Study K-301 November 10, 2004

# First Supplement to Memorandum 2004-54

## Waiver of Privilege By Disclosure: Comments of Prof. Méndez

The Commission received comments from Prof. Miguel Méndez of Stanford Law School regarding Memorandum 2004-54. These are attached as Exhibit pages 1-2. Prof. Méndez raises three issues: (1) the required mental state of the holder of a privilege regarding disclosure of a confidential communication to a person outside the privileged relationship, (2) the holder's awareness of the privileged nature of the communication and legal consequences of disclosure, and (3) the staff's suggested presumption that an uncoerced disclosure of a communication protected by a privilege listed in Evidence Code Section 912 was intentionally made or intentionally permitted by the holder of the privilege.

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

### HOLDER'S MENTAL STATE REGARDING DISCLOSURE

The Commission is proposing to amend Section 912(a) as follows:

> 912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by [Section 954, 980, 994, 1014, 1033, 1034, 1035.8, or 1037.5] 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.

The proposed Comment explains that this amendment would "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."

The proposed Comment also says that the amendment "codifies the majority view in case law applying the provision to an inadvertent disclosure."

Prof. Méndez writes that if the Commission's goal "is to exempt only inadvertent disclosures from the waiver doctrine, then your amendment does more." Exhibit p. 1. Specifically, he says that the proposed amendment would "also exemp[t] negligent disclosures and perhaps also knowing and reckless disclosures." *Id*.

He describes four different mental states regarding disclosure:

(1) **Purpose.** The holder of the privilege desires to disclose the communication.
(2) **Knowledge.** The holder is aware that disclosure will occur.
(3) **Recklessness.** The holder is aware that disclosure might occur.
(4) **Negligence.** The holder did not know but should have known that disclosure would occur.

*Id*. He is "concerned that the use of 'intentionally' might be construed as applying only to the first situation, where the privilege holder's goal is to disclose the privileged communication." *Id.* He suggests that if the Commission intends the term "intentionally" to encompass knowing disclosures and reckless disclosures, then it should choose a different term. *Id*.

In response to comments by Prof. David Leonard of Loyola Law School, the Commission previously considered whether waiver should occur only when the holder of the privilege desires to disclose the communication, or also when the holder is aware that disclosure is substantially certain to occur but does not necessarily desire that result. See Memorandum 2002-5, pp. 20-22 (available at www.clrc.ca.gov); Memorandum 2002-31, pp. 7-8 (available at www.clrc.ca.gov). The staff suggested adding the following language to the proposed Comment to make clear that waiver occurs in both situations:

> A disclosure is intentional where (1) the holder of a privilege desires to disclose privileged material to a third person and does so, or (2) the holder chooses to use a means of communication knowing that is substantially certain to result in disclosure to a third person, regardless of whether the holder desires that result.

See Memorandum 2002-5, p. 21. The Commission decided, however, that it was better to leave this point to development in case law, instead of addressing it by statute. See Memorandum 2002-31, p. 8; Minutes (July 11-12, 2002), pp. 23-24 (available at www.clrc.ca.gov). Throughout this study (most recently at the

September meeting), the Commission has repeatedly rejected the position that a reckless disclosure of a privileged communication should constitute a waiver the privilege under Section 912.

Does the Commission wish to revisit any of its decisions on these points, or stick with the proposal's present treatment of the holder's mental state regarding disclosure?

HOLDER'S AWARENESS OF THE PRIVILEGED NATURE OF THE COMMUNICATION

A separate issue is whether the holder must be aware of the legal consequences of disclosing a communication protected by a Section 912 privilege for waiver to occur. At page 24, the draft attached to Memorandum 2004-54 addresses this point:

> Significantly, the proposed standard would focus on intent to disclose the privileged communication to a third person, not intent to waive the applicable privilege. The holder of the privilege need not have been aware of the legal consequences of disclosure, so long as the disclosure was intentional.
>
> That is consistent with the history of Section 912, as enacted on recommendation of the Law Revision Commission in 1965. When the Commission prepared the Evidence Code, it used the Uniform Rules of Evidence as a starting point. In drafting Section 912, however, the Commission deliberately deleted the Uniform Rules' requirement that the holder of a privilege make a disclosure "with knowledge of his privilege." The proposed amendment of Section 912 would continue that approach.

(Footnotes omitted.)

Prof. Méndez says it is clear that the Commission "intend[s] the waiver doctrine to apply even if the privilege holder is not aware of the privileged nature of the communication." Exhibit p. 2. He thinks this is "the right outcome," but he suggests making the point in the proposed Comment. *Id*.

Again, the Commission previously considered this possibility. The staff suggested adding the following language to the proposed Comment:

> The determinative issue is whether the holder of the privilege intended to disclose the communication to a third person, not whether the holder intended to waive the privilege. The holder need not have been aware of the legal consequences of disclosure, so long as the disclosure was intentional. *Tentative Recommendation Relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964).

Memorandum 2002-5, pp. 19-20. The Commission concluded that such language is unnecessary, because it is clear from the text of the proposed amendment of Section 912 that the focus is on intent to disclose, not intent to waive the applicable privilege. See Memorandum 2002-31, p. 7; Minutes (July 11-12, 2002), pp. 23-24.

Does the Commission wish to revisit this decision, or stick with the proposal's present treatment of this point?

