Study K-301 November 15, 2004

Second Supplement to Memorandum 2004-54

Waiver of Privilege By Disclosure: Comments of State Bar Litigation Section

Attached as Exhibit pages 1-6 are comments of the State Bar Litigation Section regarding the burden of proof issue raised in Memorandum 2004-54 (available at www.clrc.ca.gov). Before addressing the points raised in these comments, we briefly recapitulate the previously expressed position of the Litigation Section.

PREVIOUS COMMENTS OF THE LITIGATION SECTION

In response to the draft recommendation circulated for comment last summer, the Litigation Section wrote that it opposed the proposed amendment of Evidence Code Section 912(a). Memorandum 2004-43, Exhibit pp. 26-27 (available at www.clrc.ca.gov). Its opposition was not based on objections to the subjective intent approach to waiver that is currently used by courts interpreting the provision. *Id*. at 26. Rather, the Litigation Section warned that the Commission's proposed codification of the subjective intent approach might unsettle the law in the area and lead to gamesmanship. *Id*. at 26-27. The group explained that many of its concerns arose "from the lack of clarity on who must prove a subjective intent to disclose and how that intent could or would be proven." *Id*. at 26. In particular, the group cautioned that "proving subjective intent is notoriously difficult." *Id*. The Litigation Section also urged the Commission to wait until the California Supreme Court decides *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.* (No. 124914) and *Rico v. Mitsubishi Motors Corp.* (No. S123808) before deciding whether to proceed with its legislative proposal.

In addition, the Litigation Section opposed two other aspects of the draft recommendation circulated last summer: (1) the proposal regarding the effect of partial disclosure of a privileged communication and (2) the proposal regarding the effect of selective disclosure of a privileged communication. Memorandum 2004-43, Exhibit pp. 27-30. As directed by the Commission at the September meeting, the current draft (attached to Memorandum 2004-54) incorporates the former proposal but not the latter.

The Litigation Section continues to oppose the Commission's proposed codification of the subjective intent approach, but does not reiterate its reasons for that position. Exhibit p. 4. The group also continues to believe that the Commission and the Legislature should "defer consideration of these changes until the public knows whether the California Supreme Court will be dealing with the issue on its own." *Id.* According to Litigation Section, "[a]lthough the current posture of *Jasmine* does not guarantee a decision on the issues under consideration, it certainly suggests that a decision that may significantly affect the relevant calculus is possible and perhaps likely." *Id*.

As encouraged in Memorandum 2004-54, the Litigation Section considered the staff's suggestion of adding a rebuttable presumption to Section 912(a) that an uncoerced disclosure of a communication protected by one of the specified privileges is presumed to have been intentionally made or intentionally permitted by the holder of the privilege. The Litigation Section "strongly opposes" that proposal. *Id.* at 6. The group "believes that this proposal is: (1) not consistent with the fundamental intent of the amendments; (2) does not provide adequate protection for the privilege as a matter of policy; and (3) was neither intended nor warranted by [its] prior comments." *Id*. at 4.

Intent of the Proposed Legislation

The Litigation Section says that "adoption of a presumption affecting the burden of proof would fundamentally change the circumstances in which a waiver is found and would substantially increase the occasions on which the privilege is deemed waived in comparison to present practice." *Id.* In the group's opinion, "this result is inconsistent with the rationale of the proposed legislation more generally — which is, to adopt the current prevailing rule and to limit the circumstances under which an inadvertent disclosure results in the waiver of the privilege." *Id.*

The Litigation Section explains that if the presumption were incorporated in Section 912

> the mere fact of a prior disclosure (whether through inadvertence, negligence or neglect) would "stack the deck" against the privilege holder. The party claiming a waiver would have no obligation to show anything more than the prior disclosure to prevail. As a result, the entire brunt of alleviating the harm that may be caused by an inadvertent disclosure would fall upon the privilege holder.

> He alone would need to produce evidence sufficient to rebut the new presumption by demonstrating that the disclosure was unintentional. This proposal makes it substantially more likely that a mistaken or negligent disclosure will result in a waiver.

