Study K-500 December 8, 2000

Memorandum 2000-84

Evidence Code Changes Required by Electronic Communications (Draft of Tentative Recommendation)

At the July meeting, the Commission directed the staff to draft a tentative recommendation revising Evidence Code Sections 917 and 952 along the lines proposed by Judge Joseph Harvey in his background study for the Commission, and soliciting input on whether any other revisions of the Evidence Code are warranted to address electronic communications. (July Minutes, pp. 16-17.) The staff prepared a draft as directed, which is attached for the Commission's review. The draft has not been circulated, because the staff identified issues in preparing it and the Commission directed that under such circumstances the issues should be presented to the Commission before circulating the draft. (*Id.* at 17.) The staff did send the draft to Judge Harvey and another Commission consultant (Prof. Miguel Mendez, who is preparing a background study comparing the Evidence Code to the Federal Rules of Evidence and Uniform Rules of Evidence), soliciting their input on the draft and on the issues identified by the staff. We have received the following communications:

The Commission needs to consider these materials and the attached draft, and determine whether to circulate the draft as a tentative recommendation (as is, or with modifications). The issues identified by the staff relate to: (1) cordless telephones, (2) work-product privilege, (3) ethical restrictions on communicating with clients by email, cellular phone, or cordless phone, (4) recent legislation on electronic transactions, and (5) consequences of intercepting a confidential communication sent by electronic means. These issues are discussed below.

RECAP OF THE DRAFT TENTATIVE RECOMMENDATION

The draft tentative recommendation proposes two reforms:

(1) Evidence Code Section 952 defines a confidential communication for purposes of the lawyer-client privilege. In 1994, this provision was revised to add a sentence stating: "A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer." Comparable provisions for other privileged relationships (e.g., Evid. Code § 992 (confidential physician-patient communications)) do not include such language. This creates a potential implication that there is no confidentiality and therefore no privilege for an electronic communication in the context of those relationships. The draft tentative recommendation would address this by deleting the sentence in question from Section 952 and inserting similar language to in Evidence Code Section 917, applicable not just to the lawyer-client privilege but to all of the privileges covered by that provision.

(2) Evidence Code Section 917 creates a presumption of confidentiality for communications between lawyer and client, physician and patient, psychotherapist and patient, clergyman and penitent, and husband and wife. It does not extend to two newly created privileges: the privileges for confidential communications made in the course of a sexual assault victim-counselor relationship or a domestic violence victim-counselor relationship. The draft tentative recommendation would amend the statute to cover confidential communications in the course of these relationships.

SUPPORT FOR THE DRAFT

Judge Harvey appears to be satisfied with the draft seeking to implement his proposed reforms. He writes that the draft "looks all right to me." (Exhibit p. 1.)

Prof. Mendez expresses support for both of the reforms in the draft. He states that the "language regarding the transmission of confidential information by electronic means needs to be moved to section 917." (Exhibit p. 4.) He also "agree[s] that section 917 needs to be amended to include the privileges enacted after the enactment of the section." (*Id.*)

CORDLESS PHONES

There is considerable literature on whether communicating by unencrypted email, cellular phone, or cordless phone either (a) prevents the lawyer-client privilege from attaching, or (b) waives the lawyer-client privilege. *See, e.g.*, Jarvis & Tellam, *Competence and Confidentiality in the Context of Cellular Telephone,*

Cordless Telephone, and E-Mail Communications, 33 Willamette L. Rev. 467 (1997); O'Neil III, Gallagher & Nevett, *Detours on the Information Superhighway: The Erosion of Evidentiary Privileges in Cyberspace and Beyond*, 1997 Stan. Tech. L. Rev. 3. Current consensus seems to be that using these methods of communication should not defeat application of the privilege. *See, e.g.*, Hyricik, *Lawyers Worry Too Much About Transmitting Client Confidences By Internet E-Mail*, 11 Geo. J. Legal Ethics 459 (1998); *but see* Gruber, Note, *E-Mail: The Attorney-Client Privilege Applied*, 66 Geo. Wash. L. Rev. 624, 656 (1998) ("Putting unprotected confidential e-mail out into the 'wild west' atmosphere of the web should eliminate the privileged status of such communications.") Federal law provides that "[n]o otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4). New York has a provision like California Evidence Code Section 952, except it applies to all privileges, not just the lawyer-client privilege. (N.Y. C.P.L.R. 4548 (McKinney 2000).)

Initially, federal law protecting electronic communications (the Electronic Communications Protection Act ("ECPA")) covered cellular phones but expressly excluded cordless phones. In 1994, it was amended to delete this exception, in recognition of improved cordless phone technology. See 18 U.S.C. § 2510(12). The language on electronic communications in Evidence Code Section 952 was added the same year. It expressly refers to cellular phones but not to cordless phones ("A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.").

