



1-1-1984

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Recommended Citation

Jennifer B. Kaufman, *Asserting Confidentiality: The Need for a Lay Representative-Claimant Privilege*, 15 PAC. L. J. 245 (1984).
Available at: <https://scholarlycommons.pacific.edu/mlr/vol15/iss2/4>

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Asserting Confidentiality: The Need for a Lay Representative-Claimant Privilege

Individuals appearing in California administrative hearings have been given the statutory right to representation by counsel or other agents¹ in a variety of settings, including hearings for Aid to Families with Dependent Children,² (hereinafter referred to as AFDC), unemployment insurance,³ workers' compensation,⁴ and the Agricultural Labor Relations Board.⁵ If an individual chooses attorney representation, an attorney-client privilege⁶ attaches to all confidential communications⁷ between the parties.⁸ If, however, a claimant elects nonattorney representation, no provision of the California Evidence Code confers a comparable privilege.⁹ Nevertheless, in certain situations, courts have recognized a lay representative-claimant privilege. Some jurisdictions have extended the attorney-client privilege to encompass patent agents

1. For example, claimants may be represented by a relative, friend or individual from a community service agency. *See, e.g.,* Welfare Rights Organization v. Crisan, 33 Cal. 3d 766, 661 P.2d 1073, 190 Cal. Rptr. 919 (1983). *See also* 45 C.F.R. §205.10(a)(3)(iii) (in hearings for public assistance, claimants "may be represented by an authorized representative such as legal counsel, relative, friend or other spokesman," or may choose self representation).

2. CAL. WELF. & INST. CODE §10950. Providing in relevant part: "If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of public social services, if his application is not acted upon with reasonable promptness, or if any person who desires to apply for public social services is refused the opportunity to submit a signed application therefor, and is dissatisfied with such refusal, he shall, in person or through an authorized representative . . . be accorded an opportunity for a fair hearing." *Id.*

3. CAL. UNEMP. INS. CODE §1957 ("Any individual claiming benefits in any proceedings before the Appeals Board or its authorized representative may be represented by counsel or agent . . .").

4. CAL. LAB. CODE §5700 ("Either party may be present at any hearing, in person, by attorney, or by any other agent . . .").

5. *Id.* §1151.3. "Any party shall have the right to appear at any hearing in person, by counsel, or by other representative." *Id.* The right to lay representation also attaches in federal administrative hearings. *See, e.g.* 5 U.S.C. §555(b); 45 C.F.R. §205.10.

6. *See generally*, CAL. EVID. CODE §§950-962 (scope of lawyer-client privilege).

7. *Id.* §952 (definition of confidential communication).

8. *See id.* §954.

9. *See id.* §§910-1060.

and their clients.¹⁰ Another approach is exemplified by *Welfare Rights Organization v. Crisan*.¹¹ In that case, the California Supreme Court found that a privilege for AFDC lay representatives was impliedly guaranteed by the statute authorizing lay representation.¹² Since the holding of *Crisan* was limited to welfare hearings and did not extend beyond statutory interpretation,¹³ whether a privilege currently exists to protect lay representative-claimant communications in other areas is unclear. The purpose of this comment is to establish a basis for finding a privilege when the claimant elects lay representation.

This comment will review the areas in which lay representatives are authorized, focusing primarily on workers' compensation and unemployment insurance hearings.¹⁴ Following this discussion, the rationale behind the attorney-client privilege will be studied, together with the reasons for extending a comparable privilege to lay representatives. The analysis will then focus on the patent agent and *Crisan* cases to explore their applicability to workers' compensation and unemployment insurance hearings. A court may choose not to follow the precedent of *Crisan* by determining that the financial need of a claimant in an AFDC hearing distinguishes *Crisan* from other situations in which lay representation is authorized. This comment will demonstrate that a lay representative-claimant privilege may be compelled by constitutional considerations through a discussion of the federal constitutional requirements of due process and equal protection and the California constitutional right to privacy. Finally, legislation will be proposed to clarify the parameters of this privilege. First, however, the proceedings in which lay representation is authorized must be examined.

A. Proceedings in which Lay Representation is Authorized

Lay representation has been legislatively authorized in a variety of administrative proceedings, including workers' compensation¹⁵ and

10. *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 391-94 (D.D.C. 1978); *Jack Winter, Inc. v. Koratron Co., Inc.*, 54 R.F.D. 44, 48 (N.D. Cal. 1971); *Venitron Medical Prod., Inc. v. Baxter Labs., Inc.*, 186 U.S.P.Q. 324, 325-26 (D. N.J. 1975); *In re Yarn Processing Patent Litig.*, 177 U.S.P.Q. 514, 514 (S.D. Fla. 1973).

11. 33 Cal. 3d 766, 661 P.2d 1073, 190 Cal. Rptr. 919 (1983).

12. *Id.* at 771, 661 P.2d at 1077, 190 Cal. Rptr. at 923.

13. *Id.* at 772, 661 P.2d at 1077, 190 Cal. Rptr. at 923.

14. This comment will not address the issue of a lay representative-claimant privilege in the public social services area. See generally Siporin, *The Least Best Hope of Legal Services for the Poor in the Eighties: The Need for Public Sector Lay Advocates with Confidential Communications*, 10 SAN FERN. V.L. REV. 21 (1982) (discussion of the constitutional basis for a privilege for AFDC representatives and claimants).

15. CAL. LAB. CODE §5700.

unemployment insurance hearings.¹⁶ Workers' compensation is awarded to an employee injured in the course of employment, irrespective of fault.¹⁷ The benefits are not intended to compensate a worker fully for the injuries sustained, but to rehabilitate the employee¹⁸ and provide "reasonable subsistence" to the injured worker.¹⁹ Another social insurance program, unemployment insurance, provides benefits to individuals who have become unemployed "through no fault of their own."²⁰ The goal of this program is to give relief to unemployed workers and to reduce the financial burden on society.²¹

The Workers' Compensation Appeals Board and the Unemployment Insurance Appeals Board are empowered to hear issues relating to the award or denial of benefits.²² At these hearings, testimony may be taken and witnesses examined by the parties to the proceedings.²³ The claimant is permitted to appear alone, with counsel, or with an authorized lay representative.²⁴ No qualifications are prescribed for a lay representative.²⁵

The rationale for lay representation is grounded in public policy.²⁶ Many claimants are indigent and cannot afford to hire legal counsel.²⁷ Furthermore, claims are often small and therefore, do not justify the

16. CAL. UNEMP. INS. CODE §1957.

17. CAL. LAB. CODE §3600; *see also*, CAL. CONST., art. XIV, §4; 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION §1.05[1] (1983).

