

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

2004-2005 RECOMMENDATIONS

Common Interest Development Law	
Architectural Review and Decisionmaking	107
Preemption of CID Architectural Restrictions	117
Obsolete Cross-References to Former Code of Civil Procedure Section 383	127
Civil Discovery	
Statutory Clarification and Minor Substantive Improvements	137
Correction of Obsolete Cross-References	161
Ownership of Amounts Withdrawn from Joint Account	199
Emergency Rulemaking Under the Administrative Procedure Act	221
Unincorporated Associations	
Unincorporated Association Governance	231
Nonprofit Association Tort Liability	257
Waiver of Privilege By Disclosure	265

November 2004

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

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The Commission's reports, recommendations, and studies are published in separate pamphlets that are later bound in hardcover form. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound, which permits citation to Commission publications before they are bound.

This publication (#221) will appear in Volume 34 of the Commission's *Reports, Recommendations, and Studies*.

Commission publications and other materials are available on the Internet at www.clrc.ca.gov.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Common Interest Development Law: Architectural Review and Decisionmaking

February 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Common Interest Development Law: Architectural Review and Decisionmaking*, 34 Cal. L. Revision Comm'n Reports 107 (2004). This is part of publication #221.

STATE OF CALIFORNIA

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EDMUND L. REGALIA

February 6, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

In many homeowner associations approval is required before a physical change can be made to a homeowner's property. The Law Revision Commission recommends that the decisionmaking process be subject to the following requirements:

- (1) The procedure used for making the decision must be fair, reasonable, and expeditious.
- (2) The decision must be made in good faith and may not be unreasonable, arbitrary, or capricious.
- (3) A decision disapproving a proposed change must be in writing and must include an explanation of the association's reason for disapproval.
- (4) The applicant is entitled to reconsideration by the board of directors, at an open meeting of the board.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

Frank Kaplan
Chairperson

COMMON INTEREST DEVELOPMENT LAW: ARCHITECTURAL REVIEW AND DECISIONMAKING

The governing documents of many common interest developments require approval of the community association before a homeowner can make a physical change to the homeowner's separate interest property.¹ For example, a homeowner might be required to obtain association approval before adding a room, choosing a color of exterior paint, or planting flowers in a front yard. There is no statutory procedure for making such a decision.

Existing case law requires that a decision regarding a proposed change to a homeowner's separate interest property be made in good faith, pursuant to a fair and reasonable procedure.² The Commission recommends that this requirement be codified. This will serve to educate homeowners and association officials of their rights and duties with respect to the decisionmaking process.

The proposed law would also require that a disapproval decision be in writing, with an explanation of the association's reason for disapproving the proposed change. A homeowner whose proposed change is disapproved would have the right to seek reconsideration of the disapproval decision at an open meeting of the board of directors. These

1. See Civ. Code § 1351(*l*) ("separate interest" defined). In some cases, the association's declaration may also permit changes to the common area. See Civ. Code §§ 1351(*b*) ("common area" defined), 1351(*h*) ("declaration" defined).

2. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (1986) ("When a homeowners' association seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious.").

requirements would improve the fairness of the process, without imposing significant costs on the association.

PROPOSED LEGISLATION

Civ. Code § 1378 (added). Procedure for decision on proposed physical change to property

SEC. ____ . Section 1378 is added to the Civil Code, to read:

1378. (a) This section applies if an association's governing documents require association approval before an owner of a separate interest may make a physical change to the owner's separate interest or to the common area. In reviewing and approving or disapproving a proposed change, the association shall satisfy the following requirements:

(1) The association shall provide a fair, reasonable, and expeditious procedure for making its decision. The procedure shall be included in the association's governing documents.

(2) A decision on a proposed change shall be made in good faith and shall not be unreasonable, arbitrary, or capricious.

(3) A decision on a proposed change shall be in writing. If a proposed change is disapproved, the written decision shall include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board of directors.

(4) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors of the association that made the decision, at an open meeting of the board. This paragraph does not require reconsideration of a decision that is made by the board of directors at an open meeting of the board.

(b) Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents or governing law.

