

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Electronic Communications and Evidentiary Privileges

June 2001

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **October 15, 2001.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

The Law Revision Commission recommends revision of Evidence Code provisions to make clear that (1) a privileged communication does not lose its privileged status simply because it is transmitted electronically, (2) the statutory presumption of confidentiality and statutory waiver requirements apply to newly created privileges, and (3) disclosure of a privileged communication waives the privilege only where the holder of the privilege intentionally makes the disclosure or intentionally permits another person to make the disclosure. Evid. Code §§ 912, 917, 952.

The Commission also solicits suggestions for other reforms needed to adapt the Evidence Code for electronic communications.

This recommendation was prepared pursuant to Resolution Chapter 78 of the Statutes of 2001.

ELECTRONIC COMMUNICATIONS AND EVIDENTIARY PRIVILEGES

1 The Law Revision Commission has initiated a review of the Evidence Code to
2 determine whether existing provisions are satisfactory in their application to elec-
3 tronic communications.¹ Pursuant to that review, legislation was enacted on
4 Commission recommendation to repeal the Best Evidence Rule² and replace it
5 with the Secondary Evidence Rule.³ The Commission now recommends that the
6 Evidence Code provisions governing privileges for communications made in con-
7 fidence between persons in specified relationships (“confidential communication
8 privileges”) be standardized in their application to electronic communications.

9 The Commission also solicits suggestions for other reforms of the Evidence
10 Code to accommodate electronic communications. This tentative recommendation
11 addresses the problems identified to date, but the Commission encourages inter-
12 ested persons to bring additional issues to its attention.

13 Confidentiality of Electronic Communications

14 Evidence Code Section 952 defines a confidential communication for purposes
15 of the lawyer-client privilege. The provision was revised in 1994 to add a sentence
16 stating, “A communication between a client and his or her lawyer is not deemed
17 lacking in confidentiality solely because the communication is transmitted by fac-
18 simile, cellular telephone, or other electronic means between the client and his or
19 her lawyer.”⁴ This language addresses the potential argument that, because an
20 electronic communication between a lawyer and client is subject to interception, it
21 is not confidential and thus not protected by the lawyer-client privilege.

22 This potential argument applies to all of the confidential communication privi-
23 leges, not just the lawyer-client privilege. But the addition of the language on
24 electronic communications in the lawyer-client privilege, combined with the lack

1. See Harvey, *The Need for Evidence Code Revisions To Accommodate Electronic Communication and Storage* (Background Study, June 2000). A copy of this study may be obtained from the Commission’s website at <<http://www.clrc.ca.gov/pub/Printed-Reports/BKST-811-HarveyElecEvid.pdf>>.

2. See *Best Evidence Rule*, 26 Cal. L. Revision Comm’n Reports 369 (1996).

3. See Evid. Code § 1521; 1998 Cal. Stat. ch. 100. Unless otherwise indicated, all further statutory references are to the Evidence Code.

4. 1994 Cal. Stat. ch. 587, § 9. This was a noncontroversial reform in an omnibus civil practice bill authored by the Assembly Judiciary Committee. It has been praised in commentary. See O’Neill, Gallagher & Nevett, *Detours on the Information Superhighway: The Erosion of Evidentiary Privileges in Cyberspace & Beyond*, 1997 Stan. Tech. L. Rev. 3:

This legislation is a useful model because it is broad enough to encompass new and emerging technologies and to remove the need for judicial evaluation of these technologies. Most importantly, it provides the protection necessary to allow lawyers and their clients to freely and efficiently use new technologies without risk of waiver.

1 of such language in comparable provisions for other relationships,⁵ provides
2 grounds for an argument that there is no confidentiality and therefore no privilege
3 for an electronic communication made in the course of any other relationship.

4 To negate that potential argument, the language on confidentiality of an elec-
5 tronic communication should be removed from Section 952 and generalized in
6 Section 917, which creates a presumption of confidentiality for communications
7 made in privileged relationships.⁶ The Commission further recommends that refer-
8 ences to specific modes of communication (e.g., email, facsimile, cellular
9 telephone, or cordless telephone) be omitted from the statute, and that a broad def-
10 inition of “electronic” be included.⁷ By using generic terminology, the proposed
11 legislation would provide flexibility to accommodate new technologies.

