Study K-301 September 10, 2004

Memorandum 2004-43

Waiver of Privilege By Disclosure (Comments on Draft Recommendation)

As directed by the Commission, over the course of the summer we informally circulated a draft recommendation on *Waiver of Privilege By Disclosure* to numerous stakeholders and interested persons for comment. We also posted the draft to the Commission's website (www.clrc.ca.gov). It is very similar but not identical to the one that was attached to Memorandum 2004-17 (available at www.clrc.ca.gov), which the Commission considered at the June meeting. The Commission received the following new input:

There were also a few important judicial and legislative developments relevant to this project during the summer. This memorandum discusses those developments first, then the new comments. The Commission needs to decide whether to finalize a recommendation (with or without revisions), put this study on hold pending resolution of litigation before the California Supreme Court, or take some other action.

Unless otherwise indicated, all statutory references in this memorandum are to the Evidence Code.

JUDICIAL DEVELOPMENTS

In mid-July, the California Supreme Court granted review in *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*, superseding the court of appeal

decision that is criticized at pages 18-19 of the informally-circulated draft recommendation. The court of appeal had adopted a two-pronged rule for waiver of the privileges specified in Section 912, under which the strict liability approach would apply to a disclosure by the holder of a privilege, and the subjective intent approach would apply to a disclosure by a representative of the holder. 12 Cal. Rptr. 3d 123, 127-30 (2004). The court of appeal had also determined that plaintiff Jasmine established a prima facie case for the crime-fraud exception to the attorney-client privilege. *Id*. at 130-32.

Because the court of appeal decision in *Jasmine* is now superseded, there no longer is a clear split of authority on use of the subjective intent approach in determining whether a privilege specified in Section 912 has been waived. The need for statutory guidance on the applicable standard is reduced. There is also the possibility that the California Supreme Court will definitively decide in the near future what standard applies in determining whether a Section 912 privilege has been waived.

The likelihood of such a ruling is not clear, however, because the Court ordered the briefing in *Jasmine* deferred "pending consideration and disposition of a related issue in *Rico v. Mitsubishi Motors Corp.*, S123808 (see Cal. Rules of Court, rule 28.2(d)(2)), or pending further order of the court." *Jasmine Networks v. Marvell Semiconductor*, 94 P.3d 475, 16 Cal. Rptr. 3d 330 (2004). Based on the court of appeal decision in *Rico*, which was superseded by the grant of review, that case does not appear to involve the standard for determining whether a Section 912 privilege has been waived. See 10 Cal. Rptr. 3d 601 (2004).

Rather, plaintiffs' counsel in *Rico* obtained a document that defense counsel had unintentionally left in a deposition room. The document "provided a summary, in dialogue form, of a defense conference between attorneys and defense experts in which the participants discussed the strengths and weaknesses of defendants' technical evidence." *Id*. at 603. Plaintiffs' counsel "made no effort to notify defense counsel of his possession of the document and instead examined, disseminated, and used the notes to impeach the testimony of defense experts during their deposition...." *Id*. Based on this conduct, the trial court granted a motion to disqualify plaintiffs' counsel.

The court of appeal upheld that ruling. It determined that the document in question was not protected by the attorney-client privilege, because it "did not memorialize any attorney-client communication and ... the document was not transmitted between an attorney and his client." *Id*. at 605-06. The court further

determined, however, that the document was clearly covered by the work-product privilege, *id*. at 603, which had not been waived, *id*. at 607. The work-product privilege is not one of the privileges specified in Section 912.

Because the document was clearly protected by the work-product privilege, the court said that plaintiffs' counsel had an ethical obligation to promptly return it. The court explained that "an attorney who inadvertently receives plainly privileged documents must refrain from examining the materials any more than is necessary to determine that they are privileged, and must immediately notify the sender, who may not necessarily be the opposing party, that he is in possession of potentially privileged documents." *Id*. at 613 (footnote omitted). The court further concluded that disqualification was the only effective sanction for plaintiffs' counsel's failure to follow that rule. *Id*. at 603.

Briefing of the *Rico* appeal is in progress. Oral argument has not yet been scheduled. We have no way of knowing how long it will be before the case is decided, nor whether the decision will provide much guidance that is relevant to the issues addressed in the draft recommendation. It is even more unclear when, or even if, the California Supreme Court will consider the issues raised in *Jasmine*. It is possible that the Court might remand the case after it issues a decision in *Rico*, instructing the court of appeal to reconsider its decision in light of *Rico*.

LEGISLATIVE DEVELOPMENTS

Two bills to amend Section 912 were pending when the Commission considered this topic in June. Senate Bill 1473 (Soto) would have created a new evidentiary privilege for confidential communications between an employee and an employee assistance professional, and would have amended Section 912 to cover that new privilege. The bill died in the Senate Judiciary Committee without a hearing. Senate Bill 1796 (Public Safety Committee) would change the terminology in Section 912 for referring to the sexual assault victim-counselor privilege and the domestic violence victim-counselor privilege. The bill is pending before the Governor. If it is enacted, it would be a simple matter to adjust the Commission's proposal accordingly.

Another important development is the enactment of Assembly Bill 3081, which implements the Commission's recommendation to reorganize the civil discovery provisions. 2004 Cal. Stat. ch. 182. The draft recommendation includes a proposed amendment of Code of Civil Procedure Section 2028, which would be

repealed and recodified as Code of Civil Procedure Sections 2028.010-2028.080 in the reorganization scheme. Again, it would be a simple matter to adjust the Commission's proposal to account for this new legislation.

NEW COMMENTS

The staff sent the draft recommendation together with a personal letter to representatives of numerous organizations, as well as several law professors and other persons with relevant expertise. The Commission did not receive as much new input as we hoped, but the comments that it did receive reflect careful consideration of the draft recommendation.

Summary of New Input

Reaction to the draft recommendation was mixed. Several of the comments voice support for all or part of the proposal without objecting to any of the proposed statutory changes. For example, Prof. Slomanson of Thomas Jefferson School of Law says the draft is clear and convincing and "[b]eautifully done." Exhibit p. 31. Personal Insurance Federation of California ("PIFC") expresses support for both the subjective intent proposal and the partial disclosure proposal, but does not comment on the selective disclosure proposal or the proposed amendment of Code of Civil Procedure Section 2028. Exhibit p. 15. The Executive Committee of the Family Law Section of the State Bar ("Flexcom") supports the subjective intent proposal, Exhibit pp. 20-22, as does Marvell Semiconductor, Inc. ("Marvell"), one of the litigants in *Jasmine*, Exhibit pp. 5-14. Neither Flexcom nor Marvell comment specifically on any of the other proposed statutory changes.

The only comment opposing the entirety of the Commission's proposal came from the State Bar Litigation Section. Exhibit pp. 23-30. The Consumer Attorneys of California ("CAOC") oppose the subjective intent proposal but support the partial disclosure and selective disclosure proposals, except to the extent that they incorporate the subjective intent approach. Exhibit pp. 1-4. In contrast, the State Bar Committee on Administration of Justice ("CAJ") supports the subjective intent proposal, partial disclosure proposal, and proposed amendment of Code of Civil Procedure Section 2028, but opposes the selective disclosure proposal. Exhibit pp. 16-19.

The comments pertaining to each proposed statutory change are described in greater detail below, in the following order:

(1) Subjective intent proposal.
(2) Partial disclosure proposal.
(3) Selective disclosure proposal.
(4) Failure to timely object to a question in a written deposition (proposed amendment of Code of Civil Procedure Section 2028).

Subjective Intent Proposal

The draft recommendation proposes to amend Section 912(a) to make clear that disclosure of a communication protected by one of the specified privileges waives the privilege only when the holder of the privilege intentionally makes the disclosure or intentionally permits another person to make the disclosure:

> 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.
>
> ....

This proposed revision drew both praise and criticism.

Support

PIFC, an association of insurance companies, "views the proposed amendments, which would require an intentional disclosure for waiver of a privilege, as appropriate and helpful." Exhibit p. 15. According to PIFC, "[t]his change is especially warranted in light of the growing reliance on electronic communication, and the potential for accidental disclosures and unintentional waivers of privilege to occur through a mistaken or inadvertent computer keystroke." *Id*.

The State Bar CAJ also supports the proposed codification of the subjective intent approach. CAJ "believes it is appropriate to conform the Evidence Code to the bulk of the case law, and to require that disclosure be intentional rather than inadvertent to constitute a waiver of a privilege." Exhibit p. 16. CAJ further "believes that mere inadvertent disclosure should not defeat a privilege, and that requiring an intent to disclose will best protect the policies underlying the privileges." *Id*. CAJ "also agrees that intent to make the disclosure, rather than intent to waive the privilege, should be the standard." *Id*. As an example, CAJ says that if a party "freely reveals information to a colleague, outside the context of a privileged communication, without legal or other compulsion, it is appropriate for the privilege to be waived, whether or not the party knows the information being communicated is privileged." *Id*. at 16-17.

Flexcom, another State Bar committee, likewise "fully supports the additions of the 'intent language' to Evidence Code §912 presently being considered." Exhibit p. 21. The group explains that "intention to disclose confidential communications is an extraordinarily important consideration in family law and family law related matters." *Id*. The group further explains:

> Family law involves not only communications between the attorney and client, but often representatives or agents of the client, and a variety of other dynamics within the context of the case through communications with the client and therapists or counselors involved, financial managers and personnel, appraisers, forensic experts, family members and the like. The potential for waiver of the attorney-client or other applicable privileges is substantial in the variety of communications which must necessarily occur in the context and the process of a family law action.
>
> The requirement that any waiver of these very important privileges be intentional is an important step toward protecting the sanctity of these relationships. Moreover, in a family law context, clients are often in a position of necessary communications with third parties, and are further often in a position of being less sophisticated, more emotional, and less aware of the potential ramifications for comments or statements made which could arguably constitute a waiver or waivers of one privilege or another. Clients in family law matters are often not sophisticated business people, corporation officers, or other persons who may have some working knowledge of the law, the process or the impact of the potential waiver of these very important privileges. The intent factor will provide, to the extent possible, a further layer of protection for these clients.

Id.

Consistent with its position in *Jasmine*, Marvell comments that "amendment of Evidence Code § 912 to expressly adopt the 'subjective intent' approach to waiver is consistent with the weight of California authority." Exhibit p. 6. Marvell further states that "[e]qually if not more importantly, the proposed amendments to Section 912 are needed to establish certainty in a key area of the law and to safeguard the important public policy considerations underlying the confidential communication privileges, particularly the lawyer-client privilege." *Id*. Marvell criticizes the strict liability approach, pointing out that under it "counsel would have no obligation to notify the disclosing party or refrain from using inadvertently disclosed materials, but would be free to use and disseminate the information with impunity." *Id*. at 10. Marvell also criticizes the multifactor balancing test, saying that it "would undercut the certainty that is necessary for the confidential communication privileges to fulfill their public policy purposes." *Id*. at 9. Marvell "urges that the Draft Recommendation and related proposed legislation be forwarded to the Legislature as soon as possible." *Id*. at 5.

Marvell also discusses the court of appeal decision in *Jasmine*, in which it was the losing party. According to Marvell, "[t]here is simply no legally or logically justifiable reason for attempting to distinguish, as the *Jasmine* court did, between inadvertent disclosures made by the privilege holder, and inadvertent disclosures by the holder's counsel." *Id*. at 10. Marvell thus agrees with the Commission's criticism of the two-pronged inadvertent disclosure analysis in the now-superseded *Jasmine* opinion. *Id*.