18. 2 W. HANNA, *supra* note 17, §1.05[3].

19. *Id.* §1.05[5][a].

20. CAL. UNEMP. INS. CODE §100.

21. *Id.*; *see* California Portland Cement Co. v. California Unemp. Ins. Appeals Bd., 178 Cal. App. 2d 263, 269-70, 3 Cal. Rptr. 37 (1960).

22. *See* CAL. LAB. CODE §§5300-5317; CAL. UNEMP. INS. CODE §§401-413.

23. *See* CAL. LAB. CODE §§5700-5710; CAL. UNEMP. INS. CODE §§1951-1959. Administrative hearings operate under relaxed rules of evidence and procedure. *See generally* O'BRIEN, CALIFORNIA EMPLOYER-EMPLOYEE BENEFITS HANDBOOK, 273-80 (1981) (hearings procedures for unemployment compensation); 1 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION, §§4.01-5.09 (1983) (hearing procedures for workers' compensation).

24. *See, e.g.*, CAL. LAB. CODE §§1151.3 (ALRB), 5700 (workers' compensation); CAL. UNEMP. INS. CODE §1957 (unemployment compensation); CAL. WELF. & INST. CODE §10950 (public social services). An unrepresented claimant is aided by the hearing examiner, who sees that all relevant information is brought out. *See* Coyle v. Gardner, 298 F. Supp. 609, 611-12 (D. Hawaii 1969).

25. *See* CAL. LAB. CODE §§1151.3, 5700; CAL. UNEMP. INS. CODE §1957; CAL. WELF. & INST. CODE §10950. Some commentators believe that it is not necessary to be an attorney to represent a claimant's interests adequately. *See* Morris, *On Appeal: Claimant Advocacy and Full and Fair Hearing*, in 3 UNEMPLOYMENT COMPENSATION STUDIES AND RESEARCH, 665, 667 (U.S. Nat'l Comm'n. on Unempl. Comp. 1980); Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L.R. 1, 79 (1981). No evidence has been presented that lay representatives have performed poorly in these hearings. *Id.*

26. *See* Eagle Indem. Co. v. Industrial Accident Comm'n., 217 Cal. 244, 249, 18 P.2d 341, 343 (1933).

27. *See id.*

use of an attorney.²⁸ Due to these financial constraints, many claimants would not be represented in administrative hearings if lay representation were not available.²⁹ By permitting lay representation, the California Legislature has provided an inexpensive means of fairly resolving disputes.³⁰

Despite these advantages, two basic arguments against lay representation have been raised. First is the concern that lay representation will result in inexpert advice being given to a claimant due to lack of control over the representative's qualifications.³¹ Representation by an attorney in these areas, however, is not a guarantee of effective counsel, particularly if the issues are complex.³² Second, the growth of workers' compensation as a certified legal specialty has minimized the need for lay representation in this field.³³ While finding a qualified attorney to represent a claimant in a workers' compensation hearing is no longer difficult, financial considerations for the claimant remain.³⁴

Notwithstanding these arguments, the statutory provisions for lay representation appear to be firmly established.³⁵ If a representative is to serve a claimant effectively, however, a privilege should attach to all confidential communications between the parties, much like the recognized attorney-client privilege. To provide a better understanding of the need for a privilege, the following section will examine the attorney-client privilege.

B. Attorney-Client Privilege

An attorney serves three basic functions: advising clients, drafting

28. See *id.* Attorney's fees in workers' compensation cases usually range from 9-12% of the award, depending on the complexity of the case. In 1975, the average fee allowed was \$482. 1 W. HANNA, *supra* note 23, §§16.03 (1)-(2); see also Bancroft, *Some Procedural Aspects of the California Workmen's Compensation Law*, 40 CAL. L.R. 378, 396-97 (1952); Morris, *supra* note 25, at 665-66.

29. See Morris, *supra* note 25, at 665-66. The lack of claimant representation often contributes to the denial of benefits. *Id.*

30. See CAL. CONST. art. XIV, §4 (workers' compensation administration "shall accomplish substantial justice in all cases expeditiously, inexpensively and without incumbrance . . ."); see also *Hustedt v. Workers' Comp. Appeals Bd.*, 30 Cal. 3d 329, 351, 636 P.2d 1139, 1152, 178 Cal. Rptr. 801, 814 (1981) (Newman, J., concurring and dissenting). The change in language in Welf. & Inst. Code section 10950 from "counsel" to "authorized representative" indicates the awareness of the Legislature of the need for lay representation. *Crisan*, 33 Cal. 3d at 770, 661 P.2d at 1076, 190 Cal. Rptr. at 922.

31. See *Bland v. Reed*, 261 Cal. App. 2d 445, 449, 67 Cal. Rptr. 859, 862 (1968); *Eagle*, 217 Cal. at 249, 18 P.2d at 343.

32. See, e.g., Morris, *supra* note 25, at 666.

33. See *Hustedt*, 30 Cal. 3d at 352, 636 P.2d at 1153, 178 Cal. Rptr. at 815 (Newman, J., concurring and dissenting); 1 W. HANNA, *supra* note 23, at §16.01(1).

