Study K-500 January 10, 2002

# Memorandum 2002-5

## Electronic Communications and Evidentiary Privileges (Comments on Tentative Recommendation)

The Commission is fortunate to have received an abundance of excellent comments on its tentative recommendation on *Electronic Communications and Evidentiary Privileges*. The following communications are attached to and analyzed in this memorandum:



The Commission needs to consider the comments, determine whether any revisions are necessary, and decide whether to finalize the proposal for introduction in the Legislature.

(Unless otherwise indicated, all statutory references are to the Evidence Code.)

### RECAP OF THE TENTATIVE RECOMMENDATION

The tentative recommendation proposes three reforms of provisions governing privileges for communications made in confidence between persons in specified relationships ("confidential communication privileges"). The proposals are:

**Confidentiality of Electronic Communications**

Section 952 states that a communication between a lawyer and a client "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 provisions governing other confidential communications privileges do not include such language.

The tentative recommendation proposes to delete the quoted statement from Section 952 and generalize it in Section 917, so that the principle applies not only to the lawyer-client privilege but also to other confidential communications privileges.

**Newly Created Privileges**

Section 917 creates a presumption of confidentiality for the confidential communication privileges that existed when the Evidence Code was enacted in 1965 (the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, and husband-wife privileges). The tentative recommendation would amend the provision to include two privileges created later (the privilege for confidential communications between a sexual assault victim and counselor, and the privilege for confidential communications between a domestic violence victim and counselor).

Similarly, the provision governing waiver of a privilege (Section 912) extends to the original confidential communications privileges and the privilege for confidential communications between a sexual assault victim and counselor, but does not mention the more-recently enacted privilege for confidential communications between a domestic violence victim and counselor. The tentative recommendation would correct this apparent oversight.

**Waiver by Disclosure**

Under Section 912, waiver occurs where any holder of a privilege "without coercion, has disclosed a significant part of [a] 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." The statute does not expressly state whether inadvertent (as opposed to intentional) disclosure of a privileged communication waives the privilege.

The tentative recommendation proposes to amend the provision to make clear that inadvertent disclosure is not a waiver. The statute would state that disclosure of

a privileged communication waives the privilege only where a holder of the privilege intentionally makes the disclosure or intentionally permits another person to make the disclosure. This would codify case law interpreting Section 912.

## OVERALL REACTION

Reaction to the tentative recommendation was generally favorable. Three law school professors expressed support while offering specific suggestions. Professor Edward Imwinkelried (University of California, Davis) "generally support[s]" the recommended reforms. (Exhibit p. 10.) Professor David Leonard (Loyola Law School) says that the proposal "is wise from a substantive standpoint, and the drafting carries out the proposal's purposes in a reasonable way." (Exhibit p. 11.) Professor William Slomanson (Thomas Jefferson School of Law) "fully agree[s] with the implicit theme that … the Evidence Code should not needlessly lag behind the need to maintain confidentiality while privileged communications are filtering through society's gradual shift to an electronic world." (Exhibit p. 16.) "The legislation "will help to close the gap between the print world (containing the California Evidence Code) and the electronic world which professionals and their clients have been facing for some time." *Id.* at 17.

The Consumer Attorneys of California ("CAOC") supports "the proposal to extend the same privileges to communications made electronically as currently exists to non electronic communications." (Exhibit p. 21.) The State Bar Committee on Administration of Justice ("CAJ") supports the proposals on confidentiality of electronic communications and newly created privileges, but "takes no position as to whether Section 912 should be revised assertedly to make clear that disclosure of a privileged communication waives the privilege only where the holder of the privilege intentionally, and not merely inadvertently, makes the disclosure or permits another person to make the disclosure." (Exhibit p. 20.) Commissioner Richard Best (San Francisco Superior Court) "believe[s] the amendment clarifying the California rule on waiver by inadvertent disclosure is desirable …." (Exhibit p. 1.) He explains the basis for his position and offers a drafting suggestion. *Id.* Nina Marino (Chairperson, Beverly Hills Bar Association, Criminal Law Section) states that her office reviewed the tentative recommendation and they agree with the proposed amendments. (Exhibit p. 15.)

Charles E. Harris (Senior Counsel, Distributed Trust Management Inc.) urges the Commission to expand the focus of its study to include issues relating to

authentication. (Exhibit pp. 4-6.) He does not express a view on the proposed reforms. *Id.*

Only John Anton (Boxer & Gerson, Oakland) opposes the tentative recommendation. (Exhibit pp. 2-3.) "Such a vast expansion of 'privilege' would only make the discovery of essential evidence more difficult." *Id.* at 3. His concerns are discussed below, as well as the specific issues raised by other commentators.

CONFIDENTIALITY OF ELECTRONIC COMMUNICATIONS (SECTIONS 917, 952)

The tentative recommendation proposes to amend Section 917 as follows:

> 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.
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> (b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.
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> (c) For purposes of this section, "electronic" has the meaning provided in Section 1633.2 of the Civil Code.
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> **Comment.** Subdivision (a) of Section 917 is amended to make clear that it applies to confidential communication privileges created after its original enactment in 1965. See Sections 1035-1036.2 (sexual assault victim), 1037-1037.7 (domestic violence victim).
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> Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2001)) and from language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer. For waiver of privileges, see Section 912 & Comment.
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> Under subdivision (c), the definition of "electronic" is broad, including any "intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form." Unif. Electronic Transactions Act, § 2 comment (1999) (enacted as Civil Code Section 1633.2).
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> For discussion of ethical considerations where a lawyer communicates with a client by electronic means, see Bus. & Prof. Code § 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

clients"); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413 ("Protecting the Confidentiality of Unencrypted E-Mail"); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 92-368 ("Inadvertent Disclosure of Confidential Materials").

For examples of provisions on the admissibility of electronic communications, see Evid. Code §§ 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. California 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).

A conforming revision would be made in the provision on confidential lawyer-client communications (Section 952), deleting the sentence on electronic communications. A number of issues were raised concerning the proposed revisions relating to confidentiality of electronic communications.

**Policy Considerations**

As a member of CAJ, John Anton had "grave reservations" about the 1994 amendment of Section 952, which added the sentence stating that "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." He opposes the proposed expansion of this principle to other privileges. (Exhibit p. 2.) He does not "think the parties to any of these relationships ought to presume (if they think about it at all) that communication by facsimile, cellular telephone, or other electronic means so readily susceptible to disclosure to others, is confidential." *Id.* Further, as an attorney representing injured workers and consumers, he finds that much of the evidence necessary to prosecute a claim is available only from the accused. He believes that the proposed reform would unduly hamper the search for the truth. *Id.*

In contrast, CAOC (whose members often represent injured workers and consumers) supports the proposal. (Exhibit p. 21.) "We generally would object to expansions of privileges in favor of open communication; however, this proposal in its current form appears to respond to the reality of modern communication and

merely assures privileges are not lost because of the electronic method of communication." *Id.* Similarly, CAJ "recommends that Sections 917 and 952 be revised as the Commission proposes to make clear that a privileged communication does not lose its privileged status simply because it is transmitted electronically." (Exhibit p. 20.) "The proposal is straightforward and noncontroversial." *Id.*

The Commission's consultant Joseph Harvey (a retired superior court judge and former member of the Commission staff who helped to draft the Evidence Code) "agree[s] with John Anton in regard to the general problem of expansion of privileges." (Exhibit p. 7.) Privileges "keep relevant and material evidence out of the truth-seeking processes of a court, when justice is seeking the truth." *Id.* But privileges also serve important purposes:

> Privileges are created because we fear that clients will not be correctly advised, will not be correctly treated, or will not be correctly counseled if they are not assured that what they tell their lawyer, physician, or counselor in confidence will be kept in confidence. Although that does impinge on the truth finding function of judicial proceedings, we value the ability of the clients, patients, etc. to obtain correct advice and treatment so much that we are willing to accept this impingement.

*Id.* at 8. "Because the policy of protecting communications is carried out by protecting electronic communication that is not known by the client to be subject to monitoring," Judge Harvey does not view the proposed amendment of Section 917 with alarm the way John Anton does. *Id.*

The staff concurs in this assessment. Privileges, together with their corresponding exceptions, restrictions, and requirements, represent a balance of competing interests. Although the confidential communication privileges may impede truth-finding to some extent, they are intended to foster frank and free-flowing communication in contexts where this is critical. This objective would be seriously undermined if the confidential communication privileges did not extend to electronic communications, because such communications are increasingly common and vital for effective interaction. **The staff therefore continues to believe that the Commission's approach is sound from a policy standpoint.**

**Definition of "Electronic"**

Section 917(c) would incorporate the definition of "electronic" found in Civil Code Section 1633.2(e), which states:

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

Civil Code Section 1633.2 is part of the Uniform Electronic Transactions Act (UETA), as enacted in California in 1999. The UETA Comment regarding the definition of "electronic" 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 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.