12 **Newly Created Privileges**

13 Generalization of the language on electronic communications exposes a flaw in
14 the drafting of Section 917. The provision creates a presumption of confidentiality
15 for communications made in the specific relationships that were mentioned in the
16 Evidence Code when the code was created in 1965. At that time, the only confi-

5. See Sections 980 (confidential marital communication), 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1032 (penitential communication), 1035.4 (confidential communication between sexual assault victim and counselor), 1037.2 (confidential communication between domestic violence victim and counselor).

6. New York already has a provision along these lines. See N.Y. C.P.L.R. 4548 (McKinney 2001) (“No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.”). See also 18 U.S.C. § 2517(4) (“No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.”).

7. The proposed definition of “electronic” is the same as in the Uniform Electronic Transactions Act (1999), which was enacted in California as Civil Code Sections 1633.1-1633.17. The comment to Section 2 of the Uniform Electronic Transactions Act (Civ. Code § 1633.2) states:

“**Electronic.**” The basic nature of most current technologies and the need for a recognized, single term warrants the use of “electronic” as the defined term. The definition is intended to assure that the Act will be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to fulfill the purpose of this Act to validate commercial transactions regardless of the medium used by the parties. Current legal requirements for “writings” can be satisfied by most any tangible media, whether paper, other fibers, or even stone. The purpose and applicability of this Act covers intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form, but which lack the tangible aspect of paper, papyrus or stone.

While not all technologies listed are technically “electronic” in nature (e.g., optical fiber technology), the term “electronic” is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically “electronic,” i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by the Act. This act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.

1 dential communication privileges contained in the code were the lawyer-client,
2 physician-patient, psychotherapist-patient, clergyman-penitent, and husband-wife
3 privileges. Since then, the Legislature has created two additional confidential
4 communication privileges: A privilege for confidential communications between a
5 sexual assault victim and counselor,⁸ and a privilege for confidential communica-
6 tions between a domestic violence victim and counselor.⁹

7 Under Section 917, a communication made in the course of one of the listed rela-
8 tionships is presumed to have been made in confidence, and the party opposing a
9 claim of privilege has the burden to establish that the communication was not
10 confidential. The policy considerations underlying this presumption apply equally
11 to all of the confidential communication privileges.¹⁰ The provision should be
12 revised to make clear that the presumption of confidentiality applies to all of the
13 confidential communications privileges.

14 Similarly, the provision governing waiver of a privilege (Section 912) should be
15 revised to make clear that it applies to the privilege for confidential communica-
16 tions between a domestic violence victim and counselor. The provision has already
17 been amended to include the privilege for confidential communications between a
18 sexual assault victim and counselor.

19 **Waiver by Disclosure**

20 Under the waiver provision, a communication loses its privileged status where
21 “any holder of the privilege, without coercion, has disclosed a significant part of

8. Sections 1035-1036.2.

9. Sections 1037-1037.7.

10. The 1965 Comment to Section 917 explains the policy considerations and discusses the effect of the presumption:

A number of sections provide privileges for communications made “in confidence” in the course of certain relationships. Although there appear to have been no cases involving the question in California, the general rule elsewhere is that a communication made in the course of such a relationship is presumed to be confidential and the party objecting to the claim of privilege has the burden of showing that it was not. [Citations omitted.]

If the privilege claimant were required to show that the communication was made in confidence, he would be compelled, in many cases, to reveal the subject matter of the communication in order to establish his right to the privilege. Hence, Section 917 is included to establish a presumption of confidentiality, if this is not already the existing law in California. See *Sharon v. Sharon*, 79 Cal. 633, 678, 22 Pac. 26, 40 (1889) (attorney-client privilege); *Hager v. Shindler*, 29 Cal. 47, 63 (1865) (“*Prima facie*, all communications made by a client to his attorney or counsel [in the course of that relationship] must be regarded as confidential.”).

