

#K-301

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft
RECOMMENDATION

Waiver of Privilege By Disclosure

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California Law Revision Commission
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SUMMARY OF RECOMMENDATION

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

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

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

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

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

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WAIVER OF PRIVILEGE BY DISCLOSURE

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

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

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

20 **Section 912**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 ***Scope***

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

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

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

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

29 ***General Rule***

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

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

13. Section 917 Comment (1965).

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

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

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

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

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

21 What is not obvious from the statutory language is whether inadvertent
22 disclosure of a privileged communication constitutes a waiver of the privilege. The
23 statute does not state whether a disclosure must be intentional to waive the
24 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).

1 **Exceptions**

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

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

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

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

15 In some instances a privilege may be waived or otherwise rendered inapplicable
16 by putting a matter in issue. For example, the Evidence Code expressly provides
17 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, _____, 9 Cal. Rptr. 3d 812 (2004); *Raytheon Co. v. Superior Court*, 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (1989).

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

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

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

13 **Approaches to Inadvertent Disclosure**

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

18 ***Strict Liability for Disclosure***

19 In some jurisdictions, disclosure of a privileged communication waives the
20 privilege, regardless of the circumstances of the disclosure.³³ The holder of the
21 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. 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).

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

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

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

15 *Subjective Intent of the Holder*

16 At the other end of the spectrum, some courts focus on the subjective intent of
17 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);

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

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

12 The approach is sometimes criticized, however, for not creating enough
13 incentives to protect against accidental disclosure of privileged communications.⁴⁷
14 This criticism is not entirely persuasive, because disclosure of a communication
15 can be very harmful even if the communication remains inadmissible at trial.⁴⁸ In
16 addition, ethical rules compel attorneys, doctors, and others to maintain
17 confidentiality of their records and client communications. These rules provide

Trilogy Communications, 652 A.2d at 1275; Scott, *supra* note 33, at 1071-73; Rest, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 Case W. Res. L. Rev. 309, 332 (1998).

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

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

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

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

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

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

48. Bruckner-Harvey, *supra* note 38, at 392 (“[W]hile a recipient may not be allowed to keep the document or introduce it into evidence, he still receives a windfall from the mere knowledge of its contents.”); Simko, *supra* note 38, at 470 (Under subjective intent approach, although disclosed documents cannot be used at trial without showing of intent to disclose, “the information contained in them can be used for strategic purposes during trial.”); Rand, *What Would Learned Hand Do?: Adapting to Technological Change and Protecting the Attorney-Client Privilege on the Internet*, 66 Brook. L. Rev. 361, ___ (2000) (“A bell may be unrung 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).

1 incentives to prevent accidental disclosure of such material even though waiver of
2 the applicable evidentiary privilege would not result.⁴⁹

3 ***Multifactor Balancing Test***

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

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

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

22 The approach also places heavy demands on the courts.⁵⁵ It requires courts to
23 examine circumstances of each communication and delve into the details of the
24 communication methods used. This increases litigation costs for the parties and

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

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

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

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

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

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

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

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

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

1 consumes scarce judicial resources.⁵⁶ It can be especially burdensome where a
2 case involves voluminous materials or numerous communications.⁵⁷

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

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

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

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

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

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

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

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

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

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

59. *Id.* at 141.

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

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

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

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

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

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

33 The court concluded that there had been no waiver in the case before it, because
34 it was “clearly demonstrated that [the holder of the privilege] had no intention to
35 voluntarily relinquish a known right.⁶⁵ The court thus framed the test as whether

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

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

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

63. *Id.* at 652.

64. *Id.* at 652-53.

65. *Id.* at 653.

1 the holder of the privilege intended to waive the privilege.⁶⁶ In describing its
2 holding, however, the court spoke only in terms of disclosure: “[W]e hold that
3 ‘waiver’ does not include accidental, inadvertent disclosure of privileged
4 information by the attorney.”⁶⁷

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

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

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

13 A more extensive discussion of the issue appears in *Federal Deposit Ins. Corp.*
14 *v. Fidelity & Deposit Co.*⁷¹ Again, counsel inadvertently produced attorney-client
15 communications during document discovery. The district court determined that
16 “[t]o the extent the disputed documents fall within the scope of the [attorney-
17 client] privilege, California law requires they remain privileged notwithstanding
18 their inadvertent disclosure during discovery.”⁷² The court explained that under
19 California law, “waiver of the attorney-client privilege depends entirely on
20 whether the client provided knowing and voluntary consent to the disclosure.”⁷³
21 That statement suggests that the critical factor in assessing whether waiver
22 occurred is the client’s intent regarding disclosure. But the court also stated that
23 “nothing in the record suggests that the counsel’s inadvertent disclosure of
24 allegedly privileged documents manifested [the client’s] knowing and voluntary
25 relinquishment of its attorney-client privilege.”⁷⁴ That statement suggests that the
26 critical factor is not the client’s intent regarding disclosure, but rather the client’s
27 intent regarding waiver of the privilege. The decision is thus an example of a case
28 in which the court intermingles these two different standards. Either way,
29 however, it is clear that the court is focusing on the subjective intent of the holder
30 of the privilege in determining whether the privilege has been waived under
31 Section 912.

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

67. *Id.* at 654.

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

69. *Id.* at 919.

70. *Id.*

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

72. *Id.* at 380.

73. *Id.*

74. *Id.*

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

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

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

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

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

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

28 Similarly, in *Menendez v. Superior Court*⁸¹ the California Supreme Court
29 considered whether the psychotherapist-patient privilege was waived as to tapes
30 that had been seized by the police. The Court ruled that one of the tapes fell within

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

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

77. *Id.* at 1410.

78. *Id.* at 1411.

