Study K-500 June 27, 2001

First Supplement to Memorandum 2001-51

Evidence Code Changes Required by Electronic Communications (Comments on Draft)

Prof. J. Clark Kelso (Institute for Legislative Practice, McGeorge School of Law) has raised questions regarding employer monitoring of email and how such monitoring affects the treatment of emails between persons in a privileged relationship. This supplement discusses his questions, the response of the Commission's consultant, Judge Joseph Harvey (Exhibit pp. 1-2), and other material relating to employer monitoring of email.

COMMENTS OF PROF. KELSO

The draft attached to Memorandum 2001-51 would amend Evidence Code Section 917 as follows:

> 917. (a) Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, ~~or~~ husband-wife, sexual assault victim-counselor, or domestic violence victim-counselor relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.
>
> (b) No communication between persons in a relationship listed in subdivision (a) loses its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery or facilitation of electronic communication may have access to the content of the communication.
>
> (c) For purposes of this section, "electronic" has the meaning provided in Section 1633.2 of the Civil Code.

(Unless otherwise indicated, all further statutory references are to the Evidence Code.) Prof. Kelso asks whether the language in Section 917(b) would adequately cover, or is intended to cover, the access that an employer has to an employee's emails. (Email from Clark Kelso to Barbara Gaal (June 6, 2001).) In his view, a person "involved in the delivery or facilitation" of electronic communication

"clearly encompasses the tech people within an organization and within the Internet infrastructure. *Id.* But he queries how the provision would apply to others in an organization, such as the Human Resources Department or the Chief Executive Officer. *Id.* "Is everyone within a business involved in the 'facilitation' of electronic communication?" *Id.*

MAY DISCUSSION

The Commission discussed employer monitoring of email to some extent at the May meeting. Judge Harvey took the position that a communication between persons in a privileged relationship is privileged only so long as the holder of the privilege does not voluntarily and intentionally disclose the communication to persons outside the privileged relationship. Once such disclosure occurs, the privilege is lost. Thus, where an employee is oblivious to employer monitoring of an otherwise privileged communication, the communication is privileged despite the monitoring. Where the employee knows of the monitoring, however, Judge Harvey would find that the communication is not privileged.

Judge Harvey suggested stating in Section 917 or 917.5 that no privileged communication "loses 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." (Memorandum 2001-29, Exhibit p. 6.) The Commission considered whether this language adequately addressed employer monitoring, as well as other situations such as computer backup. The Commission decided that it was overly restrictive to refer to whether a person was "necessary for" delivery or facilitation of an electronic communication. The Commission decided to refer instead to whether a person was "involved in" delivery or facilitation of an electronic communication. The Commission opted not to provide further specificity, so as to leave room for judicial interpretation in varying fact situations.

BACKGROUND ON EMPLOYER MONITORING

The use of email is growing explosively, both in the workplace and elsewhere. In the workplace, employers "have plenty of legitimate reasons" for monitoring employee email. Low, *E-Mail, Voicemail, and Employees' Right to Privacy: Monitoring Employees' Electronic Communications*, 29 Colo. Law. 13 (Oct.

2000); *see also* Adams, Scheuing & Feeley, *E-Mail Monitoring in the Workplace: The Good, the Bad and the Ugly*, 67 Def. Couns. J. 32, 33-34 (2000). For example, an employer may monitor an employee's email to ensure that the employee is providing quality service, using work time productively, and refraining from conduct that may subject the employer to liability (e.g., defamation, sexual harassment, or racial slurs). Not surprisingly, employer monitoring is a common practice, although exact figures on the frequency of such monitoring vary. See, e.g., (Adams, *supra*, 67 Def. Couns. J. at 32 (survey showed 20% of employers monitor); DiLuzio, *Workplace E-Mail: It's Not as Private as You Might Think*, 25 Del. J. Corp. L. 741, 743 (2000) (study found 32% of employers randomly monitor); 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) (survey showed 27% of employers monitor). Employees are often unaware that this monitoring is occurring. Adams, *supra*, 67 Def. Couns. J. at 35; McIntosh, *supra*, at 542.

