Study K-301 January 5, 2004

Memorandum 2004-8

Waiver of Privilege By Disclosure (Discussion of Issues)

In 2001, the Commission circulated a tentative recommendation on *Electronic Communications and Evidentiary Privileges*, which proposed three different reforms, including a proposal to revise Evidence Code Section 912 to make clear that inadvertent disclosure of a privileged communication covered by that provision does not constitute a waiver of the privilege. After receiving comments on the tentative recommendation, the Commission finalized a recommendation on two of the proposed reforms. *Electronic Communications and Evidentiary Privileges*, 31 Cal. L. Revision Comm'n Reports 245 (2001). Those reforms have since been enacted. 2002 Cal. Stat. ch. 72.

The Commission did not finalize a recommendation on inadvertent disclosure of a privileged communication, deciding instead to study the matter further and attempt to obtain more input. The Commission has since received and considered comments on a discussion draft prepared by the staff (based on the waiver of privilege portion of the previously circulated tentative recommendation), and identified a number of issues for the staff to research. This memorandum addresses those issues, as well as a number of other matters uncovered by the staff in its research. The Commission needs to resolve whether and how to revise its proposal before finalizing a recommendation.

The following new comments are attached:

The discussion draft and other materials relating to this study are available on the Commission's website at <www.clrc.ca.gov>. Unless otherwise specified, all further statutory references are to the Evidence Code.

OUTLINE

The discussion in this memorandum is organized as follows:

SUMMARY OF THE PROPOSAL

The discussion draft proposes to amend Section 912 to make clear that disclosure of a privileged communication covered by the statute waives the privilege only where the holder of the privilege intentionally makes the disclosure or intentionally permits another person to make the disclosure. Updated to reflect recently enacted legislation, the proposal would amend the statute as follows:

> 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 ~~consent to~~ 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.
>
> (b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8

(sexual assault victim-counselor privilege), or 1037.5 (domestic violence victim-counselor privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

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

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

Comment. Subdivision (a) of Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This codifies case law interpreting the provision. See 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). Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.

It is important to bear in mind that this statute only deals with the concept of privilege waiver — i.e., loss of the privileged status of a communication between persons in a privileged relationship by subsequent disclosure of a communication that was "confidential" when made. The provision does not address whether a communication between persons in a privileged relationship was "confidential" when originally made or whether the circumstances of the communication were such that it was not confidential and thus not privileged at all.

Another provision governs that issue. Section 917 establishes a presumption that a communication between persons in certain privileged relationships (the same ones listed in Section 912) is confidential when made. Each of the listed privileges *applies only to a confidential communication* between persons in the privileged relationship. See Sections 954, 980, 994, 1014, 1032-1034, 1035.8, 1037.5.

The presumption of confidentiality can be overcome if "the facts show that the communication was not intended to be kept in confidence …." Section 917 Comment (1965). "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." *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).

INTERRELATIONSHIP WITH THE COMMISSION'S STUDY ON CONFORMING THE EVIDENCE CODE TO THE FEDERAL RULES OF EVIDENCE

It is natural to ask how the Commission's work on waiver of privilege by disclosure interrelates with its study on conforming the Evidence Code to the Federal Rules of Evidence. The answer is simple, because the Federal Rules of Evidence do not contain provisions on privileges.

As proposed by the United States Supreme Court, the Federal Rules of Evidence did include an article on privileges, but it proved too controversial to be enacted. Congress left development of the law of privileges to each state and to the federal common law. Fed. R. Evid. 501.

Thus, there is no federal provision on waiver of privilege for the Commission to consider as a possible model. In fact, Prof. Miguel Méndez does not plan to discuss privileges at all in his background study for the Commission on conforming the Evidence Code to the Federal Rules of Evidence. That project will not overlap with this narrower study on waiver of privilege by disclosure.

SUMMARY OF THE INPUT RECEIVED

The comments on the proposed amendment were generally favorable. The Office of the Public Defender of Los Angeles County "wholly supports" the

proposed amendment and regards it as "an important concept to include" in Section 912. Memorandum 2002-31, Exhibit p. 1. Public Defender Michael Judge explained:

> On a number of occasions my Office has had to litigate the issue of waiver, where some disclosure has been made. We have taken the position that only intentional waivers qualify, but the failure of Evidence Code section 912 itself to so provide results in time-consuming and wasteful litigation while the parties review the case law you correctly cite. Codification of that case law would simplify litigation disputes, a goal I hope everyone in the criminal justice system would agree is appropriate.

Id.

Similarly, Richard Best (who served for many years as Discovery Commissioner for the San Francisco Superior Court) wrote:

> I believe the amendment clarifying the California rule on waiver by inadvertent disclosure is desirable since the Supreme Court has not spoken and there is some case law basis for a contrary position. Although other jurisdictions sometimes take a contrary position the proposed clarification seems to not only be the current rule in California but the national trend. It is also desirable because this issue arises with greater regularity and is a source of serious concern when dealing with production of electronic data.

Memorandum 2002-5, Exhibit p. 1.

The Office of the Attorney General also wrote in support of the proposal:

> We have reviewed this proposed amendment to Evidence Code section 912 which would clarify, based on current case law, that disclosure of a privileged communication waives the privilege only when the disclosure is intentional. With the understanding that the Attorney General's Office would review any actual legislative bill, we support the Commission's proposed change to Evidence Code section 912.

Memorandum 2002-31, Exhibit p. 2.

In addition, three law school professors wrote in support of the basic concept of the reform, while raising a number of issues that were discussed in the memoranda presenting their comments: Professor David Leonard of Loyola Law School (see Memorandum 2002-5, pp. 14-15, 20-22, 23 & Exhibit pp. 11-14; Memorandum 2002-31, pp. 7-8, 9-10), Professor Edward Imwinkelried of the University of California at Davis (see Memorandum 2002-5, pp. 22-23 & Exhibit

pp. 10; Memorandum 2002-31, pp. 8-9), and Professor William Slomanson of Thomas Jefferson School of Law (see Exhibit p. 4; Memorandum 2002-5, pp. 24-25 & Exhibit pp. 16-17). The proposal also received support from the Chairperson of the Beverly Hills Bar Association Criminal Law Section (Memorandum 2002-5, Exhibit p. 15), and was acceptable to Judge Joseph Harvey, who helped to draft the Evidence Code while working as a staff attorney for the Commission (Memorandum 2002-5, Exhibit pp. 7-9; Email from J. Harvey to B. Gaal (12/27/01)).

Another group supporting the proposal was the Family Law Executive Committee of the State Bar, which commented:

> This new language of intent by behavior or statement of the holder would do away with the waiver by any inadvertent disclosure, whether by the holder or by the non-holder. These further protections of the various privileges *would remedy certain existing case law where waiver of the privilege has been found under circumstances of unintentional negligent handling of privileged information by the non-holder or joint holder of the privilege,* leading to further invasion of other confidential communications between the joint holders, and thereby destroying the trust in the relationship itself.

Exhibit p. 2 (emphasis added). The comments do not cite or otherwise identify the case law to which the group referred. As explained later in this memorandum, with a few arguable exceptions California cases appear consistent with the Commission's proposal, but there is potentially confusing language in some opinions and courts in other jurisdictions (including federal courts located in California but applying federal law) sometimes use different tests in determining whether a privilege has been waived.

The position of the Consumer Attorneys of California is unclear. The group commented favorably on the tentative recommendation, but its comments may not have been directed to this particular reform. Memorandum 2002-5, Exhibit p. 21.

In contrast, the State Bar Committee on Administration of Justice deliberately refrained from taking a position on the waiver reform. The committee raised some issues regarding inadvertent disclosure, which were previously presented to the Commission. Memorandum 2002-5, pp. 17-20 & Exhibit p. 20; Memorandum 2003-31, pp. 3-4, 6-7.

Only attorney John Anton objected to the proposal. In his opinion, the reform is misguided because "determination of the subjective intent of the holder of the privilege is an unworkable standard." Memorandum 2002-5, Exhibit p. 2: see also *id*. at pp. 17-19; Memorandum 2002-31, pp. 3, 6.

ISSUES IDENTIFIED BY THE COMMISSION

When it considered the comments on the discussion draft, the Commission directed the staff to delete the last sentence of the proposed Section 912 Comment (relating to employer monitoring of email), and add parentheticals to the citations in that Comment. The Commission also asked to staff to research the following matters:

- Whether and to what extent a lawyer's conduct can be imputed to a client in determining whether a privilege has been waived.
- Whether the proposed revisions of Section 912 are properly coordinated with provisions in the Civil Discovery Act specifying consequences of failing to assert an objection.
- Whether language on the effect of failing to claim a privilege should be added to the proposed Section 912 Comment.
- Whether it is necessary to differentiate between the lawyer-client privilege and any of the other privileges mentioned in Section 912 (e.g., the clergyman-penitent privileges) in determining whether a privilege has been waived.
- Whether the last sentence of Section 912(a) should be revised in a different manner than in the discussion draft, which would revise that sentence as follows: "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating ~~consent to~~ 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."

Minutes (July 2002), pp. 23-24.

Those requests prompted the staff to conduct more general research on privilege waivers than we had done previously. In the course of that research, we uncovered additional points that the Commission should consider. This memorandum addresses most of the issues raised by the Commission (we only briefly address the two drafting issues, which we plan to consider in greater depth later in this study), as well as the additional points identified by the staff. Before turning to those matters, however, we (1) briefly summarize the various

approaches that federal and state courts have taken towards waiver of privilege by inadvertent disclosure, and (2) discuss the inadvertent disclosure cases cited in the Commission's proposed Comment.

APPROACHES TO WAIVER BY INADVERTENT DISCLOSURE

There is no nationwide consensus on how to decide whether an inadvertent disclosure of a privileged communication waives the privilege. Courts in different jurisdictions apply different tests. There are three main approaches: strict liability for disclosure, a subjective intent requirement, and a balancing test.

Strict Liability for Disclosure

In some jurisdictions, disclosure of a privileged communication waives the privilege, regardless of the circumstances of the disclosure. The idea is that once a confidential communication is disclosed, it no longer deserves protection, because it is impossible to "unring the bell." In addition, privileges impede access to evidence and the search for truth, so they should be narrowly circumscribed. The approach also spares courts from having to differentiate between various degrees of "voluntariness" in privilege waivers.

But the strict liability approach has been criticized as overly harsh. It penalizes a client for even a faultless disclosure and it undermines the policies advanced by the confidential communications privileges. Although a court cannot restore confidentiality to a document already disclosed, it can minimize the damage done by disclosure by preventing or restricting use of the document at trial.

For additional discussion of the strict liability approach, see Memorandum 2001-29, pp. 5-6 & sources cited therein.

Subjective Intent of the Holder

At the other end of the spectrum, some courts focus on the subjective intent of the holder of a privilege in determining whether the privilege has been waived. The test is phrased differently by different courts, and sometimes different formulations are intermingled within the same opinion. In particular, the courts sometimes fail to differentiate between whether the critical factor is intent to *disclose a privileged communication*, as opposed to intent to *waive the privilege* (which cannot occur unless the holder of the privilege is aware of the privilege and the consequences of disclosure).

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

The approach may be criticized, however, for not creating enough incentives to protect confidentiality of privileged communications. This criticism is not entirely persuasive, because disclosure of a communication can be very harmful even if the communication remains inadmissible at trial.

For additional discussion of the subjective intent approach, see Memorandum 2001-29, pp. 6-7 & sources cited therein.

Balancing Test

A third approach is to use a balancing test to determine whether an inadvertent disclosure constitutes a waiver of a confidential communications privilege. Under this approach, a court must examine factors such as (1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness.

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

That flexibility also makes the approach unpredictable. It thus creates a danger of inconsistent results and undercuts the effectiveness of the evidentiary privileges, which are less likely to encourage free-flowing communication if persons in a privileged relationship are unable to predict with some certainty whether a particular discussion will be protected. The approach is also judicially burdensome, because it requires a court to examine the circumstances of each communication and delve into the details of the communication methods used.

For additional discussion of the balancing test, see Memorandum 2001-29, pp. 7-8 & sources cited therein.

