

Memorandum 2005-16

AB 1133 (Harman): Waiver of Privilege By Disclosure

Assembly Bill 1133 (Harman) would implement the Commission's recommendation on *Waiver of Privilege By Disclosure*. The main purpose of the bill is to make clear that an unintentional disclosure of a privileged communication does not waive the privilege.

Many organizations support the bill, including the California Psychological Association, the California Mental Health Directors Association, the Attorney General, the Civil Justice Association of California, the California Association of Corporate Counsel, Marvell Semiconductor, the State Bar Committee on Administration of Justice, Personal Insurance Federation of California, the California Chamber of Commerce, the California Alliance Against Domestic Violence, and the AIDS Legal Referral Panel.

The Consumer Attorneys of California (CAOC) oppose the bill. CAOC contends that the bill is overly protective of privileged communications and that the Legislature should not act until the California Supreme Court decides *Rico v. Mitsubishi Motors Corp.* (No. S123808) and *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.* (No. S124914). The Commission considered these points in developing its recommendation, concluding that (1) intentional disclosure is the appropriate test for waiver of a privilege specified in Evidence Code Section 912, and (2) the Legislature should provide guidance on this issue rather than waiting for the decisions in *Rico* and *Jasmine*, because it is unclear whether the California Supreme Court will in fact address the issue in those cases.

The California District Attorneys Association (CDAA) has also raised concerns about the bill, but has not taken an official position on it as yet. Like CAOC, CDAA's chief concern is that the bill is overly protective of privileged communications.

The bill was heard in the Assembly Committee on Judiciary on April 12. Before the hearing, the author agreed to accept an amendment to add a three year sunset provision. With that amendment, as well as assurances that the

author and the Commission would attempt to resolve the concerns raised by CAOC and CDAA, the bill passed the committee by a vote of 6 to 3.

The bill then went to the Assembly floor, where it passed by a vote of 53 ayes, 11 noes, and 16 absent, abstaining, or not voting. The number of votes in favor of the bill was just short of 2/3 of the membership of the Assembly.

The bill is now pending in the Senate, where it has been referred to two policy committees: the Senate Committee on Judiciary and the Senate Public Safety Committee. It has not yet been set for hearing in either committee.

For the bill to be enacted, it is important to attempt to resolve the concerns of CAOC and CDAA. After consultation with the author of the bill and the Chair of the Commission, we sent letters to CAOC and CDAA proposing a compromise in which the bill would be amended and the Comment to Section 912 would be revised as shown in the attached Exhibit. These proposed revisions were carefully drafted to address the concerns raised by CAOC and CDAA as fully as possible, but still be acceptable to the author, the Commission, and supporters of AB 1133. We have not yet received a response from CAOC or CDAA.

The staff recommends that the Commission ratify the compromise offer shown in Exhibit A. These revisions will not actually be made unless they will help to resolve the concerns of CAOC and CDAA.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

☞ **Note.** The amendment of Evidence Code Section 912 currently proposed in AB 1133 (Harman) is set out below, together with the Law Revision Commission's proposed Comment. Shown in boldface italics are the revisions proposed as a compromise to address the concerns raised by the Consumer Attorneys of California and the California District Attorneys Association, and to revise the Comment to reflect addition of the sunset provision drafted by the Assembly Judiciary Committee.

1 **Evid. Code § 912 (amended). Waiver**

2 SEC. 2. Section 912 of the Evidence Code is amended to read:

3 912. (a) Except as otherwise provided in this section, the right of any person to
4 claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege
5 for confidential marital communications), 994 (physician-patient privilege), 1014
6 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of
7 clergyman clergy member), 1035.8 (sexual assault counselor-victim privilege), or
8 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a
9 communication protected by the privilege if any holder of the privilege, without
10 coercion, has intentionally disclosed a significant part of the communication or has
11 consented to disclosure made by anyone. Consent to disclosure is manifested by
12 any statement or other conduct of the holder of the privilege indicating ~~consent to~~
13 intent to permit the disclosure, including failure to claim the privilege in any
14 proceeding in which the holder has the legal standing and opportunity to claim the
15 privilege. *For purposes of this section,*

16 *(1) The intent to disclose or the intent to permit disclosure may be either*
17 *express, based on words indicating an intent to disclose, or implied, based on*
18 *conduct indicating an intent to disclose.*

19 *(2) The court shall examine whether the holder of the privilege acted without*
20 *coercion and was aware that a significant part of a confidential communication*
21 *was being disclosed to a third person. It is not necessary that the court find the*
22 *holder of the privilege desired disclosure.*

23 (b) Where two or more persons are joint holders of a privilege provided by
24 Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014
25 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim
26 privilege), or 1037.5 (domestic violence counselor-victim privilege), a waiver of
27 the right of a particular joint holder of the privilege to claim the privilege does not
28 affect the right of another joint holder to claim the privilege. In the case of the
29 privilege provided by Section 980 (privilege for confidential marital
30 communications), a waiver of the right of one spouse to claim the privilege does
31 not affect the right of the other spouse to claim the privilege.