John Anton criticizes the Commission's proposed definition of "electronic" as overbroad. In his view, the proposed definition is "so incapable of definition that given modern and future potential for communication and storage data the scope of the privilege would approach the infinite." (Exhibit pp. 2-3.) "On the other hand few physician / patient, psychotherapist / patient, clergyman / penitent, husband / wife, sexual assault victim / counselor, or domestic violence victim / counselor relationships use these means or require such protection." *Id.*

Prof. Slomanson takes the opposite view, stating that the proposed amendments "are particularly astute because they include a broad definition of 'electronic.'" (Exhibit p. 16.) He believes this will permit the Commission to "continue to focus on the major issues of the day — as opposed to all of the situation-specific amendments which will otherwise surely follow, rather than lead, in the electronic revolution." *Id.*

He voices concern regarding the UETA Comment, however, because it refers to "most current technologies." *Id.* He fears this could serve as a basis for narrowing the scope of the provision. *Id.*

But the UETA Comment emphasizes the breadth of the definition of "electronic" and explains that the definition "is intended to assure that the Act will be applied broadly as new technologies develop." The Commission cannot change the UETA Comment; it can either incorporate the UETA definition and corresponding Comment or use a different definition of "electronic." **The staff recommends retaining the UETA definition.** Using a different definition in the Evidence Code would create a danger of confusion, which would only be acceptable if there were benefits to using an alternative standard. So far, no alternative standard has been proposed, much less shown to be superior to the one drafted by the Uniform Law Commission.

The Commission should be aware, however, that a bill to repeal and reeanct California's version of UETA is pending (SB 97 (Sher)). As currently drafted, Senator Sher's bill would not change the definition of "electronic." The staff is tracking the bill and will alert the Commission if any developments require attention.

**Surplusage**

Although Prof. Leonard believes that a privileged communication should not lose its privileged status simply because it is transmitted electronically, he questions the need for proposed Section 917(b) and (c):

> Proposed section 917(b) provides that a communication "does not lose its privileged character for the sole reason" that it has been achieved through electronic means. …[W]hy is it necessary to include this provision? I understand that it would maintain an aspect of the 1994 amendment to section 952, and there is some concern that eliminating the reference to electronic communication might be interpreted as withdrawing the protection. At the same time, the privilege rules, particularly if amended in the manner you suggest, would certainly protect electronically transmitted communications even without this language. The test would be the intention of the person communicating. I would be hard-pressed to argue that in the

> absence of proposed section 917(b), the privileged would be held waived if the communication were transmitted electronically. Thus, I believe the proposed language is not necessary.

(Exhibit pp. 13-14.)

As a technical matter, the staff agrees with Prof. Leonard that proposed Section 917(b) and (c) are not strictly necessary. Even without such guidance, a court might well conclude that an electronic communication between persons in a privileged relationship is privileged despite the potential for interception of the communication.

As Prof. Leonard recognizes, however, deleting the sentence on electronic communications from Section 952 without inserting similar language elsewhere might be misconstrued as a withdrawal of protection for electronic communications. Further, proposed Section 917(b) and (c) would provide guidance on what is likely to be a frequently arising issue, not only for courts and litigants but also for persons who seek assurance that they can communicate electronically without forfeiting the benefits of a privilege. Consequently, **the Commission should retain proposed Section 917(b) and (c) even though they are not strictly necessary.**

**Electronic Transmission as a Factor Supporting Waiver**

Prof. Leonard's second concern about proposed Section 917(b) "is that the phrase 'for the sole reason' might be interpreted to suggest that a court could consider the fact that a communication was transmitted electronically as one factor in favor of waiver." (Exhibit p. 14.) "Because the language provides that electronic transmission cannot be the 'sole reason' for finding waiver, it can be argued that such a fact could be considered as one reason." *Id.* Prof. Leonard does not think this is the intent of the proposed language. *Id.*

The staff's understanding of the Commission's intent is that whether a message is transmitted electronically, instead of by conventional means, should not determine whether the message is treated as privileged. What should influence that determination is whether the message was subject to interception, whether the risk of interception was high or low, and whether the holder of the privilege was aware of that degree of risk.

Where, for instance, an attorney and client loudly discuss a pending case in a crowded elevator, the conversation will not be treated as privileged. The type of transmission — face-to-face oral communication — does not determine whether the privilege attaches. What matters is whether the communication is transmitted "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 those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." Section 952. Similarly, if a communication is made in confidence but later disclosed to a third person with the holder's consent, it is initially privileged but the privilege is waived by the disclosure. Section 912. In determining whether the disclosure was a waiver, the mechanics of the transmission are only relevant to the extent, if any, that they reflect on the holder's state of mind.

The staff cannot think how to revise the text of Section 917(b) to express this intent more clearly than in the tentative recommendation. It would be possible to replace "for the sole reason that" with "because" or "solely because":

> (b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character ~~for the sole reason that~~ [solely] because it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.

This might read more smoothly than the language in the tentative recommendation, but we are not sure whether it would provide clearer guidance.

**Perhaps it would be helpful to add some language to the Comment:**

> **Comment.** … Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2001)) and from language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer. ~~For waiver of privileges, see Section 912 & Comment~~ Under subdivision (b), whether a message is transmitted electronically, instead of by conventional means, does not determine whether the message is privileged. Rather, a court should examine whether the message was subject to interception, whether the risk of interception was high or low, and whether the holder of the privilege was aware of that degree of risk. See Section 912 & Comment (waiver of privileges); see also Sections 952 (confidential communication between client and lawyer), 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1032 (penitential communication), 1035.4 (confidential communication between victim and sexual assault counselor), 1037.2 (confidential communication between victim and domestic violence counselor).
>
> Under subdivision (c), ….

**Presumption of Confidentiality**

In preparing the tentative recommendation, the Commission considered whether the language on confidentiality of electronic communications should be included in Section 917 or placed in a separate section. (Minutes (Dec. 2000), p. 18; Memorandum 2001-29, Exhibit p. 3.) The Commission eventually opted to include the language in Section 917, which creates a presumption of confidentiality for communications between persons in certain privileged relationships.

A question arises from the juxtaposition of the proposed language on electronic communications and the existing language creating a presumption of confidentiality: Does a communication lose its presumption of confidentiality, as opposed to its privileged character, if communicated electronically?

**The Commission could prevent confusion on this point by rephrasing the provision as follows:**

> 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, 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 persons in a relationship listed in subdivision (a) does not lose its <u>presumption of confidentiality or its</u> privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.
>
> (c) For purposes of this section, "electronic" has the meaning provided in Section 1633.2 of the Civil Code.

This suggestion was not made in any of the comments, but the staff believes that it would be a helpful revision.

**Evidence Code Section 952**

The tentative recommendation proposes to amend Section 952 as follows:

> 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 those to whom disclosure is reasonably necessary for the transmission of the information 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.** Section 952 is amended to delete the last sentence concerning confidentiality of electronic communications, because this rule is generalized in Section 917(b)-(c) applicable to all confidential communication privileges.

Prof. Leonard suggests a revision of Section 952 that is unrelated to the Commission's proposal:

> The rule provides that "a legal opinion formed and the advice given by a lawyer in the course of that relationship" is also covered by the attorney-client privilege. Should this language be broadened? My impression is that the privilege covers any confidential communications from the lawyer to the client that are related to the purpose for which the attorney has been consulted. For example, I would think that the attorney's communication to the client of information learned by the attorney in the course of her investigation of the client's case would also be covered. Because you are already suggesting one amendment to section 952, it might make sense to broaden this part of the rule.

(Exhibit p. 14.)

Judge Harvey advises against such a revision. "My reaction is that the language has existed for more than 35 years, and I know of no problems that have arisen because of the use of the existing language." (Exhibit p. 9.)

**The staff agrees with Judge Harvey that it is better to leave well enough alone.** Section 952 expressly encompasses any "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence …." The reference to "a legal opinion formed and the advice given" merely emphasizes that those key communications are included; it does not restrict the types of communications covered. Unless courts reach a contrary result, there is no need to revise the time-tested language.

## NEWLY CREATED PRIVILEGES (SECTIONS 912, 917)

The tentative recommendation proposes to amend Section 912 (waiver) to include the privilege for confidential communications between a domestic violence victim and counselor. The tentative recommendation also proposes to add that privilege to Section 917 (presumption of confidentiality), as well as the privilege for confidential communications between a sexual assault victim and counselor. A few comments relate to these revisions:

### Noncontroversial in Concept

None of the commentators criticize the concept of fixing the omissions in Sections 912 and 917. As CAJ explains, this proposal "is straightforward and non-controversial." (Exhibit p. 20.) **The Commission should proceed with the proposal.**

### Inclusion of Other Privileges

Commissioner Best queries whether the waiver rule (Section 912) would apply "to the various tax return privileges or to work product." (Exhibit p. 1.) Similarly, Prof. Leonard observes that "section 912 in its current form and as amended would not include within its reach privileges for official information (§ 1040), identity of informer (§ 1041), secrecy of vote (§ 1050), or trade secrets (§ 1060)." (Exhibit pp. 11-12.) He suggests "that the Commission consider whether it is wise either to include the other privileges within the list contained in section 912, or to conform the waiver language in the other privileges to the wording of the proposed amendment to section 912." *Id.* at 12.

With regard to work product, the Commission previously considered whether to address that privilege in this proposal. (Memorandum 2001-29, pp. 17-18, Exhibit pp. 5-7.) The Commission decided that "[d]isclosure of materials protected by the work product privilege should be addressed in the Commission's study of discovery improvements, not in this study." (Minutes (May 2001), p. 15.)