INADVERTENT DISCLOSURE CASES CITED IN THE PROPOSED COMMENT

The proposed Comment to Section 912 in the discussion draft cites six cases waiver by inadvertent disclosure — three decided by California courts of appeal

and three decided by federal courts discussing California law. Each of these cases indicates that California follows the subjective intent approach.

Decisions By California Courts of Appeal Cited in the Proposed Comment

The three court of appeal decisions are:

State Compensation Ins. Fund v. WPS, Inc.

The most recent court of appeal decision cited in the proposed Comment is *State Compensation Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799 (1999), in which counsel, in responding to a document request, inadvertently produced documents that were subject to the attorney-client privilege. The trial court ruled that this inadvertent disclosure did not waive the attorney-client privilege.

The court of appeal upheld that ruling, focusing on whether any statement or conduct of the client indicated that the client consented to counsel's disclosure. *Id*. at 652. The court explained that a "trial court called upon to determine whether inadvertent disclosure of privileged information constitutes waiver of the privilege must examine both the subjective intent of the holder of the privilege and the relevant surrounding circumstances for any manifestation of the holder's consent to disclose the information." *Id*. at 652-53. The court concluded that there had been no waiver in the case before it, because it was "clearly demonstrated that [the holder of the privilege] had no intention to *voluntarily relinquish a known right*. *Id*. at 653 (emphasis added). The court thus framed the test as whether the holder of the privilege intended to *waive the privilege*. *Id*. at 653 & n.2. In describing its holding, however, the court spoke only in terms of disclosure: "[W]e hold that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." *Id*. at 654.

O'Mary v. Mitsubishi Electronics America, Inc.

The facts of *O'Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal. App. 4th 563, 69 Cal. Rptr. 2d 389 (1997), were similar to those in *State Compensation Ins. Fund*. In response to a document request, counsel inadvertently produced documents that were subject to the attorney-client privilege, but the trial court ruled that this disclosure did not waive the privilege.

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

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

Id. at 577 (emphasis added). The court thus reached the same result as in *State Compensation Ins. Fund*, but it focused on the holder's intent regarding *disclosure* of the documents, rather than muddling intent to disclose with intent to *waive the privilege*.

People v. Gardner

The third court of appeal decision cited in the proposed Comment is *People v. Gardner*, 151 Cal. App. 3d 134, 198 Cal. Rptr. 452 (1984), in which a probation report included confidential information from a patient's medical record. A hospital had provided the information to the probation officer at the officer's request. Over objection at the sentencing hearing, the trial court permitted the information to remain in the probation report.

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

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

Id. at 141 (emphasis added). Although the court did not mention Section 912, these comments indicate that an inadvertent disclosure of confidential physician-patient communication does not waive the privilege.

Decisions By Federal Courts Cited in the Proposed Comment

The three federal cases cited in the proposed Comment to Section 912 are:

KL Group v. Case, Kay & Lynch

In *KL Group v. Case, Kay & Lynch*, 829 F.2d 909 (9th Cir. 1987), the Ninth Circuit considered the impact of inadvertent production of an attorney-client letter in discovery. The court concluded that under "either Hawaii or *California* law, [the client] *did not waive* its attorney-client privilege by [counsel's] production of the letter." *Id*. at 919 (emphasis added). The Ninth Circuit therefore upheld the district court's issuance of a protective order. *Id.*

Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.

A more extensive discussion of the issue appears in *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 196 F.R.D. 375 (S.D. Cal. 2000). Again, counsel inadvertently produced attorney-client communications during document discovery. The district court determined that "[t]o the extent the disputed documents fall within the scope of the [attorney-client] privilege, *California law* requires they remain privileged *notwithstanding their inadvertent disclosure during discovery*." *Id*. at 380 (emphasis added). The court explained that under California law, "waiver of the attorney-client privilege depends entirely on whether the client provided knowing and voluntary consent *to the disclosure*." *Id*. (emphasis added). That statement suggests that the critical factor in assessing whether waiver occurred is the client's intent regarding disclosure. But the court also stated that "nothing in the record suggests that the counsel's inadvertent disclosure of allegedly privileged documents manifested [the client's] *knowing and voluntary relinquishment of its attorney-client privilege*." *Id*. (emphasis added). That statement suggests that the critical factor is not the client's intent regarding disclosure, but rather the client's intent regarding waiver of the privilege. The decision is thus an example of a case in which the court intermingles these two different standards. Either way, however, it is clear that the court is focusing on the subjective intent of the holder of the privilege in determining whether the privilege has been waived under Section 912.

Cunningham v. Connecticut Mut. Life Ins.

The last case cited in the proposed Comment is *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403 (S.D. Cal. 1994), which also involved counsel's inadvertent production during document discovery of a letter protected by the attorney-client privilege. The district court concluded that this did not waive the privilege under California law. It explained:

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

Id. at 1410 (emphasis added).

Again, the court did not cleanly differentiate between intent to disclose a privileged communication and intent to waive the privilege. While the statement quoted above refers to "intent to disclose," elsewhere in its opinion the court stated that under the subjective approach, "the client must *affirmatively waive the privilege*." *Id*. at 1411 (emphasis added).

The court's comments regarding California law are also dictum. 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.

Intent to Disclose Versus Intent to Waive the Privilege

As explained above, three of the decisions cited in the Commission's proposed Comment (*State Compensation Ins. Fund*, *Federal Deposit Ins. Corp.*, and *Cunningham*) fail to make clear whether the test for waiver turns on intent to disclose a privileged communication or intent to waive the privilege. The State Bar Committee on Administration of Justice raised this distinction in its comments and the Commission previously considered whether to revise its proposed amendment to address the point. Memorandum 2002-5, pp. 19-20; Memorandum 2002-31, pp. 6-7.

The Commission determined that no change in the proposed statutory language was necessary, because the provision already specifies that the critical factor is disclosure. Proposed Section 912(a) reads:

> 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.) In addition, the preliminary part (narrative portion) of the Commission's proposal explains:

> Importantly, the test is whether the holder of the privilege intended to disclose the communication to a third person, not whether the holder intended to waive the privilege. The holder need not have been aware of the legal consequences of disclosure, so long as the disclosure was intentional.

Discussion Draft on *Waiver of Privilege By Disclosure* (March 2002), p. 3 (footnote omitted).

The Commission also considered this point when it originally drafted the Evidence Code using the Uniform Rules of Evidence as a starting point. In drafting Section 912, the Commission deliberately deleted the Uniform Rules' requirement that the holder of a privilege make a disclosure "with knowledge of his privilege." 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) (hereafter, "*Tentative Recommendation on Privileges*"); 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) (hereafter, "*Privileges Study*"). Consistent with that policy determination, the current version of the statute, like the Commission's proposed amendment, focuses on disclosure, not on the holder's knowledge of the existence of the privilege. We have not seen all of the legislative history for the statute, but we have no reason to think that the Legislature's assessment of the situation was different from the Commission's.

It is important to note, however, that Section 912 requires a disclosure to be "without coercion" to constitute a waiver. In some instances, an intentional disclosure, made under a mistaken but reasonable belief that disclosure was legally required (e.g., because it was formally demanded in a legal proceeding and the precise scope of a privilege was unclear), is not a waiver of the privilege. *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).

In reaching that result, the Court in *Wells Fargo* stated that waiver is the intentional relinquishment of a known right. *Id*. at 211. But the result in *Wells Fargo* is most readily explained on the basis that a coerced disclosure — one that is not a matter of free choice — is not a waiver. The Court did not have to resolve whether a voluntary but unintentional disclosure constitutes a waiver, nor whether a party who makes a voluntary, intentional disclosure must be aware of the existence of the privilege to waive it.

The Commission's proposed amendment would have no bearing on the situation in *Wells Fargo*, in which a party intentionally discloses a communication, mistakenly but reasonably believing that disclosure is legally required. Section 912 already requires that a disclosure be uncoerced to constitute a waiver; the Commission's proposed amendment would not change this.

The concept of an intentional, uncoerced disclosure is also different from, although related to, the concept of a disclosure made with intent to waive the privilege:

- **Coercion is not limited to mistakenly believing disclosure is legally required.** In some circumstances, a disclosure might be considered coerced because it was made under the mistaken belief that the disclosure was legally required. But a disclosure could be coerced in other ways as well (e.g., by holding a gun to a person's head and forcing them to turn over a document, or by threatening to fire a person if they refuse to disclose privileged information).
- **Mistakenly believing disclosure is legally required is not necessarily coercion or grounds for waiver.** A disclosure made under a mistaken belief that it was legally required would not necessarily be regarded as a coerced disclosure or grounds for waiver under Section 912. In *Wells Fargo*, the California Supreme Court was careful to point out the party who made the disclosure believed in good faith that it was legally required, there was no

controlling authority on the point, decisions in other jurisdictions had gone both ways, the law was "unsettled and debatable," and there was an "honest mistake of law." *See* 22 Cal. 4th at 211.

- **Requiring intent to waive the privilege would be different from requiring an uncoerced, intentional disclosure.** Finding a waiver only when the holder intends to waive the privilege would restrict the scope of waiver more than finding a waiver only when the disclosure is intentional and uncoerced. When a disclosure is intentionally made without actual or apparent legal compulsion, there would be a waiver under the latter approach, but not under the former unless it was clear that the holder knew of the privilege at the time of disclosure.

The Commission's treatment of the distinction between intent to disclose and intent to waive the privilege thus appears appropriate. It does not seem necessary to change the Commission's approach, but it might be helpful to expand the discussion in the preliminary part of the Commission's proposal and conduct further research on the legislative history in hope of finding supporting material. Another possibility would be to address the point in the proposed Comment to Section 912. See Memorandum 2002-5, pp. 19-20; Memorandum 2002-31, pp. 6-7. The Commission previously rejected that option, however, concluding that the statutory text was sufficiently clear as to make discussion in the Comment unnecessary.

OTHER CASE LAW

In researching the issues raised by the Commission, the staff undertook a general review of California law on waiver of evidentiary privileges (not just waiver by disclosure). We did not find any other published cases squarely resolving the effect of an inadvertent disclosure under Section 912, but a number of cases present points that are worth mentioning here. **Unless someone raises an issue, we plan to proceed in accordance with the staff recommendation on each of the points discussed in this section and do not plan to cover any of them at the upcoming meeting.**

Additional Support for the Commission's Proposal

A number of cases, including several California Supreme Court decisions, contain language that tends to support the Commission's proposed subjective intent standard, but the cases do not squarely rule on whether an inadvertent

disclosure of a privileged communication waives the privilege. See Exhibit pp. 5-7 ("Decisions Interpreting Section 912 Consistently With the Subjective Intent Approach to Waiver By Disclosure"). Unless the Commission otherwise directs, we plan to **incorporate these cases into the preliminary part (narrative portion) of the Commission's proposal,** but not into the proposed Comment.

Case Law that Might Be Considered Inconsistent With the Commission's Proposal

A case that might be considered inconsistent with the Commission's proposed intent test for waiver of the privileges listed in Section 912 is *People v. Von Villas*, 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992), which concerned the admissibility of a husband-wife conversation that occurred while the husband was in jail. The trial court admitted the evidence over the husband's objection that the conversation was protected by the marital communications privilege.

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

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

Id. at 223 (emphasis added). Based on those circumstances, the court determined that the conversation was not made "in confidence" and thus was not privileged in the first place. *Id.* at 220-22, 223. The court also said that the conversation could be viewed as satisfying the "crime or fraud" exception to the marital privilege. *Id*. at 222-23. As still another basis for its decision, the court of appeal explained that "the trial court was faced with sufficient evidence to warrant the conclusion that even if the December 20 conversation was privileged, any such privilege was waived pursuant to Evidence Code section 912." *Id*. at 223.

