

Memorandum 2004-17

Waiver of Privilege By Disclosure (Draft of Recommendation)

Attached is a draft of a final recommendation on *Waiver of Privilege By Disclosure*. The Commission and interested parties should review the draft closely, because it is quite different from the 5-page discussion draft that was circulated for comment. The differences are discussed below. The issue before the Commission is whether to approve the draft as a final recommendation (as is or with revisions), continue to refine the draft, or seek further input on the draft (as is or with revisions).

Unless otherwise indicated, all statutory references in this memorandum are to the Evidence Code.

CODIFICATION OF THE SUBJECTIVE INTENT APPROACH
TO INADVERTENT DISCLOSURE

The attached draft would codify the subjective intent approach to inadvertent disclosure of a communication protected by one of the confidential communication privileges. Section 912(a) would be revised as follows:

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), 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (domestic violence victim-counselor privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has intentionally disclosed a significant part of the communication or has consented to 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.

This is the same language that appeared in the discussion draft on *Waiver of Privilege By Disclosure* that was circulated in 2002, and in the tentative recommendation on *Electronic Communications and Evidentiary Privileges* that was circulated in 2001, both of which were favorably received.

As directed by the Commission in July 2002, the Comment pertaining to this revision of Section 912(a) has been revised to delete a sentence on employer monitoring of email and to add parentheticals to the case citations. As discussed at pages 18-19 of Memorandum 2004-8, we have also added a reference to the contrary dictum in *People v. Von Villas*, 11 Cal. App. 4th 175, 15 Cal. Rptr. 2d 112 (1992). In addition, we have slightly revised the first two sentences of the Comment and added a reference to the contrary approach taken in a brand new case: *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*, 117 Cal. App. 4th 794, 12 Cal. Rptr. 3d 123 (1994). The Comment pertaining to subdivision (a) is thus similar but not identical to the version that was circulated.

What is substantially different with regard to the revision of Section 912(a) is the discussion in the preliminary part (narrative portion) of the Commission's proposal. As directed at the February meeting and discussed in Memorandum 2004-8, we have expanded this discussion to more thoroughly describe the pertinent case law and commentary, and to better explain the proposed reform and the reasons underlying it. We have also added an analysis of the newly decided *Jasmine* case (pp. 18-19 of the attached draft), which adopts a two-pronged standard for inadvertent disclosure of a privileged communication: (1) the strict liability approach applies to a disclosure by the holder of the privilege, and (2) the subjective intent approach applies to a disclosure by a person other than the holder. The Commission needs to decide whether it agrees with that analysis, and with the remainder of the discussion of inadvertent disclosure (pp. 6-23), particularly the reasons advanced for codification of the subjective intent approach (pp. 19-21).

WAIVER BY PUTTING A MATTER IN ISSUE

The concept of waiver by putting a matter in issue is distinct from the concept of waiver by disclosure of a privileged communication. As discussed in Memorandum 2004-8, we have added a discussion of the former concept to the Commission's proposal (p. 6 of the attached draft), and have tried to make clear that the proposal is not intended to have any impact on that line of authority. The

Commission should consider whether this discussion adequately addresses the concept of waiver by putting a matter in issue.

COORDINATION WITH CIVIL DISCOVERY PROVISIONS

The preliminary part of the attached draft includes a section on coordination of the proposed approach to inadvertent disclosure with the civil discovery provisions on waiver of privileges for failure to comply with discovery obligations (pp. 23-27). As directed at the February meeting, the draft does not propose any changes in the civil discovery provisions, except an amendment of the provision governing a deposition by written questions (Code Civ. Proc. § 2028), which was not included in the previously circulated discussion draft and tentative recommendation. The draft attempts to explain why the Commission followed that approach. The Commission should assess whether that explanation is satisfactory. It should also review the proposed amendment of Code of Civil Procedure Section 2028 and the corresponding Comment, to see if they properly implement the Commission's view on that provision.

PARTIAL DISCLOSURE AND SELECTIVE DISCLOSURE

At the February meeting, the Commission discussed the doctrine that when the holder of a privilege intentionally discloses a privileged communication to some significant extent, and none of the exceptions to Section 912 apply, "a court may require additional disclosure in the interest of fairness, *regardless of whether the holder intended to permit such additional disclosure.*" Memorandum 2004-8 at 21 (emphasis in original). The Commission decided to codify that concept, but did not settle on statutory language.

In attempting to draft a provision along those lines, the staff realized that it is important to distinguish between partial disclosure and selective disclosure.

Partial Disclosure

The term "partial disclosure" refers to disclosure of a significant portion but not the entirety of a privileged communication or set of communications. Case law establishes that when a privilege holder voluntarily and intentionally makes a partial disclosure, and none of the exceptions to Section 912 apply, a court may require additional disclosure in the interest of fairness, even though the privilege

holder did not intend to permit such additional disclosure. However, the scope of the waiver is only as broad as fairness requires.

Proposed Section 912(e) in the attached draft would codify that principle. The Comment would cite the applicable case law, which is clear and without conflict. The preliminary part (pp. 27-28) would explain the reform. This material is all new; none of it was included in the previously circulated discussion draft and tentative recommendation. The Commission should review these portions of the draft and determine whether they satisfactorily address this matter.

Selective Disclosure

The term “selective disclosure” refers to disclosure of a privileged communication to one person or on one occasion, while seeking to preclude disclosure to other persons or on other occasions. For example, the target of a governmental investigation might share privileged information with the investigating agency, on the understanding that it will not be shared with others. An obvious issue is whether disclosure of the privileged information to the investigating agency constitutes a waiver of the privilege. There has been much scholarly and judicial debate about this issue; California case law is in conflict.

This topic is discussed in brackets in the attached draft (pp. 28-33), because we were not sure whether the Commission would want to address this issue, and, if so, how. Proposed Section 912(f) would codify the staff’s proposed approach to the issue; the corresponding Comment refers to the relevant California authorities. One of these is the recent case of *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (2004), *petition for review filed*, No. S123727 (April 1, 2004). We do not know when the California Supreme Court will decide whether to accept review in that case.

The Commission needs to review the staff’s analysis and proposed approach to selective disclosure and decide how to proceed. The staff can provide further analysis of this topic at a later meeting if the Commission desires.

TYPES OF PRIVILEGES COVERED

Section 912 only applies to the confidential communication privileges, which are listed in the text of the provision. At page 50 of Memorandum 2004-8, the staff suggested adding language to the proposed Comment to make clear that the Commission’s proposed amendment is not intended to imply anything regarding

waiver of privileges other than the ones listed in Section 912. The Commission raised no objection to that approach at the February meeting.

On reflection, however, the staff thought it might be helpful to address this matter in the text of the statute, not just in the Comment. Proposed Section 912(g) and the corresponding Comment attempt to clarify the scope of the provision. We have also added a discussion of the matter to the preliminary part (pp. 33-34). The Commission should consider whether this treatment is appropriate.

THE RIGHT TO TRUTH-IN-EVIDENCE

The attached draft discusses the constitutional right to Truth-in-Evidence, explaining that the two-thirds vote requirement of that provision is inapplicable to the proposed reforms (pp. 34-36). The staff has not researched and analyzed this matter as thoroughly as we would like. The Commission should review the discussion in the attached draft and make any suggestions for improvement. Among other things, the Commission should consider whether it is advisable to cover this topic in its recommendation.

FAILURE TO RAISE A PRIVILEGE

Earlier in this study, the Commission raised the possibility of adding language to the proposed Section 912 Comment on the effect of failing to raise a privilege. Minutes (July 2002), p. 24. The staff considered this point in preparing the attached draft, but decided against covering the matter in the Comment, because it is already lengthy and we were not sure what to say that would be helpful. We did, however, include a short section on "Failure to Object at Trial" in the preliminary part (pp. 22-23). The Commission should consider whether further discussion is needed.

FRUITS OF AN UNAUTHORIZED DISCLOSURE

Suppose a patient tells her psychiatrist in confidence that she robbed a bank. The psychiatrist later shares this information with the police, without the patient's consent. The police then search the patient's home and find the holdup weapon, as well as some stolen cash. Are the holdup weapon and cash admissible in a criminal case against the patient, or are they inadmissible as fruits of an unauthorized disclosure of privileged information?

This issue is discussed at length in a recent law review article. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 Wash. U. L.Q. 961 (2003). It is not covered at all in the attached draft.

Does the Commission wish to explore this issue? Would it be better to simply mention it in the Commission's proposal and explain that the Commission has not studied it? The law in this area seems relatively undeveloped, so it may be premature to try to provide statutory guidance. The Commission needs to resolve how to handle it.

NEXT STEP

The attached draft is much more thorough in its treatment of waiver of privilege by disclosure than the versions previously circulated for Comment. The core of the Commission's proposal remains the same, but the attached draft includes important new material, not only in the preliminary part but also in the statute itself and Comment.

Even if the Commission is satisfied with the attached draft in its current form, the staff would advise against approving a final recommendation at the upcoming meeting. There is no hurry to finalize a recommendation — it is too late to introduce the proposal in the Legislature this year, and we have sufficient time to consider the matter again before finalizing a proposal for introduction next year. Two significant decisions, *Jasmine* and *McKesson*, are pending before the California Supreme Court. There may be further developments in them in the coming months. The attached draft also differs enough from the previously circulated versions that it may be helpful to solicit further input on it before finalizing a recommendation. The staff recommends **informally circulating a revised discussion draft and posting it on the Commission's website.**

Respectfully submitted,

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#K-301

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft
RECOMMENDATION

Waiver of Privilege By Disclosure

May 2004

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SUMMARY OF RECOMMENDATION

Evidence Code Section 912 governs waiver of the lawyer-client privilege, physician-patient privilege, and certain other evidentiary privileges. The Law Revision Commission recommends that this provision be revised to make clear that disclosure of a communication protected by one of the specified privileges waives the privilege only when the holder of the privilege voluntarily and intentionally makes the disclosure or voluntarily and intentionally permits another person to make the disclosure. This would codify the majority view in case law applying the provision to an inadvertent disclosure, and would provide readily accessible guidance as courts, attorneys, and litigants attempt to assess how the provision applies to unauthorized disclosures resulting from use of new means of communication.

To further clarify and improve the law in this area, the Commission also proposes to:

- Codify case law establishing that when the holder of a privilege specified in Section 912 waives the privilege by voluntarily and intentionally making or authorizing a disclosure of a significant portion of a privileged communication, a court may require additional disclosure in the interest of fairness, even though the privilege holder did not intend to permit such additional disclosure.
- [Make explicit that unless otherwise provided by statute, if the holder of a privilege specified in Section 912 voluntarily and intentionally makes or authorizes a disclosure to one person on one occasion, the holder may not continue to assert the privilege as to other persons or occasions.]
- Revise Code of Civil Procedure Section 2028 to permit a court to grant relief from waiver of an objection in specified circumstances, as is already permitted for other forms of written discovery.

These reforms would help prevent disputes over whether a privilege has been waived, and would facilitate just and consistent resolution of any disputes that do arise.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

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WAIVER OF PRIVILEGE BY DISCLOSURE

1 Evidence Code Section 912 governs waiver of the privileges for communications
2 made in confidence between persons in specified relationships (“confidential
3 communication privileges”).¹ The Law Revision Commission recommends that
4 this provision be revised to make clear how it applies to inadvertent disclosure of a
5 privileged communication.

6 Specifically, the Commission proposes to make clear that disclosure of a
7 communication protected by one of the specified privileges waives the privilege
8 only when the holder of the privilege voluntarily and intentionally makes the
9 disclosure or voluntarily and intentionally permits another person to make the
10 disclosure. This standard finds strong support in cases applying the provision to an
11 inadvertent disclosure. Codifying it would help ensure that it is consistently
12 applied, and would spare courts, attorneys, and litigants from having to expend
13 significant resources researching the appropriate standard.

14 The Commission also recommends providing statutory guidance regarding the
15 effect of (1) a partial disclosure of a privileged communication [and (2) a selective
16 disclosure of a privileged communication —i.e., a disclosure meant to be restricted
17 to a specific person or occasion.] The Commission turns to these issues after first
18 describing the law on inadvertent disclosure and explaining how it should be
19 changed.

20 **Section 912**

21 Section 912, the key provision on waiver of a privilege by disclosure, applies to
22 the following privileges:

- 23 • The lawyer-client privilege, which is held by the client.²
- 24 • The marital communications privilege, which is held by both the husband
25 and the wife.³
- 26 • The physician-patient privilege, which is held by the patient.⁴

1. The confidential communication privileges include the lawyer-client privilege, marital communications privilege, physician-patient privilege, psychotherapist-patient privilege, clergy-penitent privilege, sexual assault victim-counselor privilege, and domestic violence victim-counselor privilege. Evidence Code Section 912 expressly applies to all of these privileges.

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

2. For the provisions establishing the lawyer-client privilege and its exceptions, see Sections 950-962. The lawyer is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 955.

3. For the provisions establishing the marital communications privilege and its exceptions, see Sections 980-987.

4. For the provisions establishing the physician-patient privilege and its exceptions, see Sections 990-1007. The physician is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 995.

- 1 • The psychotherapist-patient privilege, which is held by the patient.⁵
- 2 • The clergy-penitent privilege, which is held by both the clergy member and
- 3 the penitent.⁶
- 4 • The sexual assault victim-counselor privilege, which is held by the victim.⁷
- 5 • The domestic violence victim-counselor-privilege, which is held by the
- 6 victim.⁸

7 Each of these privileges is intended to foster free-flowing communication between
8 persons in a socially beneficial relationship.⁹ With exceptions that vary depending
9 on the particular relationship, if a communication between persons in one of these
10 relationships was confidential when made, the holder of the privilege is entitled to
11 refuse to disclose the communication in any legal proceeding,¹⁰ and to prevent
12 another from disclosing it.¹¹ By protecting their confidential communications from

5. For the provisions establishing the psychotherapist-patient privilege and its exceptions, see Sections 1010-1027. The psychotherapist is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 1015.

6. For the provisions establishing the clergy-penitent privilege, see Sections 1030-1034.

7. For the provisions establishing the sexual assault victim-counselor privilege, see Sections 1035-1036.2. The sexual assault counselor is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 1036.

8. For the provisions establishing the domestic violence victim-counselor privilege, see Sections 1037-1037.8. The domestic violence counselor is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 1037.6.

9. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (purpose of attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader interests in the observance of law and administration of justice”); *People v. Superior Court (Laff)*, 25 Cal. 4th 703, 23 P.3d 563, 107 Cal. Rptr. 2d 323, 332 (2001) (lawyer-client privilege is “fundamental to our legal system,” protecting the right of every person to fully confer and confide in a legal expert, so as to obtain adequate advice and a proper defense); *People v. Gilbert*, 5 Cal. App. 4th 1372, 1391, 7 Cal. Rptr. 2d 660 (1992) (purpose of sexual assault victim-counselor privilege is to encourage sexual assault victims to make full and frank reports so they may be advised and assisted); *People v. Johnson*, 233 Cal. App. 3d 425, 438, 284 Cal. Rptr. 579 (1991) (marital communications privilege seeks to preserve the confidence and tranquility of a marital relationship); *Board of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678-79, 156 Cal. Rptr. 55 (1979) (physician-patient privilege creates zone of privacy to preclude humiliation of patient due to disclosure of ailments, and to encourage patient to inform physician of all matters necessary for effective diagnosis and treatment); Section 1014 Comment (A broad privilege should apply to psychiatrists and certified psychologists, because psychoanalysis and psychotherapy depend on “the fullest revelation of the most intimate and embarrassing details of the patient’s life.”); Section 1034 Comment (underlying reason for clergy-penitent privilege is that “the law will not compel a clergyman to violate — nor punish him for refusing to violate — the tenets of his church which require him to maintain secrecy as to confidential statements made to him in the course of his religious duties.”); M. Mendez, *Evidence: The California Code and the Federal Rules* § 26.01, at 590 (2d ed. 1999) (purpose of domestic violence victim-counselor privilege is to promote effective counseling by encouraging full disclosure by the victim).

10. For this purpose, “proceeding” is broadly defined to include “any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.” Section 901.

11. Sections 954 (lawyer-client privilege), 980 (marital communications privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033-1034 (clergy-penitent privilege), 1035.8 (sexual assault victim-counselor privilege), 1037.5 (domestic violence victim-counselor privilege).

1 forced disclosure, the privileges allow participants in the relationships to talk
2 without worrying about what might happen if their words were revealed under
3 compulsion of law.

4 Section 912 makes clear, however, that under certain circumstances disclosure of
5 a privileged communication can waive the privilege, precluding subsequent
6 assertion of the privilege with regard to the communication. It is important to
7 understand the scope and substance of this provision, its exceptions, and the
8 related doctrine of waiver by putting a matter in issue.