PRESUMPTION THAT AN UNCOERCED DISCLOSURE WAS INTENTIONAL

At page 4 of Memorandum 2004-54, the staff suggests the possibility of adding language establishing a rebuttable presumption at the end of Section 912(a), along the following lines:

> An uncoerced disclosure of a communication protected by a privilege listed in this subdivision is presumed to have been intentionally made or intentionally permitted by the holder of the privilege. This is a rebuttable presumption affecting the burden of proof.

Prof. Méndez comments that "using rebuttable presumptions is a good idea with respect to proof and disproof of the required mental state." Exhibit p. 2.

He thinks, however, "that it is a mistake to state that the presumption is one 'affecting the burden of proof.'" *Id*. He explains:

> I know that this is the Code's way of referring to the persuasion burden and not the production burden. But as I point out in my paper on presumptions, the term "burden of proof" is understood in the law of evidence to include both burdens. That is why I suggest in that paper that the Code be amended to state "burden of persuasion" in those places where that is intended by the use of the misleading term "burden of proof."

*Id*.

The paper to which Prof. Méndez refers is an article he prepared for the Commission's study on conforming the Evidence Code to the Federal Rules of Evidence: Méndez, *California Evidence Code — Federal Rules of Evidence, IV. Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. Rev. 139 (2003). The Commission has not yet begun to consider the issues raised in that article, including Prof. Méndez's recommendation that

> the Code's current use of the term "burden of proof" to refer only to the burden of persuasion should be discontinued since it causes uncertainty in terminology. Rather, the Code should employ the term "burden of persuasion" whenever the reference is to this burden.

*Id*. at 162.

Ultimately, the Commission may agree with that recommendation and the Legislature may revise the Evidence Code to consistently use the term "burden of persuasion" rather than "burden of proof." Until that occurs, however, the Commission should select the term that is currently defined and used in the Evidence Code. Thus, if the Commission decides to include the suggested presumption in its proposed amendment of Section 912, it should refer to the presumption as one "affecting the burden of proof."

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

# EMAIL FROM PROF. MENDEZ

October 20, 2004

To: Barbara Gaal
From: Miguel A. Méndez
Re: Waiver of Privileges

Barbara, I finally had an opportunity to look at your proposed memo on waiver of privileges. You recommend an amendment to Section 912 so that only intentional disclosures result in a waiver of the privilege. Your proposed amendment, I think, is designed to exempt inadvertent disclosures from the waiver doctrine.

I want to raise three issues—the mental state required for disclosure, the waiver elements to which the mental state attaches, and the presumption designed to facilitate resolution of waiver disputes.

With regard to the first issue, if your goal is to exempt only inadvertent disclosures from the waiver doctrine, then your amendment does more. It also exempts negligent disclosures and perhaps also knowing and reckless disclosures.

Let me illustrate these points by defining the universe of mental states that are pertinent to your amendment. These are purpose, knowledge, recklessness, and negligence. If the disclosure is prompted by the holder's desire or goal to disclose a privileged communication, the holder's mental state is purpose. If at the time the holder is disclosing the communication she is aware that she is disclosing a privileged communication, the holder's mental state is knowledge. If at the time the holder is disclosing the communication she is simply aware that she might be disclosing a privileged communication, the holder's mental state is recklessness. If at the time the holder is disclosing the communication she did not know but should have known that she was disclosing a privileged communication, the holder's mental state is negligence. I've taken these mental states from the Model Penal Code which is the work that best describes and defines mental states. See MPC Section 2.02.

I am concerned that the use of "intentionally" might be construed as applying only to the first situation, where the privilege holder's goal is to disclose the privileged communication. Although California has not adopted the Model Penal Code, many states have adopted at least portions. Under MPC Section 1.13 (12), intentionally or with intent means purposely. I think that under your proposed amendment you intend "intentionally" to apply also to knowing and reckless disclosures. If that is so, then you should use a term other than intentionally. Moreover, if you intend the waiver doctrine to apply to negligent disclosures, then you must also use some other term. I think that you want to exempt from the waiver doctrine only inadvertent disclosures that do not involve fault.

If that is the case, then I would rewrite the amendment as follows: "* * * the right of any person to claim a privilege provided by Section 954 * * * is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, discloses or consents to disclosure by anyone of a significant part of a communication which the holder knows or should know is a privileged communication."

If you intend to exempt negligent communications from the waiver provision, then you should strike "should know".

With regard to the second issue, it is clear that you intend the waiver doctrine to apply even if the privilege holder is not aware of the privileged nature of the communication. For example, if the holder is aware that she is disclosing what she told her lawyer in private, then that should be enough to waive the privilege even if she is unaware that the communication is privileged under the Evidence Code. In other words, the mental state required for waiving the privilege does not include proof that the holder was aware the communication was privileged. I think that this is the right outcome, but to avoid cluttering your amendment, I think that you should make this point in the comment.

With regard to the third issue, I think that using rebuttable presumptions is a good idea with respect to proof and disproof of the required mental state. Under your formulation, it will be presumed that the holder knew [or should have known] that she was disclosing a privileged communication unless the holder persuades the court by a preponderance of the evidence that she did not possess the necessary mental state. However, I think that it is a mistake to state that the presumption is one "affecting the burden of proof." I know that this is the Code's way of referring to the persuasion burden and not the production burden. But as I point out in my paper on presumptions, the term "burden of proof" is understood in the law of evidence to include both burdens. That is why I suggest in that paper that the Code be amended to state "burden of persuasion" in those places where that is intended by the use of the misleading term "burden of proof."

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