That statement, coupled with the court's earlier observation that the husband and wife "knew or reasonably should have known" that their conversation was being overheard, could be interpreted to mean that a negligent disclosure by the holder of a privilege is sufficient to waive the privilege. Alternatively, the statement could be construed to indicate that the trial court had "sufficient evidence to warrant the conclusion" that the disclosure was intentional and thus the privilege was waived. The latter interpretation is consistent with the

Commission's proposed amendment of Section 912, but the former is not. **It would be appropriate to add a "but see" citation (with an explanatory parenthetical) to *Von Villas* to the proposed Section 912 Comment.**

In addition, several cases contain statements to the effect that once a privileged communication is disclosed, the privilege is lost. *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 …."). The implication of those statements is that an inadvertent or other unintentional disclosure of a privileged communication waives the privilege, not just an intentional disclosure by or with the consent of the holder of the privilege. But none of those cases involved a ruling on an inadvertent or unintentional disclosure, so the statements in them are only dicta. **This should perhaps be explained in a footnote in the preliminary part of the Commission's proposal.**

Misleading Commentary and Other Potentially Confusing Authority

A recent student piece discusses inadvertent disclosure of confidential information in California. Stuart, Comment, *Inadvertent Disclosure of Confidential Information: What Does a California Lawyer Need to Know*, 37 Santa Clara L. Rev. 547 (1997) (hereafter, "Comment on Inadvertent Disclosure"). The piece extensively discusses a court of appeal decision on inadvertent disclosure that was depublished. *See id.* at 548-51. Presumably because the piece was in the last stages of publication when the case was depublished, the piece refers to the depublication only in a footnote, while stating in the text that in California "there is clear guidance … from the *Kanter* case." *Id.* at 548 n.8, 565. The piece thus gives the misleading impression that *Kanter*, which adopted a multi-factor balancing test for waiver of privilege by disclosure, is the leading California decision on waiver of privilege by disclosure.

In addition, the piece prominently discusses two California cases that involve disclosure of privileged documents but do not interpret Section 912, *see id.* at 552-54; Exhibit pp. 8-9 ("California Cases That Involve Disclosure of Privileged Documents But Do Not Interpret Section 912"); and four Ninth Circuit decisions on inadvertent disclosure that were tried in federal district court in California but

do not apply California law, *see* Comment on Inadvertent Disclosure, *supra*, 37 Santa Clara L. Rev. at 554-57; Exhibit p. 7 ("Decisions by Federal Courts in California, not Based on California Law"). The piece does not discuss any of the cases cited in the Commission's proposed Comment to Section 912, some but not all of which were decided after the piece was published.

Because the student piece is relatively recent but gives a misleading impression of the state of California law on waiver of privilege by inadvertent disclosure, it creates considerable potential for confusion. **The Commission should attempt to allay such confusion by explaining the case law in question in its proposal, as described in more detail at Exhibit pages 7-9.**

Another potential source of confusion is the California Supreme Court's decision in *People v. Clark*, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990). If this case is interpreted as the California Supreme Court said it should be in *Menendez v. Superior Court*, 3 Cal. 4th 435, 447-49, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992), it is not inconsistent with the Commission's proposed amendment of Section 912. As explained at Exhibit pages 9-10, however, it contains some language that might cause confusion. Unless the Commission otherwise directs, we will try to prevent or reduce such confusion **by discussing *Clark* and *Menendez* in a footnote in the Commission's proposal.**

Decisions Requiring Additional Disclosure After a Communication Has Been Intentionally Disclosed to Some Extent

There are some situations in which a holder's intentional disclosure of a privileged communication does not waive the privilege. For example, Section 912(c) provides that disclosure of a privileged communication does not waive the privilege if the disclosure is itself privileged (e.g., where a husband tells his wife in confidence what his attorney advised). Similarly, Section 912(d) provides that disclosure of a privileged communication does not waive the privilege if the disclosure is "reasonably necessary for the accomplishment of the purpose" of the privileged relationship, such as when a patient presents a doctor's prescription to a pharmacist, or perhaps when a defendant shares attorney-client communications with a codefendant in preparing a joint defense. *See Raytheon Co. v. Superior Court*, 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (1989); *see also In re Edward D.*, 61 Cal. App. 3d 10, 15, 132 Cal. Rptr. 100 (1976). It is also true that disclosure of a privileged communication does not waive the privilege if the disclosure is insignificant, such as when a patient reveals simply that she

consulted a psychiatrist and certain subjects were not discussed. *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).

But when the holder of a privilege intentionally discloses a privileged communication to some significant extent, and neither Section 912(c) or (d) applies, a court may require additional disclosure in the interest of fairness, *regardless of whether the holder intended to permit such additional disclosure*. For example, in *Kerns Construction Co. v. Superior Court*, 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (1968), a witness used privileged reports, provided by the privilege holder, to refresh his recollection before testifying, because he could not have testified on the subject otherwise. The privilege holder sought to exclude the reports themselves, but the court ruled that "[w]hen, with knowledge of their intended use, the privileged records were furnished to the witness, which act was not required to be performed, and the witness gave testimony from them, the privilege was waived." *Id.* at 413-14. The court explained that fairness required that result:

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

Id. at 414 (emphasis added).

Similarly, when a defendant disclosed a marital communication in which the defendant's wife supposedly confessed to a murder and described the details of the crime, the defendant could not preclude his wife from testifying that the conversation occurred as he said, except it was he who confessed not she. *People v. Worthington*, 38 Cal. App. 3d 359, 114 Cal. Rptr. 322 (1974). Likewise, a litigant could not agree to disclosure of confidential marital communications at a

deposition and still invoke the marital communication privilege at trial. *Feldman*, 322 F.3d at 668-69 (applying California law); *but see San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (2001) (disclosure of confidential psychotherapist-patient communications to persons handling patient's claim for workers' compensation did not waive psychotherapist-patient privilege for purposes of personal injury case against patient).

Even where a holder has intentionally made a significant disclosure, however, the privilege is not necessarily waived as to all of the communications between the persons in the privileged relationship. For example, a patient's disclosure that she ingested DES while pregnant did not waive the doctor-patient privilege as to her full medical history. *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 a general waiver of psychotherapist-patient privilege). Similarly, voluntary production of some attorney-client communications is not necessarily a waiver of the attorney-client privilege as to all communications having anything to do with the subject matter of a case. *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 the two letters). Although a court may rule that the scope of a waiver is broader than what the privilege holder intends, the waiver should only be as broad as fairness requires.

The Commission's proposal should be revised to clearly embrace this concept. For example, a sentence could be added at the end of Section 912(a) stating:

> If the holder of a privilege listed in this subdivision has, without coercion, intentionally disclosed, or intentionally permitted another person to disclose, a significant part of a confidential communication between persons in a relationship covered by this subdivision, the court may order additional disclosure of the communication to the extent necessary to prevent unfairness due to partial disclosure.

We do not ask the Commission to approve specific language on this point at this time, only the concept of expressly addressing the point in the Commission's proposal. If the Commission agrees with this concept, we will work on the

drafting and present proposed language for the Commission's consideration at another time.

Decisions in Which the Holder of a Privilege Has Agreed to Waive the Privilege But Has Not Disclosed Privileged Information

Another line of authority that warrants discussion consists of cases in which the holder of a privilege agrees or otherwise takes steps to disclose privileged communications, but no disclosure actually occurs. The leading California case on this topic 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 trial court agreed that the client had waived the privilege; it thus issued an order directing one of the client's former attorneys to answer deposition questions to which the client had objected on the basis of the privilege.

The court of appeal reversed the trial court's ruling on this issue. It explained 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). Other cases similarly interpret Section 912 to require actual disclosure, or a reasonable certainty of disclosure, before waiver occurs; mere intent to disclose, by itself, is not enough. *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).

That principle is consistent with the Commission's proposed amendment of Section 912. Under the proposed amendment, the right to claim one of the enumerated privileges "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 consented to disclosure *made* by anyone." (Emphasis added.) It is clear from this statutory language that waiver requires actual disclosure, not just intent to disclose. **No change appears necessary to account for the holdings of cases such as *Lohman*, *Shooker*, and *Tennenbaum*.**

But some of the language in those cases might be misinterpreted to mean that the holder's intent is unimportant in determining whether waiver occurred. For example, in *Tennenbaum*, the court said that "the focal point of privilege waiver analysis should be the holder's disclosure of privileged communications to someone outside the attorney-client relationship, *not the holder's intent to waive the privilege*. 77 F.3d at 341 (emphasis added). **It might be helpful to discuss this in the preliminary part of the Commission's proposal,** pointing out that although such a statement downplays the importance of intent to disclose, the holding of the case is consistent with the Commission's proposal.

Waiver By Putting a Matter in Issue

Another line of authority that the Commission should consider is the statutory and decisional law establishing that in some instances a privilege may be waived or otherwise rendered inapplicable by putting a matter in issue. For example, the Evidence Code expressly provides that the attorney-client privilege does not apply "as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." Section 958. The code includes similar provisions with regard to the marital communications privilege (Section 984), physician-patient privilege (Section 1001), and the psychotherapist-patient privilege (Section 1020).

In some circumstances, courts have also found that a litigant has impliedly waived a privilege by raising an issue in litigation — i.e., the court has found a waiver even though there is no express statutory basis for doing so. *See Southern Cal. Gas*, 50 Cal. 3d at 39-45 (discussing implied waiver doctrine but holding it inapplicable to case at hand) & cases cited therein; *Mitchell*, 37 Cal. 3d at 603-09 (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."). The theory is that the holder of the privilege "has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action." *Southern Cal. Gas*, 50 Cal. 3d at 40.

The Commission's proposal should **make clear that it is not intended to have any impact (positive or negative) on the line of authority regarding waiver of a privilege by putting a matter in issue.** This could perhaps best be accomplished in the proposed Comment, but the Commission need not decide at this time precisely where in its proposal to address the point. That can be resolved later in this study.

The Commission should also be aware that there is an interesting issue regarding whether to create a shareholder exception to the attorney-client privilege, permitting shareholders to waive the privilege on behalf of a corporation in specified circumstances. *See McDermott, Will & Emery*, 83 Cal. App. 4th at 384-85. Although the issue is important, we do not think the Commission should attempt to address it. The area is likely to be politically charged, it is not directly related to the current proposal, and the Commission has its hands full with projects already underway.

IMPUTATION OF ANOTHER PERSON'S CONDUCT TO THE HOLDER OF THE PRIVILEGE IN DETERMINING WHETHER THE PRIVILEGE HAS BEEN WAIVED

One of the issues raised by the Commission was whether and to what extent a lawyer's conduct can be imputed to a client in determining whether a privilege has been waived. In researching that issue, we looked not only for authorities discussing the lawyer-client privilege, but also for authorities relating to the other privileges listed in Section 912 that might shed light on the issue.

With respect to each of the seven listed privileges, the Evidence Code specifies who is the holder of the privilege. For the marital communications privilege and the penitential communications privilege, both persons in the privileged relationship are holders of the privilege (i.e., both husband and wife for the marital communications privilege; both clergy member and penitent for the penitential communications privilege). Evid. Code §§ 980, 1033, 1034. For the remaining privileges, the holders are:

- **Lawyer-client privilege:** Client holds the privilege. Evid. Code § 953.

- **Physician-patient privilege:** Patient holds the privilege. Evid. Code § 993.
- **Psychotherapist-patient privilege:** Patient holds the privilege. Evid. Code § 1013.
- **Sexual assault victim-counselor privilege:** Victim holds the privilege. Evid. Code § 1035.6.
- **Domestic violence victim-counselor privilege:** Victim holds the privilege. Evid. Code § 1037.4.

With regard to each of these five privileges, the other person in the privileged relationship is authorized to, and in fact obligated to, claim the privilege when disclosure of a confidential communication is sought. Evid. Code §§ 955, 995, 1015, 1036, 1037.6.

Under Section 912, a privilege is waived with respect to a communication "if any *holder of the privilege*, without coercion, has disclosed a significant part of the communication *or has consented* to disclosure made by anyone." (Emphasis added.) Numerous cases underscore that it is the holder of the privilege who controls whether a privilege is waived. *See, e.g.*, *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).

The holder of the privilege may, however, authorize another person in the privileged relationship to disclose privileged information. Section 912 specifies that "[c]onsent 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."

A leading case applying these rules is *Rudnick v. Superior Court*, 11 Cal. 3d 924, 523 P.2d 643, 114 Cal. Rptr. 603 (1974), in which physicians disclosed privileged medical information to a drug manufacturer. The California Supreme Court held that if such a disclosure is reasonably necessary to accomplish the purpose of the privileged relationship, the information remains privileged regardless of whether the patient consented to the disclosure. *Id*. at 932; Evid. Code § 912(d). But

> if disclosure of the communications is not reasonably necessary to accomplish such purpose, two different situations ensue. First, if

> the patient expressly or impliedly consents to such disclosure, he thereby waives the privilege and the communications are subject to discovery. (§ 912, subd. (a).) If the patient does not consent by word or deed to such disclosure, then conversely he has not waived the privilege.