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

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

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

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

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

17 A few court of appeal decisions provide further support for the subjective intent
18 approach, without relying on it as the basis for a holding. These include *Cooke v.*
19 *Superior Court*⁸⁸ and *Houghtaling v. Superior Court*.⁸⁹

82. Section 1024.

83. *Id.* at 455, 456.

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

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

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

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

88. 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.

89. 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.

1 **Potential Sources of Confusion**

2 Given the foregoing authorities, until recently California law on inadvertent
3 disclosure seemed relatively clear. There were, however, some potential sources of
4 confusion. These included an unnecessary discussion in *People v. Von Villas*,⁹⁰
5 dicta in a number of cases stating that a privilege is lost once disclosed, misleading
6 language in cases in which the holder of a privilege agreed to disclose a privileged
7 communication but did not do so, and a depublished decision that was relied on in
8 commentary.

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

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

14 were speaking very loudly to one another — loudly enough to be heard beyond
15 the plexiglass which separated them. They knew *or reasonably should have*
16 *known* that third parties in the person of sheriff's deputies were present.⁹¹

17 The court offered three alternate bases for its decision. First, the court concluded
18 that the conversation was not made “in confidence” and thus never became
19 privileged.⁹² That was a correct and sufficient basis for its decision; there was no
20 need for the court to say anything more.⁹³ As an alternate basis for decision,
21 however, the court also said that the conversation could be viewed as satisfying the
22 “crime or fraud” exception to the marital privilege.⁹⁴ As yet another alternate basis
23 for decision, the court said that “the trial court was faced with sufficient evidence
24 to warrant the conclusion that even if the December 20 conversation was
25 privileged, any such privilege was waived pursuant to Evidence Code section
26 912.”⁹⁵

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

90. 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992).

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

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

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

94. *Id.* at 222-23.

95. *Id.* at 223.

1 Another potential source of confusion is language in several cases to the effect
2 that once a privileged communication is disclosed, the privilege is lost.⁹⁶ The
3 implication of those statements is that an inadvertent or other unintentional
4 disclosure of a privileged communication waives the privilege, not just an
5 intentional disclosure by or with the consent of the holder of the privilege. But
6 none of the cases involved a ruling on an inadvertent or unintentional disclosure,
7 so the statements in them are only dicta.

8 Similarly, in a number of cases the holder of a privilege agreed to, or otherwise
9 took steps to, disclose privileged communications, but no disclosure actually
10 occurred. Those cases interpret Section 912 to require actual disclosure, or a
11 reasonable certainty of disclosure, before waiver occurs. Mere intent to disclose,
12 by itself, is not enough.⁹⁷

13 That principle is fully consistent with the subjective intent approach, under
14 which waiver requires both intent to disclose and actual disclosure. But some of
15 the language in this line of cases might be misinterpreted to mean that the holder's
16 intent is unimportant in determining whether waiver occurred. For example, one
17 court said that "the focal point of privilege waiver analysis should be the holder's
18 disclosure of privileged communications to someone outside the attorney-client
19 relationship, not the holder's intent to waive the privilege."⁹⁸ Although such a
20 statement downplays the importance of intent to disclose, it is dictum and the
21 holding of the case is consistent with the subjective intent approach.

22 Still another potential source of confusion is *Kanter v. Superior Court*,⁹⁹ a
23 depublished court of appeal decision that adopted the multifactor balancing test for
24 waiver of privilege by disclosure. Although the case is not good law, a fairly

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

97. 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).

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

99. 253 Cal. Rptr. 810 (1988). Another depublished decision on inadvertent disclosure is *Magill v. Superior Court*, 103 Cal. Rptr. 2d 355, 385 (2001).

1 recent student publication on inadvertent disclosure discusses it extensively,¹⁰⁰
2 refers to the depublication only in a footnote,¹⁰¹ and states in the text that in
3 California “there is clear guidance from the *Kanter* case.”¹⁰² The piece thus gives
4 the misleading impression that *Kanter* is the leading California decision on waiver
5 of privilege by disclosure.¹⁰³

6 Because these authorities are potentially confusing and require research to
7 properly understand, the Commission concluded that statutory guidance on
8 inadvertent disclosure would be useful.¹⁰⁴ A recent court of appeal decision
9 underscores the need for such a reform.

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

101. *Id.* at 548 n.8.

102. *Id.* at 565.

103. 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.

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

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

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

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

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

The Court firmly rejected that notion in a later case, however, explaining that “*Clark* holds only that when a psychotherapist discloses a patient’s threat to the patient’s intended victim ..., *the disclosed threat* is not covered by the privilege.” *Menendez*, 3 Cal. 4th at 447 (emphasis added). According to the Court, the dangerous patient exception applies to the threat itself, but other communications between the

1 *New Court of Appeal Decision on Inadvertent Disclosure*

2 In *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*,¹⁰⁵ decided just this
3 year, a group of officers and lawyers for a corporation called an officer for another
4 corporation and left a message on her voicemail. After they left the message, they
5 failed to hang up the speakerphone, and proceeded to have a conversation among
6 themselves that was also recorded on her voicemail. In subsequent litigation, their
7 corporation sought to preclude use of that conversation, claiming that it was
8 protected by the attorney-client privilege. The trial court agreed, but the court of
9 appeal reversed, advancing two bases for its decision.

