Study K-301 July 3, 2002

Memorandum 2002-31

Waiver of Privilege By Disclosure (Comments on Discussion Draft)

In February, the Commission considered the comments on its tentative recommendation on *Electronic Communications and Evidentiary Privileges* (June 2001). The Commission finalized a recommendation on two of the reforms in that proposal, which has since been enacted. 2002 Cal. Stat. ch. 72 (SB 2061 (Morrow)); *Electronic Communications and Evidentiary Privileges*, 31 Cal. L. Revision Comm'n Reports 245 (2001). The Commission decided to seek further input regarding a third reform, which would revise Evidence Code Section 912 (hereafter "Section 912") to make clear that inadvertent disclosure of a privileged communication does not constitute waiver of the privilege. Minutes (Feb. 2002), p. 8. Accordingly, the staff prepared a discussion draft consisting of the portions of the tentative recommendation relating to that reform (copy attached). We also assigned a new study number (K-301) to that proposal, which was previously part of Study K-500.

The staff solicited comments on the discussion draft from the Office of the Attorney General, the Office of the Los Angeles County District Attorney, the California Judges Association, the California District Attorneys Association, the State Bar Criminal Law Section, the California Attorneys for Criminal Justice, and the California Public Defenders Association. In response, the Commission received the following new comments:

This memorandum discusses these comments, as well as the comments previously submitted on the proposed reform. The Commission needs to consider these comments and determine whether to approve the attached draft as a final recommendation, as is or with revisions.

RECAP OF PROPOSAL

The discussion draft proposes to amend Evidence Code Section 912 to make clear that disclosure of a privileged communication waives the privilege only where the holder of the privilege intentionally makes the disclosure or intentionally permits another person to make the disclosure. The draft was prepared before the enactment of Senate Bill 2061 (Morrow), which implements the Commission's recommendation to make other revisions in Section 912. The new legislation will become operative on January 1, 2003. Updated to reflect the new 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.

OVERALL REACTION TO THE PROPOSED REFORM

Reaction to the proposed reform was generally favorable, although one attorney objected to it and the State Bar Committee on Administration of Justice ("CAJ") decided to refrain from taking a position. Both of the newly received comments support the proposal. The comments are described more specifically below.

Opposition

Attorney John Anton (Boxer & Gerson, Oakland) objects to the proposed revisions, because he believes that "determination of the subjective intent of the holder of the privilege is an unworkable standard." Memorandum 2002-5, Exhibit p. 2. He explains that "Section 437c(e) of the Code of Civil Procedure, relating to motions for summary judgment, amounts to legislative recognition that 'where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof' a trial of fact is indicated." *Id.*

Neutral

CAJ takes no position on the revisions requiring intentional disclosure, but cautions that perhaps carelessness should be a waiver in some situations:

> It is plain that, if the holder of the privilege *intentionally* makes the disclosure or permits another person to make the disclosure, he forfeits the privilege. But it is not so plain that he does not do so if

> he is *merely inadvertent*. His inadvertence might amount to the most minor and understandable of lapses in constant efforts to guard the confidentiality of the privileged communication. But it might also reveal a carelessness inimical to the privileged communication's continuing confidentiality.

Memorandum 2002-5, Exhibit p. 20 (emphasis in original). CAJ further warns that providing that disclosure of a privileged communication "waives the privilege only where *the holder of the privilege* intentionally makes the disclosure or permits another person to make the disclosure may invite manipulation of the privilege, as where a lawyer might disclose a privileged communication for tactical purposes and then claim the privilege on the client's behalf with the assertion that the client did not intentionally permit the lawyer to make the disclosure." *Id.* (emphasis in original).

Support

Commissioner Richard Best (San Francisco Superior Court) squarely supports the proposed revisions and explains why they would be helpful:

> 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.

Similarly, the Office of the Public Defender of Los Angeles County "wholly supports the proposed amendment to Evidence Code section 912." Exhibit p. 1. "[T]his is an important concept to include in Evidence Code section 912." *Id.* Public Defender Michael Judge explains:

> 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.

The Office of the Attorney General also supports 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.

