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Understanding the Marital-Communications Privilege When Invoked by a Consortium Plaintiff

By Brenda A. Sweet – March 19, 2018

It is surprising when a plaintiff in a product-liability action invokes the marital-communications privilege. First, this privilege is typically only used in the criminal context. And second, even though defense counsel asks questions about marital communications to seek party admissions, most plaintiffs nevertheless jump at the chance to explain how their spouse has complained of injuries.

But it does happen, particularly at depositions of consortium plaintiffs, and can leave even seasoned attorneys flatfooted. There are steps, however, that can be taken at deposition to examine the validity of the privilege, assess the extent of waiver, preserve the issue for the record, and reframe the question in a way that does not seek privileged communications.

The Marital Communications Privilege

Adopted to preserve marital harmony, the marital-communications privilege takes roughly the same shape in all jurisdictions: Any confidential communications between married couples are privileged, and either spouse may prevent the other from disclosing the communications. A “communication” is typically spoken or written, but in some jurisdictions, may include other gestures (e.g., pointing; nodding; facial expressions) intended to convey a message to the spouse. It does not include acts observed during the course of the marriage that were not intended to communicate meaning to the spouse (e.g., observing spouse committing a crime or enjoying vacation).

While filing a lawsuit can waive many privileges (such as the physician-patient privilege by bringing a medical-malpractice action), courts are clear (with some exception) that bringing a loss-of-consortium claim in and of itself does not waive the privilege as to *all* communications. Nor does being identified as a witness waive the privilege. Instead, courts analyze 1) the nature of claim asserted by the plaintiff, and 2) whether the plaintiff has already disclosed communications on the same topic.

Waiver as a Consortium Plaintiff

Because loss-of-consortium claims involve claims of harm to the marriage, any communications as to the health of the marriage have been waived by the filing of a consortium claim as they have put the marital relationship at issue. Therefore, a consortium plaintiff may be compelled to testify as to discussions of divorce or accusations of infidelity, and may also be required to produce marital-therapy notes.

Products Liability Litigation

However, the privilege may be used to protect communications not concerning the consortium claim. In the product-liability context, for example, the *In re Lipitor* multidistrict litigation court held that the plaintiff did not waive the privilege as to marital discussions regarding knowledge of the warnings on cigarette labels by filing of a consortium claim.

Communications on the Same Subject Matter Already Disclosed

During a deposition, a consortium plaintiff may answer some questions about spousal communications (perhaps inadvertently) but refuse to answer others. While answering some questions does not constitute a waiver as to *all* marital communications of any type, it typically waives the privilege as to communications on the same subject matter.

Assessing the Privilege in the Absence of Waiver

When inquiring about marital communications, start broadly. Whether communications on a subject (e.g., did you ever discuss with your spouse the injuries claimed by your spouse in this lawsuit?) took place at all is generally not privileged and will provide the rabbit hole to start asking more focused questions. Also inquire into whether those communications were actually confidential—were they made in the presence of anyone else? Because communications between spouses are presumed confidential, the opposing party has the burden of establishing that the subject conversations are not privileged. If you believe that the plaintiff is not appropriately invoking the privilege, ask the questions anyway to make a record.

When the communications are legitimately privileged and not waived, ask questions about matters *observed* rather than matters communicated. For example, while confidential marital communications about the risks of cigarette smoking are privileged, whether the consortium plaintiff ever observed the spouse reading cigarette warnings is not. And while whether the plaintiff ever complained to the other of pain while walking may be privileged, whether the consortium plaintiff ever observed the spouse limp or otherwise react to pain is not.

At bottom, do not let the marital-communications privilege leave you flummoxed at deposition. There are still viable areas of inquiry, such as communications about the marriage itself and acts observed. And when in doubt, always make a record.

[Brenda A. Sweet](#) is of counsel in the Cleveland, Ohio, office of Tucker Ellis LLP.