To overcome the presumption, the proponent of the evidence must persuade the presiding officer that the communication was not made in confidence. Of course, if the facts show that the 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).

1 the communication or has consented to such disclosure made by anyone.”¹¹ Con-
2 sent to disclosure is “manifested by any statement or other conduct of the holder of
3 the privilege indicating consent to the disclosure, including failure to claim the
4 privilege in any proceeding in which the holder has the legal standing and oppor-
5 tunity to claim the privilege.”¹² The statute does not expressly state whether
6 inadvertent (as opposed to intentional) disclosure of a privileged communication
7 constitutes a waiver of the privilege.

8 Courts considering the issue have concluded, however, that accidental disclosure
9 of a privileged communication to a third person (a person not in a privileged rela-
10 tionship with the holder of the privilege) is not a waiver under the statute.¹³ The
11 important policy interests underlying the confidential communications privileges
12 would be undermined if waiver could be effected so easily.¹⁴ Rather, the key crite-
13 rion is whether the holder of the privilege *intentionally* made the disclosure or

11. Section 912(a). A disclosure that is itself privileged is not a waiver of the privilege. Section 912(c) & Comment. Likewise, a disclosure that is reasonably necessary to accomplish the purpose for consulting a lawyer, physician, psychotherapist, or sexual assault counselor is not a waiver of the privilege. Section 912(d) & Comment. Where a privilege is jointly held, a waiver by one holder of the privilege does not prevent another holder from claiming the privilege. Section 912(b) & Comment.

12. *Id.*

13. *State Compensation Ins. Fund v. Telanoff*, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999); *O’Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997); *People v. Gardner*, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984); see also *KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 919 (9th Cir. 1987); *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 196 F.R.D. 375, 380 (S.D. Cal. 2000); *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994).

14. *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 279 N.J. Super. 442, 652 A.2d 1273, 1276 (1994) (“To hold that the inadvertent production of a privileged document is a waiver of the lawyer-client privilege would render nugatory this state’s strong public policy favoring the confidentiality of lawyer-client communications embodied in statute, rules of evidence, rules of professional ethics, and case law.”); see also *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) (privilege for confidential marital communications 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 clergyman-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. Mendez, *Evidence: The California Code and the Federal Rules* § 26.01, p. 590 (1999) (purpose of domestic violence victim-counselor privilege is to promote effective counseling by encouraging full disclosure by the victim).

1 *intentionally* permitted another person to make the disclosure.¹⁵ The Commission
2 recommends that Section 912 be revised to make this explicit.

3 This would not be a substantive change, but it would provide clear and readily
4 accessible guidance as courts, practitioners, and litigants grapple with evidentiary
5 issues posed by new technologies. For example, employers commonly monitor (or
6 reserve the right to monitor) employee email, which might include otherwise privi-
7 leged communications.¹⁶ The circumstances of such monitoring may differ signifi-
8 cantly from one instance to another.¹⁷ In particular, notice of monitoring may vary
9 greatly in content, timing, and format, and it may provoke different reactions.¹⁸ An
10 employee might not read a notice, or might not be notified of monitoring at all.¹⁹
11 Where an employee sends an otherwise privileged email from work, the proposed

15. See generally 1965 Comment to Section 912 (“The theory underlying the concept of waiver is that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege.”). See also Sections 952 (confidential communication between client and lawyer), 980 (confidential marital communication privilege), 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1032 (penitential communication), 1035.4 (confidential communication between sexual assault victim and counselor), 1037.2 (confidential communication between domestic violence victim and counselor). Each of these provisions focuses on whether the holder of the privilege is aware that the communication is being disclosed to a third person. For example, Section 952 defines “confidential communication between client and lawyer” to mean “information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, *so far as the client is aware, discloses the information to no third persons* other than those who are present to further the interest of the client in the consultation or the accomplishment of the purpose for which the lawyer is consulted.” (Emphasis added.) This language indicates that the holder’s subjective intent regarding disclosure to third persons is determinative. Notably, the provision focuses on whether the holder *is* aware of any disclosure to a third person, not on whether the holder *should be* aware of such a disclosure.