Exhibit p. 2.

In addition, three law school professors — Professor David Leonard (Loyola Law School), Professor Edward Imwinkelried (University of California, Davis), and Professor William Slomanson (Thomas Jefferson School of Law) — expressed support for the basic concept of the reform, as did the Chairperson of the Beverly Hills Bar Association Criminal Law Section. Memorandum 2002-5, Exhibit pp. 10-11, 15-17. As some of the Commissioners may recall, Judge Joseph Harvey prepared the background study for the Commission's work on Evidence Code changes required by electronic communications. After reviewing Mr. Anton's criticism of the proposal and CAJ's cautionary statements, Judge Harvey concluded that there was no need to change the proposal. Memorandum 2002-5, Exhibit pp. 7-9; Email from J. Harvey to B. Gaal (12/27/01). The staff is not aware of any other support for the proposal, but the Consumer Attorneys of California commented favorably on the tentative recommendation and their comments might have been intended to apply to this reform, as well as the other reforms in the tentative recommendation. Memorandum 2002-5, Exhibit p. 21.

Staff Analysis

In light of these comments, **the staff recommends proceeding with the proposed reform.** From the comments of Commissioner Best and the Los Angeles Public Defender, it is clear that the reform would provide useful guidance to courts, litigants, and persons in privileged relationships. As discussed at pages 1-2 of the discussion draft, the proposed "intent to disclose" standard is consistent with case law interpreting Section 912 and with the original intent of the Evidence Code, as evidenced by statutory text and Comments and explained by Judge Harvey at the May 2001 meeting. Some commentators have voiced other ideas about the applicable standard, and some states use different approaches. See Memorandum 2001-29, pp. 4-17. But California case law on this point is clear and consistent, and the approach appears to enjoy broad support.

The approach also provides strong protection for the important policy interests underlying the confidential communication privileges. A less stringent standard, such as finding waiver where a privileged communication is negligently or recklessly disclosed, would provide less protection for these interests. Manipulation of the proposed standard for tactical purposes should occur infrequently, because lawyers are ethically obligated to act with integrity and can be sanctioned for failure to do so. See, e.g., Bus. & Prof. Code § 6068. As for whether the standard is workable, judges already make preliminary fact determinations regarding application of privileges, as well as many other matters. Evid. Code § 405 & Comment. Under the provision to which Mr. Anton refers, a trial of fact is not mandatory but discretionary "where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." Code Civ. Proc. § 437c(e). We see no problem that would preclude use of an "intent to disclose" standard, particularly because that standard is already in use in the California courts. Section 912 should be revised to make that standard explicit.

FINE-TUNING OF THE PROPOSAL

A number of comments raise issues that could be addressed by refining the current draft of the proposal. If the Commission decides to proceed with the proposal, it should consider whether to make revisions to address these points, or proceed with the proposal as is.

Intent to Waive Privilege

CAJ points out that "it is *not* the case that a privilege may be lost only by waiver properly so called, that is by a knowing, intelligent, and voluntary surrender." Memorandum 2002-5, Exhibit p. 20 (emphasis in original). "Rather, a privilege may also be lost by forfeiture — which is what Section 912 deals with under the rubric of 'waiver'." *Id.*

At page 3, the preliminary part of the discussion draft acknowledges as much:

> 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.

(Footnote omitted.) As Judge Harvey explains, we "are concerned with what is really confidential, not with a person's understanding of his legal rights." Memorandum 2002-5, Exhibit p. 8.

To underscore that point, the staff previously suggested adding some language to the Comment:

> **Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This is not a substantive change. [Citations omitted.] Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.
>
> The determinative issue 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. *Tentative Recommendation Relating to The Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964).

