Study K-500 May 14, 2001

Memorandum 2001-29

Evidence Code Changes Required by Electronic Communications (Discussion of Issues)

In its study of Evidence Code changes required by electronic communications, the Commission has been focusing on the lawyer-client privilege and other privileges for confidential communications between persons in a privileged relationship ("confidential communications privileges"). At the December meeting, the Commission directed the staff to explore a number of issues. Since then, the Commission has received the following new communications relating to this study:

These comments are only briefly discussed in this memorandum but will be discussed in greater detail later in this study. This memorandum primarily reports on research conducted by the staff.

RECAP OF STUDY

The Commission retained Joseph B. Harvey, a retired superior court judge and former member of the Commission staff, to study whether the Evidence Code should be revised to accommodate electronic communications. (Unless otherwise indicated, all further statutory references are to the Evidence Code.) Judge Harvey concluded that the code has endured well and does not require much revision. (Memorandum 2000-53, Attachment p. 2.)

He recommended, however, that a sentence on electronic communications be moved from a provision on the lawyer-client privilege (Section 952) to a provision applicable to several confidential communications privileges, including the lawyer-client privilege (Section 917). He further recommended that the latter provision be broadened to cover two confidential communications privileges that were created after its enactment: The privilege for communications between a

counselor and a sexual assault victim, and the privilege for communications between a counselor and a domestic violence victim. (Memorandum 2000-53, Attachment pp. 15-17.)

Judge Harvey's recommendations could be implemented as follows:

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

SEC. ____. 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. ____. 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.

At the Commission's request, the staff prepared a draft of a tentative recommendation along these lines. (Minutes (July 2000), pp. 16-17.) The staff also raised a number of issues regarding the proposal. (Memorandum 2000-84.)

On considering the draft, the Commission determined that further analysis was in order, addressing points such as:

(1) Whether and how to define "electronic" in the Evidence Code.

(2) Whether the sentence in Section 952 on electronic communications should be moved to Section 917 or placed elsewhere.

(3) Whether to rephrase the sentence on electronic communications (e.g., by deleting the references to facsimile and cellular telephone from the text and referring to them and to cordless telephones and email in the Comment instead).

(4) Whether the proposal should address the work product doctrine, as well as the confidential communications privileges.

(Minutes (Dec. 2000), p. 18.) The Commission also decided that ethical issues relating to use of electronic communications in privileged relationships are

beyond the scope of this study and should instead be considered by the State Bar. *Id.*

SCOPE OF ANALYSIS

"The issue of confidentiality and the attorney-client privilege in relation to e-mail and Internet communications has created an outpouring of articles and scholarly commentary." Shirley, *Dilbert, Supermodels & Confidentiality of E-Mail Under Hawaii Law*, Hawaii Bar J. 6 (March 1999); *see, e.g.*, Harris, *Counseling Clients Over the Internet*, 629 PLI/Pat 119 (2000); Miller, *For Your Eyes Only? The Real Consequences of Unencrypted E-Mail in Attorney-Client Communication*, 80 B. U. L. Rev. 613 (2000); Rand, *What Would Learned Hand Do?: Adapting to Technological Change and Protecting the Attorney-Client Privilege on the Internet*, 66 Brook. L. Rev. 361 (2000); Stewart, *The Attorney-Client Privilege and the Internet: A Shaky Alliance*, 80 PLI/NY 365 (2000); Winick, Burris & Bush, *Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications*, 31 Tex. Tech. L. Rev. 1225 (2000); Delsa, *E-Mail and the Attorney-Client Privilege: Simple E-Mail in Confidence*, 59 La. L. Rev. 935 (1999); Pikowsky, *Privilege and Confidentiality of Attorney-Client Communication Via E-Mail*, 51 Baylor L. Rev. 483 (1999). As the Commission recognized at its December meeting, however, the underlying question is broader than how the attorney-client privilege applies to electronic communications.

Rather, the key issue is: How does disclosure, or the risk of disclosure, affect the privileged status of a communication between persons in a privileged relationship? In particular, if such a communication is inadvertently disclosed, either at or after the time it is made, is it nonetheless privileged or has the privilege been forfeited?

This has been a matter of considerable controversy and debate, both recently and in the past. *See, e.g.*, Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: Federal Law*, 159 A.L.R. Fed. 153 (2000); Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: State Law*, 51 A.L.R. 5th 603 (1997); Pickering & Story, *Limitations on California Professional Privileges: Waiver Principles and the Policies They Promote*, 9 U.C. Davis L. Rev. 477 (1976). Courts have taken a variety of approaches to this issue.

The discussion that follows (1) describes the general literature and state of the law on disclosure of communications otherwise protected by a confidential

communications privilege (e.g., lawyer-client privilege, physician-patient privilege), (2) discusses California law on this topic, (3) summarizes Judge Harvey's comments, and (4) gives the staff's analysis.