It is not yet clear how much privacy an employee is entitled to in using email at work. Adams, *supra*, 67 Def. Couns. J. at 32-33; Low, *supra*, 29 Colo. Law at 13. It is generally accepted that an employer is entitled to monitor to some extent, but there has been much debate regarding the impact of various legal doctrines protecting privacy rights, such as the Fourth Amendment, the Electronic Communications Privacy Act (18 U.S.C. §§ 2510 *et seq.*), state constitutional rights to privacy (e.g. Cal. Const. art. I, § 1), and tort law on invasion of privacy. *See, e.g.*, Garr & Boggs, *Taming the Cyberspace Workplace: Legal Issues for Employers Re: Email, Voicemail, and the Internet*, SF12 ALI-ABA 541 (2001); Adams, *supra*, 67 Def. Couns. J. at 35-42. The issues are particularly difficult in some contexts, such as where an employee uses a home computer to telecommute, or uses an employer's computer to contact home during non-work hours while traveling on business. *See* Nichols, *Window Peeping in the Workplace: A Look Into Employee Privacy in a Technological Era*, 27 Wm. Mitchell L. Rev. 1587, 1592-95 (2001). Further complications may arise where an employer not only monitors but also discloses the contents of an email message. *See generally* Blackowicz, *E-Mail Disclosure to Third Parties in the Private Sector Workplace*, 7 B.U. J. Sci. & Tech. L. 80, 83, 95-99; *Bartnicki v. Vopper*, __ U.S. __, 121 S.Ct. 1753 (2001).

Many commentators suggest that each employer establish a clear, written policy on monitoring and personal use of workplace email, and inform employees of that policy. *See, e.g.*, Schroeder, *The Information Superhighway:*

Avoiding Workplace Nightmares, 45 Boston Bar J. 8, 24 (March / Apr. 2001); Adams, *supra*, 67 Def. Couns. J. at 46; Blackowicz, *supra*, 7 B.U. J. Sci. & Tech. L. at 99-102; DiLuzio, *supra*, 25 Del. J. Corp. L. at 756; Low, *supra*, 29 Colo. Law at 16; Rogers, *You Got Mail But Your Employer Does Too: Electronic Communication and Privacy in the 21st Century Workplace*, 5 J. Tech. L. & Policy 1, 11 (Spring 2000). "Some have concluded that the mere fact of using a monitoring device and communicating its use to employees can have a dramatic effect in lessening inappropriate Web-based activity." Policy, 10 Bus. L. Today 9, 10 (Nov. / Dec. 2000). This, in turn, might improve productivity, protect the employer against liability, and preserve the employee's dignity by avoiding an embarrassing disclosure.

A pending bill (SB 147 (Bowen)) would require employers to notify employees of email monitoring and seek employee verification of such notice. Connecticut already has a law like this (Conn. Gen. Stat. Ann. § 31-48d (2001)), but similar legislation (the Privacy for Consumers and Workers Act) was unsuccessful at the federal level. Similar bills were also vetoed by Governor Davis in 1999 and 2000 as unduly burdensome on employers.

As Prof. Kelso points out, the fate of the bill banning secret monitoring might affect this study. (Email from Clark Kelso to Barbara Gaal (June 6, 2001).) In particular, suppose an email message is sent between an employee and a person in a privileged relationship with the employee. Whether that message is considered privileged might depend on what the employee has been told regarding email monitoring, as Judge Harvey explains below.

JUDGE HARVEY'S VIEWS

Judge Harvey first states his view on the correct policy regarding monitoring, and then suggests means of implementing that approach.

Views on Policy

According to Judge Harvey, the confidential communication privileges "are designed to protect communications that are transmitted by a means that, 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." (Exhibit p. 1.) Proposed Section 917(b), regarding electronic communications, "is to protect the privilege when, unbeknown to the client, technical people as a matter of necessity, or eavesdroppers, or even employers, monitor the transmission." *Id.*

"The privilege should remain even though the client might suspect that the monitoring might occur." *Id.*

Where, however, a client is actually informed that a communication is subject to monitoring, Judge Harvey believes "as a matter of principle the communication should not be considered confidential and subject to the privilege." *Id.* He explains:

> The privilege is supposed to protect confidential communications. It should not be so construed that the courts are the only bodies that do not know about the information, when such information is necessary to accomplish justice in the courts. To put it another way, if the client is willing to have the information disclosed to his employer, he ought not to be permitted to keep the information out of court.

Id.

