Study K-301 November 18, 2004

Third Supplement to Memorandum 2004-54

Waiver of Privilege By Disclosure: Comments of the State Bar Committee on Administration of Justice

The State Bar Committee on Administration of Justice ("CAJ") has submitted comments on the possibility of adding a presumption to Evidence Code Section 912(a), as discussed in Memorandum 2004-54 (available at www.clrc.ca.gov). Like the State Bar Litigation Section, CAJ opposes the concept. Exhibit pp. 1-2. In CAJ's view, the proposed rebuttable presumption would "lessen the protections provided by Section 912(a) and existing law, and unfairly tip the balance, from the outset, against the party who has inadvertently or mistakenly disclosed the privileged material." *Id*. at 3. CAJ's support position on the other proposed revisions of Section 912(a) remains unchanged. *Id*. at 2 n. 1.

Respectfully submitted,

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– COMMITTEE ON ADMINISTRATION OF JUSTICE

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TO: The California Law Revision Commission

FROM: The State Bar of California's Committee on Administration of Justice

DATE: November 17, 2004

SUBJECT: Waiver of Privilege by Disclosure – Draft Recommendation (October 14, 2004)

The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the October 14, 2004 Draft Recommendation of the California Law Revision Commission ("CLRC"), *Waiver of Privilege by Disclosure*, and appreciates the opportunity to submit these comments.

As currently under consideration, the CLRC proposal would amend Evidence Code Section 912(a) to read as follows:

> 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.

CAJ previously submitted comments supporting the proposed amendments to Section 912(a) that were contained in the June 2004 CLRC Staff Draft Recommendation. That version of the draft recommendation did not contain the newly proposed language in the last two sentences underlined above. CAJ opposes the additional language that would result in the

rebuttable presumption.[1] The proposed rebuttable presumption would undercut existing law and any additional protection that would otherwise be provided by the remainder of the proposed amendments to Section 912(a).

CAJ believes that, as a practical matter, the proposed rebuttable presumption will increase the likelihood that an *inadvertent* disclosure will result in a waiver of privilege, and certainly signals less protection of the privileges, contrary to existing law and the remainder of the proposed amendments to Section 912(a).

There are many attorneys who believe – as a matter of professional courtesy, if not strictly an ethical duty – that an attorney receiving inadvertently produced material that appears to be privileged has an obligation to return the privileged material immediately or, at a minimum, to contact counsel for the producing party, refrain from examining the content of the material any further, and return the material upon request. In *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657, the court addressed this issue:

> [W]e hold that the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact.

See also ABA Formal Op. 92-368 (1992) (a lawyer who receives inadvertently produced document, "as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, (a) should not examine the materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition").

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[1] CAJ continues to otherwise support the proposed amendments to Section 912(a) for the reasons set forth in its prior memoranda to the CLRC. Specifically, CAJ believes it is appropriate to conform the Evidence Code to the bulk of the case law, and to require that disclosure be intentional rather than inadvertent to constitute a waiver of a privilege. CAJ believes that mere inadvertent disclosure should not defeat a privilege, and that requiring an intent to disclose will best protect the policies underlying the privileges. CAJ also agrees that intent to make the disclosure, rather than intent to waive the privilege, should be the standard. Because a disclosure under Evidence Code Section 912 must be uncoerced in order to constitute a waiver, waiver would not occur if a party believed he or she were under a legal or other compulsion to produce the information. However, if, for example, a party freely reveals information to a colleague, outside the context of a privileged communication, without legal or other compulsion, it is appropriate for the privilege to be waived, whether or not the party knows the information being communicated is privileged.

The California Supreme Court may provide further guidance on this issue in the pending case of *Rico v. Mitsubishi Motors Corp*. No. S123808 (review granted July 9, 2004). In any event, CAJ believes that creating a presumption, as a matter of law, that an uncoerced disclosure is intentional (and a waiver) would be a step against protecting privileges, and effectively reverse the current approach to this issue.

As drafted, the proposed rebuttable presumption will lessen the protections provided by Section 912(a) and existing law, and unfairly tip the balance, from the outset, against the party who has inadvertently or mistakenly disclosed the privileged material. Under the first part of Section 912(a), a disclosure must be intentional *and* uncoerced before a waiver can be found. In stark contrast, under the proposed rebuttable presumption, an intent to disclose would be presumed by the mere absence of coercion, even in cases involving a purely accidental disclosure.

CAJ believes that it is neither realistic nor fair to *presume* that an uncoerced disclosure of privileged material is intentional. Suppose, for example, that an attorney intends to fax a privileged document to his or her client. Instead of putting the client's fax number on the cover sheet, the attorney mistakenly puts down opposing counsel's fax number, and the privileged document is then sent to that fax number. Under this scenario, all of the conduct would be "uncoerced." But this does not account for the fact that the attorney accidentally wrote the wrong fax number on the fax cover sheet. Thus, although the transmission of information was uncoerced (and intentional) the attorney *never* intended to transmit the privileged information *to opposing counsel*. There is no basis for presuming – as a matter of law – that the transmission to opposing counsel was intentional, which would appear to equate with a waiver under Section 912(a).

Finally, even without the proposed rebuttable presumption, the party receiving a privileged document that was produced by the other side would still be entitled to attempt to prove waiver, by proving the requisite intent. CAJ believes the presumptions and ultimate burden of proof should remain where they are under existing law, and that the balance should not be tilted, at the outset, against the party who produced the privileged document.

DISCLAIMER

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