Rudnick, 11 Cal. 3d at 932. The Court did not elaborate on how to determine whether the patient had consented to the disclosure.

With regard to the lawyer-client privilege, the client is the holder of the privilege and "only the holder may waive it." *People v. Gionis*, 9 Cal. 4th 1196, 1207, 892 P.2d 1199, 40 Cal. Rptr. 2d 456 (1995); *see also Wells Fargo*, 22 Cal. 4th at 213. If a lawyer discloses a privileged communication, the privilege is waived only if the client consented to the disclosure.

Thus, for example, in *People v. Hayes*, 21 Cal. 4th 1211, 1265, 989 P.2d 645, 91 Cal. Rptr. 2d 211 (2000), the defendant made an offer of proof that counsel for an adverse witness had disclosed to defense counsel that he had told his client she needed immunity. The defendant claimed that this disclosure by counsel for the adverse witness constituted a waiver of the lawyer-client privilege. But the California Supreme Court disagreed, explaining that there was "nothing in the record to suggest that [the adverse witness] had authorized the attorney to discuss his conversations with her with defense counsel in the manner the offer of proof claimed the attorney had done." *Id*. at 1265. Again, the Court did not elaborate on how to determine whether a privilege holder has authorized a disclosure. Nor were we able to find any other cases providing insight on that point.

But authorities discussing the lawyer-client relationship generally may offer some guidance. In particular, "an 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.

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 Cal. Rptr. 332 (1975); *Dale v. City Court of Merced*, 105 Cal. App. 2d 602, 607-08, 234 P.2d 110 (1951); Witkin, *supra*, § 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. Witkin, *supra*, § 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. We were not able to find any cases describing circumstances in which a client is not bound by counsel's intentions regarding assertion of a privilege in a litigation context in which it is incumbent on the client (acting through counsel) to voice any objections. At a minimum, however, 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). The law of agency might provide further guidance on circumstances in which a client is not bound by an attorney's action regarding waiver of a privilege.

In addition, 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 a lawyer may act. For example, consider the conversation in *Hayes* between defense counsel and the attorney for the adverse

witness. The Court's opinion does not spell out the facts of that interchange, but the conversation does not seem to have occurred while the attorney for the adverse witness was taking a formal litigation step for his client. *See Hayes*, 21 Cal. 4th at 1265. As *Hayes* demonstrates, 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.

To summarize, relevant authority is sparse but the following principles seem to apply in deciding whether and to what extent a lawyer's conduct can be imputed to a client in determining whether a privilege has been waived:

- Only the client can waive the privilege.
- The client can waive the privilege by consenting to another person's disclosure of a privileged communication.
- If disclosure of a privileged communication occurred when a lawyer was representing a client in connection with an ordinary procedural step in litigation (e.g., defending the client at a deposition), there appears to be a strong presumption that the client consented to any action the lawyer took, or failed to take, resulting in disclosure, and that the client's intent regarding disclosure was the same as the lawyer's intent.
- If disclosure occurred when the lawyer was not taking a procedural step on the client's behalf in litigation, there does not seem to be any presumption that the client consented to the disclosure, or that the client's intent regarding disclosure was the same as the lawyer's intent.

With these principles in mind, we turn to another area in which the Commission expressed interest: waiver of a privilege through failure to object to discovery or other failure to claim the privilege when legally required to do so.

EFFECT OF FAILURE TO OBJECT TO DISCOVERY OR OTHER FAILURE TO CLAIM A PRIVILEGE

In a case regarding waiver of a contractual right to arbitrate, the California Supreme Court commented on different uses of the term "waiver" and the importance of clearly identifying which concept is at stake:

> Federal as well as state courts have used the term "waiver" to refer to a number of different concepts. Generally, "waiver" denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a

> party's failure to perform an act it is required to perform, regardless of the party's intent to abandon or relinquish the right.…
>
> The confusion engendered by the multiple meanings of "waiver" is not new. More than 30 years ago, Professor Williston observed: "In view of these different meanings of the word 'waiver' it is obviously futile to attempt to define the requirements of a valid waiver unless its use is first confined to some one or more of its ordinary applications wherein the requirements of the law are identical. Until that is done there will be constant confusion of expression."

Platt Pacific v. Andelson, 6 Cal. 4th 307, 315, 862 P.2d 158, 24 Cal. Rptr. 2d 597 (1993) (citations omitted). With regard to waiver of a privilege under Section 912, it is clear that waiver can stem from failure to claim the privilege in a proceeding in which the holder has legal standing and an opportunity to do so.

In pertinent part, the statute states that waiver results when the holder of a privilege, without coercion, has consented to disclosure of a significant part of a privileged communication. The statute then goes on to say: "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*." (Emphasis added.) Thus, failure to claim the privilege is not an independent basis for finding a waiver under Section 912, but rather an indication that the holder has "consented" to disclosure of a privileged communication.

Many cases apply Section 912 where there has been a failure to claim the privilege. In the discussion below, we first discuss waiver of privilege by failure to object at trial, and then turn to waiver of privilege under the Civil Discovery Act of 1986. In each context, we consider the impact of the Commission's proposed amendment of Section 912.

Failure to Object at Trial

Numerous cases find that a privilege was waived due to failure to object at trial. For example, in *People v. Barnett*, 17 Cal. 4th 1044, 1123-24, 954 P.2d 384, 74 Cal. Rptr. 2d 121 (1998), the California Supreme Court ruled that the defendant waived the lawyer-client privilege as to certain topics when the defendant testified regarding certain aspects of his conversations with a defense investigator regarding a location of methamphetamine oil, and defense counsel did not object. The Court further ruled that defense counsel's failure to object did

not amount to ineffective assistance of counsel, because it might have reflected a reasonable strategic decision. *Id*. at 1124-25.

Similarly, in *Calvert v. State Bar of California*, 54 Cal. 3d 765, 819 P.2d 424, 1 Cal. Rptr. 2d 684 (1991), the Court held that a witness named Doris McKnight waived the lawyer-client privilege when her attorney, Louise Frampton, testified regarding certain privileged communications. The Court explained:

> Evidence Code section 912, subdivision (a) provides that a privilege is waived when a holder of a privilege fails to claim the privilege in a proceeding in which he or she has the standing and opportunity to do so. In this case, those conditions were met and the privilege must be held waived. McKnight was a holder of the privilege; as a witness who was present at the hearing she had standing and opportunity to claim it; she consulted with her attorney when the issue was raised by petitioner; and she evidently failed to instruct Frampton to claim the privilege.

Id. at 780.

Likewise, in *People v. Haskett*, 52 Cal. 3d 210, 242-43, 801 P.2d 323, 276 Cal. Rptr. 80 (1990), the Court found that the defendant waived the psychotherapist-patient and attorney-client privileges by failure to object to any of his doctor's testimony at his first trial. In *People v. Gillard*, 57 Cal. App. 4th 136, 162 n. 16, 66 Cal. Rptr. 2d 790 (1997), the court of appeal deemed waived any claim that contents of a file other than certain photos were privileged, because the defendant did not object at trial to use of anything other than the photos. And in *People v. Poulin*, 27 Cal. App. 3d 54, 64, 103 Cal. Rptr. 623 (1972), the court of appeal ruled that the defendant waived the lawyer-client privilege as to a statement when the defendant allowed a witness to testify about the statement without objection.

The results of these cases should be the same under the Commission's proposed amendment of Section 912, which would revise the statute to focus on the holder's intent to disclose a privileged communication. The proposed amendment provides:

> 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 ~~consent to~~ 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.
>
> ….

As discussed above, in conducting a trial a party's attorney speaks for the party and the attorney's intent is presumed to mirror the party's intent. If the attorney fails to object to disclosure of privileged information, the attorney is presumed to have intended the ordinary consequences of that voluntary act. Evid. Code § 665. The ordinary consequences of failure to object to evidence at trial are introduction of the evidence (i.e., disclosure of the privileged information) and waiver of the objection. Witkin, *supra*, §§ 367, 371, at 454, 459-61.

Thus, in the cases described above, it would be presumed that the attorney who failed to claim the privilege intended to disclose the privileged information. That presumption would be difficult to overcome, particularly if the failure to object resulted in a tactical benefit or otherwise appeared strategically motivated, as in *Barnett* where the Court said that the failure to object "might have reflected a reasonable strategic decision." 17 Cal. 4th at 1124-25. Moreover, absent unusual circumstances, the attorney's intent would be attributed to the client, thus satisfying the proposed requirement that the "holder of the privilege, without coercion, has intentionally disclosed a significant part of the communication or has consented to disclosure made by anyone."

Waiver of Privilege Under the Civil Discovery Act of 1986

The Civil Discovery Act of 1986 (Code Civ. Proc. §§ 2016-2036) includes five key provisions on waiver of privilege by failure to comply with discovery obligations:

(1) **Code of Civil Procedure Section 2025(m)(1):** Oral deposition in California

(2) **Code of Civil Procedure Section 2028(d)(2):** Deposition by written questions

(3) **Code of Civil Procedure Section 2030(k):** Written interrogatories to a party
(4) **Code of Civil Procedure Section 2031(*l*):** Inspection demand
(5) **Code of Civil Procedure Section 2033(k):** Requests for admission

Before discussing these provisions, it is useful to examine the scope of Section 912.

Nonexclusivity of Section 912

On its face, Section 912 does not purport to be the exclusive means of waiving the seven privileges to which it applies. Subdivision (a) states that waiver occurs "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Subdivisions (b)-(d) set forth exceptions to that rule. Nowhere does the provision say that making such a disclosure is the only way to waive the specified privileges.

Nonetheless, in *Motown Record Corp. v. Superior Court*, 155 Cal. App. 3d 482, 202 Cal. Rptr. 482 (1984), the court stated that the "*exclusive means* by which the attorney/client privilege may be waived are specified in Section 912 of the Evidence Code." *Id*. at 492 (emphasis added). Similarly, in another case involving an incident that occurred before the operative date of the Civil Discovery Act of 1986, a section of the court's opinion is entitled "Notwithstanding civil discovery statutes, Evidence Code governs waiver of attorney/client privilege." *Blue Ridge Ins. Co. v. Superior Court*, 202 Cal. App. 3d 339, 345, 248 Cal. Rptr. 346 (1988).

Those comments were perhaps correct in the contexts in which they were made. The staff is dubious, however, that Section 912 would now be interpreted to be the exclusive means of waiving the privileges to which it applies.

It is true that "evidentiary privileges shall be available only as defined by statute." *Roberts v. City of Palmdale*, 5 Cal. 4th at 373; *see* Section 911 & Comment. "Courts may not add to the statutory privileges except as required by state or federal constitutional law, nor may courts imply unwritten exceptions to existing statutory privileges." *Roberts v. City of Palmdale*, 5 Cal. 4th at 373 (citations omitted); *see also Wells Fargo*, 22 Cal. 4th at 206-09.

But there is nothing to prevent the Legislature from adding a new *statutory* means of waiving a privilege. If that occurs, the preexisting waiver statute is no longer exclusive.

That appears to be the situation with regard to Section 912. After the Civil Discovery Act of 1986 became operative, Section 912 was no longer the only statute specifying means of waiving the privileges to which it applies; other means were specified in the Civil Discovery Act. *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 ….''). Those means are discussed below.

Oral Deposition in California

Code of Civil Procedure Section 2025 is a lengthy statute governing the taking of an oral deposition in California. Under subdivision (m)(1), the "protection of information from discovery on the ground that it is privileged … is waived unless a specific objection to its disclosure is timely made during the deposition." Unlike other provisions of the Civil Discovery Act, Section 2025 does not specify any circumstances under which a party can obtain relief from such a waiver.