9 ***Scope***

10 Section 912 is limited in scope. It does not govern whether a communication
11 between persons in a privileged relationship is initially considered privileged or
12 unprivileged.

13 That depends on whether the communication was confidential when originally
14 made, or the circumstances of the communication were such that it was not
15 confidential and thus not privileged at all.¹² Another provision, Section 917,
16 governs that issue. It establishes a presumption that a communication between
17 persons in certain privileged relationships (the same ones covered by Section 912)
18 is confidential when made.

19 The presumption of confidentiality can be overcome if the facts show that the
20 communication was not intended to be kept confidential.¹³ For instance, evidence
21 that others could easily overhear the communication is a strong indication that the
22 communication was not intended to be confidential and is thus unprivileged.¹⁴

23 While Section 917 focuses on whether a communication is initially privileged,
24 Section 912 focuses on whether the privilege attaching to a communication was
25 subsequently waived. In particular, Section 912 focuses on whether a
26 communication that was privileged when made should later be stripped of its
27 privileged status because it was disclosed to persons outside the privileged
28 relationship. The circumstances of the disclosure are determinative.

29 ***General Rule***

30 Section 912(a) states the general rule that the right of any person to claim a
31 confidential communication privilege “is waived with respect to a communication
32 protected by the privilege if any holder of the privilege, without coercion, has
33 disclosed a significant part of the communication or has consented to disclosure

12. Each of the confidential communication privileges applies only to a *confidential* communication between persons in the privileged relationship. Sections 954 (lawyer-client privilege), 980 (marital communications privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1032-1034 (clergy-penitent privilege), 1035.8 (sexual assault victim-counselor privilege), 1037.5 (domestic violence victim-counselor privilege).

13. Section 917 Comment (1965).

14. *Id.* For a case applying this rule, see *North v. Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. (1972) (marital communication was privileged even though it occurred while husband was incarcerated, because husband and wife were lulled into thinking their conversation would be confidential).

1 made by anyone.” The provision further states that consent to disclosure “is
2 manifested by any statement or other conduct of the holder of the privilege
3 indicating consent to the disclosure, including failure to claim the privilege in any
4 proceeding in which the holder has the legal standing and opportunity to claim the
5 privilege.”

6 That language makes clear that a disclosure must be uncoerced to constitute a
7 waiver. For example, no waiver occurs when privileged tapes are seized by the
8 police.¹⁵ Likewise, in some circumstances an intentional disclosure, made under a
9 mistaken but reasonable belief that disclosure was legally required (e.g., because it
10 was formally demanded in a legal proceeding and the precise scope of a privilege
11 was unclear), is not a waiver of the privilege.¹⁶

12 The provision also makes clear that disclosure of a significant part of a
13 privileged communication is necessary for waiver to occur. Disclosure of a
14 privileged communication does not waive the privilege if the disclosure is
15 insignificant, such as when a patient reveals simply that the patient consulted a
16 psychiatrist and certain subjects were not discussed.¹⁷

17 It is likewise clear that it is the holder of the privilege who controls whether a
18 privilege is waived.¹⁸ The holder may, however, authorize another person in the
19 privileged relationship to disclose privileged information.¹⁹

20 What is not obvious from the statutory language is whether inadvertent
21 disclosure of a privileged communication constitutes a waiver of the privilege. The

15. *Menendez v. Superior Court*, 3 Cal. 4th 435, 455, 456, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992).

16. *See Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000) (no waiver where disclosure of privileged communications was based on mistaken but honest and reasonable belief that it was legally required).

17. *People v. Perry*, 7 Cal. 3d 756, 782-83, 499 P.2d 129, 103 Cal. Rptr. 161 (1972); *see also People v. Hayes*, 21 Cal. 4th 1211, 1265 n.14, 989 P.2d 645, 91 Cal. Rptr. 2d 211 (2000); *Southern Cal. Gas Co. v. Public Utilities Comm’n*, 50 Cal. 3d 31, 46-49, 784 P.2d 1373, 265 Cal. Rptr. 801 (1990); *Mitchell v. Superior Court*, 37 Cal. 3d 591, 602, 691 P.2d 642, 208 Cal. Rptr. 886 (1984).

18. *See, e.g., People v. Gionis*, 9 Cal. 4th 1196, 1207, 892 P.2d 1199, 40 Cal. Rptr. 2d 456 (1995) (client holds attorney-client privilege and “only the holder may waive it.”); *Menendez*, 3 Cal. 4th at 448-49 (only patient has power to waive psychotherapist-patient privilege); *Roberts v. Superior Court*, 9 Cal. 3d 330, 341, 508 P.2d 309, 107 Cal. Rptr. 309 (1973) (physician-patient privilege and psychotherapist-patient privilege belong to patient, not physician).

19. *See, e.g., People v. Hayes*, 21 Cal. 4th 1211, 1265, 989 P.2d 645, 91 Cal. Rptr. 2d 211 (2000); *Rudnick v. Superior Court*, 11 Cal. 3d 924, 932, 523 P.2d 643, 114 Cal. Rptr. 603 (1974).

A surreptitious, unauthorized disclosure does not constitute a waiver. *Cooke v. Superior Court*, 83 Cal. App. 3d 582, 147 Cal. Rptr. 915 (1978). *Cooke* was a marital dissolution proceeding in which a servant for the husband surreptitiously copied attorney-client privileged documents and mailed them to the wife, who gave them to her attorney. The trial court prohibited the wife from using the documents; the court of appeal upheld the trial court’s determination that the documents remained privileged despite the surreptitious disclosure. *Id.* at 588. The court of appeal explained that aside from the surreptitious disclosure, the documents had only been disclosed to attorneys who represented the husband or “members of his family or business associates who were legitimately kept informed of the progress of a lawsuit that directly involved the business with which they were associated.” *Id.* The court said that the latter disclosures did not defeat the privilege, because they were “reasonably necessary to further the interests” of the husband in the litigation. *Id.*; see Section 912(d). Without directly stating as much, the court also implicitly determined that a surreptitious, unauthorized disclosure of a privileged communication is insufficient to waive the privilege.

1 statute does not state whether a disclosure must be intentional to waive the
2 privilege, as opposed to reckless, negligent, or without fault.

3 ***Exceptions***

4 There are several exceptions to the general rule of Section 912(a). In particular,
5 if a privilege is jointly held, a disclosure resulting in waiver by one of the holders
6 does not affect the right of another holder to assert the privilege.²⁰

7 Further, disclosure of a privileged communication does not waive the privilege if
8 the disclosure is itself privileged.²¹ For example, no waiver occurs if a husband
9 tells his wife in confidence what his attorney advised.²²

10 Importantly, the statute also makes clear that disclosure of a privileged
11 communication does not waive the privilege if the disclosure is “reasonably
12 necessary for the accomplishment of the purpose” of the privileged relationship.²³
13 Thus, for example, no waiver occurs when a patient presents a doctor’s
14 prescription to a pharmacist²⁴ or when a defendant shares attorney-client
15 communications with a codefendant in preparing a joint defense.²⁵

20. Section 912(b); see also Section 1034 Comment (clergy member may claim privilege even if penitent waives it).

21. Section 912(c).

22. A number of statutes might be viewed as implementing this rule in a specific context. See Gov’t Code § 11045(f)(3) (disclosures made pursuant to statute governing employment of outside counsel by state agency “are deemed to be privileged communications for purposes of subdivision (c) of Section 912 of the Evidence Code, and shall not be construed to be a waiver of any privilege”); Health & Safety Code §§ 103850(a), (e) (information collected for purposes of birth defects monitoring program is confidential and furnishing confidential information in accordance with program shall not be considered waiver of any privilege), 103885(g)(1), (6) (information collected for purposes of statewide cancer reporting system is confidential and furnishing confidential information in accordance with system shall not be considered waiver of any privilege); Welf. & Inst. Code §§ 103850(c)(5), (h) (information collected for purposes of CALWORKs pilot program is private and confidential and provision governing release of record protected by evidentiary privilege “shall not be construed to waive any right of privilege contained in the Evidence Code, except in compliance with Section 912 of that code.”), 18986.46(j), (m) (information collected for purposes of children’s multidisciplinary services teams is private and confidential and provision governing sharing of information between team members “shall not be construed to waive any right of privilege contained in the Evidence Code, except in compliance with Section 912 of that code.”).

23. Section 912(d). A number of statutes might be viewed as implementing this rule in a specific context. See Civ. Code §§ 1375.1(c) (homeowners association does not waive any privilege by disclosing certain information to its members when it settles dispute with builder regarding defects in common interest development), 2860(d) (no waiver of privilege when insured or independent counsel disclose privileged information to insurer); Section 754.5 (“Whenever an otherwise valid privilege exists between an individual who is deaf or hearing impaired and another person, that privilege is not waived merely because an interpreter was used to facilitate their communication.”).

24. Section 912 Comment. Similarly, no waiver occurs when a patient’s medical records are disclosed to a medical insurer. See *Blue Cross v. Superior Court*, 61 Cal. App. 3d 798, 132 Cal. Rptr. 635 (1976).

25. See *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, ___, 9 Cal. Rptr. 3d 621 (2004); *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, ___, 9 Cal. Rptr. 3d 812 (2004); *Raytheon Co. v. Superior Court*, 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (1989).

1 ***Waiver By Putting a Matter in Issue***

2 In some instances a privilege may be waived or otherwise rendered inapplicable
3 by putting a matter in issue. For example, the Evidence Code expressly provides
4 that the lawyer-client privilege does not apply to a communication relevant to an
5 issue of breach, by either a lawyer or a client, of a duty arising out of the lawyer-
6 client relationship.²⁶ The code includes similar provisions with regard to the
7 marital communications privilege,²⁷ physician-patient privilege,²⁸ and the
8 psychotherapist-patient privilege.²⁹

9 In some circumstances, courts have also found that a litigant impliedly waived a
10 privilege by raising an issue in litigation, even though there is no express statutory
11 basis for such a determination.³⁰ The theory is that the holder of the privilege has
12 put the otherwise privileged communication directly at issue and disclosure is
13 necessary for fair adjudication of the case.³¹

14 The doctrine of waiver by putting a matter at issue is distinct from the doctrine
15 of waiver by disclosure. The Commission has not studied the former doctrine and
16 does not propose any changes with regard to it at this time.

17 **Approaches to Inadvertent Disclosure**

18 There is no nationwide consensus on whether inadvertent disclosure of a
19 privileged communication waives the privilege. Courts use three main approaches:
20 (1) strict liability for disclosure, (2) subjective intent of the holder, and (3) a
21 multifactor balancing test.³²

22 ***Strict Liability for Disclosure***

23 In some jurisdictions, disclosure of a privileged communication waives the
24 privilege, regardless of the circumstances of the disclosure.³³ The holder of the

26. Section 958.

27. Section 984.

28. Section 1001.

29. Section 1020.

30. See *Southern Cal. Gas Co. v. Public Utilities Comm'n*, 50 Cal. 3d 31, 39-45, 784 P.2d 1373, 265 Cal. Rptr. 801 (1990) (discussing implied waiver doctrine but holding it inapplicable to case at hand) & cases cited therein; *Mitchell v. Superior Court*, 37 Cal. 3d 591, 602, 603-09, 691 P.2d 642, 208 Cal. Rptr. 886 (1984). (same); but see *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 373, 853 P.2d 496, 20 Cal. Rptr. 2d 330 (1993) (“Courts may not ... imply unwritten exceptions to existing statutory privileges.”); *McDermott, Will & Emery v. Superior Court*, 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622 (2000) (Shareholder derivative action cannot proceed because corporation did not waive privilege and “creation of any shareholder right to waive the privilege in a derivative action should be left to the California Legislature.”).

31. *Southern Cal. Gas*, 50 Cal. 3d at 40.

32. There are also a variety of other approaches to inadvertent disclosure of a communication protected by a confidential communications privilege. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: Federal Law*, 159 A.L.R. Fed. 153, at § 6 (2000); Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: State Law*, 51 A.L.R. 5th 603, at §§ 6-8 (1997).

33. See, e.g., *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 883 (1st Cir. 1995); *Harmony Gold USA, Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D. Ill. 1996); *FDIC v. Singh*, 140

1 privilege is expected to zealously guard the secrecy of privileged communications
2 and any breach of that secrecy destroys the privilege.³⁴ Once the secret is out, it no
3 longer warrants protection, because it is impossible to “unring the bell.”³⁵

4 This strict liability approach is identified with renowned evidence scholar John
5 Wigmore, who stressed the importance of making evidence readily available to all
6 parties. Under this theory, privileges impede access to evidence and the search for
7 truth, so they should be narrowly circumscribed.³⁶ The strict liability approach also
8 spares courts from having to differentiate between degrees of voluntariness or
9 intent in determining whether a privilege has been waived.³⁷

10 But the approach has been criticized as unduly harsh.³⁸ It penalizes a client for
11 even a faultless disclosure³⁹ and it undermines the policies advanced by the
12 confidential communication privileges.⁴⁰ Further, although confidentiality can
13 never be restored to a disclosed communication, a court can repair much of the
14 damage done by disclosure by preventing or restricting use of the communication
15 in a trial or other legal proceeding.⁴¹

F.R.D. 252, 253 (D. Me. 1992); Scott, *Inadvertent Disclosure of Documents: Penalties and Remedies*, SJ037 ALI-ABA 1061, 1064-66 (2003); Talton, *Mapping the Information Superhighway: Electronic Mail and the Inadvertent Disclosure of Confidential Information*, 20 Rev. Litig. 271, 291-93 (2000).

34. In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (If a client “wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels — if not crown jewels.”).

35. Talton, *supra* note 33, at 292.

36. Trilogly Communications, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 444, 652 A.2d 1273 (1994).

37. See In re Sealed Case, 877 F.2d at 980 (Under strict liability approach, court does not have to “distinguish between various degrees of ‘voluntariness’ in waivers of the attorney-client privilege.”).

38. See, e.g., *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999, 1004 (1987); Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 Wash. U. L.Q. 961, 984 (2003); Simko, *Inadvertent Disclosure, the Attorney-Client Privilege, and Legal Ethics: An Examination and Suggestion for Alaska*, 19 Alaska L. Rev. 461, 469 (2002). Because the consequences of waiver are so harsh, “the strict responsibility approach promotes overexpenditure to avoid waiver.” Bruckner-Harvey, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, 46 Baylor L. Rev. 385, 389 (1994); see also Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1609-14 (1986).

39. “The privilege for confidential communications can be lost if papers are in a car that is stolen, a briefcase that is lost, a letter that is misdelivered, or in a facsimile that is missent.” *Berg Electronics, Inc. v. Molex, Inc.*, 875 F. Supp. 261, 262 (D. Del. 1995). As one commentator put it, “Clearly action does not always reflect intent. The test converts what is at best a forfeiture into a waiver.” Mosteller, *supra* note 38, at 984.

40. Marcus, *supra* note 38, at 1615-16.

41. *Manufacturers & Traders*, 522 N.Y.S.2d at 1004; see also ABA Standing Committee on Ethics & Professional Responsibility, Formal Opinion No. 92-368 (Nov. 10, 1992) (hereafter, “ABA Ethics Opin. No. 92-368”) (even where lawyer examines inadvertently disclosed materials, there are benefits to maintaining what confidentiality remains).

1 ***Subjective Intent of the Holder***

2 At the other end of the spectrum, some courts focus on the subjective intent of
3 the holder of a privilege in determining whether the privilege has been waived.⁴²
4 The test is phrased differently by different courts, and sometimes different
5 formulations are intermingled within the same opinion. In particular, the courts
6 sometimes fail to differentiate between whether the critical factor is intent to
7 *disclose a privileged communication*, as opposed to intent to *waive the privilege*
8 (which cannot occur unless the holder of the privilege is aware of the privilege and
9 the consequences of disclosure).⁴³

10 Under either of these formulations, however, there is a high threshold for
11 waiver.⁴⁴ Mere inadvertent disclosure will not defeat a privilege.⁴⁵ The subjective
12 intent approach thus protects the policies underlying the confidential
13 communication privileges, fostering free-flowing discussion between persons in a
14 socially valuable relationship.⁴⁶

15 The approach is sometimes criticized, however, for not creating enough
16 incentives to protect against accidental disclosure of privileged communications.⁴⁷
17 This criticism is not entirely persuasive, because disclosure of a communication
18 can be very harmful even if the communication remains inadmissible at trial.⁴⁸ In

42. See, e.g., *Berg Electronics*, 875 F. Supp. at 263; *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938-39 (S.D. Fla. 1991); *Mendenhall v. Barber-Green Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982); *Connecticut Mutual Life Insurance Company v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1955); *Trilogy Communications*, 652 A.2d at 1275; Scott, *supra* note 33, at 1071-73; Rest, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 Case W. Res. L. Rev. 309, 332 (1998).