34. See 1 W. HANNA, *supra* note 23, at §16.03(1)-(2).

35. The change in language from "counsel" to "authorized representative" in Welfare

legal instruments, and advocating for a client.³⁶ To permit full disclosure of information and thereby improve the quality of services rendered by an attorney,³⁷ a privilege has been granted to clients³⁸ protecting confidential communications³⁹ made in the course of the attorney-client relationship.⁴⁰ As the United States Supreme Court stated in *Upjohn Co. v. United States*,⁴¹ the purpose of the attorney-client privilege is to

encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.⁴²

Without this privilege, a client is less likely to confide freely in an attorney, thereby impeding the attorney's functions.⁴³ The attorney-client privilege, however, does not act as a complete bar to obtaining information; rather, it limits the permissible *means* of learning the contents of the communication.⁴⁴

Under the California Evidence Code, the client, as holder of the privilege,⁴⁵ may refuse to disclose or prevent another from disclosing

& Institutional Code section 10950 is indicative of this position. See *Crisan*, 33 Cal. 3d. at 770, 661 P.2d at 1076, 190 Cal. Rptr. at 922.

36. 1 B. WITKIN, CALIFORNIA PROCEDURE §3 (2d ed. 1970).

37. *Sullivan v. Superior Court*, 29 Cal. App. 3d 64, 69, 105 Cal. Rptr. 241, 244 (1972); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 53-54, 69 Cal. Rptr. 480, 489 (1968); Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1061 (1978); Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 IOWA L. REV. 811, 816-17 (1981); 7 CAL. L. REV. COMM'N., §950 at 170 (1965) [hereinafter referred to as COMMISSION].

38. CAL. EVID. CODE §951(b) (definition of client).

39. *Id.* §952 (definition of confidential communication).

40. *Id.* §954 (lawyer-client privilege); *id.* §950 (definition of lawyer). These policy considerations have been deemed to outweigh the risk of suppressing relevant evidence. See *City and County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951). Furthermore, public policy has favored fostering attorney-client communications even before the enactment of statutory provisions. See, e.g., *People v. Atkinson*, 40 Cal. 284, 285 (1870). See also *People v. Flores*, 71 Cal. App. 3d 559, 565, 139 Cal. Rptr. 546, 549 (1977). The payment of a fee and an employment relationship are not prerequisites to invoking the privilege. *Maier v. Noonan*, 174 Cal. App. 2d 260, 266, 344 P.2d 373, 377 (1959); *Benge v. Superior Ct.*, 131 Cal. App. 3d 336, 345, 182 Cal. Rptr. 275, 280 (1982). See generally 8 J. WIGMORE, EVIDENCE §2291 (Chadbourn rev. 1978) (policy of the attorney-client privilege).

41. 449 U.S. 383 (1981).

42. *Id.* at 389.

43. See *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Gonzales v. Municipal Court*, 67 Cal. App. 3d 111, 118, 136 Cal. Rptr. 475, 479 (1977); Saltzburg, *supra* note 37, at 817.

44. See Saltzburg, *supra* note 37, at 818. Only the statements made to an attorney are protected; independent investigation and questioning of a client are legitimate means of discovering protected information. *Id.*

45. CAL. EVID. CODE §953.

a confidential communication made to an attorney.⁴⁶ Once the privilege is claimed on the grounds of confidentiality, the communication is presumed to have been made in confidence and the burden of proof shifts to the person seeking disclosure.⁴⁷ While these provisions apply in administrative hearings as well as law courts,⁴⁸ the attorney-client privilege attaches only if the client has confided in an *attorney*, or someone whom the client reasonably believed to be an attorney.⁴⁹ Although a lay representative in an administrative hearing performs the functions of an attorney, no privilege attaches to communications between the representative and the client. The same policy considerations favoring an attorney-client privilege mandate a comparable privilege for lay representatives and their clients.⁵⁰

C. Extending the Attorney-Client Privilege to Lay Representatives

The California Evidence Code explicitly limits privileges to those provided by statute.⁵¹ This statutory prohibition prevents courts from expanding evidentiary privileges as a matter of judicial policy.⁵² Some courts have narrowly construed the attorney-client privilege to limit the suppression of relevant evidence that necessarily results from invoking the privilege.⁵³ Other courts, seeking to further the attorney-client relationship, have construed the privilege more broadly.⁵⁴ An argument might be raised that lay representatives should be included within the scope of the attorney-client privilege because the represen-

46. *Id.* §954. Communications from an attorney made to the client in the course of the attorney-client relationship are also privileged. *Id.* §952. This privilege, however, is subject to certain exceptions. *See id.* §§956 (attorney's services sought for the purpose of planning or committing a crime or fraud), 957 (parties claiming through deceased client), 958 (communication relevant to an issue of breach of duty arising out of attorney-client relationship), 959 (attorney as attesting witness), 960 (intent of deceased client concerning writing affecting property interest), 961 (validity of writing by deceased client affecting property interest), 962 (joint clients).

47. *Id.* §917; *see Flores*, 71 Cal. App. 3d at 564, 139 Cal. Rptr. at 548; *Romo v. Southern Pac. Transp. Co.*, 71 Cal. App. 3d 909, 922, 139 Cal. Rptr. 787, 795 (1977) (refusing to alleviate burden by ordering in camera examination to determine if privileged).

48. *See* CAL. EVID. CODE §910.

49. *See id.* §950.

50. *See* WIGMORE, *supra* note 40, at §2300a; *see also Siporin*, *supra* note 14, at 34 (arguing for privilege for AFDC lay representatives and claimants).

51. CAL. EVID. CODE §911.

52. *See id.*; COMMISSION, *supra* note 37, §911, at 160; *Dickerson v. Superior Court*, 135 Cal. App. 3d 93, 99, 185 Cal. Rptr. 97, 100 (1982); *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 656, 542 P.2d 977, 978-79, 125 Cal. Rptr. 553, 554-55 (1975).

53. *See, e.g., Greyhound Corp. v. Superior Ct.*, 56 Cal. 2d 355, 396, 364 P.2d 266, 288, 15 Cal. Rptr. 90, 112 (1961); *San Francisco*, 37 Cal. 2d at 234, 231 P.2d at 29-30; *Gonzales*, 67 Cal. App. 3d at 118, 136 Cal. Rptr. at 479; *Merritt v. Superior Ct.*, 9 Cal. App. 3d 721, 730, 88 Cal. Rptr. 337, 342-43 (1970).