Although Section 2025(m)(1) may initially seem more harsh than Evidence Code Section 912 or the Commission's proposed amendment of Section 912, we suspect that those provisions would rarely yield different results regarding waiver. As at trial, if a party at a deposition (through counsel, or directly if self-represented) fails to object to a question calling for privileged information, the party would be presumed to have intended the ordinary consequences of that action, including disclosure of the privileged information. That presumption would be difficult to overcome, because a person representing someone at a deposition normally pays close attention to what is happening and is unlikely to be able to successfully claim inadvertence.

It is possible, however, that such a person may permit disclosure of privileged information due to a mistaken belief that the disclosure is legally required (e.g., a new associate who does not know that there is 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 "Intent to Disclose Versus Intent to Waive the Privilege" *supra*. 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.

As previously discussed, the Commission's proposed amendment would have no bearing on that situation, because Section 912 already requires that a disclosure be uncoerced to constitute a waiver. Whether it is good policy to find a waiver under such circumstances is debatable and may vary depending on the nature of the mistake of law. *See generally City of Fresno v. Superior Court*, 205 Cal. App. 3d 1459, 1467, 253 Cal. Rptr. 296 (1988) ("Counsel's mistake of law on a relatively simple and undebatable matter was not a valid ground for relief" under the provision for relief from a waiver of objections to an inspection demand).

The privileges enumerated in Section 912 serve important policy interests and should not lightly be undercut by finding a waiver. But excusing a failure to object at a deposition would reduce incentives to handle depositions competently, and would be highly detrimental to the party who took the deposition, because that party may have pursued other lines of questioning had an objection been properly interposed in the first place. It may be possible, however, to provide appropriate incentives through use of other sanctions available under the Civil Discovery Act that are less drastic than invading the sanctity of a privileged relationship.

Because the proper policy is not clear-cut and it is not altogether clear how Section 912 and Code of Civil Procedure Section 2025(m)(1) would be interpreted in this context, **it seems best to leave to leave the provisions alone** rather than trying to make revisions clarifying whether waiver occurs if privileged information is disclosed at a deposition due to a mistaken belief that the disclosure is legally required.

Deposition By Written Questions

Another discovery statute with a waiver provision is Code of Civil Procedure Section 2028, which governs the taking of a deposition by written questions. Under subdivision (d)(2),

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

Like Code of Civil Procedure Section 2025, Section 2028 does not specify any circumstances under which a party can obtain relief from such a waiver.

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

Specifically, a failure to timely object to a question calling for disclosure of privileged information is more likely to stem from inadvertence in a deposition by written questions than in an oral deposition. Counsel may simply let the 15-day deadline accidentally slip by. That would waive the objection under the plain language of Code of Civil Procedure Section 2028(d)(2), but there would be no intent to disclose as expressly required for a waiver under the Commission's proposed amendment of Section 912 and implicitly required for a waiver under the current version of Section 912.

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

Given these policy considerations, we question whether the waiver provision of Code of Civil Procedure Section 2028(d)(2) is appropriate. The privileges covered by Section 912 are intended to foster socially valuable relationships. They should not be abrogated for a minor technical mistake. As the court said in *Blue Ridge*, 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). Other remedies exist to encourage proper compliance with the discovery requirements. *Korea Data Systems*, 51 Cal. App. 4th at 1517. A discovery sanction "cannot go further than is necessary to accomplish the purpose of discovery …." *Newland v. Superior Court*, 40 Cal. App. 4th 608, 613, 47 Cal. Rptr. 2d 24 (1995); *see also Motown*, 155 Cal. App. 3d at 490. This rule "is

some 35 years old in California, and is rooted in constitutional due process." *Newland*, 40 Cal. App. 4th at 613.

At a minimum, it seems advisable to add language to Section 2028(d)(2) allowing the court to grant relief from the waiver under specified circumstances, as is done in other discovery provisions. For example, the statute could authorize the court to relieve a party from a waiver based on failure to timely object to a written deposition question if the court finds that (1) the party subsequently served an objection in substantial compliance with Section 2028(d)(2), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect. *Cf*. Code Civ. Proc. §§ 2030(k), 2031(*l*), 2033(k).

If the Commission is interested, such an amendment (or more protective language) could be added to the Commission's proposal on *Waiver of Privilege By Disclosure*. Depositions by written questions are infrequent, so the point is not likely to arise often.

Written Interrogatories to a Party

Like the provision governing an oral deposition in California, the provision governing written interrogatories to a party (Code Civ. Proc. § 2030) is lengthy. Under subdivision (f), a party to whom interrogatories are propounded is required to "respond in writing under oath separately to each interrogatory by (1) an answer containing the information sought to be discovered, (2) an exercise of the party's option to produce writings, or (3) an objection to the particular interrogatory." If the party objects "based on a claim of privilege, the particular privilege invoked shall be stated." Code Civ. Proc. § 2030(f)(2).

Subdivisions (k) and (*l*) specify the procedure for and consequences of failing to comply with the requirements for responding to or promulgating written interrogatories. Notably, subdivision (k) states that if "a party to whom interrogatories have been directed fails to serve a timely response, that party waives any … objection to the interrogatories, including one based on privilege …."

Subdivision (*l*) states the procedure that applies when the party who propounded the interrogatory deems that "(1) an answer to a particular interrogatory is evasive or incomplete, (2) an exercise of the option to produce documents under paragraph (2) of subdivision (f) is unwarranted or the required specification of those documents is inadequate, or (3) an objection to an

interrogatory is without merit or too general." Subdivision (*l*) does not contain any language regarding waiver of objections. (For the full text of subdivisions (k) and (*l*), see Exhibit pp. 11-12.)

A natural reading of these provisions is that subdivision (k) applies only when "a party to whom interrogatories have been directed fails to serve a timely response," while subdivision (*l*) applies when a party timely responds to interrogatories but the propounding party is dissatisfied with the response. Under this interpretation, the waiver rule of subdivision (k) would only apply if a party failed to serve a timely response to a set of interrogatories; the rule would not apply if a party served a timely but inadequate response (e.g., a response that was not properly verified).

So interpreted, subdivision (k) would provide a broader basis for privilege waiver than under the Commission's proposed amendment of Section 912, but only in the limited circumstance where a party blows the deadline for responding to a set of interrogatories. An attorney's inadvertent failure to properly calendar the due date for responding to interrogatories could result in waiver of a privilege under subdivision (k), yet the careless attorney and the responding party would lack any intent to disclose privileged communications, which would be required for a waiver under the Commission's proposed amendment of Section 912.

Although it may seem harsh to consider a privilege waived merely due to a short delay in responding to interrogatories, subdivision (k) mitigates that result by allowing the court, on motion, to grant a party relief from such a waiver "on its determination that (1) the party has subsequently served a response that is in substantial compliance with subdivision (f), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect." That rule represents an attempt to balance the interest in fostering privileged relationships against the interest in providing appropriate incentives to comply with discovery obligations. Under it, the court has discretion to grant relief from the waiver, but is not required to do so.

An alternative approach, more protective of the socially valuable relationships that privileges are meant to foster, would be to *require*, rather than *permit*, the court to grant relief whenever it finds that the two conditions are met. If that were the rule, however, a party who has accidentally blown a deadline might manipulate the rule to its advantage, submitting its response as late as

possible, with assurance that the further delay will not result in a waiver of objections.

But the Commission could bolster the protection for privileged relationships by making relief from the waiver mandatory when the two conditions are met, unless justice otherwise requires. That could be accomplished by amending subdivision (k) along the following lines:

> (k) If a party to whom interrogatories have been directed fails to serve a timely response, that party waives any right to exercise the option to produce writings under subdivision (f), as well as any objection to the interrogatories, including one based on privilege or on the protection for work product under Section 2018. However, unless justice otherwise requires, the court, on motion, ~~may~~ shall relieve that party from this waiver on its determination that (1) the party has subsequently served a response that is in substantial compliance with subdivision (f), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.
>
> ….

The Commission should consider whether a revision like this is desirable, and, if so, whether it should apply to all objections, only objections based on a privilege, or some other subset of objections.

It is also important to recognize that a court might construe subdivision (k)'s waiver language to apply not just when a party completely fails to serve a timely response to interrogatories, but also when a party serves a timely but inadequate response. A court might consider such an interpretation necessary to prevent a party from submitting objections piecemeal.

For example, suppose a party responds to an interrogatory by claiming that it is unduly burdensome, the opponent moves to compel, and the court rules that the interrogatory is not unduly burdensome. May the party now respond to the interrogatory by claiming the marital communications privilege? Because subdivision (*l*) includes no language on waiver of objections, a court might rely on subdivisions (f) and (k) as a basis for finding a waiver in such a situation. That is essentially what occurred in *Scottsdale Ins. Co. v. Superior Court*, 59 Cal. App. 4th 263, 272-76, 69 Cal. Rptr. 2d 112 (1997), with regard to the comparable provision for production of documents. We were unable to find any case addressing the same point in the context of interrogatories, and it is unclear how far courts will go in extending the waiver language of subdivision (k).

If the court did find a waiver under subdivision (k) in that situation, that would be another example in which subdivision (k) provides a broader basis for waiver than the Commission's proposed amendment of Section 912. The party's failure to claim the marital communications privilege in the first instance might have been due to oversight, rather than reflecting any intent to disclose privileged communications, which would be expressly required for a waiver under the Commission's proposed amendment of Section 912 and is implicitly required in the current version of Section 912. Establishing that the omission was accidental would not be easy, however, because preparing a response to interrogatories requires conscious decisionmaking, not acting on autopilot, and failing to object when required to do so would be considered an indication of intent to permit disclosure under Section 912. **Nonetheless, the possibility that subdivision (k) might be interpreted to extend to this situation is another factor that the Commission should consider in assessing whether to revise the standard for relief from a subdivision (k) waiver as discussed above.**

Another alternative would be to limit the waiver provision of subdivision (k) to objections other than those based on a privilege. That was the approach taken in the draft of the Civil Discovery Act proposed in 1986 by the State Bar-Judicial Council Joint Commission on Discovery. As proposed in that draft, the first paragraph of subdivision (k) read:

> (k) **Failure to Serve Response.** If a party to whom interrogatories have been directed fails to serve a timely response thereto, that party thereby waives any right to exercise the option to produce records pursuant to subdivision (f), as well as any objection to the interrogatories, *except one based on privilege or on the protection for work product prepared in anticipation of litigation or for trial*. However, the court, on motion, may relieve that party from this waiver on its determination that: (1) the party has subsequently served a response to the interrogatories that is in substantial compliance with subdivision (f); and (2) the party's failure to serve a timely response thereto was the result of mistake, inadvertence or excusable neglect.

State Bar-Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986, at 64-65 (Jan. 1986) (emphasis added.) **The Commission should give serious thought to revising subdivision (k) to implement this approach.**

The key advantage of doing so would be to safeguard the policies underlying privileges by limiting waiver to situations in which there is a voluntary and

intentional disclosure of privileged information. That is the focus of the Commission's proposal on *Waiver of Privilege By Disclosure*, as currently drafted. It might not be necessary to apply subdivision (k) to an objection based on a privilege, because the Civil Discovery Act authorizes a broad array of other sanctions to induce compliance with discovery obligations. The fact that subdivision (k) was not adopted as originally drafted, however, suggests that there was resistance to this approach. **The staff could research this at State Archives if the Commission is interested.**

Other scenarios that might arise in responding to interrogatories include:

- **A party claims a specific privilege in response to an interrogatory, but the party's attorney accidentally fails to sign the response as required under Section 2030(g).** This is likely to be regarded as a technical shortfall, not of sufficient importance to waive the privilege. *See generally Blue Ridge*, 202 Cal. App. 3d at 345 (Under both Civil Discovery Act of 1986 and former provision on document production, "objections to a production request are effective even though the response is unverified."). The result under the Civil Discovery Act is thus likely to be the same as under the Commission's proposed amendment of Section 912.
- **A party objects to an entire set of interrogatories on the basis of privilege, but fails to specify which privilege is claimed as to a particular interrogatory.** This might also be regarded as a technical shortfall, not of sufficient importance to waive the privilege. *See generally Korea Data Systems*, 51 Cal. App. 4th at 1516-17 (untimely filing of privilege log does not waive attorney-client privilege). If so, the result under the Civil Discovery Act would again be the same as under the Commission's proposed amendment of Section 912.
- **A party discloses privileged information in answering an interrogatory, mistakenly believing that such disclosure is legally required.** As in the context of an oral deposition, this would be an instance in which the disclosure was intentional but perhaps would be considered "coerced" within the meaning of Section 912. The Commission's proposed amendment of Section 912 would have no impact in this context, because it does not affect the determination of whether a disclosure is "coerced." Further, if the court considers the disclosure "coerced" and thus there is no waiver under Section 912, the outcome may be the same under the Civil Discovery Act, either because the court finds that subdivision (k) does not apply, or because it grants relief from a waiver under subdivision (k).