This raises a significant drafting issue in preparing the tentative recommendation: Should the Commission clarify whether the language being transplanted to Evidence Code Section 917 applies to cordless phones? If so, should that be done in the statutory text, or in a Comment?

For purposes of comparison, Penal Code provisions on interception of communications expressly address both cordless and cellular telephones. See Penal Code §§ 629.51, 632.5, 632.6, 632.7. In contrast, the Uniform Electronic Transactions Act (Civ. Code §§ 1633.1-1633.17) does not expressly refer to either cellular or cordless phones. See especially Civ. Code § 1633.2 (e) ("'Electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.") Newly enacted federal

legislation (the Electronic Signatures in Global and National Commerce Act) includes the same definition of "electronic." Pub. L. No. 106-229, § 106(2) (2000). The pertinent Comment in the Uniform Electronic Transactions Act states:

> 4. **"Electronic."** The basic nature of most current technologies and the need for a recognized, single term warrants the use of "electronic" as the defined term. The definition is intended to assure that the Act will be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to fulfill the purpose of this Act to validate commercial transactions regardless of the medium used by the parties. Current legal requirements for "writings" can be satisfied by most any tangible media, whether paper, other fibers, or even stone. The purpose and applicability of this Act covers intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form, but which lack the tangible aspect of paper, papyrus or stone.
>
> While not all technologies listed are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically "electronic," i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by the Act. This act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.

Having considered these points, Judge Harvey advises against including a reference to cordless phones in Evidence Code Section 917. Although the language from Section 952 expressly refers to cellular telephones and not to cordless phones, he believes that the language is broad enough to encompass cordless phones, as well as "any other forms of electronic communications that exist now or may be developed in the future." (Exhibit p. 1.) "If you try to be exhaustive in the list stated in the code section, you imply that the list is exhaustive and does not cover new means of communication and changing technology." (*Id.*) "Also, if you add cordless phones now, should you amend the statute every time there is a new technological development in

communications?" (*Id.*) Judge Harvey is inclined "to rely on the words of extension, 'other electronic means,' that are now in the statute." (*Id.*)

Judge Harvey further comments that to "avoid any conceivable problem, you might consider adding a definition as Evidence Code section 138 … defining 'electronic' as having the same meaning as specified in Civil Code section 1633.2(e)." (*Id.*) The definition in Civil Code Section 1633.2(e) provides:

> (e) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"As a practical matter," Judge Harvey does not think addition of this definition to the Evidence Code is necessary. (Exhibit p. 1.)

For the reasons expressed by Judge Harvey, **the staff tends to agree that it is unnecessary to refer to cordless phones in Section 917 or add a definition of "electronic" to the Evidence Code.** Perhaps, however, it would be helpful to mention cordless phones in the Comment to Section 917:

> 917. …
> (b) A communication between a client and lawyer, a patient and physician, a patient and psychotherapist, a penitent and clergyman, a husband and wife, a sexual assault victim and counselor, or a domestic violence victim and counselor is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means.
> **Comment.** …
> Subdivision (b) continues the language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer, but broadens it to apply to other confidential communication privileges. <u>The provision extends not only to communications by facsimile or cellular telephone, but also to communications by other electronic means, such as a cordless telephone. For a definition of electronic communications, see Civil Code Section 1633.2.</u>
> ….

The staff did not include such language in the attached draft, but will add it if the Commission so directs.

WORK-PRODUCT PRIVILEGE

The draft tentative recommendation addresses confidential communications privileges but not the work-product privilege, which is codified in the discovery

provisions of the Code of Civil Procedure, not in the Evidence Code (Code Civ. Proc. § 2018). This led the staff to question whether a provision similar to the language being moved from Section 952 to Section 917 should be added to the statute on the work-product privilege.

Suppose, for example, two attorneys are jointly drafting a brief. May they send drafts of it to each other by email, or discuss it on a cordless or cellular phone without waiving the work-product privilege? The staff asked Judge Harvey whether the Commission's proposal should address this point.

Judge Harvey's "personal reaction is that the work product privilege should NOT be amended to cover electronic communications." He explains:

> The work product privilege is in the discovery portions of the Code of Civil Procedure instead of in the Evidence Code because it serves a different purpose than the Evidence Code privileges. The confidential communication privileges are designed to keep those communications secret. The work product privilege is designed to prevent unfairness in the discovery process, to keep the lazy or incompetent lawyer from taking advantage of his adversary's industry and efforts. Hence, the lawyer can do research, and can investigate the unfavorable aspects of his case, without fear that his opponent will force him to regurgitate the adverse information he has acquired during the preparation of his case for trial. The opponent will have to do his own research and look up that sort of information on his own time and with his own money.
>
> Because it is simply designed to prevent one attorney from riding on the efforts of another, the information is not necessarily secret if there is no other source for the information, work product information can be required to be disclosed. After all, the whole process is supposed to be a search for the truth; what really happened, what is the actual fact? ….
>
> Because of the limited purpose of the privilege, it seems to me that if an attorney wants to broadcast his work product to the world by unencrypted electronic transmission, he should take his chances on whether his opponent will be sophisticated enough to intercept the transmission.

