

Study K-500

June 4, 2001

Memorandum 2001-51**Evidence Code Changes Required by Electronic Communications
(Draft of Tentative Recommendation)**

Attached is a draft of a Tentative Recommendation on *Electronic Communications and Evidentiary Privileges*, which would implement decisions made at the May meeting. The Commission needs to decide whether to approve this draft for printing and circulation. We have received no new communications regarding this study, but encourage interested persons and organizations to submit any comments or suggestions they may have.

Respectfully submitted,

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CALIFORNIA LAW REVISION COMMISSION

Staff Draft TENTATIVE RECOMMENDATION

Electronic Communications and Evidentiary Privileges

June 2001

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) make clear that the statutory presumption of confidentiality and statutory waiver requirements apply to newly created privileges. Evid. Code §§ 912, 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

1 The Law Revision Commission has initiated a review of the Evidence Code to
2 determine whether existing provisions are satisfactory in their application to
3 electronic communications.¹ Pursuant to that review, legislation was enacted on
4 Commission recommendation to repeal the Best Evidence Rule² and replace it
5 with the Secondary Evidence Rule.³ The Commission now recommends that the
6 Evidence Code provisions governing privileges for communications made in
7 confidence between persons in specified relationships (“confidential
8 communication privileges”) be standardized in their application to electronic
9 communications.

10 Confidentiality of Electronic Communications

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

19 This potential argument applies to all of the confidential communication
20 privileges, not just the lawyer-client privilege. But the addition of the language on
21 electronic communications in the provision on the lawyer-client privilege,
22 combined with the lack of such language in comparable provisions for other
23 relationships,⁵ creates an argument that there is no confidentiality and therefore no

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 at <<http://www.clrc.ca.gov/pub/Printed-Reports/BKST-811-HarveyElecEvid.pdf>>.

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 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, *Detours on the Information Superhighway: The Erosion of Evidentiary Privileges in Cyberspace & Beyond*, 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), 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1032

1 privilege for an electronic communication made in the course of any other
2 relationship.

3 To negate that potential argument, the language on confidentiality of an
4 electronic communication should be removed from Section 952 and generalized in
5 Section 917, which creates a presumption of confidentiality for communications
6 made in privileged relationships.⁶ The Commission further recommends that
7 references to specific modes of communication (e.g., email, facsimile, cellular
8 telephone, or cordless telephone) be omitted from the statute, and a broad
9 definition of “electronic” included.⁷ By using generic terminology, the proposed
10 law would provide flexibility to accommodate new technologies.

11 **Presumption of Confidentiality**

12 Generalization of the language on electronic communications exposes a flaw in
13 the drafting of Section 917. The provision creates a presumption of confidentiality
14 for communications made in the specific relationships that were mentioned in the
15 Evidence Code when the code was created in 1965. At that time, the only
16 confidential communication privileges contained in the code were the lawyer-
17 client, physician-patient, psychotherapist-patient, clergyman-penitent, and
18 husband-wife privileges. Since then, the Legislature has created two additional
19 confidential communication privileges: A privilege for confidential
20 communications between a sexual assault victim and counselor,⁸ and a privilege

(penitential communication), 1035.4 (confidential communication between sexual assault victim and counselor), 1037.2 (confidential communication between domestic violence victim and counselor).

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. The proposed definition of “electronic” is the same as in the Uniform Electronic Transactions Act, which was enacted in California as Civil Code Sections 1633.1-1633.17. The Comment to Section 2 of the Uniform Electronic Transactions Act (Civil Code § 1633.2) states:

“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

1 for confidential communications between a domestic violence victim and
2 counselor.⁹

3 Under Section 917, a communication made in the course of one of the listed
4 relationships is presumed to have been made in confidence, and the party opposing
5 a claim of privilege has the burden to establish that the communication was not
6 confidential. The policy considerations underlying this presumption apply equally
7 to all of the confidential communication privileges.¹⁰ The provision should be
8 revised to make clear that the presumption of confidentiality applies to all of the
9 confidential communications privileges.

10 **Waiver**

11 Similarly, the provision governing waiver of a privilege (Section 912) should be
12 revised to make clear that it applies to the privilege for confidential
13 communications between a domestic violence victim and counselor. The provision
14 has already been amended to include the privilege for confidential
15 communications between a sexual assault victim and counselor.

16 **Commission Solicits Other Suggestions for Reform**

The Commission has made a careful review of the Evidence Code to identify problems relating to electronic communications. This tentative recommendation addresses the known issues. The Commission also solicits suggestions for other

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.

8. Sections 1035-1036.2.

9. Sections 1037-1037.7.

10. The Comment to Section 917 explains the policy considerations and discusses the effect of the presumption:

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.]

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 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).

reforms of the Evidence Code that are warranted to accommodate electronic communications.

PROPOSED LEGISLATION

1 **Evid. Code § 912 (amended). Waiver**

2 SECTION 1. Section 912 of the Evidence Code is amended to read:

3 912. (a) Except as otherwise provided in this section, the right of any person to
4 claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege
5 for confidential marital communications), 994 (physician-patient privilege), 1014
6 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of
7 clergyman), ~~or 1035.8 (sexual assault victim-counselor privilege), or 1037.5~~
8 (domestic violence victim-counselor privilege) is waived with respect to a
9 communication protected by such privilege if any holder of the privilege, without
10 coercion, has disclosed a significant part of the communication or has consented to
11 such disclosure made by anyone. Consent to disclosure is manifested by any
12 statement or other conduct of the holder of the privilege indicating consent to the
13 disclosure, including failure to claim the privilege in any proceeding in which the
14 holder has the legal standing and opportunity to claim the privilege.

