judge at the time of trial. First, they allow you to request that any evidence withheld based on privilege be excluded (tactics to do this are explained further below), as well as any related evidence that is unfavorable to you. Secondly, and just as importantly, they allow you to present the defendant's history of gamesmanship and evasion during the discovery process to allow you to use balance and fairness arguments to have the evidence excluded under Evidence Code section 352 as prejudicial and misleading. To make these motions and arguments effective, point out the correlations between pre-trial discovery procedures and evidence in your motions in limine or at oral argument. Doing so will not only be informative to the court, but it will also empower the court and provide authority to rule in your favor to exclude the evidence.

Discovery statutes are designed to expedite the trial of civil matters and provide for disclosure of the real facts in dispute between the parties. Moreover, this design is intended to afford an adequate factual basis for trial preparation and to eliminate any element of gamesmanship in arriving at the truth. (*Greyhound Corp. v. Sup. Ct.* (1961) 56 Cal.2d 355, 376.)

In *Greyhound*, the California Supreme Court described the legislative intent in formulating California's discovery regulation:

> The new system, as did the federal system, was intended to accomplish the following results: (1) *to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury;* (2) *to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses*; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) *to educate the parties in advance of trial as to the real value of their claims and defenses*, thereby encouraging settlements; (5) to expedite litigation; (6) *to safeguard against surprise*; (7) to prevent delay; (8) to simplify and know the issues; and, (9) to expedite and facilitate both preparation and trial.

(*Id.* (citations omitted, emphasis added).)

The general intent of the Discovery Act of 1957 was "[to] make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." (*Williams v. Volkswagen Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1254 (citing *Greyhound, supra,* 56 Cal.2d at 376).) This intent is equally applicable to the Civil Discovery Act of 1986. California litigants may be compelled to reveal the nature and extent of their contentions and the facts underlying a party's affirmative defenses. (C.C.P. § 2017.010; *Burke v. Sup. Ct.* (1969) 71 Cal.2d 276, 281.) As the *Burke* Court stated, "the discovery laws in California are designed to expedite the trial of civil matters by (1) enabling counsel to more quickly and thoroughly obtain evidence and evidentiary leads, and thus to more quickly and effectively prepare for trial, and (2) enabling counsel to 'set at rest' issues that are not genuinely disputed." (*Burke, supra,* 71 Cal.2d at 280-81.)

In making these arguments you can present the court with a choice that empowers the judge to watch for underhanded uses of withheld evidence. Argue that if the court finds that the defendant's claim of privilege allows them not to produce requested material, it must also limit defendant's ability to use such privileged material to defend themselves. Based on the principles reflected in the above, several California courts have ruled that when a party relies on a claim of privilege to avoid disclosing information in discovery, it is proper to exclude that evidence at trial. (E.g., *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163; *A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566; *Dwyer v. Crocker Nat'l Bank* (1987) 194 Cal.App.3d 1418, 1432-33.) A court has "the power to preclude at the hearing the use of any evidence withheld from appellant at deposition as well as the related documents belatedly filed." (*Hoffmeister, supra,* 161 Cal.App.3d at 1171.)

Also emphasize for the judge that the court has discretion to balance goals of discovery with privilege claims. A trial court has broad discretion in determining the applicability of a statutory privilege. (*Weingarten v. Sup. Ct.* (2002) 102 Cal.App.4th 268, 274 (citation omitted).) Privilege statutes generally are narrowly construed, while discovery statutes are liberally construed. (*Nat'l Steel Products Co. v. Sup. Ct.* (1985) 164 Cal.App.3d 476, 487-88 (citing *Greyhound Corp., supra*, 56 Cal.2d at 377, 396; *Sullivan v. Sup. Ct.* (1972) 29 Cal.App.3d 64, 72.)

The balance between discovery and privilege may result in the protection of certain privileged documents, but only where those documents are specifically identified, the privilege is explicitly not waived by production, and the privilege is not used to deny discovery of investigation files generally.