Judge Harvey also "see[s] no need to expand the proposed amendment to cover the non-communication privileges as suggested by Professor Leonard." (Exhibit p. 8.) "There is no policy of encouraging therapeutic communication … that would be enhanced by such an expansion." *Id.*

The staff is also inclined to limit this proposal to the confidential communication privileges, but for a different reason. Thus far, the proposal has received considerable support and may be ready for introduction in the Legislature this session. Expanding the proposal to include other privileges might generate

opposition and would almost certainly slow the process of finalizing a recommendation. **We would not dismiss the notion of addressing other privileges without studying the point more carefully, but we recommend handling that issue as a separate matter.**

**Drafting Technique**

Prof. Leonard suggests that in drafting Sections 912 and 917, it might be "more sensible to refer to all testimonial privileges protecting confidential communications generally rather than to list them." (Exhibit pp. 11, 13.) That approach would avoid the need to amend the provisions each time a new testimonial privilege is recognized. *See id.* Commissioner Best makes a similar suggestion. (Exhibit p. 1.)

Judge Harvey comments that "new privileges are rarely created, and the problem suggested by Prof. Leonard is really a minor problem." (Exhibit p. 9.) "It would be solved if this Commission or somebody else undertook a continuing obligation to monitor new proposed amendments to make sure that necessary conforming amendments are also made." *Id.* Ideally, Judge Harvey thinks that Legislative Counsel's office should fill that role. *Id.*

To assess the scope of the drafting issue identified by Prof. Leonard and Commissioner Best, the staff searched the codes for provisions that refer to three or more privileges. We found many provisions that refer to all of the privileges collectively. *See, e.g.*, Bus. & Prof. Code § 19827 ("any information that is privileged pursuant to Division 8 (commencing with Section 900) of the Evidence Code, or any other provision of law"); Code Civ. Proc. § 2017 (discovery of "any matter, not privileged"); Penal Code § 1054.6 ("any materials or information which are work product as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States").

Only a few provisions list three or more privileges:

(1) *Section 912*. As the Commission proposes to amend it, subdivision (a) would refer to the lawyer-client privilege, privilege for confidential marital communications, physician-patient privilege, psychotherapist-patient privilege, privilege of penitent, privilege of clergyman, sexual assault victim-counselor privilege, and domestic violence victim-counselor privilege. Subdivision (c) and the first sentence of subdivision (b) would refer to five of these privileges: All but the privilege of penitent, privilege of clergyman, and privilege for confidential marital communications, which is referred to in the second sentence of subdivision (b).

(2) *Section 917*. As the Commission proposes to amend it, Section 917 would refer to the same privileged relationships that would be listed in Section 912(a).

(3) *Labor Code § 1102.5. Employee disclosure of violation of law*. This 1984 provision makes it unlawful for an employer to prohibit an employee from reporting a violation of law, or to retaliate against an employee who does so. The statute does not prevent an employer from sanctioning an employee who violates the lawyer-client, physician-patient, or trade secret privilege.

(4) *Penal Code § 11163.3. Domestic violence death review team*. This provision was amended in 1999 to permit (but not require) disclosure of privileged material to members of a domestic violence death review team. Any material disclosed to the team is confidential. The provision refers to the same five privileges that would be listed in the first sentence of Section 912(b), as well as various provisions making specified information confidential (e.g., child abuse reports and investigations).

(5) *Penal Code § 11174.8. Elder death review team*. This provision, enacted in 2001, is similar to the provision on domestic violence death review teams. It refers to the lawyer-client, physician-patient, and psychotherapist-patient privileges, as well as various provisions making specified information confidential.

(6) *Health & Safety Code § 120595. Witnesses in proceeding relating to prevention and control of sexually transmitted disease*. This 1995 provision makes several privileges inapplicable in the proceedings to which it pertains: the privilege not to testify against your spouse, the privilege not to be called as a witness in a case in which your spouse is a party, the privilege for confidential marital communications, the physician-patient privilege, and the psychotherapist-patient privilege.

(7) *Welf. & Inst. Code § 317. Appointment of counsel for child*. This provision permits a child or counsel for a child to invoke the psychotherapist-patient, physician-patient, and clergyman-penitent privileges. It was enacted in 1987, but the references to these privileges were added by an amendment that became operative on January 1, 2001.

**Based on this research, the staff is inclined to stick with the current approach.** There does not seem to be a clear need to define "confidential communication privilege" (or a similar term) in the codes. Other than Sections 912 and 917, there do not appear to be any provisions that clearly should cover newly created privileges but fail to do so. Rather, the provisions that refer to a select group of privileges

already include the sexual assault victim- and domestic violence victim-counselor privileges (e.g., Penal Code § 11163.3), or appear to have been deliberately limited to certain privileges (e.g., Penal Code § 11174.8). While these choices may merit review at some point, the current approach of listing privileges (rather than using a term to refer to them collectively) helps to ensure that statutes apply only to privileges that they are intended to cover.

### WAIVER BY DISCLOSURE (SECTION 912)

The tentative recommendation proposes to amend Section 912 to make clear that disclosure of a privileged communication waives the privilege only where the holder of the privilege intentionally makes the disclosure or intentionally permits another person to make the disclosure:

> 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), or 1037.5 (domestic violence victim-counselor privilege) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has intentionally 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~~ intent to permit 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), or 1037.5 (domestic violence 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), or 1037.5 (domestic violence 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, or domestic violence counselor was consulted, is not a waiver of the privilege.

**Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This is not a substantive change. See State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999); O'Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984); see also KL Group v. Case, Kay & Lynch, 829 F.2d 909, 919 (9th Cir. 1987); Federal Deposit Ins. Corp. v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994). Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.

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

The following comments relate to this proposed reform:

**Need for the Reform**

John Anton objects to the proposed revisions, because he believes that "determination of the subjective intent of the holder of the privilege is an unworkable standard." (Exhibit p. 2.) He explains that "Section 437c(e) of the Code of Civil Procedure, relating to motions for summary judgment, amounts to legislative recognition that 'where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof' a trial of fact is indicated." *Id.*

CAJ takes no position on the revisions requiring intentional disclosure, but cautions that perhaps carelessness should be a waiver in some situations:

> It is plain that, if the holder of the privilege *intentionally* makes the disclosure or permits another person to make the disclosure, he forfeits the privilege. But it is not so plain that he does not do so if he is *merely inadvertent*. His inadvertence might amount to the most minor and understandable of lapses in constant efforts to guard the

> confidentiality of the privileged communication. But it might also reveal a carelessness inimical to the privileged communication's continuing confidentiality.

(Exhibit p. 20 (emphasis in original).) CAJ further warns that providing that disclosure of a privileged communication "waives the privilege only where *the holder of the privilege* intentionally makes the disclosure or permits another person to make the disclosure may invite manipulation of the privilege, as where a lawyer might disclose a privileged communication for tactical purposes and then claim the privilege on the client's behalf with the assertion that the client did not intentionally permit the lawyer to make the disclosure." *Id.* (emphasis in original).

In contrast, Commissioner Best squarely supports the proposed revisions and explains why they would be helpful:

> I believe the amendment clarifying the California rule on waiver by inadvertent disclosure is desirable since the Supreme Court has not spoken and there is some case law basis for a contrary position. Although other jurisdictions sometimes take a contrary position the proposed clarification seems to not only be the current rule in California but the national trend. It is also desirable because this issue arises with greater regularity and is a source of serious concern when dealing with production of electronic data.

(Exhibit p. 1.)

Prof. Leonard (Exhibit p. 11), Prof. Imwinkelried (Exhibit p. 10), Prof. Slomanson (Exhibit pp. 16-17), and the Chairperson of the Beverly Hills Bar Association Criminal Law Section (Exhibit p. 15) also support the basic concept of the reform. Thus far, Judge Harvey sees no need to change this or any other aspect of the tentative recommendation. (Exhibit pp. 7-9; Email from J. Harvey to B. Gaal (12/27/01).)

**The staff continues to believe that the proposed reform would provide useful guidance to courts, litigants, and persons in privileged relationships.** As discussed at pages 4-5 of the tentative recommendation, the proposed "intent to disclose" standard is consistent with case law interpreting Section 912 and with the original intent of the Evidence Code, as evidenced by statutory text and Comments and explained by Judge Harvey at the May 2001 meeting. A less stringent standard, such as finding waiver where a privileged communication is negligently or recklessly disclosed, would provide less protection for the important policy interests underlying the confidential communication privileges. Manipulation of the standard

for tactical purposes should occur infrequently, because lawyers are ethically obligated to act with integrity and can be sanctioned for failure to do so. See, e.g., Bus. & Prof. Code § 6068.

As for whether the standard is workable, judges already make preliminary fact determinations regarding application of privileges, as well as many other matters. Section 405 & Comment. Under the provision to which Mr. Anton refers, a trial of fact is not mandatory but discretionary "where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." Code Civ. Proc. § 437c(e). We see no problem that would preclude use of an "intent to disclose" standard, particularly because that standard is already in use in the California courts.

**Intent to Waive Privilege**

CAJ points out that "it is *not* the case that a privilege may be lost only by waiver properly so called, that is by a knowing, intelligent, and voluntary surrender." (Exhibit p. 20 (emphasis in original).) "Rather, a privilege may also be lost by forfeiture — which is what Section 912 deals with under the rubric of 'waiver'." *Id.*

The preliminary part of the tentative recommendation acknowledges as much:

> Importantly, the test is whether the holder of the privilege intended to disclose the communication to a third person, not whether the holder intended to waive the privilege. The holder need not have been aware of the legal consequences of disclosure, so long as the disclosure was intentional.

(p. 6 (footnotes omitted).) As Judge Harvey explains, we "are concerned with what is really confidential, not with a person's understanding of his legal rights." (Exhibit p. 8.)

