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§ 9.100 INTRODUCTION

Throughout the years, legal scholars and judges have formed the notion that thieves, muggers, rapists, hit-and-run drivers, squealers, unfaithful spouses, and wrongdoers in general, should all have somewhere safe to go and talk of their afflictions. At least, that's what the creators and perpetrators of the law of privilege believe. More particularly, the theory suggests that it is beneficial if certain people can be "trusted" to keep quiet. Were this not the case, people would be reluctant to seek professional help. And this would, of course, create a national crisis - shrinks, doctors, and we lawyers might be out of business.

In a courtroom setting, the term "privilege" means that the witness has a legal right to refuse to answer a question because of some special relationship, law, or constitutional guarantee. Questions that violate an established privilege may be objected to. If no objection is made, however, the privilege will be waived.

The law of privilege presents a unique set of problems because of its lack of uniformity throughout the fifty states. Some states recognize privileges that others do not. Even the Federal Rules of Evidence, which have created nearly-complete uniformity for 85 out of 100 jurisdictions (i.e., 50 federal plus 35 states) avoids the *privilege* issue by referring the reader back to the laws of the respective states. But despite the diversity, the reader should detect some consistency with respect to certain basic principles that transcend state lines.

§ 9.200 QUICK EXPLANATION

The following is a list of eleven classic groups involving privileged communications. *Certain* conversations between the people listed in each duet are privileged, meaning that those questions are objectionable, and need not be answered. We

place some emphasis upon the word “certain,” because there are exceptions. Here is the list of the duos:

1. Lawyer - Client
2. Doctor - Patient
3. Therapist - Patient
4. Accountant - Client
5. Clergyman - Penitent
6. Husband - Wife
7. Parent - Child
8. Informant - Police
9. Journalist - News Source
10. Confidential Institutional Communications
11. Self-Incrimination (i.e., Person - Self)

EXAMPLES OF PRIVILEGED QUESTIONS:

1. What did your lawyer tell you to say at this hearing?
2. Did you confess any crimes to your priest?
3. What did you tell your psychiatrist?

WHAT TO LOOK FOR:

Questions that involve conversations or exchanges of information between professionals, clergymen, and close family members. Any “confidential communication” might be a candidate for some type of privilege.

HOW TO OBJECT

OBJECTION:

“Objection. Privileged.”

POTENTIAL RESPONSES TO OBJECTION:

- A. “The privilege has been waived.”
- B. “Opposing counsel has not established the foundation elements required for the assertion of this privilege.” (See §9.501 through §9.512.)

§ 9.300 GENERAL LEGAL ANALYSIS

The laws pertaining to privilege are complex, at times inconsistent, and may vary from state to state. So determining whether or not a question seeks privileged information is not always a simple task. The Federal Rules of Evidence, which normally provide a model for the states to follow, offer very little help. Fed. R. Evid. 501 directs the reader to other sources with the following wordy instructions:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, *the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.* However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law (*emphasis supplied*).

The rule says that the principles pertaining to privilege come primarily from case law,¹ even though they may be modified by statutes and the U.S. Constitution. Perhaps we can shed some light on this complex situation by providing some general principles for each of the eleven duos.

References

Scholar's privilege under Rule 501 of Fed. R. Evid. 81 A.L.R. Fed. 904.

§ 9.400 STATE RULES

The law of privilege among the several states provides a bit of diversity, untainted by the influence of the Federal Rules of

¹ *United States v. Talley*, 790 F.2d 1468 (9th Cir. 1986).