16. 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).

17. For example, suppose an employee is given numerous informational documents on starting a job, including one that states in fine print that the employer reserves the right to randomly monitor email. The employee receives no further notice regarding monitoring. Several years later, the employee is involved in a divorce and sends an urgent email to his attorney from work. That is quite different from a situation in which an employee persists in sending email to his wife during work hours, despite repeated, recent face-to-face warnings by his boss that such conduct is unacceptable and his email is being monitored for compliance.

18. For example, suppose an employee’s computer routinely displays a message that employee email is actually being monitored. Does it matter whether the message is displayed on a daily basis, or only every month? Does it matter whether the message requires a response (e.g., clicking “OK”), or simply appears on the screen during the startup process, when the employee may be performing other tasks? Does it matter whether the employee has consented to the monitoring, or has been asked to consent? What if the message states that monitoring might occur, not that it will occur? What if the message states that the Technology Department is responsible for monitoring, but the employee knows that the Technology Department is not conducting any monitoring? The proposed law would help provide guidance in these situations, by expressly directing the court to focus on whether the employee (or other holder of the privilege in question) intentionally disclosed the privileged communication, or intentionally permitted another person to make such a disclosure.

19. Adams, *supra* note 16, at 35; McIntosh, *supra* note 16, at 542.

1 legislation would direct a court to focus on the holder’s intent regarding disclosure
2 in determining whether the privilege was waived due to employer monitoring.
3 Evidence that the holder was notified of monitoring in advance, and evidence of
4 the nature of such notice, bears on the holder’s intent.

5 Importantly, the test is whether the holder of the privilege intended to disclose
6 the communication to a third person, not whether the holder intended to waive the
7 privilege. The holder need not have been aware of the legal consequences of dis-
8 closure, so long as the disclosure was intentional.²⁰ Further, the privilege is waived
9 even where the holder intended the disclosure to a third person to be confidential
10 (e.g., where the holder tells a close friend what the holder’s attorney advised, and
11 asks the friend not to share that information with anyone else). So long as the
12 holder has intentionally disclosed the privileged communication to a person who is
13 not in a privileged relationship with the holder, the privilege is waived, regardless
14 of any expectation that the third person would maintain the confidence.²¹

20. *Tentative Recommendation Relating to The Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm’n Reports 201, 262 (1964). Some jurisdictions use a stricter test, requiring proof that the holder intentionally relinquished a known right. See, e.g., *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 279 N.J. Super. 442, 652 A.2d 1273, 1275 (1994); Rest, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 Case W. Res. L. Rev. 309, 332 (1998). In other jurisdictions, disclosure of a privileged communication automatically waives the privilege, regardless of the circumstances of the disclosure. *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); Talton, *Mapping the Information Superhighway: Electronic Mail and the Inadvertent Disclosure of Confidential Information*, 20 Rev. Litig. 271, 292 (2000). Still other jurisdictions use a multi-factor balancing test to determine whether disclosure of a privileged communication is a waiver of the privilege. See, e.g., *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993); *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997), *rev’d on other grounds*, 978 P.2d 663 (Colo. 1999).

21. Mendez, *supra* note 14, at 505 (“Disclosing a significant part of a confidential communication to a third person will suffice even if the holder intended the disclosure to be confidential.”).

PROPOSED LEGISLATION

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

2 SECTION 1. Section 912 of the Evidence Code is amended to read:

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

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

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

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

34 **Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged
35 communication does not waive the privilege. This is not a substantive change. See State
36 Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999);
37 O'Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389
38 (1997); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984); see also KL
39 Group v. Case, Kay & Lynch, 829 F.2d 909, 919 (9th Cir. 1987); Federal Deposit Ins. Corp. v.
40 Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000); Cunningham v. Connecticut Mut.

1 Life Ins., 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994). Evidence that the holder of a privilege
2 was notified in advance of employer monitoring or other disclosure bears on the holder's intent.

3 Section 912 is also amended to make clear that it applies to the privilege for confidential
4 communications between a domestic violence victim and counselor, which did not exist when the
5 statute was originally enacted in 1965. See Sections 1037-1037.7 (domestic violence victim).