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(*Kaiser Foundation Hospitals. v. Sup. Ct.* (1988) 66 Cal.App.4th 1217, 1225.) In *Kaiser*, the defendant hospital pled the adequacy of its internal investigation as a defense to an employee's action for discrimination and harassment. The court held that the attorney-client privilege and/or work product doctrine applied to certain documents, but only to certain specified communications directly between employees and legal counsel. The court's holding was based, in part, on the fact that Kaiser produced "over 90 percent of its investigation-related documents after obtaining a *written stipulation* that such production did *not* constitute a waiver of the attorney-client privilege." (*Id*. at 1225 (emphasis in original).) Kaiser only withheld or partially redacted less than ten percent of the whole of its investigation and produced a detailed privilege log detailing the nature of each withheld document. (*Ibid*.) The Court held that Kaiser "never denied the plaintiffs any discovery of its investigation files" and therefore preserved the privilege on the few documents it specifically identified. (*Ibid*.)

The *Kaiser* court based its decision on *Wellpoint Health Networks, Inc. v. Superior Court* (1977) 59 Cal.App.4th 110. In *Wellpoint*, an employer undertook an investigation through an outside law firm. An attorney from the firm sent a letter rejecting the employee's claims but refused to produce the entire investigation file on the grounds of privilege. The court held that should the employer raise the defense of adequate investigation, it could not hide behind the privilege to keep the investigation secret. (*Id*. at 125-29.)

Courts have limited the use of privilege in other contexts as well to ensure that privilege is not being used improperly to deny information and leave claims and contentions unchallengeable. In *Weingarten, supra,* 102 Cal.App.4th at 275-76 the court held that while the relevance of tax returns to punitive damages issues does not ordinarily warrant abrogation of the privilege that bars their disclosure, disclosure was warranted where defendant had refused to produce relevant non-privileged financial documents, noting that "the balance changes when the defendant, without a valid basis, refuses to comply with legitimate discovery requests that seek non-privileged financial information." (*Ibid*.)

In *Green v. Sup. Ct. of San Joaquin County* (1963) 220 Cal.App.2d 121, 127, the court held that bringing an action in which the welfare of children is a vital factor, a wife placed her fitness as a custodial parent on the line and required the disclosure of privileged tax information. The court reasoned that if the privileged materials were not disclosed, there was no way to test the veracity of her financial status, which was her primary contention in the case: "In fact her position in invoking the privilege is really this: I assert that the welfare of the children will be best served by placing them with me because I am a normal, well and stable parent fit to have them, but the court, nevertheless, cannot be allowed to test these assertions by examining my doctors (or their agents, the pharmacists) as witnesses, notwithstanding that they are the persons best able to confirm my fitness." (*Ibid*.) Similarly, *In re Marriage of Parks* (1982) 138 Cal.App.3d 346, 349, the Court held that a husband could not "hide behind" tax privileges because it would "force Wife and the court to guess at the amount of the pension or accept Husband's uncorroborated testimony thereon." (*Ibid*.)

Argue that privilege may not be used as both a sword and a shield

Another approach to excluding evidence is to present to the court that a litigant cannot, on the one hand resist discovery by asserting a privilege, and then seek to introduce at trial selective favorable evidence on the same subject for which they asserted a privilege. This type of selective presentation of the evidence is known as an improper "sword-and-shield" tactic – where a party would gain an unfair advantage by intentionally and selectively producing favorable privileged evidence while simultaneously seeking to protect damaging evidence on the same subject.

In your briefing, make clear that it is improper for defendant to use privilege as a shield in discovery and then use the information subject to that privilege as a sword at trial. (*Nat'l Steel Products Co., supra,* 164 Cal.App.3d at 487; see also *Dwyer, supra,* 194 Cal.App.3d at 1432 ("[C]ourts have never allowed a plaintiff to use 'the self-incrimination privilege as a 'shield and as a sword.'").) In balancing privilege against discovery, "[t]he rule predicated on fairness articulated in the decisions is a shield to prevent a litigant from taking undue advantage of his adversary's industry and effort, not a sword to be used to thwart justice or to defeat the salut[a]ry objects of the Discovery Act." (*Williamson v. Sup. Ct.* (1972) 21 Cal.3d 829, 838 (quoting *Petterson v. Sup. Ct.* (1974) 39 Cal.App.3d 267, 273 (emphasis added).)