Marvell requests, however, that the Commission modify its discussion of the crime-fraud issue in *Jasmine*. That points is discussed under "Other Issues" at the end of this memorandum.

Prof. Slomanson wrote that he was "delighted" to see the *Jasmine* case included in the Commission's analysis. Exhibit p. 31. He explained that although the case "could have rested on crime-fraud grounds, as your draft points out, it's not hard to predict that future courts may read it to explore new and unintended legislative interstices." *Id*. That danger has lessened now that the court of appeal decision in *Jasmine* has been superseded.

Several other groups and individuals wrote in support of the subjective intent proposal earlier in this study. These included the Office of the Attorney General, the Office of the Public Defender of Los Angeles County, former San Francisco

discovery commissioner Richard Best, Prof. David Leonard of Loyola Law School, Prof. Edward Imwinkelried of the University of California at Davis, and the Chairperson of the Beverly Hills Bar Association Criminal Law Section. We do not know whether the positions of any of these groups and individuals have changed since they submitted their comments.

Opposition

CAOC is a strong advocate for the concept of sunshine in litigation — i.e., free availability of information relevant to pending litigation. Consistent with that position, CAOC "in general objects to *any expansion of privileges* to the detriment of open communication." Exhibit p. 1 (emphasis in original).

While it is debatable whether the subjective intent proposal amounts to an expansion of privileges, CAOC opposes the proposal. It considers the multifactor balancing test to be better policy than the subjective intent test. *Id*. at 2. According to CAOC, "the burden of proving intent is too hard to meet." *Id*. CAOC further explains:

> While, as the Commission accurately states, there is a need to be sensitive to the demands on the courts that could *hypothetically* be involved in applying the multifactor balancing test, Consumer Attorneys believes that it is vital to keep evidentiary privileges as narrowly circumscribed as possible. The *multifactor test* includes the following components: (1) 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 disclosure and (5) overriding issue of fairness. These factors provide practical guideposts for the courts.

Id. (emphasis in original). CAOC predicts that "[t]he 'flexibility' that the *multifactor test* provides will help the courts over time develop a thorough frame of reference against which to evaluate fact sensitive acts of 'inadvertent disclosure.'" *Id*. at 3 (emphasis in original).

The State Bar Litigation Section also opposes the subjective intent proposal. However, its opposition "is not founded on a desire to adopt a different standard from the cases predating *Jasmine Networks*." Exhibit p. 26. Nor does the Litigation Section "believe that *Jasmine Networks* is necessarily rightly decided." *Id*.

Rather, the Litigation Section comments that the Commission's proposal "may not restore the *status quo*, may unsettle existing patterns of practice, and may encourage litigants to play games." *Id*. It explains that "[m]any of these

concerns arise from the lack of clarity on who must prove a subjective intent to disclose and how that intent could or would be proven." *Id*

The Litigation Section further states that "proving subjective intent is notoriously difficult." *Id*. It elaborates:

> No one can observe it. Rarely do documents record it. Moreover, the party with the most knowledge regarding the question — the holder of the privilege — has every incentive to deny it. The proponent of disclosure has nearly no means of determining what his opponent intended and very few means in discovery to amass evidence regarding it. Thus, if the party seeking disclosure must bear the burden of proving subjective intent, it may be impossible.

Id.

The Litigation Section contrasts that situation with what it describes as current practice, under which a party who inadvertently discloses a document requests return of the document and has to convince the other side that it had no intent to disclose the document. According to the Litigation Section, "in practice, proof of 'inadvertence' by the holder is not equivalent to proof by the party seeking disclosure of his opponent's subjective intent to disclose." *Id*. In its opinion, adopting the subjective intent proposal "will in practice result in potentially quite different outcomes than the rule prior to *Jasmine Networks*." *Id*.

The Litigation Section warns that this could create an opening for unscrupulous gamesmanship. *Id*. at 26-27. It acknowledges that this would be unusual but cautions that "these rare circumstances ... are most likely to result in the greatest unfairness." *Id*. at 27.

The Litigation Section also says that the proposed amendment would "unsettle the law in this area," casting doubt on the continued applicability of cases prior to *Jasmine*. *Id*. The group further suggests that "any proposal is premature prior to a decision from the California Supreme Court." *Id*.

Earlier in this study, attorney John Anton also objected to the subjective intent proposal. He wrote that the reform was misguided because "determination of the subjective intent of the holder of the privilege is an unworkable standard." Memorandum 2002-5, Exhibit p. 2 (available at www.clrc.ca.gov).

Analysis

We are not persuaded that the proposed subjective intent standard is unworkable as the Litigation Section and Mr. Anton suggest. As discussed at length in the draft recommendation, the standard is already being used by the

courts. The party asserting a Section 912 privilege bears the initial burden of proving that a communication was made in confidence in the course of a privileged relationship. *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 196 F.R.D. 375, 380 (S.D. Cal. 2000). But "[o]nce the party asserting the privilege makes this initial showing, the burden shifts to the party opposing the privilege to show either that the information was not confidential or that it falls within an exception." *Id*. There is no indication that this approach is causing problems. Prosecutors routinely prove subjective intent beyond a reasonable doubt in criminal cases; it is likewise possible for a party to prove another person's subjective intent to disclose a privileged document (e.g., by showing that the holder of the privilege sent the document to a third party together with a cover letter referring to the contents of the document).

We are likewise unconvinced that the proposed amendment of Section 912(a) would unsettle the law in the area, casting doubt on the continued applicability of prior precedents. The proposed Comment expressly states that the amendment codifies existing law and includes citations to the relevant cases. The obvious intent is to reaffirm that case law.

It is indisputable, however, that the subjective intent proposal sets a stiff standard for waiver of a Section 912 privilege. It places a high value on the policies underlying the privileges, but at the cost of excluding information that may be useful in the search for truth. **Whether this represents the proper balance of competing interests is for the Commission to resolve.** The pros and cons of the three main approaches to privilege waiver are discussed at pages 6-10 of the draft recommendation. Another alternative, discussed at some of the Commission meetings, would be to use a recklessness standard: Disclosure of a privileged communication would waive the privilege when the holder of the privilege intentionally *or recklessly* makes the disclosure or intentionally *or recklessly* permits another person to make the disclosure.

In deciding how to proceed, the Commission should take into account that pursuing the subjective intent approach over opposition, particularly from CAOC, would be difficult, would consume extensive Commission resources, and may well be unsuccessful. Switching to another test, such as the multifactor balancing approach favored by CAOC, might engender opposition from parties who favor the subjective intent approach. Further, CAOC is deeply committed to concept of sunshine in litigation, so it is unlikely to change its position on the subjective intent approach. CAOC is almost certain to speak up in the legislative

process if the Commission goes forward with its proposal; it is less clear to what extent other commentators will do so.

The Commission should also consider the possibility of conserving its resources by putting this matter on hold pending resolution of *Rico* and *Jasmine* in the California Supreme Court. There is no assurance that the Court will provide guidance on the issues addressed in the draft recommendation, but that is certainly a possibility. The Commission could reassess the need for its proposal after the Court issues its decisions.

Partial Disclosure Proposal

The term "partial disclosure" refers to the disclosure of a significant portion but not the entirety of a privileged communication to a person outside the privileged relationship. The draft recommendation proposes to add a provision on partial disclosure to Section 912:

> (e) If the holder of a privilege makes or consents to disclosure of a significant part of a confidential communication under the circumstances specified in subdivision (a), the court may order disclosure of another part of the communication or a related communication, but only to the extent necessary to prevent unfairness from partial disclosure.

As discussed more fully in the proposed Comment, this provision is intended to codify existing case law.

Support

Reaction to the partial disclosure proposal was generally favorable. CAOC supports the proposal, except to the extent that it incorporates the subjective intent approach. Exhibit p. 3. PIFC also supports the proposal:

> The proposed changes to Section 912, in addition to requiring intent to disclose for waiver of a privilege, provide that if a holder of a privilege makes or consents to disclosure of a significant part of a confidential communication, then the court may order disclosure of another part, but only to the extent necessary to prevent unfairness from partial disclosure.
>
> Again, the proposed changes seem appropriate, especially in this era of electronic communication when an inadvertent press of a single computer key might produce an unexpected disclosure and unwanted waiver of a valuable privilege.

Exhibit p. 15.

CAJ supports the proposal "in principle," but makes a drafting suggestion. Exhibit p. 17. CAJ believes that "the specific proposed language potentially conflicts with the proposed amendments to Section 912(a) and, at a minimum, may create some confusion." *Id*. CAJ explains that "in repeating part, but not all, of Section 912(a), and then referring to Section 912(a), Section 912(e) would include 'shorthand' repetition, but would deemphasize the portions of Section 912(a) that it does not repeat." *Id*. CAJ also "suggests deleting 'but only,' as that text is superfluous." *Id*. Thus, CAJ would revise proposed Section 912(e) as follows:

> (e) If the holder of a privilege ~~makes or consents to disclosure of~~ waives the privilege as to a significant part of a confidential communication ~~under the circumstances specified in~~ pursuant to subdivision (a), the court may order disclosure of another part of the communication or a related communication~~, but only~~ to the extent necessary to prevent unfairness from partial disclosure.

Id.

Opposition

The Litigation Section opposes the partial disclosure proposal as "unnecessary." Exhibit p. 28. It maintains that the proposed new provision is not needed to prevent confusion and forestall disputes, because "it is unclear that such confusion exists." *Id*. The group also questions whether the standard established by the proposed new provision would be equivalent to the standard currently used in case law. *Id*. Further, the group says that "courts both have more experience and expertise than the legislature with this specific issue and thus are better able to weigh and resolve competing interests." *Id*.

Analysis

Based on the generally positive response to proposed Section 912(e), we continue to believe that it would provide helpful guidance, despite the concerns of the Litigation Section. The case citations in the proposed Comment would help ensure that the provision is interpreted consistently with existing law. The Commission could perhaps add a citation to the *People v. Washington* case mentioned by the Litigation Section, but the Litigation Section did not provide a citation to that case and a Westlaw search of published California cases did not uncover any case by that name that includes the word "fairness."

It would be difficult to go forward with this proposal, however, if the Commission decides not to pursue the subjective intent proposal or another proposal to clarify the applicable standard for waiver. Questions and discussion relating to the applicable standard for waiver almost certainly would arise in connection with the legislation. If the Commission had no clear position on the applicable standard, the legislation could muddy the water on that point, while existing case law is relatively clear and consistent. The Commission should **not pursue the partial disclosure proposal unless it also pursues the subjective intent proposal or another proposal to clarify the applicable standard for waiver.**

If the Commission goes forward with the partial disclosure proposal, it should **accept CAJ's drafting suggestion.** For the reasons given by CAJ, its proposed language is preferable to the language in the draft recommendation.