54. *See, e.g., Benge*, 131 Cal. App. 3d at 344, 182 Cal. Rptr. at 279; *Flores*, 71 Cal. App. 3d at 563, 139 Cal. Rptr. at 548.

tatives serve the same functions as attorneys in administrative hearings. A similar expansion of the attorney-client privilege has occurred in some patent agent cases.

A registered patent agent is authorized to represent patent applicants before the U.S. Patent and Trademark Office.⁵⁵ In *Sperry v. Florida*,⁵⁶ the state of Florida attempted to prohibit the activities of patent agents. The United States Supreme Court held that the state was preempted from finding that patent agents who appeared before the U.S. Patent Office were engaged in the unauthorized practice of law.⁵⁷ Some courts later expanded the rights of patent applicants by including the patent agent-client relationship within the scope of the attorney-client privilege.⁵⁸ The courts reasoned that patent agents are licensed to appear before the Patent Office *only after* proving their qualifications to practice. Consequently, professional and ethical standards can be insured.⁵⁹ The attorney-client privilege was also extended to patent agents and their clients in the decision of *In re Ampicillin Antitrust Litigation*.⁶⁰ In that case, the court stated as follows:

Congress, in creating the Patent Office, has expressly permitted both patent attorneys and patent agents to practice before that office. The registered patent agent is required to have a full and working knowledge of the law of patents and is even regulated by the same standards, including the Code of Professional Responsibility, as are applied to attorneys in all courts. Thus, in appearance and fact, the registered patent agent stands on the same footing as an attorney in proceedings before the Patent Office.⁶¹

Lay representatives in the public sector, however, are not subject to any qualifying procedures.⁶² While some organizations exist to provide assistance to claimants, particularly in the public social service

55. 37 C.F.R. §1.341.

56. 373 U.S. 379 (1963).

57. See *id.* at 386-88.

58. See, e.g., *Ampicillin*, 81 F.R.D. at 393-94; *Jack Winter*, 54 F.R.D. at 48; *Vernitron*, 186 U.S.P.Q. at 324; *Yarn Processing*, 177 U.S.P.Q. at 514. But see *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1975); *Rayette-Faberge, Inc. v. John Oster Mfg. Co.*, 47 F.R.D. 524 (E.D.Wis. 1969); *Joh. A. Benckiser G.m.b.H., Chem. F. v. Hygrade Food Prod. Corp.*, 253 F. Supp. 999 (D.N.J. 1966); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950) (all holding that the attorney-client privilege does not extend to individuals not admitted to the bar).

59. See *Ampicillin*, 81 F.R.D. at 391-94; *Jack Winter*, 54 F.R.D. at 48; *Vernitron* 186 U.S.P.Q. at 325-26; *Yarn Processing*, 177 U.S.P.Q. at 514; see also WIGMORE, *supra* note 40, at §2300a (discussing a professional privilege to encompass qualified practitioners).

60. 81 F.R.D. 377 (D.D.C. 1978).

61. *Id.* at 393.

62. See, e.g., CAL. LAB. CODE §§1151.3, 5700; CAL. UNEMPL. INS. CODE §1957; CAL. WELF. & INST. CODE §10950.

arena,⁶³ a claimant may be represented by a friend or neighbor with no expertise in a given area. Although the issue of qualifications has become moot due to the statutory authorization of lay representation in state administrative hearings, the lack of control over a lay representative's qualifications serves to distinguish this situation from the patent agent cases. The expansion of the *attorney-client* privilege to include claimants and lay representatives without prescribing qualifications for the representative, therefore, would be inappropriate.⁶⁴ Although the Evidence Code precludes courts from creating new privileges,⁶⁵ a basis for a lay representative-claimant privilege may be found in the *Crisan* case.⁶⁶

D. *Judicially Recognized Privilege: Welfare Rights Organization v. Crisan*

In *Welfare Rights Organization v. Crisan*, the court was confronted with a lay representative from the Welfare Rights Organization. The lay representative was subpoenaed by the Butte County Social Welfare Department to testify concerning past communications with an AFDC claimant. The claimants, representative, and organization filed an action for injunctive and declaratory relief arguing that a privilege was constitutionally required under the state and federal due process clauses. Additionally, the claimants asserted that federal AFDC regulations compelled recognition of a lay representative-claimant privilege, and therefore that the supremacy clause of the United States Constitution precluded the state from denying the existence of the privilege. The trial court dismissed the complaint after ruling that no evidentiary privilege existed to protect communications between claimants and nonattorney representatives. The Court of Appeal affirmed the dismissal.⁶⁷

On appeal to the California Supreme Court, the judgment of dismissal was reversed.⁶⁸ Although the court recognized the intent of the Legislature to prevent judicially created privileges,⁶⁹ the court found that the privilege was impliedly provided by section 10950 of the

63. See Siporin, *supra* note 14, at 27-28; Livingston, *Organizations and Administrative Practice - A Balance to the Corporate State?*, 26 HASTINGS L.J. 89, 101 (1974).

64. See WIGMORE, *supra* note 40, at §2300a (proposing a privilege for lay representatives only if certain qualifications are met).

65. See *supra* notes 51-52 and accompanying text.

66. *Welfare Rights Organization v. Crisan*, 33 Cal. 3d 766, 661 P.2d 1073, 190 Cal. Rptr. 919 (1983).

67. *Id.* at 768, 661 P.2d at 1074, 190 Cal. Rptr. at 920.

68. *Id.* at 772, 661 P.2d at 1077, 190 Cal. Rptr. at 923.

69. *Id.* at 769, 661 P.2d at 1075, 190 Cal. Rptr. at 921.