Comment. Section 1378 is new. Paragraphs (1) and (2) of subdivision (a) are consistent with case law. See *Ironwood Owners Ass'n IX v. Solomon*, 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18 (1986) ("When a homeowners' association seeks to enforce the provisions of its CCRs to

compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious.”). Nothing in this section is intended to shift the existing burden of proof as to the validity of an association’s governing documents.

Physical changes that might be subject to association approval requirements include additions or renovations, landscaping, choice of exterior paint colors, coverings, or roofing materials, changes to windows and balconies, and other such changes to the structure or appearance of the property.

Subdivision (a)(4) provides an applicant with the option to seek reconsideration of a disapproval decision, at an open meeting of the board of directors. Nothing in this subdivision is intended to imply that a board meeting required under another provision is not open. See Section 1363.05 (Common Interest Development Open Meeting Act). An applicant preserves other remedies whether or not the applicant seeks reconsideration. The right of reconsideration by the board only applies if the initial decision is made by an entity other than the board of directors.

The requirements of this section apply regardless of any contrary provision in an association’s governing documents. Nothing in this section affects the limitation on director liability provided in Section 1367.5 or in Corporations Code Section 7231.

Subdivision (b) makes clear that this section does not authorize physical change to the common area in a manner that is inconsistent with an association’s governing documents or the governing law. In many associations the governing documents require a vote of the membership to approve a change to the common area. See, e.g., *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 280 Cal. Rptr. 568 (1991). In other associations, the governing documents may permit changes to certain features of the common areas (such as common walls, ceilings, floors, and exclusive use common areas) with the approval of the association. See Civ. Code § 1351(i) (“exclusive use common area” defined). In all cases, the requirements of the governing documents control.

Nothing in this section prevents an association from adopting an operating rule, consistent with its governing documents, that provides for automatic approval of a specifically identified type of physical change.

CONFORMING REVISION

Civ. Code § 1373 (amended). Nonresidential developments

SEC. ____ . Section 1373 of the Civil Code is amended to read:

1373. (a) The following provisions do not apply to a common interest development that is limited to industrial or commercial uses by zoning or by a declaration of covenants, conditions, and restrictions that has been recorded in the official records of each county in which the common interest development is located:

(1) Section 1356.

(2) Article 4 (commencing with Section 1357.100) of Chapter 2 of Title 6 of Part 4 of Division 2.

(3) Subdivision (b) of Section 1363.

(4) Section 1365.

(5) Section 1365.5.

(6) Subdivision (b) of Section 1366.

(7) Section 1366.1.

(8) Section 1368.

(9) *Section 1378.*

(b) The Legislature finds that the provisions listed in subdivision (a) are appropriate to protect purchasers in residential common interest developments, however, the provisions may not be necessary to protect purchasers in commercial or industrial developments since the application of those provisions could result in unnecessary burdens and costs for these types of developments.

Comment. The introductory clause of subdivision (a) of Section 1373 is amended to more closely parallel the language used in Business and Professions Code Section 11010.3 (exemption of nonresidential subdivision from laws governing subdivided land). This is a nonsubstantive change.

Subdivision (a)(9) is added to exempt a nonresidential common interest development from the statutory provision governing review of a

proposed physical change to property within the development. Nothing in this section affects the application of a common law requirement governing association review of a proposed property change. An industrial or commercial common interest development that is subject to such a requirement remains subject to the requirement.

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

Preemption of CID Architectural
Restrictions

November 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Preemption of CID Architectural Restrictions*, 34 Cal. L. Revision Comm'n Reports 117 (2004). This is part of publication #221.

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FRANK KAPLAN
SENATOR BILL MORROW

November 19, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

The governing documents of many common interest developments require approval of the community association before a homeowner can make a physical change to the homeowner's property. The proposed law would make clear that an association decision approving or disapproving a proposed change must be consistent with land use and public safety law, notwithstanding any contrary provision in the association's governing documents. This will avoid disputes and uncertainty that can result when an association's architectural restrictions conflict with the law.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

William E. Weinberger
Chairperson

PREEMPTION OF CID ARCHITECTURAL RESTRICTIONS

The governing documents of many common interest developments require approval of the community association before a homeowner can make a physical change to the homeowner's property. For example, a homeowner might be required to obtain approval before replacing a roof or making changes to landscaping. In deciding whether to approve a proposed change, the association is bound by restrictions in the association's governing documents.