15 (b) Where two or more persons are joint holders of a privilege provided by
16 Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014
17 (psychotherapist-patient privilege), ~~or 1035.8 (sexual assault victim-counselor~~
18 privilege), or 1037.5 (domestic violence victim-counselor privilege), a waiver of
19 the right of a particular joint holder of the privilege to claim the privilege does not
20 affect the right of another joint holder to claim the privilege. In the case of the
21 privilege provided by Section 980 (privilege for confidential marital
22 communications), a waiver of the right of one spouse to claim the privilege does
23 not affect the right of the other spouse to claim the privilege.

24 (c) A disclosure that is itself privileged is not a waiver of any privilege.

25 (d) A disclosure in confidence of a communication that is protected by a
26 privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient
27 privilege), 1014 (psychotherapist-patient privilege), ~~or 1035.8 (sexual assault~~
28 victim-counselor privilege), or 1037.5 (domestic violence victim-counselor
29 privilege), when such disclosure is reasonably necessary for the accomplishment
30 of the purpose for which the lawyer, physician, psychotherapist, ~~or sexual assault~~
31 counselor, or domestic violence counselor was consulted, is not a waiver of the
32 privilege.

33 **Comment.** Section 912 is amended to make clear that it applies to the privilege for confidential
34 communications between a domestic violence victim and counselor, which did not exist when the
35 statute was originally enacted in 1965. See Sections 1037-1037.7 (domestic violence victim).

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

37 SEC. 2. Section 917 of the Evidence Code is amended to read:

38 917. (a) Whenever a privilege is claimed on the ground that the matter sought to
39 be disclosed is a communication made in confidence in the course of the lawyer-

1 client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-
2 wife, sexual assault victim-counselor, or domestic violence victim-counselor
3 relationship, the communication is presumed to have been made in confidence and
4 the opponent of the claim of privilege has the burden of proof to establish that the
5 communication was not confidential.

6 (b) No communication between persons in a relationship listed in subdivision (a)
7 loses its privileged character for the sole reason that it is communicated by
8 electronic means or because persons involved in the delivery or facilitation of
9 electronic communication may have access to the content of the communication.

10 (c) For purposes of this section, “electronic” has the meaning provided in
11 Section 1633.2 of the Civil Code.

12 **Comment.** Subdivision (a) of Section 917 is amended to make clear that it applies to
13 confidential communication privileges created after its original enactment in 1965. See Sections
14 1035-1036.2 (sexual assault victim); 1037-1037.7 (domestic violence victim).

15 Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2000)) and from
16 language formerly found in Section 952 relating to confidentiality of an electronic
17 communication between a client and a lawyer.

18 Under subdivision (c), the definition of “electronic” is broad, including any “intangible media
19 which are technologically capable of storing, transmitting and reproducing information in human
20 perceivable form ...” Uniform Electronic Transactions Act, Comment to Section 2 (enacted as
21 Civil Code Section 1633.2).

22 For discussion of ethical considerations where a lawyer communicates with a client by
23 electronic means, see Bus. & Prof. Code § 6068(e) (attorney had duty to “maintain inviolate the
24 confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients”);
25 ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413
26 (“Protecting the Confidentiality of Unencrypted E-Mail”); ABA Standing Committee on Ethics &
27 Professional Responsibility, Formal Op. 92-368 (“Inadvertent Disclosure of Confidential
28 Materials”). For examples of provisions on the admissibility of electronic communications, see
29 Evid. Code §§ 1521 & Comment (Secondary Evidence Rule), 1552 (printed representation of
30 computer information or computer program), 1553 (printed representation of images stored on
31 video or digital medium); Code Civ. Proc. § 1633.13 (“In a proceeding, evidence of a record or
32 signature may not be excluded solely because it is in electronic form.”). See also *People v.*
33 *Martinez*, 22 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000); *People v. Hernandez*, 55
34 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (1997); *Aguimatang v. California State Lottery*, 234 Cal.
35 App. 3d 769, 286 Cal. Rptr. 57 (1991); *People v. Lugashi*, 205 Cal. App. 3d 632, 252 Cal. Rptr.
36 434 (1988).

37 **Evid. Code § 952 (amended). “Confidential communication between client and lawyer”**
38 **defined**

39 SEC. 3. Section 952 of the Evidence Code is amended to read:

40 952. As used in this article, “confidential communication between client and
41 lawyer” means information transmitted between a client and his or her lawyer in
42 the course of that relationship and in confidence by a means which, so far as the
43 client is aware, discloses the information to no third persons other than those who
44 are present to further the interest of the client in the consultation or those to whom
45 disclosure is reasonably necessary for the transmission of the information or the
46 accomplishment of the purpose for which the lawyer is consulted, and includes a
47 legal opinion formed and the advice given by the lawyer in the course of that

1 ~~relationship. A communication between a client and his or her lawyer is not~~
2 ~~deemed lacking in confidentiality solely because the communication is transmitted~~
3 ~~by facsimile, cellular telephone, or other electronic means between the client and~~
4 ~~his or her lawyer.~~

5 **Comment.** The sentence in Section 952 on confidentiality of an electronic communication is
6 generalized in Section 917(b)-(c), which applies to all of the confidential communication
7 privileges.