10 First, the court of appeal determined that the privilege had been waived, even
11 though the recording of the conversation was inadvertent.¹⁰⁶ Citing *State*
12 *Compensation Ins. Fund*, the court acknowledged that “an attorney’s inadvertent
13 disclosure does not waive the privilege absent the privilege holder’s intent to
14 waive.”¹⁰⁷ The court distinguished that situation, however, pointing out that in the
15 case before it “the *privilege holder* inadvertently disclosed the information.”¹⁰⁸
16 The court then asserted that there “is no requirement in the statute itself, nor in the
17 cases interpreting the statute that the privilege holder intend to disclose the
18 information when ... the holder makes an uncoerced disclosure.”¹⁰⁹ Accordingly,
19 the court concluded that it was unimportant whether the corporation intended to
20 disclose the information; it was enough that the corporation “was not coerced in
21 any way to make the disclosure, and as such, its disclosure falls squarely within
22 the meaning of section 912, subdivision (a).”¹¹⁰

23 As an alternate basis for its decision, the court concluded that “[e]ven if the
24 attorney-client privilege were not waived in this case, the voicemail is not
25 protected, because it falls within the crime-fraud exception to the attorney-client
26 privilege stated in section 956.”¹¹¹ Explaining that there was abundant evidence of
27 fraud, the court cautioned that in “an era where corporate fraud and boardroom

psychotherapist and the patient remain privileged, despite the disclosure of the threat. *Id.* at 447-49; *see also* *San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (2001).

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

105. 117 Cal. App. 4th 794, 12 Cal. Rptr. 3d 123 (2004), *petition for review filed*, No. S124914 (May 18, 2004).

106. 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.

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

108. *Id.* (emphasis added).

109. *Id.*

110. *Id.* at 129.

111. *Id.*

1 misconduct is front-page news as well as prosecutions of accountants and lawyers
2 in connection with such conduct, our courts are required to ensure that the
3 attorney-client privilege is not used to promote or further any such conduct.”¹¹² A
4 petition for review is pending.

5 Unfortunately, *Jasmine* creates further potential for confusion in an area that
6 already warranted clarification. The court of appeal’s comments on privilege
7 waiver were unnecessary to its decision, which could have rested solely on the
8 crime-fraud exception to the attorney-client privilege. In its outrage over the
9 fraudulent actions of the corporate representatives and its eagerness to admit the
10 incriminating voicemail, the court fashioned a new variant of the waiver doctrine:
11 A two-pronged rule in which the strict liability approach applies to a disclosure by
12 the holder of a privilege, while the subjective intent approach applies to disclosure
13 by a representative of the holder. Previous decisions made no mention of such a
14 two-pronged approach. Guidance is needed to make clear what rule applies.

15 **Proposed Approach to Inadvertent Disclosure**

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

21 ***Codification of the Subjective Intent Approach***

22 Specifically, the Commission proposes to codify the subjective intent approach
23 with regard to all disclosures, whether by the privilege holder or by someone else.
24 Section 912(a) would be amended to provide that subject to the statutory
25 exceptions, the right of any person to claim a confidential communication
26 privilege “is waived with respect to a communication protected by the privilege if
27 any holder of the privilege, without coercion, has *intentionally* disclosed a
28 significant part of the communication or has consented to disclosure made by
29 anyone.”¹¹³ The provision would further state that consent to disclosure “is
30 manifested by any statement or other conduct of the holder of the privilege
31 indicating *intent to permit* the disclosure, including failure to claim the privilege in
32 any proceeding in which the holder has the legal standing and opportunity to claim
33 the privilege.”¹¹⁴

34 This approach has a number of advantages. First, it avoids drawing a distinction
35 between a disclosure by a privilege holder and a disclosure by someone else. The
36 apparent rationale for such a distinction is to avoid penalizing the privilege holder
37 for another person’s lack of vigilance in protecting the confidentiality of privileged

112. *Id.* at 132.

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

114. *Id.* (emphasis added).

1 material. But the two-pronged approach leads to incongruous results. For instance,
2 the physician-patient privilege would be waived if disclosure occurred because
3 medical records were in a briefcase stolen from a patient, but the privilege would
4 not be waived if the records were in a briefcase stolen from a physician. Such a
5 harsh result as waiver should not turn on fortuity. This would not occur if the
6 subjective intent approach applied to all disclosures.

7 Second, the subjective intent approach is most consistent with the case law
8 interpreting Section 912.¹¹⁵ Codifying the approach would not be a break with past
9 practice and precedent, but would simply maintain the longstanding status quo.

10 Third, the subjective intent approach is most consistent with the statutory
11 scheme governing the confidential communication privileges. With regard to each
12 such privilege, subjective intent is determinative in assessing whether a
13 communication is initially considered privileged or unprivileged.¹¹⁶

14 For instance, a “confidential communication between client and lawyer” is
15 defined as “information transmitted between a client and his or her lawyer in the
16 course of that relationship and in confidence by a means which, *so far as the client*
17 *is aware, discloses the information to no third persons* other than those who are
18 present to further the interest of the client in the consultation or the
19 accomplishment of the purpose for which the lawyer is consulted”¹¹⁷ The focus
20 is on whether the client knew, and therefore can be presumed to have intended,
21 that the communication was being disclosed to a third person at the time it was
22 made.

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

27 Fourth, the subjective intent approach accords with the search for truth in a trial
28 or other legal proceeding. The approach does not insulate a special category of

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

116. 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.)

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

1 information from use at trial. Rather, it only ensures that information protected by
2 a confidential communication privilege remains privileged unless the holder of the
3 privilege chooses to disclose the information. The doctrine is thus no more of a
4 burden on the use of evidence than the privilege itself,¹¹⁸ which was created in
5 recognition that the search for truth is sometimes less pressing than the policies
6 served by the privilege.¹¹⁹

7 Most importantly, the subjective intent approach is good policy. In contrast to
8 the multifactor balancing approach, it establishes a clear standard, yields
9 predictable results, and thus is readily-administered instead of routinely requiring
10 court adjudication. Further, it safeguards the important policies underlying the
11 confidential communication privileges. Effective functioning of the relationships
12 in question (e.g., lawyer-client, psychotherapist-patient) is crucial to our society,
13 helping to ensure, for instance, that the correct person goes to jail or that a
14 mentally ill person receives appropriate treatment and does not become a safety
15 threat.¹²⁰ By protecting the confidentiality of communications between persons in
16 these relationships, the privileges promote the free-flowing communication that is
17 considered essential for such effective functioning.¹²¹ A low threshold for waiver
18 would undercut that effect, jeopardizing the functioning of the privileged
19 relationships.¹²² The subjective intent approach restricts waiver to situations in
20 which it is clear that disclosure of the privileged communication is acceptable to
21 the holder of the privilege. Consequently, there is no disincentive to free-flowing
22 communication in the privileged relationship, and the relationship can continue to
23 function effectively.