DISCLOSURE OF COMMUNICATIONS BETWEEN PERSONS IN A PRIVILEGED RELATIONSHIP: A GENERAL OVERVIEW

It is widely agreed that a communication between persons in a privileged relationship is not privileged if the holder of the privilege voluntarily and intentionally discloses the communication to a third person. *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993); Talton, *Mapping the Information Superhighway: Electronic Mail and the Inadvertent Disclosure of Confidential Information*, 20 Rev. Litig. 271, 289 (2000); M. Mendez, Evidence: The California Code and the Federal Rules, p. 504 (2d ed. 1999). This rule does not apply if disclosure to the third person is necessary to further the privileged relationship (e.g., disclosure to a paralegal assisting in preparation of the client's case). See, e.g., Section 912(d). Likewise, a communication remains protected if the disclosure itself is privileged (e.g., if a husband tells his wife about a conversation with his attorney). See, e.g., Section 912(c).

Disclosure to a third person can occur either at the time of the communication or after the communication is made. Where a communication is voluntarily and intentionally disclosed to a third person at the time of the communication (e.g., where a client talks to her attorney in the presence of her opponent), the communication is not privileged because it was not confidential. See, e.g., Section 917 & Comment. Where a communication is made in confidence but later voluntarily and intentionally disclosed by the holder of the privilege, the communication is not privileged because the privilege was waived. See, e.g., Section 912.

There is no consensus on the effect of an inadvertent disclosure of a privileged communication. Courts use three main approaches: strict liability for disclosure, a subjective intent requirement, and a balancing test.

Strict Liability for Disclosure

In some jurisdictions, disclosure of a privileged communication waives the privilege, regardless of the circumstances of the disclosure. Talton, *supra*, at 291-93. The holder of the privilege is expected to zealously guard the secrecy of privileged communications and any breach of that secrecy destroys the privilege.

If a client "wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels — if not crown jewels." *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989). Once the secret is out, it no longer warrants protection, because it is impossible to "unring the bell." Talton, *supra*, at 292.

This strict liability approach is identified with Dean Wigmore, who believed in making evidence readily available to all parties. Under this theory, privileges impede access to evidence and the search for truth, so they should be narrowly circumscribed. *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 279 N.J. Super. 442, 652 A.2d 1273, 1275 (1994). The strict liability approach also spares courts from having to "distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege." *In re Sealed Case*, 877 F.2d at 980.

But the approach has been criticized as unduly harsh. *See, e.g., Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999, 1004 (1987). It penalizes a client for even a faultless disclosure and it undermines the policies advanced by the confidential communications privileges. "Moreover, although confidentiality can never be restored to a document already disclosed, a court can repair much of the damage done by disclosure by preventing or restricting use of the document at trial." *Manufacturers & Traders*, 522 N.Y.S.2d at 1004; *see also* ABA Standing Committee on Ethics & Professional Responsibility, Formal Opinion No. 92-368 (Nov. 10, 1992) (hereafter, "ABA Ethics Opin. No. 92-368") (even where lawyer examines inadvertently disclosed materials, there are benefits to maintaining what confidentiality remains).

Subjective Intent of the Holder

At the opposite extreme, some courts find a waiver only where a privileged communication is voluntarily and intentionally disclosed by the holder of the privilege, or the holder voluntarily and intentionally authorizes another person to make the disclosure. These courts regard waiver as the intentional relinquishment of a known right. *See, e.g., Trilogy Communications*, 652 A.2d at 1275; Rest, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 Case W. Res. L. Rev. 309, 332 (1998). Because a waiver must be intentional, inadvertent disclosure can never effect a waiver in these jurisdictions. *Trilogy Communications*, 652 A.2d at 1276; Talton, *supra*, at 293; *see also* ABA Ethics Opin. (lawyer who receives privileged materials under circumstances where disclosure was obviously inadvertent must return materials to opponent).

This is a clear test, establishing a high threshold for waiver. It thus protects the policies underlying the confidential communications privileges, fostering free-flowing discussion between persons in a socially valuable relationship. *Trilogy Communications*, 652 A.2d at 1276-77.

To some extent, the approach conflicts with the notion of a "confidential communications privilege." A communication remains protected by the applicable "confidential communications privilege" even though the communication is no longer confidential or may even have been overheard by (or otherwise unwittingly disclosed to) a third party at the time it was made.

The subjective intent approach may also be criticized for not creating enough incentives to protect confidentiality of privileged communications. This criticism is not entirely persuasive, because disclosure of a communication can be very harmful even if the communication remains privileged (e.g., an attorney's inadvertent disclosure of privileged material may cause the client to lose confidence in the attorney and hire new counsel). "A bell may be un-rung in a court of law, but not in the outside world." Rand, *supra*, 66 Brook. L. Rev. at __.