Welfare & Institutions Code, the statute authorizing lay representation.⁷⁰ After emphasizing the importance of the attorney-client privilege,⁷¹ the court concluded:

Suffice it to say that the considerations which support the privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons. Otherwise that right would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.⁷²

The court did not decide the constitutional issues argued by the plaintiffs.⁷³ Furthermore, the court limited its holding to claimants in public social service administrative hearings, which are based on an individual's economic circumstance or social condition.⁷⁴

Justice Richardson, dissenting, argued that the court was precluded from finding a lay representative-claimant privilege for two reasons. First, he asserted that the privilege was a matter for legislative determination since the privilege is not specified in the Evidence Code.⁷⁵ Second, Justice Richardson found no constitutional basis to compel judicial recognition of the privilege.⁷⁶ Consequently, the dissent concluded, the failure to protect communications within the lay representative-claimant relationship does not create an "unfairness of constitutional dimensions."⁷⁷

The rationale of the majority in *Crisan* is also applicable to workers' compensation and unemployment insurance hearings. As Justice Broussard noted, the Legislature could not have intended that the only sound advice a lay representative in these areas could offer was,

70. *Id.* at 772, 661 P.2d at 1077, 190 Cal. Rptr. at 923. The court also noted that the claimants "believed and intended their consultation with him [their representative] in that capacity to be confidential." *Id.* at 768, 661 P.2d at 1074, 190 Cal. Rptr. at 920.

71. *Id.* at 770-71, 661 P.2d at 1076, 190 Cal. Rptr. at 922.

72. *Id.* at 771, 661 P.2d at 1076-77, 190 Cal. Rptr. at 922-23.

73. *Id.* at 772, 661 P.2d at 1077, 190 Cal. Rptr. at 923.

74. *Id.*; see CAL. WELF. & CODE §10051 (definition of public social services).

75. *Crisan*, 33 Cal. 3d at 777, 661 P.2d at 1080-81, 190 Cal. Rptr. at 926-27 (Richardson, J., dissenting). The dissent refused to follow the patent agent cases, distinguishing the qualification guarantees in those cases. *Id.* at 775-76, 661 P.2d at 1080, 190 Cal. Rptr. at 926. The Evidence Code has, in fact, been recently amended to expand the recognized privileges. In 1970, the psychotherapist-patient privilege was amended to include clinical social workers and school psychologists. CAL. EVID. CODE §1010(c), (d). In 1974, this privilege was further expanded to include marriage, family and child counselors. *Id.* §1010(e). Finally, in 1980 a new privilege was recognized for victims of sexual assault and their counselors. *Id.* §§1035-1036.2. The fact that the Legislature has amended these provisions appears to support the dissent's position in *Crisan*.

76. *Crisan*, 33 Cal. 3d at 776-77, 661 P.2d at 1080, 190 Cal. Rptr. at 926 (Richardson, J., dissenting).

77. *Id.* at 777, 661 P.2d at 1080, 190 Cal. Rptr. at 926. (Richardson, J., dissenting).

“Don’t talk to me.”⁷⁸ A court, therefore, may follow the precedent of *Crisan* and find a privilege impliedly guaranteed in statutes authorizing lay representation. Thus, a dichotomy becomes apparent between the *Crisan* approach and the prohibition of the Evidence Code against judicially created privileges.⁷⁹ By recognizing a privilege employing the *Crisan* rationale, courts may be thwarting the intent of the Legislature. Conversely, a court may distinguish the welfare setting of *Crisan* from workers’ compensation and unemployment insurance hearings and refuse to find an impliedly guaranteed privilege. If, however, constitutional grounds for a lay representative-claimant privilege exist, another basis can be found for judicial recognition of the privilege. This comment will next discuss due process, equal protection, and right to privacy as constitutional grounds for establishing a lay representative-claimant privilege.

E. Procedural Due Process

In *Goldberg v. Kelly*,⁸⁰ appellants, recipients of benefits under AFDC or a state Home Relief program, challenged the adequacy of benefit termination proceedings. The appellants claimed that the failure to provide for a personal appearance at a pretermination hearing, with an opportunity to present evidence and examine witnesses, was a violation of the due process clause of the federal Constitution.⁸¹ The United States Supreme Court, finding that the benefits were a statutory entitlement and therefore constituted a property interest,⁸² recognized the right of a welfare recipient to an evidentiary hearing before the termination of benefits.⁸³ The extent of procedural due process protection that the Constitution requires is to be determined by the extent of the loss suffered by the claimant.⁸⁴ Therefore, although posttermination hearings may be sufficient in some cases,⁸⁵ depriving individuals of their means of existence mandates a pretermination hearing.⁸⁶ The Court concluded that fundamental due process requires the opportunity to be heard in a meaningful and timely manner, tailored to the capabilities of those to be heard.⁸⁷ The right to confront and cross-

78. *Id.* at 771 n.3, 661 P.2d at 1077 n.3, 190 Cal. Rptr. at 923 n.3.

79. See CAL. EVID. CODE §911.

80. 397 U.S. 254 (1970).

81. *Id.* at 259.

82. *Id.* at 262.

83. *Id.* at 267-68.

84. *Id.* at 262-63.

85. *Id.* at 263.

86. *Id.* at 264.

87. *Id.* at 267-69.

examine witnesses is of paramount importance in a termination hearing, since the continuation of benefits may depend on this testimony.⁸⁸ The claimant must also have an opportunity to present defenses and arguments.⁸⁹ As a result, the Court held that counsel need not be provided to a claimant at public expense, although the claimant must be permitted to retain counsel.⁹⁰ Without representation, the right to be heard is virtually meaningless.⁹¹

The pretermination hearing requirements of *Goldberg* subsequently have been applied to the suspension⁹² and reduction of social service benefits.⁹³ Workers' compensation and unemployment insurance benefits are also considered property interests requiring pretermination hearings.⁹⁴ Consequently, the right to be heard in a meaningful manner should attach to a claimant choosing to appear with a lay representative. The recognition of a lay representative-claimant privilege is vitally important for this right to be fully exercised, particularly if an attorney need not be appointed to assist the claimant in a hearing.