But neither the statutory text nor the proposed Comment make that point, and the preliminary part will be much less accessible than those materials. **We therefore suggest adding appropriate language to the Comment,** perhaps along the following lines:

> **Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This is not a substantive change. [Citations omitted.] Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.
>
> The determinative issue is whether the holder of the privilege intended to disclose the communication to a third person, not whether the holder intended to waive the privilege. The holder need not have

> been aware of the legal consequences of disclosure, so long as the disclosure was intentional. *Tentative Recommendation Relating to The Uniform Rules of Evidence: Article V. Privileges,* 6 Cal. L. Revision Comm'n Reports 201, 262 (1964).
>
> Section 912 is also amended to ….

**Desire to Disclose Privileged Communication**

Prof. Leonard observes that in tort law "the term 'intent' usually means a *desire* to bring about a particular unlawful result …, or *knowledge to a substantial certainty* that such result will occur." (Exhibit p. 13 (emphasis in original).) He questions whether "intent to disclose or permit disclosure" under the proposed amendment of Section 912 would exist in both of these situations, or only where the holder desires that disclosure occur. *Id.* This is an important issue and we are grateful to Prof. Leonard for bringing it to our attention.

Prof. Leonard believes that "either answer can be supported." *Id.* He personally leans towards the latter approach:

> My own sense is that the term 'intent' should be interpreted in the manner most protective of the privilege. Because the maintenance of confidentiality is thought to be essential to the relationships protected by the privileges, the holder's desires should be paramount. I would suggest that the privileges be maintained unless the holder *wishes* the communication to be revealed to a person outside the circle of the privilege.

*Id.* (emphasis in original). He acknowledges, however, that a client "who chooses a method of communication that is substantially certain to result in another's interception of the message has arguably not taken sufficient steps to protect confidentiality." *Id.*

Judge Harvey would find that the privilege was waived in that situation. In his opinion, "the idea is to keep confidential and secret only what is truly confidential and secret, and what is needed to be confidential and secret to make the relationships involved (attorney/client, physician/patient, counselor/victim) truly effective." (Exhibit p. 8.) If a client, "knowing that the employer will monitor the e-mail transmission, nevertheless decides to communicate with the lawyer through the employer's computer, and if the employer learns by that means that the client has committed a serious crime that another is accused of, that the client intends to commit perjury in a pending proceeding, etc., and if the employer makes that evidence available to those who have an interest in it, we should not be keeping that evidence out of court." *Id.* Judge Harvey sees "nothing in the policy underlying the

privilege that would warrant the requirement that the courts ignore that information even though everyone else concerned knows about it." *Id.* He does not consider it necessary to make any changes in the tentative recommendation to more clearly reflect his view.

Based on discussions at previous Commission meetings, the staff's impression is that the Commission agrees with Judge Harvey: Waiver occurs not only when the holder of a privilege desires to disclose privileged material and does so, but also when the holder chooses to use a means of communication knowing that it is substantially certain to result in disclosure, regardless of whether the holder desires that result. For example, if a man meets with his attorney, then loudly recounts the meeting to his wife in a crowded elevator, disclosure to third persons is substantially certain and the man surely knows as much. Because disclosure is plainly inevitable, the man may be said to have intended that result, even though he may not like the fact that third persons heard him.

The tentative recommendation reflects that view by mentioning the importance of factors such as whether "an employee's computer routinely displays a message that employee email is actually being monitored," and whether "the message states that the Technology Department is responsible for monitoring, but the employee knows that the Technology Department is not conducting any monitoring." (p. 5, n. 18.) As Prof. Leonard's comments reflect, however, the point should be made more clearly. **We suggest revising the Comment along the following lines:**

> **Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This is not a substantive change. [Citations omitted.] Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.
>
> The determinative issue is whether the holder of the privilege intended to disclose the communication to a third person, not whether the holder intended to waive the privilege. The holder need not have been aware of the legal consequences of disclosure, so long as the disclosure was intentional. *Tentative Recommendation Relating to The Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964). A disclosure is intentional where (1) the holder of a privilege desires to disclose privileged material to a third person and does so, or (2) the holder chooses to use a means of communication knowing that it is substantially certain to result in disclosure to a third person, regardless of whether the holder desires that result.
>
> Section 912 is also amended to ….

This revision incorporates the previously suggested language on awareness of the legal consequences of disclosure.

**Reliance on Inadvertently Disclosed Privileged Communication**

Prof. Imwinkelried "for the most part" favors an intentionality standard for waiver. (Exhibit p. 10.) In one setting, however, he believes that the standard "poses practical problems." *Id.* Specifically, he is concerned about the situation where the holder of a privilege accidentally produces privileged material, and the opponent "not only reviews the material but also reasonably relies on the material." *Id.* He queries whether the Commission intends courts to use the intentionality standard even in this situation, or apply "a multi-factor balancing test permitting the trial judge to weigh the opponent's reliance interest." *Id.* "It would be helpful if one of your Comments gave the California bench guidance on this issue." *Id.*

Judge Harvey thinks that Prof. Imwinkelried's concern "is answered in footnotes 13 and 14 to the tentative recommendation," which cite cases holding that inadvertent disclosure is not a waiver, and cases explaining the purposes underlying the confidential communication privileges. (Exhibit p. 8.) He "cannot think of any language that could be added to the statute that would be any clearer than the language proposed now." *Id.*

The staff shares Judge Harvey's view that the intentionality standard should and does apply in California regardless of whether an opponent has relied on inadvertently disclosed material. Such reliance is not reasonable, because case law provides constructive notice that inadvertent disclosure is not a waiver, and the proposed amendment would provide additional notice. **We agree with Prof. Imwinkelried that the Comment should explain the effect of relying on inadvertently disclosed privileged material, perhaps as follows:**

> **Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This is not a substantive change. [Citations omitted.] Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.
>
> The determinative issue is whether the holder of the privilege intended to disclose the communication to a third person, not whether the holder intended to waive the privilege. The holder need not have been aware of the legal consequences of disclosure, so long as the disclosure was intentional. *Tentative Recommendation Relating to The Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964). A disclosure is intentional where (1) the holder of a privilege desires to disclose privileged material to a

third person and does so, or (2) the holder chooses to use a means of communication knowing that it is substantially certain to result in disclosure to a third person, regardless of whether the holder desires that result.

This standard applies regardless of whether an opponent relies on inadvertently produced privileged material. Such reliance is not reasonable, because Section 912 provides constructive notice that inadvertent disclosure of a privileged communication does not waive the privilege.

Section 912 is also amended to ….

As before, we have incorporated the revisions suggested earlier in this memorandum, as well as the proposed paragraph regarding reliance.

**Disclosure to Necessary Assistants**

Section 912(a) provides that the privileged status of a communication is waived when any holder has "disclosed a significant part of the communication or has consented to such disclosure made by anyone." Prof. Leonard points out that to "an attorney unfamiliar with the structure of these code sections, this might suggest that any disclosure, including disclosure to those necessary to the maintenance of the privilege, would waive the privilege." (Exhibit p. 12.) He queries whether the statute should be revised to make more clear that disclosure to a necessary assistant (such as a secretary or paralegal) is not a waiver. *Id.*

Such a revision does not seem necessary, however, because Section 912(d) squarely addresses the issue:

> (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), or 1037.5 (domestic violence 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, or domestic violence counselor was consulted, is not a waiver of the privilege.

**We would leave the proposal as is with regard to this matter.**

**Use of "Such"**

As presently drafted, Section 912 uses the word "such" in three places. The tentative recommendation would leave this language intact.

The staff thinks that the use of "such" in Section 912 is appropriate, and none of the commentators have raised any concerns about it. The Commission should be aware, however, that Legislative Counsel's office routinely eliminates the word "such" from provisions being amended. We can anticipate that Legislative Counsel's office will attempt to make revisions along these lines in Section 912 if asked to prepare a bill amending the provision.

The Commission and the author of the bill could simply refuse to accept such revisions. It might be simpler, however, to eliminate "such" from our proposed amendment of Section 912 and do it in the manner that the Commission deems most appropriate, instead of a way chosen by Legislative Counsel's office in the midst of the legislative session. **We suggest the following:**

> 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), or 1037.5 (domestic violence victim-counselor privilege) is waived with respect to a communication protected by ~~such~~ the privilege if any holder of the privilege, without coercion, has intentionally 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~~ intent to permit 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.
>
> ….
>
> (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), or 1037.5 (domestic violence 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, or domestic violence counselor was consulted, is not a waiver of the privilege.

**Nonsubstantive Reform**

The phrase "This would not be a substantive change" appears in the preliminary part of the tentative recommendation (p. 5, line 3), and the similar phrase "This is not a substantive change" is used in the proposed Comment to Section 912. Prof.

Slomanson agrees with the proposed reforms of Section 912, but he suggests describing them differently. He "would not use the convenient but sometimes confusing pronoun 'this'." (Exhibit p. 16.) He explains that if "it were qualified, then maybe I would better understand why 'this' is not a 'substantive' change." *Id.*

The staff agrees that a more precise statement might be better in the two places to which Prof. Slomanson refers. Instead of saying "This is not a substantive change" in the proposed Comment, **we would rephrase the first paragraph of the Comment as follows:**

> **Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This ~~is not a substantive change~~ codifies case law interpreting the provision. See State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999); O'Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984); see also KL Group v. Case, Kay & Lynch, 829 F.2d 909, 919 (9th Cir. 1987); Federal Deposit Ins. Corp. v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994). Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.