Selective Disclosure Proposal

The term "selective disclosure" refers to disclosure of a privileged communication to one person outside the privileged relationship or on one occasion, while seeking to preclude disclosure to other persons or on other occasions. The draft recommendation proposes to add a provision on partial disclosure to Section 912:

> 912. ... (f) Except as otherwise provided by statute, disclosure to one person on one occasion under the circumstances specified in subdivision (a) waives the privilege as to all persons and all occasions.
>
> ....
>
> **Comment.** ... Subdivision (f) addresses selective disclosure (i.e., disclosure of a privileged communication to one person or on one occasion, while seeking to preclude disclosure to other persons or on other occasions). It is added to make clear that unless otherwise provided by statute (e.g., by subdivision (b), (c), or (d)), if a privilege holder voluntarily and intentionally makes or authorizes a disclosure to one person, the holder may not continue to assert the privilege as to other persons. Likewise, unless otherwise provided by statute, if a privilege holder voluntarily and intentionally makes or authorizes a disclosure on one occasion (e.g., at a deposition), the holder may not continue to assert the privilege on another occasion (e.g., at trial). This codifies the results in *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (2004) (company under investigation waived attorney-client privilege by disclosing audit report to SEC and

> United States Attorney, despite confidentiality agreement purporting to preclude disclosure to other persons), and *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 668-69 (9th Cir. 2003) (under California law, litigant could not voluntarily disclose confidential marital communications at deposition and still invoke marital communication privilege at trial). It disapproves the contrary result in *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). For an example of a provision that permits selective disclosure of a privileged communication without waiver of the privilege, see Bus. & Prof. Code § 19828 (no waiver of privilege by providing information to gambling control authorities); see also Gov't Code § 13954 (person applying for compensation from California Victim Compensation and Government Claims Board does not waive privilege by making disclosure that Board deems necessary for verification of application).

As explained in the proposed Comment, this would resolve a conflict in California case law.

Support

CAOC supports the selective disclosure proposal, except to the extent that it incorporates the subjective intent approach. Exhibit p. 3. In CAOC's view, the Commission "makes an important point when it emphasizes the problem balancing the potential good that selective disclosure might accomplish against the 'potential for manipulation' that could result from selective disclosures." *Id*.

Prof. Slomanson writes that "[i]ntentional disclosure to one person on one occasion (Sec. 912) is ok, but I'm not completely convinced of the rationale for unrelated litigation." Exhibit p. 31. His point appears to be that there would be no harm from permitting disclosure of a privileged communication for purposes of one case while maintaining the privilege for purposes of another case. Nonetheless, Prof. Slomanson appears to support the selective disclosure proposal. He goes on to say that "[i]t's great to have a brightline rule and for that reason I suspect that it will pass muster with the Legislature." *Id*.

Opposition

CAJ "does not believe proposed Section 912(f) should be added to the Evidence Code." Exhibit p. 17. To the extent that the proposal reflects existing,

law, CAJ says it is unnecessary. *Id*. For instance, CAJ explains, some existing statutes already authorize selective disclosure, such as the ones cited in the proposed Comment. According to CAJ, these statutes "provide protection without the need for proposed Section 912(f)." *Id*. Further, "[a]dditional statutes could also be enacted in the future, if deemed appropriate, and provide necessary protection, independent of proposed Section 912(f)."

To the extent that the selective disclosure proposal "would modify existing law, CAJ believes additional consideration is warranted, pending further development of the law in this area." *Id*. CAJ explains that although it "generally supports statutory amendments that clarify or eliminate a conflict in the law, sometimes a conflict exists for a reason." *Id*. at 17-18. In CAJ's view, the area of selective disclosure requires further development and examination by the courts, or, at a minimum, more comprehensive research regarding how the issue is handled in other states and in the federal courts, before adopting any one approach." *Id*. at 18. CAJ points out that "the area is undergoing change," and specifically refers to proposed amendments of certain federal provisions governing civil discovery. *Id*. Thus, CAJ concludes that "adopting any one rule at this time would be premature." *Id*.

CAJ further comments that proposed Section 912(e) "is too rigid and narrow — by limiting the protection to that which may be provided by other *statutes* — and not sufficiently protective of a parties' interest in maintaining the confidentiality of privileged communications in a variety of circumstances where 'selective disclosure' could arise." *Id*. For example, CAJ points out that the provision would not "allow a claim of privilege to be preserved by rule, regulation, or court order." *Id*. CAJ also urges that if the Commission pursues Section 912(e), "as a minimum, the language should be modified to parallel CAJ's suggested changes to proposed Section 912(e)...." *Id*.

Like CAJ, the Litigation Section opposes the selective disclosure proposal. Its reasoning is similar to that of CAJ, focusing on the "volatile climate" of this area of the law. Exhibit p. 29. The Litigation Section explains:

> New legislation and a renewed focus on corporate internal investigations ... have, at least in the corporate world, changed the climate in which the selective disclosure doctrine operates. Since the collapse of Enron, WorldCom, and Global Crossing, and the enactment of new corporate laws like Sarbanes-Oxley, corporate counsel is regularly being asked to conduct internal investigations. Frequently, parts or all of the investigation involves privileged

> communications. Thereafter, government agencies have recently required as a condition of cooperation that defendants waive the privilege and produce internal investigations. These agencies possess wide discretion in deciding what charges to bring, putting coercive pressure on defendants to waive the privilege in order to gain favorable treatment. Such circumstances arise when two parties (e.g. the corporation and an executive) may also seek to assert the privilege but each party has very different interests. Corporate governance disputes are not the only circumstance in which this issue is arising. In certain class actions, regulator action or other mass settlements, litigants, government regulators, or courts have placed pressure on parties to waive the privilege in connection with a settlement in order [to] obtain agreement or the court's approval. Further, criminal defense attorneys have reported efforts by prosecutors to force a plea bargaining defendant to waive the privilege in connection with their search for evidence on a co-conspirator or co-defendant. Many of these issues have not faced court challenge. None have been reviewed by the California Supreme Court.

Id.

Given these circumstances, the Litigation Section believes that legislative action is unwarranted and it is "more appropriate for the courts to weigh the competing interests on a case-by-case basis." *Id*. In that group's experience, courts are "well equipped to obtain all the necessary facts and to weigh and balance the competing policy concerns presented by evidentiary questions." *Id*. at 30. Thus, the Litigation Section concludes that "[t]he issue does not appear to be ripe for legislation." *Id*.

Analysis

CAJ and the Litigation Section are correct that selective disclosure is a hot topic in the courts and elsewhere. Although the concept of proposed Section 912(f) still strikes us as basically sound, **it may be a good idea to monitor developments in this area for awhile before proceeding with legislation.**

It should not be forgotten, however, that the proper role of the courts is to interpret the law. This constrains their ability to weigh competing policy interests and choose the best policy. Even if legislation is premature now, it may be necessary before too long.

If the Commission is inclined to go forward with Section 912(f), it should accept CAJ's drafting suggestion and also revise the provision to encompass a regulation or court rule. That could be achieved as follows:

> 912. ... (f) Except as otherwise provided by statute, court rule, or regulation, disclosure to one person on one occasion ~~under the circumstances specified in~~ pursuant to subdivision (a) waives the privilege as to all persons and all occasions.

As with the partial disclosure proposal, it would be difficult to go forward with the selective intent proposal if the Commission decides not to pursue the subjective intent proposal or another proposal to clarify the applicable standard for waiver. It seems inadvisable to proceed with it under those circumstances.

Failure to Timely Object to a Question in a Written Deposition (Proposed Amendment of Code of Civil Procedure Section 2028)

The draft recommendation proposes to amend the provision governing a deposition by written questions (Code Civ. Proc. § 2028) to permit a court to grant relief from waiver of an objection in specified circumstances, as is already permitted for other forms of written discovery. CAJ supports that amendment:

> Revising Section 2028(d)(2) to conform to the provisions governing other written discovery seems sensible. For example, if a party's counsel is on vacation and therefore fails to object in writing to a written deposition question, that privilege is forever waived, but the failure to object in the same circumstance to an interrogatory or request for production may be cured. CAJ therefore supports the proposed amendment.

Exhibit p. 19. None of the other comments take a position on it.

The proposed amendment needs to be adjusted to reflect the enactment of the Commission's bill reorganizing the discovery provisions. **With that adjustment, the Commission should proceed with the amendment.** If the Commission decides not to go forward with the other reforms in the draft recommendation, it could turn this amendment into a separate, narrow recommendation, and perhaps combine it in a bill with one or more of the Commission's other discovery-related proposals.

Other Issues

Marvell is concerned that the discussion at pages 18-19 of the draft recommendation "will serve only to unjustly impugn the integrity of Marvell and its officers and employees, without advancing the Draft Recommendation's important efforts to reform Evidence Code § 912." Exhibit p. 6. In particular, Marvell points out that the *Jasmine* court of appeal expressly held that "[n]othing herein shall be construed as a finding that a crime or fraud occurred in this case;

rather, we narrowly rule on the issue of a prima facie case of the crime-fraud exception to the attorney-client privilege." 12 Cal. Rptr. 3d at 132 n.7. If the Commission decides to go forward with the subjective intent proposal, **we will present new language on this point for the Commission for review.**

NEXT STEP

Once the Commission resolves whether and how to proceed on the various aspects of its proposal, we will implement those decisions as appropriate. Even if the Commission decides to pursue the proposal essentially as is, it will be necessary to prepare a new draft that reflects the granting of review in *Jasmine*, the reorganization of civil discovery act, and possibly also the amendment of Section 912 that is now pending before the Governor.

Respectfully submitted,

Barbara Gaal
Staff Counsel

CONSUMER ATTORNEYS OF CALIFORNIA

Ms. Barbara S. Gaal,
Staff Counsel
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, Ca 94303-4739

August 16, 2004

Dear Ms. Gaal:

Consumer Attorneys of California (Consumer Attorneys) must respectfully oppose certain of the proposed changes in the California Law Revision Commission's *Staff Draft Recommendation: Waiver of Privilege by Disclosure*, June 2004. The *Draft Recommendation* specifically addresses three disclosures of privileged communication issues: inadvertent disclosure, and two forms of intentional disclosure, i.e., partial disclosure and selective disclosure of a privileged communication. Consumer Attorneys in general objects to *any expansion of privileges* to the detriment of open communication (Consumer Attorney's letter to Commission dated October 15, 2001). Consumer Attorneys points to the general rule regarding disclosure: "failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity to claim the privilege constitutes a waiver of that privilege" (*City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 233 (1951) cited in West's Ann. Cal. Evid. Code § 912 (2004)). If the holder of the privilege, without coercion, discloses a significant part of the communication or consents to another's disclosure, the privilege is lost. (*Menendez v. Superior Court*, 3 Cal. 4th 435, 455 (1992)).

Furthermore, any claim of privilege must be narrowly tailored to subject matter within the *scope* of the relationship in which it was made (attorney-client, physician-patient).(*Id.* citing *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874 (2004)). The doctrine of wavier of a privilege helps to protect against unfairness that would result from a privilege holder *selectively disclosing privileged communications* to an adversary, revealing those that support a cause while claiming shelter of privilege to avoid disclosing those that are less favorable. (*Tennenbaum v. Deloitte & Touche*, 77 F. 3d 337 (9th Cir. 1996)). Consumer Attorneys emphasizes its support for the rule that an implied waiver of privilege occurs when the privilege holder tenders an issue involving substance or content of a protected communication. (*Eisendrath v. Superior Court* 109 Cal. App. 4th 351 (2001)). In those instances where a privilege holder's own action initiates the disclosure (*Palay v. Superior Court*, 18 Cal. App. 4th 919 (1993)) then the privilege is lost.

I. Waiver By Inadvertent Disclosure:

The *Draft Recommendation* focuses upon the specific **exceptions** to the general rule: the inadvertent disclosure of a privileged communication, or the intentional disclosure (partial disclosure, and selective disclosure). An inadvertent disclosure would be a disclosure that is neither voluntary nor knowing without sufficient awareness of the relevant circumstances and likely consequences. (*Draft Recommendation* at 13). Addressing the exception of inadvertent disclosures the Commission notes the lack of consensus as to what is the appropriate test to determine if an inadvertent disclosure waives the privilege. (*Draft Recommendation* at 6). The *Draft Recommendation* identifies: (►) strict liability for disclosure (►) subjective intent of the holder of the privilege and (►) the multifactor balancing test. **Consumer Attorneys supports the majority rule: the *multifactor balancing test* as opposed to the Commission's preference for the *subjective intent of the holder* test.** (Draft Recommendation at 9 n. 51, 19).

