Study K-301 October 14, 2004

Memorandum 2004-54

Waiver of Privilege By Disclosure (Draft of Recommendation)

Attached for the Commission's review and possible final approval is a new draft of the proposal on *Waiver of Privilege By Disclosure*. This draft incorporates the decisions that the Commission made at the September meeting. The issue before the Commission is whether to approve the attached draft as a final recommendation (as is or with revisions), for printing and submission to the Legislature. We encourage interested parties to submit any further comments they have on this matter at their earliest convenience, and to share their views at the upcoming Commission meeting, which is currently scheduled for November 19, 2004, in Burbank. We especially encourage comments on the burden of proof issue discussed below.

DIFFERENCES BETWEEN THIS DRAFT AND THE PREVIOUS DRAFT

The attached draft differs from the previous draft in the following significant respects:

- The discussion of *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*, No. S124914 (review granted July 21, 2004), has been substantially revised to reflect the current status of the case and to more accurately describe the court of appeal's ruling on the crime-fraud exception to the attorney-client privilege. See pages 19-21.
- The attached draft reflects the enactment of the Commission's nonsubstantive reorganization of the civil discovery provisions (AB 3081 (Assembly Committee on Judiciary), 2004 Cal. Stat. ch. 182). See in particular pages 26-29 and the proposed amendment of Code of Civil Procedure Section 2028.050.
- The attached draft reflects a recent amendment of Evidence Code Section 912, which will become operative on January 1, 2005. See SB 1796 (Committee on Public Safety), 2004 Cal. Stat. ch. 405, § 1. This amendment simply changed the terminology for referring to two of the privileges listed in Section 912.
- As directed by the Commission, the attached draft incorporates a drafting suggestion made by the State Bar Committee on Administration of Justice, relating to the proposed new provision

on partial disclosure of a privileged communication (proposed Section 912(e)).

- As directed by the Commission, the attached draft does not include a proposed provision on selective disclosure of a privileged communication. Pages 31-33 discuss selective disclosure and explain that it would be premature to propose legislation on the topic.
- The staff also made various other minor revisions to improve the draft.

BURDEN OF PROOF

As discussed at the September meeting, when a party requests production of or testimony regarding a privileged communication, the party resisting that request bears the initial burden of showing that the communication was made in confidence in the course of a privileged relationship and thus is protected by the privilege. *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 196 F.R.D. 375, 380 (S.D. Cal. 2000); *State Farm Fire & Casualty Co. v. Superior Court*, 54 Cal. App. 4th 625, 639, 62 Cal. Rptr. 2d 834 (1997); Méndez, *California Evidence Code — Federal Rules of Evidence, III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003, 1016 (2003). In meeting that burden, the party can invoke the statutory presumption that a communication between persons in a relationship covered by Evidence Code Section 912 was made in confidence. Evid. Code § 917; *National Steel Products Co. v. Superior Court*, 164 Cal. App. 3d 476, 483, 210 Cal. Rptr. 535 (1985).

"Once the party asserting the privilege makes this initial showing, the burden shifts to the party opposing the privilege to show either that the information was not confidential or that it falls within an exception." *Federal Deposit Ins. Corp.*, 196 F.R.D. at 380; Evid. Code § 405 Comment. Thus, when a party seeks production of or testimony regarding privileged evidence on the ground that the privilege was waived, that party bears the burden of establishing that waiver occurred. *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 894, 9 Cal. Rptr. 3d 621 (2004); *Wellpoint Health Networks v. Superior Court*, 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844, 852-53 (1997); *People v. Superior Court (Broderick)*, 231 Cal. App. 3d 584, 591, 282 Cal. Rptr. 418 (1991). This preliminary fact issue is to be resolved by the court under Evidence Code Section 405(a), using a preponderance of the evidence standard. *See* Evid. Code § 405 Comment;

Méndez, *supra*, at 1019-20; *see also* Evid. Code § 115 (except as otherwise provided by law, burden of proof requires proof by preponderance of evidence).

A concern raised by the Consumer Attorneys of California ("CAOC") and the State Bar Litigation Section with regard to the proposed codification of the subjective intent approach is that the burden of proving that a disclosure was intentional is too difficult to meet. See Memorandum 2004-43, pp. 8-10 (available at www.clrc.ca.gov). This point was discussed at the September meeting and is addressed at page 9 of the attached draft, which states:

> Another criticism of the subjective intent approach is that the burden of proving intent is too hard to meet. Whether one agrees with this criticism largely depends on how much value one places on the policies underlying the confidential communication privileges. It is clear, however, that the burden of providing another person's subjective intent is not insurmountable. Prosecutors routinely prove the defendant's subjective intent beyond a reasonable doubt in criminal cases. It is similarly feasible for a party in a civil or criminal case to prove another person's intent to disclose a privileged document (e.g., by showing that the holder of the privilege sent the document to a third party together with a cover letter referring to the contents of the document). That is particularly evident because such intent must only be proved by a preponderance of the evidence.

(Footnotes omitted.)

After the September meeting, it occurred to the staff that a possible means of meeting the expressed concerns regarding proof of subjective intent would be to establish a rebuttable presumption that the disclosure of a privileged communication was intentional. On initial consideration, we believe that this idea is worth pursuing. **It could be implemented 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~~ clergy member), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim 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. An uncoerced disclosure of a communication protected by a privilege listed in this subdivision is presumed to have been intentionally made or intentionally permitted by the holder of the privilege. This is a rebuttable presumption affecting the burden of proof.

....

Comment. Subdivision (a) of Section 912 is amended 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 intentionally makes the disclosure or intentionally permits another person to make the disclosure. This codifies the majority view in case law applying the provision to an inadvertent disclosure. *See* State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999) (Waiver "does not include accidental, inadvertent disclosure of privileged information by the attorney."); O'Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997) ("Inadvertent disclosure during discovery by no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something."); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984) ("As in other privileges for confidential communications, the physician-patient privilege precludes a court disclosure of a communication, even though there has been an accidental or unauthorized out-of-court disclosure of such communication") (dictum); *see also* KL Group v. Case, Kay & Lynch, 829 F.2d 909, 919 (9th Cir. 1987) (under either Hawaii or California law, client did not waive attorney-client privilege by counsel's inadvertent production of letter); Federal Deposit Ins. Corp. v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000) (under California law, "waiver of the attorney-client privilege depends entirely on whether the client provided knowing and voluntary consent to the disclosure."); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994) (California appears to follow subjective approach to waiver by a privilege holder, under which "the client's intent to disclose is controlling.") (dictum). It disapproves what could be construed as contrary dictum in *People v. Von Villas*, 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992) (marital privilege was waived when husband and wife "knew or reasonably should have known" that their conversation was being overheard) (one of three alternate bases for decision).

Subdivision (a) is also amended to clarify the burden of proof regarding intent to disclose a privileged communication. When a party requests production of or testimony regarding a privileged communication, the party resisting that request bears the initial burden of showing that the communication was made in confidence in the course of a privileged relationship and thus is protected by the privilege. Federal Deposit Ins. Corp. v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000); State Farm Fire & Casualty Co. v. Superior Court, 54 Cal. App. 4th 625, 639, 62 Cal. Rptr. 2d 834 (1997); Méndez, *California Evidence Code — Federal Rules of Evidence, III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003, 1016 (2003). In meeting that burden, the party can invoke the statutory presumption that a communication between persons in a relationship covered by this section was made in confidence. Section 917; National Steel Products Co. v. Superior Court, 164 Cal. App. 3d 476, 483, 210 Cal. Rptr. 535 (1985).

Once the party asserting the privilege makes this initial showing, the burden shifts to the other party to show either that the information was not confidential or that it falls within an exception. *Federal Deposit Ins. Corp.*, 196 F.R.D. at 380; Section 405 Comment. Thus, when a party seeks production of or testimony regarding privileged evidence on the ground that the privilege was waived by disclosure, that party bears the burden of establishing that waiver occurred. Oxy Resources California LLC v. Superior Court, 115 Cal. App. 4th 874, 894, 9 Cal. Rptr. 3d 621 (2004); Wellpoint Health Networks v. Superior Court, 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844, 852-53 (1997); People v. Superior Court (Broderick), 231 Cal. App. 3d 584, 591, 282 Cal. Rptr. 418 (1991).