**We would also revise the preliminary part:**

> …Rather, the key criterion is whether the holder of the privilege *intentionally* made the disclosure or *intentionally* permitted another person to make the disclosure. [Footnote omitted.] The Commission recommends that Section 912 be revised to make this explicit.
>
> ~~This would not be a substantive change~~ Revising the provision along these lines would not change the applicable standard, but it would provide clear and readily accessible guidance as courts, practitioners, and litigants grapple with evidentiary issues posed by new technologies. …

If all of the recommended changes relating to the provision are consolidated, **the amendment of Section 912 would read:**

> 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), or 1037.5 (domestic violence victim-counselor privilege) is waived with respect to a

communication protected by ~~such~~ the privilege if any holder of the privilege, without coercion, has intentionally 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~~ intent to permit 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.

(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), or 1037.5 (domestic violence 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.

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

(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), or 1037.5 (domestic violence 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, or domestic violence counselor was consulted, is not a waiver of the privilege.

**Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This codifies case law interpreting the provision. See State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999); O'Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984); see also KL Group v. Case, Kay & Lynch, 829 F.2d 909, 919 (9th Cir. 1987); Federal Deposit Ins. Corp. v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994). Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.

The determinative issue is whether the holder of the privilege intended to disclose the communication to a third person, not whether the holder intended to waive the privilege. The holder need not have

> been aware of the legal consequences of disclosure, so long as the disclosure was intentional. *Tentative Recommendation Relating to The Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964). A disclosure is intentional where (1) the holder of a privilege desires to disclose privileged material to a third person and does so, or (2) the holder chooses to use a means of communication knowing that it is substantially certain to result in disclosure to a third person, regardless of whether the holder desires that result.
>
> This standard applies regardless of whether an opponent relies on inadvertently produced privileged material. Such reliance is not reasonable, because Section 912 provides constructive notice that inadvertent disclosure of a privileged communication does not waive the privilege.
>
> Section 912 is also amended to make clear that it applies to the privilege for confidential communications between a domestic violence victim and counselor, which did not exist when the statute was originally enacted in 1965. See Sections 1037-1037.7 (domestic violence victim).

## SCOPE OF STUDY

Charles Harris suggests expanding the scope of the Commission's study. He states that the proposed legislation "may be sufficient if its sole purpose is to provide a broader statutory basis for preserving the confidential nature of privileged communications by excluding it from discovery, etc." (Exhibit p. 6.) But he urges the Commission "to take a broader perspective, and at least address the larger problem of establishing and preserving document authenticity." *Id.*

Mr. Harris explains that "[i]nformation that has been digitally encoded for storage or transmission is easily duplicated and modified, and such tampering can be made without detection." *Id.* at 4. Although methods of proving that digital photographs are untainted exist, Mr. Harris cautions these practices "are burdensome and expensive, and such diligence is rare outside of the criminal justice system." *Id.* at 5. He points out that his company (Distributed Trust Management Inc.) and several other companies have "technology available that can prove beyond a reasonable doubt that a digital file that has been [part of a computer network or the Internet] has not been altered from the moment that the authenticating technology is applied to the time that the digital file is submitted as evidence." *Id.*

Judge Harvey does not think revision of the authentication provisions is necessary. (Exhibit p. 9.) He explains:

> As my original study pointed out, the courts have dealt with authentication problems already, and the Evidence Code has been amended to deal with electronic data, printouts, and originals. I know of no problem that has arisen in that regard that the courts have not been able to solve in a perfectly straightforward fashion, using the rules now prescribed in the Evidence Code. There is always the hazard that some "writing" may have been altered. There has always been that hazard, although the techniques for forging and alteration have become much more sophisticated. But the Code now requires simply a prima facie showing of authenticity, the opponent can attack that showing, and the trier of fact has to resolve the dispute based on the best information available. In February, I heard a real estate fraud case where the experts on both sides were able to get an amazing amount of information out of a hard drive that had been erased. I saw no problem that a judge conversant with the Evidence Code could not readily handle.

*Id.*

Like Judge Harvey, the staff sees no need to address authentication issues in the current proposal. We are not aware of any defects in the authentication statutes that require urgent attention. It is true that new technology is posing new authentication issues. For example, a recent article discusses the difficulty of proving that an alleged cyberstalker sent an anonymous email from a computer in a public library. *Stalker Changed Venues, DA Says*, San Francisco Daily Journal (Oct. 23, 2001). Despite soliciting suggestions in the tentative recommendation, however, the Commission has not received any comments relating to authentication except the one from Mr. Harris. **We are therefore inclined to stick with the current scope of the proposal, but perhaps study authentication issues at a later time, if a need for such work appears.**

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

# EMAIL FROM COMMISSIONER BEST (DECEMBER 28, 2001)

From: Richard Best <rbest@sftc.org>

To: Barbara Gaal <bgaal@clrc.ca.gov>

Subject: CLRC study on Evidence Code Changes Required by Electronic Communications

I believe the amendment clarifying the California rule on waiver by inadvertent disclosure is desirable since the Supreme Court has not spoken and there is some case law basis for a contrary position. Although other jurisdictions sometimes take a contrary position the proposed clarification seems to not only be the current rule in California but the national trend. It is also desirable because this issue arises with greater regularity and is a source of serious concern when dealing with production of electronic data.

The Commission may want to consider the deletion of enumerated privileges to avoid a need to update EC 912 when a new privilege is created and the danger than one may be inadvertently overlooked since it appears the intent is to have the provisions apply to all privileges. For example, do these provisions apply to the various tax return privileges or to work product?

Richard E. Best

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August 23, 2001

California Law Revision Commision
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Electronic Communications and Evidentiary Privileges

Dear California Law Revision Commision:

Thank you for the opportunity to comment on the tentative recommendation of the California Law Revision Commission regarding "Electronic Communications and Evidentiary Privileges" dated June 2001. I have the following concerns.

While on the State Bar's Committee on Administration of Justice I had grave reservations about the 1994 Amendment to Evidence Code Section 952, The Lawyer/Client Privilege. While it is now the law that "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" I still have reservations about presuming confidential what the parties to a communication (if they think about it at all) would not themselves presume to be confidential.

The Law Revision Commission suggests "this potential argument applies to all of the confidential communication privileges, not just the lawyer/client privilege," and would extend the scope from lawyer/client to physician/patient, psychotherapist/patient, clergyman/penitent, husband/wife, sexual assault victim/counselor, and domestic violence victim/counselor.

I do not think the parties to any of these relationships ought to presume (if they think about it at all) that communication by facsimile, cellular telephone, or other electronic means so readily susceptible to disclosure to others, is confidential.

The Law Revision Commission next suggests that "The key criterion is whether the holder of the privilege *intentionally* made the disclosure or *intentionally* permitted another person to make the disclosure." The determination of the subjective intent of the holder of the privilege is an unworkable standard. Section 437c(e) of the Code of Civil Procedure, relating to motions for summary judgment, amounts to legislative recognition that "where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof" a trial of fact is indicated.

Evidence Code Section 952 refers to transmission "by facsimile, cellular telephone, or other electronic means." The Law Revision Commission's proposed definition of "electronic" is so incapable of

definition that given modern and future potential for communication and storage data the scope of privilege would approach the infinite. On the other hand few physician/patient, psychotherapist/patient, clergyman/penitent, husband/wife, sexual assault victim/counselor, or domestic violence victim/counselor relationships use these means or require such protection.

To an attorney representing injured workers and consumers much of the evidence necessary to prosecute claim is obtainable only from the accused. Such a vast expansion of "privilege" would only make the discovery of essential evidence more difficult. Privileges like immunities tend to keep the truth from becoming evidence. For these reasons I cannot support the tentative recommendation.

Very truly yours,

BOXER & GERSON

JOHN M. ANTON

JMA/amh

**Charles E. Harris**
ATTORNEY AT LAW

October 15, 2001

Via Facsimile (650) 494-1827 and e-mail bgaal@clrc.ca.gov

Barbara S. Gaal, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Study #K-500 Evidence Code Changes Required By Electronic Communications

Honorable Members of the Commission:

One can appreciate the emphasis the Commission placed on privilege as it relates to electronic communication (i.e. "Electronic Communications and Evidentiary Privileges"), the environment within which such communication takes place (e.g. email, cordless telephone, facsimile), and the relationship of the parties involved (e.g. attorney-client, husband-wife, physician-patient, clergyman-penitent).

The ever-changing face of technology makes a broad and useful definition of electronic information difficult, and the analysts clearly recognized this dilemma. However, it would be a mistake to not acknowledge a broader perspective of what a "digital file" might be in the context of the evidence code, and to better acknowledge the differences between long-established forms of "physical" evidence (e.g. "writings"), and more elusive forms of electronic evidence that are less easily manifested in conventional ways. Of particular concern are those sections of the Evidence Code relating to the authentication of evidence.

For example, if an email message is exchanged between two parties, the same body of evidence may exist is several forms – in the memory of the various computers that were used to convey the message, in the network and routers in which the message was transmitted, in the "hard disks" and "floppies" where copies of the message were saved.

Information that has been digitally encoded for storage or transmission is easily duplicated and modified, and such tampering can be made without detection. A physical writing or an analog photo can be altered; however there will inevitably be telltale signs of the alteration on the document or the photo that can be sought out by a trained forensic examiner.