While, as the Commission accurately states, there is a need to be sensitive to the demands on the courts that could *hypothetically* be involved in applying the multifactor balancing test, Consumer Attorneys believes that it is vital to keep evidentiary privileges as narrowly circumscribed as possible. The *multifactor test* includes the following components: (1) 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 disclosure and (5) overriding issue of fairness. These factors provide practical guideposts for the courts. The Commission itself points to the fact that the subjective intent test is phrased differently and formulated differently by courts. (Draft Recommendation at 8). The Commission points however to the "**high threshold** for (establishing) a waiver as an assurance that free-flowing discussions will be fostered. (*Id.*) Consumer Attorneys must align itself with those whom the Commission cites as contending that the burden of proving intent is too hard to meet. (Draft Recommendation at 8 n. 44).

Contrary to the Draft Recommendation's claim, Consumer Attorneys believes that the *multifactor balancing test* is better policy than the *subjective intent of the holder test*. (Draft Recommendation at 21). While the *subjective intent test* may have at first glance, appear to provide " a clear standard, yielding predictable results," that clarity is a product only of the high threshold of intent. Consumer Attorneys believes that this test fails to provide an appropriate context-sensitive examination such as that provided by the *multifactor test* in the context of inadvertent disclosures. The *multifactor test* is better suited to evaluate disclosures in the evolving context of new technologies. (*Draft*

Recommendation at 36). The "flexibility" that the *multifactor test* provides will help the courts over time develop a thorough frame of reference against which to evaluate fact sensitive acts of "inadvertent disclosure".

II. Waiver By Partial Disclosure:

A partial disclosure occurs where a significant portion but not the entirety of a privileged communication is revealed to a person outside of the privileged relationship. (*Draft Recommendation* at 27). The Commission proposes that a new subdivision (e) be added to Cal. Evid. Code § 912 stating that "if the holder of a privilege makes or consents to disclosure of a significant part of a confidential communication under circumstances specified in subdivision (a), the court may order disclosure of another part of the communication or a related communication, but only to the extent necessary to prevent unfairness from partial disclosure. " (*Draft Recommendation at 29*).

In general, Consumer Attorneys supports this proposal. However, Consumer Attorneys opposes the new subdivision (e) to the extent that the proposed subdivision incorporates the Commission's proposed *subjective intent* language in subdivision (a).

III. Waiver By Selective Disclosure:

Selective disclosure is the disclosure of a privileged communication to one person outside of the privileged relationship or on one occasion, while seeking to preclude disclosure to other persons or on other occasions. (*Draft Recommendation* at 29). California and Federal law are unsettled as to whether a selective disclosure constitutes a waiver of an applicable privilege. (*Draft Recommendation* at 29, 31). The Commission suggests adding a new subdivision (f) to Cal. Evid. Code § 912 establishing a general rule that if a privilege holder voluntarily and intentionally makes or authorizes a disclosure of privileged information to one person, the holder could not continue to assert the privilege as to other persons. (*Draft Recommendation* at 33). The Commission makes an important point when it emphasizes the problem balancing the potential good that selective disclosure might accomplish against the "potential for manipulation" that could result from selective disclosures. (*Id.*).

Again, Consumer Attorneys supports this proposal, except to the extent that it incorporates the word: "*intentionally*" by reference to the proposed subdivision (a).

The Consumer Attorneys of California commends the Commission on its exhaustive research and analysis. Nevertheless, the general rule regarding waiver by disclosure(s) should be clarified through reference to a *multifactor analysis* as opposed to the Commission's *subjective intent test*. Consumer Attorneys is highly sensitive to the "heavy demands currently placed upon our courts". However, a *multifactor analysis* will ultimately better serve to alleviate that burden by developing a rich context of guideposts that respond to the evolving means of potential waivers. If you or one of your representatives have any questions please contact me in our Sacramento office.

Sincerely,

James C. Sturdevant
President

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August 16, 2004

VIA EMAIL AND HAND DELIVERY

Frank Kaplan, Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

Re: Waiver of Privilege By Disclosure -- Draft Recommendation

Dear Mr. Kaplan:

On behalf of Marvell Semiconductor, Inc. ("Marvell"), we respectfully submit the following comments on the Commission's Staff Draft Recommendation on Waiver of Privilege By Disclosure (June 2004) ("Draft Recommendation").

Introduction.

Marvell wholeheartedly supports the Draft Recommendation's proposed amendments to Evidence Code § 912 concerning inadvertent disclosure of privileged communications. As detailed below, Marvell believes that the Draft Recommendation's proposed amendments are in accord with California law regarding inadvertent disclosure. At least as importantly, the proposed amendments to Section 912 will be important in establishing badly-needed certainty in the law of privilege, preventing confusion and erroneous decisions, and safeguarding the public policy considerations underlying the confidential communication privileges. Marvell urges that the Draft Recommendation and related proposed legislation be forwarded to the Legislature as soon as possible.

Marvell would further like to comment on the Draft Recommendation's discussion of the recent court of appeal opinion in *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.* (2004) 117 Cal. App. 4th 794 ("*Jasmine*"), in which Marvell is the defendant-respondent.[1] Marvell concurs in the Draft Recommendation's conclusion that *Jasmine's* waiver analysis is seriously flawed, and adopts an approach that is unsupported by California law.

[1] On July 21, 2004, the California Supreme Court granted review in *Jasmine* as Case No. S124914.

Marvell is concerned, however, that the Draft Recommendation's discussion of the *Jasmine's* court's characterization of the facts and analysis of the crime-fraud exception to the lawyer-client privilege overlooks the court of appeal's express holding that it did ***not*** find that a crime or fraud occurred in this case, but rather ruled narrowly that there were assertions made by plaintiff and appellant which, if true, could support the existence of a *prima facie* case for invocation of the crime-fraud exception. *Jasmine*, 117 Cal. App. 4th at 805, fn. 6. Marvell therefore respectfully requests that certain minor revisions be made to the Draft Recommendation's discussion of *Jasmine* in order to more accurately describe the state of the record in that case. In particular, the Draft Recommendation's statements at p. 18:26-19:3 that the Sixth District "explain[ed] that there was abundant evidence of fraud," and at p. 19:8-14 as to "fraudulent actions" of Marvell personnel and an "incriminating voicemail," are unnecessary to the Draft Recommendation's discussion of the waiver issue. As discussed below, the *Jasmine* court's statements regarding alleged "fraud" and a *prima facie* case for the crime-fraud exception:

- Are based upon incompetent and inadmissible evidence;

- Ignore substantial evidence before the court of appeal that the original voicemail at issue was ***altered and edited, and then destroyed***, by Jasmine;

- Ignore the governing substantial evidence standard of review and the factual findings of the trial court; and

- Are based upon a flawed analysis of the crime-fraud exception which conflicts with the standards established by other judicial districts and would eliminate any requirement of intention on the part of the client to further the alleged fraud.

The inclusion of the matter discussed above will serve only to unjustly impugn the integrity of Marvell and its officers and employees, without advancing the Draft Recommendation's important efforts to reform Evidence Code § 912. Marvell therefore respectfully requests that the Commission revise its discussion of the *Jasmine* opinion as set forth below.

The Proposed Amendments Regarding Inadvertent Disclosure Of Privileged Communications Are Necessary to Provide Certainty In An Important Area of Law.

Marvell concurs in the findings of the Draft Recommendation that amendment of Evidence Code § 912 to expressly adopt the "subjective intent" approach to waiver is consistent with the weight of California authority. Equally if not more importantly, the proposed amendments to Section 912 are needed to establish certainty in a key area of the law and to safeguard the important public policy considerations underlying the confidential communication privileges, particularly the lawyer-client privilege.

Preserving the confidentiality of client information is essential to the trust that is the hallmark of the lawyer-client relationship.[2] Clients are thereby encouraged to communicate fully and frankly with counsel, even with respect to potentially embarrassing or legally damaging information. Attorneys need this information to represent their clients effectively and to advise their clients to refrain from unlawful conduct. As stated by the California Supreme Court, "[a]dequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading . . . ." *City and County of San Francisco v. Superior Court* (1951) 37 Cal. 2d 227, 235 (internal quotations and citations omitted); *see also*, *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal. 4th 1135, 1146 ("Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring the right of every person to freely and fully confer and confide in one having knowledge of the law . . . in order that the former may have adequate advice and a proper defense." (internal quotations and citations omitted)).

Certainty and predictability as to the lawyer-client privilege is thus critical. "[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States* (1981) 449 U.S. 383, 393.

The need for a clear standard is heightened by the increasing use of new technologies such as email, fax and voicemail, both inside and outside of the litigation context. Given the rapidly expanding use of electronic communication, and corresponding increase in the potential for inadvertent disclosures of privileged communications, it is of key importance that the law keep pace with new technology.

There is thus a manifest need for certainty regarding the effect of inadvertent disclosures of privileged information. As noted in the Draft Recommendation there is no current California Supreme Court decision resolving this issue, and the current text of Evidence Code § 912 leaves room for confusion and anomalous decisions, as exemplified by the opinion of the Sixth Appellate District in *Jasmine.*

Marvell believes the Draft Recommendation is correct in concluding that the "subjective intent" standard for waiver both safeguards the public policy underlying the confidential

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[2] A lawyer's duty to maintain the confidentiality of client information is codified in Rule of Professional Conduct 3-310(E) and Business and Professions Code § 6068(e), which provides that it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

communication privileges and provides a clear standard which yields readily predictable results, ensuring the certainty necessary for these privileges to serve their public policy purposes.

The Proposed Amendments Would Codify The Majority View Regarding Inadvertent Disclosure.

Marvell further agrees with the Draft Recommendation that codification of the "subjective intent" standard of waiver is consistent with the majority (and the better reasoned) of the California cases.

It has long been settled under California law that a "waiver is the ***intentional*** relinquishment of a known right." *Henderson v. Drake* (1953) 42 Cal.2d 1, 5 (emphasis in original). Thus in *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 343, the California Supreme Court found that a form consent was ineffective to waive a patient's psychotherapist-patient privilege, holding that "waiver of an important right must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences."

The requirement of a voluntary or intentional disclosure has been applied in the context of the lawyer-client privilege. *See*, *Glade v. Superior Court* (1978) 76 Cal.App.3d 738, 744 ("the attorney-client privilege is retained, even without express assertion thereof, until the holder voluntarily discloses a substantial part of the privileged communication"); *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 211 (waiver of lawyer-client privilege requires the "intentional relinquishment of a known right").

In *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, the court expressly addressed the issue of inadvertent disclosure and found that there was no waiver of the lawyer-client privilege. While framing its analysis in terms of the subjective intent of the privilege holder, and concluding that "[i]t is clearly demonstrated that State Fund had no intention to voluntarily relinquish a known right" (*Id.,* at 653), the court's holding was more narrow: "[W]e hold that "waiver" does not include accidental, inadvertent disclosure of privileged information by the attorney." *Id.,* at 654. *State Fund* does not suggest, however, that a different standard should apply to disclosures by the privilege holder than to disclosures by his attorney, and there seems to be no principled basis for doing so.

The requirement that waiver consist of an intentional disclosure is further consistent with the statutory definitions of the confidential communication privileges, and the circumstances under which a communication is considered to be privileged thereunder. In each case, the intent of the privilege holder is determinative. For example, Evidence Code § 952 defines a "confidential communication between client and lawyer" as "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 the accomplishment of the purpose for which the lawyer is consulted ...." (Emphasis added.)