Drafting Suggestions

Judge Harvey makes three points regarding the drafting of the Commission's proposal:

Existing Draft May Be Adequate

First, Judge Harvey says that the current draft (attached to Memorandum 2001-51) is consistent with his views on the proper policy. "Proposed section 917(b) says the communication remains privileged even though persons involved in the delivery or facilitation of the communication may have access to the communication." (Exhibit p. 2.) "If the case came before me, I would hold that an employer is not involved in the delivery or facilitation of the communication." *Id.* "He is involved in making sure that employees are not using company time for personal business." *Id.*

Express Statement that Notice of Monitoring Defeats the Privilege

Judge Harvey acknowledges, however, that the draft "may not be as clear as it ought to be" regarding employer monitoring. *Id.* "Prof. Kelso's comment points out that uncertainty." *Id.*

To provide greater clarity, Judge Harvey suggests adding language "that says, in effect, that if the client is actually notified that monitoring is occurring or may occur, the communication is not privileged." *Id.* He does not propose specific language.

Comment Explaining Effect of Notice of Monitoring

As an alternative, Judge Harvey proposes to "explain in the comment why actual notification from the employer to the employee that his e-mails are subject to employer review destroys the privilege: because the employee is then "aware" that the information will be disclosed to someone who is not there to further the interest of the client in the consultation." *Id.* "The commission has used comments before to explain nice distinctions that are not readily apparent from a superficial reading of the statute." *Id.*

ANALYSIS

Employer monitoring of email is an important topic that is generating tremendous debate. How such monitoring affects privileged communications is a significant subtopic that is likely to generate litigation. As Prof. Kelso's questions demonstrate, the Commission's current draft does not clearly address this point. While some degree of judicial discretion may be appropriate, further guidance could help to avoid unnecessary litigation and defeated expectations. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

Although Commission Comments can be very useful, the staff is dubious that this area can be satisfactorily addressed solely in a Comment. The Legislature is increasingly reluctant to "legislate by Comment," largely because Comments are less readily accessible than statutes. See, e.g., Senate Judiciary Committee analysis of SB 209 (Kopp) (Jan. 13, 1998).

Statutory clarification seems the best option, but it is not a simple matter. Judge Harvey suggests stating that if the client is actually notified that monitoring is occurring or may occur, the communication is not privileged. (Exhibit p. 2.) This raises numerous questions. Notice of monitoring may vary greatly in content, timing, and format. Suppose an employee is given numerous forms to sign 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 and his spouse from work. Is that different from a situation in which an employee repeatedly sends emails to her husband on her lunchbreak, even though her computer

routinely displays a message that employee email is actually being monitored? Does it matter whether she has read the message? Does it matter whether she has expressly agreed to the monitoring? 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 in the startup process, when the employee may be performing other tasks? Does it matter whether her husband knew of the monitoring? 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? Is there a guiding principle in evaluating these situations?

At the May meeting, Judge Harvey said that "intentional revelation or disclosure" by the holder of a privilege is the key in determining whether the privilege has been waived. The Commission appeared to accept that principle. It is consistent with the provisions on what constitutes a confidential communication, which focus on whether the holder *is aware* of disclosure to a person outside the privileged relationship. See Sections 952, 992, 1012, 1032, 1035.4, 1037.2; Memorandum 2001-29, pp. 8-11.

But the waiver provision (Section 912) does not expressly refer to the holder's intent. Rather, it states that waiver occurs

> if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to 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.

At the May meeting, the Commission decided to leave this language alone, because courts have interpreted it to mean that inadvertent disclosure of a privileged communication is not a waiver. Memorandum 2001-29, pp. 11-12; Minutes, p. 14.

To provide clear guidance in situations such as employer monitoring, however, the staff continues to believe that the statute should be revised to expressly refer to the holder's intent. **We suggest the following:**

Evid. Code § 912 (amended). Waiver

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

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), ~~or~~ 1035.8 (sexual assault victim-counselor privilege)<u>, or 1037.5 (domestic violence victim-counselor privilege)</u> is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has <u>intentionally</u> disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating ~~consent to~~ <u>intent to permit</u> 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.

….

Comment. Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This is not a substantive change. See State Compensation Insurance 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. of Maryland, 196 F.R.D. 375, 380 (S.D. Cal. 2000); Cunningham v. Connecticut Mutual Life Ins., 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994). Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.

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

We would also refer to employer monitoring in Section 917, as well as computer backup. The latter should be addressed because it is another common practice entailing potential for disclosure of electronic communications. **The statute could be amended along following along the following lines**:

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

(b) No communication between persons in a relationship listed in subdivision (a) loses its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, employer monitoring, or backup of electronic communication may have access to the content of the communication.