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This is rarely so with a digital file. In some cases, a digitally encoded document may be examined in the larger context of the information systems within which a file is maintained, and any associated audit logs and the like. In such cases, evidence may remain that might corroborate allegations of tampering. However, without other safeguards, a reasonably competent individual can easily tamper with a digital file in a fashion that such tampering cannot be detected.

Therefore, an obvious question arises as to whether or not a particular digital file that is submitted for admission into evidence is the same digital file that was originally created by the author.

This problem presents itself most clearly in the area of forensic photography. Authentication of analog photos from the crime scene currently require testimony regarding the chain of custody from the moment the picture was taken to the time that the finished photo is presented into evidence. This testimony includes testimony that the images on the photo are the same images that were imprinted on the film at the crime scene and those images have not been altered.

With digital photography, it is far more difficult for a person to testify with certainty that the digital file containing images from the crime scene has not been altered. Current practices are to place copies of the digital files on storage devices (e.g. floppy disks) that can then be handled like conventional types of physical evidence. Likewise, before a forensic examination of a computer's "hard disk" or other storage device, it is common practice to make an exact duplicate, thus helping to prove that the evidence has not been accidentally tainted during the examination process.

Such practices are burdensome and expensive, and such diligence is rare outside of the criminal justice system. In the larger world in which the Evidence Code must be applied, the Commission should acknowledge that most digital files are inherently suspect. Information accessed from desktop computers is particularly vulnerable, and this vulnerability vastly increases when the computer is part of a larger network or the Internet itself.

There is technology available that can prove beyond a reasonable doubt that a digital file that has been subjected to such technology has not been altered from the moment that the authenticating technology is applied to the time that the digital file is submitted as evidence.

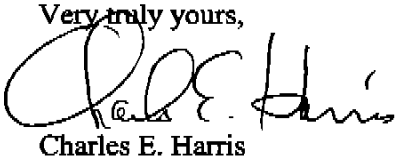
Digital Trust Management Inc. of Sonoma, California, has such technology. So do companies such as Tripwire, Inc. of Portland, OR; Surety, Inc. of Sterling, VA; Verisign of San Jose, CA; and AuthentiDate, Inc. of New York, NY. Other companies specializing in the fields of digital notarization, watermarking, and digital rights management may also have applicable technology. The application of such technology

to digital files will eliminate the otherwise inherent vulnerability of digital files to undetected tampering.

The proposed legislation may be sufficient if its sole purpose is to provide a broader statutory basis for preserving the confidential nature of privileged communications by excluding it from discovery, etc. However, we urge the Commission to take a broader perspective, and at least address the larger problem of establishing and preserving document authenticity.

I hope that the foregoing will serve to encourage the commission to expand its perspective on the broader issues raised in the context of digital evidence.

Very truly yours,



Charles E. Harris
Senior Counsel, Distributed Trust Management Inc.

CEH/jea

cc: Jonathan Kaplan, President
Distributed Trust Management Inc.

Joseph B. Harvey
Superior Court Judge (ret.)
P.O. Box 567
Susanville, CA 96130

Ph. (530) 257-9777

October 31, 2001



Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Comments on recommended Evidence Code amendment

Dear Ms. Gaal:

I have reviewed the comments that I have. So that we can be sure we are connecting on this matter, I have the comments of Edward J. Imwinkelried, John Anton, William Slomanson, David Leonard, the State Bar Committee on Administration of Justice, Lea-Ann Tratten (Consumer Attorneys of California), Beverly Hills Bar Association, and Charles E. Harris. I also have the governor's veto message on Senator Bowen's bill relating to employer monitoring. I also have Miguel Mendez's e-mail of January 23 and Clark Kelso's previous comments.

If there are some other comments that I have not mentioned, I may have misplaced them, or I may not have received them.

First, there is no need to discuss the comments of the Consumer Attorneys or the Beverly Hills Bar Association. They approve the recommendation. Also, there is no need to discuss the bulk of the State Bar comment, because it too approves the tentative recommendation. The Bar raises the question, however, of the proposed addition of the element of "intent" to Section 912. Prof. Imwinkelried also raises the question of inadvertent disclosure as waiver. Prof. Leonard asks the rhetorical question whether a client should be "punished" for communicating with her lawyer by e-mail, knowing that it is subject to employer monitoring.

Philosophically, I agree with John Anton in regard to the general problem of expansion of privileges. Privileges are not created to enforce the professional ethical requirement of not discussing a client's affairs at cocktail parties. That is a matter for professional disciplinary committees. But privileges keep relevant and material evidence out of the truth-seeking processes of a court, when justice is seeking the truth. Anton points out that in much serious litigation, much of the evidence necessary to establish the truth is available only from the adverse party. He opposes the broadening of the existing provision applicable to the attorney/client privilege to all other communication privileges on the ground that it is difficult enough now to discover the truth without broadening these privileges.

In contrast Professor Leonard suggests that the protection for electronic transmission should be broadened to the non-communication privileges, such as the governmental secrets privilege.

Privileges are created because we fear that clients will not be correctly advised, will not be correctly treated, or will not be correctly counseled if they are not assured that what they tell their lawyer, physician, or counselor in confidence will be kept in confidence. Although that does impinge on the truth finding function of judicial proceedings, we value the ability of the clients, patients, etc. to obtain correct advice and treatment so much that we are willing to accept this impingement.

But the idea is to keep confidential and secret only what is truly confidential and secret, and what is needed to be confidential and secret to make the relationships involved (attorney/client, physician/patient, counselor/victim) truly effective. Therefore, it seems to me that if a client, knowing that the employer will monitor the e-mail transmission, nevertheless decides to communicate with the lawyer through the employer's computer, and if the employer learns by that means that the client has committed a serious crime that another is accused of, that the client intends to commit perjury in a pending proceeding, etc., and if the employer makes that evidence available to those who have an interest in it, we should not be keeping that evidence out of court. I see nothing in the policy underlying the privilege that would warrant the requirement that the courts ignore that information even though everyone else concerned knows about it. Making a privilege inapplicable to already disclosed information is not "punishing" anyone, it is simply making available to the truth-determining processes of the courts information that has already been intentionally disclosed. (That is why the waiver section, section 912, is not worded in terms of the traditional language of waiver: "intentional relinquishment of a known right." We are concerned with what is really confidential, not with a person's understanding of his legal rights.)

Because the policy of protecting communications is carried out by protecting electronic communication that is not known by the client to be subject to monitoring, I do not view with alarm the amendment that is proposed to 917 as does Mr. Anton. The amendment already exists insofar as the attorney/client privilege is concerned, and as Mr. Anton correctly points out, there is hardly ever any occasion for electronic transmission where the other communication privileges are concerned. The proposed amendment is really quite modest, and it should have little practical impact. However, I also see no need to expand the proposed amendment to cover the non-communication privileges as suggested by Professor Leonard. There is no policy of encouraging therapeutic communication (if I can call lawyer/client communications for a therapeutic purpose) that would be enhanced by such an expansion.

Prof. Imwinkelried mentions a problem about the used of the word "intent" in section 912. What about inadvertent, unintentional disclosure during the discovery process? I can see how that might happen when a client is required to disclose a large volume of records and, inadvertently, an exchange of correspondent between the client and his lawyer is included. However, I think his concern is answered in footnotes 13 and 14 to the tentative recommendation. I cannot think of any language that could be added to the statute that would be any clearer than the language proposed now.

In regard to the listing of the communication privileges in 912 and 917, and the hazard of forgetting to amend those sections when a new communication privilege is added, my reaction is that

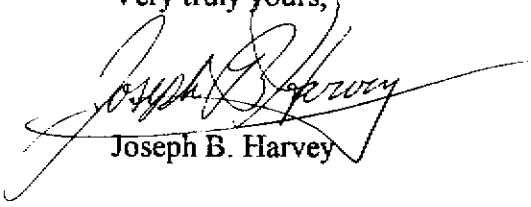
new privileges are rarely created, and the problem suggested by Prof. Leonard is really a minor problem. It would be solved if this Commission or somebody else undertook a continuing obligation to monitor new proposed amendments to make sure that necessary conforming amendments are also made. Ideally, I think that function ought to be performed by the Legislative Counsel's Office. In fact, ideally, I think that all legislation should be screened by that office to ensure uniform numbering, consistent drafting, conforming amendments generally, etc. (But that is beyond our task at present.)

Professor Leonard also suggests an amendment to the attorney/client privilege. My reaction is that the language has existed for more than 35 years, and I know of no problems that have arisen because of the use of the existing language.

Charles Harris raises problems related to authentication of electronic data. As my original study pointed out, the courts have dealt with authentication problems already, and the Evidence Code has been amended to deal with electronic data, printouts, and originals. I know of no problem that has arisen in that regard that the courts have not been able to solve in a perfectly straightforward fashion, using the rules now prescribed in the Evidence Code. There is always the hazard that some "writing" may have been altered. There has always been that hazard, although the techniques for forging and alteration have become much more sophisticated. But the Code now requires simply a prima facie showing of authenticity, the opponent can attack that showing, and the trier of fact has to resolve the dispute based on the best information available. In February, I heard a real estate fraud case where the experts on both sides were able to get an amazing amount of information out of a hard drive that had been erased. I saw no problem that a judge conversant with the Evidence Code could not readily handle.

I am sorry I won't be able to be at the November meeting inasmuch as I will be touring my birth country, China. But I'll be in touch when I return to find out if you want me to comment any further. I will be able to attend the January meeting in Sacramento.