Similarly, Evidence Code § 917 provides that where a privilege is claimed under any of the confidential communication privileges, the communication is presumed to have been made in confidence; the Comment to Section 917 states that "if the facts show that the communication was not ***intended*** to be kept in confidence, the communication is not privileged." (Emphasis added.) The "overhearing cases," which hold that the lawyer-client privilege does not attach under Evidence Code § 952 to communications made in public, where third parties were openly present, are of similar import; the fact that the communication was made where third parties could obviously overhear is strong evidence that the communication was not intended to be confidential, and is therefore not within the protection of the privilege. *See, e.g., People v. Poulin* (1972) 27 Cal.App.3d 54, 64 ("[n]o privilege of confidential communication attaches to a statement which is made in the presence of a third party who is ostensibly present," where appellant made statements and gestures to his attorney in open court in the presence of a nearby bailiff); *People v. Castiel* (1957) 153 Cal.App.2d 653, 659 (lawyer-client privilege did not attach to statement made in the presence of court reporter who was in "plain sight" and "openly present").

The California cases involving inadvertent disclosure have further roundly rejected the "strict liability" theory of waiver. *See, O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal. App. 4th 563, 577 (["[Plaintiff] invites us to adopt a 'gotcha' theory of waiver, in which an underling's slip-up in a document production becomes the equivalent of actual consent. We decline."). [3]

The strict liability theory is also inconsistent with the leading authorities setting out the ethical duties of counsel upon the receipt of inadvertently disclosed privileged information. In *State Fund, supra*, counsel responding to a document request inadvertently produced documents that were subject to the attorney-client privilege. The court held that a lawyer who receives inadvertently provided materials that "obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged" has an affirmative ethical duty to "refrain from examining the materials any more than is essential to ascertain if the materials are privileged" and to contact the disclosing party immediately so that any question of privilege can be resolved by agreement or resort to the courts. *State Fund, supra,* 70 Cal.App.4th at 656-57. The *State Fund* court based its conclusion on the importance which the attorney-client privilege holds in the jurisprudence of this state (*Id.*, at 657), and emphasized that "an attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." *Id.*

[3] No reported California decision appears to have adopted the multi-factor balancing test for waiver by disclosure. As the Draft Recommendation notes, this approach would undercut the certainty that is necessary for the confidential communication privileges to fulfill their public policy purposes. *See, Upjohn Co. v. United States, supra,* 449 U.S. at 393.

The strict liability or "gotcha" theory of waiver is clearly incompatible with *State Fund's* view of an attorney's ethical obligations. Under the strict liability theory, counsel would have no obligation to notify the disclosing party or refrain from using inadvertently disclosed materials, but would be free to use and disseminate the information with impunity. This is precisely the sort of "unprofessional conduct" that the *Sate Fund* court sought to discourage. *Id.*, at 657.

The subjective intent theory of waiver by disclosure is clearly consistent with the California case law interpreting Evidence Code § 912, the statutes establishing the confidential communication privileges, and the law regarding counsel's ethical duties. Marvell strongly supports the Draft Recommendation's proposed revisions to Section 912.

The *Jasmine* Opinion.

The decision of the Sixth Appellate District in *Jasmine* underscores the need for the Draft Recommendation's proposed revisions to Section 912. *Jasmine* exemplifies the uncertainty and danger of erroneous decisions presented by the current statutory language. As noted in the Draft Recommendation, the *Jasmine* opinion is unsupported by California law regarding inadvertent disclosure. There is simply no legally or logically justifiable reason for attempting to distinguish, as the *Jasmine* court did, between inadvertent disclosures made by the privilege holder, and inadvertent disclosures by the holder's counsel. This two-pronged approach can, and in the *Jasmine* case did, lead to incongruous and improper results. *See*, Draft Recommendation, pp. 19-20. Marvell concurs with the Draft Recommendation's characterization of the *Jasmine* decision as "anomalous." *Id.*, at p. 36. We strongly agree with the Draft Recommendation's conclusion that "*Jasmine* creates further potential for confusion in an area that already warranted clarification" and that as a result of uncertainty created by the *Jasmine* opinion's improper application of the law, "[g]uidance is needed to make clear what rule applies." Draft Recommendation, p. 19.

The *Jasmine* opinion is defective in numerous other respects as well. Marvell is concerned that due to its understandable focus on the issue of waiver under Evidence Code § 912, the Draft Recommendation's discussion of the Sixth District's characterization of the facts and application of the crime-fraud exception overlooks the fact that the court of appeal expressly held that "***[n]othing herein shall be construed as a finding that a crime or fraud occurred in this case***; rather, we narrowly rule on the issue of a prima facie case of the crime-fraud exception to the attorney-client privilege." 117 Cal.App.4th at 805, fn. 6 (emphasis added). Further, as discussed below, because the Sixth District improperly relied upon incompetent and inadmissible "evidence" in finding a *prima facie* case, Marvell respectfully requests that the Draft Recommendation be modified slightly in order to more accurately describe the state of the record in *Jasmine*.

In particular, the Draft Recommendation states at pp. 18:26 – 19:3 that "[e]xplaining that there was abundant evidence of fraud, the [*Jasmine*] court cautioned that in 'an era where corporate fraud and boardroom misconduct is front-page news as well as prosecutions of

accountants and lawyers in connection with such conduct, our courts are required to ensure that the attorney-client privilege is not used to promote or further any such conduct.'" Further, at page 19:8-14, the Draft Recommendation states:

> "The court of appeal's comments on privilege waiver were unnecessary to its decision, which could have rested solely on the crime-fraud exception to the attorney-client privilege. In its outrage over the fraudulent actions of the corporate representatives and its eagerness to admit the incriminating voicemail, the court fashioned a new variant of the waiver doctrine: A two-pronged rule in which the strict liability approach applies to disclosure by a representative of the holder. Previous decisions made no mention of such a two-pronged approach. Guidance is needed to make clear what rule applies."

Marvell believes that the Draft Recommendation should be revised to make it clear that the court of appeal specifically did not find that a crime or fraud occurred, and that it was only plaintiff and appellant Jasmine Networks, Inc. ("Jasmine") that *alleged* "abundant evidence of fraud" and "fraudulent actions," or an "incriminating voicemail." As discussed below, the Sixth District's conclusions in this regard, and its gratuitous statement regarding "corporate fraud and boardroom misconduct" are based on (i) a reliance on inadmissible and tampered with evidence submitted by appellant Jasmine; (ii) an erroneous failure to apply the substantial evidence standard of review, instead substituting its own determination of factual issues for those of the trial court; and (iii) a seriously flawed analysis of Evidence Code § 956 and the crime-fraud exception to the lawyer-client privilege.

Marvell respectfully submits that the sentence at pp. 18:26 – 19:3 of the Draft Recommendation should be deleted in its entirety. At the very least, that sentence should be revised to read as follows: "Finding, on the basis of disputed evidence (and contrary to the factual determination of the trial court) that there was evidence which, if believed, would indicate a fraud had occurred, the court cautioned that the attorney-client privilege should not be used to further such alleged conduct."

Similarly, the sentence that now reads "[i]n its outrage over the fraudulent actions of the corporate representatives and its eagerness to admit the incriminating voicemail, the court fashioned a new variant of the waiver doctrine" should be revised by insertion of the word "alleged" or "allegedly," as follows:

> "In its outrage over the *allegedly* fraudulent actions of the corporate representatives and its eagerness to admit the *allegedly* incriminating voicemail, the court fashioned a new variant of the waiver doctrine:"

In addition, Marvell believes that a revision should be made to the sentence that now reads: "The court of appeal's comments on privilege waiver were unnecessary to its decision, which could have rested solely on the crime-fraud exception to the attorney-client privilege."

That sentence should be revised to make clear that the Commission simply recognized that the court of appeal made an alternative holding under the crime-fraud exception:

> "The court of appeal's comments on privilege waiver were unnecessary to its decision, which also was based on an alternative holding under the crime-fraud exception to the attorney-client privilege."

***Jasmine's* Reliance on Inadmissible and Tampered With Evidence.**

The *Jasmine* court based its decision on the crime-fraud exception in large part on the alleged content of a purported "revised draft transcript" of the voicemail proffered by Jasmine, despite the fact that there is no competent or admissible evidence showing that the alleged transcript is what it purports to be, i.e., a complete and accurate account of the voicemail at issue. The opinion further failed to address evidence submitted to the court of appeal that the original recording was altered and edited, and then destroyed by Jasmine.[4]

The *Jasmine* court relied on a "revised draft transcript" of the voicemail prepared by Jasmine's counsel. In direct violation of her ethical duties under *State Fund*, *supra*, upon receipt of the voicemail, Jasmine's in-house counsel refused to return the clearly privileged materials to Marvell; rather, counsel disseminated the privileged communication inside and outside of Jasmine, and Jasmine sought to use its possession of a purported tape recording of the voicemail to coerce Marvell into making substantial business concessions.

The "revised draft transcript" is clearly inadmissible. Among other things, neither the revised draft transcript nor the "copy" of the recording from which it was made were ever authenticated, and it is not the best evidence of the communication set forth therein. Tellingly, Jasmine destroyed the original recording underlying the "revised draft transcript," and there was no evidentiary link between the original voicemail and the "revised draft transcript" relied upon by the Sixth District. Indeed, there was substantial evidence before the court of appeal that the original recording was ***tampered with by Jasmine, and then destroyed***.

In light of the clear inadmissibility of the "revised draft transcript" relied upon by the Sixth District, a reader of the Draft Recommendation could be misled into believing that Marvell personnel engaged in "fraudulent actions." This is unnecessary to the Draft Recommendation's analysis of the *Jasmine* opinion and its detailed analysis of the need for revision of Evidence Code § 912, and would needlessly impugn the character and cause irreparable harm to the reputations of the Marvell personnel involved — all based upon an incompetent, inadmissible "draft transcript" of a copy of an altered recording proffered by Jasmine.

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[4] The opinion not only quotes selectively from Jasmine's inadmissible "revised draft transcript," but misquotes that purported "evidence" by moving portions of the alleged text out of sequence so as to further misstate the voicemail message.

***Jasmine's* Flawed Crime-Fraud Analysis.**

The court of appeal's decision on the crime-fraud exception is itself seriously flawed. The crime-fraud exception of Evidence Code § 956 provides that there is no privilege "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." Thus, an essential element of the crime-fraud exception is the client's intent: To invoke the crime-fraud exception, the party opposing the privilege must make a *prima facie* showing of both an actual planned crime or fraud, and that the client's purpose in seeking the lawyer-client communication was to further the fraud. *See, Nowell v. Superior Court* (1963) 223 Cal. App. 2d 652, 657. The requirement of intention on the part of the client to abuse the attorney-client relationship was made clear in *Glade v. Superior Court* (1978) 76 Cal. App. 3d 738, 744, which reasoned that Section 956 "is invoked only when a client seeks or obtains legal assistance 'to enable or aid' one to commit a crime or fraud."

Contrary to *Glade*, the Sixth District adopted an overly broad and ill-defined standard, relying on the anomalous opinion of *BP Alaska Exploration, Inc. v. Superior Court* (1988)199 Cal. App. 3d 1240, 1268, stating that "a specific showing of the client's intent in consulting the attorney is not required," and that "[a] finding that the privileged material 'reasonably relates' to the subject matter of the crime or fraud should suffice." That standard conflicts with *Glade*, as well as the language of Section 956, and would negate the client intent requirement. An attorney-client communication could clearly bear a "reasonable relationship" to the subject matter of a fraud contemplated by others but unknown to the client. Such a standard is so overbroad as to allow the narrow crime-fraud exception to swallow the privilege.