43. See, e.g., *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 196 F.R.D. 375, 380 (S.D. Cal. 2000); compare *Berg Electronics*, 875 F. Supp. at 263 (focusing on intent to disclose communication) with *Connecticut Mutual*, 18 F.R.D. at 451 (focusing on intent to waive privilege).

44. Some contend that the burden of proving intent is too hard to meet. See, e.g., Mosteller, *supra* note 38, at 983-84. Whether one agrees with this criticism largely depends on how much value one places on the policies underlying the confidential communication privileges.

45. *Trilogy Communications*, 652 A.2d at 1276; Talton, *supra* note 33, at 293; see also ABA Ethics Opin. (lawyer who receives privileged materials under circumstances where disclosure was obviously inadvertent must return materials to opponent).

46. *Leibel v. General Motors Corp.*, 250 Mich. App. 229, 241, 646 N.W.2d 179 (Mich. Ct. App. 2003); *Trilogy Communications*, 652 A.2d at 1276-77; Simko, *supra* note 38, at 471.

47. See, e.g., *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996) (subjective intent test “creates little incentive for lawyers to maintain tight control over privileged material.”); Simko, *supra* note 38, at 471-72 (“If there is no threat of waiver or sanctions, the lawyer has no incentive to protect her client’s confidential documents.”).

A related criticism is that the approach “ignores the importance of confidentiality, which, when lost, eliminates much of the purpose of the privilege.” Mosteller, *supra* note 38, at 983. Although a communication has been disclosed, however, there may still be benefits to restricting its use. See note 41 *supra* and accompanying text.

48. *Bruckner-Harvey*, *supra* note 38, at 392 (“[W]hile a recipient may not be allowed to keep the document or introduce it into evidence, he still receives a windfall from the mere knowledge of its contents.”); Simko, *supra* note 38, at 470 (Under subjective intent approach, although disclosed documents cannot be used at trial without showing of intent to disclose, “the information contained in them can be used for strategic purposes during trial.”); Rand, *What Would Learned Hand Do?: Adapting to Technological Change and Protecting the Attorney-Client Privilege on the Internet*, 66 Brook. L. Rev. 361,

1 addition, ethical rules compel attorneys, doctors, and others to maintain
2 confidentiality of their records and client communications. These rules provide
3 incentives to prevent accidental disclosure of such material even though waiver of
4 the applicable evidentiary privilege would not result.⁴⁹

5 ***Multifactor Balancing Test***

6 Still other courts use a balancing test to determine whether an inadvertent
7 disclosure constitutes a waiver of a confidential communication privilege. These
8 courts examine factors such as (1) the reasonableness of precautions taken to
9 prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope
10 of discovery, (4) the extent of the disclosure, and (5) the overriding issue of
11 fairness.⁵⁰ An apparent majority of jurisdictions follow this approach.⁵¹ The
12 applicable standard of care (negligence in making the disclosure, as opposed to
13 recklessness) is not always clear.

14 This balancing test seeks to protect the policies underlying the confidential
15 communication privileges, yet also provide adequate incentives to protect
16 communications from disclosure.⁵² It is a highly flexible approach, under which
17 judges have broad discretion to achieve justice in varied circumstances.

18 That flexibility also makes the approach unpredictable and creates a danger of
19 inconsistent results.⁵³ The lack of predictability can undercut the effectiveness of
20 the evidentiary privileges. As the United States Supreme Court has repeatedly
21 explained, if an evidentiary provision is to effectively encourage communication,
22 persons communicating must be able to predict with some certainty whether a
23 particular discussion will be protected.⁵⁴

— (2000) (“A bell may be unring in a court of law, but not in the outside world.”); *see also Legal or Not, Leaks are Hard to Stop*, S.F. Daily J. 2 (April 29, 2004) (describing impact of disclosing attorney-client privileged documents on effectiveness of electronic voting machines).

49. Bruckner-Harvey, *supra* note 38, at 392.

50. *See, e.g., Gray*, 86 F.3d at 1483-84; *Alldread*, 988 F.2d at 1433-34; *Local 851 of the International Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127, 131 (E.D.N.Y. 1999); *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999); Scott, *supra* note 33, at 1066-70.

51. *Alldread*, 988 F.2d at 1434; Talton, *supra* note 33, at 294.

52. *Alldread*, 988 F.2d at 1434; *see also* Talton, *supra* note 33, at 295.

53. Scott, *supra* note 33, at 1066; Simko, *supra* note 38, at 476; Talton, *supra* note 33, at 295. As one commentator explains:

[T]he balancing test is cumbersome because it requires a court to weigh five different factors to determine whether there was a waiver of the attorney-client privilege. Often, there is considerable overlap among these factors themselves. More significantly, courts are not uniform in their application of each factor.

Stanoch, Comment, “*Finders ... Weepers?*” *Clarifying a Pennsylvania Lawyer’s Obligations to Return Inadvertent Disclosures, Even After New ABA Rule 4.4(B)*, 75 Temp. L. Rev. 657, 671-72 (2002) (footnotes omitted).

54. *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996); *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

1 The approach also places heavy demands on the courts.⁵⁵ It requires courts to
2 examine circumstances of each communication and delve into the details of the
3 communication methods used. This increases litigation costs for the parties and
4 consumes scarce judicial resources.⁵⁶ It can be especially burdensome where a
5 case involves voluminous materials or numerous communications.⁵⁷

6 **Cases Interpreting California Law on Inadvertent Disclosure**

7 There is no California Supreme Court decision squarely resolving the effect of
8 an inadvertent disclosure of a communication protected by one of the confidential
9 communication privileges. Until recently, however, published decisions of the
10 courts of appeal and federal courts interpreting California law consistently
11 followed the subjective intent approach. Several California Supreme Court
12 decisions also lend support to that approach. There were, however, a few potential
13 sources of confusion, suggesting that statutory guidance would be helpful. In
14 addition, a recently issued court of appeal decision conflicts with the prevailing
15 line of authority, injecting uncertainty into this area of the law and increasing the
16 need for statutory clarification.

17 ***Court of Appeal Decisions on Inadvertent Disclosure***

18 The first court of appeal decision addressing inadvertent disclosure appears to
19 have been *People v. Gardner*,⁵⁸ in which a probation report included confidential
20 information from a patient's medical record. A hospital had provided the
21 information to the probation officer at the officer's request. Over objection at the
22 sentencing hearing, the trial court permitted the information to remain in the
23 probation report.

24 The court of appeal ruled that this was error, but that the error was harmless. The
25 court of appeal based its decision on Welfare and Institutions Code Section 5328,
26 which prohibits disclosure of certain medical information. In reaching that
27 decision, however, the court explained:

28 As in other privileges for confidential communications, the physician-patient
29 privilege precludes a court disclosure of a communication, even though there has
30 been an accidental or unauthorized out-of-court disclosure of such
31 communication. Thus, an eavesdropper or other interceptor is not allowed to
32 testify to an overheard or intercepted communication, otherwise privileged from
33 disclosure, because it was intended to be confidential. Subdivision (f) of section
34 5328 does not authorize the court to order disclosure of matter which the
35 Evidence Code makes privileged.⁵⁹

55. Scott, *supra* note 33, at 1066; Talton, *supra* note 33, at 295.

56. Bruckner-Harvey, *supra* note 38, at 391; Simko, *supra* note 38, at 476.

57. One could also argue that "such procedures would result in more distrust of the legal system as a whole, since lawyers would be seen as quibbling over secondary issues instead of pursuing real justice." *Id.*

58. 151 Cal. App. 3d 134, 198 Cal. Rptr. 452 (1984).

59 *Id.* at 141.

1 Although the court did not mention Section 912, these comments indicate that an
2 inadvertent disclosure of confidential physician-patient communication does not
3 waive the privilege.

4 A later case, *O’Mary v. Mitsubishi Electronics America, Inc.*,⁶⁰ makes the point
5 more forcefully. In that case, counsel responding to a document request
6 inadvertently produced documents that were subject to the attorney-client
7 privilege. The trial court ruled that this disclosure did not waive the privilege.

8 On appeal, the proponent of the evidence contended that the documents were
9 admissible because any uncoerced disclosure of privileged material waives the
10 privilege. The court of appeal disagreed, stating that the proponent

11 forgets that discovery is coercion. The force of law is being brought upon a person
12 to turn over certain documents. Inadvertent disclosure during discovery by no
13 stretch of the imagination shows consent to the disclosure: It merely demonstrates
14 that the poor paralegal or junior associate who was lumbered with the tedious job
15 of going through voluminous files and records in preparation for a document
16 production may have missed something. [The proponent] invites us to adopt a
17 “gotcha” theory of waiver, in which an underling’s slipup in a document
18 production becomes the equivalent of actual consent. We decline. The substance
19 of an inadvertent disclosure under such circumstances demonstrates that there was
20 no voluntary release.⁶¹

21 The court of appeal thus made clear that an inadvertent disclosure of a privileged
22 communication does not result in waiver. In reaching that conclusion, it focused
23 on the holder’s intent regarding disclosure of the documents, rather than on intent
24 to waive the privilege.

25 The facts of *State Compensation Ins. Fund v. WPS, Inc.*⁶² were similar. Again,
26 counsel responding to a document request inadvertently produced documents that
27 were subject to the attorney-client privilege. As in *O’Mary*, the court of appeal
28 upheld the trial court’s ruling that this disclosure did not waive the attorney-client
29 privilege.

30 The court of appeal focused on whether any statement or conduct of the client
31 indicated that the client consented to counsel’s disclosure.⁶³ It explained that a
32 “trial court called upon to determine whether inadvertent disclosure of privileged
33 information constitutes waiver of the privilege must examine both the subjective
34 intent of the holder of the privilege and the relevant surrounding circumstances for
35 any manifestation of the holder’s consent to disclose the information.”⁶⁴

36 The court concluded that there had been no waiver in the case before it, because
37 it was “clearly demonstrated that [the holder of the privilege] had no intention to

60. 59 Cal. App. 4th 563, 69 Cal. Rptr. 2d 389 (1997).

61. *Id.* at 577 (citation omitted).

62. 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799 (1999).

63. *Id.* at 652.

64. *Id.* at 652-53.

1 voluntarily relinquish a known right.⁶⁵ The court thus framed the test as whether
2 the holder of the privilege intended to waive the privilege.⁶⁶ In describing its
3 holding, however, the court spoke only in terms of disclosure: “[W]e hold that
4 ‘waiver’ does not include accidental, inadvertent disclosure of privileged
5 information by the attorney.”⁶⁷

6 ***Federal Decisions Interpreting California Law on Inadvertent Disclosure***

7 Three federal decisions also conclude that under California law, inadvertent
8 disclosure of a privileged communication does not waive the privilege.

9 In *KL Group v. Case, Kay & Lynch*,⁶⁸ the Ninth Circuit considered the impact of
10 inadvertent production of an attorney-client letter in discovery. The court
11 concluded that under “either Hawaii or California law, [the client] did not waive
12 its attorney-client privilege by [counsel’s] production of the letter.”⁶⁹ The Ninth
13 Circuit therefore upheld the district court’s issuance of a protective order.⁷⁰

14 A more extensive discussion of the issue appears in *Federal Deposit Ins. Corp.*
15 *v. Fidelity & Deposit Co.*⁷¹ Again, counsel inadvertently produced attorney-client
16 communications during document discovery. The district court determined that
17 “[t]o the extent the disputed documents fall within the scope of the [attorney-
18 client] privilege, California law requires they remain privileged notwithstanding
19 their inadvertent disclosure during discovery.”⁷² The court explained that under
20 California law, “waiver of the attorney-client privilege depends entirely on
21 whether the client provided knowing and voluntary consent to the disclosure.”⁷³
22 That statement suggests that the critical factor in assessing whether waiver
23 occurred is the client’s intent regarding disclosure. But the court also stated that
24 “nothing in the record suggests that the counsel’s inadvertent disclosure of
25 allegedly privileged documents manifested [the client’s] knowing and voluntary
26 relinquishment of its attorney-client privilege.”⁷⁴ That statement suggests that the
27 critical factor is not the client’s intent regarding disclosure, but rather the client’s
28 intent regarding waiver of the privilege. The decision is thus an example of a case
29 in which the court intermingles these two different standards. Either way,
30 however, it is clear that the court is focusing on the subjective intent of the holder

65. *Id.* at 653.

66. *Id.* at 653 & n.2.

67. *Id.* at 654.

68. 829 F.2d 909 (9th Cir. 1987).

69. *Id.* at 919.

70. *Id.*

71. 196 F.R.D. 375 (S.D. Cal. 2000).

72. *Id.* at 380.

73. *Id.*

74. *Id.*

1 of the privilege in determining whether the privilege has been waived under
2 Section 912.

3 Similarly, *Cunningham v. Connecticut Mut. Life Ins.*⁷⁵ involved counsel's
4 inadvertent production during document discovery of a letter protected by the
5 attorney-client privilege. The district court concluded in dictum⁷⁶ that this did not
6 waive the privilege under California law. It explained:

7 Courts generally use three approaches to resolve whether inadvertent disclosure
8 constitutes a waiver: (1) an evaluation of all the circumstances surrounding the
9 disclosure, (2) the client is held strictly responsible for any disclosure, and (3) the
10 client's intent to disclose is controlling. California appears to follow the
11 subjective approach to waiver by a privilege holder.⁷⁷

12 Again, the court clearly endorsed the subjective intent approach, but did not
13 clearly differentiate between intent to disclose a privileged communication and
14 intent to waive the privilege. While the statement quoted above refers to "intent to
15 disclose," elsewhere in its opinion the court stated that under the subjective
16 approach, "the client must affirmatively waive the privilege."⁷⁸

17 ***California Decisions That Support Use of the Subjective Intent Approach But Do Not Squarely***
18 ***Resolve the Effect of an Inadvertent Disclosure***

19 A number of California cases contain language that tends to support the
20 subjective intent approach, without squarely ruling on whether an inadvertent
21 disclosure of a privileged communication waives the privilege.

22 For example, in *Roberts v. Superior Court*⁷⁹ the California Supreme Court
23 considered whether a form consent was effective to waive a patient's
24 psychotherapist-patient privilege. The Court said there was no waiver under the
25 circumstances of the case, because the "waiver of an important right must be a
26 voluntary and knowing act done with sufficient awareness of the relevant
27 circumstances and likely consequences."⁸⁰ The Court did not have to resolve the
28 impact of an inadvertent disclosure, but its reference to a "knowing act" suggests
29 that a disclosure must be intentional to constitute a waiver.

30 Similarly, in *Menendez v. Superior Court*⁸¹ the California Supreme Court
31 considered whether the psychotherapist-patient privilege was waived as to tapes

75. 845 F. Supp. 1403 (S.D. Cal. 1994).

76. The court pointed out that counsel not only inadvertently produced the letter, but also failed to list the letter on its privilege log, a matter governed not by California law but by federal common law. *Id.* at 1408-10. The court relied on this ground in holding that the privilege had been waived. *Id.* at 1412.

77. *Id.* at 1410.

78. *Id.* at 1411.

79. 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973).

80. *Id.* at 343. This portion of *Roberts* was quoted in *Maas v. Municipal Court*, 175 Cal. App. 3d 601, 606-07, 221 Cal. Rptr. 245 (1985), in which the court held that an immunity agreement did not waive the attorney-client privilege because "consent to disclosure must be unambiguously manifested."

81. 3 Cal. 4th 435, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992).

1 that had been seized by the police. The Court ruled that one of the tapes fell within
2 the dangerous patient exception to the psychotherapist-patient privilege,⁸² but the
3 other tapes were privileged when made and remained privileged, because there had
4 been no “intentional waiver” or waiver by operation of law.⁸³ The Court’s
5 reference to an “intentional waiver” is suggestive of a subjective intent standard,
6 but the Court did not have to confront the issue of waiver by voluntary but
7 inadvertent disclosure.

8 Likewise, in *Wells Fargo Bank v. Superior Court*⁸⁴ the California Supreme
9 Court stated that ““a waiver is the intentional relinquishment of a known right.””⁸⁵
10 The Court held that the attorney-client privilege was not waived by disclosure of
11 attorney-client communications in discovery, because the disclosure was based on
12 a mistaken but honest and reasonable belief that it was legally required.⁸⁶ The case
13 thus exemplifies the already-codified principle that a coerced disclosure does not
14 constitute a waiver.⁸⁷ The Court’s reference to an “intentional relinquishment”
15 suggests that a disclosure must be intentional as well as uncoerced to waive the
16 privilege, but the Court did not have to decide whether an unintentional disclosure
17 constitutes a waiver.⁸⁸

18 *Potential Sources of Confusion*

19 Given the foregoing authorities, until recently California law on inadvertent
20 disclosure seemed relatively clear. There were, however, some potential sources of
21 confusion. These included an unnecessary discussion in *People v. Von Villas*,⁸⁹
22 dicta in a number of cases stating that a privilege is lost once disclosed, misleading
23 language in cases in which the holder of a privilege agreed to disclose a privileged
24 communication but did not do so, and a depublished decision that was relied on in
25 commentary.