An architectural restriction may conflict with land use or public safety law. For example, a restriction designed to ensure uniformity may require use of a particular type of roofing material (e.g., wood shakes). Subsequent changes in fire safety law may prohibit the use of wood shakes. In such a case, the association may be unsure whether its restriction is preempted and may feel duty-bound to enforce its restriction until a court rules on the enforceability of the restriction.¹ This uncertainty can lead to unnecessary litigation and expense and may result in perpetuation of an unlawful and unsafe condition.²

The specific problem of a conflict between an association restriction on roofing material and fire safety law has been addressed, by requiring that an association accept at least one of the types of roofing material required by fire safety law.³

1. A recorded restriction is presumed to be valid and enforceable, putting the burden on a challenger to prove in court that the restriction is unreasonable. See generally *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994); Civ. Code § 1354.

2. See, e.g., McGhee, *Raising Roof in Fair Oaks*, Sac. Bee, Nov. 5, 2003, at B1.

3. See 2004 Cal. Stat. ch. 318, §§ 1-2 (Civ. Code § 1353.7; Health & Safety Code § 13132.7).

However, there are many other potential sources of conflict between an association architectural restriction and the law. For example, fire safety law may require that vegetation be cleared within a certain distance of structures in fire-prone areas. Such a requirement might conflict with an association landscaping restriction.

As a matter of policy, an association architectural restriction should be preempted by governing land use and public safety law. The fact that an association chooses to restrict its own use of property should not exempt it from generally applicable legal requirements.

As a matter of law, a restriction that conflicts with land use or public safety law is probably unenforceable. A restriction is unenforceable if it conflicts with fundamental public policy or if it imposes a burden on the use of affected land that far outweighs any benefit.⁴ Land use and public safety laws implement important public policies. They ensure that structures conform to established health and safety and construction standards. The burden of an architectural restriction that requires maintenance of an unsound or unsafe condition outweighs the benefit of aesthetic uniformity.

The proposed law would eliminate any uncertainty as to whether an architectural restriction that conflicts with land use or public safety law should be enforced. This will provide clear guidance to association board members and help avoid the need for a lawsuit to invalidate such a restriction.

Existing law already requires that an architectural review decision be consistent with governing law.⁵ The proposed law would make clear that this rule applies to a conflict between an association's governing documents and land use and public safety law.

4. *Nahrstedt*, 8 Cal. 4th at 382.

5. See Civ. Code § 1378(a)(3).

PROPOSED LEGISLATION

Civ. Code § 1378 (amended). Architectural review and decisionmaking

1378. (a) This section applies if an association's governing documents require association approval before an owner of a separate interest may make a physical change to the owner's separate interest or to the common area. In reviewing and approving or disapproving a proposed change, the association shall satisfy the following requirements:

(1) The association shall provide a fair, reasonable, and expeditious procedure for making its decision. The procedure shall be included in the association's governing documents. The procedure shall provide for prompt deadlines. The procedure shall state the maximum time for response to an application or a request for reconsideration by the board of directors.

(2) A decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious.

(3) *A Notwithstanding a contrary provision of the governing documents, a decision on a proposed change shall be consistent with any governing provision of law, including, but not limited to, the Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), or a building code or other applicable law governing land use or public safety.*

(4) A decision on a proposed change shall be in writing. If a proposed change is disapproved, the written decision shall include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board of directors.

(5) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors of the

association that made the decision, at an open meeting of the board. This paragraph does not require reconsideration of a decision that is made by the board of directors or a body that has the same membership as the board of directors, at a meeting that satisfies the requirements of Section 1363.05. Reconsideration by the board does not constitute dispute resolution within the meaning of Section 1363.820.

(b) Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents ~~or governing~~ *unless the change is required by law.*

(c) An association shall annually provide its members with notice of any requirements for association approval of physical changes to property. The notice shall describe the types of changes that require association approval and shall include a copy of the procedure used to review and approve or disapprove a proposed change.