Balancing Test

Still other courts use a balancing test to determine whether an inadvertent disclosure constitutes a waiver of a confidential communications privilege. These courts examine factors such as (1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness. *See, e.g.*, *Alldread*, 988 F.2d at 1433-34; *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999). An apparent majority of jurisdictions follow this approach. *Alldread*, 988 F.2d at 1434; Talton, *supra*, at 294. The applicable standard of care (negligence in making the disclosure, as opposed to recklessness) is not always clear.

This balancing test seeks to protect the policies underlying the confidential communications privileges, yet also provide adequate incentives to protect communications from disclosure. *Alldread*, 988 F.2d at 1434; *see also* Talton, *supra*, at 295. It is a highly flexible approach, under which judges have broad discretion to achieve justice in varied circumstances.

That flexibility also makes the approach unpredictable and creates a danger of inconsistent results. Talton, *supra*, at 295. The lack of predictability can undercut the effectiveness of the evidentiary privileges. As the Supreme Court has

repeatedly explained, if an evidentiary provision is to effectively encourage communication, persons communicating must be able to predict with some certainty whether a particular discussion will be protected. *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996); *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

The approach also places heavy demands on the courts. Talton, *supra*, at 295. It requires courts to examine circumstances of each communication and delve into the details of the communication methods used. This can be especially burdensome where a case involves voluminous materials or numerous communications.

Other Approaches

There are also a variety of other approaches to inadvertent disclosure of a communication protected by a confidential communications privilege. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: Federal Law*, *supra*, at § 6; Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: State Law*, *supra*, at §§ 6-8. The staff can provide information on these alternative approaches if the Commission is interested.

DISCLOSURE OF COMMUNICATIONS BETWEEN PERSONS IN A PRIVILEGED RELATIONSHIP: CALIFORNIA LAW

California law on inadvertent disclosure of privileged material is not fully settled. The California Supreme Court does not appear to interpreted the Evidence Code on this point. A variety of views have been advanced. The area may be ripe for clarification.

Key Statutes

Different provisions apply depending on whether a communication is inadvertently disclosed at the time it is made, or not until later.

Disclosure at the Time a Communication Is Made

Where disclosure occurs at the time a communication is made, the issue is whether the communication constitutes a "confidential communication" triggering the applicable privilege. The Evidence Code separately defines "confidential communication" for the various different privileges. See Sections 952 (confidential communication between client and lawyer), 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 victim and counselor), 1037.2 (confidential communication between domestic violence victim and counselor).

Each of these provisions focuses on whether the holder of the privilege is aware that the communication is being disclosed to a third person. For example, Section 952 defines "confidential communication between client and lawyer" to mean "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 …." (Emphasis added.) Similarly, Section 992 defines "confidential communication between patient and physician" to mean "information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, *so far as the patient is aware, discloses the information to no third persons* other than those who are present to further the interest of the patient 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 physician is consulted …." (Emphasis added.) This language suggests that the holder's subjective intent regarding disclosure to third persons is determinative. Notably, the provisions focus on whether the holder *is* aware of any disclosure to a third person, not on whether the holder *should be* aware of such a disclosure.

The only exception is the provision on confidential marital communications, which refers only to whether a communication was made "in confidence." Aside from this lack of specificity, the provision is not phrased in gender-neutral terms, although gender-neutral language seems especially warranted in this context:

> 980. Subject to Section 912 and except as otherwise provided in this article, a spouse (or *his* guardian or conservator when *he* has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if *he* claims the privilege and the communication was made in confidence between *him* and the other spouse while they were husband and wife.

(Emphasis added.)

The burden of proving whether a communication constitutes a "confidential communication" within the meaning of these definitions is governed by Section 917, which establishes a presumption of confidentiality:

> 917. 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 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.

As previously discussed, this provision needs to be revised to encompass the confidential communications privileges that were created after its enactment (counselor and sexual assault victim; counselor and domestic violence victim).

The Comment to Section 917 provides further indication that the holder's intent regarding disclosure is the key consideration in determining whether a communication is privileged when made:

> **Comment.** 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. [Cites omitted.]
>
> ….
>
> To overcome the presumption, the proponent of 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).

(Emphasis added.)

A case interpreting the physician-patient privilege also underscores the importance of the holder's intent:

> As in other privileges for confidential communications, the physician-patient privilege precludes a court disclosure of a communication, even though there has been an accidental or unauthorized out-of-court disclosure of such communication. Thus, an eavesdropper or other interceptor is not allowed to testify to an overheard or intercepted communication, otherwise privileged from disclosure, *because it was intended to be confidential*.

People v. Gardner, 1515 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984) (emphasis added).