Very truly yours,



Joseph B. Harvey

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August 1, 2001

Ms. Barbara S. Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739



Dear Ms. Gaal:

I want to thank you for sending me the tentative recommendation on *Electronic Communications and Evidentiary Privileges.* I am quite interested in the topic; it just so happens that last week I finished the draft of the revision of privilege volume in the Wigmore evidence treatise.

I generally support your recommendations. However, I did want to call one issue to your attention. Although for the most part I favor an intentionality standard for waiver, there is one setting in which that standard poses practical problems. That setting is inadvertent production during pretrial discovery. Suppose that the holder accidentally produces material. Assume further that following production, the opponent not only reviews the material but also reasonably relies on the material–perhaps changing a facet of his or her litigation strategy. These fact situations present a conflict between the holder's privacy interest and the opponent's reliance interest. My impression is that in this setting, the majority of courts do not apply a strict intentionality standard; rather, they have adopted a multi-factor balancing test permitting the trial judge to weigh the opponent's reliance interest. It would be helpful if one of your Comments gave the California bench guidance on this issue. Do you intend the intentionality standard to apply even in this situation?

Sincerely yours,

Edward Imwinkelried

Edward J. Imwinkelried
Professor of Law

# LOYOLA LAW SCHOOL

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October 4, 2001

Barbara S. Gaal
Staff Counsel
California Law Revision Commission
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Re: Tentative Recommendation #K-500 (Electronic Communications and Evidentiary Privileges

Dear Ms. Gaal:

Thank you for giving me an opportunity to comment on Tentative Recommendation K-500. The proposal is wise from a substantive standpoint, and the drafting carries out the proposal's purposes in a reasonable way. I have a few suggestions and questions.

Proposed amendment to Evidence Code section 912 (Waiver).

(1) Wisdom of listing covered privileges. If the rule is to list the specific privileges to which it applies, it is vital that the list be complete. In that light, your proposed addition of the domestic violence victim-counselor privilege is necessary. This drafting technique, however, requires an amendment whenever a new testimonial privilege is recognized. In light of that, I wonder if it might not be more sensible to refer to all testimonial privileges protecting confidential communications generally rather than to list them. If, for example, the legislature should create an accountant-client privilege, it would be necessary not only to add provisions creating that privilege, but to amend section 912. In addition, though I am not aware of any judicially-created privileges, the existence of any such privileges would provide an additional reason not to use the list approach of current section 912 as the rule as amended.

(2) Omission of other privileges from the list. Both section 912 in its current form and as amended would not include within its reach privileges for

official information (§ 1040), identity of informer (§ 1041), secrecy of vote (§ 1050), or trade secrets (§ 1060). I realize that these privileges are different from the other privileges in that they do not involve types of professional or familial relationships analogous to those covered by the other privileges. However, there are parallels in the language of some of these omitted privileges.

For example, the privilege for official information does not exist "if any person authorized to [claim the privilege] has consented that the information be disclosed in the proceeding" (§ 1040(b)(2)). This consent-based theory of waiver echoes current section 912(a), which provides that a covered privilege will be waived "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" and that "[c]onsent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure...." The proposed amendment to section 912(a) would shift the focus from consent to "intentional[]" disclosure or "intent to permit the disclosure." If the proposed amendment would change the focus of waiver for the enumerated privileges, should it also do so for the official information privilege? I cannot discern a policy reason why the same inquiry should not be made when the issue concerns waiver of the official information privilege. The same issue arises in the interpretation of the privilege for identity of informer (§ 1041), and might apply to others as well.
I would suggest that the Commission consider whether it is wise either to include the other privileges within the list contained in section 912, or to conform the waiver language in the other privileges to the wording of the proposed amendment to section 912.

(3) A part of section 912(a) that you do not propose to change provides that a privilege is waived when any holder has "disclosed a significant part of the communication or has consented to such disclosure made by anyone." To an attorney unfamiliar with the structure of these code sections, this might suggest that any disclosure, including disclosure to those necessary to the maintenance of the privilege, would waive the privilege. That this is not the case is made clear by the wording of the specific privileges. For example, section 952 expressly allows disclosure, without waiver, to "those who are present to further the interest of the client 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 lawyer is consulted...." Though this is a rather minor point, I wonder if it would be useful to change section 912(a) by adding general language after the word "disclosed" in the language quoted above. One possibility would be to add the phrase "to persons outside the scope of the privilege as defined in the provisions creating such privilege" or "to persons not covered by the privilege as defined in the provisions creating such privilege." Making this kind of change would have the advantage of clarifying section 912(a), though it might create some debate about the meaning of the new phrase. I raise this issue for discussion only; I am not certain that I would favor a change.

(4) I have tried to determine whether use of the words "intent" and "intentional" creates any possible ambiguity. This sometimes occurs, particularly in relation to different forms of "intent" in criminal and tort law. In tort law, for example, the term "intent" usually means a *desire* to bring about a particular unlawful result (for example, contact with another person, apprehension of contact), or *knowledge to a substantial certainty* that such result will occur. Do you envision that intent to disclose, or to permit disclosure by another person, would exist in both of these situations?

Suppose, for example, that an employee knows that several times a week, her employer monitors employees' email messages to determine whether any improper activity is occurring. The employee is embroiled in a legal matter, and sends her attorney an important, and sensitive, email. It is fair to say that the employee does not *desire* the communication to be intercepted by the employer, but would you intend to provide that confidentiality has been waived if the employee knows that the employer is "substantially certain" to view the email message? One reasonable answer is that waiver should be found in both situations. A client who chooses a method of communication that is substantially certain to result in another's interception of the message has arguably not taken sufficient steps to protect confidentiality. But what if it is necessary for the client to communicate immediately with the lawyer, and the only means reasonably available is to use email? (One could imagine, for example, that the attorney must have a written communication from the client immediately, and email is the only way to transmit the information effectively.) Should the client be punished for using that means of communication when she certainly did not desire the breach of confidentiality to occur?
As I suggest, either answer can be supported. My own sense is that the term "intent" should be interpreted in the manner most protective of the privilege. Because the maintenance of confidentiality is thought to be essential to the relationships protected by the privileges, the holder's desires should be paramount. I would suggest that the privileges be maintained unless the holder *wishes* the communication to be revealed to a person outside the circle of the privilege.

<u>Proposed amendment to Evidence Code section 917 (Presumption of confidentiality)</u>

(1) I have the same question as above concerning the choice to list the affected privileges, rather than to use general language.

(2) Proposed section 917(b) provides that a communication "does not lose its privileged character for the sole reason" that it has been achieved through electronic means. I have two concerns, both minor. First, why is it necessary to include this provision? I understand that it would maintain an aspect of the 1994 amendment to section 952, and there is some concern that eliminating the reference to electronic communication might be interpreted as withdrawing the protection. At the same time, the privilege rules, particularly if amended in the manner you suggest, would certainly protect electronically transmitted communications even without this language. The

test would be the intention of the person communicating. I would be hard-pressed to argue that in the absence of proposed section 917(b), the privilege would be held waived if the communication were transmitted electronically. Thus, I believe the proposed language is not necessary.

(3) My second concern about proposed section 917(b) is that the phrase "for the sole reason" might be interpreted to suggest that a court could consider the fact that a communication was transmitted electronically as one factor in favor of waiver. Perhaps this interpretation is too strained, but I can imagine an advocate making such an argument. Because the language provides that electronic transmission cannot be the "sole reason" for finding waiver, it can be argued that such a fact could be one considered as one reason. I do not think this is the intention behind the proposed language.

Proposed amendment to Evidence Code section 952 ("Confidential communication between client and lawyer" defined

I have only one comment, and it is not addressed to your proposed amendment. The rule provides that "a legal opinion formed and the advice given by a lawyer in the course of that relationship" is also covered by the attorney-client privilege. Should this language be broadened? My impression is that the privilege covers any confidential communications from the lawyer to the client that are related to the purpose for which the attorney has been consulted. For example, I would think that the attorney's communication to the client of information learned by the attorney in the course of her investigation of the client's case would also be covered. Because you are already suggesting one amendment to section 952, it might make sense to broaden this part of the rule.

Once again, thank you for giving me the opportunity to comment on Tentative Recommendation #K-500. As I stated at the beginning of this letter, I agree with the substance of the proposed amendments to these Evidence Code sections. I do not believe that my comments and questions raise fundamental flaws in your proposal.

Please let me know if there is any other assistance I can provide as this recommendation moves forward.

Sincerely,

David P. Leonard
Professor of Law and
William M. Rains Fellow

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October 15, 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 943034739
*Via Facsimile Only: (650) 494-1827*

Re: Request for Public Comment

Dear Commission:

I am Chairperson of the Beverly Hills Bar Association Criminal Law Section.

Our office has reviewed the tentative recommendation clarifying the law of privilege as stated in the California Evidence Code. We agree with the proposed amendments.

Thank your for fowarding the proposed legislation for our review.

Very truly yours,
KAPLAN MARINO, Attorneys at Law

NINA MARINO

cc: Bert Z. Tigerman

# EMAIL FROM PROF. SLOMANSON (AUGUST 21, 2001)

To: Barbara Gaal <bgaal@clrc.ca.gov>
From: "William R. Slomanson" <slomansonb@worldnet.att.net>
Subject: ELECTRONIC COMMUNICATIONS & EVIDENTIARY PRIVILEGES

Barbara:

Thanks for the opportunity to review the Commission's evidence & electronic communications study. I do not purport to be an evidence expert. However, it is my hope that all input is good input--but some may be better than others.