82. Section 1024.

83. *Id.* at 455, 456.

84. 22 Cal. 4th 201, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000).

85. 22 Cal. 4th at 211, *quoting* BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240, 1252, 245 Cal. Rptr. 682 (1988).

86. *Wells Fargo*, 22 Cal. 4th at 211-12.

87. Section 912(a); *see also* Andrade v. Superior Court, 46 Cal. App. 4th 1609, 1613-14, 54 Cal. Rptr. 2d 504 (1996); Rodriguez v. Superior Court, 14 Cal. App. 4th 1260, 1270, 18 Cal. Rptr. 2d 120 (1993).

88. *Houghtaling v. Superior Court*, 17 Cal. App. 4th 1128, 21 Cal. Rptr. 2d 855 (1993), is another decision that provides support for the subjective intent approach, without relying on it as the basis for a holding. In dictum, the *Houghtaling* court cautioned that the small claims court must “be vigilant to prevent disclosure of possibly privileged material through inadvertence, and to ensure that the parties and witnesses are aware of their rights in this respect.” *Id.* at 1138 n. 8. The court went on to say: “We do not believe that silence, on the part of a layman, should be deemed a waiver of any privilege, and the court should elicit *an informed, express waiver* before such evidence is admitted.” *Id.* (emphasis added). These comments indicate that at least where a person is self-represented in small claims court, the court should examine the subjective intent of the holder of the privilege in determining whether a privilege is waived.

89. 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992).

1 *Von Villas* concerned the admissibility of a husband-wife conversation that
2 occurred while the husband was in jail. The trial court admitted the evidence over
3 the husband’s objection that the conversation was protected by the marital
4 communications privilege.

5 The court of appeal upheld that ruling, pointing out that the husband and wife
6 were speaking very loudly to one another — loudly enough to be heard beyond
7 the plexiglass which separated them. They knew *or reasonably should have*
8 *known* that third parties in the person of sheriff’s deputies were present.⁹⁰

9 The court offered three alternate bases for its decision. First, the court concluded
10 that the conversation was not made “in confidence” and thus never became
11 privileged.⁹¹ That was a correct and sufficient basis for its decision; there was no
12 need for the court to say anything more.⁹² As an alternate basis for decision,
13 however, the court also said that the conversation could be viewed as satisfying the
14 “crime or fraud” exception to the marital privilege.⁹³ As yet another alternate basis
15 for decision, the court said that “the trial court was faced with sufficient evidence
16 to warrant the conclusion that even if the December 20 conversation was
17 privileged, any such privilege was waived pursuant to Evidence Code section
18 912.”⁹⁴

19 That statement, coupled with the court’s earlier observation that the husband and
20 wife “knew or reasonably should have known” that their conversation was being
21 overheard, could be interpreted to mean that a negligent disclosure by the holder of
22 a privilege is sufficient to waive the privilege. Alternatively, the statement could
23 be construed to indicate that the trial court had “sufficient evidence to warrant the
24 conclusion” that the disclosure was intentional and thus the privilege was waived.
25 The latter interpretation is consistent with the subjective intent approach, but the
26 former is not. Thus, this dictum in *Von Villas* might, but need not necessarily, be
27 construed to conflict with that approach.

28 Another potential source of confusion is language in several cases to the effect
29 that once a privileged communication is disclosed, the privilege is lost.⁹⁵ The
30 implication of those statements is that an inadvertent or other unintentional
31 disclosure of a privileged communication waives the privilege, not just an
32 intentional disclosure by or with the consent of the holder of the privilege. But

90. *Id.* at 223 (emphasis added).

91. *Id.* at 220-22, 223.

92. See discussion under “Scope” *supra*.

93. *Id.* at 222-23.

94. *Id.* at 223.

95. See *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 668 (9th Cir. 2003) (Under California law, “once confidential communications are disclosed to a third party the privilege is forever lost.”); *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 744, 104 Cal. Rptr. 2d 803 (2001) (attorney-client privilege “once lost, can never be regained”); *PSC Geothermal Services Co. v. Superior Court*, 25 Cal. App. 4th 1697, 1708, 31 Cal. Rptr. 2d 213 (1994) (“It is true that once documents are disclosed, the privilege is waived”).

1 none of the cases involved a ruling on an inadvertent or unintentional disclosure,
2 so the statements in them are only dicta.

3 Similarly, in a number of cases the holder of a privilege agreed to, or otherwise
4 took steps to, disclose privileged communications, but no disclosure actually
5 occurred. Those cases interpret Section 912 to require actual disclosure, or a
6 reasonable certainty of disclosure, before waiver occurs. Mere intent to disclose,
7 by itself, is not enough.⁹⁶

8 That principle is fully consistent with the subjective intent approach, under
9 which waiver requires both intent to disclose and actual disclosure. But some of
10 the language in this line of cases might be misinterpreted to mean that the holder's
11 intent is unimportant in determining whether waiver occurred. For example, one
12 court said that "the focal point of privilege waiver analysis should be the holder's
13 disclosure of privileged communications to someone outside the attorney-client
14 relationship, not the holder's intent to waive the privilege."⁹⁷ Although such a
15 statement downplays the importance of intent to disclose, it is dictum and the
16 holding of the case is consistent with the subjective intent approach.

17 Still another potential source of confusion is *Kanter v. Superior Court*,⁹⁸ a
18 depublished court of appeal decision that adopted the multifactor balancing test for
19 waiver of privilege by disclosure. Although the case is not good law, a fairly
20 recent student publication on inadvertent disclosure discusses it extensively,⁹⁹
21 refers to the depublication only in a footnote,¹⁰⁰ and states in the text that in
22 California "there is clear guidance from the *Kanter* case."¹⁰¹ The piece thus gives

96. The leading decision on this point is *Lohman v. Superior Court*, 81 Cal. App. 3d 90, 146 Cal. Rptr. 171 (1978), in which a client (through her current attorney) caused subpoenas to be issued to four of her former attorneys, seeking records regarding their representation of the client. No such records were actually disclosed in response to the subpoenas, but the client's adversary argued that the client waived the attorney-client privilege as to those records simply by issuing the subpoenas. The court of appeal disagreed, explaining that "waiver occurs only when the holder of the privilege has, *in fact*, voluntarily disclosed or consented to a disclosure made, *in fact*, by someone else." *Id.* at 95 (emphasis added). The court went on to say that "[p]ut another way, the *intent to disclose* does not operate as a waiver, waiver comes into play after a disclosure has been made." *Id.* (emphasis added).

For similar decisions, see *Shooker v. Superior Court*, 111 Cal. App. 4th 923, 4 Cal. Rptr. 3d 334, 336 (2003) (privilege is not waived if expert witness designation is withdrawn before party discloses significant part of privileged communication or before it is known with reasonable certainty that party will actually testify as expert); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996) (agreement to waive attorney-client privilege, without actual disclosure, does not waive privilege under federal law or under Section 912, to which court looked for guidance).

97. *Tennenbaum*, 77 F.3d at 341.

98. 253 Cal. Rptr. 810 (1988). Another depublished decision on inadvertent disclosure is *Magill v. Superior Court*, 103 Cal. Rptr. 2d 355, 385 (2001).

99. Stuart, Comment, *Inadvertent Disclosure of Confidential Information: What Does a California Lawyer Need to Know*, 37 Santa Clara L. Rev. 547, 548-51 (1997).

100. *Id.* at 548 n.8

101. *Id.* at 565.

1 the misleading impression that *Kanter* is the leading California decision on waiver
2 of privilege by disclosure.¹⁰²

3 Because these authorities are potentially confusing and require research to
4 properly understand, the Commission concluded that statutory guidance on
5 inadvertent disclosure would be useful.¹⁰³ A recent court of appeal decision
6 underscores the need for such a reform.

102. The piece also prominently discusses two California cases that involve disclosure of privileged documents but do not interpret Section 912. *See id.* at 552-54 (discussing *Aerojet-General Corp. v. Transport Indemnity Ins.*, 18 Cal. App. 4th 996, 22 Cal. Rptr. 2d 862 (1993), and *McGinty v. Superior Court*, 26 Cal. App. 4th 204, 31 Cal. Rptr. 2d 292 (1994)). In addition, the piece refers to four Ninth Circuit decisions on inadvertent disclosure that were tried in federal district court in California but do not apply California law. *See id.* at 554-57 (discussing *United States v. De La Jara*, 973 F.2d 746 (9th Cir. 1992), *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part & vacated in part*, 491 U.S. 554 (1989), *Weil v. Investment/Indicators, Research & Management Inc.*, 647 F. 2d 18 (9th Cir. 1981), and *Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d 646 (9th Cir. 1978)). The piece does not discuss any of the published decisions on inadvertent disclosure described here, some but not all of which were decided after the piece was written.

103. Other potential sources of confusion include a 1976 law review article and the California Supreme Court's decision in *People v. Clark*, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990). There are also two federal district court decisions on inadvertent disclosure that were tried in California but decided under federal common law, not California law. *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179 (N. Dist. Cal. 1990); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N. Dist. Cal. 1985).

In the law review article, the authors state that Section 912

does not require ... that the holder have known or intended waiver to be a consequence of his actions. If he voluntarily performed an act upon which consent to disclosure may be predicated, waiver occurs *regardless of the holder's subjective intent to preserve the confidentiality of the privileged communication.*

Pickering & Story, *Limitations on California Professional Privileges: Waiver Principles and the Policies They Promote*, 9 U.C. Davis L. Rev. 477, 496 (1976) (emphasis added; footnotes omitted); *see also id.* at 498. The authors rely on John Wigmore's treatise as support for this assertion, but that treatise predates the enactment of Section 912. *See id.* at 477 n.1, 496 n.98.

In *Clarke*, the California Supreme Court ruled that the defendant could not claim the psychotherapist-patient privilege because the "reason for the privilege — protecting the patient's right to privacy and thus promoting the therapeutic relationship — and thus the privilege itself, disappear once the communication is no longer confidential." *Id.* at 620. The Court viewed the question not as whether the defendant waived the psychotherapist-patient privilege or whether the dangerous patient exception applied, but "whether the privilege may be claimed at all once the communication is no longer confidential." *Id.* Although the Court did not couch its ruling in terms of waiver, its language suggests that *any* disclosure of a confidential psychotherapist-patient communication (inadvertent, unknown to the privilege holder, or otherwise) defeats the privilege.

The Court firmly rejected that notion in a later case, however, explaining that "*Clark* holds only that when a psychotherapist discloses a patient's threat to the patient's intended victim ..., *the disclosed threat* is not covered by the privilege." *Menendez*, 3 Cal. 4th at 447 (emphasis added). According to the Court, the dangerous patient exception applies to the threat itself, but other communications between the psychotherapist and the patient remain privileged, despite the disclosure of the threat. *Id.* at 447-49; *see also* *San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (2001).

Thus, although *Clark* contains broad language regarding the psychotherapist-patient privilege that could be considered inconsistent with the subjective intent approach to inadvertent disclosure, it is clear from *Menendez* that such an interpretation of *Clark* is incorrect. Moreover, the discussion of the attorney-client privilege in *Clark* is consistent with, and in fact tends to support, the principle that only an *intentional* disclosure of a privileged communication is sufficient to waive a privilege listed in Section 912. *See* 50 Cal. 3d at 621 (defendant's response to psychotherapist's warning did not waive privilege, because "there was no clear intent to waive the privilege in that statement).

1 *New Court of Appeal Decision on Inadvertent Disclosure*

2 In *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*,¹⁰⁴ decided just this
3 year, a group of officers and lawyers for a corporation called an officer for another
4 corporation and left a message on her voicemail. After they left the message, they
5 failed to hang up the speakerphone, and proceeded to have a conversation among
6 themselves that was also recorded on her voicemail. In subsequent litigation, their
7 corporation sought to preclude use of that conversation, claiming that it was
8 protected by the attorney-client privilege. The trial court agreed, but the court of
9 appeal reversed, advancing two bases for its decision.

10 First, the court of appeal determined that the privilege had been waived, even
11 though the recording of the conversation was inadvertent.¹⁰⁵ Citing *State*
12 *Compensation Ins. Fund*, the court acknowledged that “an attorney’s inadvertent
13 disclosure does not waive the privilege absent the privilege holder’s intent to
14 waive.”¹⁰⁶ The court distinguished that situation, however, pointing out that in the
15 case before it “the *privilege holder* inadvertently disclosed the information.”¹⁰⁷
16 The court then asserted that there “is no requirement in the statute itself, nor in the
17 cases interpreting the statute that the privilege holder intend to disclose the
18 information when ... the holder makes an uncoerced disclosure.”¹⁰⁸ Accordingly,
19 the court concluded that it was unimportant whether the corporation intended to
20 disclose the information; it was enough that the corporation “was not coerced in
21 any way to make the disclosure, and as such, its disclosure falls squarely within
22 the meaning of section 912, subdivision (a).”¹⁰⁹

23 As an alternate basis for its decision, the court concluded that “[e]ven if the
24 attorney-client privilege were not waived in this case, the voicemail is not
25 protected, because it falls within the crime-fraud exception to the attorney-client
26 privilege stated in section 956.”¹¹⁰ Explaining that there was abundant evidence of
27 fraud, the court cautioned that in “an era where corporate fraud and boardroom
28 misconduct is front-page news as well as prosecutions of accountants and lawyers
29 in connection with such conduct, our courts are required to ensure that the
30 attorney-client privilege is not used to promote or further any such conduct.”¹¹¹

31 Unfortunately, *Jasmine* creates further potential for confusion in an area that
32 already warranted clarification. The court of appeal’s comments on privilege
33 waiver were unnecessary to its decision, which could have rested solely on the

104. 117 Cal. App. 4th 794, 12 Cal. Rptr. 3d 123 (2004).

105. The court apparently assumed that the conversation was privileged when made and remained privileged until the voicemail was played, at which time the privilege was waived.

106. *Id.* at 128 (emphasis added).

107. *Id.* (emphasis added).

108. *Id.*

109. *Id.* at 129.

110. *Id.*

111. *Id.* at 132.

1 crime-fraud exception to the attorney-client privilege. In its outrage over the
2 fraudulent actions of the corporate representatives and its eagerness to admit the
3 incriminating voicemail, the court fashioned a new variant of the waiver doctrine:
4 A two-pronged rule in which the strict liability approach applies to a disclosure by
5 the holder of a privilege, while the subjective intent approach applies to disclosure
6 by a representative of the holder. Previous decisions made no mention of such a
7 two-pronged approach. Guidance is needed to make clear what rule applies.

8 **Proposed Approach to Inadvertent Disclosure**

9 The Commission recommends amending Section 912 to provide statutory
10 guidance on inadvertent disclosure. Expressly stating the rule in the statute would
11 prevent disputes over the applicable rule and thus save adversaries, attorneys, and
12 courts the expense and effort entailed in researching, debating, and resolving the
13 matter.

14 *Codification of the Subjective Intent Approach*

15 Specifically, the Commission proposes to codify the subjective intent approach
16 with regard to all disclosures, whether by the privilege holder or by someone else.
17 Section 912(a) would be amended to provide that subject to the statutory
18 exceptions, the right of any person to claim a confidential communication
19 privilege “is waived with respect to a communication protected by the privilege if
20 any holder of the privilege, without coercion, has *intentionally* disclosed a
21 significant part of the communication or has consented to disclosure made by
22 anyone.”¹¹² The provision would further state that consent to disclosure “is
23 manifested by any statement or other conduct of the holder of the privilege
24 indicating *intent to permit* the disclosure, including failure to claim the privilege in
25 any proceeding in which the holder has the legal standing and opportunity to claim
26 the privilege.”¹¹³

27 This approach has a number of advantages. First, it avoids drawing a distinction
28 between a disclosure by a privilege holder and a disclosure by someone else. The
29 apparent rationale for such a distinction is to avoid penalizing the privilege holder
30 for another person’s lack of vigilance in protecting the confidentiality of privileged
31 material. But the two-pronged approach leads to incongruous results. For instance,
32 the physician-patient privilege would be waived if disclosure occurred because
33 medical records were in a briefcase stolen from a patient, but the privilege would
34 not be waived if the records were in a briefcase stolen from a physician. Such a
35 harsh result as waiver should not turn on fortuity. This would not occur if the
36 subjective intent approach applied to all disclosures.

112. See proposed Section 912 *infra* (emphasis added).

113. *Id.* (emphasis added).

1 Second, the subjective intent approach is most consistent with the case law
2 interpreting Section 912.¹¹⁴ Codifying the approach would not be a break with past
3 practice and precedent, but would simply maintain the longstanding status quo.