Memorandum 2002-5, pp. 19-20. The Commission discussed this suggestion at the February meeting, and tentatively concluded that such language was unnecessary. In light of the additional support that the proposal has received since then, **the staff is now inclined to leave the Comment alone.**

Desire to Disclose Privileged Communication

Prof. Leonard observes that in tort law "the term 'intent' usually means a *desire* to bring about a particular unlawful result …, or *knowledge to a substantial certainty* that such result will occur." Memorandum 2002-5, Exhibit p. 13 (emphasis in original). He questions whether "intent to disclose or permit disclosure" under the proposed amendment of Section 912 would exist in both of these situations, or only where the holder desires that disclosure occur. *Id.* He believes that either answer can be supported, but he personally leans towards the latter approach:

> My own sense is that the term "intent" should be interpreted in the manner most protective of the privilege. Because the maintenance of confidentiality is thought to be essential to the relationships protected by the privileges, the holder's desires should be paramount. I would suggest that the privileges be maintained unless the holder *wishes* the communication to be revealed to a person outside the circle of the privilege.

Id. (emphasis in original). He acknowledges, however, that a client "who chooses a method of communication that is substantially certain to result in another's interception of the message has arguably not taken sufficient steps to protect confidentiality." *Id.*

Judge Harvey would find that the privilege was waived in that situation. In his opinion, "the idea is to keep confidential and secret only what is truly confidential and secret, and what is needed to be confidential and secret to make the relationships involved (attorney / client, physician / patient, counselor / victim) truly effective." Memorandum 2002-5, Exhibit p. 8. If a client, "knowing that the employer will monitor the e-mail transmission, nevertheless decides to communicate with the lawyer through the employer's computer, and if the employer learns by that means that the client has committed a serious crime that another is accused of, that the client intends to commit perjury in a pending proceeding, etc., and if the employer makes that evidence available to those who have an interest in it, we should not be keeping that evidence out of court." *Id.* Judge Harvey sees "nothing in the policy underlying the privilege that would warrant the requirement that the courts ignore that information even though everyone else concerned knows about it." *Id.* He does not consider it necessary to make any changes in the tentative recommendation to more clearly reflect his view.

The Commission discussed these comments to some extent at the February meeting. It also considered the staff's suggestion that the Comment to Section 912 be revised to address the distinction between desire to disclose a privileged communication and knowledge to a substantial certainty that such disclosure will occur. Memorandum 2002-5, p. 21. The Commission's tentative inclination was to leave it to the courts to consider that distinction, rather than revising its proposal to provide further guidance on the matter. Instead of committing to that approach, however, the Commission decided to solicit further input on its proposal, which led to the support letters from the Office of the Attorney General and the Office of the Public Defender of Los Angeles County (Exhibit pp. 1-2). Given this additional support for the proposal in its current form, **the staff would leave the proposal as is,** rather than attempting to provide further guidance on the type of intent required.

Reliance on Inadvertently Disclosed Privileged Communication

Prof. Imwinkelried "for the most part" favors an intentionality standard for waiver. Memorandum 2002-5, Exhibit p. 10. In one setting, however, he believes that the standard "poses practical problems." *Id.* Specifically, he is concerned about the situation where the holder of a privilege accidentally produces privileged material, and the opponent "not only reviews the material but also reasonably relies on the material." *Id.* He queries whether the Commission intends courts to use the intentionality standard even in this situation, or apply

"a multi-factor balancing test permitting the trial judge to weigh the opponent's reliance interest." *Id.* "It would be helpful if one of your Comments gave the California bench guidance on this issue." *Id.*

Judge Harvey thinks that Prof. Imwinkelried's concern "is answered in footnotes 13 and 14 to the tentative recommendation" (footnotes 5 and 6 to the discussion draft), which cite cases holding that inadvertent disclosure is not a waiver, and cases explaining the purposes underlying the confidential communication privileges. Memorandum 2002-5, Exhibit p. 8. He "cannot think of any language that could be added to the statute that would be any clearer than the language proposed now." *Id.*

The staff shares Judge Harvey's view that the intent standard should and does apply in California regardless of whether an opponent has relied on inadvertently disclosed material. Such reliance is not reasonable, because case law provides constructive notice that inadvertent disclosure is not a waiver, and the proposed amendment would provide additional notice. We previously suggested adding language to the Comment to explain the effect of relying on inadvertently disclosed privileged material, as recommended by Prof. Imwinkelried. Memorandum 2002-5, pp. 22-23. For example, the Comment could be revised to say:

> **Comment.** Section 912 is amended to make clear that unintentional disclosure of a privileged communication does not waive the privilege. This is not a substantive change. [Citations omitted.] Evidence that the holder of a privilege was notified in advance of employer monitoring or other disclosure bears on the holder's intent.
>
> The intent standard applies regardless of whether an opponent relies on inadvertently produced privileged material. Such reliance is not reasonable, because Section 912 provides constructive notice that inadvertent disclosure of a privileged communication does not waive the privilege.