Also point out that it is fundamentally unfair for a party to use privilege as both a sword and a shield. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771 ("Fundamental fairness in this context is an extension of the principle that, 'the privilege which protects attorney-client communications may not be used both as a sword and a shield.'") (Also citing *Chevron Corp. v. Pennzoil Co.* (9th Cir.1992) 974 F.2d 1156, 1162).) Where a party raises a claim which in fairness requires disclosure of a protected communication, the privilege may be implicitly waived. (*Chevron,* supra, at 1162).

Stress that defendants cannot suborn perjury by withholding information from the jury

Depending on the type of case, also consider emphasizing to the judge that a defendant should not be able to suborn perjury by selectively using a privilege to perpetuate knowingly false evidence or evidence that knowingly creates a false picture of the facts at hand. As for the basis for exclusion, argue that the jury will be misled by false, partial testimony based on introduction of evidence which excludes privileged materials regarding the same issues, so such evidence should be excluded as misleading under Evidence Code section 352.

Any person who, under oath, "states as true any material matter which he or

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she knows to be false" has committed perjury. (Penal Code, § 118a.) Perjury is not limited to testifying falsely; making "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." (Penal Code, § 125.)

The term subornation of perjury includes a circumstance when an attorney either causes a witness to lie, or knows a witness is lying, under oath. Suborning perjury is defined as "willfully procure[ing] another person to commit perjury" and is punishable in the same manner as perjury. (Penal Code, § 127.) An attorney is not permitted to "knowingly allow a witness to testify falsely." (*People v. Pike* (1962) 58 Cal.2d 70, 97.) "An attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution (Penal Code, § 127) as well as severe disciplinary action." (*In Re Branch* (1969) 70 Cal.2d 200, 210-211.)

As above, two of the primary purposes of the Civil Discovery Act are "to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury" and "to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses..." (*Greyhound Corp., supra,* 56 Cal.2d at 376.) While Courts obviously recognize the existence of certain privileges such as attorney-client and work product, "[a]greements to suppress evidence have long been held void as against public policy, both in California and in most common law jurisdictions." (*Smith v. Sup. Ct.* (1996) 41 Cal.App.4th 1014, 1025 (citing *Williamson, supra,* 21 Cal.3d at 836-837); 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 611, p. 550; 6A Corbin on Contracts (1962) § 1430, p. 380.).

Privileges are not meant to allow defendants to suborn perjury. If an attorney is aware that his or her client is committing perjury, the attorney-client privilege may not be used to suborn such perjury. (*United States v. Talao* (9th Cir. 2000) 222 F.3d 1133, 1140 ["It would be an anomaly to allow the subornation of perjury to be cloaked by an ethical rule, particularly one manifestly concerned with the administration of justice."].) Further, under the crime or fraud exception to the attorney-client privilege, "[t]here is no privilege...if the services of the lawyer were sought to obtain or aid anyone to commit or plan to commit a crime or a fraud." (Evid. Code, § 956.)

Argue against cherry-picking

You should also inform the court that defendants may not cherry-pick which documents or information to withhold on privilege grounds. A party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving. "Voluntary disclosure of part of a privileged communication is a waiver as to the remainder of the privileged communication about the same subject." (*Handgards, Inc. v. Johnson & Johnson* (N.D. Cal. 1976) 413 F.Supp. 926, 929). In determining what information is covered by the privilege, a court ultimately must be guided by "the subject matter of the documents disclosed, balanced by the need to protect the frankness of the client disclosure and to preclude unfair partial disclosures." (*SNK Corp. of Am. v. Atlus Dream Entm't Co.*, 188 F.R.D. 566, 571 (N.D. Cal. 1999) (citing *Starsight Telecast, Inc. v. Gemstar Development Corp.*, 158 F.R.D. 650 (N.D.Cal.1994)).)

California Evidence Code section 356 similarly limits "cherry picking" in the evidence context, stating:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

(Evid. Code, § 356.)

The purpose of Section 356 is "to prevent a party from using select aspects of a conversation, act, declaration, or writing to create a misleading impression on the subject presented to the jury." (*People v. Arias* (1996) 13 Cal.4th 92, 156.)

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