Under subdivision (a) as amended, however, when a party shows that a privileged communication was voluntarily disclosed to a third party, it is rebuttably presumed that the holder of the privilege intentionally made or intentionally permitted another person to make the disclosure. The burden then shifts back to the party asserting the privilege to show that the disclosure was not intentional. See Sections 601 (classification of presumptions) & 605 (presumption affecting burden of proof) & Comments; see also Section 665 (person is rebuttably presumed to intend ordinary consequences of voluntary act).

Subdivision (a) is ~~also~~ further amended to conform to the terminology used in Section 1034 (privilege of clergy member).

....

Revising the proposal in this manner would have a number of advantages. First, it might help to alleviate some of the concerns raised and reduce the

amount and intensity of opposition to the Commission's proposal. It would be helpful to hear what CAOC, the State Bar Litigation Section, and other interested parties think of the approach.

Second, the proposed new presumption may promote basic notions of fairness, because the holder of a privilege generally is better-situated than anyone else to present evidence regarding the holder's own intent. In allocating a burden of proof, fairness and sound public policy are the guiding principles, and among the relevant factors are the knowledge of the parties concerning the particular fact and the availability of the evidence to the parties. Evid. Code § 500 Comment. Both of these factors weigh in favor placing the burden on the holder of a privilege to establish that disclosure of a privileged communication was unintentional. Other relevant factors are "the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact." Evid. Code § 500 Comment. It is less clear how these factors apply to proof of the holder's intent in disclosing or permitting another person to disclose a privileged communication. It is debatable what result (waiver or no waiver) is the best policy when there is no evidence regarding the holder's intent, as when the holder is dead. Similarly, which situation is most probable (intentional or unintentional disclosure) is likely to vary depending on the particular facts of a case. Because these factors provide little guidance and the other factors point in favor of the proposed new presumption, it may be both fair and reasonable to establish that presumption.

It is possible, however, that the proposed new presumption would generate new concerns from parties satisfied with the Commission's proposal in its current form. To some extent such concerns would be unwarranted, because Evidence Code Section 665 already establishes a rebuttable presumption that a person "is presumed to intend the ordinary consequences of his voluntary act." Like the proposed new presumption, this is a presumption affecting the burden of proof. See Section 660. In other words, it is a presumption "established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others." Section 605.

In contrast, a presumption affecting the burden of producing evidence is "a presumption established to implement no public policy other than to facilitate

the determination of the particular action in which the presumption is applied." Section 603. "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." Section 604.

The staff considered the possibility of classifying the proposed new presumption as a presumption affecting the burden of producing evidence, instead of as a presumption affecting the burden of proof. We rejected that approach, however, because the existing presumption that a person intended the ordinary consequences of a voluntary act (Section 665) is classified as a presumption affecting the burden of proof. With regard to a disclosure by the holder of the privilege (as opposed to a disclosure by another person), the proposed new presumption amounts to a restatement of that presumption in the specific context of a voluntary disclosure of a privileged communication. It would thus be inconsistent to classify the proposed new presumption differently than the existing presumption under Section 665.

Respectfully submitted,

Barbara Gaal
Staff Counsel

#K-301

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft
RECOMMENDATION

Waiver of Privilege By Disclosure

November 2004

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

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.
- Revise the provision governing waiver of a privilege in a deposition by written questions (Code Civ. Proc. § 2028.050) 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.

Contents

WAIVER OF PRIVILEGE BY DISCLOSURE 1
Section 912 1
Scope 3
General Rule 4
Exceptions 5
Waiver By Putting a Matter in Issue 5
Approaches to Inadvertent Disclosure 6
Strict Liability for Disclosure 6
Subjective Intent of the Holder 7
Multifactor Balancing Test 9
Cases Interpreting California Law on Inadvertent Disclosure 10
Court of Appeal Decisions on Inadvertent Disclosure 11
Federal Decisions Interpreting California Law on Inadvertent Disclosure 12
California Decisions That Support Use of the Subjective Intent Approach But Do Not Squarely Resolve the Effect of an Inadvertent Disclosure 14
Potential Sources of Confusion 15
The *Jasmine* Case 19
Proposed Approach to Inadvertent Disclosure 21
Codification of the Subjective Intent Approach 21
Intent to Disclose Versus Intent to Waive the Privilege 24
Failure to Object at Trial 25
Coordination of the Proposed Approach With Civil Discovery Provisions 26
Nonexclusivity of Section 912 26
Privilege Waiver Under the Civil Discovery Provisions 27
Privilege Waiver in a Deposition by Written Questions 28
Partial Disclosure and Selective Disclosure 30
Partial Disclosure 30
Selective Disclosure 31
Types of Privileges Covered 33
The Right to Truth-in-Evidence 34
Need for the Proposed Reforms 35
PROPOSED LEGISLATION 39
Code Civ. Proc. § 2028.050 (amended). Privilege objection in deposition by written questions 39
Evid. Code § 912 (amended). Waiver 39

WAIVER OF PRIVILEGE BY DISCLOSURE

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

Specifically, the Commission proposes 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 standard finds strong support in cases applying the provision to an inadvertent disclosure. Codifying it would help ensure that it is consistently applied, and would spare courts, attorneys, and litigants from having to expend significant resources researching the appropriate standard. Such guidance is needed because inadvertent disclosure is an increasingly frequent problem due to the use of new technologies such as email and voicemail.

The Commission also recommends that (1) Section 912 be amended to provide statutory guidance regarding the effect of a partial disclosure of a privileged communication, and (2) the provision governing waiver of a privilege in a deposition by written questions (Code Civ. Proc. § 2028.050) be amended 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. The Commission addresses these issues after describing the law on inadvertent disclosure and explaining how it should be changed.

Section 912

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

- The lawyer-client privilege, which is held by the client.[2]
- The marital communications privilege, which is held by both the husband and the wife.[3]

---

1. The confidential communication privileges include the lawyer-client privilege, marital communications privilege, physician-patient privilege, psychotherapist-patient privilege, clergy-penitent privilege, sexual assault counselor-victim privilege, and domestic violence counselor-victim 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.

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

Each of these privileges is intended to foster free-flowing communication between persons in a socially beneficial relationship.[9] With exceptions that vary depending on the particular relationship, if a communication between persons in one of these relationships was confidential when made, the holder of the privilege is entitled to refuse to disclose the communication in any legal proceeding,[10] and to prevent

---

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.

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 counselor-victim 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 counselor-victim 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 right of every person to fully confer and confide in legal expert, so as to obtain adequate advice and proper defense); People v. Gilbert, 5 Cal. App. 4th 1372, 1391, 7 Cal. Rptr. 2d 660 (1992) (purpose of sexual assault counselor-victim 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. Méndez, Evidence: The California Code and the Federal Rules § 26.01, at 590 (2d ed. 1999) (purpose of domestic violence counselor-victim 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,

another from disclosing it.[11] By protecting their confidential communications from forced disclosure, the privileges allow participants in the relationships to talk without worrying about what might happen if their words were revealed under compulsion of law.

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

Scope

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

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

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

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

---

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 counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege).

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 counselor-victim privilege), 1037.5 (domestic violence counselor-victim 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).

General Rule

Section 912(a) states the general rule that the right of any person to claim a confidential communication privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." The provision further states that consent to disclosure "is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

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

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

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

What is not obvious from the statutory language is whether inadvertent disclosure of a privileged communication constitutes a waiver of the privilege. The statute does not state whether a disclosure must be intentional to waive the privilege, as opposed to reckless, negligent, or without fault.

---

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).

Exceptions

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

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

Importantly, the statute also makes clear that disclosure of a privileged communication does not waive the privilege if the disclosure is "reasonably necessary for the accomplishment of the purpose" of the privileged relationship.[23] Thus, for example, no waiver occurs when a patient presents a doctor's prescription to a pharmacist[24] or when a defendant shares attorney-client communications with a codefendant in preparing a joint defense.[25]

Waiver By Putting a Matter in Issue

In some instances a privilege may be waived or otherwise rendered inapplicable by putting a matter in issue. For example, the Evidence Code expressly provides that the lawyer-client privilege does not apply to a communication relevant to an

---

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, 1237-38, 9 Cal. Rptr. 3d 812 (2004); Raytheon Co. v. Superior Court, 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (1989).

issue of breach, by either a lawyer or a client, of a duty arising out of the lawyer-client relationship.[26] The code includes similar provisions with regard to the marital communications privilege,[27] physician-patient privilege,[28] and the psychotherapist-patient privilege.[29]

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

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

Approaches to Inadvertent Disclosure

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

Strict Liability for Disclosure

In some jurisdictions, disclosure of a privileged communication waives the privilege, regardless of the circumstances of the disclosure.[33] The holder of the privilege is expected to zealously guard the secrecy of privileged communications

---

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. *See, e.g.*, 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 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).

and any breach of that secrecy destroys the privilege.[34] Once the secret is out, it no longer warrants protection, because it is impossible to "unring the bell."[35]

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

But the approach has been criticized as unduly harsh.[38] It penalizes a client for even a faultless disclosure[39] and it undermines the policies advanced by the confidential communication privileges.[40] Further, although confidentiality can never be restored to a disclosed communication, a court can repair much of the damage done by disclosure by preventing or restricting use of the communication in a trial or other legal proceeding.[41]

Subjective Intent of the Holder

At the other end of the spectrum, some courts focus on the subjective intent of the holder of a privilege in determining whether the privilege has been waived.[42]

---

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. Trilogy 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).

