

First Supplement to Memorandum 2013-52

Technical and Minor Substantive Statutory Corrections (Other Issues)

As noted in Memorandum 2013-52,¹ there were a few pending bills that amended the sections at issue in the draft recommendation. This supplement discusses the one bill that was signed into law by the Governor.

Except as otherwise indicated, all statutory references in this memorandum refer to the Evidence Code.

AB 267 (Chau) amends a section (Evidence Code Section 912) at issue in the draft recommendation.² AB 267 creates a new privilege, the lawyer referral service-client privilege, and makes related changes to the law. AB 267's amendments to Section 912 are shown in ~~strikeout~~ and underscore below.

(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of ~~clergyman~~, clergy member), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has 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 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), 966 (lawyer referral service-client privilege), 994 (physician-patient privilege),

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2013 Cal. Stat. ch. 123.

1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim 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), 966 (lawyer referral service-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, lawyer referral service, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.³

As indicated above, AB 267 amends Section 912 to add the new lawyer referral service-client privilege to the list of privileges it governs. The Commission's proposed addition of the human trafficking caseworker-victim privilege to Section 912⁴ is still needed to clarify that Section 912 governs that privilege. AB 267 does not undermine the analysis supporting the Commission's proposed change or otherwise conflict with the spirit of this proposed change. **However, the draft recommendation needs to be revised so that the proposed amendments use the newly enacted language as the starting point.**

In addition, AB 267 amends Section 912's reference to the "privilege of the clergyman" to instead refer to "privilege of the clergy member."⁵ The Commission had also identified the need to make this reference gender-neutral and proposed a similar modification (changing the reference to "privilege of the clergy").⁶ With the enactment of AB 267, that change is moot. As such, the **staff recommends that the proposed change to the reference and the related discussion be removed from the draft recommendation.**⁷

3. *Id.* § 1.

4. Draft Recommendation attached to Memorandum 2013-52, at 1, 9.

5. *Id.* § 1.

6. Tentative Recommendation on *Technical and Minor Substantive Statutory Corrections* (April 2013), pp. 1, 9.

7. See Draft Recommendation attached to Memorandum 2013-52, at 1, 9.

COMMISSION DECISION ON DRAFT RECOMMENDATION

The staff recommends that the Commission **approve the draft, incorporating the revisions discussed herein, as a final recommendation for submission to the Legislature and printing in the Commission's official reports.**

Respectfully submitted,

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