Comment. Subdivision (a)(3) of Section 1378 is amended to make clear that a decision on a proposed change must be consistent with building codes and other laws relating to land use and public safety. A restriction that requires violation of such a law is against public policy and is unenforceable. See *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal. 4th 361, 382, 878 P.2d 1275, 33 Cal. Rptr. 2d 63 (1994). An association restriction may impose requirements beyond what is required by the law, so long as those additional requirements do not conflict with the law. For example, an association restriction requiring that a fence be five feet in height would be consistent with a municipal ordinance providing that a fence may not exceed six feet in height. An association restriction requiring that the fence be seven feet in height would conflict with the ordinance and would be unenforceable. The term "law" is intended to be construed broadly and includes a constitutional provision, statute, regulation, local ordinance, and court decision.

Subdivision (a)(3) is consistent with other laws that subordinate a property use restriction to important public policies. See, e.g., Sections 53 (discriminatory covenant unenforceable), 712 (restraint on display of sign advertising real property is void), 714 (prohibition of solar energy system is void), 782 (racially restrictive deed restriction is void), 1353.6 (prohibition on display of certain noncommercial signs is unenforceable), 1376 (prohibition on installation of television antenna or satellite dish is

void); Health & Safety Code §§ 1597.40 (restriction on use of home for family day care is void), 13132.7(*l*) (rules governing roofing material in very high fire hazard severity zone supersede conflicting provision of common interest development's governing documents).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Obsolete Cross-References to Former
Code of Civil Procedure Section 383

November 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Obsolete Cross-References to Former Code of Civil Procedure Section 383*, 34 Cal. L. Revision Comm'n Reports 127 (2004). This is part of publication #221.

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November 19, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

Recent legislation repealed Code of Civil Procedure Section 383 and relocated its substance, without change, to the Davis-Stirling Common Interest Development Act. The proposed law would update statutory cross-references to former Section 383 to reflect the relocation of its substance.

This recommendation was prepared pursuant to Resolution Chapter 192 of the Statutes of 2003.

Respectfully submitted,

William E. Weinberger
Chairperson

OBSOLETE CROSS-REFERENCES
TO FORMER CODE OF CIVIL
PROCEDURE SECTION 383

Former Code of Civil Procedure Section 383 provided that an association established to manage a common interest development can sue on behalf of its members in certain specified actions. It also provided special rules relating to comparative fault in such a suit.

In 2004, Section 383 was repealed and its substance was relocated, without change, to the Davis-Stirling Common Interest Development Act.¹

The proposed law would update statutory cross-references to former Section 383 to reflect the relocation of its substance. The proposed changes are nonsubstantive.

1. See 2004 Cal. Stat. ch. 754, §§ 4, 7. Subdivision (a) of former Section 383 is continued without substantive change in Civil Code Section 1368.3. Subdivisions (b)-(e) of former Section 383 are continued without substantive change in Civil Code Section 1368.4. See *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003).

PROPOSED LEGISLATION

Civ. Code § 945 (amended). Application of requirements relating to action for construction defect

SECTION 1. Section 945 of the Civil Code is amended to read:

945. The provisions, standards, rights, and obligations set forth in this title are binding upon all original purchasers and their successors-in-interest. For purposes of this title, associations and others having the rights set forth in ~~Section 383 of the Code of Civil Procedure Sections 1368.3 and 1368.4~~ shall be considered to be original purchasers and shall have standing to enforce the provisions, standards, rights, and obligations set forth in this title.

Comment. Section 945 is amended to correct the cross-reference to former Code of Civil Procedure Section 383. This is a nonsubstantive change. The substance of former Code of Civil Procedure Section 383 is continued in Sections 1368.3 and 1368.4. See 2004 Cal. Stat. ch. 754, §§ 4, 7; *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003).

Civ. Code § 1363 (amended). Community association management

SEC. 2. Section 1363 of the Civil Code is amended to read:

1363. (a) A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association.

(b) An association, whether incorporated or unincorporated, shall prepare a budget pursuant to Section 1365 and disclose information, if requested, in accordance with Section 1368.

(c) Unless the governing documents provide otherwise, and regardless of whether the association is incorporated or unincorporated, the association may exercise the powers granted to a nonprofit mutual benefit corporation, as

enumerated in Section 7140 of the Corporations Code, except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates in accordance with Section 7313 of the Corporations Code.

The association, whether incorporated or unincorporated, may exercise the powers granted to an association by ~~Section 383 of the Code of Civil Procedure and the powers granted to the association in this title.~~

(d) Meetings of the membership of the association shall be conducted in accordance with a recognized system of parliamentary procedure or any parliamentary procedures the association may adopt.