(Exhibit pp. 1-2.)

The staff concurs in Judge Harvey's recommendation to leave the work-product privilege alone, at least for purposes of the present proposal. As Judge Harvey points out, if a problem "appears in the future concerning electronic communication of an attorney's work product, the problem can be addressed when the problem arises." (*Id.* at 2.)

ETHICAL RESTRICTIONS

There is abundant literature on whether it is ethical for attorneys to communicate with clients by unencrypted email, cellular phone, or cordless phone. *See, e.g.*, Nuara & Falero, *Proceed with Caution: Lawyer Ethics and the Internet*, 608 PLI/Pat 271 (2000); Mika, *Of Cell Phones and Electronic Mail: Disclosure of Confidential Information Under Disciplinary Rule 4-101 and Model Rule 1.6*, 13 Notre Dame J.L. Ethics & Pub. Policy 121 (1999). In particular, a recent ABA opinion addresses the use of unencrypted email:

> A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint …. a lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation.

ABA Formal Op. 99-413 ("Protecting the Confidentiality of Unencrypted E-Mail").

Different states have followed different approaches at different times (e.g., requiring express client consent to send confidential information by email, requiring reasonable care in selecting the mode of attorney-client communication, requiring attorneys to advise clients of the risks of communicating by email). California does not appear to have provided guidance on the ethical (as opposed to evidentiary) issues.

In the draft tentative recommendation, the Comment to proposed Evidence Code Section 917 refers to the ABA opinion on unencrypted email and to Business and Professions Code Section 6068(e) (attorney has duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"). The staff included these cites to help alert attorneys to the possibility of ethical restrictions on the mode of communicating with clients. We sought Judge Harvey's advice on whether this treatment of the ethical issues is adequate for purposes of the Commission's study.

Judge Harvey is dubious that the cites in the Comment will have much impact. "Hardly any attorneys will ever read the comments to the amended sections, so the comments are not likely to alert any substantial number of people

to the potential ethical problems involved in using unencrypted electronic transmission of confidential information." (Exhibit p. 2.)

Judge Harvey further advises that the ethical issues should be addressed by the State Bar, not by the Law Revision Commission. It "is a matter that should be left to the Bar to consider in connection with the Rules of Professional Conduct." (*Id.*)

The staff agrees that the ethical issues are beyond the scope of this study and properly should be addressed by the Bar. Despite Judge Harvey's pessimism regarding the impact of the Comment, however, **we would retain the cites to the sources on these issues**. They may help some people even if not many, and they probably will not do any harm.

RECENT LEGISLATION

The Uniform Electronic Transactions Act was approved by the Uniform Law Commission in 1999 and enacted with revisions in California the same year (SB 820 (Sher)). It is codified at Civil Code Sections 1633.1-1633.17. In the attached draft, the Comment to proposed Evidence Code Section 917 refers to Civil Code Section 1633.13 ("In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.").

The staff asked Judge Harvey whether the Commission should do anything other than providing this cross-reference to account for the Uniform Electronic Transactions Act, as well as recent federal legislation on electronic signatures (the Electronic Signatures in Global and National Commerce Act, which became effective on October 1, 2000).

Judge Harvey responded that no further steps appear necessary. "Civil Code section 1633.13 is adequate to effectuate the policies of the Uniform Electronic Transactions Act; so I do not see the need to duplicate or reinforce its provisions by another section in the Evidence Code." (Exhibit p. 2.) "You are always on dangerous ground when you duplicate (wholly or in part) a section in one Code with a provision in another, because some time the Legislature may amend or repeal one of the provisions and overlook the fact that there is a virtually identical provision in another Code." (*Id.*)

Given Judge Harvey's advice, **the staff is not inclined to do anything further with respect to the Uniform Electronic Transactions Act or Electronic Signatures in Global and National Commerce Act.**

The portion of Evidence Code Section 952 that would be moved to Section 917 states in relevant part: "A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer." The meaning of this language is not as clear as perhaps it should be.

Does it simply mean that a communication may be privileged even though it is sent by email or cellular phone? Or does it also mean that a communication may be privileged even though it is sent by email or cellular phone *and* intercepted, legally or illegally? Put differently, does the sentence in Section 952 only indicate that a lawyer-client communication *may be a "confidential communication"* even though it is transmitted by email or cellular phone, *or* does it also mean that interception of an attorney-client communication sent by cellular phone or email *does not waive* the lawyer-client privilege?