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);

The test is phrased differently by different courts, and sometimes different formulations are intermingled within the same opinion. In particular, the courts sometimes fail to differentiate between whether the critical factor is intent to *disclose a privileged communication*, as opposed to intent to *waive the privilege* (which cannot occur unless the holder of the privilege is aware of the privilege and the consequences of disclosure).[43]

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

The approach is sometimes criticized, however, for not creating enough incentives to protect against accidental disclosure of privileged communications.[46] This criticism is not entirely persuasive, because disclosure of a communication can be very harmful even if the communication remains inadmissible at trial.[47] In addition, ethical rules compel attorneys, doctors, and others to maintain

---

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. *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).

45. 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.

46. *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.

47. Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 271 Wis.2d 610, 631, 679 N.W.2d 794 (2004) ("[I]nformation obtained from the documents before the plaintiffs made any objection to the disclosure cannot easily be erased from the minds of defense counsel or the defendants with whom the documents were shared."); 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, 419 (2000) ("A bell may be un-rung 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 regarding effectiveness of electronic voting machines).

confidentiality of their records and client communications.[48] These rules provide incentives to prevent accidental disclosure of such material even though waiver of the applicable evidentiary privilege would not result.[49]

Another criticism of the subjective intent approach is that the burden of proving intent is too hard to meet.[50] Whether one agrees with this criticism largely depends on how much value one places on the policies underlying the confidential communication privileges. It is clear, however, that the burden of proving another person's subjective intent is not insurmountable. Prosecutors routinely prove the defendant's subjective intent beyond a reasonable doubt in criminal cases. It is similarly feasible for a party in a civil or criminal case to prove another person's intent to disclose a privileged document (e.g., by showing that the holder of the privilege sent the document to a third party together with a cover letter referring to the contents of the document).[51] That is particularly evident because such intent must only be proved by a preponderance of the evidence.[52]

Multifactor Balancing Test

Still other courts use a balancing test to determine whether an inadvertent disclosure constitutes a waiver of a confidential communication privilege. These courts examine factors such as (1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of

---

48. *See, e.g.*, Bus. & Prof. Code § 6068(e) (duty of attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client").

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

50. *See, e.g.*, Mosteller, *supra* note 38, at 983-84.

51. Under California law, the party asserting a Section 912 privilege bears the initial burden of proving that a communication was made in confidence in the course of a privileged relationship. Federal Deposit Ins. Corp. v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000); State Farm Fire & Casualty Co. v. Superior Court, 54 Cal. App. 4th 625, 639, 62 Cal. Rptr. 2d 834 (1997); Méndez, *California Evidence Code — Federal Rules of Evidence, III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003, 1016 (2003). In meeting that burden, the party can invoke the statutory presumption that a communication between persons in a relationship covered by Evidence Code Section 912 was made in confidence. Evid. Code § 917; National Steel Products Co. v. Superior Court, 164 Cal. App. 3d 476, 483, 210 Cal. Rptr. 535 (1985).

"Once the party asserting the privilege makes this initial showing, the burden shifts to the party opposing the privilege to show either that the information was not confidential or that it falls within an exception." *Federal Deposit Ins. Corp.*, 196 F.R.D. at 380; Section 405 Comment. Thus, when a party proffers privileged evidence on the ground that the privilege was waived, that party bears the burden of establishing that waiver occurred. Oxy Resources California LLC v. Superior Court, 115 Cal. App. 4th 874, 894, 9 Cal. Rptr. 3d 621 (2004); Wellpoint Health Networks v. Superior Court, 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844, 852-53 (1997); People v. Superior Court (Broderick), 231 Cal. App. 3d 584, 591, 282 Cal. Rptr. 418 (1991). This preliminary fact issue is to be resolved by the court under Section 405(a). See Section 405 Comment.

52. See Méndez, *supra* note 51, at 1019-20; see also Section 115 (except as otherwise provided by law, burden of proof requires proof by preponderance of evidence).

fairness.[53] An apparent majority of jurisdictions follow this approach.[54] The applicable standard of care (negligence in making the disclosure, as opposed to recklessness) is not always clear.

This balancing test seeks to protect the policies underlying the confidential communication privileges, yet also provide adequate incentives to protect communications from disclosure.[55] It is a highly flexible approach, under which judges have broad discretion to achieve justice in varied circumstances.

That flexibility also makes the approach unpredictable and creates a danger of inconsistent results.[56] The lack of predictability can undercut the effectiveness of the evidentiary privileges. As the United States Supreme Court has repeatedly explained, if an evidentiary provision is to effectively encourage communication, persons communicating must be able to predict with some certainty whether a particular discussion will be protected.[57]

The approach also places heavy demands on the courts.[58] It requires courts to examine circumstances of each communication and delve into the details of the communication methods used. This increases litigation costs for the parties and consumes scarce judicial resources.[59] It can be especially burdensome where a case involves voluminous materials or numerous communications.[60]

Cases Interpreting California Law on Inadvertent Disclosure

There is no California Supreme Court decision squarely resolving the effect of an inadvertent disclosure of a communication protected by one of the confidential communication privileges. As discussed below, published decisions of the courts of appeal and federal courts interpreting California law consistently follow the subjective intent approach. Other decisions, including several California Supreme

---

53. *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.

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

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

56. 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).

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

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

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

60. 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*.

Court decisions, also lend support to that approach. There are potential sources of confusion, however, suggesting that statutory guidance would be helpful.

In particular, a recent court of appeal opinion conflicted with the prevailing line of authority. It was superseded when the California Supreme Court granted review in the case.[61] As explained below, however, it may be futile to wait for the Court to provide guidance, because there is no assurance that it will address the issue of waiver by inadvertent disclosure, or even hear argument in the case in question.

Court of Appeal Decisions on Inadvertent Disclosure

The first court of appeal decision addressing inadvertent disclosure appears to have been *People v. Gardner*,[62] in which a probation report included confidential information from a patient's medical record. A hospital had provided the information to the probation officer at the officer's request. Over objection at the sentencing hearing, the trial court permitted the information to remain in the probation report.

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

> As in other privileges for confidential communications, the physician-patient privilege precludes a court disclosure of a communication, even though there has been an accidental or unauthorized out-of-court disclosure of such communication. Thus, an eavesdropper or other interceptor is not allowed to testify to an overheard or intercepted communication, otherwise privileged from disclosure, because it was intended to be confidential. Subdivision (f) of section 5328 does not authorize the court to order disclosure of matter which the Evidence Code makes privileged.[63]

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

A later case, *O'Mary v. Mitsubishi Electronics America, Inc.*,[64] makes the point more forcefully. In that case, counsel responding to a document request inadvertently produced documents that were subject to the attorney-client privilege. The trial court ruled that this disclosure did not waive the privilege.

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

---

61. Cal. R. Ct. 976.
62. 151 Cal. App. 3d 134, 198 Cal. Rptr. 452 (1984).
63 *Id*. at 141.
64. 59 Cal. App. 4th 563, 69 Cal. Rptr. 2d 389 (1997).

> forgets that discovery is coercion. The force of law is being brought upon a person to turn over certain documents. Inadvertent disclosure during discovery by no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something. [The proponent] invites us to adopt a "gotcha" theory of waiver, in which an underling's slipup in a document production becomes the equivalent of actual consent. We decline. The substance of an inadvertent disclosure under such circumstances demonstrates that there was no voluntary release.[65]

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

The facts of *State Compensation Ins. Fund v. WPS, Inc.*[66] were similar. Again, counsel responding to a document request inadvertently produced documents that were subject to the attorney-client privilege. As in *O'Mary*, the court of appeal upheld the trial court's ruling that this disclosure did not waive the attorney-client privilege.