4 Third, the subjective intent approach is most consistent with the statutory
5 scheme governing the confidential communication privileges. With regard to each
6 such privilege, subjective intent is determinative in assessing whether a
7 communication is initially considered privileged or unprivileged.¹¹⁵

8 For instance, a “confidential communication between client and lawyer” is
9 defined as “information transmitted between a client and his or her lawyer in the
10 course of that relationship and in confidence by a means which, *so far as the client*
11 *is aware, discloses the information to no third persons* other than those who are
12 present to further the interest of the client in the consultation or the
13 accomplishment of the purpose for which the lawyer is consulted”¹¹⁶ The focus
14 is on whether the client knew, and therefore can be presumed to have intended,
15 that the communication was being disclosed to a third person at the time it was
16 made.

17 It would not be appropriate to use a subjective intent approach in determining
18 whether a communication is initially privileged, yet use a different approach in
19 determining whether the privilege attaching to a communication was subsequently
20 waived. The subjective intent approach should apply in both situations.

21 Fourth, the subjective intent approach accords with the search for truth in a trial
22 or other legal proceeding. The approach does not insulate a special category of
23 information from use at trial. Rather, it only ensures that information protected by
24 a confidential communication privilege remains privileged unless the holder of the
25 privilege chooses to disclose the information. The doctrine is thus no more of a
26 burden on the use of evidence than the privilege itself,¹¹⁷ which was created in

114. See discussion under “Cases Interpreting California Law on Inadvertent Disclosure” *supra*.

115. See discussion under “Scope” *supra*. The Comment to Section 917 states that if a communication *was not intended* to be kept in confidence the communication is not privileged. See *Solon v. Lichtenstein*, 39 Cal. 2d 75, 244 P.2d 907 (1952). And the fact that the communication was made under circumstances where others could easily overhear is a strong indication that the communication *was not intended* to be confidential and is, therefore, unprivileged. See *Sharon v. Sharon*, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889); *People v. Castiel*, 153 Cal. App. 2d 653, 315 P.2d 79 (1957).

(Emphasis added.)

116. Section 952 (emphasis added). Similarly, a “confidential communication between patient and physician” is defined as “information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, *so far as the patient is aware, discloses the information to no third persons* other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted” Section 992 (emphasis added). See also Sections 1012 (psychotherapist-patient privilege), 1032 (clergy-penitent privilege), 1035.4 (sexual assault victim-counselor privilege), 1037.2 (domestic violence victim-counselor privilege).

117. As one commentator explained,

1 recognition that the search for truth is sometimes less pressing than the policies
2 served by the privilege.¹¹⁸

3 Most importantly, the subjective intent approach is good policy. In contrast to
4 the multifactor balancing approach, it establishes a clear standard, yields
5 predictable results, and thus is readily-administered instead of routinely requiring
6 court adjudication. Further, it safeguards the important policies underlying the
7 confidential communication privileges. Effective functioning of the relationships
8 in question (e.g., lawyer-client, psychotherapist-patient) is crucial to our society,
9 helping to ensure, for instance, that the correct person goes to jail or that a
10 mentally ill person receives appropriate treatment and does not become a safety
11 threat.¹¹⁹ By protecting the confidentiality of communications between persons in
12 these relationships, the privileges promote the free-flowing communication that is
13 considered essential for such effective functioning.¹²⁰ A low threshold for waiver
14 would undercut that effect, jeopardizing the functioning of the privileged
15 relationships.¹²¹ The subjective intent approach restricts waiver to situations in
16 which it is clear that disclosure of the privileged communication is acceptable to
17 the holder of the privilege. Consequently, there is no disincentive to free-flowing
18 communication in the privileged relationship, and the relationship can continue to
19 function effectively.

20 ***Intent to Disclose Versus Intent to Waive the Privilege***

21 Significantly, the proposed standard would focus on intent to disclose the
22 privileged communication to a third person, not intent to waive the applicable
23 privilege.¹²² The holder of the privilege need not have been aware of the legal
24 consequences of disclosure, so long as the disclosure was intentional.

The criticism that [the subjective intent] approach may undermine justice stems from the concern that a privileged document may contain information which could go to the merits of a case, such as an admission of guilt, and it would be excluded from evidence. A close scrutiny of this criticism, however, shows that it lacks merit, for this analysis does no more to undermine justice than the attorney-client privilege. The [subjective intent] approach merely allows the sending counsel to keep the privileged document out of evidence. It gives no greater protection to the incriminating evidence than the document has already received from the attorney-client privilege.

Bruckner-Harvey, *supra* note 38, at 392; *See also* Simko, *supra* note 38, at 471 (The subjective intent approach “does not hamper zealous advocacy any more than the attorney-client privilege does. Although the receiving attorney may not introduce inadvertently disclosed documents into evidence, this is no greater an imposition than if the documents remained undisclosed.”) (footnotes omitted).

118. Venture Law Group v. Superior Court, ___ Cal. App. 4th ___, 12 Cal. Rptr. 3d 656 (2004).

119. *See, e.g.,* Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348 (1985) (lawyer-client privilege “encourages observance of the law and aids in the administration of justice.”).

120. *See* note 9 *supra*.

121. *See* notes 40 & 46 *supra*.

122. That is clear from the proposed statutory language, which repeatedly refers to an intentional *disclosure*, not an intentional *forfeiture of a legal right*:

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

1 That is consistent with the legislative history of Section 912, as enacted on
2 recommendation of the Law Revision Commission in 1965. When the
3 Commission prepared the Evidence Code, it used the Uniform Rules of Evidence
4 as a starting point. In drafting Section 912, however, the Commission deliberately
5 deleted the Uniform Rules' requirement that the holder of a privilege make a
6 disclosure "with knowledge of his privilege."¹²³ The proposed amendment of
7 Section 912 would continue that approach.

8 ***Failure to Object at Trial***

9 Numerous cases find that a privilege was waived due to failure to object at
10 trial.¹²⁴ The results of these cases should be the same under the Commission's
11 proposed amendment of Section 912.

12 In conducting a trial, a party's attorney speaks for the party¹²⁵ and the attorney's
13 intent is presumed to mirror the party's intent.¹²⁶ If an attorney fails to object to

(privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (domestic violence victim-counselor privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has intentionally *disclosed* a significant part of the communication or has consented to *disclosure* made by anyone. Consent to *disclosure* is manifested by any statement or other conduct of the holder of the privilege indicating 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.

(Emphasis added.)

123. Commission Staff Memorandum 63-11; *Tentative Recommendation Relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964); Chadbourn, *A Study Relating to the Privileges Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm'n Reports 301, 509-10 (1964).

124. See, e.g., *People v. Barnett*, 17 Cal. 4th 1044, 1123-24, 954 P.2d 384, 74 Cal. Rptr. 2d 121 (1998); *Calvert v. State Bar of California*, 54 Cal. 3d 765, 819 P.2d 424, 1 Cal. Rptr. 2d 684 (1991); *People v. Haskett*, 52 Cal. 3d 210, 242-43, 801 P.2d 323, 276 Cal. Rptr. 80 (1990); *People v. Gillard*, 57 Cal. App. 4th 136, 162 n. 16, 66 Cal. Rptr. 2d 790 (1997); *People v. Poulin*, 27 Cal. App. 3d 54, 64, 103 Cal. Rptr. 623 (1972).

125. "[A]n attorney is an agent of the client ..., and the client as principal is bound by the acts of the attorney-agent within the scope of the attorney's actual (express or implied) or apparent or ostensible authority, or by unauthorized acts ratified by the client." 1 B. Witkin, *California Procedure Attorneys* § 261, at 326 (4th ed. 1996). If a client is represented by an attorney in a proceeding, "the client has no direct control over the proceeding." *Id.* § 265, at 330. Rather, "[a]ll legal steps must ordinarily be taken by the attorney," *id.*, and adverse parties must deal with the attorney, not the client, *id.* § 266, at 331.

126. There is a strong presumption that acts taken by the attorney in conducting the litigation are within the scope of the attorney's authority. *Gagnon Co., Inc. v. Nevada Desert Inn*, 45 Cal. 2d 448, 459-60, 289 P.2d 466 (1955); *Security Loan & Trust Co. v. Estudillo*, 134 Cal. 166, 169, 66 P. 257 (1901); *Ford v. State*, 116 Cal. App. 3d 507, 516-17, 172 Cal. Rptr. 162 (1981); *Clark Equipment Co. v. Wheat*, 92 Cal. App. 3d 503, 523, 154 Cal. Rptr. 874 (1979); *City of Fresno v. Baboian*, 52 Cal. App. 3d 753, 757-58, 125 Cal. Rptr. 332 (1975); *Dale v. City Court of Merced*, 105 Cal. App. 2d 602, 607-08, 234 P.2d 110 (1951); Witkin, *supra* note 125, § 263, at 328-29. The client retains authority to fire the attorney at any time and to give the attorney instructions, which may or may not be binding on the attorney, depending on the circumstances. *Id.* § 269, at 334. The client also retains authority to make certain major decisions, such as whether to settle the case and whether to stipulate to binding arbitration. *Id.* §§ 272-283, at 336-52. But the attorney "is relatively free from control by the client in ordinary procedural matters" *Id.* § 271, at 336; see also *id.* § 270, at 334-36.

As a general rule, a decision regarding whether to interpose an evidentiary objection in the course of a legal proceeding, even an objection based on a privilege, would seem to fall into that category. After all, it

1 disclosure of privileged information at trial, the attorney would be presumed to
2 have intended the ordinary consequences of that voluntary act.¹²⁷ The ordinary
3 consequences of failure to object to evidence at trial are introduction of the
4 evidence (i.e., disclosure of the privileged information) and waiver of the
5 objection.¹²⁸

6 Thus, it would be presumed that an attorney who failed to claim the privilege at
7 trial intended to disclose the privileged information.¹²⁹ That presumption would be
8 difficult to overcome, particularly if the failure to object resulted in a tactical
9 benefit or otherwise appeared strategically motivated.¹³⁰ Moreover, absent unusual
10 circumstances, the attorney’s intent would be attributed to the client, thus
11 satisfying the proposed requirement that the “holder of the privilege, without
12 coercion, has *intentionally* disclosed a significant part of the communication or has
13 consented to disclosure made by anyone.”¹³¹

14 **Coordination of the Proposed Approach With Civil Discovery Provisions**

15 The Civil Discovery Act contains a number of provisions on privilege waiver.¹³²
16 Those provisions would not conflict with the Commission’s proposed amendment
17 of Section 912.

is the attorney and not the client who voices objections in court (even when the client is testifying), at depositions, and in documents such as a discovery response or a summary judgment opposition. The attorney is presumed to speak for the client on those matters; the attorney’s intent is presumed to mirror the client’s intent.

In some circumstances, however, that presumption might be overcome. Case law on this point appears sparse. At a minimum, it would seem reasonable to accord such relief when the attorney deliberately acts contrary to the client’s best interest. *Cf. Carroll v. Abbott Laboratories, Inc.*, 32 Cal. 3d 892, 898, 654 P.2d 775, 187 Cal. Rptr. 592 (1982) (court may set aside judgment against client when attorney’s conduct resulting in entry of judgment was so extreme as to constitute positive misconduct). Further clarification of this point is beyond the scope of this study.

127. Evid. Code § 665.

128. Witkin, *supra* note 125, §§ 367, 371, at 454, 459-61.

129. It is important to differentiate between a litigation setting in which a lawyer is required to voice objections for the client (e.g., a deposition), and other settings in which the lawyer may act. For example, *People v. Hayes*, 21 Cal. 4th 1211, 989 P.2d 645, 91 Cal. Rptr. 2d 211 (2000), involved a conversation between defense counsel and the attorney for an adverse witness, in which the witness’ attorney allegedly disclosed an attorney-client communication to defense counsel. The Court’s opinion does not spell out all of the facts of that interchange, but the conversation does not seem to have occurred while the witness’ attorney was taking a formal litigation step for his client. 21 Cal. 4th at 1265. In such circumstances, there does not seem to be any presumption that the attorney acts for the client with regard to disclosure of a privileged communication. Rather, the Court concluded that the communication remained privileged because nothing in the record suggested that the adverse witness authorized his attorney to disclose the communication to defense counsel. *Id.* at 1265.

130. In *Barnett*, for instance, the court noted that the failure to object “might have reflected a reasonable strategic decision.” 17 Cal. 4th at 1124-25.

131. See proposed Section 912 *infra* (emphasis added).

132. Code Civ. Proc. §§ 2025(m)(1), 2028(d)(2), 2030(k), 2031(l), 2033(k).

1 ***Nonexclusivity of Section 912***

2 On its face, Section 912 does not purport to be the exclusive means of waiving
3 the seven privileges to which it applies. Subdivision (a) specifies circumstances
4 under which disclosure of a privileged communication results in waiver.
5 Subdivisions (b)-(d) set forth exceptions to that rule. Nowhere does the provision
6 say that making such a disclosure is the only way to waive the specified privileges.

7 Nonetheless, a couple of cases seem to indicate as much.¹³³ One of these was
8 decided before enactment of the Civil Discovery Act of 1986, however, and the
9 other involved an incident that occurred before the operative date of that Act.

10 It is true that courts “may not add to the statutory privileges except as required
11 by state or federal constitutional law, nor may courts imply unwritten exceptions
12 to existing statutory privileges.”¹³⁴ But there is nothing to prevent the Legislature
13 from adding a new *statutory* means of waiving a privilege. If that occurs, the
14 preexisting waiver statute is no longer exclusive.

15 That appears to be the situation with regard to Section 912. After the Civil
16 Discovery Act of 1986 became operative, Section 912 was no longer the only
17 statute specifying means of waiving the privileges to which it applies; other means
18 were specified in the Civil Discovery Act.¹³⁵

19 ***Privilege Waiver Under the Civil Discovery Provisions***

20 The pertinent civil discovery provisions include the key statute governing an oral
21 deposition in California and a number of provisions relating to written discovery.

22 Under the statute governing an oral deposition, the right to assert a privilege with
23 regard to a communication “is waived unless a specific objection to its disclosure
24 is timely made during the deposition.”¹³⁶ Unlike other provisions of the Civil
25 Discovery Act, the statute does not specify any circumstances under which a party
26 can obtain relief from such a waiver.

27 Although that rule may initially seem more harsh than the Commission’s
28 proposed amendment of Section 912, results under the two provisions are
29 generally likely to be the same. As at trial, if a party at a deposition (through
30 counsel, or directly if self-represented) fails to object to a question calling for
31 privileged information, the party would be presumed to have intended the ordinary

133. See *Motown Record Corp. v. Superior Court*, 155 Cal. App. 3d 482, 492, 202 Cal. Rptr. 482 (1984) (the “exclusive means by which the attorney/client privilege may be waived are specified in Section 912 of the Evidence Code.”); see also *Blue Ridge Ins. Co. v. Superior Court*, 202 Cal. App. 3d 339, 345, 248 Cal. Rptr. 346 (1988) (“Notwithstanding civil discovery statutes, Evidence Code governs waiver of attorney/client privilege.”).

134. *Roberts v. City of Palmdale*, 5 Cal. 4th at 373 (citations omitted); see also Section 911 & Comment; *Wells Fargo*, 22 Cal. 4th at 206-09; *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, ___, 9 Cal. Rptr. 3d 621 (2004).

135. See *Korea Data Systems Co. Ltd. v. Superior Court*, 51 Cal. App. 4th 1513, 1517, 59 Cal. Rptr. 2d 925 (1997); but see Code Civ. Proc. § 2017(e)(4) (“Nothing in this chapter diminishes the rights and duties of the parties regarding ... privileges”).

136. Code Civ. Proc. 2025(m)(1).

1 consequences of that action, including disclosure of the privileged information.¹³⁷
2 That presumption would be difficult to overcome, because a person representing
3 someone at a deposition normally pays close attention to what is happening and is
4 unlikely to be able to successfully claim inadvertence.¹³⁸

5 Moreover, finding a waiver in such circumstances appears appropriate. Excusing
6 a failure to object at a deposition would reduce incentives to handle depositions
7 competently, and would be highly detrimental to the party who took the
8 deposition, because that party may have pursued other lines of questioning had an
9 objection been properly interposed in the first place. The Commission sees no
10 need to revise the provision governing privilege waiver at a deposition.