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

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

Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2000)) and from language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer. Whether a communication is privileged despite employer monitoring or similar practices depends on the intent of the holder of the privilege. See Section 912. Evidence that the holder was notified in advance of employer monitoring or other disclosure bears on the holder's intent. See Section 912 Comment.

Under subdivision (c), the definition of "electronic" is broad, including any "intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form …." Uniform Electronic Transactions Act, Comment to Section 2 (enacted as Civil Code Section 1633.2).

For discussion of ethical considerations where a lawyer communicates with a client by electronic means, see Bus. & Prof. Code § 6068(e) (attorney had duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients"); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413 ("Protecting the Confidentiality of Unencrypted E-Mail"); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 92-368 ("Inadvertent Disclosure of Confidential Materials"). For examples of provisions on the admissibility of electronic communications, see Evid. Code §§ 1521 & Comment (Secondary Evidence Rule), 1552

(printed representation of computer information or computer program), 1553 (printed representation of images stored on video or digital medium); Code Civ. Proc. § 1633.13 ("In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form."). See also People v. Martinez, 22 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000); People v. Hernandez, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (1997); Aguimatang v. California State Lottery, 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (1991); People v. Lugashi, 205 Cal. App. 3d 632, 252 Cal. Rptr. 434 (1988).

Importantly, proposed Section 917(b) states that no communication loses its privileged character "for the *sole* reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, employer monitoring, or backup of electronic communication may have access to the content of the communication." (Emphasis added.) As Commission Chair Huebner pointed out at the May meeting, the word "sole" provides latitude for courts to account for differing fact situations. For example, the fact that an employer monitored an email message between an employee and an employee's attorney would be insufficient, in and of itself, to render the message unprivileged. But the result under proposed Section 917 should be different where that fact is coupled with clear evidence that the employee knew the message would be monitored.

Respectfully submitted,

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Staff Counsel

Exhibit

COMMENTS OF JUDGE HARVEY

(EMAIL TO B. GAAL ON JUNE 18, 2001)

Prof. Kelso raises a good point. (He usually does.)

As a matter of principle, I think that, if the client is actually aware that someone else has the right or duty to actually monitor the electronic communication, the communication should not be considered confidential.

The communication privileges are designed to protect communications that are transmitted by a means that, 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. The electronic communication language was added to the lawyer-client privilege to forestall the argument that the client ought to be aware of the potential for eavesdropping or monitoring by others. Because he ought to be aware of that potential, the communication cannot be confidential. So, it seems to me that the electronic communication exception is to protect the privilege when, unbeknown to the client, technical people as a matter of necessity, or eavesdroppers, or even employers, monitor the transmission. The privilege should remain even though the client might suspect that the monitoring might occur.

But, where the client is actually informed that the communication is subject to monitoring, or is subject to being reviewed by an employer, as a matter of principle the communication should not be considered confidential and subject to the privilege. The privilege is supposed to protect confidential communications. It should not be so construed that the courts are the only bodies that do not know about the information, when such information is necessary to accomplish justice in the courts. To put it another way, if the client is willing to have the information disclosed to his employer, he ought not to be permitted to keep the information out of court.

It can be argued that the present draft expresses this principle now. The language of each privilege section says that a confidential communication is privileged if it is transmitted by a means that, so far as the client is aware, discloses the information to no third persons. Proposed section 917(b) says the communication remains privileged even though persons involved in the delivery or facilitation of the communication may have access to the communication. If the case came before me, I would hold that an employer is not involved in the delivery or facilitation of the communication. He is involved in making sure that employees are not using company time for personal business.

But this may not be as clear as it ought to be. Prof. Kelso's comment points out that uncertainty. I haven't conceived the language, but perhaps some language could be added that says, in effect, that if the client is actually notified that monitoring is occurring or may occur, the communication is not privileged. Drafting such language may be awkward because the statutes vary the description of the person who must be aware of the third party disclosure, The word client is used in attorney / client, but we also have patient, victim, etc.

Another way of addressing the employer problem might to be explain in the comment why actual notification from the employer to the employee that his e-mails are subject to employer review destroys the privilege: because the employee is then "aware" that the information will be disclosed to someone who is not there to further the interest of the client in the consultation.

The commission has used comments before to explain nice distinctions that are not readily apparent from a superficial reading of the statute. That was the purpose behind the long comments to sections 403 and 405.

Unfortunately I will be unable to attend the Sacramento meeting. I have a Judicial Council jury instructions task force meeting at the same time.