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

25 Significantly, the proposed standard would focus on intent to disclose the
26 privileged communication to a third person, not intent to waive the applicable

118. 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).

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

120. *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.”).

121. *See* note 9 *supra*.

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

1 privilege.¹²³ The holder of the privilege need not have been aware of the legal
2 consequences of disclosure, so long as the disclosure was intentional.

3 That is consistent with the legislative history of Section 912, as enacted on
4 recommendation of the Law Revision Commission in 1965. When the
5 Commission prepared the Evidence Code, it used the Uniform Rules of Evidence
6 as a starting point. In drafting Section 912, however, the Commission deliberately
7 deleted the Uniform Rules' requirement that the holder of a privilege make a
8 disclosure "with knowledge of his privilege."¹²⁴ The proposed amendment of
9 Section 912 would continue that approach.

10 ***Failure to Object at Trial***

11 Numerous cases find that a privilege was waived due to failure to object at
12 trial.¹²⁵ The results of these cases should be the same under the Commission's
13 proposed amendment of Section 912.

14 In conducting a trial, a party's attorney speaks for the party¹²⁶ and the attorney's
15 intent is presumed to mirror the party's intent.¹²⁷ If an attorney fails to object to

123. 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 victim-counselor privilege), or 1037.5 (domestic violence victim-counselor privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has intentionally *disclosed* a significant part of the communication or has consented to *disclosure* made by anyone. Consent to *disclosure* is manifested by any statement or other conduct of the holder of the privilege indicating intent to permit the *disclosure*, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(Emphasis added.)

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

125. *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).

126. "[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.

127. 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

1 disclosure of privileged information at trial, the attorney would be presumed to
2 have intended the ordinary consequences of that voluntary act.¹²⁸ The ordinary
3 consequences of failure to object to evidence at trial are introduction of the
4 evidence (i.e., disclosure of the privileged information) and waiver of the
5 objection.¹²⁹

6 Thus, it would be presumed that an attorney who failed to claim the privilege at
7 trial intended to disclose the privileged information.¹³⁰ That presumption would be
8 difficult to overcome, particularly if the failure to object resulted in a tactical
9 benefit or otherwise appeared strategically motivated.¹³¹ Moreover, absent unusual
10 circumstances, the attorney's intent would be attributed to the client, thus
11 satisfying the proposed requirement that the "holder of the privilege, without
12 coercion, has *intentionally* disclosed a significant part of the communication or has
13 consented to disclosure made by anyone."¹³²

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 126, § 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.

128. Evid. Code § 665.

129. Witkin, *supra* note 126, §§ 367, 371, at 454, 459-61.

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

131. 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.

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

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

2 The Civil Discovery Act contains a number of provisions on privilege waiver.¹³³
3 Those provisions would not conflict with the Commission’s proposed amendment
4 of Section 912.

5 ***Nonexclusivity of Section 912***

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

11 Nonetheless, a couple of cases seem to indicate as much.¹³⁴ One of these was
12 decided before enactment of the Civil Discovery Act of 1986, however, and the
13 other involved an incident that occurred before the operative date of that Act.

14 It is true that courts “may not add to the statutory privileges except as required
15 by state or federal constitutional law, nor may courts imply unwritten exceptions
16 to existing statutory privileges.”¹³⁵ But there is nothing to prevent the Legislature
17 from adding a new *statutory* means of waiving a privilege. If that occurs, the
18 preexisting waiver statute is no longer exclusive.

19 That appears to be the situation with regard to Section 912. After the Civil
20 Discovery Act of 1986 became operative, Section 912 was no longer the only
21 statute specifying means of waiving the privileges to which it applies; other means
22 were specified in the Civil Discovery Act.¹³⁶

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

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

26 Under the statute governing an oral deposition, the right to assert a privilege with
27 regard to a communication “is waived unless a specific objection to its disclosure
28 is timely made during the deposition.”¹³⁷ Unlike other provisions of the Civil

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

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

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

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

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

1 Discovery Act, the statute does not specify any circumstances under which a party
2 can obtain relief from such a waiver.

3 Although that rule may initially seem more harsh than the Commission’s
4 proposed amendment of Section 912, results under the two provisions are
5 generally likely to be the same. As at trial, if a party at a deposition (through
6 counsel, or directly if self-represented) fails to object to a question calling for
7 privileged information, the party would be presumed to have intended the ordinary
8 consequences of that action, including disclosure of the privileged information.¹³⁸
9 That presumption would be difficult to overcome, because a person representing
10 someone at a deposition normally pays close attention to what is happening and is
11 unlikely to be able to successfully claim inadvertence.¹³⁹

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

18 The waiver provisions relating to interrogatories, inspection demands, and
19 requests for admission take a different approach. Each of those provisions states
20 that failure to file a timely response to a discovery request waives any objection to
21 the request, including an objection based on privilege. For example, the provision
22 governing interrogatories states that if “a party to whom interrogatories have been
23 directed fails to serve a timely response, that party waives any ... objection to the
24 interrogatories, including one based on privilege”¹⁴⁰ Each of the provisions also
25 allows a court to grant relief from such a waiver, on motion, upon determining that
26 (1) the party from whom discovery was sought subsequently served a response in
27 substantial compliance with the applicable discovery requirements, and (2) the