32 (c) A disclosure that is itself privileged is not a waiver of any privilege.

1 (d) A disclosure in confidence of a communication that is protected by a
2 privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient
3 privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault
4 counselor-victim privilege), or 1037.5 (domestic violence counselor-victim
5 privilege), when disclosure is reasonably necessary for the accomplishment of the
6 purpose for which the lawyer, physician, psychotherapist, sexual assault counselor,
7 or domestic violence counselor was consulted, is not a waiver of the privilege.

8 (e) If the holder of a privilege waives the privilege as to a significant part of a
9 confidential communication pursuant to subdivision (a), the court may order
10 disclosure of another part of the communication or a related communication to the
11 extent necessary to prevent unfairness from partial disclosure.

12 (f) This section applies only to the privileges identified in subdivision (a). It
13 implies nothing regarding waiver of any other privilege.

14 (g) This section shall remain in effect only until January 1, 2009, and as of that
15 date is repealed, unless a later enacted statute that is enacted on or before January
16 1, 2009, deletes or extends that date.

17 **Comment.** Subdivision (a) of Section 912 is amended to make clear that disclosure of a
18 communication protected by one of the specified privileges waives the privilege only when the
19 holder of the privilege intentionally makes the disclosure or intentionally permits another person
20 to make the disclosure. This codifies the majority view in case law applying the provision to an
21 inadvertent disclosure. *See* State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654,
22 82 Cal. Rptr. 2d 799 (1999) (Waiver “does not include accidental, inadvertent disclosure of
23 privileged information by the attorney.”); O’Mary v. Mitsubishi Electronics America, Inc., 59
24 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389 (1997) (“Inadvertent disclosure during discovery by
25 no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the
26 poor paralegal or junior associate who was lumbered with the tedious job of going through
27 voluminous files and records in preparation for a document production may have missed
28 something.”); People v. Gardner, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984) (“As in
29 other privileges for confidential communications, the physician-patient privilege precludes a court
30 disclosure of a communication, even though there has been an accidental or unauthorized out-of-
31 court disclosure of such communication”) (dictum); *see also* KL Group v. Case, Kay & Lynch,
32 829 F.2d 909, 919 (9th Cir. 1987) (under either Hawaii or California law, client did not waive
33 attorney-client privilege by counsel’s inadvertent production of letter); Federal Deposit Ins. Corp.
34 v. Fidelity & Deposit Co., 196 F.R.D. 375, 380 (S.D. Cal. 2000) (under California law, “waiver of
35 the attorney-client privilege depends entirely on whether the client provided knowing and
36 voluntary consent to the disclosure.”); Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp.
37 1403, 1410-11 (S.D. Cal. 1994) (California appears to follow subjective approach to waiver by a
38 privilege holder, under which “the client’s intent to disclose is controlling.”) (dictum). ***It***
39 ***disapproves what could be construed as contrary dictum in People v. Von Villas, 11 Cal. App.***
40 ***4th 175, 223, 15 Cal. Rptr. 2d 112 (1992) (marital privilege was waived when husband and wife***
41 ***“knew or reasonably should have known” that their conversation was being overheard) (one of***
42 ***three alternate bases for decision). The amendment supplants what might be construed as***
43 ***contrary dictum in several cases. It is not inconsistent with the outcome in People v. Von Villas,***
44 ***11 Cal. App. 4th 175, 211, 222, 223, 15 Cal. Rptr. 2d 112 (1992) (marital privilege was waived***
45 ***when communication between husband and wife was audible to jail personnel and couple knew***
46 ***their communications were being overheard and monitored) (one of three alternate bases for***
47 ***decision).***

48 *Subdivision (a)(1) makes clear that in finding intent to disclose or intent to permit disclosure,*
49 *a court may rely on either direct or circumstantial evidence.*

50 *Subdivision (a)(2) makes clear that a disclosure need not be purposeful to constitute a*
51 *waiver. It is sufficient if the holder of the privilege acted without coercion and knew that the*