Disclosure After a Privileged Communication Is Made

Issues relating to inadvertent disclosure generally arise where a communication is made in confidence between persons in a privileged relationship, but later disclosed. Section 912 governs this situation:

> 912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), or 1035.8 (sexual assault victim -counselor privilege) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.
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> (b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), or 1035.8 (sexual assault victim-counselor privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.
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> (c) A disclosure that is itself privileged is not a waiver of any privilege.
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> (d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client

> privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), or 1035.8 (sexual assault victim-counselor privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, or sexual assault counselor was consulted, is not a waiver of the privilege.

As Judge Harvey points out, this provision needs to be revised to encompass the newly-created privilege between a counselor and domestic violence victim. (Exhibit p. 3.)

Further revisions may also be warranted. Some courts have concluded that an inadvertent disclosure is not a waiver pursuant to the statute, at least where the disclosure is made during discovery by an agent for the privilege-holder. For example, in *O'Mary v. Mitsubishi Electronics America, Inc.*, the court concluded:

> Inadvertent disclosure during discovery by no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something. O'Mary invites us to adopt a "gotcha" theory of waiver, in which an underling's slipup in a document production becomes the equivalent of actual consent. We decline. The substance of an inadvertent disclosure under such circumstances demonstrates that there was no voluntary release.

59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997). Similarly, in *State Compensation Insurance Fund v. Telanoff*, the court held that waiver "does not include accidental, inadvertent disclosure of privileged information by the attorney." 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999); *see also KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 919 (9th Cir. 1987); *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co. of Maryland*, 196 F.R.D. 375, 380 (S.D. Cal. 2000); *Cunningham v. Connecticut Mutual Life Ins.*, 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994).

But there is also authority pointing towards a more strict approach towards disclosure. For example, dictum in a recent decision states that the attorney-client privilege, "once lost, can never by regained." *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 104 Cal. Rptr. 2d 803, 808 (2001). The court explains that once privileged material is disclosed, there is no way to undo the harm, which consists of the disclosure itself. *Id.*

Commentary also interprets the waiver provision as establishing a standard other than subjective intent. For example, one article states:

> Evidence Code section 912 provides that the holder who "has consented" to disclosure of "a significant part of a privileged communication" waives the privilege. The consent may be express or it may be implied from the holder's conduct. In either instance, the holder must have acted "without coercion." The statute does not require, however, that the holder have known or intended waiver to be the consequence of his actions. If he voluntarily performed an act upon which consent to disclosure may be predicated, waiver occurs *regardless of the holder's subjective intent to preserve the confidentiality of the privileged communication*.

Pickering & Story, *Limitations on California Professional Privileges: Waiver Principles and the Policies They Promote*, 9 U.C. Davis L. Rev. 477, 496 (1976) (emphasis added, footnotes omitted); *see also id.* at 498. The authors go on to explain that "[w]aiver in the context of professional privileges thus differs from waiver in other contexts, where it has generally been defined as … 'the intentional relinquishment of a known right.'" *Id.* at 496 n. 98.

Similarly, another commentator views Section 912 as establishing a test for waiver that is distinct from the three main approaches previously described. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: Federal Law*, *supra*, at § 6[a]; Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: State Law*, *supra*, at §§ 2, 6. He dubs this "significant part analysis, explaining that waiver occurs where (1) a holder discloses a significant part of a privileged communication and (2) does so voluntarily. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: State Law*, *supra*, at § 2. In his view, this test "seems sensible given the language of the California statute and similar statutes which have evolved therefrom." *Id.* "Such codifications appear to intend to be comprehensive, and, hence, resort to factors not mentioned therein seems dubious." *Id.*

Prof. Miguel Mendez of Stanford Law School describes the statutory standard as a strict liability approach:

> An intent to waive the privilege is not required. The party claiming waiver does not have to show that the holder knew or should have known that waiver could result from the disclosure. Disclosing a significant part of a confidential communication to a third person will suffice even if the holder intended the disclosure to be confidential. Thus, *strict liability, as well as negligence and conscious relinquishment, can furnish a basis for waiving a privilege.*

Mendez, *supra*, at 505 (emphasis added). He bases this interpretation on comments in the Law Revision Commission's tentative recommendation relating to the "Privileges" portion of the Evidence Code. *Id.* at 506. The tentative recommendation states in part:

> The [Uniform Rules of Evidence] provid[e] that a waiver is effective only if disclosure is made by the holder of the privilege "with knowledge of his privilege." This requirement has been eliminated because the existing California law apparently does not require a showing that the person knew he had a privilege at the time he made the disclosure. [Cites omitted.] The privilege is lost because the seal of secrecy has in fact been broken and because the holder did not himself consider the matter sufficiently confidential to keep it secret. If the holder does not think it important to keep the matter secret, there is no reason to permit him to exclude the communication when it is needed in order to do justice.

Tentative Recommendation relating to *The Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964).