6 **Evid. Code § 917 (amended). Presumption of confidentiality**

7 SEC. 2. Section 917 of the Evidence Code is amended to read:

8 917. (a) Whenever a privilege is claimed on the ground that the matter sought to
9 be disclosed is a communication made in confidence in the course of the lawyer-
10 client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-
11 wife, sexual assault victim-counselor, or domestic violence victim-counselor
12 relationship, the communication is presumed to have been made in confidence and
13 the opponent of the claim of privilege has the burden of proof to establish that the
14 communication was not confidential.

15 (b) A communication between persons in a relationship listed in subdivision (a)
16 does not lose its privileged character for the sole reason that it is communicated by
17 electronic means or because persons involved in the delivery, facilitation, or
18 storage of electronic communication may have access to the content of the
19 communication.

20 (c) For purposes of this section, "electronic" has the meaning provided in
21 Section 1633.2 of the Civil Code.

22 **Comment.** Subdivision (a) of Section 917 is amended to make clear that it applies to
23 confidential communication privileges created after its original enactment in 1965. See Sections
24 1035-1036.2 (sexual assault victim), 1037-1037.7 (domestic violence victim).

25 Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2001)) and from
26 language formerly found in Section 952 relating to confidentiality of an electronic
27 communication between a client and a lawyer. For waiver of privileges, see Section 912 &
28 Comment.

29 Under subdivision (c), the definition of "electronic" is broad, including any "intangible media
30 which are technologically capable of storing, transmitting and reproducing information in human
31 perceivable form." Unif. Electronic Transactions Act, § 2 comment (1999) (enacted as Civil Code
32 Section 1633.2).

33 For discussion of ethical considerations where a lawyer communicates with a client by
34 electronic means, see Bus. & Prof. Code § 6068(e) (attorney has duty to "maintain inviolate the
35 confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients");
36 ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413
37 ("Protecting the Confidentiality of Unencrypted E-Mail"); ABA Standing Committee on Ethics &
38 Professional Responsibility, Formal Op. 92-368 ("Inadvertent Disclosure of Confidential
39 Materials").

40 For examples of provisions on the admissibility of electronic communications, see Evid. Code
41 §§ 1521 & Comment (Secondary Evidence Rule), 1552 (printed representation of computer
42 information or computer program), 1553 (printed representation of images stored on video or
43 digital medium); Code Civ. Proc. § 1633.13 ("In a proceeding, evidence of a record or signature
44 may not be excluded solely because it is in electronic form."). See also *People v. Martinez*, 22
45 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000); *People v. Hernandez*, 55 Cal. App. 4th
46 225, 63 Cal. Rptr. 2d 769 (1997); *Aguimatang v. California State Lottery*, 234 Cal. App. 3d 769,
47 286 Cal. Rptr. 57 (1991); *People v. Lugashi*, 205 Cal. App. 3d 632, 252 Cal. Rptr. 434 (1988).

1 **Evid. Code § 952 (amended). “Confidential communication between client and lawyer”**
2 **defined**

3 SEC. 3. Section 952 of the Evidence Code is amended to read:

4 952. As used in this article, “confidential communication between client and
5 lawyer” means information transmitted between a client and his or her lawyer in
6 the course of that relationship and in confidence by a means which, so far as the
7 client is aware, discloses the information to no third persons other than those who
8 are present to further the interest of the client in the consultation or those to whom
9 disclosure is reasonably necessary for the transmission of the information or the
10 accomplishment of the purpose for which the lawyer is consulted, and includes a
11 legal opinion formed and the advice given by the lawyer in the course of that
12 relationship. ~~A communication between a client and his or her lawyer is not~~
13 ~~deemed lacking in confidentiality solely because the communication is transmitted~~
14 ~~by facsimile, cellular telephone, or other electronic means between the client and~~
15 ~~his or her lawyer.~~

16 **Comment.** Section 952 is amended to delete the last sentence concerning confidentiality of
17 electronic communications, because this rule is generalized in Section 917(b)-(c) applicable to all
18 confidential communication privileges.