The staff referred these questions to Judge Harvey, inquiring whether the Commission should take steps to eliminate ambiguity regarding these matters. Notably, New York's statute on evidentiary privileges and electronic communications is phrased differently from the California version:

> 4548. No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

(N.Y. C.P.L.R. 4548 (McKinney 2000).) Commentators have noted, however, that the New York provision does not address unauthorized access by snoopers who do not have anything to do with transmission of the electronic message. See Masur, Comment, *Safety In Numbers: Revisiting the Risks to Client Confidences and Attorney-Client Privilege Posed By Internet Electronic Mail*, 14 Berkeley Tech. L.J. 1117, 1124 & n.22 (1999).

Judge Harvey's Advice: Stick With the Current Language

Judge Harvey suggests that the Commission stick with the language that is now in Section 952, rather than attempting to rephrase it. "Whenever you change language, you always raise the specter of a possible change in meaning; so,

unless there is a real problem, my inclination is to leave the language alone." (Exhibit p. 3.)

Judge Harvey provides a careful explanation of how he interprets Section 952 and why we should retain its language, which we quote in full because it is well-expressed:

> Unauthorized eavesdropping has been a problem forever, and it is not unique to electronic communications. The problem is treated in the underlying definitions of confidential communications. All of the Articles covering the communication privileges provide that, upon assertion by someone authorized by statute to do so, a client, patient, victim, etc. has a privilege to refuse to disclose, and to prevent another person from disclosing, a "confidential communication between" such person and another having the required relationship to that person. A confidential communication is defined as one "which, so far as the client [or patient, etc.] is aware, discloses the information to no third persons other than those who are present to further the interest of the client [or patient, etc.] in the consultation …." The existence of electronic communications does not necessitate a special provision permitting the holder of the privilege to prevent disclosure of privileged information obtained by unauthorized eavesdropping.
>
> So far as the meaning of the added sentence is concerned, it is to eliminate a potential argument that an electronic communication cannot be privileged because it can never meet the statutory definition of a confidential communication. The adding of the sentence proposed in the amendment simply means that a communication between people in the requisite relation meets the definition of confidential communication (if it meets the other requirements of the appropriate definition) even though the communication was by electronic means.
>
> As noted above, the definitional language requires the communication to be "in confidence by a means which, so far as the client [or patient, etc.] is aware, discloses the information to no third persons other than those who are present to further the interest of the client [or patient, etc.]" Although lack of confidentiality because the communication is in the presence of others is often loosely referred to as a "waiver" of the privilege, technically the communication is simply not privileged because it does not meet the definition of "confidential." Only confidential communications are privileged. Waiver is actually a consensual disclosure of the confidential information in a nonprivileged context. (Evidence Code section 912). So unauthorized interception of a confidential communication transmitted by electronic means cannot be a "waiver" of the privilege.

> But, the potential for authorized interception does raise the question of whether the communication meets the definition. If the transmitter knows of the interception, or of the potential for interception, then the question arises whether the transmission had the necessary confidentiality to qualify as a privileged communication. Does the client's [or patient's, etc.] knowledge of the potential for interception mean that he "is aware" that someone is listening and, therefore, does the communication fail to meet the definition of "confidential communication"? *The sentence in Section 952 was added for the purpose of assuring that the transmission of a communication by electronic means would not destroy the necessary confidentiality despite the increased potential for interception, whether by unauthorized eavesdroppers or by persons necessary to facilitate the transfer of the information.*
>
> The sentence added to section 952 (and proposed to be transferred to section 917) does not say this quite as clearly as the New York statute, but the language of 952 has been the law of California since 1994, and no court of which I'm aware has as yet perceived any ambiguity in the language. *Unless there is a serious problem, I suggest using the same language used in the 1994 amendment.*

(Exhibit pp. 2-3 (emphasis added).)

Comments of Prof. Mendez on Electronic Eavesdropping

Prof. Mendez has also commented on the impact of interception or potential interception of electronic communications that would otherwise be privileged. He first refers to the Comment to Evidence Code Section 954, the basic provision on the lawyer-client privilege, which was enacted on Commission recommendation in 1965. In pertinent part, the Comment states that prohibiting eavesdroppers on privilege grounds from disclosing the information they wrongfully obtain does not alter "the rule that the making of the communication under circumstances where others could easily overhear it is evidence that the client did not intend the communication to be confidential."