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

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

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

1 party's failure to serve a timely response was the result of mistake, inadvertence,
2 or excusable neglect.¹⁴¹

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

12 *Minor Adjustment*

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

15 [a] party who objects to any question on the ground that it calls for information
16 that is privileged ... shall serve a specific objection to that question on all parties
17 entitled to notice of the deposition within 15 days after service of the question. A
18 party who fails to timely serve that objection waives it.¹⁴²

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

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

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

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

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

142. Code Civ. Proc. § 2028(d)(2).

1 The confidential communication privileges foster socially valuable relationships
2 and should not be abrogated for a minor technical mistake.¹⁴³ Other remedies exist
3 to encourage proper compliance with the discovery requirements.¹⁴⁴ A discovery
4 sanction “cannot go farther than is necessary to accomplish the purpose of
5 discovery”¹⁴⁵ The Commission therefore recommends that the provision
6 governing a deposition by written questions be amended to track the other
7 provisions governing written discovery. Like those provisions, it should provide a
8 means for obtaining relief from a privilege waiver based on failure to timely object
9 to a question.¹⁴⁶

10 **Partial Disclosure and Selective Disclosure**

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

14 *Partial Disclosure*

15 Sometimes a privileged communication is partially disclosed, meaning that a
16 significant portion but not the entirety of the communication is revealed to a
17 person outside the privileged relationship. This may confer an unfair tactical
18 advantage, as when a privilege holder discloses favorable portions of a privileged
19 document, but withholds unfavorable portions. Case law establishes, however, that
20 if the holder of a privilege voluntarily and intentionally makes a partial disclosure
21 (or voluntarily and intentionally permits another person to do so), and the situation
22 is not covered by one of the exceptions to Section 912,¹⁴⁷ a court may require
23 additional disclosure in the interest of fairness, even though the holder did not
24 intend to permit such additional disclosure.

25 For example, the defendant in *People v. Worthington*¹⁴⁸ disclosed a marital
26 communication in which the defendant’s wife supposedly confessed to a murder
27 and described the details of the crime. Having presented his version of the

143. 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).

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

145. *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).

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

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

148. 38 Cal. App. 3d 359, 114 Cal. Rptr. 322 (1974).

1 conversation, the defendant could not preclude his wife from testifying that the
2 conversation occurred as he said, except it was he who confessed not she.¹⁴⁹

3 Similarly, in *Kerns Construction Co. v. Superior Court*,¹⁵⁰ a witness used
4 privileged reports, provided by the holder of the privilege, to refresh his
5 recollection before testifying, because he could not have testified on the subject
6 otherwise. The privilege holder sought to exclude the reports themselves, but the
7 court ruled that “[w]hen, with knowledge of their intended use, the privileged
8 records were furnished to the witness, which act was not required to be performed,
9 and the witness gave testimony from them, the privilege was waived.”¹⁵¹ The court
10 explained that fairness required that result:

11 It would be unconscionable to allow a rule of evidence that a witness can testify
12 to material contained in a report, though not verbatim, and then prevent a
13 disclosure of the reports. As is stated in 8 Wigmore, Evidence, section 2327
14 (McNaughton rev. 1961), “There is always also the objective consideration that
15 when his [holder of the privilege] conduct touches a certain point of disclosure,
16 fairness requires that his privilege shall cease *whether he intended that result or*
17 *not*. He cannot be allowed, *after disclosing as much as he pleases*, to withhold the
18 remainder. He may elect to withhold or to disclose, but after a certain point, his
19 election must remain final.”¹⁵²

20 Even when a holder voluntarily and intentionally makes a significant disclosure,
21 however, the privilege is not necessarily waived as to all of the communications
22 between the persons in the privileged relationship. For example, a patient’s
23 disclosure that she ingested DES while pregnant did not waive the physician-
24 patient privilege as to her full medical history.¹⁵³ Similarly, voluntary production
25 of some attorney-client communications is not necessarily a waiver of the
26 attorney-client privilege as to all communications having anything to do with the
27 subject matter of a case.¹⁵⁴ Although a court may rule that the scope of a waiver is
28 broader than what the privilege holder intended when making a partial disclosure,
29 the waiver should only be as broad as fairness requires.

30 Section 912 should be revised to codify that concept, so that the rule is clear on
31 the face of the statute. The Commission recommends adding a new subdivision
32 stating that “[i]f the holder of a privilege makes or consents to disclosure of a

149. *Id.* at 365-66.

150. 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (1968).

151. *Id.* at 413-14.

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

153. *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).

154. *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).

1 significant part of a confidential communication under the circumstances specified
2 in subdivision (a), the court may order disclosure of another part of the
3 communication or a related communication, but only to the extent necessary to
4 prevent unfairness from partial disclosure.”¹⁵⁵

5 ***Selective Disclosure***

6 Selective disclosure is the disclosure of a privileged communication to one
7 person outside the privileged relationship or on one occasion, while seeking to
8 preclude disclosure to other persons or on other occasions. For example, a man
9 might tell a friend about a discussion he had with his psychiatrist, but ask the
10 friend to keep the matter confidential. Or the target of a governmental
11 investigation might share privileged information with the investigating agency, on
12 the understanding that it will not be shared with others, such as potential civil
13 litigants. The investigating agency may even offer a reduced penalty or other
14 incentive to encourage such a disclosure.¹⁵⁶