Id. at 5.

Protection of the Policies Underlying the Attorney-Client Privilege

The Litigation Section further comments that "the policies protected by the attorney-client privilege deserve greater protection than would be provided in the case of the proposed presumption." *Id*. According to the group,

> Mere negligence or even neglect should not be the basis for discarding the privilege. The proposed presumption however creates a substantial likelihood that negligence would lead to such a result. If the Commission were to adopt the proposal with the presumption, it would be taking "one step forward and two steps back" — limiting waiver to a finding of intentional disclosure but substantially broadening the circumstances in which an intentional disclosure will be found.

Id. The Litigation Section also views the suggested presumption as "out of step with a substantial current in modern legal practice, which holds that professional courtesy and perhaps professional ethics demand that attorneys voluntarily safeguard the protections provided by privileges, even for those who are not their clients." *Id*.

Prior Comments of the Litigation Section

Finally, the Litigation Section recognizes that the suggested presumption "may have been motivated in part by ... its prior comments about the difficulty of proving subjective intent and the practicalities of proof that arise in the case of motions advocating a waiver." *Id*. The group makes clear that adopting the suggested presumption would have a negative rather than positive impact on its view of the Commission's proposal. *Id*. at 5-6. According to the group, the presumption "would dramatically shift the 'balance of power' in connection with informal negotiations among counsel and would likely undermine, rather than encourage, the resolution of disputes over alleged waivers without the intervention of the courts." *Id*. at 6. The group further asserts that "[i]n a different degree and in a different direction, the proposed presumption may itself encourage more 'game playing' of the type referred to in" its previous comments. *Id*.

ANALYSIS

As explained in Memorandum 2004-54, Evidence Code Section 665 already establishes a rebuttable presumption that a person "is presumed to intend the ordinary consequences of his voluntary act." Like the new presumption suggested in that memorandum, this presumption affects the burden of proof. See Evid. Code § 660.

Applying the presumption of Section 665 in the context of voluntary disclosure of a privileged communication, a person who makes such a voluntary disclosure would be presumed to have done so intentionally. Thus, at least with regard to a disclosure by the holder of a privilege, the suggested new presumption would simply amount to restatement of the existing presumption in the specific context of voluntary disclosure of a privileged communication. The party opposing use of the privileged communication could overcome the presumption by presenting evidence tending to show that the disclosure was unintentional. That could be as simple as credibly attesting that the disclosure was accidental, or pointing out that the content of the communication was so damaging or embarrassing that it is unfathomable that the holder would have disclosed it intentionally.

While this may be true as a technical matter, incorporating a presumption of intentional disclosure into Section 912 might be *perceived* as a significant change in the law, easing the burden of establishing that a disclosure was intentional. The Litigation Section might thus be correct in predicting that the presumption would "shift the balance" and make it "substantially more likely that a mistaken or negligent disclosure will result in a waiver." Consequently, the proposed new presumption might have an unintended and serious negative effect, yet it would not help make the Commission's proposal more palatable to the Litigation Section. We would therefore **drop the idea of a presumption and stick with the amendment of Section 912(a) that is shown at pages 39-40 of the draft attached to Memorandum 2004-54.**

Respectfully submitted,

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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 Commission's Draft Staff Recommendation entitled Waiver of Privilege by Disclosure, dated October 14, 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 members 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 a concern during document discovery in litigation, new technologies may make inadvertent disclosure more prevalent in every day contexts. Common situations in which the problem may arise 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; a person forwards an e-mail message, not realizing that a confidential communication is attached; or an employee sends an e-mail that is monitored by his or her employer.

California courts have addressed in various circumstances whether such inadvertent disclosures waive any privileges. In an effort to clarify the law, the California Law Review Commission (the "Commission") has provided a written recommendation to change 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 second draft proposal and provides the Administration of Justice Committee's position on new elements of the Commissions' recommendations.

The Administration of Justice Committee of the Litigation Section of the State Bar continues to opposes the adoption of a subjective intent standard. Whether or not the Committee adopts that proposal, the Committee opposes the adoption of a presumption as a means of assisting in the resolution of disputes over inadvertent production.