- **An attorney intends for the client to claim the attorney-client privilege in response to Interrogatory #3, but the attorney's handwriting is sloppy and the secretary preparing the response misinterprets it to refer to Interrogatory #8.** This seems exactly the type of situation in which a court might find that the privilege was waived under the Civil Discovery Act by the failure to object to Interrogatory #3, but should grant relief from the waiver because the failure to object "was the result of mistake, inadvertence, or excusable neglect." Clearly, the attorney (and thus presumably also the client) lacked any intent to disclose privileged information, so there would not be a waiver under the Commission's proposed amendment of Section 912. The possibility that a court might interpret the waiver provision of subdivision (k) to apply to this situation, yet is not *required* to grant relief from the waiver, is disturbing. **The Commission should take this into account** in deciding whether to revise subdivision (k) to either (1) make relief from a waiver mandatory when the two statutory conditions for such relief are satisfied, unless justice otherwise requires, or (2) make the waiver provision of subdivision (k) inapplicable to an objection based on a privilege.

Inspection Demand

The statute governing a document request or other inspection demand (Code Civ. Proc. § 2031) is a lengthy provision much like the one governing interrogatories. Under subdivision (g), a party responding to an inspection demand is required to respond to each of the demands by "a statement that the party will comply with the particular demand for inspection and any related activities, a representation that the party lacks the ability to comply with the demand for inspection of a particular item or category of item, or an objection to the particular demand." If the party raises an objection, the response "shall (A) identify with particularity any document, tangible thing, or land falling within any category of item in the demand to which an objection is being made, and (B) set forth clearly the extent of, and the specific ground for, the objection." Code Civ. Proc. § 2031(g)(3). Further, "[i]f an objection is based on a claim of privilege, the particular privilege invoked shall be stated." *Id*.

Subdivisions (*l*), (m), and (n) specify the procedure for and consequences of failing to comply with the requirements for responding to or promulgating an inspection demand. Like the provision governing interrogatories, subdivision (*l*) states that 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 ….” Subdivision (*l*) permits a court to grant relief from such a waiver if it determines that “(1) the party has subsequently served a response that is in substantial compliance with subdivision (g), and (2) the party’s failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.”

Subdivisions (m) and (n) do not include any language on waiver of objections. Subdivision (m) applies when a party demanding an inspection deems that “(1) a statement of compliance with the demand is incomplete, (2) a representation of inability to comply is inadequate, incomplete, or evasive, or (3) an objection in the response is without merit or too general.” Subdivision (n) applies when a party submits a written response to an inspection demand but “thereafter fails to permit the inspection in accordance with that party's statement of compliance.” (For the full text of subdivisions (*l*), (m), and (n), see Exhibit pp. 12-13.)

Like the corresponding provision for interrogatories, in some circumstances subdivision (*l*) provides a broader basis for privilege waiver than under the Commission’s proposed amendment of Section 912. Most obviously, an attorney’s inadvertent failure to properly calendar the due date for responding to an inspection demand could result in waiver of a privilege under subdivision (*l*), yet the careless attorney and the responding party would lack any intent to disclose privileged communications, which would be required for a waiver under the Commission’s proposed amendment of Section 912.

In that situation, the responding party could seek relief from the waiver, but the court is not required to grant such relief under subdivision (*l*) and it may decline to do so. *See City of Fresno v. Superior Court*, 205 Cal. App. 3d at 1467 (attorney’s confusion regarding due date for response to inspection demand was not sufficient basis for relief from waiver of objections, nor was press of attorney’s practice). As with the corresponding provision for interrogatories, **the Commission should consider whether to revise subdivision (*l*) to either (1) make relief from a waiver mandatory when the two statutory conditions for such relief are satisfied, unless justice otherwise requires, or (2) make the waiver provision of subdivision (*l*) inapplicable to an objection based on a privilege.**

Other situations the Commission should take into account in deciding whether to revise subdivision (*l*) include:

- **A party timely responds to an inspection demand, but the attorney preparing the response neglects to include an objection based on a privilege listed in Section 912.** This situation recently arose in *Scottsdale*, 59 Cal. App. 4th at 267-68. The responding party argued that former Section 2031(k) (now Section 2031 (*l*)) "does not apply where a party files a timely response … but fails to list specific objections." *Id*. at 270. The court disagreed and held that the responding party had waived the attorney-client privilege, because the party could not show "that its failure to assert the critical objection of attorney-client privilege [was] anything other than inexcusable negligence." *Id*. This is thus an example of a situation in which the court found that a privilege listed in Section 912 was waived, even though the court made no determination that the holder of the privilege (or even the holder's attorney) intended to disclose privileged information. It is probable, however, that the result would have been the same under the Commission's proposed amendment of Section 912: Intent to disclose could be inferred from the failure to object and establishing that the failure to object was accidental would be hard because stating any and all applicable objections is a major objective in responding to an inspection demand. Still, if Section 912 governed it would be possible to avert a waiver by proving that the omission was accidental, whereas the Civil Discovery Act requires the court to find a waiver and makes relief from the waiver discretionary if specified conditions are satisfied. **The Commission should consider this distinction in deciding whether to revise subdivision (*l*) to make it easier to obtain relief from a waiver, or to make the waiver provision of subdivision (*l*) inapplicable to an objection based on a privilege.**
- **A party claims a specific privilege in response to an inspection demand, but the party's attorney accidentally fails to sign the response as required under Section 2031(h).** This situation arose in *Blue Ridge*, 202 Cal. App. 3d at 341, which was decided after adoption of the Civil Discovery Act of 1986 but before the operative date of that Act. The court determined that under both the Civil Discovery Act and the prior provision governing document production, "objections to a production request are effective even though the response is unverified." *Id*. at 345. According to the court, "[t]he statutes reflect recognition that objections are legal conclusions interposed by counsel, not factual assertions by a party, making their verification unnecessary." *Id*. The court also explained that "where there is a timely assertion of the attorney/client privilege, putting the other side on notice, a forced waiver for some technical shortfall is at odds with Evidence Code section 912 and is an excessive sanction not reasonably calculated to achieve the purpose of effecting compliance with

discover." *Id*. at 347 (footnote omitted). The result under the Civil Discovery Act is thus the same in this situation as it would be under the Commission's proposed amendment of Section 912.

- **A party objects to an entire inspection demand on the basis of privilege, but fails to timely specify which privilege is claimed as to each particular demand and fails to timely file a privilege log as required under Code of Civil Procedure Section 2031(g)(3).** This situation arose in *Korea Data Systems*, 51 Cal. App. 4th at 1515. The court of appeal determined that neither the Civil Discovery Act nor Section 912 "authorizes a finding of waiver based on a failure to file a privilege log in a timely manner." *Id*. at 1517. In reaching this conclusion, the court pointed out that "[a]lthough lacking the proper specificity," the party responding to the inspection demand did assert the attorney-client privilege in a timely manner. *Id*. The court also explained that "[o]ther remedies exist to deter the type of abusive discovery tactics engaged in" by that party. *Id*. In another recent case the court also stated that "a forced waiver of the attorney-client privilege is not an appropriate sanction for a tardy 'privilege log,' so long as the privilege is invoked in a timely manner." *Hernandez v. Superior Court*, 112 Cal. App. 4th 285, 4 Cal. Rptr. 3d 883 (2003). Thus, the result in this situation is again the same as it would be under the Commission's proposed amendment of Section 912.
- **A party produces a privileged document in response to an inspection demand, intending to make the disclosure but mistakenly believing that the disclosure is legally required.** This is what happened in *Wells Fargo*. As previously discussed, the Commission's proposed amendment of Section 912 would not affect the determination of whether a disclosure is "coerced." Further, if the court considers the disclosure "coerced" and thus there is no waiver under Section 912, the outcome may be the same under the Civil Discovery Act, either because the court finds that subdivision (*l*) does not apply, or because it grants relief from a waiver under subdivision (*l*).

Last but not least, the Commission should consider the situation in which inadvertent disclosure of a privileged communication perhaps most commonly occurs: Production of a privileged document that is mixed in with other documents in responding to an inspection demand. As discussed earlier (see "Inadvertent Disclosure Cases Cited in the Proposed Comment," *supra*), case law firmly establishes that inadvertent disclosure of a privileged document in discovery does not waive the privilege.

Although most of those cases were decided after adoption of the Civil Discovery Act of 1986, none of them discuss the waiver provision of Code of Civil Procedure Section 2031(*l*), perhaps because the plain language of that provision limits its application to a failure to "serve a timely response." In light of *Scottsdale*, which applied Section 2031(*l*) to a failure to state an objection in a response that was timely served, it is not out of the question that a litigant will argue that Section 2031(*l*) should also be applied to inadvertent production of a privileged document. It seems likely that a court would reject the argument, because the inadvertent production could be viewed as a failure to include the privileged document on a privilege log, and *Korea Data Systems* holds that the Civil Discovery Act does not "authoriz[e] a finding of waiver based on a failure to file a privilege log in a timely manner." 51 Cal. App. 4th at 1517. **But the mere possibility that an argument along these lines might be raised is another point that the Commission should consider in deciding whether to revise subdivision (*l*) to strengthen the protection for privileged communications as previously discussed.**

Request for Admission

The provision governing requests for admission is much like the one governing interrogatories. See Code Civ. Proc. § 2033(f), (k), (*l*). There does not seem to be any case law on waiver of privileges in this context. The considerations with regard to responding to requests for admission are much the same as with regard to responding to interrogatories. **The Commission's treatment of this provision should parallel its treatment of the provision governing interrogatories.**

Subpoena of Consumer Records

Another context that the Commission should consider is when consumer records are subpoenaed and the consumer is notified pursuant to Code of Civil Procedure Section 1985.3 that the records are being sought. In *Inabnit v. Berkson*, 199 Cal. App. 3d 1230, 1235-39, 245 Cal. Rptr. 525 (1988), the court of appeal concluded that a patient waived the psychotherapist-patient privilege by failing to object to disclosure of her records after being notified pursuant to Section 1985.3 that the records had been subpoenaed from her psychotherapist.

The result probably would be the same under the Commission's proposed amendment of Section 912. The notice to a consumer under Section 1985.3 is

specifically intended to draw the consumer's attention to the fact that records are being sought, to advise the consumer of how to object to disclosure of those records, and to alert the consumer that there may be a right of privacy in the records. Section 1985.3(e) provides:

> (e) Every copy of the subpoena duces tecum and affidavit, if any, served on a consumer or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) records about the consumer are being sought from the witness named on the subpoena; (2) if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court or serve a written objection as provided in subdivision (g) prior to the date specified for production on the subpoena; and (3) if the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting his or her rights of privacy. If a notice of taking of deposition is also served, that other notice may be set forth in a single document with the notice required by this subdivision.

A consumer who receives such a notice yet fails to take action to prevent disclosure of the records can fairly be presumed to have intended that such disclosure occur. Assuming that the consumer is the holder of the privilege in question, the Commission's proposed standard for waiving any privilege applicable to the records would be satisfied, because there would be sufficient evidence to find intent to permit disclosure of the records. **No revision of Code of Civil Procedure Section 1985.3 appears necessary to properly coordinate the provision with the Commission's proposed amendment of Section 912.**

Revision of the Comment to Section 912

Among the issues that the Commission raised was whether language on the effect of failing to claim a privilege should be added to the proposed Section 912 Comment. Having reviewed the Civil Discovery Act and case law on failure to claim a privilege, the staff believes that **some reference to this situation should be made in the proposed Comment.** We are not yet sure what should be said on this point, but we plan to address the matter in redrafting the proposal for the Commission.