Prof. Mendez observes that one of the Commission's tasks will be to determine the extent to which language along these lines should be included in the Comment to amended Section 917. (Exhibit p. 4.) He writes:

> The quoted language made sense when 'eavesdropping" consisted of overhearing the communication. Technology has changed that. Your goal is to accommodate the role that technology plays in today's communications by generally prohibiting, upon objection, unauthorized technological eavesdroppers from disclosing an otherwise confidential communication when cell phones, e-mail,

> faxes, and other electronic means are used for the transmission. The difficulty is that most of us know (or should know) that no electronic transmission of information is completely free of the risk of unauthorized viewing or hearing. The question, then, is whether the party seeking to defeat the privilege should be allowed to offer evidence that the objecting party knew or should have known of the risk that a determined eavesdropper could penetrate the electronic means used.
>
> Requiring actual knowledge of the perceived risk would help preserve the privilege, but such a requirement will become less effective as the knowledge of the risk becomes widely known. Perhaps only proof that the privilege claimant consciously disregarded a substantial risk of interception in the choice of transmission means should result in the loss of the privilege, and negligence should never suffice.
>
> On the other hand, prohibiting the admission of evidence that the sender was truly reckless in choosing the means used seems to be wrong. Choosing a means knowing of a very high risk of interception does indicate that the sender did not intend for the communication to be confidential. But merely knowing of the risks commonly associated with technologies which the creators hope are safe from most, if not all, intrusions should not result in the loss of the privilege. Otherwise, those of us involved in confidential relationships must do without the technology that has come to define our age.

(*Id.*)

Analysis

The staff regrets that we have not yet had time to carefully consider the points raised by Prof. Mendez. The question for present purposes is whether to move the language on electronic communications from Section 952 to Section 917, and broaden it to extend to other privileges, without attempting to refine that language or explain its meaning in any detail in a Comment or Commission recommendation. The issues raised by Prof. Mendez could simply be left to the courts to grapple with as necessary. Alternatively, the Commission could engage in a more detailed analysis of the policies relating to electronic transmission of communications in a privileged relationship, and the best means of wording Section 917 to appropriately protect such communications.

This is largely a matter of how ambitious the Commission wants to be in undertaking this study. At this point, **the staff does not feel strongly about the appropriate course of action.** Both Judge Harvey and Prof. Mendez support the

reforms proposed in the draft tentative recommendation. It may be productive to circulate the proposal in its present form and see what kind of input we get. A second tentative recommendation could be prepared and circulated if necessary to address concerns raised. Alternatively, the Commission could explore the area in greater depth now and revise the draft to attempt to provide greater guidance on how evidentiary privileges apply to electronic communications, before the proposal is circulated.

Respectfully submitted,

Barbara S. Gaal
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November 7, 2000

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Re: Evidence Code & Electronic Communications

Dear Ms. Gaal:

The tentative recommendation looks all right to me. In regard to the items in your memorandum, these are my reactions.

(1) **Cordless phones**. I do not think that the LRC should add a reference to cordless phones. "Other electronic means" should be relied on to cover any other forms of electronic communications that exist now or may be developed in the future. If you try to be exhaustive in the list stated in the code section, you imply that the list is exhaustive and does not cover new means of communication and changing technology. Also, if you add cordless phones now, should you amend the statute every time there is a new technological development in communications? My inclination is to rely on the words of extension, "other electronic means," that are now in the statute.

To avoid any conceivable problem, you might consider adding a definition as Evidence Code section 138 (to keep the definitions in alphabetical order) defining "electronic" as having the same meaning as specified in Civil Code section 1633.2(e). As a practical matter, however, I do not think it is necessary.

(2) **The work product privilege**. My personal reaction is that the work product privilege should NOT be amended to cover electronic communications. The work product privilege is in the discovery portions of the Code of Civil Procedure instead of in the Evidence Code because it serves a different purpose than the Evidence Code privileges. The confidential communication privileges are designed to keep those communications secret. The work product privilege is designed to prevent unfairness in the discovery process, to keep the lazy or incompetent lawyer from taking advantage of his adversary's industry and efforts. Hence, the lawyer can do research, and can investigate the unfavorable aspects of his case, without fear that his opponent will force him to regurgitate the adverse information he has acquired during the preparation of his case for trial. The opponent will have to do his own research and look up that sort of information on his own time and with his own money.

Because it is simply designed to prevent one attorney from riding on the efforts of another, the information is not necessarily secret if there is no other source for the information, work product information can be required to be disclosed. After all, the whole process is

supposed to be a search for the truth; what really happened, what is the actual fact? . If a lawyer wants to, as an intimidating technique, he can disclose his work product to his adversary without infringing on anyone's rights.

Because of the limited purpose of the privilege, it seems to me that if an attorney wants to broadcast his work product to the world by unencrypted electronic transmission, he should take his chances on whether his opponent will be sophisticated enough to intercept the transmission.

If a problem appears in the future concerning electronic communication of an attorney's work product, the problem can be addressed when the problem arises.

(3) **Ethical restrictions on communicating with a client by unencrypted electronic transmission.** Hardly any attorneys will ever read the comments to the amended sections, so the comments are not likely to alert any substantial number of people to the potential ethical problems involved in using unencrypted electronic transmission of confidential information. The proposed amendment makes no change in the law so far as attorney-client communications are concerned; so few attorneys will ever have any occasion to read the amendment or the comment.

