Study K-500 February 4, 2002

First Supplement to Memorandum 2002-5

Electronic Communications and Evidentiary Privileges
(Further Comments of Judge Harvey)

At page 11 of Memorandum 2002-5, the staff suggested the following revision of the Commission's proposed amendment of Evidence Code Section 917:

> 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 presumption of confidentiality or 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.
>
> (c) For purposes of this section, "electronic" has the meaning provided in Section 1633.2 of the Civil Code.

The Commission's consultant, Judge Joseph B. Harvey (ret.), advises against this revision. (Exhibit pp. 1-2.)

He believes that the proposed additional language "is not necessary." *Id.* at 1. "Since a presumption is simply an allocation of the burden of proof, and that is said in subdivision (a), it is somewhat redundant to say in subdivision (b), in effect, that the allocation of the burden of proof is not lost by proof of transmission by electronic means." *Id.* at 2. Judge Harvey cautions that the proposed additional language might be misinterpreted:

> Maybe I'm unduly sensitive, but California had a long history of misinterpreting presumptions. See the comment to section 600. And I would not want anything to create the impression that a presumption is anything more than simply an allocation of the burden of proof, that having specifically assigned the burden of

> proof already, that the presumption somehow still has a role to play. So I would far prefer to let the statutory allocation of the burden of proof in subdivision (a) do its job; and if it is still necessary to say that evidence of electronic transmission does not change the burden of proof, that should be done in a comment.

Id.

The staff is inclined to defer to Judge Harvey's judgment on the likelihood of misinterpretation, which is based on his experience in drafting the Evidence Code and applying it for many years. **We would therefore leave the proposed amendment of Section 917 as in the tentative recommendation, and perhaps add language along the following lines to the proposed Comment:**

> **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). The presumption set forth in subdivision (a) applies regardless of how a communication is transmitted. In each instance, the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.
>
> Subdivision (b) is drawn from ….

Respectfully submitted,

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January 22, 2002

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Re: Cancelled Meeting

Dear Ms. Gaal:

Discussion of travel claim omitted.

On the meeting memo: I do not see the need for the proposed change to Evidence Code section 917(b) as suggested at page 11 of the memo. That is the suggested amendment:

> 917(b) A communication between persons in a relationship listed in subdivision (a) does not lose its presumption of confidentiality or its privileged character for the sole reason that it is communicated by electronic means ....

The additional language is not necessary. The presumption is simply an allocation of the burden of proof on confidentiality (see Evidence Code §§ 600, 604), and that subject is completely covered in subdivision (a). The way the matter will come up is this: Some party will ask a witness a question about the content of an e-mail that he has seen. The theory of admissibility is admission, because the e-mail is from the party-opponent. The opponent of the evidence objects. "Privileged. That e-mail was to his lawyer. The question calls for a communication between client and lawyer." Proponent: "The communication is not privileged; the communication was not confidential." The judge then has to rule. First, he requires the objecting party to establish that the communication was in fact from the client to his lawyer. Once that is established, then subdivision (a) requires the judge to rule that the proponent of the evidence must prove that the communication was not confidential. Subdivision (b) says that he cannot meet that burden simply by showing that the communication was by e-mail and

that a sophisticated hacker can intercept such messages, or that the e-mail server has access to the content of such messages. (Indeed, the witness may well be an employee of the e-mail server who has monitored the e-mail in question.) In addition, now, he must show that the e-mail was simultaneously sent to third parties, or that it was sent from the computer of the client's employer, that the employer had forbidden the use of his computers for personal communication, and that the employer had also warned all his employees (including the client) that all e-mails would be monitored to make sure that the computers were not used for personal purposes.

Since a presumption is simply an allocation of the burden of proof, and that is said in subdivision (a), it is somewhat redundant to say in subdivision (b), in effect, that the allocation of the burden of proof is not lost by proof of transmission by electronic means.

Or to put it another way: In the light of what is said in subdivision (a)–the opponent of the privilege (the proponent of the evidence) has the burden of proving non-confidentiality–when the objection of privilege is made, what conceivable basis is there for the proponent to argue that the privilege claimant has the burden of proof on confidentiality? If the proponent of the evidence tries to argue that the privilege claimant has the burden, my response would be: "Read subdivision (a). Where is your authority that says the contrary? Where is the authority that says that if the transmission was electronic, the proponent of the evidence must prove confidentiality?"

Maybe I'm unduly sensitive, but California had a long history of misinterpreting presumptions. See the comment to section 600. And I would not want anything to create the impression that a presumption is anything more than simply an allocation of the burden of proof, that having specifically assigned the burden of proof already, that the presumption somehow still has a role to play. So I would far prefer to let the statutory allocation of the burden of proof in subdivision (a) do its job; and if it is still necessary to say that evidence of electronic transmission does not change the burden of proof, that should be done in a comment.

Very truly yours,

Joseph B. Harvey