The court of appeal focused on whether any statement or conduct of the client indicated that the client consented to counsel's disclosure.[67] It explained that a "trial court called upon to determine whether inadvertent disclosure of privileged information constitutes waiver of the privilege must examine both the subjective intent of the holder of the privilege and the relevant surrounding circumstances for any manifestation of the holder's consent to disclose the information."[68]

The court concluded that there had been no waiver in the case before it, because it was "clearly demonstrated that [the holder of the privilege] had no intention to voluntarily relinquish a known right.[69] The court thus framed the test as whether the holder of the privilege intended to waive the privilege.[70] In describing its holding, however, the court spoke only in terms of disclosure: "[W]e hold that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." [71]

Federal Decisions Interpreting California Law on Inadvertent Disclosure

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

---

65. *Id*. at 577 (citation omitted).
66. 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799 (1999).
67. *Id*. at 652.
68. *Id*. at 652-53.
69. *Id*. at 653.
70. *Id*. at 653 & n.2.
71. *Id*. at 654.

In *KL Group v. Case, Kay & Lynch*,[72] the Ninth Circuit considered the impact of inadvertent production of an attorney-client letter in discovery. The court concluded that under "either Hawaii or California law, [the client] did not waive its attorney-client privilege by [counsel's] production of the letter."[73] The Ninth Circuit therefore upheld the district court's issuance of a protective order.[74]

A more extensive discussion of the issue appears in *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*[75] Again, counsel inadvertently produced attorney-client communications during document discovery. The district court determined that "[t]o the extent the disputed documents fall within the scope of the [attorney-client] privilege, California law requires they remain privileged notwithstanding their inadvertent disclosure during discovery."[76] The court explained that under California law, "waiver of the attorney-client privilege depends entirely on whether the client provided knowing and voluntary consent to the disclosure."[77] That statement suggests that the critical factor in assessing whether waiver occurred is the client's intent regarding disclosure. But the court also stated that "nothing in the record suggests that the counsel's inadvertent disclosure of allegedly privileged documents manifested [the client's] knowing and voluntary relinquishment of its attorney-client privilege."[78] That statement suggests that the critical factor is not the client's intent regarding disclosure, but rather the client's intent regarding waiver of the privilege. The decision is thus an example of a case in which the court intermingles these two different standards. Either way, however, it is clear that the court is focusing on the subjective intent of the holder of the privilege in determining whether the privilege has been waived under Section 912.

Similarly, *Cunningham v. Connecticut Mut. Life Ins.*[79] involved counsel's inadvertent production during document discovery of a letter protected by the attorney-client privilege. The district court concluded in dictum[80] that this did not waive the privilege under California law. It explained:

> Courts generally use three approaches to resolve whether inadvertent disclosure constitutes a waiver: (1) an evaluation of all the circumstances surrounding the disclosure, (2) the client is held strictly responsible for any disclosure, and (3) the

72. 829 F.2d 909 (9th Cir. 1987).

73. *Id*. at 919.

74. *Id.*

75. 196 F.R.D. 375 (S.D. Cal. 2000).

76. *Id*. at 380.

77. *Id*.

78. *Id*.

79. 845 F. Supp. 1403 (S.D. Cal. 1994).

80. 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.

> client's intent to disclose is controlling. California appears to follow the subjective approach to waiver by a privilege holder.[81]

Again, the court clearly endorsed the subjective intent approach, but did not clearly differentiate between intent to disclose a privileged communication and intent to waive the privilege. While the statement quoted above refers to "intent to disclose," elsewhere in its opinion the court stated that under the subjective approach, "the client must affirmatively waive the privilege."[82]

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

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

For example, in *Roberts v. Superior Court*[83] the California Supreme Court considered whether a form consent was effective to waive a patient's psychotherapist-patient privilege. The Court said there was no waiver under the circumstances of the case, because the "waiver of an important right must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences."[84] The Court did not have to resolve the impact of an inadvertent disclosure, but its reference to a "knowing act" suggests that a disclosure must be intentional to constitute a waiver.

Similarly, in *Menendez v. Superior Court*[85] the California Supreme Court considered whether the psychotherapist-patient privilege was waived as to tapes that had been seized by the police. The Court ruled that one of the tapes fell within the dangerous patient exception to the psychotherapist-patient privilege,[86] but the other tapes were privileged when made and remained privileged, because there had been no "intentional waiver" or waiver by operation of law.[87] The Court's reference to an "intentional waiver" is suggestive of a subjective intent standard, but the Court did not have to confront the issue of waiver by voluntary but inadvertent disclosure.

---

81. *Id*. at 1410.

82. *Id*. at 1411.

83. 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973).

84. *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."

85. 3 Cal. 4th 435, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992).

86. Section 1024.

87. *Id*. at 455, 456.

Likewise, in *Wells Fargo Bank v. Superior Court*[88] the California Supreme Court stated that "'a waiver is the intentional relinquishment of a known right.'"[89] The Court held that the attorney-client privilege was not waived by disclosure of attorney-client communications in discovery, because the disclosure was based on a mistaken but honest and reasonable belief that it was legally required.[90] The case thus exemplifies the already-codified principle that a coerced disclosure does not constitute a waiver.[91] The Court's reference to an "intentional relinquishment" suggests that a disclosure must be intentional as well as uncoerced to waive the privilege, but the Court did not have to decide whether an unintentional disclosure constitutes a waiver.

A few court of appeal decisions provide further support for the subjective intent approach, without relying on it as the basis for a holding. These include *Cooke v. Superior Court*[92] and *Houghtaling v. Superior Court*.[93]

Potential Sources of Confusion

Given the foregoing authorities, California law on inadvertent disclosure seems relatively clear. There are, however, some potential sources of confusion. These include an unnecessary and unclear discussion in *People v. Von Villas*,[94] dicta in a number of cases stating that a privilege is lost once disclosed, misleading language

---

88. 22 Cal. 4th 201, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000).

89. 22 Cal. 4th at 211, *quoting* BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240, 1252, 245 Cal. Rptr. 682 (1988).

90. Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201, 211-12, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000).

91. 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).

92. 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. The case is thus consistent with the subjective intent approach.

93. 17 Cal. App. 4th 1128, 21 Cal. Rptr. 2d 855 (1993). In dictum, the court in this case 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.

94. 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992).

in cases in which the holder of a privilege agreed to disclose a privileged communication but did not do so, a depublished decision that was relied on in commentary, and the superseded opinion in the inadvertent disclosure case that is now pending before the California Supreme Court.

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

The court of appeal upheld that ruling, pointing out that the husband and wife

> were speaking very loudly to one another — loudly enough to be heard beyond the plexiglass which separated them. They knew *or reasonably should have known* that third parties in the person of sheriff's deputies were present.[95]

The court offered three alternate bases for its decision. First, the court concluded that the conversation was not made "in confidence" and thus never became privileged.[96] That was a correct and sufficient basis for its decision; there was no need for the court to say anything more.[97] As an alternate basis for decision, however, the court also said that the conversation could be viewed as satisfying the "crime or fraud" exception to the marital privilege.[98] As yet another alternate basis for decision, the court said that "the trial court was faced with sufficient evidence to warrant the conclusion that even if the December 20 conversation was privileged, any such privilege was waived pursuant to Evidence Code section 912."[99]

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

Another potential source of confusion is language in several cases to the effect that once a privileged communication is disclosed, the privilege is lost.[100] The

---

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

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

97. See discussion under "Scope" *supra*.

98. *Id*. at 222-23.

99. *Id*. at 223.

100. *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,

implication of those statements is that an inadvertent or other unintentional disclosure of a privileged communication waives the privilege, not just an intentional disclosure by or with the consent of the holder of the privilege. But none of the cases involved a ruling on an inadvertent or unintentional disclosure, so the statements in them are only dicta.

Similarly, in a number of cases the holder of a privilege agreed to, or otherwise took steps to, disclose privileged communications, but no disclosure actually occurred. Those cases interpret Section 912 to require actual disclosure, or a reasonable certainty of disclosure, before waiver occurs. Mere intent to disclose, by itself, is not enough.[101]

That principle is fully consistent with the subjective intent approach, under which waiver requires both intent to disclose and actual disclosure. But some of the language in this line of cases might be misinterpreted to mean that the holder's intent is unimportant in determining whether waiver occurred. For example, one court said that "the focal point of privilege waiver analysis should be the holder's disclosure of privileged communications to someone outside the attorney-client relationship, not the holder's intent to waive the privilege."[102] Although such a statement downplays the importance of intent to disclose, it is dictum and the holding of the case is consistent with the subjective intent approach.