Because the ethical problem of an attorney using unencrypted e-mail to communicate with a client is an ethical problem to be addressed by the Bar, it is a matter that should be left to the Bar to consider in connection with the Rules of Professional Conduct. I think the LRC should leave that matter to the State Bar. The proposed recommendation deals with the client's privilege problem already.

(4) **The Uniform Electronic Transactions Act**. Civil Code section 1633.13 is adequate to effectuate the policies of the Uniform Electronic Transactions Act; so I do not see the need to duplicate or reinforce its provisions by another section in the Evidence Code. You are always on dangerous ground when you duplicate (wholly or in part) a section in one Code with a provision in another, because some time the Legislature may amend or repeal one of the provisions and will overlook the fact that there is a virtually identical provision in another Code.

(5) **Consequences of intercepting an electronic confidential communication**. Unauthorized eavesdropping has been a problem forever, and it is not unique to electronic communications. The problem is treated in the underlying definitions of confidential communications. All of the Articles covering the communication privileges provide that, upon assertion by someone authorized by statute to do so, a client, patient, victim, etc. has a privilege to refuse to disclose, and to prevent another person from disclosing, a "confidential communication between" such person and another having the required relationship to that person. A confidential communication is defined as one "which, so far as the client [or patient, etc.] is aware, discloses the information to no third persons other than those who are present to further the interest of the client [or patient, etc.] in the consultation ... ." The existence of electronic communications does not necessitate a special provision permitting the holder of the privilege to prevent disclosure of privileged information obtained by unauthorized eavesdropping.

So far as the meaning of the added sentence is concerned, it is to eliminate a potential argument that an electronic communication cannot be privileged because it can never meet the statutory definition of a confidential communication. The adding of the sentence proposed in the amendment simply means that a communication between people in the requisite relationship meets the definition of confidential communication (if it meets the other requirements of the appropriate definition) even though the communication was by electronic means.

As noted above, the definitional language requires the communication to be "in confidence by a means which, so far as the client [or patient, etc.] is aware, discloses the information to no third persons other than those who are present to further the interest of the client [or patient, etc.]" Although lack of confidentiality because the communication is in the presence of others is often loosely referred to as a "waiver" of the privilege, technically the communication is simply not privileged because it does not meet the definition of "confidential." Only confidential communications are privileged. Waiver is actually a consensual disclosure of the confidential information in a nonprivileged context. (Evidence Code section 912.) So unauthorized interception of a confidential communication transmitted by electronic means cannot be a "waiver" of the privilege.

But, the potential for authorized interception does raise the question of whether the communication meets the definition. If the transmitter knows of the interception, or of the potential for interception, then the question arises whether the transmission had the necessary confidentiality to qualify as a privileged communication. Does the client's [or patient's, etc.] knowledge of the potential for interception mean that he "is aware" that someone is listening and, therefore, does the communication fail to meet the definition of "confidential communication"? The sentence in Section 952 was added for the purpose of assuring that the transmission of a communication by electronic means would not destroy the necessary confidentiality despite the increased potential for interception, whether by unauthorized eavesdroppers or by persons necessary to facilitate the transfer of the information.

The sentence added to 952 (and proposed to be transferred to section 917) does not say this quite as clearly as the New York statute, but the language of 952 has been the law of California since 1994, and no court of which I'm aware has as yet perceived any ambiguity in the language. Unless there is a serious problem, I suggest using the same language used in the 1994 amendment. Whenever you change language, you always raise the specter of a possible change in meaning; so, unless there is a real problem, my inclination is to leave the language alone.

Very truly yours,

Joseph B. Harvey

Date: Tues., Nov. 21, 2000
To: Barbara Gaal <bgaal@clrc.ca.gov>
From: Miguel Mendez <mmendez@leland.Stanford.EDU>
Subject: Re: TR on Electronic Communications & Evidentiary Privileges

Barbara, I have taken a look at the memo, and these are my initial responses.

1. I agree with both changes. The language regarding the transmission of confidential information by electronic means needs to be moved to section 917.

2. I also agree that section 917 needs to be amended to include the privileges enacted after the enactment of the section (even though this will require rewriting this portion of my book).

3. The comment to section 954 states that prohibiting eavesdroppers on privilege grounds from disclosing the information they wrongfully obtain does not alter "the rule that the making of the communication under circumstances where others could easily overhear it is evidence that the client [holder] did not intend the communication to be confidential."

