

Fourth Supplement to Memorandum 2004-54

**Waiver of Privilege By Disclosure (Material Received at Meeting)**

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The following material was received by the Commission at the meeting on November 19, 2004, in connection with Study K-301 on *Waiver of Privilege By Disclosure*, and is attached as an Exhibit:

	<i>Exhibit p.</i>
1. Email from Richard Best to Barbara Gaal (Nov. 18, 2004) . . . . .	1
2. Consumer Attorneys of California (Nov. 17, 2004) . . . . .	2

Respectfully submitted,

Barbara Gaal  
Staff Counsel

Exhibit

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**EMAIL FROM RICHARD BEST**

Date: Nov. 18, 2004  
From: rich best <rebest@comcast.net>  
To: bgaal@clrc.ca.gov

Although it may be a moot point, I suggest giving the Supreme Court a chance to illuminate this area of inadvertent waiver. In my view for what it is worth both O'Mary and Jasmine represent extremes that should be rejected and were wrongly decided. Perhaps the nuances and variations of this issue cannot be resolved adequately by statute. This is an issue of national interest and certainly one where the Supreme Court could write an opinion that will address a number of issues and stand the test of time like the Chadbourne decision 40 years ago.

rich best

November 17, 2004

Ms. Barbara S. Gaal,  
Staff Counsel  
California Law Review Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, Ca 94303-4739

Re: Amendment to Evid. Code Sec. 912

Dear Ms. Gaal:

Consumer Attorneys of California wishes to thank the Commission for the opportunity to comment upon the most recent proposed amendment on waiver of privileges. The Consumer Attorneys of California (CAOC) believes that it would be advisable to await the California Supreme Court's resolution of the *Rico v. Mitsubishi Motors Corp. Inc.*, 10 Cal.Rptr. 3d 601 (2004) and *Jasmine Networks, Inc. v. Marvel Semiconductor, Inc.*, 117 Cal. App. 4th 794 (2004) cases before undertaking to amend to Section 912. Nevertheless, at this time CAOC offers the following observations regarding the Commission's thoroughgoing work on Waiver of Privilege by Disclosure.

In our letter of August 16, Consumer Attorneys of California (Consumer Attorneys) opposed certain proposed changes in the California Law Revision Commission's *Staff Draft Recommendation: Waiver of Privilege by Disclosure*, June 2004. Consumer Attorneys in general objects to *any expansion of privileges* (Consumer Attorney's letter to Commission dated October 15, 2001). Consumer Attorneys points to the general rule regarding disclosure: "failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity to claim the privilege constitutes a waiver of that privilege" (*City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 233 (1951) cited in West's Ann. Cal. Evid. Code § 912 (2004)). If the holder of the privilege, without coercion, discloses a significant part of the communication or consents to another's disclosure, the privilege is lost. (*Menendez v. Superior Court*, 3 Cal. 4th 435, 455 (1992)).

Furthermore, we emphasized that any claim of privilege must be **narrowly tailored** to subject matter within the *scope* of the relationship in which it was made (attorney-client, physician-patient) (*Id.* citing *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874 (2004)). The doctrine of waiver of a privilege helps to protect against unfairness that would result from a privilege holder *selectively disclosing privileged communications* to an adversary, revealing those that support a cause while claiming shelter of privilege to avoid disclosing those that are less favorable. (*Tennenbaum v.*

*Deloitte & Touche*, 77 F. 3d 337 (9<sup>th</sup> Cir. 1996)). Consumer Attorneys emphasized its support for the rule that an implied waiver of privilege occurs when the privilege holder tenders an issue involving substance or content of a protected communication. (*Eisendrath v. Superior Court* 109 Cal. App. 4<sup>th</sup> 351 (2001)). In those instances where a privilege holder's own action initiates the disclosure (*Palay v. Superior Court*, 18 Cal. App. 4<sup>th</sup> 919 (1993)) then the privilege is lost.

**Consumer Attorneys' Comment Concerning the Commission's Amendment to Cal. Evid. Code § 912:**

The inclusion of a *rebuttable presumption* helps to address the concerns that we expressed on August 16, 2004. Additionally, CAOC agrees with the observations of Professor Mendez pointing to the importance of making clear that the exemption would also apply to "knowing, negligent, and reckless" waivers. (Comments of Professor Miguel A. Mendez, Oct. 20, 2004 Ex.2).

Consumer Attorneys respectfully notes the concerns of The State Bar of California, Litigation Section, Administration of Justice Committee that the *rebuttable presumption* would "shift the balance" making it more likely that the a mistaken or negligent disclosure would result in a waiver and that "professional courtesy and professional ethics demand attorneys voluntarily safeguard the protections afforded by privileges". (Comments of the State Bar Litigation Section, Nov. 15, 2004 at 3, 4). Consumer Attorneys of California are steadfast advocates for the safeguarding of professional courtesy. Additionally, Consumer Attorneys believe that the cultivation of strong professional ethics is a matter of paramount concern.

However, Consumer Attorneys believe that requiring too stringent a test for proving a waiver by disclosure could prove equally detrimental and entrenches its own imbalance. Privileges must be respected and precisely protected but that precision requires certain responsibilities on the part of the holder of the privilege. Privileges require the conscientious attention by the holder and must not be relied upon as an automatic fallback in every instance where negligence results in the disclosure of evidence that might fall under the protection of a privilege. Specifically, **shifting the burden of proof back to the holder of a privilege when a "privileged communication was voluntarily disclosed to a third party,"** does not place an onerous burden on the privilege holder. (amended Comment to Cal. Evid. Code § 912 at 5).

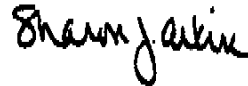
While, as the Commission accurately states, there is a need to be sensitive to *hypothetically* increased demands on the courts that could result from the *rebuttable presumption*, Consumer Attorneys believes that it is vital to keep evidentiary privileges as narrowly circumscribed as possible and that the Courts in their wisdom will call upon practical guideposts in order to appropriately determine whether a privilege has been waived..

Consumer Attorneys of California appreciates the most recent amendment adding a *rebuttable presumption* to Cal. Evid. Code § 912 and the language addressing the burden of proof in the Comment. CAOC thanks the Commission for its efforts to address concerns that were expressed regarding the earlier draft's proposed subjective intent test. Additionally, The Consumer Attorneys of California commends the Commission on its exhaustive research and analysis. If you or one of your representatives have any questions please contact me in our Sacramento office.

Sincerely,



James C. Sturdevant  
President 2004



Sharon J. Arkin  
President 2005