Still another potential source of confusion is *Kanter v. Superior Court*,[103] a depublished court of appeal decision that adopted the multifactor balancing test for waiver of privilege by disclosure. Although the case is not good law, a fairly recent student publication on inadvertent disclosure discusses it extensively,[104] refers to the depublication only in a footnote,[105] and states in the text that in

---

1708, 31 Cal. Rptr. 2d 213 (1994) ("It is true that once documents are disclosed, the privilege is waived ….").

101. 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).

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

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

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

105. *Id*. at 548 n.8.

California "there is clear guidance from the *Kanter* case."[106] The piece thus gives the misleading impression that *Kanter* is the leading California decision on waiver of privilege by disclosure.[107]

Because these authorities are potentially confusing and require research to properly understand, statutory guidance on inadvertent disclosure would be useful.[108] The circumstances surrounding the inadvertent disclosure case pending

---

106. *Id*. at 565.

107. 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.

108. 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 v. Superior Court, 3 Cal. 4th 435, 447, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992) (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.

before the California Supreme Court — *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*[109] — underscore the need for such a reform.

The* Jasmine *Case

In *Jasmine*, a group of officers and lawyers for a corporation called an officer for another corporation and left a message on her voicemail. After they left the message, they failed to hang up the speakerphone, and proceeded to have a conversation among themselves that was also recorded on her voicemail. In subsequent litigation, their corporation sought to preclude use of that conversation, claiming that it was protected by the attorney-client privilege. The trial court agreed, but the court of appeal reversed, advancing two bases for its decision.[110]

First, the court of appeal determined that the privilege had been waived, even though the recording of the conversation was inadvertent.[111] Citing *State Compensation Ins. Fund*, the court acknowledged that "an *attorney's* inadvertent disclosure does not waive the privilege absent the privilege holder's intent to waive."[112] The court distinguished that situation, however, pointing out that in the case before it "the *privilege holder* inadvertently disclosed the information."[113] The court then asserted that there "is no requirement in the statute itself, nor in the cases interpreting the statute that the privilege holder intend to disclose the information when ... the holder makes an uncoerced disclosure."[114] Accordingly, the court concluded that it was unimportant whether the corporation intended to disclose the information; it was enough that the corporation "was not coerced in any way to make the disclosure, and as such, its disclosure falls squarely within the meaning of section 912, subdivision (a)."[115]

As an alternate basis for its decision, the court concluded that "[e]ven if the attorney-client privilege were not waived in this case, the voicemail is not protected, because it falls within the crime-fraud exception to the attorney-client

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).

109. No. S124914 (review granted July 21, 2004).

110. The court of appeal decision was formerly published at 117 Cal. App. 4th 794 (2004). The decision was superseded when the California Supreme Court granted review. It may no longer be cited as precedent. Cal. R. Ct. 976, 977. The decision can be found at 12 Cal. Rptr. 3d 123 (2004).

111. 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.

112. 12 Cal. Rptr. 3d at 128 (emphasis added).

113. *Id*. (emphasis added).

114. *Id*.

115. *Id*. at 129.

privilege stated in section 956."[116] The court explained that there was sufficient evidence to satisfy a prima facie case of fraud.[117]

The court's comments on privilege waiver were thus unnecessary to its decision. In addressing the issue, the court fashioned a new variant of the waiver doctrine: A two-pronged rule in which the strict liability approach applies to a disclosure by the holder of a privilege, while the subjective intent approach applies to disclosure by a representative of the holder. Previous decisions made no mention of such a two-pronged approach. The decision thus generated further potential for confusion in an area that already warranted clarification.

That problem was alleviated to some extent when the California Supreme Court granted review and the decision was superseded. But considerable uncertainty remains. Although the court of appeal decision can no longer be cited as precedent,[118] nothing would prevent a future litigant from arguing for its two-pronged approach.

Further, there is no assurance that the California Supreme Court will definitively decide in the near future what standard applies in determining whether a Section 912 privilege has been waived. The Court ordered the briefing in *Jasmine* deferred pending consideration and disposition of a related issue in *Rico v. Mitsubishi Motors Corp.*[119] or further order of the court.[120] Based on the court of appeal decision in *Rico*, which was superseded by the grant of review, that case does not appear to involve the standard for determining whether a Section 912 privilege has been waived.[121]

Rather, plaintiffs' counsel in *Rico* obtained a document that defense counsel had unintentionally left in a deposition room. The document "provided a summary, in dialogue form, of a defense conference between attorneys and defense experts in which the participants discussed the strengths and weaknesses of defendants' technical evidence."[122] Plaintiffs' counsel "made no effort to notify defense counsel of his possession of the document and instead examined, disseminated, and used the notes to impeach the testimony of defense experts during their deposition...."[123] Based on this conduct, the trial court granted a motion to disqualify plaintiffs' counsel.

---

116. *Id.*

117. *Id.* at 132. The court was careful to point out that "[N]othing herein shall be construed as a finding that a crime or fraud occurred in this case; rather, we narrowly rule on the issue of a prima facie case of the crime-fraud exception to the attorney-client privilege." *Id.* at 129 n.7.

118. Cal. R. Ct. 976, 977.

119. No. S123808 (review granted June 9, 2004).

120. 94 P.3d 475, 16 Cal. Rptr. 3d 33 (July 21, 2004).

121. The court of appeal decision in *Rico* can be found at 10 Cal. Rptr. 3d 601 (2004). It was formerly published at 116 Cal. App. 4th 51 (2004).

122. 10 Cal. Rptr. 3d at 603.

123. *Id.*

The court of appeal upheld that ruling. It determined that the document in question was not protected by the attorney-client privilege,[124] but was clearly covered by the work-product privilege,[125] which had not been waived.[126] The work-product privilege is not one of the privileges specified in Section 912.

Because the document was clearly protected by the work-product privilege, the court said that plaintiffs' counsel had an ethical obligation to promptly return it. The court explained that "an attorney who inadvertently receives plainly privileged documents must refrain from examining the materials any more than is necessary to determine that they are privileged, and must immediately notify the sender, who may not necessarily be the opposing party, that he is in possession of potentially privileged documents."[127] The court further concluded that disqualification was the only effective sanction for plaintiffs' counsel's failure to follow that rule.[128]

It is unclear when the California Supreme Court will decide *Rico*,[129] and whether that decision will provide any guidance that is relevant to privilege waiver under Section 912. It is even more unclear when, or even if, the California Supreme Court will consider the issues raised in *Jasmine*. It is possible that the Court might remand the case after it issues a decision in *Rico,* instructing the court of appeal to reconsider its decision in light of *Rico*. It may thus be counterproductive to await guidance from the Court on the appropriate standard for waiver under Section 912.

Proposed Approach to Inadvertent Disclosure

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

Codification of the Subjective Intent Approach

Specifically, the Commission proposes to codify the subjective intent approach with regard to all disclosures, whether by the privilege holder or by someone else. Section 912(a) would be amended to provide that subject to the statutory exceptions, the right of any person to claim a confidential communication privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has *intentionally* disclosed a

---

124. The court reasoned that the attorney-client privilege was inapplicable because the document "did not memorialize any attorney-client communication and ... the document was not transmitted between an attorney and his client." *Id*. at 605-06.

125. *Id*. at 603.

126. *Id*. at 607.

127. *Id*. at 613 (footnote omitted).

128. *Id*. at 603.

129. As of October 13, 2004, briefing of the *Rico* appeal is in progress. Oral argument has not yet been scheduled.

significant part of the communication or has consented to disclosure made by anyone."[130] The provision would further state that 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."[131]

This approach has a number of advantages. First, it avoids drawing a distinction between a disclosure by a privilege holder and a disclosure by someone else. The apparent rationale for such a distinction is to make the privilege holder strictly accountable for the holder's own actions, but avoid penalizing the holder for another person's lack of vigilance in protecting the confidentiality of privileged material. Under this rationale, the status of in-house counsel is unclear; it is possible that an inadvertent disclosure by in-house counsel in a document production would be deemed a waiver while a similar disclosure by outside counsel would not. The two-pronged approach also leads to other incongruous results. For instance, the physician-patient privilege would be waived if disclosure occurred because medical records were in a briefcase stolen from a patient, but the privilege would not be waived if the records were in a briefcase stolen from a physician. Such a harsh result as waiver should not turn on fortuity. This would not occur if the subjective intent approach applied to all disclosures.