The accompanying background study is more explicit in advocating Wigmore's strict approach to waiver. The study refers to the then-existing version of the Uniform Rule of Evidence governing waiver, which required a showing that the privilege-holder had knowledge of the privilege. It then explains:

> The thought probably is that waiver should depend upon intent to waive, and, since intent requires knowledge, knowledge is an element of waiver. Wigmore is, however, contra, contending that the overriding consideration is not intent but fairness. "[W]hen," says Wigmore, "conduct [of the privilege holder] touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not," and, therefore, the holder of the privilege "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder."
>
> *It is recommended that [the Uniform Rule] be amended to conform to the Wigmorean view, deleting from the rule the requirement of knowledge.*

A Study Relating to the Privileges Article of the Uniform Rules of Evidence, 6 Cal. L. Revision Comm'n Reports 201, 510 (1964) (emphasis added, footnotes omitted). As usual, in publishing the background study the Commission cautioned that it did not necessarily express the views of the Commission. *Id.* at 203.

Perhaps most importantly, the plain language of Section 912 leaves open the possibility that an inadvertent disclosure, particularly an inadvertent disclosure

by the holder of the privilege, may waive the privilege. The provision states that a confidential communications privilege "is waived with respect to a communication protected by such privilege if any holder of the privilege, *without coercion, has disclosed a significant part* of the communication or has consented to such disclosure made by anyone." (Emphasis added.) While a disclosure in response to discovery may be regarded as coerced, it is difficult to argue that coercion exists where a privilege-holder accidentally directs an email or a fax to the wrong person, or mistakenly mails a package of documents to opposing counsel instead of to the holder's own attorney. Section 912 might thus be construed to mean that such an accidental disclosure constitutes a waiver, even though the privilege-holder had no subjective intent to make the disclosure.

In sum, the effect of an inadvertent disclosure under Section 912 is unclear, at least in some circumstances. It may be appropriate to amend the provision to provide more guidance on this point.

JUDGE HARVEY'S VIEWS

Judge Harvey has provided detailed comments on some of the specific drafting issues that the Commission considered at its December meeting, such as whether to include a definition of "electronic" in the Evidence Code, where to move the language on electronic communications that is now in Section 952, and whether to eliminate references to faxes, cellular phones, or other specific means of transmission. (Exhibit pp. 2-7.) We plan to address these matters once the Commission resolves the more basic question of how to handle inadvertent disclosures generally. Prof. Mendez has also provided a drafting suggestion, which should likewise be considered at a later point in this study. (Exhibit p. 1.)

Importantly, Judge Harvey helped to draft the Evidence Code as a member of the Commission staff. He is planning to attend the upcoming meeting in San Diego, and may be able to provide insights regarding the code's approach to waiver by disclosure of a privileged communication.

ANALYSIS

Based on the discussions at the Commission meetings, the subjective intent approach seems most consistent with the Commission's views on the importance of the privileges for confidential communications and the significance of disclosure. It furthers the important policies underlying those privileges, and

facilitates use of efficient new communication methods such as email, which are critical to maintain competitive in modern commerce. If this correctly reflects the Commission's view, Section 912 should be amended to clearly adopt this approach.

There are, however, possible variations on the subjective intent approach. In particular, one possibility would be to codify the doctrine that waiver occurs only upon intentional relinquishment of a known right. In other words, disclosure of a privileged communication is a waiver of the privilege only where (1) the holder of the privilege voluntarily and intentionally made the disclosure to a third person, knowing that doing so would render the communication unprivileged, or (2) the privilege-holder voluntarily and intentionally agreed to have another person to make the disclosure, knowing that disclosing the communication would render it unprivileged, and disclosure actually occurred.

A second possibility would be to require only intent to disclose the privileged communication to a third person, not knowledge of the privilege and intent to relinquish it. Under this approach, disclosure of a privileged communication would waive the privilege where (1) the holder of the privilege made the disclosure voluntarily, with intent to disclose the communication to a third person, or (2) the holder of the privilege voluntarily and intentionally agreed to have another person make the disclosure, and disclosure actually occurred.

The Commission needs to consider which of these alternatives it prefers, if any. A further complication is whether to apply the chosen approach only to waiver by disclosure of a privileged communication, or also to other waiver contexts, such as waiver by failure to assert the privilege. The staff has not yet explored this point in any detail, but could address it in a future memorandum if the Commission so desires.

Once the Commission settles on a basic approach to waiver, we will consider how to implement it. At this point, however, **it is clear that the following reforms should be made**:

(1) Section 912 should be revised to cover the privilege between a counselor and a domestic violence victim.

(2) Section 917 should be revised to cover the privilege between a counselor and a sexual assault victim, and the privilege between a counselor and a domestic violence victim.

(3) If Section 980 is revised for substantive purposes (e.g., to provide greater specificity regarding what constitutes a confidential communication between husband and wife), the provision should also be made gender-neutral.