11 The waiver provisions relating to interrogatories, inspection demands, and
12 requests for admission take a different approach. Each of those provisions states
13 that failure to file a timely response to a discovery request waives any objection to
14 the request, including an objection based on privilege. For example, the provision
15 governing interrogatories states that if “a party to whom interrogatories have been
16 directed fails to serve a timely response, that party waives any ... objection to the
17 interrogatories, including one based on privilege”¹³⁹ Each of the provisions also
18 allows a court to grant relief from such a waiver, on motion, upon determining that
19 (1) the party from whom discovery was sought subsequently served a response in
20 substantial compliance with the applicable discovery requirements, and (2) the
21 party’s failure to serve a timely response was the result of mistake, inadvertence,
22 or excusable neglect.¹⁴⁰

23 The Commission does not propose any change in these provisions at this time.
24 Although they establish an additional way to waive a privilege, they mitigate the
25 potential harm to privileged relationships by providing a means of seeking relief
26 from such a waiver if the failure to timely respond to the discovery request was

137. See discussion under “Failure to Object at Trial” *supra*.

138. It is possible that privileged information would be disclosed at a deposition due to a mistaken belief that the disclosure was legally required (e.g., if the deponent was represented by a new associate who did not know that there was a privilege for a confidential communication between a domestic violence victim and a counselor). That would be an instance in which the disclosure was intentional but perhaps would be considered “coerced” within the meaning of Section 912. See *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000) (no waiver where disclosure of privileged communications was based on mistaken but honest and reasonable belief that it was legally required). It is thus conceivable that the disclosure would be considered a waiver under Code of Civil Procedure Section 2025(m)(1) but not under Section 912. The statutes are not in conflict, however, because Section 912 is not the exclusive statement of means by which waiver of the specified privileges can occur. Further, the Commission’s proposed amendment would have no bearing on the situation, because the requirement that a disclosure be uncoerced to constitute a waiver is already codified in Section 912.

139. Code Civ. Proc. § 2030(k). See also Code Civ. Proc. §§ 2031(l) (if “a party to whom an inspection demand has been directed fails to serve a timely response to it, that party waives any objection to the demand, including one based on privilege”), 2033(k) (“If a party to whom requests for admission have been directed fails to serve a timely response, that party thereby waives any objection to the requests, including one based on privilege”).

140. Code Civ. Proc. §§ 2030(k) (interrogatories), 2031(l) (inspection demand), 2033(k) (requests for admission).

1 inadvertent. It is important to maintain incentives to timely comply with discovery
2 obligations. The provisions governing interrogatories, inspection demands, and
3 requests for admission appear to strike a fair balance between that objective and
4 the competing goal of protecting the policies underlying the confidential
5 communication privileges.

6 ***Minor Adjustment***

7 The Civil Discovery Act also includes a provision governing a deposition by
8 written questions, which states that

9 [a] party who objects to any question on the ground that it calls for information
10 that is privileged ... shall serve a specific objection to that question on all parties
11 entitled to notice of the deposition within 15 days after service of the question. A
12 party who fails to timely serve that objection waives it.¹⁴¹

13 Like the statute governing an oral deposition, this provision does not specify any
14 circumstances under which a party can obtain relief from such a waiver.

15 At first glance, it might seem appropriate to apply the same privilege waiver rule
16 to both types of depositions. But there are distinctions that warrant different
17 treatment.

18 Specifically, a failure to timely object to a question calling for disclosure of
19 privileged information is more likely to stem from inadvertence in a deposition by
20 written questions than in an oral deposition. Counsel may simply let the 15-day
21 deadline accidentally slip by. That would waive the objection under the Civil
22 Discovery Act, but there would be no intent to disclose.

23 Further, the harm from failure to timely object to a written deposition question
24 calling for disclosure of privileged information almost certainly will be less severe
25 than the harm from failure to timely object to a similar question at an oral
26 deposition. In contrast to an oral deposition, a party taking a written deposition is
27 unlikely to immediately act in reliance on the failure to object, shaping follow-up
28 questions based on the response. A delay in receiving an objection to a written
29 question could as easily stem from a delay in mail service as from failure to timely
30 serve the objection. The impact on the party taking the deposition would be the
31 same but the latter scenario would result in waiver of the privilege while the
32 former would not.

33 The confidential communication privileges foster socially valuable relationships
34 and should not be abrogated for a minor technical mistake.¹⁴² Other remedies exist

141. Code Civ. Proc. § 2028(d)(2).

142. As one court explained, the attorney-client privilege

is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege.

202 Cal. App. 3d at 345, *quoting* People v. Kor, 129 Cal. App. 2d 436, 447, 277 P.2d 94 (1954) (Shinn, P.J., concurring); *see also* Fortunato v. Superior Court, __ Cal. App. 4th __, 82 Cal. Rptr. 3d 87 (2004) (Waiver of privilege must be narrowly rather than expansively construed to protect purpose of privilege).

1 to encourage proper compliance with the discovery requirements.¹⁴³ A discovery
2 sanction “cannot go farther than is necessary to accomplish the purpose of
3 discovery”¹⁴⁴ The Commission therefore recommends that the provision
4 governing a deposition by written questions be amended to track the other
5 provisions governing written discovery. Like those provisions, it should provide a
6 means for obtaining relief from a privilege waiver based on failure to timely object
7 to a question.¹⁴⁵

8 **Partial Disclosure and Selective Disclosure**

9 In addition to codifying the subjective intent approach to an inadvertent
10 disclosure, the Commission recommends addressing two types of intentional
11 disclosure: (1) partial disclosure and (2) selective disclosure.

12 *Partial Disclosure*

13 Sometimes a privileged communication is partially disclosed, meaning that a
14 significant portion but not the entirety of the communication is revealed to a
15 person outside the privileged relationship. This may confer an unfair tactical
16 advantage, as when a privilege holder discloses favorable portions of a privileged
17 document, but withholds unfavorable portions. Case law establishes, however, that
18 if the holder of a privilege voluntarily and intentionally makes a partial disclosure
19 (or voluntarily and intentionally permits another person to do so), and the situation
20 is not covered by one of the exceptions to Section 912,¹⁴⁶ a court may require
21 additional disclosure in the interest of fairness, even though the holder did not
22 intend to permit such additional disclosure.

23 For example, the defendant in *People v. Worthington*¹⁴⁷ disclosed a marital
24 communication in which the defendant’s wife supposedly confessed to a murder
25 and described the details of the crime. Having presented his version of the
26 conversation, the defendant could not preclude his wife from testifying that the
27 conversation occurred as he said, except it was he who confessed not she.¹⁴⁸

28 Similarly, in *Kerns Construction Co. v. Superior Court*,¹⁴⁹ a witness used
29 privileged reports, provided by the holder of the privilege, to refresh his
30 recollection before testifying, because he could not have testified on the subject
31 otherwise. The privilege holder sought to exclude the reports themselves, but the
32 court ruled that “[w]hen, with knowledge of their intended use, the privileged

143. *Korea Data Systems Co. Ltd. v. Superior Court*, 51 Cal. App. 4th 1513, 1517, 59 Cal. Rptr. 2d 925 (1997).

144. *Newland v. Superior Court*, 40 Cal. App. 4th 608, 613, 47 Cal. Rptr. 2d 24 (1995); *see also* *Motown Record Corp. v. Superior Court*, 155 Cal. App. 3d 482, 490, 202 Cal. Rptr. 482 (1984).

145. See proposed Code Civ. Proc. § 2028 *infra*.

146. Section 912(b)-(d), which are discussed under “Exceptions” *supra*.

147. 38 Cal. App. 3d 359, 114 Cal. Rptr. 322 (1974).

148. *Id.* at 365-66.

149. 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (1968).

1 records were furnished to the witness, which act was not required to be performed,
2 and the witness gave testimony from them, the privilege was waived.”¹⁵⁰ The court
3 explained that fairness required that result:

4 It would be unconscionable to allow a rule of evidence that a witness can testify
5 to material contained in a report, though not verbatim, and then prevent a
6 disclosure of the reports. As is stated in 8 Wigmore, Evidence, section 2327
7 (McNaughton rev. 1961), “There is always also the objective consideration that
8 when his [holder of the privilege] conduct touches a certain point of disclosure,
9 fairness requires that his privilege shall cease *whether he intended that result or*
10 *not*. He cannot be allowed, *after disclosing as much as he pleases*, to withhold the
11 remainder. He may elect to withhold or to disclose, but after a certain point, his
12 election must remain final.”¹⁵¹

13 Even when a holder voluntarily and intentionally makes a significant disclosure,
14 however, the privilege is not necessarily waived as to all of the communications
15 between the persons in the privileged relationship. For example, a patient’s
16 disclosure that she ingested DES while pregnant did not waive the physician-
17 patient privilege as to her full medical history.¹⁵² Similarly, voluntary production
18 of some attorney-client communications is not necessarily a waiver of the
19 attorney-client privilege as to all communications having anything to do with the
20 subject matter of a case.¹⁵³ Although a court may rule that the scope of a waiver is
21 broader than what the privilege holder intended when making a partial disclosure,
22 the waiver should only be as broad as fairness requires.

23 Section 912 should be revised to codify that concept, so that the rule is clear on
24 the face of the statute. The Commission recommends adding a new subdivision
25 stating that “[i]f the holder of a privilege makes or consents to disclosure of a
26 significant part of a confidential communication under the circumstances specified
27 in subdivision (a), the court may order disclosure of another part of the
28 communication or a related communication, but only to the extent necessary to
29 prevent unfairness from partial disclosure.”¹⁵⁴

30 **[*Selective Disclosure*]**

31 [Selective disclosure is the disclosure of a privileged communication to one
32 person outside the privileged relationship or on one occasion, while seeking to

150. *Id.* at 413-14.

151. *Id.* at 414 (emphasis added).

152. *Jones v. Superior Court*, 119 Cal. App. 3d 534, 547, 174 Cal. Rptr. 148 (1981); *see also* *People v. Superior Court*, 231 Cal. App. 3d 584, 589-91, 282 Cal. Rptr. 418 (1991) (trial court erred in finding general waiver of psychotherapist-patient privilege).

153. *Owens v. Palos Verdes Monaco*, 142 Cal. App. 3d 855, 870, 191 Cal. Rptr. 381 (1983); *see also* *Travelers Ins. Cos. v. Superior Court*, 143 Cal. App. 3d 436, 445, 191 Cal. Rptr. 871 (1983) (inadvertent disclosure of two attorney-client letters did not waive privilege as to other items and privilege was not claimed as to those two letters).

154. Proposed Section 912(e) *infra*.

1 preclude disclosure to other persons or on other occasions. For example, a man
2 might tell a friend about a discussion he had with his psychiatrist, but ask the
3 friend to keep the matter confidential. Or the target of a governmental
4 investigation might share privileged information with the investigating agency, on
5 the understanding that it will not be shared with others, such as potential civil
6 litigants. The investigating agency may even offer a reduced penalty or other
7 incentive to encourage such a disclosure.¹⁵⁵

8 California law is unsettled as to whether a selective disclosure constitutes a
9 waiver of the applicable privilege, such that a court or other tribunal could compel
10 disclosure of the once-privileged communication to persons other than the holder's
11 chosen confidant. In *San Diego Trolley, Inc. v. Superior Court*,¹⁵⁶ a patient
12 disclosed confidential psychotherapist-patient communications to persons
13 handling her claim for workers' compensation. She was later sued in a personal
14 injury case, and the plaintiff sought discovery of the psychotherapist-patient
15 communications the patient had selectively disclosed. The trial court ordered
16 disclosure but the court of appeal reversed, explaining:

17 [O]ur focus is on preservation of [the patient's] relationship with her psychiatrist
18 and more broadly her ability to have a trusting therapeutic relationship with other
19 psychotherapists. The fact [that she] has been willing to put her psychotherapeutic
20 relationship somewhat at risk in the workers' compensation proceedings and the
21 relationship was evidently able to withstand whatever limited disclosure occurred
22 there does not support an inference [that she] meant her relationship with her
23 psychiatrist could continue to be put at risk following disposition of her claims.¹⁵⁷

24 Two years later, the Ninth Circuit Court of Appeals took the opposite approach
25 in a case interpreting California law. In *Feldman v. Allstate Ins. Co.*,¹⁵⁸ a litigant
26 voluntarily disclosed confidential marital communications at a deposition, but
27 sought to invoke the marital communications privilege at trial. The Ninth Circuit
28 ruled that the privilege had been waived. It declined to "read a broad 'selective
29 waiver' rule into the California law of privilege,"¹⁵⁹ because such a rule would not
30 serve any constructive purpose in the discovery process and would "contravene the
31 general rule that once confidential communications are disclosed to a third party
32 the privilege is forever lost."¹⁶⁰

155. See, e.g., Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why it is Misguided)*, 48 Vill. L. Rev. 469, 534-48, 564-86, 590-92 (2003); Symchych, *Selective Waiver of Attorney-Client Privilege*, 60 Minn. Bench & Bar 17, 19-20 (Oct. 2003).

156. 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (2001).

157. *Id.* at 1094.

158. 322 F.3d 660 (9th Cir. 2003).

159. *Id.* at 668.

160. *Id.* The court did not mention *San Diego Trolley*. It did refer to *People v. Aguilar*, 218 Cal. App. 3d 1556, 167 Cal. Rptr. 879 (1990), describing it as a case in which a California court "recognized a party's ability to preserve a privilege through a limited waiver." *Feldman*, 322 F.2d at 668. In fact, however, the disclosure in *Aguilar* was "not freely and voluntarily made." 218 Cal. App. 3d at 1565. Rather, the

1 Another case involving selective disclosure was decided in a California court of
2 appeal just this year. In *McKesson HBOC, Inc. v. Superior Court*,¹⁶¹ a company
3 under investigation disclosed an audit report prepared by its attorneys to the
4 Securities and Exchange Commission (“SEC”) and the United States Attorney. In
5 making this disclosure, the company entered into confidentiality agreements with
6 the SEC and the United States Attorney, purporting to preserve the confidentiality
7 of the audit report. The company was later sued in several civil actions, which
8 were consolidated. Plaintiffs sought discovery of the audit report, contending that
9 the company had waived the lawyer-client privilege by disclosing the report to the
10 government.

11 The trial court agreed, as did the court of appeal. The court of appeal rejected the
12 company’s argument that the disclosure fell within the scope of Section 912(d),
13 which permits disclosure without waiving the lawyer-client privilege when the
14 disclosure is “reasonably necessary for the accomplishment of the purpose” for
15 which the lawyer was consulted. The court of appeal acknowledged that this
16 provision permits sharing of privileged information among codefendants, but
17 noted that there is “no real alignment of interests between the government and
18 persons or entities under investigation for securities law violations.”¹⁶² Rather, the
19 situation “is not qualitatively different than a defendant sharing privileged material
20 with one plaintiff, but not another.”¹⁶³ The company had thus waived the privilege,
21 because no one even suggested that “a defendant facing multiple plaintiffs should
22 be able to disclose privileged materials to one plaintiff without waiving the
23 attorney-client privilege as to the other plaintiffs.”¹⁶⁴

24 Further, in the context of the work product privilege, the SEC urged the court “to
25 adopt the ‘selective waiver’ theory, under which a client could disclose a
26 privileged or protected communication to the government, while continuing to
27 assert it against other parties.”¹⁶⁵ The court of appeal declined, explaining that
28 such a policy decision should be made by the Legislature, not the courts.¹⁶⁶ A
29 petition for review is pending before the California Supreme Court.

30 Like the California courts, federal courts are divided on the issue of selective
31 waiver.¹⁶⁷ Some decisions hold that a selective disclosure of privileged

disclosure was induced by erroneous action of the trial court, a circumstance that the Ninth Circuit used to distinguish the case. *Feldman*, 322 at 668.

161. 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (2004), *petition for review filed*, No. S123727 (April 1, 2004).

162. *Id.* at 1238.

163. *Id.*

164. *Id.*

165. *Id.* at 1240.

166. *Id.* at 1241.

167. There has also been extensive scholarly debate about selective disclosure. *See, e.g.*, Symchych, *supra* note 155; Pinto, *Cooperation and Self-Interest are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation*, 106 W. Va. L. Rev. 359 (2004).

1 information in confidence does not waive the applicable privilege.¹⁶⁸ Of the
2 federal circuit courts that have considered whether a privilege holder can
3 selectively waive the privilege, however, a majority have rejected such claims.¹⁶⁹

4 As a matter of policy, there may be some benefits to permitting a privilege
5 holder to selectively disclose privileged information without waiver of the
6 privilege.¹⁷⁰ In particular, permitting such a disclosure to a governmental entity
7 conducting an investigation may further the goals of the investigation.¹⁷¹ It may
8 also encourage practices such as hiring independent outside counsel to investigate

168. See, e.g., *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (government’s selective disclosure of tapes was not harmful to persons seeking access to them and did not result in waiver of law enforcement investigatory privilege, even though government did not obtain confidentiality agreement before making disclosure); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (party does not waive attorney-client privilege by nonpublic disclosure of privileged material to government).

169. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 302 (9th Cir. 2002) (“we reject the concept of selective waiver, in any of its various forms”), *cert. dismissed sub nom. HCA, Inc. v. Tennessee Laborers Health & Welfare Fund*, 124 S. Ct. 27 (2002); *Genentech, Inc. v. United States International Trade Commission*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (waiver of attorney-client and work product privileges, which resulted from disclosure of documents in district court, was not limited to that forum but applied in other forums as well); *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 684-86 (1st Cir. 1997) (party who voluntarily disclosed documents to Department of Defense could not assert attorney-client privilege when IRS sought same documents); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1418, 1423-1427 (3d Cir. 1991) (by disclosing documents to Securities and Exchange Commission and Department of Justice, Westinghouse waived attorney-client and work-product privileges with respect to those documents, despite confidentiality agreements); *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988) (by disclosing privileged material to Department of Justice and Department of Defense, company waived attorney-client privilege and non-opinion work product privilege); *In re John Doe Corp.*, 675 F.2d 482, 488-89 (2d Cir. 1982) (disclosure of report prepared by company’s lawyers to counsel representing underwriter waived attorney-client privilege because company cannot invoke pick and choose theory of privilege); *Permian Corp. v. United States*, 665 F.2d 1214, 1220-22 (D.C. Cir. 1981) (by disclosing privileged information to Securities and Exchange Commission, corporation waived attorney-client privilege and thus could not assert that privilege in subsequent administrative litigation); see also *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993) (rejecting selective waiver of work product privilege on facts presented, but declining to resolve whether selective waiver is permissible when privilege holder enters into confidentiality agreement with person to whom privileged material is disclosed); *United States v. Billmyer*, 57 F.3d 31, 37 (1st Cir. 1995) (rejecting selective waiver of attorney-client privilege on facts presented, but declining to resolve whether selective waiver is permissible when information is disclosed in confidence to government).

170. It has been argued that the benefits of permitting selective disclosure without waiver are unrelated to the policies underlying the confidential communication privileges, and should thus be discounted. See, e.g., *Columbia/HCA Healthcare*, 293 F.3d at 302; *Permian*, 665 F.2d at 1220-21. The Commission disagrees with this perspective. In developing rules for whether a privilege is waived, the Legislature should consider any significant policy interest that may be affected, regardless of whether it is related to the purpose of the privilege. See generally *Columbia/HCA Healthcare*, 293 F.3d at 308 (Boggs, J., dissenting) (“It is not clear why an exception to the third-party waiver rule need be moored to the justifications of the attorney-client privilege.”).

As the court pointed out in *Massachusetts Institute of Technology*, however, it might be appropriate to discount the interest of a government agency in obtaining voluntary disclosures, because “such agencies usually have means to secure the information they need and, if not, can seek legislation from Congress.” 129 F.3d at 685; see also *Westinghouse*, 951 F.2d at 1426. “By contrast, the safeguarding of the attorney-client relationship has largely been left to the courts, which have a comparative advantage in assessing consequences in this sphere.” *Massachusetts Institute of Technology*, 129 F.3d at 685.

171. See, e.g., *Columbia/HCA Healthcare*, 293 F.3d at 303.

1 and advise a corporation and thereby protect stockholders, potential stockholders,
2 and customers.¹⁷²

3 But condoning selective disclosure would also have downsides. There is a
4 danger of manipulation. If the approach were widely accepted, a privilege holder
5 might exploit it to unfair advantage, deliberately disclosing information to certain
6 entities, secure in the knowledge that others would not have access to the same
7 information.¹⁷³

8 There is also a potential line-drawing problem. It may be difficult for the courts
9 to develop coherent judicial doctrine defining when a privileged communication
10 can be selectively disclosed without waiving the privilege.¹⁷⁴

11 Further, the practice of encouraging a selective disclosure by offering an
12 incentive such as a reduced penalty tends to erode the applicable privilege and its
13 underlying policies.¹⁷⁵ Taken individually, a disclosure of privileged information
14 to a selected person or entity is less of an intrusion on the privileged relationship
15 than a disclosure of the same information to anyone who seeks it. Taken
16 collectively, however, numerous selective disclosures induced by incentives and
17 assurances of confidentiality may in fact be more burdensome on the policies
18 underlying the applicable privileges than a rule precluding selective waiver. It may
19 be better to force a privilege holder to choose between disclosing privileged
20 material to no one and disclosing such material to everyone.¹⁷⁶

21 The Commission suggests a compromise approach to selective disclosure. A
22 new subdivision would be added to Section 912, establishing a general rule that if
23 a privilege holder voluntarily and intentionally makes or authorizes a disclosure of
24 privileged information to one person, the holder could not continue to assert the
25 privilege as to other persons. Likewise, the new provision would make clear that if
26 a privilege holder voluntarily and intentionally makes or authorizes a disclosure on

172. *Diversified Industries*, 572 F.2d at 611; see also *Columbia/HCA Healthcare*, 293 F.3d at 303.

173. *Columbia/HCA Healthcare*, 293 F.3d at 302-03 (any form of selective waiver transforms lawyer-client privilege into merely another brush on lawyer's palette, used and manipulated to gain tactical or strategic advantage); *Permian*, 665 F.2d at 1221 (Client cannot be allowed to pick and choose among opponents, waiving the privilege as to some and resurrecting claim of confidentiality to obstruct others).

174. *Columbia/HCA Healthcare*, 293 F.3d at 303, 304; *Massachusetts Institute of Technology*, 129 F.3d at 685, 686; but see *Columbia/HCA Healthcare*, 293 F.3d at 312 (Boggs, J. dissenting) ("I am comfortable ... providing a clear exception for government investigations, and leaving private litigants out.").

175. See American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 Duq. L. Rev. 307 (2003).

176. As the court commented in *Steinhardt Partners*:

Petitioner alleges that a denial of the petition will present those in similar situations with a Hobson's choice between waiving work product protection through cooperation with investigatory authorities, or not cooperating with the authorities. Whether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative metaphoric cliché, the "Hobson's choice" argument is unpersuasive given the facts of this case. An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.

9 F.3d at 236.

1 one occasion (e.g., at a deposition), the holder could not continue to assert the
2 privilege on another occasion (e.g., at trial).¹⁷⁷

3 This general rule would, however, be overridden by any statute authorizing
4 selective disclosure, without waiver of the applicable privilege, in a specific
5 context. The existing exceptions to Section 912¹⁷⁸ are examples of such
6 provisions. A few other such provisions already exist.¹⁷⁹ The Legislature could
7 add more of these as it sees fit.

8 This would be a well-tailored approach, ensuring that selective disclosure is
9 permitted only in contexts where the Legislature has weighed the competing
10 policy considerations and determined that this treatment is appropriate. Codifying
11 the approach would bring clarity to an area of the law that is currently in a state of
12 confusion.]

13 **Types of Privileges Covered**

14 By its terms, Section 912 applies only to the confidential communication
15 privileges, not to other privileges such as the privilege against self-incrimination,
16 the trade secret privilege, the spousal testimony privilege, the secret vote privilege,
17 the official information privilege, or the privilege for the identity of an informer.
18 Further, the text of the provision treats all of the confidential communication
19 privileges the same way, rather than establishing different waiver standards for
20 different privileges.

21 The Commission believes this treatment is appropriate. The Commission
22 carefully explored what privileges to include in Section 912 when it originally
23 drafted the provision in the early 1960's.¹⁸⁰ The decision to exclude other
24 privileges was deliberate.

25 For example, the privilege against self-incrimination was excluded because
26 waiver of this privilege “is determined by the cases interpreting the pertinent
27 provisions of the California and United States Constitutions.”¹⁸¹ The trade secret
28 privilege was excluded because “a matter will cease to be a trade secret if the
29 secrecy of the information is not guarded.”¹⁸² The spousal testimony privilege,

177. See proposed Section 912(f) *infra*.

178. Section 912(b)-(d), which are discussed under “Exceptions” *supra*.

179. See Bus. & Prof. Code § 19828 (no waiver of privilege by providing information to gambling control authorities); Gov't Code § 13954 (person applying for compensation from California Victim Compensation and Government Claims Board does not waive privilege by making disclosure that Board deems necessary for verification of application).

180. See *Tentative Recommendation Relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 260 (1964) (hereafter “*Tentative Recommendation on Privileges*”); Chadbourn, *A Study Relating to the Privileges Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm'n Reports 301, 514-15 (1964); Commission Staff Memorandum 63-11, p. 2 & Exhibit I, pp. 3-4; First Supplement to Commission Staff Memorandum 63-11, p. 1 & Exhibit II, pp. 1-3.

181. Section 940 Comment; see also *Tentative Recommendation on Privileges*, *supra* note 180, at 260; Chadbourn, *supra* note 180, at 514-15; First Supplement to Commission Staff Memorandum 63-11 at Exhibit II, p. 1.

182. *Tentative Recommendation on Privileges*, *supra* note 180, at 260.

1 secret vote privilege, official information privilege, and privilege for the identity
2 of an informer were excluded because those privileges “contain their own waiver
3 provisions.”¹⁸³

4 In applying the various privileges and other provisions protecting confidential
5 information, courts have recognized that Section 912 was only meant to pertain to
6 the privileges enumerated in it.¹⁸⁴ In some instances, however, a court construing
7 another privilege may find this section useful by analogy.¹⁸⁵

8 The California Supreme Court has also made clear that the same waiver
9 principles apply to all of the privileges enumerated in Section 912. At one point,
10 the Court appeared to endorse a lower threshold for waiver of the psychotherapist-
11 patient privilege than for other privileges,¹⁸⁶ but the Court later clarified that this
12 was not the case.¹⁸⁷

13 The Commission is reluctant to disrupt this scheme, which seems to have
14 functioned well for many years. For purposes of clarification, however, the
15 Commission recommends adding language to Section 912 stating that the
16 provision is not intended to imply anything regarding waiver of privileges other
17 than the ones listed in it.¹⁸⁸ This would help to ensure that the proposed reforms
18 are not applied in an inappropriate context.¹⁸⁹

19 **The Right to Truth-in-Evidence**

20 The Truth-in-Evidence provision of the California Constitution states:

183. *Tentative Recommendation on Privileges*, *supra* note 180, at 260; *see also* Sections 972-973 (spousal testimony privilege); 1040-1042 (official information privilege and privilege for identity of informer); 1050 (secret vote privilege); First Supplement to Commission Staff Memorandum 63-11 at Exhibit II, p. 2-3.

184. For example, in *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351, 362-63, 134 Cal. Rptr. 2d 716, 719-20, 723-24 (2003), the court rejected the argument that Section 912 governed waiver of the confidentiality of mediation communications and materials. Similarly, in *University of Southern California v. Superior Court*, 45 Cal. App. 4th 1283, 1292, 53 Cal. Rptr. 2d 260 (1996), the court decided that “Section 912’s privilege waiver provisions ... do not apply to section 1157’s discovery exemption.” Likewise, in *City of Fresno v. Superior Court*, 205 Cal. App. 3d 1459, 1473, 253 Cal. Rptr. 296 (1988), the court determined that waiver of the privilege protecting the privacy of peace officer personnel records (Sections 1043-1047; Penal Code §§ 832.7-832.8) was governed by different rules than waiver of the privileges listed in Section 912.

185. *See* *Fortunato v. Superior Court*, 114 Cal. App. 4th 475, 480 n.3, 8 Cal. Rptr. 3d 82 (2003) (“Although the statutory privileges and their exceptions are not applicable to privacy claims or the tax-return privilege, they may provide analogous reasoning in the appropriate case.”); *Brown v. Superior Court*, 180 Cal. App. 3d 701, 711, 226 Cal. Rptr. 10 (1986) (court looks to Section 912 for guidance in the particular context before it, but acknowledges that waiver of privilege against self-incrimination is subject to constitutional constraints and Section 912 does not list that privilege).

186. *See* *People v. Clark*, 50 Cal. 3d 583, 620-21, 789 P.2d 127, 268 Cal. Rptr. 399 (1990).

187. *See* *Menendez v. Superior Court*, 3 Cal. 4th 435, 446-49, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992); *San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 1090-91, 105 Cal. Rptr. 2d 476 (2001).

188. *See* proposed Section 912(g) *infra*.

189. In conducting this study, the Commission has only analyzed the privileges enumerated in Section 912. At some point, the Commission may study the rules governing waiver of other privileges, if its resources permit.

1 (d) Except as provided by statute hereafter enacted by a two-thirds vote of the
2 membership in each house of the Legislature, relevant evidence shall not be
3 excluded in any criminal proceeding, including pretrial and post conviction
4 motions and hearings, or in any trial or hearing of a juvenile for a criminal
5 offense, whether heard in juvenile or adult court. *Nothing in this section shall*
6 *affect any existing statutory rule of evidence relating to privilege* or hearsay, or
7 Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any
8 existing statutory or constitutional right of the press.¹⁹⁰

9 It is important to consider whether the two-thirds vote requirement of the Truth-in-
10 Evidence provision would apply to the Commission’s proposed amendment of
11 Section 912.

12 The Commission does not believe that the two-thirds vote requirement applies.
13 By its terms, the Truth-in-Evidence provision had no impact on “any existing
14 statutory rule of evidence relating to privilege.” Section 912 is a rule of evidence
15 relating to privilege, and it was enacted long before the voters approved the Truth-
16 in-Evidence provision.¹⁹¹ Consequently, the constitutional exemption for “any
17 existing statutory rule of evidence relating to privilege” may be a sufficient basis
18 for finding the Commission’s proposal consistent with the right to Truth-in-
19 Evidence.¹⁹²

20 It is possible, however, that a court might consider the constitutional exemption
21 inapplicable, because it refers to any *existing* statutory rule of evidence relating to
22 privilege. A court could conclude that the exemption does not encompass a reform
23 proposed after enactment of the Truth-in-Evidence provision, even if the reform is
24 merely a modification of a privilege rule predating that provision.

25 If a court interprets the Truth-in-Evidence provision in that manner, the two-
26 thirds vote requirement still should not apply to the proposed amendment of
27 Section 912. The Truth-in-Evidence provision is only triggered by a reform that
28 narrows the admissibility of relevant evidence in a criminal case. The proposed
29 amendment would not do that.

30 Rather, the proposed codification of the subjective intent approach to inadvertent
31 disclosure would merely make express what a strong majority of courts have said
32 is already implicit in the statute.¹⁹³ The proposed new subdivision on partial
33 disclosure is likewise consistent with existing interpretations of the statute.¹⁹⁴ As
34 for the subdivision on selective disclosure, if a court views it as a change in the
35 law, it would be a change broadening the scope of privilege waiver by rejecting
36 the concept of selective waiver. The reform would thus expand rather than contract

190. Cal. Const. art. I, § 28(d) (emphasis added).

191. Section 912 was enacted in 1965. 1965 Cal. Stat. ch. 299, § 2. The Truth-in-Evidence provision was an initiative measure approved by the voters on June 8, 1982.

192. *See generally* Commission Staff Memorandum 2003-26, pp. 35-36.

193. *See* discussion under “Cases Interpreting California Law on Inadvertent Disclosure” *supra*.

194. *See* discussion under “Partial Disclosure” *supra*.

1 the admissibility of evidence, so it would not trigger the Truth-in-Evidence
2 supermajority vote requirement.

3 **Need for the Proposed Reforms**

4 The proposed codification of the subjective intent approach would provide clear
5 and readily accessible guidance to courts, litigants, and other persons dealing with
6 an inadvertent disclosure of a confidential communication protected by one of the
7 privileges specified in Section 912. Instead of having to research case law to
8 discover that only an intentional disclosure waives the privilege under the statute,
9 such persons would find that standard stated in the statutory text and the key cases
10 would be cited in the corresponding Comment.

11 It would not be necessary to engage in exhaustive research and analysis such as
12 the Commission has undertaken in preparing this report. The danger of
13 misinterpretation due to the anomalous new *Jasmine* decision,¹⁹⁵ other potentially
14 confusing case law,¹⁹⁶ and misleading commentary¹⁹⁷ would also be reduced.

15 Although document discovery in litigation is a context in which inadvertent
16 disclosure of a privileged communication typically occurs, such a disclosure can
17 readily result from use of new technologies such as email, fax, and voicemail.¹⁹⁸
18 Common situations in which the problem can arise include:

- 19 • A person accidentally directs a fax, email message, or voicemail to the
20 wrong recipient.
- 21 • A person forgets to hang up the phone after a phonecall is completed, then
22 has a conversation that is overheard or recorded at the other end of the line.
- 23 • A person forwards an email message, not realizing that a confidential
24 communication is attached.
- 25 • A person “deletes” a computer file or “erases” a tape, not realizing that the
26 material in question is recoverable.