Second, the subjective intent approach is most consistent with the case law interpreting Section 912.[132] Codifying the approach would not be a break with past practice and precedent, but would simply maintain the longstanding status quo.

Third, the subjective intent approach is most consistent with the statutory scheme governing the confidential communication privileges. With regard to each such privilege, subjective intent is determinative in assessing whether a communication is initially considered privileged or unprivileged.[133]

For instance, a "confidential communication between client and lawyer" is defined as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, *so far as the client is aware, discloses the information to no third persons* other than those who are present to further the interest of the client in the consultation or the

---

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

131. *Id*. (emphasis added).

132. See discussion under "Cases Interpreting California Law on Inadvertent Disclosure" *supra*.

133. 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.)

accomplishment of the purpose for which the lawyer is consulted ...."[134] The focus is on whether the client knew, and therefore can be presumed to have intended, that the communication was being disclosed to a third person at the time it was made.

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

Fourth, the subjective intent approach does not unduly impede the search for truth in a trial or other legal proceeding. The approach does not insulate a special category of information from use at trial. Rather, it only ensures that information protected by a confidential communication privilege remains privileged unless the holder of the privilege chooses to disclose the information. The doctrine is thus no more of a burden on the use of evidence than the privilege itself,[135] which was created in recognition that the search for truth is sometimes less pressing than the policies served by the privilege.[136]

Most importantly, the subjective intent approach is good policy. In contrast to the multifactor balancing approach, it establishes a clear standard, yields predictable results, and thus is readily-administered instead of routinely requiring court adjudication. Further, it safeguards the important policies underlying the confidential communication privileges. Effective functioning of the relationships in question (e.g., lawyer-client, psychotherapist-patient) is crucial to our society, helping to ensure, for instance, that the correct person goes to jail or that a mentally ill person receives appropriate treatment and does not become a safety

---

134. 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 counselor-victim privilege), 1037.2 (domestic violence counselor-victim privilege).

135. As one commentator explained,

> 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).

136. Venture Law Group v. Superior Court, 118 Cal. App. 4th 96, 12 Cal. Rptr. 3d 656 (2004).

threat.[137] By protecting the confidentiality of communications between persons in these relationships, the privileges promote the free-flowing communication that is considered essential for such effective functioning.[138] A low threshold for waiver would undercut that effect, jeopardizing the functioning of the privileged relationships.[139] The subjective intent approach restricts waiver to situations in which it is clear that disclosure of the privileged communication is acceptable to the holder of the privilege. Consequently, there is no disincentive to free-flowing communication in the privileged relationship, and the relationship can continue to function effectively.

Intent to Disclose Versus Intent to Waive the Privilege

Significantly, the proposed standard would focus on intent to disclose the privileged communication to a third person, not intent to waive the applicable privilege.[140] The holder of the privilege need not have been aware of the legal consequences of disclosure, so long as the disclosure was intentional.

That is consistent with the history of Section 912, as enacted on recommendation of the Law Revision Commission in 1965. When the Commission prepared the Evidence Code, it used the Uniform Rules of Evidence as a starting point. In drafting Section 912, however, the Commission deliberately deleted the Uniform Rules' requirement that the holder of a privilege make a disclosure "with knowledge of his privilege."[141] The proposed amendment of Section 912 would continue that approach.

---

137. 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.").

138. See note 9 *supra*.

139. See *supra* notes 40 & 46 and accompanying text.

140. 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 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim 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.)

141. 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) (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, 509-10 (1964).

Failure to Object at Trial

Numerous cases find that a privilege was waived due to failure to object at trial.[142] The results of these cases should be the same under the Commission's proposed amendment of Section 912. In conducting a trial, a party's attorney speaks for the party[143] and the attorney's intent is presumed to mirror the party's intent.[144] If an attorney fails to object to disclosure of privileged information at trial, the attorney would be presumed to have intended the ordinary consequences of that voluntary act.[145] The ordinary consequences of failure to object to evidence at trial are introduction of the evidence (i.e., disclosure of the privileged information) and waiver of the objection.[146]

Thus, it would be presumed that an attorney who failed to claim the privilege at trial intended to disclose the privileged information.[147] That presumption would be

---

142. *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).

143. "[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.

144. 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 143, § 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 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.

145. Evid. Code § 665.

146. Witkin, *supra* note 143, §§ 367, 371, at 454, 459-61.

147. 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,

difficult to overcome, particularly if the failure to object resulted in a tactical benefit or otherwise appeared strategically motivated.[148] Moreover, absent unusual circumstances, the attorney's intent would be attributed to the client, thus satisfying the proposed requirement that the "holder of the privilege, without coercion, has *intentionally* disclosed a significant part of the communication or has consented to disclosure made by anyone."[149]

Coordination of the Proposed Approach With Civil Discovery Provisions

The Civil Discovery Act contains a number of provisions on privilege waiver.[150] Those provisions would not conflict with the Commission's proposed amendment of Section 912.

Nonexclusivity of Section 912

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

Nonetheless, a couple of cases seem to indicate as much.[151] One of these was decided before enactment of the Civil Discovery Act of 1986, however, and the other involved an incident that occurred before the operative date of that Act.

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.

148. 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.

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

150. A nonsubstantive reorganization of the Civil Discovery Act was enacted in 2004 on recommendation of the Law Revision Commission. 2004 Cal. Stat. ch. 182. The reorganization will become operative on July 1, 2005. *Id*. at § 64. In the Civil Discovery Act as reorganized, the provisions on privilege waiver are:

(1) Code Civ. Proc. § 2025.460 (former Section 2025(m)(1)).

(2) Code Civ. Proc. § 2028.050 (former Section 2028(d)(2).

(3) Code Civ. Proc. § 2030.280 (former Section 2030(k)).

(4) Code Civ. Proc. § 2031.300 (former Section 2031(*l*)).

(5) Code Civ. Proc. § 2033.280 (former Section 2033(k)).

Unless otherwise specified, all further references to civil discovery provisions are to the provisions as reorganized and operative on July 1, 2005 (Code Civ. Proc. §§ 2016.010-2036.050), not to the civil discovery provisions that will be repealed on that date (Code Civ. Proc. §§ 2016-2036).

151. *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.

It is true that courts "may not add to the statutory privileges except as required by state or federal constitutional law, nor may courts imply unwritten exceptions to existing statutory privileges."[152] But there is nothing to prevent the Legislature from adding a new *statutory* means of waiving a privilege. If that occurs, the preexisting waiver statute is no longer exclusive.

That appears to be the situation with regard to Section 912. After the Civil Discovery Act of 1986 became operative, Section 912 was no longer the only statute specifying means of waiving the privileges to which it applies; other means were specified in the Civil Discovery Act.[153]

Privilege Waiver Under the Civil Discovery Provisions

The pertinent civil discovery provisions include one of the sections pertaining to an oral deposition in California and a number of provisions relating to written discovery.

Under the section governing waiver of an objection in an oral deposition in California, the right to assert a privilege with regard to a communication "is waived unless a specific objection to its disclosure is timely made during the deposition."[154] Unlike other provisions of the Civil Discovery Act, the statute does not specify any circumstances under which a party can obtain relief from such a waiver.

Although that rule may initially seem more harsh than the Commission's proposed amendment of Section 912, results under the two provisions are generally likely to be the same. As at trial, if a party at a deposition (through counsel, or directly if self-represented) fails to object to a question calling for privileged information, the party would be presumed to have intended the ordinary consequences of that action, including disclosure of the privileged information.[155] That presumption would be difficult to overcome, because a person representing someone at a deposition normally pays close attention to what is happening and is unlikely to be able to successfully claim inadvertence.[156]

Rptr. 346 (1988) ("Notwithstanding civil discovery statutes, Evidence Code governs waiver of attorney/client privilege.").

152. *Roberts v. City of Palmdale*, 5 Cal. 4th at 373 (citations omitted); *see also* Section 911 & Comment; Wells Fargo Bank v. Superior Court, 22 Cal. 4th 201, 206-09, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000); Oxy Resources California LLC v. Superior Court, 115 Cal. App. 4th 874, 888-89, 9 Cal. Rptr. 3d 621 (2004).

