

#K-500

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

DISCUSSION DRAFT

## Waiver of Privilege By Disclosure

March 2002

This discussion draft is being distributed so that interested persons 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.

**COMMENTS ON THIS DRAFT SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN June 15, 2002.**

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## SUMMARY

Evidence Code Section 912 governs waiver of the lawyer-client privilege, physician-patient privilege, and other specified evidentiary privileges. The Law Revision Commission recommends that this provision be revised to make clear that 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. This would codify case law regarding inadvertent disclosure, and provide readily accessible guidance as courts, attorneys, and litigants attempt to assess how the provision applies to new means of communication.

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

## WAIVER OF PRIVILEGE BY DISCLOSURE

1 The Law Revision Commission is reviewing the Evidence Code to determine  
2 whether existing provisions satisfactorily address electronic communications.<sup>1</sup> In  
3 connection with that review, the Commission studied Section 912, which governs  
4 waiver of the privileges for communications made in confidence between persons  
5 in specified relationships (“confidential communication privileges”).<sup>2</sup> The  
6 Commission recommends that this provision be revised to make clear how it  
7 applies to inadvertent disclosure of a privileged communication.

8 Under Section 912, a communication loses its privileged status where “any  
9 holder of the privilege, without coercion, has disclosed a significant part of the  
10 communication or has consented to such disclosure made by anyone.”<sup>3</sup> Consent to  
11 disclosure is “manifested by any statement or other conduct of the holder of the  
12 privilege indicating consent to the disclosure, including failure to claim the  
13 privilege in any proceeding in which the holder has the legal standing and oppor-  
14 tunity to claim the privilege.”<sup>4</sup> The statute does not expressly state whether  
15 inadvertent (as opposed to intentional) disclosure of a privileged communication  
16 constitutes a waiver of the privilege.

17 Courts considering the issue have concluded, however, that accidental disclosure  
18 of a privileged communication to a third person (a person not in a privileged rela-

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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>>.

As a result of the Commission’s work in this area, legislation was enacted to repeal the Best Evidence Rule and replace it with the Secondary Evidence Rule. See Evid. Code §§ 1520-1523; 1998 Cal. Stat. ch. 100; *Best Evidence Rule*, 26 Cal. L. Revision Comm’n Reports 369 (1996).

The Commission has also recommended Evidence Code revisions to make clear that a privileged communication does not lose its privileged status simply because it is transmitted electronically. *Electronic Communications and Evidentiary Privileges*, 31 Cal. L. Revision Comm’n Reports 245 (2001). Legislation to implement this recommendation is pending. See SB 2061 (Morrow).

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

2. The confidential communication privileges include the lawyer-client privilege, privilege for confidential marital communications, physician-patient privilege, psychotherapist-patient privilege, privilege of penitent, privilege of clergyman, sexual assault victim-counselor privilege, and domestic violence victim-counselor privilege. Section 912 expressly applies to all of these privileges except the domestic violence victim-counselor privilege, which did not exist when the statute was originally enacted in 1965. The Law Revision Commission has recommended that the statute be amended to include the domestic violence victim-counselor privilege. See *Electronic Communications and Evidentiary Privileges*, *supra* note 1, at 251-53, 255-56.

3. 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.

4. *Id.*

1 tionship with the holder of the privilege) is not a waiver under the statute.<sup>5</sup> The  
 2 important policy interests underlying the confidential communications privileges  
 3 would be undermined if waiver could be effected so easily.<sup>6</sup> Rather, the key crite-  
 4 rion is whether the holder of the privilege *intentionally* made the disclosure or  
 5 *intentionally* permitted another person to make the disclosure.<sup>7</sup> The Commission  
 6 recommends that Section 912 be revised to make this explicit.

7 Revising the provision along these lines would not change the applicable  
 8 standard, but it would provide clear and readily accessible guidance as courts,

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5. 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).

6. 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).

7. 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 those to whom disclosure is reasonably necessary for the transmission of the information 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.

1 practitioners, and litigants grapple with evidentiary issues posed by new  
2 technologies. For example, employers commonly monitor (or reserve the right to  
3 monitor) employee email, which might include otherwise privileged  
4 communications.<sup>8</sup> The circumstances of such monitoring may differ significantly  
5 from one instance to another.<sup>9</sup> In particular, notice of monitoring may vary greatly  
6 in content, timing, and format, and it may provoke different reactions.<sup>10</sup> An  
7 employee might not read a notice, or might not be notified of monitoring at all.<sup>11</sup>  
8 Where an employee sends an otherwise privileged email from work, the proposed  
9 legislation would direct a court to focus on the holder's intent regarding disclosure  
10 in determining whether the privilege was waived due to employer monitoring.  
11 Evidence that the holder was notified of monitoring in advance, and evidence of  
12 the nature of such notice, bears on the holder's intent.

13 Importantly, the test is whether the holder of the privilege intended to disclose  
14 the communication to a third person, not whether the holder intended to waive the  
15 privilege. The holder need not have been aware of the legal consequences of dis-  
16 closure, so long as the disclosure was intentional.<sup>12</sup> Further, the privilege is waived

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8. 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).

9. 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.

10. 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.

11. Adams, *supra* note 8, at 35; McIntosh, *supra* note 8, at 542.

12. *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 *State Compensation Ins. Fund v. Telanoff*, 70 Cal. App. 4th 644, 653, 82 Cal. Rptr. 2d 799 (1999), the court refers to this test, but only "hold[s] that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." *Id.* at 654. 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:*

1 even where the holder intended the disclosure to a third person to be confidential  
2 (e.g., where the holder tells a close friend what the holder's attorney advised, and  
3 asks the friend not to share that information with anyone else). So long as the  
4 holder has intentionally disclosed the privileged communication to a person who is  
5 not in a privileged relationship with the holder, the privilege is waived, regardless  
6 of any expectation that the third person would maintain the confidence.<sup>13</sup>

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*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., *Allread 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).

13. *Mendez*, *supra* note 6, 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) is waived with  
8 respect to a communication protected by such the privilege if any holder of the  
9 privilege, without coercion, has intentionally disclosed a significant part of the  
10 communication or has consented to such disclosure made by anyone. Consent to  
11 disclosure is manifested by any statement or other conduct of the holder of the  
12 privilege indicating ~~consent to~~ intent to permit the disclosure, including failure to  
13 claim the privilege in any proceeding in which the holder has the legal standing  
14 and opportunity to claim the privilege.

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

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

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

30 **Comment.** Subdivision (a) of Section 912 is amended to make clear that unintentional  
31 disclosure of a privileged communication does not waive the privilege. This codifies case law  
32 interpreting the provision. See *State Compensation Ins. Fund v. Telanoff*, 70 Cal. App. 4th 644,  
33 654, 82 Cal. Rptr. 2d 799 (1999); *O'Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal. App.  
34 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997); *People v. Gardner*, 151 Cal. App. 3d 134, 141, 198  
35 Cal. Rptr. 452 (1984); see also *KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 919 (9th Cir.  
36 1987); *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 196 F.R.D. 375, 380 (S.D. Cal.  
37 2000); *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994).  
38 Evidence that the holder of a privilege was notified in advance of employer monitoring or other  
39 disclosure bears on the holder's intent.