TYPES OF PRIVILEGES COVERED

Another issue that the Commission wanted the staff to explore was whether it is necessary to differentiate between the lawyer-client privilege and any of the other privileges mentioned in Section 912 (e.g., the clergyman-penitent privileges) in drafting the standard for determining whether a privilege has been waived. Along similar lines, Prof. Slomanson queries whether Section 912 should be limited to the seven privileges listed in it. Exhibit p. 4. That question was previously raised by Prof. Leonard and former discovery commissioner Richard Best. Memorandum 2002-5, pp. 13-14 & Exhibit pp. 1, 11-12.

The Commission carefully explored what privileges to include in Section 912 when it originally drafted the provision in the early 1960's. *See Tentative Recommendation on Privileges*, *supra*, 6 Cal. L. Revision Comm'n Reports at 260; *Privileges Study*, *supra*, 6 Cal. L. Revision Comm'n Reports at 514-15; Memorandum 63-11, p. 2 & Exhibit I, pp. 3-4; First Supplement to Memorandum 63-11, p. 1 & Exhibit II, pp. 1-3. The decision to exclude privileges such as the privilege against self-incrimination, the trade secret privilege, the spousal testimony privilege, the secret vote privilege, the official information privilege, and the privilege for the identity of an informer was quite deliberate.

For example, the privilege against self-incrimination was excluded because waiver of this privilege "is determined by the cases interpreting the pertinent provisions of the California and United States Constitutions." Section 940 Comment; *see also Tentative Recommendation on Privileges*, *supra*, 6 Cal. L. Revision Comm'n Reports at 260; *Privileges Study*, *supra*, 6 Cal. L. Revision Comm'n Reports at 514-15; First Supplement to Memorandum 63-11 at Exhibit II, p. 1. The trade secret privilege was excluded because "a matter will cease to be a trade secret if the secrecy of the information is not guarded." *Tentative Recommendation on Privileges*, *supra*, 6 Cal. L. Revision Comm'n Reports at 260. The spousal testimony privilege, secret vote privilege, official information privilege, and privilege for the identity of an informer were excluded because those privileges "contain their own waiver provisions." *Tentative Recommendation on Privileges*, *supra*, 6 Cal. L. Revision Comm'n Reports 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 Memorandum 63-11 at Exhibit II, p. 2-3.

In applying the various privileges and other provisions protecting confidential information, courts have recognized that Section 912 was only meant to pertain to the privileges enumerated in it. Thus, for example, in *City of Fresno v. Superior Court*, 205 Cal. App. 3d at 1473, 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. In *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351, 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. 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." Even in *Brown v. Superior Court*, 180 Cal. App. 3d 701, 711, 226 Cal. Rptr. 10 (1986), the court looked to Section 912 for guidance in the particular context before it, but acknowledged that waiver of the privilege against self-incrimination is subject to constitutional constraints and Section 912 does not list that privilege.

The staff is reluctant to disrupt this scheme, which seems to have functioned well for many years. It is true that the privileges listed in Section 912 serve different purposes, and the contours of those privileges were drafted with sensitivity towards those purposes, differing in scope as needed to serve the goals of each privilege. *See, e.g.*, *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (explaining policy reasons why clergy member is holder of penitential privilege but psychotherapist is not holder of psychotherapist-patient privilege). It is also true that at one point the California Supreme Court appeared to be developing different waiver rules for different privileges listed in Section 912, based on differing policy considerations. *See Clark*, 50 Cal. 3d at 620-21 (seemingly differentiating between waiver of psychotherapist-patient privilege and waiver of attorney-client privilege). But the Court later clarified that it was not establishing a lower threshold for waiver of the psychotherapist-patient privilege than for other privileges listed in Section 912. *See Menendez*, 3 Cal. 4th at 446-49; *San Diego Trolley*, 87 Cal. App. 4th at 1090-91. (For further discussion of *Clark* and *Menendez*, see Exhibit pp. 6, 9-10.) We are therefore inclined to **stick with the current scope of Section 912, treating the seven listed privileges similarly and not expanding the list to include other privileges.**

We suggest, however, **adding language to the proposed Comment to make clear that the proposed amendment is not intended to imply anything regarding waiver of privileges other than the ones listed in Section 912.** In addition, at some point it might be appropriate for the Commission to study the rules governing waiver of other privileges, such as the spousal testimony privilege, secret vote privilege, official information privilege, privilege for the identity of an informer, trade secret privilege, work product privilege, tax return privilege, and perhaps others. At present, however, the Commission's resources are stretched too thin to broaden the scope of this project to encompass additional privileges.

RIGHT TO TRUTH-IN-EVIDENCE

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

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

Cal. Const. art. I, § 28(d) (emphasis added). Under the Truth-in-Evidence provision, with certain limitations (including the limitations of the federal Constitution) it is unconstitutional to exclude relevant evidence in a criminal case. It is important to consider whether the Truth-in-Evidence provision would have any impact on (1) the Commission's proposed amendment of Section 912, or (2) the possible civil discovery reforms discussed in this memorandum.

Proposed Amendment of Section 912

By its terms, the Truth-in-Evidence provision has no impact on "any existing statutory rule of evidence relating to privilege." Section 912 is a rule of evidence relating to privilege, and it was enacted long before the voters approved the Truth-in-Evidence provision. Consequently, the constitutional exemption for "any existing statutory rule of evidence relating to privilege" is likely to be a

sufficient basis for finding the Commission's proposal consistent with the right to Truth-in-Evidence. *See generally* Memorandum 2003-26, pp. 35-36.

Suppose, however, a court finds that the Truth-in-Evidence provision applies to the proposed amendment of Section 912, because the constitutional exemption refers to any "*existing* statutory rule of evidence relating to privilege," and that does not encompass a rule proposed after enactment of the Truth-in-Evidence provision. (Emphasis added.) Even if a court interprets the Truth-in-Evidence provision in that manner, there should not be a problem.

The Truth-in-Evidence provision will have an impact on a proposed reform only if the reform (1) narrows the admissibility of evidence, (2) was enacted by less than a two-thirds vote in the Assembly or Senate or both, and (3) is applied in a criminal case. As discussed at length above, the Commission's proposed amendment of Section 912 would simply codify existing law, rather than narrowing the admissibility of evidence. It thus appears unlikely that the reform would trigger application of the Truth-in-Evidence provision. Nonetheless, **we will continue to look into this matter unless the Commission otherwise directs.**

Civil Discovery Reforms

A further issue is whether any of the reforms of the civil discovery provisions discussed in this memorandum would raise Truth-in-Evidence issues. Because those reforms would relate to civil discovery, not criminal discovery, it might at first seem clear that the Truth-in-Evidence provision would not apply.

The effect of the reforms, however, would be to make it more difficult to find that a party waived a privilege through action or inaction in civil discovery. That, in turn, could narrow the admissibility of evidence in a related criminal case, by affecting whether the evidence is considered privileged.

With regard to privileges predating the Truth-in-Evidence provision, however, that effect may not trigger constitutional concerns, because nothing in the Truth-in-Evidence provision "shall affect any existing statutory rule of evidence relating to privilege …." In addition, the Truth-in-Evidence provision would be inapplicable to any reform enacted by a two-thirds vote in each house.

The likelihood of a constitutional problem thus seems relatively small. We have only scratched the surface in studying the Truth-in-Evidence provision, however, and **we will continue to look into this matter unless the Commission otherwise directs.**

NEED FOR THE REFORM

The Commission's proposal on *Waiver of Privilege By Disclosure* is intended to provide clear and readily accessible guidance to courts, litigants, and other persons dealing with an inadvertent disclosure of a confidential communication protected by one of the privileges specified in Section 912. Instead of having to research case law to discover that only an intentional disclosure waives the privilege under Section 912, such persons would find that standard stated in the statute itself and the key cases would be cited in the Commission's Comment.

It would not be necessary to engage in exhaustive research and analysis such as the staff has undertaken in preparing this memorandum. The danger of misinterpretation due to misleading commentary and potentially confusing case law (e.g., the authorities referred to in "Case Law that Might Be Considered Inconsistent With the Commission's Proposal" and "Misleading Commentary and Other Potentially Confusing Authority" *supra*) would also be reduced.

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

- A person accidentally directs a fax, email message, or voicemail to the wrong recipient.
- A person forwards an email message, not realizing that a confidential communication is attached.
- A person unintentionally stores an email message containing a confidential communication in a manner in which a third party can obtain access.

See 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). The frequency of such situations highlights the need for the guidance that the Commission's proposal would provide.

REFINEMENT OF THE PROPOSAL

The Commission's proposal on *Waiver of Privilege By Disclosure* was originally drafted as part of a larger legislative package, not as a stand-alone reform. The

Commission was right that it needed to be fleshed out more thoroughly before being presented to the Legislature.

Given the broad support expressed for the proposal, the staff continues to believe that it is worth pursuing. We have some hesitation, however, because the topic is complex and therefore time-consuming. It may also prove divisive in the Legislature despite the broad support expressed thus far.

If the Commission decides to proceed with the proposal, we will prepare a new draft for the Commission to review, incorporating the ideas discussed in this memorandum and any revisions approved by the Commission. As usual, we will raise drafting and policy issues as appears appropriate.

Among the issues that the Commission asked the staff to pursue was whether the last sentence of Section 912(a) should be revised in a different manner than in the discussion draft, which would revise that sentence as follows: "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating ~~consent to~~ 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." After the extensive research described in this memorandum, **the staff is inclined to stick with that proposed language, because it seems to hold up well under scrutiny.** We will give this matter further thought as we prepare the next draft.

Respectfully submitted,

Barbara Gaal
Staff Counsel

TO: Terry Miller, Principal Legislative Consultant

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DATE: April 12, 2002

RE: SB 2061, as introduced
Introduced by Senator Morrow

SECTION POSITION: The Family Law Executive Committee of the State Bar supports SB 2061.

Position recommended: Support.
Date position recommended: March 16, 2002
Executive Committee vote: Ayes: 11 Noes: 0 N.V.: 0

ANALYSIS:

(1) Summary of existing law

Existing law, Evidence Code Section 912, specifies that the right of a person to claim an evidentiary privilege is waived if the holder of the privilege discloses a significant part of the privileged communication or has consented to that disclosure.

Existing law, Evidence Code Section 952, provides that a communication between a client and attorney does not lack confidentiality solely because the communication is transmitted by fax, cel phone or other electronic means.

(2) Changes to existing law proposed by this bill

This bill would add a finding of intent to waive to Evidence Code Section 912 as a necessary pre-requisite to a waiver of certain enumerated privileged communications and would add to the list of such privileged relationships that of domestic violence victim-counselor.

This bill would amend Evidence Code Sections 952 and 917 so as to extend the privilege by electronic communications set forth in Section 952 and currently applicable only to communications between lawyer and client to all persons in a privileged relationship as set forth in Section 912.

(3) Analysis

Section 1 of the bill would make it more difficult to find a waiver of a privileged communication between a lawyer and client, physician and patient, psychotherapist and patient, penitent and clergyman, sexual assault victim and counselor and domestic violence victim and counselor. Under the proposed amendment to Section 912 of the Evidence Code, a waiver would only occur with respect to a protected communication in such relationships if the holder of the privilege intentionally discloses a significant part of the communication. This new prerequisite finding of intent to consent to the waiver of the privilege would be manifested, according to the proposed version of the statute, by a statement or conduct of the holder indicating such an intent to permit the disclosure.

This new language of intent by behavior or statement of the holder would do away with the waiver by any inadvertent disclosure, whether by the holder or by the non-holder. These further protections of the various privileges would remedy certain existing case law where waiver of the privilege has been found under circumstances of unintentional negligent handling of privileged information by the non-holder or joint holder of the privilege, leading to further invasion of other confidential communications between the joint holders, and thereby destroying the trust in the relationship itself. As a matter of public policy, such relationships should be protected and enhanced. This proposed legislation would strengthen such relationships without any prejudicial effect on the discoverer of the inadvertently disclosed communication.

Section 2 and 3 of the bill would give further protections to communications which are made electronically or stored electronically by extending the protections of Evidence Code Section 952, formerly available only to lawyer-client communications, making these protections also available in other privileged relationships. For the same policy reasons as enunciated above, with respect to the protection and strengthening of privileged relationships, this proposal ought to apply to all of the listed privileged relationships, and not solely to the attorney-client relationship. Electronic communications are part of everyday life for all.