(e) Notwithstanding any other provision of law, notice of meetings of the members shall specify those matters the board intends to present for action by the members, but, except as otherwise provided by law, any proper matter may be presented at the meeting for action.

(f) Members of the association shall have access to association records, including accounting books and records and membership lists, in accordance with Article 3 (commencing with Section 8330) of Chapter 13 of Part 3 of Division 2 of Title 1 of the Corporations Code. The members of the association shall have the same access to the operating rules of the association as they have to the accounting books and records of the association.

(g) If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents or rules of the association, including any monetary penalty relating to the activities of a guest or invitee of a member, the board of directors shall adopt and distribute to each member, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with

authorization for member discipline contained in the governing documents. The board of directors shall not be required to distribute any additional schedules of monetary penalties unless there are changes from the schedule that was adopted and distributed to the members pursuant to this subdivision.

(h) When the board of directors is to meet to consider or impose discipline upon a member, the board shall notify the member in writing, by either personal delivery or first-class mail, at least 10 days prior to the meeting. The notification shall contain, at a minimum, the date, time, and place of the meeting, the nature of the alleged violation for which a member may be disciplined, and a statement that the member has a right to attend and may address the board at the meeting. The board of directors of the association shall meet in executive session if requested by the member being disciplined.

If the board imposes discipline on a member, the board shall provide the member a written notification of the disciplinary action, by either personal delivery or first-class mail, within 15 days following the action. A disciplinary action shall not be effective against a member unless the board fulfills the requirements of this subdivision.

(i) Whenever two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association shall be entitled to attend all meetings of the joint association other than executive sessions, (1) shall be given reasonable opportunity for participation in those meetings and (2) shall be entitled to the same access to the joint association's records as they are to the participating association's records.

(j) Nothing in this section shall be construed to create, expand, or reduce the authority of the board of directors of an

association to impose monetary penalties on an association member for a violation of the governing documents or rules of the association.

Comment. Subdivision (c) of Section 1363 is amended to delete the cross-reference to former Code of Civil Procedure Section 383. This is a nonsubstantive change. Because the substance of former Section 383 is continued in this title, a separate reference to the powers conferred by former Section 383 is unnecessary. See Sections 1368.3, 1368.4; 2004 Cal. Stat. ch. 754, §§ 4, 7; *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003).

Civ. Code § 1374 (amended). Application of Davis-Stirling Common Interest Development Act

SEC. 3. Section 1374 of the Civil Code is amended to read:

1374. Nothing in this title may be construed to apply to a development wherein there does not exist a common area as defined in subdivision (b) of Section 1351, ~~nor may this title be construed to confer standing pursuant to Section 383 of the Code of Civil Procedure to an association created for the purpose of managing a development wherein there does not exist a common area.~~

This section is declaratory of existing law.

Comment. Section 1374 is amended to delete the cross-reference to former Code of Civil Procedure Section 383. This is a nonsubstantive change. The substance of former Section 383 is continued in this title and therefore does not apply to a development that lacks a common area. Specific language making clear that former Section 383 does not confer standing on an association created for the purpose of managing such a development is no longer required. See Sections 1368.3, 1368.4; 2004 Cal. Stat. ch. 754, §§ 4, 7; *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

**Civil Discovery: Statutory Clarification
and Minor Substantive Improvements**

June 2004

California Law Revision Commission
4000 Middlefield Road, Room D-1
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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports 137 (2004). This is part of publication #221.

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EDMUND L. REGALIA

June 10, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

The Law Revision Commission recommends the following improvements in California's civil discovery statutes:

- (1) The one-deposition rule for a limited civil case (Code Civ. Proc. § 94) should be amended to make clear that a deposition of an organization is to be treated as a single deposition, even if more than one individual is deposed.
- (2) The section governing the procedure for conducting an oral deposition in California (Code Civ. Proc. § 2025.330) should be amended to make clear that a party's right to make an audio or video recording of a deposition is not dependent on the method of recording used by the party who noticed the deposition.
- (3) Remaining references to audiotape in the Civil Discovery Act (Code Civ. Proc. §§ 2032.510, 2032.530) should be revised to reflect advances in technology, consistent with prior legislation.
- (4) Provisions governing presuit discovery (Code Civ. Proc. §§ 2035.010, 2035.030, 2035.050) should be amended to permit such discovery in anticipation of a suit by a petitioner's successor in interest, subject to statutory safeguards.