15 California law is unsettled as to whether a selective disclosure constitutes a
16 waiver of the applicable privilege, such that a court or other tribunal could compel
17 disclosure of the once-privileged communication to persons other than the holder’s
18 chosen confidant. In *San Diego Trolley, Inc. v. Superior Court*,¹⁵⁷ a patient
19 disclosed confidential psychotherapist-patient communications to persons
20 handling her claim for workers’ compensation. She was later sued in a personal
21 injury case, and the plaintiff sought discovery of the psychotherapist-patient
22 communications the patient had selectively disclosed. The trial court ordered
23 disclosure but the court of appeal reversed, explaining:

24 [O]ur focus is on preservation of [the patient’s] relationship with her psychiatrist
25 and more broadly her ability to have a trusting therapeutic relationship with other
26 psychotherapists. The fact [that she] has been willing to put her psychotherapeutic
27 relationship somewhat at risk in the workers’ compensation proceedings and the
28 relationship was evidently able to withstand whatever limited disclosure occurred
29 there does not support an inference [that she] meant her relationship with her
30 psychiatrist could continue to be put at risk following disposition of her claims.¹⁵⁸

31 Two years later, the Ninth Circuit Court of Appeals took the opposite approach
32 in a case interpreting California law. In *Feldman v. Allstate Ins. Co.*,¹⁵⁹ a litigant
33 voluntarily disclosed confidential marital communications at a deposition, but
34 sought to invoke the marital communications privilege at trial. The Ninth Circuit

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

156. 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).

157. 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (2001).

158. *Id.* at 1094.

159. 322 F.3d 660 (9th Cir. 2003).

1 ruled that the privilege had been waived. It declined to “read a broad ‘selective
2 waiver’ rule into the California law of privilege,”¹⁶⁰ because such a rule would not
3 serve any constructive purpose in the discovery process and would “contravene the
4 general rule that once confidential communications are disclosed to a third party
5 the privilege is forever lost.”¹⁶¹

6 Another case involving selective disclosure was decided in a California court of
7 appeal just this year. In *McKesson HBOC, Inc. v. Superior Court*,¹⁶² a company
8 under investigation disclosed an audit report prepared by its attorneys to the
9 Securities and Exchange Commission (“SEC”) and the United States Attorney. In
10 making this disclosure, the company entered into confidentiality agreements with
11 the SEC and the United States Attorney, purporting to preserve the confidentiality
12 of the audit report. The company was later sued in several civil actions, which
13 were consolidated. Plaintiffs sought discovery of the audit report, contending that
14 the company had waived the lawyer-client privilege by disclosing the report to the
15 government.

16 The trial court agreed, as did the court of appeal. The court of appeal rejected the
17 company’s argument that the disclosure fell within the scope of Section 912(d),
18 which permits disclosure without waiving the lawyer-client privilege when the
19 disclosure is “reasonably necessary for the accomplishment of the purpose” for
20 which the lawyer was consulted. The court of appeal acknowledged that this
21 provision permits sharing of privileged information among codefendants, but
22 noted that there is “no real alignment of interests between the government and
23 persons or entities under investigation for securities law violations.”¹⁶³ Rather, the
24 situation “is not qualitatively different than a defendant sharing privileged material
25 with one plaintiff, but not another.”¹⁶⁴ The company had thus waived the privilege,
26 because no one even suggested that “a defendant facing multiple plaintiffs should
27 be able to disclose privileged materials to one plaintiff without waiving the
28 attorney-client privilege as to the other plaintiffs.”¹⁶⁵

29 Further, in the context of the work product privilege, the SEC urged the court “to
30 adopt the ‘selective waiver’ theory, under which a client could disclose a
31 privileged or protected communication to the government, while continuing to

160. *Id.* at 668.

161. *Id.* The court did not mention *San Diego Trolley*. It did refer to *People v. Aguilar*, 218 Cal. App. 3d 1556, 167 Cal. Rptr. 879 (1990), describing it as a case in which a California court “recognized a party’s ability to preserve a privilege through a limited waiver.” *Feldman*, 322 F.2d at 668. In fact, however, the disclosure in *Aguilar* was “not freely and voluntarily made.” 218 Cal. App. 3d at 1565. Rather, the disclosure was induced by erroneous action of the trial court, a circumstance that the Ninth Circuit used to distinguish the case. *Feldman*, 322 F.2d at 668.

162. 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (2004).

163. *Id.* at 1238.

164. *Id.*

165. *Id.*

1 assert it against other parties.”¹⁶⁶ The court of appeal declined, explaining that
2 such a policy decision should be made by the Legislature, not the courts.¹⁶⁷

3 Like the California courts, federal courts are divided on the issue of selective
4 waiver.¹⁶⁸ Some decisions hold that a selective disclosure of privileged
5 information in confidence does not waive the applicable privilege.¹⁶⁹ Of the
6 federal circuit courts that have considered whether a privilege holder can
7 selectively waive the privilege, however, a majority have rejected such claims.¹⁷⁰

8 As a matter of policy, there may be some benefits to permitting a privilege
9 holder to selectively disclose privileged information without waiver of the
10 privilege.¹⁷¹ In particular, permitting such a disclosure to a governmental entity

166. *Id.* at 1240.

167. *Id.* at 1241.

168. There has also been extensive scholarly debate about selective disclosure. *See, e.g.*, Symchych, *supra* note 156; 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).

169. *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).

170. *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).