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 make obvious 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. The Supreme Court has granted review in *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*, 117 Cal. App. 4th 794, 803 (2004), which may resolve the issue.

Numerous Court of Appeals decisions have addressed the issue. These decisions predominantly hold 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). In general, these decisions 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 when determining whether the privilege is waived. *State Comp. Ins. Fund*, 70 Cal.

[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.

App. 4th at 652-53. Thus, an attorney's inadvertent disclosure generally does not waive the attorney-client privilege, because, by definition, the holder/client does not provide knowing and voluntary consent.

One recent Court of Appeal decision, which addressed the issue directly, departed from this prior precedent. It found that inadvertent disclosure by the *privilege holder* may indeed 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 language of the statute. Section 912(a) provides that waiver of the privilege may occur either by disclosure 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 granted review in the case.

B. The Commission's Revised Proposal

The Committee commented on the Commissions first proposal in June 2004. Subsequently, the Commissions' staff issued a new draft proposal. The Commission continues to advocate the addition of language to make clear that the privilege holder must subjectively intend to disclose a communication in order for a waiver to occur. Accordingly to the proposal, 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." Second Draft Recommendations, p. 41. The new statute 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 continues to propose the addition of a section providing courts with authority to order a further waiver of additional documents following a partial waiver. In a change from the initial staff recommendation, the Commission has determined that addressing the issue of "selective waiver" is premature.

Finally, the Commission has proposed new language addressing proof that a waiver has occurred. Specifically, the Commission proposes that evidence of an uncoerced disclosure would result in a rebuttable presumption affecting the burden of proof that would support a finding that a waiver has occurred. Thus, the new draft recommendations add the following proposed language: "An uncoerced disclosure of a communications 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."

C. The Committee's Opposition

The Administration of Justice Committee continues to oppose the Commission's proposal on the addition of the word "intentionally" to the statute. The Committee's reasons were stated in its last response, and the Committee will not repeat its rationale in this memorandum.

The Committee continues to believe that consideration of changes to Evidence Code section 912 should be deferred until after the Supreme Court resolves *Jasmine Networks, Inc.* The Commission's current draft suggests that the grant of review in *Jasmine Networks, Inc. v. Marvel Semiconductor, Inc.*, 117 Cal. App.4th 794 (2004), does not favor deferring action until after the California Supreme Court renders a decision because the Supreme Court may not definitively resolve the issue. The Committee disagrees. While the Supreme Court has stayed its consideration of *Jasmine* while the Court decides *Rico v. Mitsubishi Motors Corp.*, 10 Cal. Rptr. 3d 601 (2004), the issues in the two cases are sufficiently similar that a decision in *Rico* may provide appropriate guidance in *Jasmine*. Moreover, the Supreme Court may still hear and resolve *Jasmine* after it decides *Rico*. Although the current posture of *Jasmine* does not guarantee a decision on the issues under consideration, it certainly suggests that a decision that may significantly affect the relevant calculus is possible and perhaps likely. It would be wise for the Commission and the legislature to defer consideration of these changes until the public knows whether the California Supreme Court will be dealing with the issue on its own.

At requested in the draft recommendation, the Committee has specifically considered the issue of applying a presumption affecting the burden of proof in connection with revisions to Evidence Code section 912. The Committee believes that this proposal is: (1) not consistent with the fundamental intent of the amendments; (2) does not provide adequate protection for the privilege as a matter of policy; and (3) was neither intended nor warranted by the Committee's prior comments.

The adoption of a presumption affecting the burden of proof would fundamentally change the circumstances in which a waiver is found and would substantially increase the occasions on which the privilege is deemed waived in comparison to present practice. In the Committee's opinion, this result is inconsistent with the rationale of the proposed legislation more generally -- which is, to adopt the current prevailing rule and to limit the circumstances under which an inadvertent disclosure results in the waiver of the privilege. The staff report ably demonstrates that the prevailing law in California is that inadvertent disclosure has generally not sufficed to constitute a waiver. While this proposition is not without some contrary authority, the Committee agrees that it is consistent with the current state of the law. Moreover, this position is consistent with California's policy of requiring that a party, who seeks to obtain a privilege document, bear the burden of proof on the issue. *See Oxy Resources LLC v. Superior Court*, 115 Cal. App. 4th 874, 894 (2004). This outcome is appropriately dictated by many years of deference to the protections provided by the attorney-client privilege.