1 *confidential communication was being disclosed to a person outside the privileged relationship.*
2 *See generally Section 917 Comment (“the fact that the communication was made under*
3 *circumstances where others could easily overhear is a strong indication that the*
4 *communication was not intended to be confidential and is, therefore, unprivileged.”); Cel-Tech*
5 *Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 172-75, 973*
6 *P.2d 527, 83 Cal. Rptr. 2d 548 (1999) (explaining that term “intent” may refer to knowing act*
7 *as well as purposeful act).*

8 Subdivision (a) is also amended to conform to the terminology used in Section 1034 (privilege
9 of clergy member).

10 Subdivision (e) addresses partial disclosure (i.e., disclosure of a portion of a privileged
11 communication or set of communications). It is added to make clear that when the holder of a
12 specified privilege voluntarily and intentionally discloses or permits another person to disclose a
13 significant portion of a privileged communication, and subdivisions (b)-(d) are inapplicable, a
14 court may require additional disclosure in the interest of fairness, even though the privilege holder
15 did not intend to permit such additional disclosure. This codifies case law. *See People v.*
16 *Worthington, 38 Cal. App. 3d 359, 365-66, 114 Cal. Rptr. 322 (1974) (when defendant disclosed*
17 *marital communication in which his wife supposedly described and confessed to murder, he could*
18 *not preclude wife from testifying that conversation did occur but he confessed not she); Kerns*
19 *Constr. Co. v. Superior Court, 266 Cal. App. 2d 405, 413-14, 72 Cal. Rptr. 74 (1968) (“It would*
20 *be unconscionable to allow a rule of evidence that a witness can testify to material contained in a*
21 *report, though not verbatim, and then prevent a disclosure of the reports.”).*

22 Even when a privilege holder voluntarily and intentionally makes or authorizes a significant
23 disclosure, however, the privilege is not necessarily waived as to all of the communications
24 between the persons in the privileged relationship. Although the scope of the waiver may be
25 broader than what the privilege holder intends, the waiver is only as broad as fairness requires.
26 *See People v. Superior Court, 231 Cal. App. 3d 584, 589-91, 282 Cal. Rptr. 418 (1991) (trial*
27 *court erred in finding general waiver of psychotherapist-patient privilege); Travelers Ins. Cos. v.*
28 *Superior Court, 143 Cal. App. 3d 436, 445, 191 Cal. Rptr. 871 (1983) (inadvertent disclosure of*
29 *two attorney-client letters did not waive privilege as to other items and privilege was not claimed*
30 *as to disclosed letters); Jones v. Superior Court, 119 Cal. App. 3d 534, 547, 174 Cal. Rptr. 148*
31 *(1981) (patient’s disclosure that she ingested DES while pregnant did not waive physician-patient*
32 *privilege as to her full medical history).*

33 Subdivision (f) is added to underscore that this section only prescribes rules pertaining to
34 waiver of the privileges listed in subdivision (a); it does not specify what rules apply to waiver of
35 any other privilege. In some instances, a court construing another privilege may find this section
36 useful by analogy. *See, e.g., Fortunato v. Superior Court, 114 Cal. App. 4th 475, 480 n.3, 8 Cal.*
37 *Rptr. 3d 82 (2003) (“Although the statutory privileges and their exceptions are not applicable to*
38 *privacy claims or the tax-return privilege, they may provide analogous reasoning in the*
39 *appropriate case.”). But different policy considerations apply to different privileges and*
40 *confidentiality protections, sometimes necessitating different rules regarding waiver. See, e.g.,*
41 *Eisendrath v. Superior Court, 109 Cal. App. 4th 351, 357, 362-63, 134 Cal. Rptr. 2d 716 (2003)*
42 *(Section 912 does not govern waiver of mediation confidentiality); Section 940 Comment (waiver*
43 *of privilege against self-incrimination “is determined by the cases interpreting the pertinent*
44 *provisions of the California and United States Constitutions”); Section 973 & Comment (waiver*
45 *of spousal testimony privilege); Tentative Recommendation Relating to the Uniform Rules of*
46 *Evidence: Article V. Privileges, 6 Cal. L. Revision Comm’n Reports 201, 260 (1964); Chadbourn,*
47 *A Study Relating to the Privileges Article of the Uniform Rules of Evidence, 6 Cal. L. Revision*
48 *Comm’n Reports 301, 514-15 (1964).*

49 ***Under subdivision (g), this version of Section 912 will be repealed on January 1, 2009, unless***
50 ***that sunset date is extended or deleted. If this version sunsets, the provision that will become***
51 ***operative is identical to the one in place immediately before enactment of this version, except***
52 ***for the subdivision stating the operative date. See 2004 Cal. Stat. ch. 405, § 1.***