One of your tasks will be to determine what part of the comment should be moved to the amended section 917. The quoted language made sense when "eavesdropping" consisted of overhearing the communication. Technology has changed that. Your goal is to accommodate the role that technology plays in today's communications by generally prohibiting, upon objection, unauthorized technological eavesdroppers from disclosing an otherwise confidential communication when cell phones, e-mail, faxes, and other electronic means are used for the transmission. The difficulty is that most of us know (or should know) that no electronic transmission of information is completely free of the risk of unauthorized viewing or hearing. The question, then, is whether the party seeking to defeat the privilege should be allowed to offer evidence that the objecting party knew or should have known of the risk that a determined eavesdropper could penetrate the electronic means used.

Requiring actual knowledge of the perceived risk would help preserve the privilege, but such a requirement will become less effective as the knowledge of the risk becomes widely known. Perhaps only proof that the privilege claimant consciously disregarded a substantial risk of interception in the choice of transmission means should result in the loss of the privilege, and negligence should never suffice.

On the other hand, prohibiting the admission of evidence that the sender was truly reckless in choosing the means used seems to be wrong. Choosing a means knowing of a very high risk of interception does indicate that the sender did not intend for the communication to be confidential. But merely knowing of the risks commonly associated with technologies which the creators hope are safe from most, if not all, intrusions should not result in the loss of the privilege. Otherwise, those of us involved in confidential relationships must do without the technology that has come to define our age.

#K-500

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft TENTATIVE RECOMMENDATION

Electronic Communications and Evidentiary Privileges

December 2000

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **xxxx.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

The Law Revision Commission recommends revision of Evidence Code provisions to (1) ensure that a privileged communication does not lose its privileged status simply because it is transmitted electronically, and (2) clarify that the statutory presumption of confidentiality applies to newly created privileges. (Evid. Code §§ 917, 952.)

The Commission also solicits suggestions for other reforms of the Evidence Code relating to electronic communications.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

ELECTRONIC COMMUNICATIONS AND EVIDENTIARY PRIVILEGES

The Law Revision Commission has initiated a review of the Evidence Code to determine whether existing provisions are satisfactory in their application to electronic communications.[1] Pursuant to that review, the Commission has previously recommended, and the Legislature has enacted, legislation to repeal the Best Evidence Rule[2] and replace it with the Secondary Evidence Rule.[3] The Commission now recommends that the Evidence Code provisions governing privileges for certain communications made in confidence (confidential communication privileges) be standardized in their application to electronic communications.

Confidentiality of Electronic Communications

Evidence Section 952 defines a confidential communication for purposes of the lawyer-client privilege. The provision was revised in 1994 to add a sentence stating, "A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer."[4] This language addresses the potential argument that, because an electronic communication between a lawyer and client is subject to interception, it is not confidential and thus not protected by the lawyer-client privilege.

This potential argument applies to all of the confidential communication privileges, not just the lawyer-client privilege. But the addition of the language on electronic communications in the provision on the attorney-client privilege, combined with the lack of such language in comparable provisions for other confidential relationships,[5] creates at least an argument that there is no

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1. See Harvey, *The Need for Evidence Code Revisions To Accommodate Electronic Communication and Storage* (Background Study, June 2000). A copy of this study may be obtained from the Commission's website, http://www.clrc.ca.gov.

2. See *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369 (1996).

3. See Evid. Code § 1521; 1998 Cal. Stat. ch. 100. Unless otherwise indicated, all further statutory references in this recommendation are to the Evidence Code.

4. 1994 Cal. Stat. ch. 587, § 9. This was a noncontroversial reform in an omnibus civil practice bill authored by the Assembly Judiciary Committee. It has been praised in commentary. See O'Neill, Gallagher & Nevett, 1997 Stan. Tech. L. Rev. 3 ("This legislation is a useful model because it is broad enough to encompass new and emerging technologies and to remove the need for judicial evaluation of these technologies. Most importantly, it provides the protection necessary to allow lawyers and their clients to freely and efficiently use new technologies without risk of waiver.")

5. See Sections 980 (confidential marital communication privilege), 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1032 (penitential communication), 1035.4 (confidential communication between sexual assault counselor and victim, 1037.2 (confidential communication between domestic violence counselor and victim).

confidentiality and therefore no privilege for an electronic communication made in the course of any other confidential relationship.

To negate that potential argument, the language on confidentiality of an electronic communication should be removed from Section 952 and generalized in Section 917, which creates a presumption of confidentiality for communications made in confidential relationships generally.[6]

Presumption of Confidentiality

Generalization of Section 917's language on electronic communications exposes a flaw in the drafting of that section. Section 917 creates a presumption of confidentiality for communications made in the specific confidential relationships mentioned in the Evidence Code when the code was created in 1965. At that time, the only confidential communication privileges contained in the code were the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, and husband-wife privileges. Since then, the Legislature has created two additional communication privileges — a privilege for confidential communications made in the course of a sexual assault victim-counselor relationship[7] or a domestic violence victim-counselor relationship.[8]

Section 917 provides that a communication made in the course of one of the confidential relationships mentioned in the section is presumed to have been made in confidence, and the opponent of the privilege has the burden of proof to establish that the communication was not confidential. The policy considerations underlying this presumption apply equally to all confidential communication privileges.[9] The provision should be revised to make the presumption of confidentiality applicable to all of the confidential relationships.