195. See discussion under “New Court of Appeal Decision on Inadvertent Disclosure” *supra*.

196. See discussion under “Potential Sources of Confusion” *supra*.

197. *Id.*

198. As a recent article explains:

While the inadvertent production of privileged or protected documents has always been a concern for legal practitioners, the increasing frequency and volume of digital exchanges has made it a more pressing issue. Why? Because it often is difficult to discern exactly what is contained in an electronic file or on a storage device, privileged documents may end up in the hands of opposing counsel despite reasonable steps and protocols constructed to prevent such an event. This problem is related not only to the inadvertent inclusion of a document that should not appear, but also to the failure to remove metadata and comments from documents in native formats (such as the “date created” and “last modified dates” associated with most files). In addition, what appears to be a blank tape or disk may instead contain reams of “deleted” documents that are recoverable with the help of special programs and skills.

Redgrave & Nimsgar, *Electronic Discovery and Inadvertent Productions of Privileged Documents*, 49 Fed. Lawyer 37, 37 (2002).

- 1 • A person unintentionally stores an email message containing a confidential
2 communication in a manner in which a third party can obtain access.¹⁹⁹

3 The frequency of such situations highlights the need for the guidance that the
4 proposed amendment would provide.²⁰⁰

5 The proposed reforms relating to partial disclosure and selective disclosure
6 would also help prevent confusion in determining whether a privilege has been
7 waived. The Legislature could forestall numerous disputes and save both litigant
8 and judicial resources by stating the applicable rules in the text of the statute as
9 proposed.

199. See *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*, 117 Cal. App. 4th 794, 12 Cal. Rptr. 3d 123 (2004); Formanek, *Giving Legal Advice Via E-Mail May Result in Loss of Privilege*, San Francisco Daily J. 5 (Sept. 12, 2003); M. Overly, *Overly on Electronic Evidence in California Discovery of Electronic Evidence* § 5.2 (2003 ed.); Dodge, *Honoring Confidentiality When Communications Take a Wrong Turn*, 37 Ariz. Att’y 14 (Feb. 2001); Bruckner-Harvey, *supra* note 38, at 385.

Google is offering a free new email service, which electronically scans a message and generates a pop-up ad relating to the content of the message. Editorial, *If Google ogles your e-mail, will Ashcroft be far behind?*, S. Jose Mercury News (April 15, 2004). This might be another way in which unintended disclosure of a privileged communication occurs. For example, it might be possible to deduce the content of a message, at least in part, by the content of the pop-up ad.

200. Another context in which a privileged communication might be disclosed is when an employer monitors employee email, which is a common business practice. See, e.g., Adams, Scheuing & Feeley, *E-Mail Monitoring in the Workplace: The Good, the Bad and the Ugly*, 67 Def. Couns. J. 32, 32 (2000); DiLuzio, *Workplace E-Mail: It’s Not as Private as You Might Think*, 25 Del. J. Corp. L. 741, 743 (2000); McIntosh, *E-Monitoring@Workplace.com: The Future of Communication Privacy in the Minnesota Private-Sector Workplace*, 23 Hamline L. Rev. 539, 543 n.11 (2000). The circumstances of such monitoring may differ significantly from one instance to another. In particular, notice of monitoring may vary greatly in content, timing, and format, and it may provoke different reactions. An employee might not read a notice, or might not be notified of monitoring at all. Where an employee sends or receives an otherwise privileged email message at work, the proposed legislation would direct a court to focus on the holder’s intent regarding disclosure in determining whether the privilege was waived due to employer monitoring. Evidence that the holder was notified of monitoring in advance, and evidence of the nature of such notice, bears on the holder’s intent.

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 2028 (amended). Deposition by written questions**

2 SECTION 1. Section 2028 of the Code of Civil Procedure is amended to read:

3 2028. (a) Any party may obtain discovery by taking a deposition by written
4 questions instead of by oral examination. Except as modified in this section, the
5 procedures for taking oral depositions set forth in Sections 2025, 2026, and 2027
6 apply to written depositions.

7 (b) The notice of a written deposition shall comply with subdivision (d) of
8 Section 2025, except that (1) the name or descriptive title, as well as the address,
9 of the deposition officer shall be stated, and (2) the date, time, and place for
10 commencement of the deposition may be left to future determination by the
11 deposition officer.

12 (c) The questions to be propounded to the deponent by direct examination shall
13 accompany the notice of a written deposition.

14 Within 30 days after the deposition notice and questions are served, a party shall
15 serve any cross questions on all other parties entitled to notice of the deposition.

16 Within 15 days after being served with cross questions, a party shall serve any
17 redirect questions on all other parties entitled to notice of the deposition.

18 Within 15 days after being served with redirect questions, a party shall serve any
19 recross questions on all other parties entitled to notice of the deposition.

20 The court may, for good cause shown, extend or shorten the time periods for the
21 interchange of cross, redirect, and recross questions.

22 (d) (1) A party who objects to the form of any question shall serve a specific
23 objection to that question on all parties entitled to notice of the deposition within
24 15 days after service of the question. A party who fails to timely serve an objection
25 to the form of a question waives it. The objecting party shall promptly move the
26 court to sustain the objection. This motion shall be accompanied by a declaration
27 stating facts showing a reasonable and good faith attempt at an informal resolution
28 of each issue presented by the objection and motion. Unless the court has
29 sustained that objection, the deposition officer shall propound to the deponent that
30 question subject to that objection as to its form.

31 The court shall impose a monetary sanction under Section 2023 against any
32 party, person, or attorney who unsuccessfully makes or opposes a motion to
33 sustain an objection, unless it finds that the one subject to the sanction acted with
34 substantial justification or that other circumstances make the imposition of the
35 sanction unjust.

36 (2) A party who objects to any question on the ground that it calls for
37 information that is privileged or is protected work product under Section 2018
38 shall serve a specific objection to that question on all parties entitled to notice of
39 the deposition within 15 days after service of the question. A party who fails to
40 timely serve that objection waives it. The court, on motion, may relieve that party

1 from this waiver on its determination that the party has subsequently served an
2 objection that is in substantial compliance with this paragraph and that the party's
3 failure to serve a timely objection was the result of mistake, inadvertence, or
4 excusable neglect.

5 The party propounding any question to which an objection is made on those
6 grounds of privilege or work product may then move the court for an order
7 overruling that objection. This motion shall be accompanied by a declaration
8 stating facts constituting a reasonable and good faith attempt at an informal
9 resolution of each issue presented by the objection and motion. The deposition
10 officer shall not propound to the deponent any question to which a written
11 objection on those grounds has been served unless the court has overruled that
12 objection.

13 The court shall impose a monetary sanction under Section 2023 against any
14 party, person, or attorney who unsuccessfully makes or opposes a motion to
15 overrule an objection, unless it finds that the one subject to the sanction acted with
16 substantial justification or that other circumstances make the imposition of the
17 sanction unjust.

18 (e) The party taking a written deposition may forward to the deponent a copy of
19 the questions on direct examination for study prior to the deposition. No party or
20 attorney shall permit the deponent to preview the form or the substance of any
21 cross, redirect, or recross questions.

22 (f) In addition to any appropriate order listed in subdivision (i) of Section 2025,
23 the court may order any of the following:

24 (1) That the deponent's testimony be taken by oral, instead of written,
25 examination.

26 (2) That one or more of the parties receiving notice of the written deposition be
27 permitted to attend in person or by attorney and to propound questions to the
28 deponent by oral examination.

29 (3) That objections under subdivision (d) be sustained or overruled.

30 (4) That the deposition be taken before an officer other than the one named or
31 described in the deposition notice.

32 (g) The party taking the deposition shall deliver to the officer designated in the
33 deposition notice a copy of that notice and of all questions served under
34 subdivision (c). The deposition officer shall proceed promptly to propound the
35 questions and to take and record the testimony of the deponent in response to the
36 questions.

37 **Comment.** Subdivision (d)(2) of Section 2028 is amended to follow the same approach to
38 waiver that is used for other forms of written discovery. See Sections 2030(k) (written
39 interrogatories), 2031(l) (inspection demand), 2033(k) (requests for admission).

40 ☞ **Staff Note.** Assembly Bill 3081 (Assem. Judic. Comm.) would implement the Commission's
41 recommendation on nonsubstantive reorganization of the Civil Discovery Act. *Civil Discovery:*
42 *Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003). If that bill is enacted,
43 the Commission will need to adjust the proposed amendment of Section 2028 accordingly.

1 Similar revisions should also be made in the preliminary part (narrative portion) of the
2 Commission's proposal.

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

4 SEC. 2. Section 912 of the Evidence Code is amended to read:

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

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

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

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

35 (e) If the holder of a privilege makes or consents to disclosure of a significant
36 part of a confidential communication under the circumstances specified in
37 subdivision (a), the court may order disclosure of another part of the
38 communication or a related communication, but only to the extent necessary to
39 prevent unfairness from partial disclosure.

40 [(f) Except as otherwise provided by statute, disclosure to one person on one
41 occasion under the circumstances specified in subdivision (a) waives the privilege
42 as to all persons and all occasions.]

1 (g) This section applies only to the privileges identified in subdivision (a). It
2 implies nothing regarding waiver of any other privilege.

3 **Comment.** Subdivision (a) of Section 912 is amended to make clear that disclosure of a
4 communication protected by one of the specified privileges waives the privilege only when the
5 holder of the privilege intentionally makes the disclosure or intentionally permits another person
6 to make the disclosure. This codifies the majority view in case law applying the provision to an
7 inadvertent disclosure. *See* State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654,
8 82 Cal. Rptr. 2d 799 (1999) (Waiver “does not include accidental, inadvertent disclosure of
9 privileged information by the attorney.”); O’Mary v. Mitsubishi Electronics America, Inc., 59
10 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997) (“Inadvertent disclosure during discovery by
11 no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the
12 poor paralegal or junior associate who was lumbered with the tedious job of going through
13 voluminous files and records in preparation for a document production may have missed
14 something.”); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984) (“As in
15 other privileges for confidential communications, the physician-patient privilege precludes a court
16 disclosure of a communication, even though there has been an accidental or unauthorized out-of-
17 court disclosure of such communication”) (dictum); *see also* KL Group v. Case, Kay & Lynch,
18 829 F.2d 909, 919 (9th Cir. 1987) (under either Hawaii or California law, client did not waive
19 attorney-client privilege by counsel’s inadvertent production of letter); Federal Deposit Ins. Corp.
20 v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000) (under California law, “waiver of
21 the attorney-client privilege depends entirely on whether the client provided knowing and
22 voluntary consent to the disclosure.”); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp.
23 1403, 1410-11 (S.D. Cal. 1994) (California appears to follow subjective approach to waiver by a
24 privilege holder, under which “the client’s intent to disclose is controlling.”) (dictum). It
25 disapproves two contrary discussions that were not necessary to the decisions reached. *See*
26 Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., 117 Cal. App. 4th 794, ___, 12 Cal. Rptr.
27 3d 123 (2004) (“[I]ntent to disclose is not required in order for the holder to waive the privilege
28 through uncoerced disclosure.”) (alternate basis for decision); People v. Von Villas, 11 Cal. App.
29 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992) (marital privilege was waived when husband and wife
30 “knew or reasonably should have known” that their conversation was being overheard) (one of
31 three alternate bases for decision).

32 Subdivision (e) addresses partial disclosure (i.e., disclosure of a portion of a privileged
33 communication or set of communications). It is added to make clear that when the holder of a
34 specified privilege voluntarily and intentionally discloses or permits another person to disclose a
35 significant portion of a privileged communication, and subdivisions (b)-(d) are inapplicable, a
36 court may require additional disclosure in the interest of fairness, even though the privilege holder
37 did not intend to permit such additional disclosure. This codifies case law. *See* People v.
38 Worthington, 38 Cal. App. 3d 359, 365-66, 114 Cal. Rptr. 322 (1974) (when defendant disclosed
39 marital communication in which his wife supposedly described and confessed to murder, he could
40 not preclude wife from testifying that conversation did occur but he confessed not she); Kerns
41 Construction Co. v. Superior Court, 266 Cal. App. 2d 405, 413-14, 72 Cal. Rptr. 74 (1968) (“It
42 would be unconscionable to allow a rule of evidence that a witness can testify to material
43 contained in a report, though not verbatim, and then prevent a disclosure of the reports.”).

44 Even when a privilege holder voluntarily and intentionally makes or authorizes a significant
45 disclosure, however, the privilege is not necessarily waived as to all of the communications
46 between the persons in the privileged relationship. Although the scope of the waiver may be
47 broader than what the privilege holder intends, the waiver is only as broad as fairness requires.
48 *See* People v. Superior Court, 231 Cal. App. 3d 584, 589-91, 282 Cal. Rptr. 418 (1991) (trial
49 court erred in finding general waiver of psychotherapist-patient privilege); Travelers Ins. Cos. v.
50 Superior Court, 143 Cal. App. 3d 436, 445, 191 Cal. Rptr. 871 (1983) (inadvertent disclosure of
51 two attorney-client letters did not waive privilege as to other items and privilege was not claimed
52 as to disclosed letters); Jones v. Superior Court, 119 Cal. App. 3d 534, 547, 174 Cal. Rptr. 148

1 (1981) (patient’s disclosure that she ingested DES while pregnant did not waive physician-patient
2 privilege as to her full medical history).

3 [Subdivision (f) addresses selective disclosure (i.e., disclosure of a privileged communication
4 to one person or on one occasion, while seeking to preclude disclosure to other persons or on
5 other occasions). It is added to make clear that unless otherwise provided by statute (e.g., by
6 subdivision (b), (c), or (d)), if a privilege holder voluntarily and intentionally makes or authorizes
7 a disclosure to one person, the holder may not continue to assert the privilege as to other persons.
8 Likewise, unless otherwise provided by statute, if a privilege holder voluntarily and intentionally
9 makes or authorizes a disclosure on one occasion (e.g., at a deposition), the holder may not
10 continue to assert the privilege on another occasion (e.g., at trial). This codifies the results in
11 *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (2004)
12 (company under investigation waived attorney-client privilege by disclosing audit report to SEC
13 and United States Attorney, despite confidentiality agreement purporting to preclude disclosure to
14 other persons), *petition for review filed*, No. S123727 (April 1, 2004), and *Feldman v. Allstate*
15 *Ins. Co.*, 322 F.3d 660, 668-69 (9th Cir. 2003) (under California law, litigant could not
16 voluntarily disclose confidential marital communications at deposition and still invoke marital
17 communication privilege at trial). It disapproves the contrary result in *San Diego Trolley, Inc. v.*
18 *Superior Court*, 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (2001) (disclosure of confidential
19 psychotherapist-patient communications to persons handling patient’s claim for workers’
20 compensation did not waive psychotherapist-patient privilege for purposes of personal injury case
21 against patient). For an example of a provision that permits selective disclosure of a privileged
22 communication without waiver of the privilege, see Bus. & Prof. Code § 19828 (no waiver of
23 privilege by providing information to gambling control authorities); see also Gov’t Code § 13954
24 (person applying for compensation from California Victim Compensation and Government
25 Claims Board does not waive privilege by making disclosure that Board deems necessary for
26 verification of application).]

27 Subdivision (g) is added to underscore that this section only sets forth rules pertaining to
28 waiver of the privileges listed in subdivision (a); it does not specify what rules apply to waiver of
29 any other privilege. In some instances, a court construing another privilege may find this section
30 useful by analogy. *See, e.g.*, *Fortunato v. Superior Court*, 114 Cal. App. 4th 475, 480 n.3, 8 Cal.
31 Rptr. 3d 82 (2003) (“Although the statutory privileges and their exceptions are not applicable to
32 privacy claims or the tax-return privilege, they may provide analogous reasoning in the
33 appropriate case.”). But different policy considerations apply to different privileges and
34 confidentiality protections, sometimes necessitating different rules regarding waiver. *See, e.g.*,
35 *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351, 357, 362-63, 134 Cal. Rptr. 2d 716 (2003)
36 (Section 912 does not govern waiver of mediation confidentiality); Section 940 Comment (waiver
37 of privilege against self-incrimination “is determined by the cases interpreting the pertinent
38 provisions of the California and United States Constitutions”); Section 973 & Comment (waiver
39 of spousal testimony privilege); *Tentative Recommendation Relating to the Uniform Rules of*
40 *Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm’n Reports 201, 260 (1964); *Chadborn,*
41 *A Study Relating to the Privileges Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision
42 Comm’n Reports 301, 514-15 (1964).

43 ➡ **Staff Note.** Two bills to amend Section 912 are pending. Senate Bill 1473 (Soto) would create
44 a new evidentiary privilege for confidential communications between an employee and an
45 employee assistance professional, and would amend Section 912 to cover that privilege.
46 Assembly Bill 1796 (Pub. Safety Comm.) would change the terminology for referring to the
47 sexual assault victim-counselor privilege and domestic violence victim-counselor privilege. If
48 either or both of these bills are enacted, the Commission will need to adjust the proposed
49 amendment of Section 912 accordingly.