Indeed, the *Jasmine* opinion goes further than the overbroad standard set out in *BP Alaska*, holding the courts may rely on incompetent and inadmissible evidence to find a *prima facie* case to invoke the crime-fraud exception. Such a rule, dispensing with the need for any competent proof that the services of a lawyer were sought or obtained to enable or aid in the commission or planning of illegality, would effectively negate the lawyer-client privilege. The mere allegation of fraud would suffice to pierce the privilege, and the exception would again swallow the rule.

The proponent of the crime-fraud exception must show that the alleged crime or fraud has a foundation in fact. "The mere charge of illegality will not defeat the privilege. There must be *prima facie* evidence that the illegality has some foundation in fact." *Nowell v. Superior Court*, *supra*, 223 Cal.App.2d at 657. As stated by the United States Supreme Court, "[i]t is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. To drive the privilege away, there must be 'something to give colour to the charge; there must be *prima facie* evidence that it has some foundation in fact.'" *Clark v. United States* (1933) 289 U.S. 1, 15 (internal quotations and citations omitted).

Evidence sufficient to establish a *prima facie* case must be competent and admissible. *See, e.g., Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 830, overruled in part on other

grds., *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68 (*prima facie* case cannot be based on inadmissible hearsay). Nonetheless, the Sixth District relied upon incompetent, inadmissible and tampered with evidence as the lynchpin of its finding that Jasmine stated a *prima facie* case for the crime-fraud exception.

Indeed, the Sixth District was able to find a *prima facie* case for invocation of the crime-fraud exception only by ignoring the applicable standard of review. The published decisions uniformly apply the substantial evidence standard in reviewing findings with respect to the crime fraud exception:

> "The appellate court may not weigh the evidence, resolve conflicts in the evidence, or resolve conflicts in the inferences that can be drawn from the evidence. ***If there is substantial evidence in favor of the finding, no matter how slight it may appear in comparison with the contradictory evidence, the finding must be affirmed.*** [Citation.]"

State Farm Fire & Cas. Co. v. Superior Court (1997) 54 Cal.App.4th 625, 645 (emphasis in original).

The trial court in *Jasmine* found that no *prima facie* case had been made. Nonetheless, the court of appeal did not apply the substantial evidence test, but instead substituted its own judgment for that of the trial court. The court of appeal's decision on the crime-fraud exception is riddled with other flaws that are fully discussed in Marvell's successful Petition for Review to the California Supreme Court (attached).

Thank you for your consideration of our comments. We will be pleased to provide the Commission with any further information or documents that the Commission might request to assist in its analysis of the *Jasmine* decision, or in support of the Draft Recommendation's proposed revisions to Evidence Code § 912.

Very truly yours,

BUCHALTER, NEMER, FIELDS & YOUNGER
A Professional Corporation

By _____
Julian W. Mack

JWM:jwm

Personal Insurance Federation of California

California's Personal Lines Trade Association
REPRESENTING THE LEADING AUTOMOBILE AND HOMEOWNERS INSURERS
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August 12, 2004

Barbara Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Proposal to Amend Evidence Code Section 912
Waiver of Privilege by Disclosure (File: K-301)

Dear Barbara:

Thank you for inviting us to comment on the Law Revision Commission's proposal to amend Evidence Code Section 912. PIFC views the proposed amendments, which would require an intentional disclosure for waiver of a privilege, as appropriate and helpful. This change is especially warranted in light of the growing reliance on electronic communication, and the potential for accidental disclosures and unintentional waivers of privilege to occur through a mistaken or inadvertent computer keystroke.

The recommendation of the commission is "that this provision [regarding waiver of a privilege by disclosure] be revised to make clear that disclosure of a communication protected by one of the specified privileges waives the privilege only when the holder of the privilege voluntarily and intentionally makes the disclosure or voluntarily and intentionally permits another person to make the disclosure."

According to the commission, "[t]his would codify the majority view in case law applying the provision to an inadvertent disclosure and would provide readily accessible guidance as courts, attorneys, and litigants attempt to assess how the provision applies to unauthorized disclosures resulting from use of new means of communication."

The proposed changes to Section 912, in addition to requiring intent to disclose for waiver of a privilege, provide that if a holder of a privilege makes or consents to disclosure of a significant part of a confidential communication, then the court may order disclosure of another part, but only to the extent necessary to prevent unfairness from partial disclosure.

Again, the proposed changes seem appropriate, especially in this era of electronic communication when an inadvertent press of a single computer key might produce an unexpected disclosure and unwanted waiver of a valuable privilege.

If you have any questions regarding PIFC's comments, please let me know.

Sincerely,

G. Diane Colborn

cc: Dan Dunmoyer, PIFC

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THE STATE BAR OF CALIFORNIA

— COMMITTEE ON ADMINISTRATION OF JUSTICE

TO: The California Law Revision Commission

FROM: The State Bar of California's Committee on Administration of Justice

DATE: August 27, 2004

SUBJECT: Waiver of Privilege by Disclosure – Draft Recommendation

The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the June 2004 Staff Draft Recommendation of the California Law Revision Commission ("CLRC"), *Waiver of Privilege by Disclosure*, and appreciates the opportunity to submit these comments.

A. Proposed Amendments to Section 912

1. Section 912(a)

CAJ supports the proposed amendments to Section 912. CAJ believes it is appropriate to conform the Evidence Code to the bulk of the case law, and to require that disclosure be intentional rather than inadvertent to constitute a waiver of a privilege. CAJ believes that mere inadvertent disclosure should not defeat a privilege, and that requiring an intent to disclose will best protect the policies underlying the privileges.

CAJ also agrees that intent to make the disclosure, rather than intent to waive the privilege, should be the standard. Because a disclosure under Evidence Code Section 912 must be uncoerced in order to constitute a waiver, waiver would not occur if a party believed he or she

were under a legal or other compulsion to produce the information. However, if, for example, a party freely reveals information to a colleague, outside the context of a privileged communication, without legal or other compulsion, it is appropriate for the privilege to be waived, whether or not the party knows the information being communicated is privileged.

2. **Section 912(e)**

CAJ supports the proposed amendments to Section 912(e) in principle, but believes the specific proposed language potentially conflicts with the proposed amendments to Section 912(a) and, at a minimum, may create some confusion.

The proposed amendments to Section 912(a) emphasize that uncoerced **intent** to disclose the information is required to cause a waiver, but in proposed Section 912(e) the language would revert to "makes or consents to disclosure . . ." without clearly requiring intent, or a lack of coercion. One could, for example, unintentionally make a disclosure, or disclose otherwise privileged information due to coercion. CAJ recognizes that proposed Section 912(e) attempts to deal with the situation by stating: "under the circumstances specified in subdivision (a)." However, in repeating part, but not all, of Section 912(a), and then referring to Section 912(a), Section 912(e) would include "shorthand" repetition, but would deemphasize the portions of Section 912(a) that it does not repeat. Restating in Section 912(e) *all* of the relevant language from Section 912(a) would, however, appear to involve unnecessary repetition. CAJ believes that Section 912(e) should be revised to avoid these pitfalls. CAJ also suggests deleting "but only," as that text is superfluous.

CAJ suggests that Section 912(e) could be modified as follows, to address these issues:

> (e) If the holder of the privilege ~~makes or consents to disclosure of~~ waives the privilege as to a significant part of a confidential communication ~~under the circumstances specified in~~ pursuant to subdivision (a), the court may order disclosure of another part of the communication or a related communication~~, but only~~ to the extent necessary to prevent unfairness from partial disclosure.

3. **Section 912(f)**

CAJ does not believe proposed Section 912(f) should be added to the Evidence Code. To the extent the proposal reflects existing law, it is unnecessary. As the CLRC Staff Draft Recommendation points out, there are existing statutes that authorize selective disclosure without waiver of the applicable privilege in a specific context, for example Evidence Code Section 912 (b)-(d), Business and Professions Code Section 19828, and Government Code Section 13954. These statutes provide protection without the need for proposed Section 912(f). Additional statutes could also be enacted in the future, if deemed appropriate, and provide necessary protection, independent of proposed Section 912(f).

To the extent proposed Section 912(f) would modify existing law, CAJ believes additional consideration is warranted, pending further development of the law in this area. As the CLRC Staff Draft Recommendation points out, the law governing the impact of selective

disclosure on one's right to claim a privilege is in conflict. Although CAJ generally supports statutory amendments that clarify or eliminate a conflict in the law, sometimes a conflict exists for a reason. This area of the law requires further development and examination by the courts, or, at a minimum, more comprehensive research regarding how the issue is handled in other states and in the federal courts, before adopting any one approach. Moreover, CAJ believes the proposed language is too rigid and narrow – by limiting the protection to that which may be provided by other *statutes* – and not sufficiently protective of a parties' interest in maintaining the confidentiality of privileged communications in a variety of circumstances where "selective disclosure" could arise. The proposal would not, for example, allow a claim of privilege to be preserved by rule, regulation, or court order.

The proposal is problematic for yet another reason. The Federal Judicial Conference Committee on Rules of Practice and Procedure recently circulated for public comment a set of proposed amendments to the federal rules.[1] Included are proposed amendments to the discovery rules, generated in large part as a result of the increasingly frequent use of discovery of electronic information. Proposed amendments to Federal Rules of Civil Procedure 16(b)(6) and 26(f)(4) would provide a process whereby, if the parties could agree to the production of discoverable information without a privilege review, and protect the right to assert privilege after the production of privileged information, the court could enter a case management order adopting that agreement. The report of the Civil Rules Advisory Committee notes that these amendments would apply to all discoverable information, but are particularly important with regard to electronically stored information, where the burden, cost, and difficulties of privilege review are compounded.

CAJ recognizes that the agreement and order described above would be based on a federal model, where there might be an *intent to disclose* the communications without an *intent to waive* the privilege. CAJ raises the proposed federal amendments merely to illustrate that 1) potential variations on the "selective disclosure" issues raised by the proposed amendments to Evidence Code section 912(f) continue to be a developing area of the law, and 2) there may be circumstances that are *not* provided by statute under which disclosure – or waiver – as to one person should not be considered a waiver as to all persons on all occasions. As proposed, Section 912(f) would essentially render these federal innovations useless in California; no litigant in federal court could take advantage of the proposed procedures without a risk that it will have waived the privilege for all the communications that the litigant disclosed, as to other parties in pending or subsequent California state court litigation, whether the claims asserted in California state court are related or unrelated to the claims asserted in federal court.

The federal proposal and the differing approaches outlined in the CLRC Staff Draft Recommendation illustrate that the area is undergoing change. CAJ believes that adopting any

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[1] The proposed amendments to the Federal Rules of Civil Procedure can be found at http://www.uscourts.gov/rules/comment2005/CVAug04.pdf. The comment deadline is February 15, 2005.

one rule at this time would premature. CAJ further believes that, even if it were appropriate to adopt a statute at this time, proposed Section 912(f) is too limited, and should not be adopted.[2]

B. **Proposed Amendments to Section 2028(d)(2)**

Revising Section 2028(d)(2) to conform to the provisions governing other written discovery seems sensible. For example, if a party's counsel is on vacation and therefore fails to object in writing to a written deposition question, that privilege is forever waived, but the failure to object in the same circumstance to an interrogatory or request for production may be cured. CAJ therefore supports the proposed amendment.