Again, however, **we are now inclined to leave the Comment alone,** because of the broad support expressed for the proposal in its current form.

Disclosure to Necessary Assistants

Section 912(a) provides that the privileged status of a communication is waived when any holder has "disclosed a significant part of the communication or has consented to such disclosure made by anyone." Prof. Leonard points out that to "an attorney unfamiliar with the structure of these code sections, this might suggest that any disclosure, including disclosure to those necessary to the

maintenance of the privilege, would waive the privilege." Memorandum 2002-5, Exhibit p. 12. He queries whether the statute should be revised to make more clear that disclosure to a necessary assistant (such as a secretary or paralegal) is not a waiver. *Id.*

Such a revision does not seem necessary, however, because Section 912(d) squarely addresses the issue:

> (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.

We would leave the proposal as is with regard to this matter.

NEXT STEP

The preliminary part and statutory text of the discussion draft need to be updated to reflect the enactment of SB 2061 (Morrow). That step appears straightforward and should not require Commission attention.

After resolving the issues discussed in this memorandum, the Commission should determine whether it is ready to approve a final recommendation on this topic. If it decides to do so, the staff will seek an author to introduce the proposal in the next legislative session.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

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MICHAEL P. JUDGE
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EXECUTIVE OFFICE

May 3, 2002

Barbara S. Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94304-4739

Dear Ms. Gaal:

Thank you for your letter of March 26, 2002, soliciting my comment on the draft related to waivers of privilege. I am pleased to offer my input on this important topic.

The proposed legislative change would make it clear that there is a waiver only when the holder of a privilege intentionally discloses a confidential communication. I believe this is an important concept to include in Evidence Code section 912.

On a number of occasions my Office has had to litigate the issue of waiver, where some disclosure had 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 all 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.

The Office of the Public Defender wholly supports the proposed amendment to Evidence Code section 912.

Sincerely,

MICHAEL P. JUDGE, PUBLIC DEFENDER
LOS ANGELES COUNTY, CALIFORNIA

MPJ:am

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

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Chief Deputy Attorney General
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May 31, 2002

Barbara S. Gaal, Staff Counsel
California Law Revision Commission
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Re: Law Revision Commission proposal on *Waiver of Privilege By Disclosure*

Dear Ms. Gaal:

Thank you for requesting comments from the Attorney General's Office regarding the California Law Revision Commission's March 2002, Discussion Draft on *Waiver of Privilege By Disclosure*.

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.

Sincerely,

PETER SIGGINS
Chief Deputy Attorney General
Legal Affairs

EX 2

#K-500

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

DISCUSSION DRAFT

Waiver of Privilege By Disclosure

March 2002

This discussion draft is being distributed so that interested persons can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature.

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

California Law Revision Commission
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SUMMARY

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

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

WAIVER OF PRIVILEGE BY DISCLOSURE

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

Under Section 912, a communication loses its privileged status where "any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone."[3] 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."[4] The statute does not expressly state whether inadvertent (as opposed to intentional) disclosure of a privileged communication constitutes a waiver of the privilege.

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

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

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

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

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

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

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

4. *Id.*

tionship with the holder of the privilege) is not a waiver under the statute.[5] The important policy interests underlying the confidential communications privileges would be undermined if waiver could be effected so easily.[6] Rather, the key criterion is whether the holder of the privilege *intentionally* made the disclosure or *intentionally* permitted another person to make the disclosure.[7] The Commission recommends that Section 912 be revised to make this explicit.