(4) Proposed amendments

None.

(5) Germaneness

The subject matter of the bill would directly affect the family law practice in the State of California by amending three sections of the Evidence Code relating to privileged communications. As a matter of evidence affecting family law attorneys, their clients and the clients' counselors, the subject matter requires the special knowledge, training, experience and technical expertise of the Family Law Section.

Sincerely,

Suzanne Harris
Family Law Executive Committee

cc: Tracey Jensen, Section Chair
Diane Waznicky, Section Legislative Chair
Lulu Wong, Assistant Legislative Chair
Susan Orloff, Section Coordinator
Scott Wylie, LegCor Committee Liaison
Larry Doyle, Chief Legislative Counsel
Rick Zanassi, Office of General Counsel

EMAIL FROM PROF. SLOMANSON

To: Nat Sterling and Barbara Gaal
From: <slomansonb@att.net>
Date: July 30, 2002

My one concern re the proposed 912 waiver only by intentional disclosure matter is as follows: at page 2, under proposed 912(a) and (b), I did not understand the need to list all of the affected privileges. If one that is not on the list materializes in either future legislation or a case, then some court is going to interpret the list as a closed list. Put another way, is there some privilege where unintentional disclosure is nevertheless a waiver? If not, then I have reservations about the two lists (I understand why two, but my Q is why list them at all?).

CASE LAW APPENDIX

DECISIONS INTERPRETING SECTION 912 CONSISTENTLY WITH THE SUBJECTIVE INTENT APPROACH TO WAIVER BY DISCLOSURE

The following decisions help to buttress the Commission's proposed approach to waiver by inadvertent disclosure of a privileged communication, without squarely ruling on the issue:

(1) ***Cooke v. Superior Court*, 83 Cal. App. 3d 582, 147 Cal. Rptr. 915 (1978).** In this marital dissolution proceeding, 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; it also made various other rulings.

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 Commission's proposed amendment of Section 912, although it does not address the waiver issue as directly as the cases cited in the proposed Comment.

(2) ***Houghtaling v. Superior Court*, 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.

(2) ***Menendez v. Superior Court*, 3 Cal. 4th 435, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992).** In this case, the California Supreme Court considered whether the psychotherapist-patient privilege was waived as to tapes that had been seized by the police. The Court ruled that one of the tapes fell within the dangerous patient exception to the psychotherapist-patient privilege (Section 1024), but the other tapes were privileged when made and remained privileged, because there had been no "intentional waiver" or waiver by operation of law. *Id*. at 455, 456. The Court's reference to an "intentional waiver" is suggestive of a subjective intent standard, but the Court did not have to confront the issue of waiver by inadvertent disclosure.

(3) ***Roberts v. Superior Court*, 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973).** In this case, the California Supreme Court considered whether a form consent was effective to waive a patient's psychotherapist-patient privilege. The Court said there was no waiver under the circumstances of the case, because the "waiver of an important right must be a voluntary and *knowing* act done with sufficient awareness of the relevant circumstances and likely consequences." *Id*. at 343 (emphasis added).

The Court did not have to resolve the impact of an inadvertent disclosure, but its reference to a "*knowing* act" suggests that a disclosure must be intentional to constitute a waiver. 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."

(4) ***Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000).** In this case, the California Supreme Court stated that "'a waiver is the *intentional* relinquishment of a known right.'" 22 Cal. 4th at 211, *quoting BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1252, 245 Cal. Rptr. 682 (1988) (emphasis added). The Supreme Court held that the attorney-client privilege was not waived by disclosure of attorney-client communications in discovery, because the disclosure was based on a mistaken but honest and reasonable belief that it was legally required. *Wells Fargo*, 22 Cal. 4th at 211-12.

The case thus exemplifies the already-codified principle that a coerced disclosure does not constitute a waiver. 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). The Supreme Court's reference to an "*intentional* relinquishment" suggests that a disclosure must be intentional as well as uncoerced to waive the privilege, but the Court did not have to reach that issue.

These cases **are probably all worth incorporating into the preliminary part (narrative portion) of the Commission's proposal,** but not into the proposed Comment.

DEPUBLISHED DECISIONS

The following cases discussing inadvertent disclosure of a privileged communication were depublished:

(1) *Kanter v. Superior Court*, 253 Cal. Rptr. 810 (1988).
(2) *Magill v. Superior Court*, 103 Cal. Rptr. 355, 385 (2001).

To preclude confusion regarding the import of these cases, **it might be helpful to mention them in a footnote, pointing out that they were depublished.**

DECISIONS BY FEDERAL COURTS IN CALIFORNIA, NOT BASED ON CALIFORNIA LAW

The following Ninth Circuit cases on inadvertent disclosure were tried in federal district court in California but were not decided under California law:

(1) *Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d 646 (9th Cir. 1978).
(2) *United States v. De La Jara*, 973 F.2d 746 (9th Cir. 1992).
(3) *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part & vacated in part*, 491 U.S. 554 (1989).
(4) *Weil v. Investment/Indicators, Research & Management Inc.*, 647 F. 2d 18 (9th Cir. 1981).

Similarly, the following decisions on inadvertent disclosure were tried in the United States District Court for the Northern District of California, but were decided under federal common law, not under California law:

(1) *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179 (N. Dist. Cal. 1990).
(2) *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N. Dist. Cal. 1985).

It might be helpful to clarify in a footnote that none of these cases was decided under California law.

CALIFORNIA CASES THAT INVOLVE DISCLOSURE OF PRIVILEGED DOCUMENTS BUT DO NOT INTERPRET SECTION 912

The following cases involve disclosure of privileged documents but do not interpret Section 912:

(1) ***Aerojet-General Corp. v. Transport Indemnity Ins.*, 18 Cal. App. 4th 996, 22 Cal. Rptr. 2d 862 (1993).** In this case an attorney was given attorney-client privileged documents by an employee of the opponent without having requested the documents. The trial court sanctioned the attorney for failing to promptly notify opposing counsel of the event.

The court of appeal reversed, stating that the sanction award could not stand in "the absence of any clear statutory, regulatory or decisional authority imposing a duty of immediate disclosure of the inadvertent receipt of privileged information …." *Id*. at 1006. In reaching that conclusion, the court stated that the "attorney-client privilege is a shield against deliberate intrusion; it is not an insurer against inadvertent disclosure." *Id*. at 1004. The court explained that the attorney-client privilege only protects against disclosure of actual attorney-client communications; it does not protect against disclosure of the underlying facts on which the communications are based. *Id*. at 1004-05; *see also 2,022 Ranch, L.L.C. v. Superior Court*, __ Cal. App. 4th __, 2003 DJDAR 13213, 13215 (Dec. 5, 2003); *Maas v. Municipal Court*, 175 Cal. App. 3d at 606. Thus, the attorney who received the privileged documents could not be faulted for deposing a witness whose identity was disclosed in the documents. The identity of the witness was an underlying fact, not a privileged communication.

In reversing the sanction award against the attorney, the court of appeal made no determination regarding whether the actual attorney-client communication remained privileged. As the court explained, "[t]his case does not involve an attempt to introduce privileged communications into evidence, nor to obtain such information through formal discovery." *Aerojet*, 18 Cal. App. 4th at 1002.

(2) ***McGinty v. Superior Court*, 26 Cal. App. 4th 204, 31 Cal. Rptr. 2d 292 (1994).** In *McGinty*, an expert witness gave plaintiff's counsel certain documents containing trade secrets in violation of a protective order that a court entered in another case. The trial

court sanctioned the plaintiffs by precluding them from using the documents and the expert witness.

The court of appeal reversed, pointing out that although the documents contained trade secrets they would have been properly discoverable in the action, possibly subject to a protective order similar to the one that had been entered in the other case. *Id*. at 208, 210, 212, 215. The court considered it inappropriate to sanction the plaintiffs for having innocently received the documents from their expert witness instead of through discovery. The court did not interpret Section 912, which does not apply to trade secrets, nor did it determine that the trade secret protection had been waived.

Because neither *Aerojet* nor *McGinty* interpret Section 912, they are not inconsistent with the line of authority cited in the proposed Comment to that section. **This should be explained in a footnote in the Commission's proposal.**

PEOPLE V. CLARK

The following case is potentially confusing but, if it is interpreted as the California Supreme Court said it should be, it is not inconsistent with the Commission's proposed amendment of Section 912:

- ***People v. Clark*, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990).** In this case, a psychotherapist was appointed to examine a defendant at the request of his attorney. In sessions with the psychotherapist, the defendant threatened to harm certain people. When the psychotherapist cautioned that she might have to reveal his threats, the defendant expressed satisfaction that this would cause his intended victims to worry. The psychotherapist later arranged for the attorney to notify the intended victims of the defendant's threats.

  At trial, the prosecution sought to introduce the defendant's threats, but the defendant asserted the psychotherapist-patient and attorney-client privileges. The trial court overruled both objections and admitted the evidence.

  On appeal, 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 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 Commission's proposed amendment of Section 912, 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.

Specifically, the Court in *Clark* determined that the defendant's threats were not a waiver of the attorney-client privilege, because the defendant made them before the psychotherapist warned him that she might have to reveal them. 50 Cal. 3d at 621. Further, the defendant's response to the psychotherapist's warning did not waive the privilege, because "there was *no clear intent* to waive the privilege in that statement …." *Id*. (emphasis added). Like the California Supreme Court cases discussed above in "Decisions Interpreting Section 912 Consistently With the Subjective Intent Approach to Waiver By Disclosure" (*Wells Fargo Bank*, *Roberts*, and *Menendez*), this portion of *Clark* bolsters the Commission's proposed approach, but does not squarely address the issue of waiver by inadvertent disclosure.

Because *Clark* contains potentially confusing language regarding the psychotherapist-patient privilege and does not squarely address the issue of inadvertent disclosure, it would be inappropriate to rely on the case in the proposed Comment to Section 912. **It might be helpful, however, to explain *Clark* in a footnote in the Commission's proposal.**

EXCERPTS FROM THE CIVIL DISCOVERY ACT

CODE OF CIVIL PROCEDURE SECTION 2030(k), (*l*)

2030.…

(k) If a party to whom interrogatories have been directed fails to serve a timely response, that party waives any right to exercise the option to produce writings under subdivision (f), as well as any objection to the interrogatories, including one based on privilege or on the protection for work product under Section 2018. However, the court, on motion, may relieve that party from this waiver on its determination that (1) the party has subsequently served a response that is in substantial compliance with subdivision (f), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

The party propounding the interrogatories may move for an order compelling response to the interrogatories. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey an order compelling answers, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

(*l*) If the propounding party, on receipt of a response to interrogatories, deems that (1) an answer to a particular interrogatory is evasive or incomplete, (2) an exercise of the option to produce documents under paragraph (2) of subdivision (f) is unwarranted or the required specification of those documents is inadequate, or (3) an objection to an interrogatory is without merit or too general, that party may move for an order compelling a further response. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

Unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the propounding party and the responding party have agreed in writing, the propounding party waives any right to compel a further response to the interrogatories.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

If a party then fails to obey an order compelling further response to interrogatories, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

CODE OF CIVIL PROCEDURE SECTION 2031(*l*), (m), (n)

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 or on the protection for work product under Section 2018. However, the court, on motion, may relieve that party from this waiver on its determination that (1) the party has subsequently served a response that is in substantial compliance with subdivision (g), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

The party making the demand may move for an order compelling response to the inspection demand. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey the order compelling a response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

(m) If the party demanding an inspection, on receipt of a response to an inspection demand, deems that (1) a statement of compliance with the demand is incomplete, (2) a representation of inability to comply is inadequate, incomplete, or evasive, or (3) an objection in the response is without merit or too general, that party may move for an order compelling further response to the demand. This motion (A) shall set forth specific facts showing good cause

justifying the discovery sought by the inspection demand, and (B) shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by it.

Unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waives any right to compel a further response to the inspection demand. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

If a party fails to obey an order compelling further response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

(n) If a party filing a response to a demand for inspection under subdivision (g) thereafter fails to permit the inspection in accordance with that party's statement of compliance, the party demanding the inspection may move for an order compelling compliance.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

If a party then fails to obey an order compelling inspection, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.