171. It has been argued that the benefits of permitting selective disclosure without waiver are unrelated to the policies underlying the confidential communication privileges, and should thus be discounted. *See, e.g.*, *Columbia/HCA Healthcare*, 293 F.3d at 302; *Permian*, 665 F.2d at 1220-21. The Commission disagrees with this perspective. In developing rules for whether a privilege is waived, the Legislature should consider any significant policy interest that may be affected, regardless of whether it is related to the purpose of the

1 conducting an investigation may further the goals of the investigation.¹⁷² It may
2 also encourage practices such as hiring independent outside counsel to investigate
3 and advise a corporation and thereby protect stockholders, potential stockholders,
4 and customers.¹⁷³

5 But condoning selective disclosure would also have downsides. There is a
6 danger of manipulation. If the approach were widely accepted, a privilege holder
7 might exploit it to unfair advantage, deliberately disclosing information to certain
8 entities, secure in the knowledge that others would not have access to the same
9 information.¹⁷⁴

10 There is also a potential line-drawing problem. It may be difficult for the courts
11 to develop coherent judicial doctrine defining when a privileged communication
12 can be selectively disclosed without waiving the privilege.¹⁷⁵

13 Further, the practice of encouraging a selective disclosure by offering an
14 incentive such as a reduced penalty tends to erode the applicable privilege and its
15 underlying policies.¹⁷⁶ Taken individually, a disclosure of privileged information
16 to a selected person or entity is less of an intrusion on the privileged relationship
17 than a disclosure of the same information to anyone who seeks it. Taken
18 collectively, however, numerous selective disclosures induced by incentives and
19 assurances of confidentiality may in fact be more burdensome on the policies
20 underlying the applicable privileges than a rule precluding selective waiver. It may
21 be better to force a privilege holder to choose between disclosing privileged
22 material to no one and disclosing such material to everyone.¹⁷⁷

privilege. *See generally Columbia/HCA Healthcare*, 293 F.3d at 308 (Boggs, J., dissenting) (“It is not clear why an exception to the third-party waiver rule need be moored to the justifications of the attorney-client privilege.”).

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

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

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

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

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

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

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

Petitioner alleges that a denial of the petition will present those in similar situations with a Hobson’s choice between waiving work product protection through cooperation with investigatory authorities, or not cooperating with the authorities. Whether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative

1 The Commission suggests a compromise approach to selective disclosure. A
2 new subdivision would be added to Section 912, establishing a general rule that if
3 a privilege holder voluntarily and intentionally makes or authorizes a disclosure of
4 privileged information to one person, the holder could not continue to assert the
5 privilege as to other persons. Likewise, the new provision would make clear that if
6 a privilege holder voluntarily and intentionally makes or authorizes a disclosure on
7 one occasion (e.g., at a deposition), the holder could not continue to assert the
8 privilege on another occasion (e.g., at trial).¹⁷⁸

9 This general rule would, however, be overridden by any statute authorizing
10 selective disclosure, without waiver of the applicable privilege, in a specific
11 context. The existing exceptions to Section 912¹⁷⁹ are examples of such
12 provisions. A few other such provisions already exist.¹⁸⁰ The Legislature could
13 add more of these as it sees fit.

14 This would be a well-tailored approach, ensuring that selective disclosure is
15 permitted only in contexts where the Legislature has weighed the competing
16 policy considerations and determined that this treatment is appropriate. Codifying
17 the approach would bring clarity to an area of the law that is currently in a state of
18 confusion.

19 **Types of Privileges Covered**

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

27 The Commission believes this treatment is appropriate. The Commission
28 carefully explored what privileges to include in Section 912 when it originally
29 drafted the provision in the early 1960's.¹⁸¹ The decision to exclude other
30 privileges was deliberate.

metaphoric cliché, the “Hobson’s choice” argument is unpersuasive given the facts of this case. An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.

9 F.3d at 236.

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

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

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

181. See *Tentative Recommendation Relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm’n Reports 201, 260 (1964) (hereafter “*Tentative Recommendation on Privileges*”);

1 For example, the privilege against self-incrimination was excluded because
2 waiver of this privilege “is determined by the cases interpreting the pertinent
3 provisions of the California and United States Constitutions.”¹⁸² The trade secret
4 privilege was excluded because “a matter will cease to be a trade secret if the
5 secrecy of the information is not guarded.”¹⁸³ The spousal testimony privilege,
6 secret vote privilege, official information privilege, and privilege for the identity
7 of an informer were excluded because those privileges “contain their own waiver
8 provisions.”¹⁸⁴

9 In applying the various privileges and other provisions protecting confidential
10 information, courts have recognized that Section 912 was only meant to pertain to
11 the privileges enumerated in it.¹⁸⁵ In some instances, however, a court construing
12 another privilege may find this section useful by analogy.¹⁸⁶

13 The California Supreme Court has also made clear that the same waiver
14 principles apply to all of the privileges enumerated in Section 912. At one point,
15 the Court appeared to endorse a lower threshold for waiver of the psychotherapist-
16 patient privilege than for other privileges,¹⁸⁷ but the Court later clarified that this
17 was not the case.¹⁸⁸

18 The Commission is reluctant to disrupt this scheme, which seems to have
19 functioned well for many years. For purposes of clarification, however, the

Chadbourne, *A Study Relating to the Privileges Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm’n Reports 301, 514-15 (1964); Commission Staff Memorandum 63-11, p. 2 & Exhibit I, pp. 3-4; First Supplement to Commission Staff Memorandum 63-11, p. 1 & Exhibit II, pp. 1-3.

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

183. *Tentative Recommendation on Privileges, supra* note 181, at 260.

184. *Tentative Recommendation on Privileges, supra* note 181, at 260; *see also* Sections 972-973 (spousal testimony privilege); 1040-1042 (official information privilege and privilege for identity of informer); 1050 (secret vote privilege); First Supplement to Commission Staff Memorandum 63-11 at Exhibit II, pp. 2-3.

185. 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.

186. *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).

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

188. *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).

