

First Supplement to Memorandum 2004-43

**Waiver of Privilege By Disclosure (Further Comments of Marvell
Semiconductor, Inc.)**

Attached are additional comments of Marvell Semiconductor, Inc., regarding the draft recommendation on *Waiver of Privilege By Disclosure*. Marvell reports that it is unclear whether and when the California Supreme Court will issue a decision addressing the standard for waiver of the evidentiary privileges specified in Evidence Code Section 912. According to Marvell, “[t]he delay and uncertainty as to whether the California Supreme Court will provide guidance argues strongly in favor of proceeding with the Law Revision Commission’s proposed revisions codifying the ‘subjective intent’ standard of waiver.” Exhibit p. 1.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

FURTHER COMMENTS OF MARVELL SEMICONDUCTOR, INC.

From: Mack, Pete <PMACK@Buchalter.com>
To: <bgaal@clrc.ca.gov>
Subject: Waiver of Privilege by Disclosure - Draft Recommendation
Date: Wed, 15 Sep 2004

Dear Ms. Gaal:

Thank you for your response to the comments of Marvell Semiconductor, Inc. ("Marvell") with respect to Law Revision Commission's Draft Recommendation on Waiver of Privilege by Disclosure. We will plan to attend the Law Revision Commission's public meeting on September 17, 2004, at which the matter will be discussed.

With respect to the status of the California Supreme Court's ruling on the Rico and Jasmine cases, as you know, briefing in Jasmine has been deferred pending a decision in Rico. In Rico, respondent Mitsubishi Motors Corp. recently substituted new appellate counsel. As a result, Mitsubishi requested an extension of time to file its answer brief on the merits until November 1, 2004. The California Supreme Court web site indicates that this request was granted today.

In light of this delay, it will quite be some time before the Court renders a decision in Rico. Oral argument has not yet been scheduled. It is further unclear whether the Court's decision in Rico will provide guidance as to the standards for determining whether the Evidence Code Section 912 privileges have been waived. As noted in the Law Revision Commission's Memorandum 2004-43, the Court of Appeal in Rico held that the document in question was not protected by the attorney-client privilege, but rather by the work product doctrine. 116 Cal. App. 4th at 59, 65.

Thus, while the question of waiver of the Evidence Code Section 912 privileges is squarely presented by the Petition for Review in Jasmine, it is unclear when, or if, a decision of the California Supreme Court will be rendered thereon. It is possible that the Court will not reach the issue, and will instead remand the case with instructions to reconsider the Court of Appeal's decision in light of Rico.

The delay and uncertainty as to whether the California Supreme Court will provide guidance argues strongly in favor of proceeding with the Law Revision Commission's proposed revisions codifying the "subjective intent" standard of waiver. As pointed out in Marvell's initial comments, there is a clear need for certainty regarding the effect of inadvertent disclosures of privileged information. The current text of Evidence Code §

912 leaves room for confusion and anomalous decisions, of which Jasmine is a prime example. As Professor Slomanson points out in his comment, absent a clear statutory standard it is not hard to foresee that other courts may “explore new and unintended legislative interstices.”

Marvell therefore urges that the Commission proceed with the proposed revisions of Section 912 to codifying the “subjective intent” standard.

Thank you for your consideration of our comments.

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