I fully agree with the implicit theme that (unlike law school accreditation disconnects) the Evidence Code should not needlessly lag behind the need to maintain confidentiality while privileged communications are filtering through society's gradual shift to an electronic world. If you really have too much time on your hands, or suffer from insomnia, you might appreciate the related recommendations I provided in E-Laywering and the Academy, 48 Journal of Legal Education 216 (1998) <http://home.att.net/~slomansonb/jle.html> (does not deal with evidence--does recommend that we academics accept the responsibility to prepare our grads for the day-to-day electronic issues which they will face upon graduation). The amendments, designed to cover all current and future privileged communications, are particularly astute because they include a broad definition of "electronic." Thus, the CLRC can continue to focus on the major issues of the day--as opposed to all of the situation-specific amendments which would otherwise surely follow, rather than lead, in the electronic revolution.

I do have two thoughts, one of which is almost too minor to mention. In fact, I think you could stop reading at this point. But I'll share them with you, because y/our task is to try to read the tea leafs. I'll start with a really minor point. The p.2, note 7 analogy to the UETA definition of "electronic" is a very good one. But there are a couple of concerns I have with the line 1 phrase "most current technologies." One of them is that naysayers, or future appeals, may see some room for deviating from the broad generic definitional approach the CLRC advocates, because of that limiting phrase. Should you ultimately revise any like commentary you present to the Legislature re the study's proposed Evidence Code changes, I'd recommend a different qualifier (if one is really needed). Maybe "evolving," or possibly something like "The basic nature of technology and ...." I think that the Civil Code's legislative comment should be more inclusive, to avoid some advocate/court relying on such language, contrary to your intentions, to except some future technology because the legislative comment was not as broad as could be.

Far more importantly, yet still just barely a drop in the bucket, is the comment on p.5, line 3, which says that "This would not be a substantive change." At the risk of sounding like a 10th grade English teacher, I would not use the convenient but sometimes confusing pronoun "this." If it were qualified, then maybe I would better understand why "this" is not a "substantive" change. For me, an Evidence Code change is not necessarily "procedural." This (confusion on my part with the use of the word "substantive") may be

attributable to my federal Civ Pro background--and the famous governing law Erie line of cases, whereby evidentiary privileges are considered substantive, when there is a difference between a state and federal evidentiary privilege application. While this might be a case where an academic (like in StarTrek) going where no man has gone before, a change in the applicability of an evidentiary privilege seems to be something a bit more than just a "procedural" change.

Admittedly, there is a twilight zone between the draft's use of the word "substance," and my understanding of the term. For example, the two new privileges created since adoption of the 1965 Evidence Code would now be governed by a universal use of the term "electronic." But rather than my further engaging in what an evidence professor might characterize as academic knit picking, is there really a need to employ the sentence with which I'm concerned? I think your point can be expressed in a way that avoids characterizing the quite welcome "changes," without risking some appellate court one day going off the deep end as I have with this particular nuance.

On the other hand, not characterizing the intended impact of the change would have its drawbacks. Lawyers and courts tend to look to commentaries to ascertain whether there has been a "substantive" change. So maybe you could articulate this passage so that "Amended Sec. ___ is not intended to create any substantive law changes, but rather to ...." (Aren't academics great? They point out some miniscule "problem" but don't know how to fix it!) Of course, if I am the only one who thinks that there is a semantic problem, that may be the "best evidence" that there is no problem. [See what you get for asking a civ pro teacher to tackle an evidence problem J]

Hope this helps, or at least does not detract too much from what will be a well received amendment to the Evidence Code which will help to close the gap between the print world (containing the California Evidence Code) and the electronic world which professionals and their clients have been facing for some time.

Regards,

Bill

MEMORANDUM

**To:** **California Law Revision Commission**

**From:** **Committee on Administration of Justice,**
**State Bar of California**

**Date:** **October 1, 2001**

**Subject:** **California Law Revision Commission Tentative Recommendation Relating to Electronic Communications and Evidentiary Privileges [Study K-500]**

**Recommend:** **Support in Part, Take No Position in Part**

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## Introduction

The California Law Revision Commission (Commission) has circulated a Tentative Recommendation relating to Electronic Communications and Evidentiary Privileges "to make clear that (1) a privileged communication does not lose its privileged status simply because it is transmitted electronically, (2) the statutory presumption of confidentiality and statutory waiver requirements apply to newly created privileges, and (3) disclosure of a privileged communication waives the privilege only where the holder of the privilege intentionally makes the disclosure or intentionally permits another person to make the disclosure."

## Discussion

The Commission has initiated a review of the Evidence Code to determine whether existing provisions are satisfactory in their application to electronic communications and evidentiary privileges.

### Confidentiality of Electronic Communications

Section 952 defines a confidential communication for purposes of the lawyer-client privilege. It was revised in 1994 to add a sentence stating that, "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 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 Section 952 dealing with the lawyer-client privilege, combined with the lack of such language in comparable provisions dealing with other privileges, provides grounds for an argument that there is no confidentiality and therefore no privilege for an electronic communication made in the course of any privileged relationship other than between lawyer and client. To negate that potential argument, the Commission proposes the deletion of the language on confidentiality of an electronic communication from Section 952 and the addition of generalized language in Section 917, which creates a presumption of confidentiality for communications made in privileged relationships. The Commission further proposes the deletion of references to specific modes of communication (e.g., e-mail, facsimile, cellular telephone, or cordless telephone) and the addition of a broad definition of "electronic," in order to provide flexibility to accommodate new technologies.

**Newly Created Privileges**

Generalization of the language on electronic communications exposes a flaw in the drafting of Section 917. Section 917 creates a presumption of confidentiality for communications made in the specific privileged relationships that were listed in the Evidence Code on its enactment in 1965. At that time, the only privileged relationships were between lawyer and client, physician and patient, psychotherapist and patient, clergyman and penitent, and husband and wife. Since then, two privileged relationships have been added, those between sexual assault victim and counselor and domestic violence victim and counselor.

Under Section 917, a communication made in the course of one of the privileged relationships listed is presumed to have been made in confidence, and the party opposing a claim of privilege has the burden to establish that the communication was not confidential. The policy considerations underlying this presumption apply equally to all privileged relationships. The Commission proposes the revision of Section 917 accordingly. Similarly, the Commission proposes the revision of Section 912, which governs waiver of a privilege, to make clear that it applies to the privileged relationship between domestic violence victim and counselor (it has already been amended to include the privileged relationship between sexual assault victim and counselor).

**Waiver by Disclosure**

Under Section 912, a communication loses its privileged status where "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." Section 912 does not state whether inadvertent, as opposed to intentional, disclosure of a privileged communication constitutes a waiver of the privilege. The Commission proposes the revision of Section 912 to make explicit what is said to be implicit, namely,

that the holder of the privilege must intentionally make the disclosure or permit another person to make the disclosure, and may not do so merely inadvertently.

**Recommendation**

The Committee on Administration of Justice of the State Bar of California (Committee) recommends that Sections 917 and 952 be revised as the Commission proposes to make clear that a privileged communication does not lose its privileged status simply because it is transmitted electronically. The proposal is straightforward and non-controversial.

The Committee also recommends that Section 917 be further revised as the Commission proposes to make clear that the statutory presumption of confidentiality and statutory waiver requirements apply to newly created privileges. This proposal too is straightforward and non-controversial.

The Committee, however, takes no position as to whether Section 912 should be revised assertedly to make clear that disclosure of a privileged communication waives the privilege only where the holder of the privilege intentionally, and not merely inadvertently, makes the disclosure or permits another person to make the disclosure. The Committee makes the following two points for the Commission's consideration. *First*, it is *not* the case that a privilege may be lost only by waiver properly so called, that is, by a knowing, intelligent, and voluntary surrender. Rather, a privilege may also be lost by forfeiture — which is what Section 912 deals with under the rubric of "waiver." It is plain that, if the holder of the privilege *intentionally* makes the disclosure or permits another person to make the disclosure, he forfeits the privilege. But it is not so plain that he does not do so if he is *merely inadvertent*. His inadvertence might amount to the most minor and understandable of lapses in constant efforts to guard the confidentiality of the privileged communication. But it might also reveal a carelessness inimical to the privileged communication's continuing confidentiality. *Second*, to provide that disclosure of a privileged communication waives the privilege only where *the holder of the privilege* intentionally makes the disclosure or permits another person to make the disclosure may invite manipulation of the privilege, as where a lawyer might disclose a privileged communication for tactical purposes and then claim the privilege on the client's behalf with the assertion that the client did not intentionally permit the lawyer to make the disclosure.

**Disclaimer**

**This position is only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.**

# CONSUMER ATTORNEYS OF CALIFORNIA



*via facsimile 650-494-1827*

October 15, 2001

To: California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Fr: Lea-Ann Tratten
Legal Counsel

Re: Electronic Communications and Evidentiary Privileges

On behalf of Consumer Attorneys of California, I write in support of the proposal to extend the same privileges to communications made electronically as currently exists to non electronic communications. We generally would object to expansions of privileges in favor of open communication; however, this proposal in its current form appears to respond to the reality of modern communication and merely assures privileges are not lost because of the electronic method of communication.

Thank you for seeking our comment on this proposal. Please contact me should you have any questions about our position.

**Legislative Department**
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