The Commissions' original draft recommendation sought to codify the prevailing view (and arguably to strengthen it) by changing Evidence Code section 912 to explicitly require an

intentional disclosure. Both in practice and legally, the Committee understood that the proposal would reduce the circumstances in which a waiver is found to have occurred.

In contrast, the adoption of the presumption would, in practice, substantially increase the number of occasions in which an inadvertent disclosure of a privilege communication would result in a waiver of the privilege. It would also fundamentally shift the traditional allocation of the burden of proof to the proponent of a waiver. Under the new proposal, the mere fact of a prior disclosure (whether through inadvertence, negligence or neglect) would "stack the deck" against the privilege holder. The party claiming a waiver would have no obligation to show anything more than the prior disclosure to prevail. As a result, the entire brunt of alleviating the harm that may be caused by an inadvertent disclosure would fall upon the privilege holder. He alone would need to produce evidence sufficient to rebut the new presumption by demonstrating that the disclosure was unintentional. This proposal makes it substantially more likely that a mistaken or negligent disclosure will result in a waiver. The Committee believes that this result that is inconsistent with the original intent of draft legislation.

Moreover, the Committee believes that the policies protected by the attorney-client privilege deserve greater protection than would be provided in the case of the proposed presumption. The privilege has long been a fundamental precept of the common law and the California legal system. Over many years of history, the privilege has served to promote justice and compliance with the law. Mere negligence or even neglect should not be the basis for discarding the privilege. The proposed presumption however creates a substantial likelihood that negligence would lead to such a result. If the Commission were to adopt the proposal with the presumption, it would be taking "one step forward and two steps back" -- limiting waiver to a finding of intentional disclosure but substantially broadening the circumstances in which an intentional disclosure will be found.

The proposed presumption is also out of step with a substantial current in modern legal practice, which holds that professional courtesy and perhaps professional ethics demand that attorneys voluntarily safeguard the protections provided by privileges, even for those who are not their clients. Certainly, prevailing practice among most litigators calls for the return of privileged documents that are disclosed due to the mistake or even negligence of opposing counsel. In the Committee's experience, most attorneys honor this practice. The Court of Appeals in *Rico v. Mitsubishi Motors Corp.*, 10 Cal. Rptr. 3d 601 (2004), went further and found the use of an unintentionally disclosed document containing attorney work product to be inconsistent with a lawyer's ethical and professional obligations. The Supreme Court has granted review and may resolve the issue differently. Nonetheless, the case reflects a substantial legal tradition that forbids lawyers from taking advantage of an opponent's mistaken disclosure.

Finally, the Committee recognizes that the Commission's proposal may have been motivated in part by the Committee's statements in its prior comments about the difficulty of proving subjective intent and the practicalities of proof that arise in the case of motions advocating a waiver. The Committee's comments were motivated by a reluctance to disturb the status quo and were provided the Commission with insight into the practical context in which disputes over inadvertent production arise. The Committee believes that the adoption of a

presumption would undermine the patterns of practice that were previously described in its prior comments. A presumption would dramatically shift the "balance of power" in connection with informal negotiations among counsel and would likely undermine, rather than encourage, the resolution of disputes over alleged waivers without the intervention of the courts. In a different degree and in a different direction, the proposed presumption may itself encourage more "game playing" of the type referred to in the Committee's prior response. Thus, the Committee strongly opposes the proposal.

The Committee appreciates the Commission's consideration of its comments. The Committee is committed to working with the Commission in connection with its consideration of the issue despite its current opposition. The Committee will seek to send a representative to the next meeting of the Commission on November 19, 2004 in Burbank to elaborate on these issues.

III. 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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