DISCLAIMER

This position is only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

[2] In the event any version of Section 912(f) is pursued, CAJ believes that, as a minimum, the language should be modified to parallel CAJ's suggested changes to proposed Section 912(e), discussed above.

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OF COUNSEL:
PAMELA SOMERS

August 17, 2004

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

Re: **Flexcom Response to California Law Revision Commission Request for Comments on Waiver of Privilege by Disclosure**

Dear Mr. Sterling:

This letter is sent on behalf of the Executive Committee of the Family Law Section of the State Bar of California, and sets forth said body's comments concerning the proposed revisions to Evidence Code §912 governing waiver of specified evidentiary privileges by disclosure.

Preliminarily, I note that on March 16, 2002, by letter from Suzanne Harris (then a sitting member of Flexcom), Flexcom supported prior revisions to Evidence Code §912 as set forth in then-pending SB 2061 introduced by Senator Morrow. Flexcom voted 11 - 0 in favor of supporting the then-existing amendments to Evidence Code §912.

Said letter provided that the new language of Evidence Code §912 was a positive step in protecting and enhancing the privileged communications between the applicable parties under section 912, and protections against inadvertent disclosures of otherwise privileged communications. Flexcom supported revisions which protected the subject and very important privileges from inadvertent waivers, and supports the amendments being considered at this time to further promote and enhance those protections.

The changes to Evidence Code §912 were found by Flexcom to be germane to its purpose in that, as a matter of evidence effecting Family Law attorneys, their clients, and the clients' counselors, the subject matter was directly within the special knowledge, training, experience and technical expertise of the family law section. Said germaneness applies to the revisions being considered at this time as well.

Notwithstanding the revisions to Evidence Code §912 as advanced by SB 2061, further clarification is required at this time of the subject waiver protection given cases which have addressed the issue of waiver, the inadvertence of same, and the potential deleterious effect on the attorney-client or other relationships.

The further modification of Evidence Code §912 to include the intent language proposed at this time would take a necessary step to avoid results of such cases as that cited in the staff recommendation of June 23, 2004, specifically Jasmine Networks, Inc. v. Marvell Semiconductor, Inc. (2004) 117 Cal. App. 4th 794. In that case, the waiver of the attorney-client privilege became an issue upon clearly inadvertent disclosure of privileged communications when a speaker phone transaction was not ended properly, and the speaker phone remained on, resulting in privileged information being left on the voice mail of the officer of another corporation.

The intention to disclose confidential communications is an extraordinarily important consideration in family law and family law related matters. Family law involves not only communications between the attorney and client, but often representatives or agents of the client, and a variety of other dynamics within the context of the case through communications with the client and therapists or counselors involved, financial managers and personnel, appraisers, forensic experts, family members and the like. The potential for waiver of the attorney-client or other applicable privileges is substantial in the variety of communications which must necessarily occur in the context and the process of a family law action.

The requirement that any waiver of these very important privileges be intentional is an important step toward protecting the sanctity of these relationships. Moreover, in a family law context, clients are often in a position of necessary communications with third parties, and are further often in a position of being less sophisticated, more emotional, and less aware of the potential ramifications for comments or statements made which could arguably constitute a waiver or waivers of one privilege or another. Clients in family law matters are often not sophisticated business people, corporation officers, or other persons who may have some working knowledge of the law, the process or the impact of the potential waiver of these very important privileges. The intent factor will provide, to the extent possible, a further layer of protection for these clients.

Flexcom continues its previously enunciated position that modifications to the Evidence Code which strengthen the privileges which protect the relationship and communications between Family Law litigants and the attorneys and other professionals who are covered by Evidence Code §912 and otherwise should be promoted and advanced. Toward that end, Flexcom fully supports the additions of the "intent language" to Evidence Code §912 presently being considered.

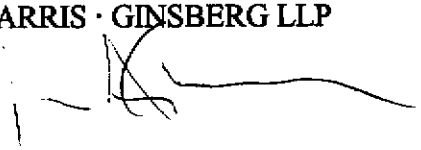
These comments are provided by the Executive Committee of the Family Law Section of the State Bar of California. This position is only that of the Family Law Section. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Family Law Section and its Executive Committee is voluntary and funding for the Section and Committee activities, including all legislative activities, is obtained entirely from voluntary sources.

Should the commission or other reviewing body desire any further input from the Family Law section of the State Bar, please do not hesitate to contact the undersigned.

Thank you.

Sincerely,

HARRIS · GINSBERG LLP



Larry A. Ginsberg

LG:ce
cc: Nancy Perkovich, Esq.
Greg Herring, Esq.
Larry Doyle, Esq.
Saul Bercovitch, Esq.

MORRISON & FOERSTER LLP

M E M O R A N D U M

TO: California Law Revision Commission

FROM: State Bar of California, Litigation Section, Administration of Justice Committee

DATE: August 16, 2004 FILE:

RE: California Law Review Commission's Proposal Regarding Waiver of Privilege by Disclosure

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Reference is made to the Commissions Draft Staff Recommendation entitled Waiver of Privilege by Disclosure, dated June 2004.

These comments are provided by the Administration of Justice Subcommittee of the Litigation Section of the State Bar of California. This position is only that of the Litigation Section and has been approved by the Executive Committee of the Section. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Litigation Section and its Administration of Justice Committee is voluntary and funding for the Section and Committee activities, including all legislative activities, is obtained entirely from voluntary sources. There are currently more than 8,500 California attorneys in the Litigation Section, who represent clients in court, before administrative bodies and in alternative dispute resolution procedures.

I. INTRODUCTION

Although inadvertent disclosure of confidential communications has long been an issue during document discovery in litigation, heightened concerns have arisen that new technologies such as email, fax, and voicemail make inadvertent disclosure more prevalent today. Examples of inadvertent disclosures include: a person accidentally directs a fax to the wrong recipient; a person forgets to hang up the phone after a phone-call, then has a conversation that is overheard or recorded on voicemail; and a person forwards an e-mail message, not realizing that a confidential communication is attached.

California courts have addressed in various circumstances whether such inadvertent disclosures waive any confidential communication privileges. In an effort to clarify the law, the California Law Review Commission (the “Commission”) has recommended a change in the law so that only an intentional disclosure of confidential communications would waive the privilege. This memorandum provides a high level overview of the Commission’s proposal and provides the Litigation Section and its Administration of Justice Committees’ position on each of the Commission’s recommendations.

In short, the Litigation Section opposes the adoption of a subjective intent standard due to problems of proof that are not addressed in the proposal. Further, it opposes the Commission's proposals regarding partial and selective disclosure as unnecessary. The Committee believes that these matters are better handled through case by case evaluation in the courts.

II. INADVERTANT DISCLOSURE

A. Current Status of the Law

California Evidence Code Section 912(a) states that a confidential communication 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."[1]

The statutory language does not address whether inadvertent disclosure of a privileged communication constitutes a waiver of the privilege. There is no California Supreme Court decision squarely resolving the issue of inadvertent disclosure of a communication protected by one of the confidential communication privileges.

Numerous Courts of Appeal decisions have addressed the issue. Under these decisions, it appears settled in California that inadvertent disclosure by counsel does not waive the attorney-client privilege. For example, in *O'Mary v. Mitsubishi Electronics America, Inc.*, the court stated that "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 though voluminous files and records in preparation for a document production may have missed something." 59 Cal. App. 4th 563, 577 (1997). *See also State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 654 (1999) ("[W]aiver does not include accidental, inadvertent disclosure of privileged information by the attorney."). Federal courts, applying California law, have reached the same conclusion. *KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 919 (9th Cir. 1987) (concluding that under California or Hawaii law, counsel's inadvertent disclosure of documents did not waive the attorney client privilege); *FDIC v. Fidelity & Deposit Co.*, 196 F.R.D. 375, 380 (S.D. Cal. 2000) (holding that California law required that documents remain privileged, notwithstanding their inadvertent disclosure during discovery).

Courts have stated that the reason inadvertent disclosure does not waive the privilege is the lack of subjective intent by the privilege holder. Evidence code section 912 states that the privilege is waived where the holder discloses a significant portion of the communication or has consented to disclosure made by anyone. CAL. EVID. CODE § 912(a). In order to determine

[1] Section 912 applies to the following privileges: the lawyer-client privilege, the marital communications privilege, the physician-patient privilege, the psychotherapist-patient privilege, the clergy-penitent privilege, the sexual assault victim-counselor privilege, and the domestic violence victim-counselor privilege.

whether the holder consented to the disclosure, courts look to the subjective intent of the holder of the privilege and the relevant surrounding circumstance for any manifestation of the holder's consent to disclose the information. *State Comp. Ins. Fund*, 70 Cal. App. 4th at 652-53. That is, waiver of the attorney-client privilege depends entirely on whether the client, the privilege holder, knowingly and voluntarily consented to the disclosure. *FDIC*, 196 F.R.D. at 380. An attorney's inadvertent disclosure does not waive the attorney-client privilege, because, by definition, the holder/client does not provide knowing and voluntary consent.

However, one recent court of appeal decision, which addressed the issue directly, departed from this precedent. It found that inadvertent disclosure by the privilege holder may waive the privilege. *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*, 117 Cal. App. 4th 794, 803 (2004) ("[I]ntent to disclose is not required in order for the holder to waive the privilege through uncoerced disclosure."). The court justified this distinction by focusing on the first half of the statute. Section 912(a) provides that waiver of the privilege may occur either by disclosure or by the holder's consent. According to the court, waiver by disclosure does not require intent, so long as it is not coerced, even though waiver by consent does require some intent on the part of the holder of the privilege. The California Supreme Court has since granted review in the case.

B. The Commission's Proposal

The Commission proposes to codify the subjective intent approach with regard to all inadvertent disclosures, whether by the privilege holder or by someone else. Section 912(a) would be amended to provide that, subject to certain statutory exceptions, the right of any person to claim a confidential communication 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." Draft Recommendations, p. 41. The provision would further state that 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." *Id.*

The Commission proposes three additional changes to support the codification of the subjective intent approach to inadvertent disclosures. The proposed changes relate to deposition by written question, partial disclosure, and selective disclosure. The latter two are dealt with below.

The Commission's analysis suggests that three options exist to determine when an inadvertent disclosure constitutes waiver: (1) strict liability, (2) a multi-factor balancing test, and (3) subjective intent. There is no nationwide consensus on which test is most appropriate. The law in California appears to have favored some form of subjective intent test until *Jasmine Networks*.

The Commission claims that its amendment, explicitly adopting the subjective intent approach, has a number of advantages and would remedy the current confusion. First, it believes

that it provides a clear standard that is easily administered without requiring court adjudication. Second, the standard avoids drawing a distinction between a disclosure by a privilege holder and a disclosure by someone else. Thus, the privilege holder is not penalized for another person's lack of vigilance in protecting the confidentiality of privileged material. Third, the Commission believes that the subjective intent approach is most consistent with the statutory scheme governing confidential communication, as subjective intent is determinative in assessing whether a communication is initially considered privileged or unprivileged.

C. The Committee's Opposition

The Litigation Section opposes the proposal. This opposition is not founded on a desire to adopt a different standard from the cases predating *Jasmine Networks*. Nor does the Committee believe that *Jasmine Networks* is necessarily rightly decided. However, the Commission's proposal may not restore the *status quo*, may unsettle existing patterns of practice, and may encourage litigants to play games. Many of these concerns arise from the lack of clarity on who must prove a subjective intent to disclose and how that intent could or would be proven.