WORK PRODUCT PRIVILEGE

At the December meeting, the Commission expressed interest in considering the work product privilege, as well as the privileges for confidential communications between persons in certain relationships. The work product privilege is codified in the Code of Civil Procedure, not the Evidence Code:

> **Code Civ. Proc. § 2018. Attorney's work product**
>
> 2018. (a) It is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts.
>
> (b) Subject to subdivision (c), the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing the party's claim or defense or will result in an injustice.
>
> (c) Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.
>
> ….

It is clear that the work product privilege applies at trial, as well as in discovery. *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 648, 151 Cal. Rptr. 399, 410 (1978); *Kizer v. Sulnick*, 202 Cal. App. 3d 431, 440, 248 Cal. Rptr. 712 (1988); M. Mendez, Evidence: The California Code and the Federal Rules, at 544 (2d ed. 1999). The absolute protection for an attorney's "impressions, conclusions, opinion, or legal research or theories" applies in both civil and criminal cases, but the qualified protection for other work product does not extend to criminal cases. *Izazaga v. Superior Court*, 54 Cal. 3d 356, 382 n.19, 815 P.2d 304, 285 Cal. Rptr. 231 (1991).

"There is no statutory provision governing waiver of work product protection." *Raytheon Co. v. Superior Court*, 208 Cal. App. 3d 683, 688, 256 Cal. Rptr. 425 (1989). Nonetheless, "the courts have held that an attorney may waive this protection, which is created for the attorney's benefit." 2 B. Jefferson,

California Evidence Benchbook *Attorney's Work-Product Privilege* § 41.14, at 895 (3d ed. 2001); see *Wellpoint Health Networks v. Superior Court*, 59 Cal. App. 4th 110, 120, 68 Cal. Rptr. 2d 844 (1997); *Raytheon*, 208 Cal. App. 3d at 689; *Lohman v. Superior Court*, 81 Cal. App. 3d 90, 101, 146 Cal. Rptr. 171 (1978); *Kerns Constr. Co. v. Superior Court*, 266 Cal. App. 2d 405, 411, 72 Cal. Rptr. 74 (1968). In some circumstances, disclosure of work product can effect a waiver of the work product privilege. *See, e.g.*, *Raytheon*, 208 Cal. App. 3d at 689; *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1261, 245 Cal. Rptr. 682 (1988); *Los Angeles v. Superior Court (Friedman)*, 170 Cal. App. 3d 744, 754-55, 216 Cal. Rptr. 311 (1985).

It is abundantly clear, however, that the purposes underlying the work product privilege and the rules governing its application differ significantly from those pertaining to the privileges for confidential communications in privileged relationships. *See, e.g.*, *State ex rel. United States Fidelity & Guaranty Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677, 689 n. 18 (1995); see also Exhibit p. 6. Waiver principles applicable to the privileges for confidential communications may not be appropriate with regard to the work product privilege. *See, e.g.*, Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: State Law*, *supra*, at § 2[a]. Thus, unless the Commission otherwise directs, **we plan to treat this matter separately, rather than analyzing it in conjunction with the privileges for confidential communications.**

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

Email message from Prof. Miguel Mendez to Barbara Gaal (Jan. 23, 2001), regarding Memorandum 2000-84:

Barbara, thanks for mailing me the memo. One solution is simply to delete that portion of the comment to section 954 that states 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." Another solution is to add language to the comment to amended section 917 to the following effect:

> The comment to section 954 states "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." This language should not be construed as preventing the privilege from attaching to communications which are intended by the parties to be confidential but which are transmitted by electronic or other technological means which can be penetrated by determined hackers or other unauthorized persons. Most, if not all, all communications technologies can be penetrated by determined eavesdroppers. Using technologies subject to some possible risk of penetration will not prevent the privilege from attaching to otherwise confidential communications. Otherwise, parties to confidential communications must forego the use of technologies now commonly used for communication. It is only when one of the parties to the communication chooses a means of transmission which the party knows carries a high risk of penetration that the privilege for confidential communications does not attach. Choosing such a means would be tantamount to having the communications in a crowded elevator.

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March 7, 2001

Barbara S. Gaal
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California Law Revision Commission
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Palo Alto, CA 94303-4739

Re: Evidence Code & Electronic Communications

Dear Barbara:

Forgive me for not getting back to you sooner. But I was in Sacramento and Sutter Counties for most of January, trying a juvenile murder case, and I was in Nevada County for the full month of February, trying a real estate fraud case.

I read your tentative recommendation and the discussion of the commissioners. I noted at page 8 your comment, "I wish Judge Harvey were here." When and where is the next meeting where this will be discussed? I'll try to clear my calendar in order to be there.