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

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

6. Trilogy Communications, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 652 A.2d 1273, 1276 (1994) ("To hold that the inadvertent production of a privileged document is a waiver of the lawyer-client privilege would render nugatory this state's strong public policy favoring the confidentiality of lawyer-client communications embodied in statute, rules of evidence, rules of professional ethics, and case law."); see also People v. Superior Court (Laff), 25 Cal. 4th 703, 23 P.3d 563, 107 Cal. Rptr. 2d 323, 332 (2001) (lawyer-client privilege is "fundamental to our legal system," protecting the right of every person to fully confer and confide in a legal expert, so as to obtain adequate advice and a proper defense); People v. Gilbert, 5 Cal. App. 4th 1372, 1391, 7 Cal. Rptr. 2d 660 (1992) (purpose of sexual assault victim-counselor privilege is to encourage sexual assault victims to make full and frank reports so they may be advised and assisted); People v. Johnson, 233 Cal. App. 3d 425, 438, 284 Cal. Rptr. 579 (1991) (privilege for confidential marital communications seeks to preserve the confidence and tranquility of a marital relationship); Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 678-79, 156 Cal. Rptr. 55 (1979) (physician-patient privilege creates zone of privacy to preclude humiliation of patient due to disclosure of ailments, and to encourage patient to inform physician of all matters necessary for effective diagnosis and treatment); Section 1014 Comment (A broad privilege should apply to psychiatrists and certified psychologists, because psychoanalysis and psychotherapy depend on "the fullest revelation of the most intimate and embarrassing details of the patient's life."); Section 1034 Comment (underlying reason for clergyman-penitent privilege is that "the law will not compel a clergyman to violate — nor punish him for refusing to violate — the tenets of his church which require him to maintain secrecy as to confidential statements made to him in the course of his religious duties."); M. Mendez, Evidence: The California Code and the Federal Rules § 26.01, p. 590 (1999) (purpose of domestic violence victim-counselor privilege is to promote effective counseling by encouraging full disclosure by the victim).

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

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

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.[12] Further, the privilege is waived

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8. See, e.g., Adams, Scheuing & Feeley, *E-Mail Monitoring in the Workplace: The Good, the Bad and the Ugly*, 67 Def. Couns. J. 32, 32 (2000); DiLuzio, *Workplace E-Mail: It's Not as Private as You Might Think*, 25 Del. J. Corp. L. 741, 743 (2000); McIntosh, *E-Monitoring@Workplace.com: The Future of Communication Privacy in the Minnesota Private-Sector Workplace*, 23 Hamline L. Rev. 539, 543 n.11 (2000).

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

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

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

12. *Tentative Recommendation Relating to The Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964). Some jurisdictions use a stricter test, requiring proof that the holder intentionally relinquished a known right. See, e.g., Trilogy Communications, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 652 A.2d 1273, 1275 (1994); Rest, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 Case W. Res. L. Rev. 309, 332 (1998). In *State Compensation Ins. Fund v. Telanoff*, 70 Cal. App. 4th 644, 653, 82 Cal. Rptr. 2d 799 (1999), the court refers to this test, but only "hold[s] that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." *Id.* at 654. In other jurisdictions, disclosure of a privileged communication automatically waives the privilege, regardless of the circumstances of the disclosure. *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989); Talton, *Mapping the Information Superhighway:*

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

Electronic Mail and the Inadvertent Disclosure of Confidential Information, 20 Rev. Litig. 271, 292 (2000). Still other jurisdictions use a multi-factor balancing test to determine whether disclosure of a privileged communication is a waiver of the privilege. See, e.g., Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993); Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999).

13. Mendez, *supra* note 6, at 505 ("Disclosing a significant part of a confidential communication to a third person will suffice even if the holder intended the disclosure to be confidential.").

PROPOSED LEGISLATION

Evid. Code § 912 (amended). Waiver

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

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), or 1035.8 (sexual assault victim-counselor privilege) is waived with respect to a communication protected by ~~such~~ the privilege if any holder of the privilege, without coercion, has intentionally disclosed a significant part of the communication or has consented to ~~such~~ disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating ~~consent to~~ 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), or 1035.8 (sexual assault 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), or 1035.8 (sexual assault victim-counselor privilege), when ~~such~~ 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.