Proving subjective intent to act is notoriously difficult. No one can observe it. Rarely do documents record it. Moreover, the party with the most knowledge regarding the question -- the holder of the privilege -- has every incentive to deny it. The proponent of disclosure has nearly no means of determining what his opponent intended and very few means in discovery to amass evidence regarding it. Thus, if the party seeking disclosure must bear the burden of proving subjective intent, it may be impossible.

In contrast, current practice follows the following more typical pattern: A party who has inadvertently disclosed requests the return of documents. If the parties disagree, the party seeking return of the materials produces evidence of an inadvertent disclosure. The proponent of disclosure thereafter has the opportunity to introduce evidence, if any, to rebut the holder's claims of inadvertence. If the privilege holder demonstrates lack of intent to disclose, the documents are generally returned. Thus, in practice, proof of "inadvertence" by the holder is not equivalent to proof by the party seeking disclosure of his opponent's subjective intent to disclose. Adoption of a "subjective intent" standard will in practice result in potentially quite different outcomes than the rule prior to *Jasmine Networks*. In general, this avoids the need for depositions of the attorneys involved and/or a client in order to establish what the parties subjective intent was. While unusually, members of the Executive Committee and the Administration of Justice Committee had seen people to resort to this in the effort to attack a party's claim. In general, this is undesirable and risks harassment of the party who seeks to preserve the privilege.

If, as we suggest, the Commission's proposal raises the bar to prove that a disclosure constitutes a waiver, an opening could arise for unscrupulous "game playing." A party could "leak" or otherwise permit disclosure of privileged documents that he believes may favor them but claim that it was not the client's subjective intent to disclose. Similarly, a privileged document that a party believes may be useful to them may be included in a production and, if it later becomes clear that the document is not helpful (or not as helpful as originally hoped), the

party may claim that there is no evidence of subjective intent to disclose. Without effective means of discovering the answer to this question, it is not clear that the party advocating a waiver could meet his burden. Clearly, these circumstances would be unusual and generally, the harm resulting from disclosure will be enough to prevent such behavior, but this is not assured. The Committee also recognizes that this hypothetical assumes the worst on behalf of some of our colleagues. Nonetheless, it is these rare circumstances that are most likely to result in the greatest unfairness.

Separately, the Commission's proposal deletes the existing language "consent to disclosure" and replaces it with "intent to permit disclosure." Even if the Commission believes it appropriate to recommend explicit adoption of a subjective intent standard, it is likely unwise and unnecessary to change this language. Cases prior to *Jasmine Networks* have interpreted "consent" in a manner that approaches (and may be equivalent to) subjective intent. However, if this language is revised, it will be unclear whether and to what degree these decisions still apply. There is no reason to unsettle the law in this area, which action would only increase the amount of litigation and the need for the Courts of Appeal to address the issue.

Finally, the California Supreme Court has granted review in *Jasmine Networks.* The end result of the Court's review is not know and should not be predicted. However, whatever the result, it is likely to generate changes to the legal landscape that should be incorporated into any legislative proposal. Accordingly, the Committee suggests that any proposal is premature prior to a decision from the California Supreme Court.

If the Commission chooses to proceed with a proposal regardless of these concerns, the Litigation Section would commit to provide assistance to the Commission in an effort to craft a proposal or procedure that might avoid some of the problems presented in this section. The Executive Committee and the Administration of Justice Committee is aware of local rules and federal rules that may provide suitable alternatives. However, all of the foregoing is likely to be brought into greater focus after a decision by the California Supreme Court.

III. PARTIAL DISCLOSURE

The Commission proposes new legislation to adopt a specific statutory standard for when partial disclosure of a privilege communication compels the production of additional parts of the communication or other communications.

A. The Commission's Recommendation

The Commission recommends adding a new subdivision stating that "[i]f the holder of a privilege makes or consents to disclosure of a significant part of a confidential communication under the circumstances specified in subdivision (a), the court may order disclosure of another part of the communication or a related communication, but only to the extent necessary to prevent unfairness from partial disclosure."

This proposal is meant to codify the existing case law that established that partial disclosure may confer an unfair tactical advantage, as when a privilege holder discloses favorable portions of a privileged document, but withholds unfavorable portions. In such situations, courts may require additional disclosure in the interest of fairness, even though the holder did not intend to permit such additional disclosure. *See People v. Worthington*, 38 Cal. App. 3d 359 (1974); *Kerns Constr. Co. v. Super. Ct.*, 266 Cal. App. 2d 405 (1968).

B. The Committee's Opposition

Codification of the courts inherent power to force additional production based on a partial waiver is unnecessary. Courts have this inherent power today. The Commission argues that codifying the existing rule may help prevent confusion in determining whether a privilege has been waived and could forestall numerous disputes, saving both litigant and judicial resources. The Commission's argument is unpersuasive, however, because it is unclear that such confusion exists. If there is serious confusion as to whether courts possessed the power to order the production of the undisclosed portions or additional documents, then legislation may be appropriate. But, where, as here, it is clear that the courts retain the discretion to act as fairness demands, the new legislation is superfluous.

Moreover, the manner and degree to which partial disclosure should result in the production of additional privileged material is a uniquely fact-specific enterprise. Each case or set of similar circumstances must be determined on its own merits. Courts are an adequate venue to determine what standards should apply and what results should be reached in the individual case. Those factors may or may not be properly encompassed by the use of the words "to prevent unfairness" as proposed by the Commission. Nor is it clear that this formulation is equivalent to the "in the interest of fairness" language adopted by *People v. Washington*. The courts both have more experience and expertise than the legislature with this specific issue and thus are better able to weigh and resolve competing interests. For both of these reasons, the Administration of Justice Committee opposes the recommendation of the Commission and recommends that no proposal be made.

IV. SELECTIVE DISCLOSURE

The Commission has also made a proposal to codify a provision that make disclosure to one party equivalent to a disclosure as to all parties, effectively eliminating the possibility for a "selective disclosure."

A. The Commission's Proposal

"Selective" disclosure refers to the circumstances in which the holder discloses a privilege communication in one context while he seeks to preclude disclosure in another context. California law is unsettled as to whether selective disclosure constitutes a waiver of the applicable privilege. *Compare San Diego Trolley, Inc. v. Super. Ct.*, 87 Cal. App. 4th 1083, 1093 (2001) (refusing to waive the privilege in a personal injury case where the plaintiff had disclosed confidential psychotherapist-patient communications in a prior worker's compensation

action) *with Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 668 (9th Cir. 2003) (interpreting California law and waiving the marital communications privilege at trial where the litigant voluntarily disclosed confidential marital communications at a deposition) *and McKesson HBOC, Inc. v. Super. Ct.*, 115 Cal. App. 4th 1229, 1240-41 (2004) (declining to adopt the selective waiver theory, holding that a litigant waived the privilege by disclosing the confidential communication to the government in a prior proceeding).

The Commission suggests that a new general rule be established. If a privilege holder voluntarily and intentionally makes or authorizes a disclosure of privileged information to one person, the holder could not continue to assert the privilege as to other persons. Likewise, the new provision would make clear that if a privilege holder voluntarily and intentionally makes or authorizes a disclosure on one occasion (e.g., at a deposition), the holder could not continue to assert the privilege on another occasion (e.g., at trial). The general rule would, however, be overridden by any statute authorizing selective disclosure, without waiver of the applicable privilege, in a specific context.

The Commission claims that its proposal strikes the right balance between protecting the confidential relationships and encouraging access to information at trial by ensuring that selective disclosure is permitted only in contexts where the legislature has weighed the competing policy considerations. New legislation and a renewed focus on corporate internal investigations, however, have, at least in the corporate world, changed the climate in which the selective disclosure doctrine operates. Since the collapse of Enron, WorldCom, and Global Crossing, and the enactment of new corporate laws like Sarbanes-Oxley, corporate counsel is regularly being asked to conduct internal investigations. Frequently, parts or all of the investigation involves privileged communications. Thereafter, government agencies have recently required as a condition of cooperation that defendants waive the privilege and produce internal investigations. These agencies possess wide discretion in deciding what charges to bring, putting coercive pressure on defendants to waive the privilege in order to gain favorable treatment. Such circumstances arise when two parties (e.g. the corporation and an executive) may also seek to assert the privilege but each party has very different interests. Corporate governance disputes are not the only circumstance in which this issue is arising. In certain class actions, regulator action or other mass settlements, litigants, government regulators, or courts have placed pressure on parties to waive the privilege in connection with a settlement in order obtain agreement or the court's approval. Further, criminal defense attorneys have reported efforts by prosecutors to force a plea bargaining defendant to waive the privilege in connection with their search for evidence on a co-conspirator or co-defendant. Many of these issues have not faced court challenge. None have been reviewed by the California Supreme Court.

B. The Committee's Opposition.

Given such a volatile climate, the Litigation Section believes that legislative action is inappropriate. It is more appropriate for the courts to weigh the competing interests on a case-by-case basis. Serious policy concerns are at stake -- both within the evidence code and code of civil procedure and in each substantive area that is affected. There may or may not be a justification for selective disclosure in each or any of these instances. However, each deserves

careful consideration in the context of a specific case or controversy that crystallizes the issues that are at stake. The current split of opinion may be a natural part of the process to reach a consensus or to carve out limited circumstances in which selective disclosure may be allowed. Courts have had difficult reaching a *per se* rule. This difficulty in reaching a *per se* rule has caused some courts to adopt an explicit case-by-case approach. Deference to these judgments by the legislature is warranted at this time. Which approach is most appropriate is better left to the courts, especially given the almost coercive pressure placed on many defendants to waive the privilege.

We do not believe that the inability of the courts to reach a *per se* rule in this area reflects any institutional judicial failing that requires a legislative remedy. Determining when the privilege has been waived is a purely evidentiary matter. Courts are well equipped to obtain all the necessary facts and to weigh and balance the competing policy concerns presented by evidentiary questions. In fact, one could argue that the courts are uniquely qualified to do just that.

In sum, legislative action is inappropriate at this time. This is an evolving area of the law, in which numerous competing legal and policy concerns are at stake. The issue does not appear to be ripe for legislation. Nor does it appear that legislative intervention is necessary. Rather, the courts appear capable of weighing the competing concerns on a case-by-case basis. Perhaps legislation will be appropriate some time in the future, after the courts have had more time to clearly define the issues involved.

V. CONCLUSION

For the foregoing reasons, the Administration of Justice Committee of the Litigation Section of the California State Bar respectfully requests that the Commission table or amend its draft recommendations for changes to California Evidence Code 912.

Respectfully Submitted:

/s/ Erik J. Olson

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COMMENTS OF PROF. SLOMANSON

From: slomansonb@att.net
To: Nathaniel Sterling <sterling@clrc.ca.gov>
Subject: EVIDENCE PRIVILEGE DISCLOSURE WAIVER
Date: Tue, 27 Jul 2004

Hi, Nat:

This is CLRC's "Man in Kosovo," writing as I recall doing last year on some draft for which you sought input. This time, it's re the staff draft on Waiver of Privilege by Disclosure (June 2004).

Intentional disclosure to one person on one occasion (Sec. 912) is ok, but I'm not completely convinced of the rationale for unrelated litigation. It's great to have a brightline rule, and for that reason I suspect that it will pass muster with the Legislature. I am delighted to see the Jasmine case included in your analysis. Although it could have rested on crime-fraud grounds, as your draft points out, it's not hard to predict that future courts may read it to explore new and unintended legislative interstices.

My only real comment about this draft, which unfortunately may not be very helpful in looking for draft gaps, is that I wish that Law Review writing were (speaking of evidence) this "clear & convincing." Beautifully done IMHO.

Regards,

Bill