Some comments on the discussion:

In the light of the discussion, I think there is some merit to a definition of "electronic" in the Evidence Code. To meet the problem I mentioned in my last letter, the suggestion was made that the definition consist simply of a cross-reference to the definition in the Uniform Electronic Transactions Act. If the Commission decides to do this, there are two ways that might be considered. A new section 137 (numbering the section 137 keeps the definitions in alphabetical order) could be added stating:

> 137. "Electronic" means electronic as defined in Section 1633.2 of the Civil Code.

In the alternative, the definition could be placed in the portion of the Evidence Code dealing with privileged communications in general. (See suggestion below.) So far as I am aware, the privileges portion of the Evidence Code is the only place where "electronic" is used in connection with the transmittal of information. (The term does appear in Section 260, defining "duplicate", and the term appears in Section 1551, dealing with photographic copies of lost documents.) Since there is only one section that needs to deal with the term as defined here, perhaps it would be better to place the definition in the one section where the defined term is used. Then the code user would not have to look elsewhere to find the defined term. There is some language suggested below that carries out this possibility.

So far as the location of the language dealing with electronic privileged communications is concerned, the logical place is in Chapter 3 (Sections 911-920) of Division 8 of the Evidence Code. Division 8 relates to all privileges, and Chapter 3 is entitled "General Provisions Relating to Privileges." That chapter contains several rules that relate to all or to several of the privileges. For example, section 912 contains the rules on waiver of the confidential communication privileges. (I note in passing that the Legislature neglected to add the domestic violence-counselor privilege to this section when it created that new privileged communication.) Section 913 has the rules about commenting on the exercise of a privilege. Section 915 deals with disclosure of privileged information in ruling on a claim of privilege. Etc.

Hence, if there is going to be a general rule relating to the privileged status of communications that are electronically transmitted, the logical place is somewhere in these general provisions. Section 917 is the section creating the burden of proof presumption requiring the opponent of a confidential communication privilege to prove that the communication was not confidential. That is a logical place to provide that a communication that is otherwise privileged does not lose that status simply because it was transmitted electronically. But it is equally logical to create a stand alone section, perhaps section 917.5. I have suggested language for a stand alone section below.

In the discussion at the meeting, some question was raised about the need to transfer to the general provisions, not only the sentence dealing with electronic communications, but also the language dealing with confidentiality. That is unnecessary. Each confidential communication privilege already has a statement of the needed confidentiality. All that is necessary is to create a general provision that says an otherwise privileged communication does not lose its privileged status simply because it was transmitted electronically. That is what both the New York statute and the federal statute do.

The Evidence Code articles establishing the confidential communication privileges (lawyer-client, physician-patient, psychotherapist-patient, sexual assault victim-counselor, domestic violence victim-counselor) define a "confidential communication" to be information "transmitted between [client, patient, victim, etc. and counselor] in the course of that relationship and in confidence by a means which, so far as the [client, patient, victim, etc.] is aware, discloses the information to no third persons other than those who are present to further the interest of the [client, patient, victim, etc.] in the consultation."

This identical language was used originally in the lawyer-client privilege, the physician-patient privilege, and the psychotherapist privilege. When the new sexual assault victim, domestic violence victim privileges were created, the identical language was simply carried over into the new sections.

The definitional language varies somewhat in the husband-wife communication privilege. There, confidential communication is not defined. Instead, Section 980, in creating the privilege, states that it applies to "a communication made in confidence between [the spouses]."

There is another variation in the language of the clergyman-penitent privilege. There, "penitential communication" is defined as "a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman ...."

Because the principle of confidentiality–in the expectation of the client, patient, victim, etc., is already in each of the communication privileges, there is no need to duplicate that principle in Section 917. Section 917 was created simply to create a burden of proof presumption of confidentiality, placing the burden of proof on the opponent of the privilege to prove the communication was not confidential. Since it applies to all communication privileges, it appears as section 917 in the general provisions. That avoided repeating it in each privilege.

None of the original definitions gets bogged down in trying to define what are protected means of transmission. That is desirable. If you begin to specify means of transmission, you may not keep up with changing technology, and you may not list everything that needs to be listed. So, the better course is to leave the means of transmission out. The privilege applies if the information is transmitted, by any means, but in confidence and by a means that, so far as the client, patient, victim, etc. is aware, discloses the information to no third parties. Telephone, letter, personal interview, are all included. Thus, it probably would be a good idea to eliminate all references to means of transmission from the statute, referring to them instead in the comment.

The problem addressed in the previous amendment to 952, relating solely to the attorney-client privilege, is the problem that an electronic transmission might be considered a form of transmission that does reveal the communication to third parties, and the transmission is therefore not confidential and not privileged.

Since that is a problem common to all of the communication privileges, the remedial language that the legislature put in Section 952 ought to be in a section that applies to all of the communication privileges. Section 917 is that section. The presumption of confidentiality stated there ought to be expanded to the subsequently created confidential communication privileges. But it is appropriate, at the same time, to address in the same section the question whether a communication, otherwise meeting the definition of a confidential communication, loses that status simply because it is transmitted electronically.