The extent of procedural due process required depends on the balancing of three factors enunciated in *Mathews v. Eldridge*.⁹⁵ In that case, the respondent's social security disability insurance benefits were terminated by the Social Security Administration. The respondent challenged the termination procedure and asserted that his benefits should be reinstated pending a hearing on the issue of his disability. The Court, rejecting this argument, set forth the factors to determine constitutional due process requirements. The factors to be weighed are (1) the private interests of the claimant affected by the official action, (2) the risk of erroneous deprivation of the interest through the procedures used and probable value, if any, of additional or substitute safeguards, and (3) the governmental interests.⁹⁶

1. Private interests of the claimant

One of the private interests that would be considered important in determining the procedures required by due process is the financial interest of the claimant. In both *Goldberg* and *Mathews*, the claim-

88. *Id.* at 269.

89. *Id.* at 267-68.

90. *Id.* at 270.

91. *Id.*

92. *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (benefits for the aged).

93. Comment, *California Welfare Fair Hearings: An Adequate Remedy?*, 15 U.C.D. L. REV. 542, 579 (1972) (federal and state requirements).

94. See *Staley v. California Unempl. Ins. Appeals Bd.*, 6 Cal. App. 3d 674, 678, 86 Cal. Rptr. 294, 295 (1970); CAL. LAB. CODE §5803.

95. 424 U.S. 319 (1976).

96. *Id.* at 335.

ant had a financial interest in the uninterrupted receipt of benefits,⁹⁷ yet the Court came to different conclusions regarding the need for a pretermination hearing. In *Goldberg*, the need for benefits was crucial because welfare benefits, and therefore the basic necessities of life, were at stake.⁹⁸ The Court in *Mathews*, however, viewed the termination of social security disability benefits as less important because those benefits were not based on financial need.⁹⁹ If need became a factor for a claimant due to the termination of the benefits, other government programs were available to provide assistance.¹⁰⁰

Workers' compensation and unemployment insurance present a situation similar to *Mathews* in that benefits under both programs are paid despite the financial circumstances of the recipients. Employees may receive workers' compensation benefits for permanent injuries even if they are working and receiving a salary.¹⁰¹ While unemployment insurance recipients by definition, are not receiving a salary, payment is made even though the recipient has accumulated savings or other sources of income.¹⁰² The possibility is strong, therefore, that a court would give relatively little weight to a claimant's financial interest in deciding whether a lay representative-claimant privilege is required under the due process clause.

A second interest is also at stake for the claimant, however: an interest in adequate representation to prevent the wrongful termination of benefits. Through the presentation of issues and examination of witnesses, counsel can protect a claimant's interests.¹⁰³ This interest in adequate representation is adversely affected by the failure to recognize a lay representative-claimant privilege, as the next section will discuss.

2. Risk of erroneous deprivation of interests

If a claimant is not adequately represented in an administrative hearing, the risk of erroneous deprivation is high.¹⁰⁴ In *Mathews*, however,

97. See *id.* at 340; 397 U.S. at 264.

98. See 397 U.S. at 264.

99. See 424 U.S. at 340-43.

100. *Id.* at 342.

101. See, e.g., *Department of Motor Vehicles v. Industrial Acc. Comm'n.*, 14 Cal. 2d 189, 191-92, 93 P.2d 131, 132 (1939). Temporary disability payments compensate for lost wages, while permanent disability compensates for a theoretical loss of ability to compete in the labor market. *Russell v. Bankers Life Co.*, 46 Cal. App. 3d 405, 415-16, 120 Cal. Rptr. 627, 633-34 (1975).

102. See CAL. UNEMP. INS. CODE §1253 (individual is eligible for benefits if unemployed, available for work and appropriate claim is filed); see also *id.* §1252 (definition of unemployed).

103. 397 U.S. at 270-71.

104. See *id.*; see also Siporin, *supra* note 14, at 34 (citing studies that claimants who are

the Court found that a pretermination hearing was not constitutionally required due to the nature of the evidence presented.¹⁰⁵ Much of the evidence in social security disability hearings is comprised of medical assessments and standard medical reports;¹⁰⁶ witness credibility is rarely at issue.¹⁰⁷

In workers' compensation cases, medical reports also play a significant role in determining the extent of disability. Other factors, however, must also be proved, including that the injury arose out of and in the course of employment.¹⁰⁸ Unlike the social security disability case in *Mathews*, unemployment compensation cases rely heavily on witness testimony.¹⁰⁹ Effective presentation of a claimant's case, including cross-examination of witnesses, is essential in administrative hearings.¹¹⁰ If communications between a claimant and a representative are inhibited, however, due to the lack of a privilege, effective representation becomes illusory.¹¹¹ The claimant's interest in effective representation thus appears to be an important interest which must be weighed against the interests of the government in denying a lay representative-claimant privilege. The government interests at stake are examined in the following section.

3. Government Interests

The Court in *Goldberg* found that welfare payments enabled a recipient to participate in the life of the community, thus preventing dissatisfaction and unrest.¹¹² As a consequence, the government had an important interest in granting pretermination hearings.¹¹³ The government also has an important interest in effective representation in workers' compensation and unemployment insurance cases because denial of benefits will increase the burdens on society to care for the injured and unemployed.¹¹⁴

represented in administrative hearings are twice as successful in their claims as unrepresented claimants) and *Morris*, *supra* note 25, at 665-66 (describing disadvantages of claimants in unemployment insurance hearings).

105. *See* 424 U.S. at 343-44.

106. *Id.* at 343.

107. *Id.* at 344.

108. CAL. LAB. CODE §3600. "Arises out of employment" refers to the causal connection of the injury to the employment, while "course of employment" refers to the necessary time and place elements. *See Artukovich v. St. Paul-Mercury Indem. Co.*, 150 Cal. App. 2d 312, 322, 310 P.2d 461, 466-67 (1957).

109. *See* O'BRIEN, *supra* note 23, at 273-77.

110. *See* 397 U.S. at 269-70.

111. *See supra* notes 47-54 and accompanying text (rationale for attorney-client privilege).

112. 397 U.S. at 265.

113. *Id.* at 264-65.