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

154. Code Civ. Proc. § 2025.460.

155. See discussion under "Failure to Object at Trial" *supra*.

156. 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*, 22 Cal. 4th 201 (no waiver where disclosure of privileged communications was based on mistaken but honest and reasonable belief

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

The waiver provisions relating to interrogatories, inspection demands, and requests for admission take a different approach. Each of those provisions states that failure to file a timely response to a discovery request waives any objection to the request, including an objection based on privilege. For example, the provision governing interrogatories states that if a party to whom interrogatories are directed fails to serve a timely response, that party "waives ... any objection to the interrogatories, including one based on privilege ...."[157] Each of the provisions also allows a court to grant relief from such a waiver, on motion, upon determining that (1) the party from whom discovery was sought subsequently served a response in substantial compliance with the applicable discovery requirements, and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.[158]

The Commission does not propose any change in these provisions at this time. Although they establish an additional way to waive a privilege, they mitigate the potential harm to privileged relationships by providing a means of seeking relief from such a waiver if the failure to timely respond to the discovery request was inadvertent. It is important to maintain incentives to timely comply with discovery obligations. The provisions governing interrogatories, inspection demands, and requests for admission appear to strike a fair balance between that objective and the competing goal of protecting the policies underlying the confidential communication privileges.

Privilege Waiver in a Deposition by Written Questions

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

---

that it was legally required). It is thus conceivable that the disclosure would be considered a waiver under Code of Civil Procedure Section 2025.460 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.

157. Code Civ. Proc. § 2030.290. See also Code Civ. Proc. §§ 2031.300 (If party to whom inspection demand is directed fails to serve timely response, that party "waives any objection to the demand, including one based on privilege ...."), 2033.280 (If party to whom requests for admission are directed fails to serve timely response, that party "waives any objection to the requests, including one based on privilege ....").

158. Code Civ. Proc. §§ 2030.290 (interrogatories), 2031.300 (inspection demand), 2033.280 (requests for admission).

> A party who objects to any question on the ground that it calls for information that is privileged … shall serve a specific objection to that question on all parties entitled to notice of the deposition within 15 days after service of the question. A party who fails to timely serve that objection waives it.[159]

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

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

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

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

The confidential communication privileges foster socially valuable relationships and should not be abrogated for a minor technical mistake.[160] Other remedies exist to encourage proper compliance with the discovery requirements.[161] A discovery sanction "cannot go farther than is necessary to accomplish the purpose of discovery ...."[162] The Commission therefore recommends that the provision governing privilege waiver in a deposition by written questions be amended to track the comparable provisions governing other forms of written discovery. Like

---

159. Code Civ. Proc. § 2028.050.

160. 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, 114 Cal. App. 4th 475, 8 Cal. Rptr. 3d 87 (2004) (Waiver of privilege must be narrowly rather than expansively construed to protect purpose of privilege).

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

162. 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).

those provisions, it should provide a means for obtaining relief from a privilege waiver based on failure to timely object to a question.[163]

Partial Disclosure and Selective Disclosure

In addition to studying the law governing an inadvertent disclosure of a privileged communication, the Commission considered two types of intentional disclosure: (1) partial disclosure and (2) selective disclosure.

Partial Disclosure

Sometimes a privileged communication is partially disclosed, meaning that a significant portion but not the entirety of the communication is revealed to a person outside the privileged relationship. This may confer an unfair tactical advantage, as when a privilege holder discloses favorable portions of a privileged document, but withholds unfavorable portions. Case law establishes, however, that if the holder of a privilege voluntarily and intentionally makes a partial disclosure (or voluntarily and intentionally permits another person to do so), and the situation is not covered by one of the exceptions to Section 912,[164] a court may require additional disclosure in the interest of fairness, even though the holder did not intend to permit such additional disclosure.

For example, the defendant in *People v. Worthington*[165] disclosed a marital communication in which the defendant's wife supposedly confessed to a murder and described the details of the crime. Having presented his version of the conversation, the defendant could not preclude his wife from testifying that the conversation occurred as he said, except it was he who confessed not she.[166]

Similarly, in *Kerns Construction Co. v. Superior Court*,[167] a witness used privileged reports, provided by the holder of the privilege, to refresh his recollection before testifying, because he could not have testified on the subject otherwise. The privilege holder sought to exclude the reports themselves, but the court ruled that "[w]hen, with knowledge of their intended use, the privileged records were furnished to the witness, which act was not required to be performed, and the witness gave testimony from them, the privilege was waived."[168] The court explained that fairness required that result:

> It would be unconscionable to allow a rule of evidence that a witness can testify to material contained in a report, though not verbatim, and then prevent a disclosure of the reports. As is stated in 8 Wigmore, Evidence, section 2327 (McNaughton rev. 1961), "There is always also the objective consideration that

163. See proposed Code Civ. Proc. § 2028.050 *infra*.

164. Section 912(b)-(d), which are discussed under "Exceptions" *supra*.

165. 38 Cal. App. 3d 359, 114 Cal. Rptr. 322 (1974).

166. *Id*. at 365-66.

167. 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (1968).

168. *Id*. at 413-14.

> when his [holder of the privilege] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease *whether he intended that result or not*. He cannot be allowed, *after disclosing as much as he pleases*, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final."[169]

Even when a holder voluntarily and intentionally makes a significant disclosure, however, the privilege is not necessarily waived as to all of the communications between the persons in the privileged relationship. For example, a patient's disclosure that she ingested DES while pregnant did not waive the physician-patient privilege as to her full medical history.[170] Similarly, voluntary production of some attorney-client communications is not necessarily a waiver of the attorney-client privilege as to all communications having anything to do with the subject matter of a case.[171] Although a court may rule that the scope of a waiver is broader than what the privilege holder intended when making a partial disclosure, the waiver should only be as broad as fairness requires.

Section 912 should be revised to codify that concept, so that the rule is clear on the face of the statute. The Commission recommends adding a new subdivision stating that "[i]f the holder of a privilege waives the privilege as to a significant part of a confidential communication pursuant to subdivision (a), the court may order disclosure of another part of the communication or a related communication to the extent necessary to prevent unfairness from partial disclosure."[172]

Selective Disclosure

Selective disclosure is the disclosure of a privileged communication to one person outside the privileged relationship or on one occasion, while seeking to preclude disclosure to other persons or on other occasions. For example, a man might tell a friend about a discussion he had with his psychiatrist, but ask the friend to keep the matter confidential. Or 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, such as potential civil litigants. The investigating agency may even offer a reduced penalty or other incentive to encourage such a disclosure.[173]

---

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

170. 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).

171. 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).

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

173. *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).

California law is unsettled as to whether a selective disclosure constitutes a waiver of the applicable privilege, such that a court or other tribunal could compel disclosure of the once-privileged communication to persons other than the holder's chosen confidant.[174] The federal courts are also divided on the issue of selective disclosure,[175] and there has been extensive scholarly debate on the topic.[176] Much

174. *Compare* San Diego Trolley, Inc. v. Superior Court, 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (2001) (disclosure of confidential psychotherapist-patient communications to persons handling patient's claim for workers' compensation did not waive psychotherapist-patient privilege for purposes of personal injury case against patient), *with* McKesson HBOC, Inc. v. Superior Court, 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (2004) (company under investigation waived attorney-client privilege by disclosing audit report to SEC and United States Attorney, despite confidentiality agreement purporting to preclude disclosure to other persons), *and* Feldman v. Allstate Ins. Co., 322 F.3d 660, 668-69 (9th Cir. 2003) (under California law, litigant could not voluntarily disclose confidential marital communications at deposition and still invoke marital communication privilege at trial). A few statutes authorize selective disclosure of a privileged communication in a specific situation. See Bus. & Prof. Code § 19828 (no waiver of privilege by providing information to gambling control authorities); see also 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).

175. Some decisions hold that a selective disclosure of privileged information in confidence does not waive the applicable privilege. *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).

Of the federal circuit courts that have considered whether a privilege holder can selectively waive the privilege, however, a majority have rejected such claims. *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).

176. *See, e.g.*, Symchych, *supra* note 173; 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).

has been written about the competing policy considerations.[177] The issue is hot and the debate is evolving in light of recent events such as the war on terrorism and high profile corporate scandals.[178]

At some point, it may be necessary to curtail the debate by providing express statutory guidance on the issue. The Commission believes that would be premature to propose such legislation at this time. The Commission might make a recommendation on this matter at a later date.

Types of Privileges Covered

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

The Commission believes this treatment is appropriate. The Commission carefully explored what privileges to include in Section 912 when it originally drafted the provision in the early 1960's.[179] The decision to exclude other privileges was deliberate.[180]

In applying the various privileges and other provisions protecting confidential information, courts have recognized that Section 912 was only meant to pertain to

177. For a good example of the debate on the competing policy considerations, see the majority and dissenting opinions in *In re* Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289 (9th Cir. 2002), *cert. dismissed sub nom.* HCA, Inc. v. Tennessee Laborers Health & Welfare Fund, 124 S. Ct. 27 (2002).