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6. New York already has a provision along these lines. See N.Y. C.P.L.R. 4548 (McKinney 2000) ("No communication privileged under this article shall lose its privileged character for the sole reason that it is communication by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.") See also 18 U.S.C. § 2517(4) ("No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.")

7. Sections 1035-1036.2.

8. Sections 1037-1037.7.

9. The policy considerations are enunciated in the Comment to Section 917:

> A number of sections provide privileges for communications made "in confidence" in the course of certain relationships. Although there appear to have been no cases involving the question in California, the general rule elsewhere is that a communication made in the course of such a relationship is presumed to be confidential and the party objecting to the claim of privilege has the burden of showing that it was not. See generally, with respect to the marital communication privilege, 8 Wigmore, Evidence 2336 (McNaughton rev. 1961). See also Blau v. United States, 340 U.S. 332, 333-335 (1951) (holding that marital communications are presumed to be confidential). In adopting by statute a revised version of the privileges article of the Uniform Rules of Evidence, New Jersey included such a provision in its statement of the lawyer-client privilege. N.J. Rev. Stat. 2A:84A-20(3), added by N.J. Laws 1960, Ch. 52, p. 452.
>
> If the privilege claimant were required to show that the communication was made in confidence, he would be compelled, in many cases, to reveal the subject matter of the

Law Revision Commission Solicits Other Suggestions for Reform

The Commission has made a careful review of the Evidence Code to identify problems relating to electronic communications.[10] This tentative recommendation addresses the known issues. The Commission also solicits suggestions for other reforms of the Evidence Code that are needed to accommodate electronic communications.

communication in order to establish his right to the privilege. Hence, Section 917 is included to establish a presumption of confidentiality, if this is not already the existing law in California. See Sharon v. Sharon, 79 Cal. 633, 678, 22 Pac. 26, 40 (1889) (attorney- client privilege); Hager v. Shindler, 29 Cal. 47, 63 (1865) ("*Prima facie*, all communications made by a client to his attorney or counsel [in the course of that relationship] must be regarded as confidential.").

To overcome the presumption, the proponent of the evidence must persuade the presiding officer that the communication was not made in confidence. Of course, if the facts show that the communication was not intended to be kept in confidence, the communication is not privileged. See Solon v. Lichtenstein, 39 Cal. 2d 75, 244 P.2d 907 (1952). And the fact that the communication was made under circumstances where others could easily overhear is a strong indication that the communication was not intended to be confidential and is, therefore, unprivileged. See Sharon v. Sharon, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889); People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957).

10. See note 1, *supra*.

PROPOSED LEGISLATION

Evid. Code § 917 (amended). Presumption of confidentiality

SECTION 1. Section 917 of the Evidence Code is amended to read:

917. (a) Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, ~~or~~ husband-wife, sexual assault victim-counselor, or domestic violence victim-counselor relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

(b) A communication between a client and lawyer, a patient and physician, a patient and psychotherapist, a penitent and clergyman, a husband and wife, a sexual assault victim and counselor, or a domestic violence victim and counselor is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means.

Comment. Subdivision (a) of Section 917 is amended to extend to confidential communication privileges created after its original enactment in 1965.

Subdivision (b) continues the language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer, but broadens it to apply to other confidential communication privileges.

For ethical considerations where a lawyer communicates with a client by electronic means, see Bus. & Prof. Code § 6068(e) (attorney had duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients"); ABA Formal Op. 99-413 ("Protecting the Confidentiality of Unencrypted E-Mail"). For examples of provisions on the admissibility of electronic communications, see Sections 1521 & Comment (Secondary Evidence Rule), 1552 (printed representation of computer information or computer program), 1553 (printed representation of images stored on video or digital medium); Code Civ. Proc. § 1633.13 ("In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form."). See also People v. Martinez, 22 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000); People v. Hernandez, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (1997); Aguimatang v. Calif. State Lottery, 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (1991); People v. Lugashi, 205 Cal. App. 3d 632, 252 Cal. Rptr. 434 (1988).

Evid. Code § 952 (amended). "Confidential communication between client and lawyer" defined

SEC. 2. Section 952 of the Evidence Code is amended to read:

952. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. ~~A communication between a client and his or her lawyer is not~~

~~deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.~~

Comment. The sentence on confidentiality of electronic communication, is deleted from Section 952 and relocated to Section 917 (presumption of confidentiality), with revisions to apply to all of the confidential communication privileges.