114. Note, *Workmen's Compensation Act: Practice of Law: Right of Laymen to Appear*

Conversely, the government has an interest in conserving its fiscal and administrative resources. While this interest was not sufficient to override the need for pretermination hearings in a welfare context,¹¹⁵ the interest was given considerable weight by the Court in *Mathews*.¹¹⁶ The costs to the government resulting from the recognition of a lay representative-claimant privilege, however, would be negligible. The only government saving in denying this privilege is the cost of information gathering: obtaining information from a claimant's representative is less expensive than initiating a separate investigation. The manipulation of a claimant's right to representation, however, is not a legitimate means of saving resources.

The application of the foregoing *Mathews* factors suggests that the risk of deprivation of the claimant's interests by failing to recognize a lay representative-claimant privilege in workers' compensation and unemployment insurance cases outweighs the benefit that the government gains when the privilege does not exist. To insure that the claimant's interest in adequate representation is protected, a lay representative-claimant privilege appears to be required under the due process clause.¹¹⁷ Another area that may constitutionally compel a lay representative-claimant privilege is the equal protection clause of the United States Constitution.¹¹⁸

F. Equal Protection

The equal protection clause of the federal Constitution mandates that no person shall be denied equal protection of the law by the government.¹¹⁹ As a result, persons similarly situated must be treated in a similar manner.¹²⁰ Under traditional analysis, heightened judicial scrutiny will be applied to any classification made by the government that distinguishes individuals on a suspect basis, such as race.¹²¹ If, however, the classification is made on another basis, that classification is constitutional only if rationally related to a legitimate government interest.¹²² Claimants in administrative hearings, whether

Before Industrial Accident Commission in Representative Capacity, 22 CALIF. L. REV. 121, 123 (1934).

115. See 397 U.S. at 264-66.

116. See 424 U.S. at 347-48.

117. See also Siporin, *supra* note 14, at 32-37 (discussion of due process requirements for a privilege for AFDC representatives).

118. U.S. CONST. amend. XIV, §1.

119. *Id.*

120. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 586 (1983).

121. *Id.* at 592.

122. *Id.* at 591. See generally *id.* 590-99 (standards of review for equal protection analysis).

represented by attorneys or lay representatives, are similarly situated. By granting a privilege only to claimants appearing with attorneys and denying the same protection to individuals choosing lay representation, a classification is made that must pass this rational basis test.

As discussed in the preceding section, the government has an interest in permitting fair hearings. The government, however, also has an interest in receiving all relevant information at these hearings. Any privilege necessarily thwarts this interest.¹²³ Nonetheless, because claimants are similarly situated, a distinction between claimants with attorneys and those without in granting a privilege may not meet the rational basis test.

The government may contend that the suppression of relevant evidence is outweighed only if a claimant chooses attorney representation, thereby insuring that competent advice will be received.¹²⁴ The fact that an attorney is a professional, however, does not guarantee the quality of service to a client.¹²⁵ Furthermore, the attorney-client privilege attaches to a nonattorney as well, if the client reasonably believes the individual is authorized to practice law.¹²⁶ As a result, a communication made to a lay representative with expertise in the area is not privileged, while communication with a nonattorney, lacking any qualifications, may be protected under existing statutory provisions.¹²⁷

The attorney-client privilege was recognized to encourage open communications between the parties and thereby improve the quality of representation provided to a client.¹²⁸ Without this privilege, the function of an attorney is severely restricted. Similarly, lay representatives cannot effectively represent claimants in an administrative hearing without a privilege to protect their communications.¹²⁹ The distinction between attorney and lay representative, therefore, appears to be irrational. Consequently, the denial of a lay representative-claimant privilege may violate the equal protection clause of the Constitution. Furthermore, the right to privacy as established in the California Constitution may compel a lay representative-claimant privilege.

123. See *supra* note 53 and accompanying text.

124. The state has a substantial interest in protecting claimants and administrative processes from incompetent advocacy. Rhode, *supra* note 25, at 77.

125. See *supra* notes 25 and 31 and accompanying text.

126. CAL. EVID. CODE §950.

127. See, e.g., *People v. Barker*, 27 N.W. 539, 546 (1886) (confession to detective posing as attorney held privileged), see also WIGMORE, *supra* note 40, at §2302.

128. See *supra* notes 36-43 and accompanying text.

129. See *id*; WIGMORE, *supra* note 40, at §2300a.

G. Right to Privacy

In 1972, the California Constitution was amended to include privacy as an inalienable right.¹³⁰ This provision was enacted in response to the encroachment on personal freedom stemming from increased government surveillance and data collection.¹³¹ The drafters placed particular emphasis on the gathering, retention, and improper use of personal information collected about individuals.¹³² For example, in *White v. Davis*,¹³³ the California Supreme Court found that covert police surveillance in classes at the University of California in Los Angeles may have violated California privacy provisions. The court characterized this action as “‘governmental snooping’ in the extreme,”¹³⁴ and went on to hold that because the information gathered appeared to have been unrelated to any criminal activity, the gathering of information may have been unconstitutional.¹³⁵ The court then articulated the test to determine whether the right to privacy was violated: to justify the collection of this information, the government must show that a compelling state interest exists and no less intrusive means for accomplishing that goal is available.¹³⁶

If no lay representative-claimant privilege is recognized, an administrative agency has instant access to relevant information by merely issuing a subpoena at any time to the representative.¹³⁷ As set forth in *White v. Davis*, the state must establish a compelling interest to rationalize this intrusion into a claimant’s right to privacy. As discussed above, cost savings are not sufficient to justify the denial of the privilege.¹³⁸ On the other hand, the prevention of future fraudulent activity on the part of claimants may be a compelling state interest. The second prong of the test established in *White* must also be met, however: that no less intrusive means exists to achieve the compelling state interest. This portion of the test is failed by denying a lay representative-claimant privilege because a less intrusive means is apparent. The scope of the privilege can be limited, as in the attorney-

130. CAL. CONST. art. I, §1.

131. *White v. Davis*, 13 Cal. 3d 757, 774-75, 533 P.2d 222, 233-34, 120 Cal. Rptr. 94, 105-06 (1975).