178. E.g., the Enron collapse and the WorldCom bankruptcy.

179. *See* Tentative Recommendation on Privileges, *supra* note 141, at 260; Chadbourn, *supra* note 141, at 514-15; 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.

180. For example, the privilege against self-incrimination was excluded because waiver of this privilege "is determined by the cases interpreting the pertinent provisions of the California and United States Constitutions." Section 940 Comment; *see also* Tentative Recommendation on Privileges, *supra* note 141, at 260; Chadbourn, *supra* note 141, at 514-15.

the privileges enumerated in it.[181] In some instances, however, a court construing another privilege may find this section useful by analogy.[182]

The California Supreme Court has also made clear that the same waiver principles apply to all of the privileges enumerated in Section 912. At one point, the Court appeared to endorse a lower threshold for waiver of the psychotherapist-patient privilege than for other privileges,[183] but the Court later clarified that this was not the case.[184]

The Commission is reluctant to disrupt this scheme, which seems to have functioned well for many years. For purposes of clarification, however, the Commission recommends adding language to Section 912 stating that the provision is not intended to imply anything regarding waiver of privileges other than the ones listed in it.[185] This would help to ensure that the proposed reforms are not applied in an inappropriate context.[186]

The Right to Truth-in-Evidence

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

> (d) Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. *Nothing in this section shall affect any existing statutory rule of evidence relating to privilege* or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.[187]

---

181. 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.

182. *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).

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

184. *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).

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

186. In conducting this study, the Commission 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.

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

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

The Commission does not believe that the two-thirds vote requirement applies. By its terms, the Truth-in-Evidence provision had no impact on "any existing statutory rule of evidence relating to privilege." Section 912 is a rule of evidence relating to privilege, and it was enacted long before the voters approved the Truth-in-Evidence provision.[188] Consequently, the constitutional exemption for "any existing statutory rule of evidence relating to privilege" may be a sufficient basis for finding the Commission's proposal consistent with the right to Truth-in-Evidence.

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

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

Rather, the proposed codification of the subjective intent approach to inadvertent disclosure would merely make express what a strong majority of courts have said is already implicit in the statute.[189] The proposed new subdivision on partial disclosure is likewise consistent with existing interpretations of the statute.[190]

Need for the Proposed Reforms

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

It would not be necessary to engage in exhaustive research and analysis such as the Commission has undertaken in preparing this report. The danger of

188. 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.

189. See discussion under "Cases Interpreting California Law on Inadvertent Disclosure" *supra*.

190. See discussion under "Partial Disclosure" *supra*.

misinterpretation due to potentially confusing case law,[191] and misleading commentary[192] would also be reduced.

Although document discovery in litigation is a context in which inadvertent disclosure of a privileged communication typically occurs, such a disclosure can readily result from use of new technologies such as email, fax, and voicemail.[193] Common situations in which the problem can arise include:

- A person accidentally directs a fax, email message, or voicemail to the wrong recipient.
- A person forgets to hang up the phone after a phonecall is completed, then has a conversation that is overheard or recorded at the other end of the line.
- A person forwards an email message, not realizing that a confidential communication is attached.
- A person "deletes" a computer file or "erases" a tape, not realizing that the material in question is recoverable.
- A person unintentionally stores an email message containing a confidential communication in a manner in which a third party can obtain access.[194]

The frequency of such situations highlights the need for the guidance that the proposed amendment would provide.[195]

---

191. See discussions under "Potential Sources of Confusion" and "The *Jasmine* Case" *supra.*

192. See discussion under "Potential Sources of Confusion" *supra.*

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

194. *See* 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, from the content of the pop-up ad.

195. 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*

The proposed reform relating to partial disclosure would also help prevent confusion in determining whether a privilege has been waived. The Legislature could forestall disputes and save both litigant and judicial resources by stating the applicable rule in the text of the statute as proposed.

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

Code Civ. Proc. § 2028.050 (amended). Privilege objection in deposition by written questions

SECTION 1. Section 2028.050 of the Code of Civil Procedure is amended to read:

2028.050. (a) A party who objects to any question on the ground that it calls for information that is privileged or is protected work product under Chapter 4 (commencing with Section 2018.010) shall serve a specific objection to that question on all parties entitled to notice of the deposition within 15 days after service of the question. A party who fails to timely serve that objection waives it. The court, on motion, may relieve that party from this waiver on its determination that the party has subsequently served an objection that is in substantial compliance with this paragraph and that the party's failure to serve a timely objection was the result of mistake, inadvertence, or excusable neglect.

(b) The party propounding any question to which an objection is made on ~~those~~ grounds of privilege or work product may then move the court for an order overruling that objection. This motion shall be accompanied by a meet and confer declaration under Section 2016.040. The deposition officer shall not propound to the deponent any question to which a written objection on those grounds has been served unless the court has overruled that objection.

(c) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to overrule an objection, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Comment. Subdivision (a) of Section 2028.050 is amended to follow the same approach to privilege waiver that is used for other forms of written discovery. See Sections 2030.290 (written interrogatories), 2031.300 (inspection demand), 2033.280 (requests for admission). Subdivision (b) is amended to improve clarity.

Evid. Code § 912 (amended). Waiver

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

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of ~~clergyman~~ clergy member), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim 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.

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

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

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

(e) If the holder of a privilege waives the privilege as to a significant part of a confidential communication pursuant to subdivision (a), the court may order disclosure of another part of the communication or a related communication to the extent necessary to prevent unfairness from partial disclosure.

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

Comment. Subdivision (a) of Section 912 is amended 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 intentionally makes the disclosure or intentionally permits another person to make the disclosure. This codifies the majority view in case law applying the provision to an inadvertent disclosure. *See* State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999) (Waiver "does not include accidental, inadvertent disclosure of privileged information by the attorney."); O'Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997) ("Inadvertent disclosure during discovery by no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something."); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984) ("As in other privileges for confidential communications, the physician-patient privilege precludes a court disclosure of a communication, even though there has been an accidental or unauthorized out-of-court disclosure of such communication") (dictum); *see also* KL Group v. Case, Kay & Lynch, 829 F.2d 909, 919 (9th Cir. 1987) (under either Hawaii or California law, client did not waive attorney-client privilege by counsel's inadvertent production of letter); Federal Deposit Ins. Corp. v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000) (under California law, "waiver of the attorney-client privilege depends entirely on whether the client provided knowing and voluntary consent to the disclosure."); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994) (California appears to follow subjective approach to waiver by a

privilege holder, under which "the client's intent to disclose is controlling.") (dictum). It disapproves what could be construed as contrary dictum in *People v. Von Villas*, 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992) (marital privilege was waived when husband and wife "knew or reasonably should have known" that their conversation was being overheard) (one of three alternate bases for decision).

Subdivision (a) is also amended to conform to the terminology used in Section 1034 (privilege of clergy member).

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

Even when a privilege holder voluntarily and intentionally makes or authorizes a significant disclosure, however, the privilege is not necessarily waived as to all of the communications between the persons in the privileged relationship. Although the scope of the waiver may be broader than what the privilege holder intends, the waiver is only as broad as fairness requires. *See* 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); 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 disclosed letters); Jones v. Superior Court, 119 Cal. App. 3d 534, 547, 174 Cal. Rptr. 148 (1981) (patient's disclosure that she ingested DES while pregnant did not waive physician-patient privilege as to her full medical history).

Subdivision (f) is added to underscore that this section only sets forth rules pertaining to waiver of the privileges listed in subdivision (a); it does not specify what rules apply to waiver of any other privilege. In some instances, a court construing another privilege may find this section useful by analogy. *See, e.g.*, 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."). But different policy considerations apply to different privileges and confidentiality protections, sometimes necessitating different rules regarding waiver. *See, e.g.*, Eisendrath v. Superior Court, 109 Cal. App. 4th 351, 357, 362-63, 134 Cal. Rptr. 2d 716 (2003) (Section 912 does not govern waiver of mediation confidentiality); Section 940 Comment (waiver of privilege against self-incrimination "is determined by the cases interpreting the pertinent provisions of the California and United States Constitutions"); Section 973 & Comment (waiver of spousal testimony privilege); *Tentative Recommendation Relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 260 (1964); 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).