If the remedial language is not put in Section 917, it at least ought to be in Chapter 3 (Sections 911-920) of Division 8 on Privileges.

Another means of solving the problem, equally valid, and having the merit of having been previously used in New York (a comparable statute exists at the federal level, too), would be to propose an independent section, perhaps section 917.5, providing:

> (a) No communication privileged under this article loses 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..
>
> (b) For purposes of this section, "electronic" has the meaning defined in Civil Code section 1633.2.

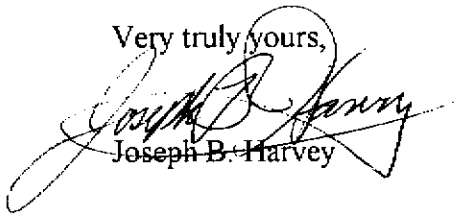
Beyond this, I don't think it's desirable to get further involved in the means of transmission of confidential communications. Even here, we are hypothesizing a problem that hasn't arisen; and

given the broad nature of the original definition, I'm not sure the problem would have arisen. Or if someone with a straight face really did argue that FAXes and e-mails are inherently not confidential, I'm dubious whether a court would have come out with the wrong result. By overemphasizing the means of transmission, I think you tend to undercut the basic definition–implying that it may not apply to all of the communications that fit the definition.

On work product, the question is whether work product information transmitted electronically loses its privileged status because it was so transmitted. There is nothing in the language of CCP section 2018 that would support such an argument. The need for the amending language in the communication privilege sections arises because of the words "by a means which, so far as the [client, patient, victim, etc.] is aware, discloses the information to no third persons ...". The amending language is designed to meet the argument that a person should be aware that electronic transmission will disclose the information to third persons; therefore, information so transmitted cannot meet the definition of a confidential communication. Because there is no similar language in the section establishing the work product rule; so, there is no need for an amendment to meet a language problem that does not exist.

Moreover, the work product rule is in the Code of Civil Procedure, not the Evidence Code. No problem has arisen, so far as I am aware, involving electronic eavesdropping on work product information that is transmitted electronically. The question of waiver is not addressed in CCP section 2018, and I think that it would be unwise to address the question of possible waiver by electronic transmission without addressing question of waiver generally. That could involve a whole range of other problems. My feeling is that, in the absence of an identified problem, there is no need to suggest an amendment to deal with the nonexistent problem.

Very truly yours,



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April 25, 2001

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Re: Evidence Code & Electronic Communications

Dear Barbara:

Upon re-reading my letter of March 7, I discovered an error in the drafting of proposed section 917.5. I used "communication" in one place where I should have used "communicated." The proposed section should read:

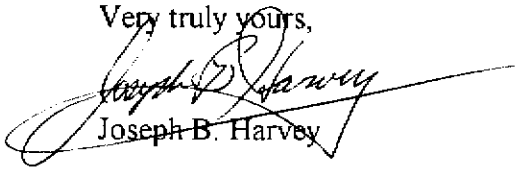
> 917.5. (a) No communication privileged under this article loses its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication..
>
> (b) For purposes of this section, "electronic" has the meaning defined in Civil Code section 1633.2.

What I meant to add to the work product discussion in our telephone conversation is this: In the letter of March 7, I pointed out that the current amendment to the definition of confidential communication in the context of the attorney-client privilege, which amendment is being made applicable to all of the confidential communication privileges, is not necessary in regard to the work product privilege because there is no similar requirement in that privilege that the information be confidential. Actually, so far as the statutory language is concerned, there is nothing in the work product statutes that requires the work product to be confidential originally, and there is nothing in the statutory language that requires it to remain confidential. That is because the work product doctrine serves a different purpose: it is designed to prevent unfairness in the discovery process, to keep the lazy or incompetent lawyer from taking of his adversary's industry and efforts. Hence, it does not make any difference whether the lawyer who owns the work product privilege has disclosed his work product to others or not. His adversary is still not entitled to it. In fact, my belief is that it is not uncommon for attorneys representing similar interests (for example, plaintiffs' attorneys representing persons injured in Firestone Tire cases) to share work product information with each other. Even if they do, the information is still privileged so far as Firestone is concerned.

My belief remains therefore that there is no problem in connection with electronic transmission of work product information that needs solution by an amendment to the Code of Civil Procedure sections that define the work product doctrine. It is not broken, so don't fix it. You may inadvertently create problems where none existed before. For example, specifying that electronic transmission is not a waiver might imply the existence of a general doctrine of waiver which does not exist now.

I recommend that the Commission correct the problem that was created by the amendment to the definition of confidential communication in the lawyer-client privilege context (make the amendment applicable to all confidential communication privileges) and leave the work product doctrine alone because the definitional problem does not exist there.

Very truly yours,



Joseph B. Harvey

EX 7