132. *Id.* The referendum election brochure emphasized that “‘fundamental to our privacy is the ability to control the circulation of personal information’” (emphasis in the original). *Id.* at 774, 533 P.2d at 234, 120 Cal. Rptr. at 106.

133. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

134. *Id.* at 775-76, 533 P.2d at 234, 120 Cal. Rptr. at 106.

135. *Id.* at 776, 533 P.2d at 234, 120 Cal. Rptr. at 106.

136. *Id.* at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

137. This was attempted by the Butte County Social Welfare Department, leading to *Welfare Rights Organization v. Crisan*, 33 Cal. 3d 766, 661 P.2d 1073, 190 Cal. Rptr. 919 (1983).

138. See *supra* notes 112-17 and accompanying text.

client privilege, to exclude communications relating to future fraudulent or criminal activities.¹³⁹ Since a less drastic means of achieving this goal is available — legislation — a violation of the right to privacy appears to exist.¹⁴⁰

H. Proposed Legislation

The above discussion has revealed that several possible constitutional bases for recognizing a lay representative-claimant privilege may exist. Procedural due process appears to mandate a privilege to protect a claimant's interest in adequate representation. Equal protection issues arise because claimants in administrative proceedings are similarly situated, yet receive different degrees of protection depending on whether they appear with an attorney or a lay representative. Finally, the California constitutional right to privacy may be violated if the government is permitted access to information about benefit recipients through their lay representatives.

If constitutional questions are at stake, the courts are free to develop a privilege to protect a claimant's rights. Particular details of the privilege, however, such as the scope of protected communications, may give rise to a flood of litigation. To clarify the parameters of this privilege, this comment proposes that legislation be enacted to amend the Evidence Code to include a lay representative-claimant privilege.

CONCLUSION

This comment has demonstrated the need for a privilege to protect communications between a lay representative and a claimant. Without this protection, the claimant's freedom of selection in choosing a representative is impaired because anything communicated to a lay representative may later be subject to discovery.¹⁴¹

Although the California Supreme Court has found that a privilege for an AFDC representative impliedly exists within the statute authorizing lay representation, the California Evidence Code precludes the court from creating additional privileges. Future decisions may follow *Crisan* and find a lay representative-claimant privilege impliedly guaranteed in the authorizing legislation in other areas, such as workers' compensation and unemployment insurance. In the absence of decisions implying a privilege as the court did in *Crisan*, further

139. See CAL. EVID. CODE §956.

140. See also Siporin, *supra* note 14, at 46-48 (privacy considerations relating to privilege for AFDC representatives).

141. See *Ampicillin*, 81 F.R.D. at 393.

justification for this privilege can be found in federal due process and equal protection requirements and the California constitutional right to privacy.

Due process considerations may require that a lay representative-claimant privilege be recognized. A lay representative, like an attorney, cannot adequately represent a claimant if information is withheld by the claimant due to fear of discovery by an adverse party. A privilege insures that all confidential information will be protected. By weighing the factors presented in *Mathews v. Eldridge*,¹⁴² the author of this comment concluded that the right of the claimant to adequate representation and the risk of deprivation of this interest appear to outweigh the governmental interests involved. Consequently, an argument can be made that the denial of this privilege constitutes a violation of the due process clause.

Futhermore, a lay representative-claimant privilege may also be compelled under the equal protection clause. Permitting a privilege to protect communications made to an attorney, but denying that same protection to communications made to a lay representative, fails to satisfy the rational basis analysis required for nonsuspect classifications.

Finally, the lay representative-claimant privilege appears to be required under the privacy provisions of the California Constitution. The accelerated encroachment on privacy through government data collection gave rise to the constitutional amendment that incorporated privacy as an inalienable right of California citizens. Without this protection, an administrative agency has ready access to any relevant information communicated by a claimant. To permit the government to acquire information by subpoenaing lay representatives to disclose information received from claimants appears to be a direct violation of the California Constitution.

Although the author has suggested that courts have a constitutional basis in which to find a lay representative-claimant privilege, the argument has been made that legislation is required to clarify the details of the privilege. The addition of this privilege to the California Evidence Code would fortify the interests of claimants in a fair hearing.

Jennifer Brodkey Kaufman

142. 424 U.S. 319 (1976).

APPENDIX

PROPOSED LAY REPRESENTATIVE-CLAIMANT PRIVILEGE
FOR THE CALIFORNIA EVIDENCE CODE

1. As used in this article, "lay representative" means a nonattorney selected by a claimant to represent the claimant in an administrative hearing as authorized by statute.
2. As used in this article, "claimant" means a person appearing in an administrative hearing who consults a lay representative for the purpose of representation as authorized by statute.
3. As used in this article, "confidential communication between lay representative and claimant" means information, transmitted between a claimant and a lay representative in the course of that relationship and in confidence by a means which, so far as the claimant is aware, discloses the information to no third person other than those who are present to further the interest of the claimant in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lay representative is consulted, and includes an opinion formed and the advice given by the lay representative in the course of that relationship.
4. As used in this article, "holder of the privilege" means the claimant or the claimant's guardian or conservator.
5. Subject to Section 912 and except as otherwise provided in this article, the claimant has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between claimant and lay representative if the privilege is claimed by:
 - (a) the holder of the privilege;
 - (b) a person who is authorized to claim the privilege by the holder of the privilege; or
 - (c) the person who was the lay representative at the time of the confidential communication, but this person may not claim the privilege if no holder of the privilege exists or if otherwise instructed by a person authorized to permit disclosure.
6. The lay representative who received or made a communication subject to the privilege under this article shall claim the privilege whenever the representative is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 5.

7. No privilege exists under this article if the services of the lay representative were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

8. No privilege exists under this article as to a communication relevant to an issue of breach, by the lay representative or by the claimant, of a duty arising out of the lay representative-claimant relationship.

9. No privilege exists under this article as to a communication relevant to an issue concerning the intention or competence of a claimant executing an attested document of which the lay representative is an attesting witness, or concerning the execution or attestation of such a document.