1 Commission recommends adding language to Section 912 stating that the
2 provision is not intended to imply anything regarding waiver of privileges other
3 than the ones listed in it.¹⁸⁹ This would help to ensure that the proposed reforms
4 are not applied in an inappropriate context.¹⁹⁰

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

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

7 (d) Except as provided by statute hereafter enacted by a two-thirds vote of the
8 membership in each house of the Legislature, relevant evidence shall not be
9 excluded in any criminal proceeding, including pretrial and post conviction
10 motions and hearings, or in any trial or hearing of a juvenile for a criminal
11 offense, whether heard in juvenile or adult court. *Nothing in this section shall*
12 *affect any existing statutory rule of evidence relating to privilege or hearsay, or*
13 *Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any*
14 *existing statutory or constitutional right of the press.*¹⁹¹

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

18 The Commission does not believe that the two-thirds vote requirement applies.
19 By its terms, the Truth-in-Evidence provision had no impact on “any existing
20 statutory rule of evidence relating to privilege.” Section 912 is a rule of evidence
21 relating to privilege, and it was enacted long before the voters approved the Truth-
22 in-Evidence provision.¹⁹² Consequently, the constitutional exemption for “any
23 existing statutory rule of evidence relating to privilege” may be a sufficient basis
24 for finding the Commission’s proposal consistent with the right to Truth-in-
25 Evidence.¹⁹³

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

31 If a court interprets the Truth-in-Evidence provision in that manner, the two-
32 thirds vote requirement still should not apply to the proposed amendment of
33 Section 912. The Truth-in-Evidence provision is only triggered by a reform that

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

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

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

192. 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.

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

1 narrows the admissibility of relevant evidence in a criminal case. The proposed
2 amendment would not do that.

3 Rather, the proposed codification of the subjective intent approach to inadvertent
4 disclosure would merely make express what a strong majority of courts have said
5 is already implicit in the statute.¹⁹⁴ The proposed new subdivision on partial
6 disclosure is likewise consistent with existing interpretations of the statute.¹⁹⁵ As
7 for the subdivision on selective disclosure, if a court views it as a change in the
8 law, it would be a change broadening the scope of privilege waiver by rejecting
9 the concept of selective waiver. The reform would thus expand rather than contract
10 the admissibility of evidence, so it would not trigger the Truth-in-Evidence
11 supermajority vote requirement.

12 **Need for the Proposed Reforms**

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

20 It would not be necessary to engage in exhaustive research and analysis such as
21 the Commission has undertaken in preparing this report. The danger of
22 misinterpretation due to the anomalous new *Jasmine* decision,¹⁹⁶ other potentially
23 confusing case law,¹⁹⁷ and misleading commentary¹⁹⁸ would also be reduced.

24 Although document discovery in litigation is a context in which inadvertent
25 disclosure of a privileged communication typically occurs, such a disclosure can
26 readily result from use of new technologies such as email, fax, and voicemail.¹⁹⁹
27 Common situations in which the problem can arise include:

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

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

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

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

198. *Id.*

199. 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.

- 1 • A person accidentally directs a fax, email message, or voicemail to the
2 wrong recipient.
- 3 • A person forgets to hang up the phone after a phonecall is completed, then
4 has a conversation that is overheard or recorded at the other end of the line.
- 5 • A person forwards an email message, not realizing that a confidential
6 communication is attached.
- 7 • A person “deletes” a computer file or “erases” a tape, not realizing that the
8 material in question is recoverable.
- 9 • A person unintentionally stores an email message containing a confidential
10 communication in a manner in which a third party can obtain access.²⁰⁰

11 The frequency of such situations highlights the need for the guidance that the
12 proposed amendment would provide.²⁰¹

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

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

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

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

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

PROPOSED LEGISLATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 **Comment.** Subdivision (a) of Section 912 is amended to make clear that disclosure of a
4 communication protected by one of the specified privileges waives the privilege only when the
5 holder of the privilege intentionally makes the disclosure or intentionally permits another person
6 to make the disclosure. This codifies the majority view in case law applying the provision to an
7 inadvertent disclosure. *See* State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654,
8 82 Cal. Rptr. 2d 799 (1999) (Waiver “does not include accidental, inadvertent disclosure of
9 privileged information by the attorney.”); O’Mary v. Mitsubishi Electronics America, Inc., 59
10 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997) (“Inadvertent disclosure during discovery by
11 no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the
12 poor paralegal or junior associate who was lumbered with the tedious job of going through
13 voluminous files and records in preparation for a document production may have missed
14 something.”); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984) (“As in
15 other privileges for confidential communications, the physician-patient privilege precludes a court
16 disclosure of a communication, even though there has been an accidental or unauthorized out-of-
17 court disclosure of such communication”) (dictum); *see also* KL Group v. Case, Kay & Lynch,
18 829 F.2d 909, 919 (9th Cir. 1987) (under either Hawaii or California law, client did not waive
19 attorney-client privilege by counsel’s inadvertent production of letter); Federal Deposit Ins. Corp.
20 v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000) (under California law, “waiver of
21 the attorney-client privilege depends entirely on whether the client provided knowing and
22 voluntary consent to the disclosure.”); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp.
23 1403, 1410-11 (S.D. Cal. 1994) (California appears to follow subjective approach to waiver by a
24 privilege holder, under which “the client’s intent to disclose is controlling.”) (dictum). It
25 disapproves two contrary discussions that were not necessary to the decisions reached. *See*
26 Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., 117 Cal. App. 4th 794, 803, 12 Cal. Rptr.
27 3d 123 (2004) (“[I]ntent to disclose is not required in order for the holder to waive the privilege
28 through uncoerced disclosure.”) (alternate basis for decision), *petition for review filed*, No.
29 S124914 (May 18, 2004); People v. Von Villas, 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112
30 (1992) (marital privilege was waived when husband and wife “knew or reasonably should have
31 known” that their conversation was being overheard) (one of three alternate bases for decision).

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

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

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

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

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

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