- (5) The statute governing use of a presuit deposition (Code Civ. Proc. § 2035.060) should be amended to make clear that if such a deposition is taken in another jurisdiction, it must be taken under the law of that jurisdiction, or under California or federal law, to be admissible in California.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

Frank Kaplan
Chairperson

CIVIL DISCOVERY: STATUTORY CLARIFICATION AND MINOR SUBSTANTIVE IMPROVEMENTS

The Law Revision Commission is engaged in a study of civil discovery.¹ As a preliminary step, the Commission proposed a nonsubstantive reorganization of the provisions governing civil discovery, to make them more user-friendly and facilitate sound development of the law.² The proposal was enacted.³ The Commission has also begun to consider substantive matters, starting with minor issues relating to:

- The one-deposition rule in a limited civil case.
- Audio or video recording of a deposition.
- References to “audiotape” in the Civil Discovery Act.
- Presuit discovery.

As explained below, the Commission tentatively recommends reforms in each of these areas, to eliminate ambiguities, update terminology, and make other minor improvements.

The Commission’s work on civil discovery is continuing, and the Commission may propose further reforms in the future. The Commission encourages interested persons to identify other matters in need of reform.

1. Prof. Gregory Weber of McGeorge School of Law prepared a background study for the Commission. See Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051 (2001).

2. *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm’n Reports 789 (2003).

3. 2004 Cal. Stat. ch. 182. The reorganization will become operative on July 1, 2005. *Id.* at § 64. Unless otherwise specified, all references are to the civil discovery provisions as reorganized and operative on July 1, 2005 (Code Civ. Proc. §§ 2016.010-2036.050), not to the civil discovery provisions that will be repealed on that date (Code Civ. Proc. §§ 2016-2036). Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

Application of the One-Deposition Rule to the Deposition of an Organization

A limited civil case⁴ is usually subject to special litigation rules known as economic litigation procedures,⁵ which are designed to reduce the cost of litigation in a case for a relatively small amount.⁶ Among the special procedures applicable to a limited civil case is the one-deposition rule, which permits a party to take only one oral or written deposition as to each adverse party.⁷ The one-deposition rule is ambiguous as applied to a deposition of an organization.

A deposition notice directed to a corporation or other organization must “describe with reasonable particularity the matters on which examination is requested.”⁸ The organization is obligated to designate and produce at the deposition “those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf.”⁹ The statute setting forth the one-deposition rule does not specify how the rule applies if a deposition notice in a limited civil case specifies more than one topic on which an organization will be examined, but no one person in the organization has knowledge of every topic specified.

This has led to confusion over whether the organization must produce only one person, even though that person lacks knowledge of all the specified topics, or must produce several people, despite the one-deposition rule.¹⁰ Although the issue

4. For the rules governing whether an action or special proceeding is treated as a limited civil case, see Section 85 & Comment. In general, the maximum amount in controversy in a limited civil case is \$25,000.

5. Section 91.

6. 1982 Cal. Stat. ch. 1581, § 5.

7. Section 94(b).

8. Section 2025.230.

9. *Id.*

10. Email from Chris Wilson to Stan Ulrich (Oct. 20, 2000) (Commission Staff Memorandum 2002-21, Exhibit p. 20); see also R. Weil & I. Brown, Jr.,

arises at the trial level, there is no published appellate decision resolving it, probably because a limited civil case ordinarily does not receive appellate review resulting in a published decision.

The ambiguity in the one-deposition rule should be eliminated by making clear that the organization must produce as many witnesses as necessary to testify knowledgeably to all of the topics specified in the deposition notice.¹¹ The organization is the deponent — not the officers, employees, and agents testifying on its behalf. The organization must necessarily speak through natural persons. Because of the large and decentralized nature of some organizations, the deponent’s “knowledge” may be dispersed among several individuals.

If the deposition of an organization were limited to one individual, gamesmanship could occur. For example, an organization could designate as a witness the employee most qualified to testify on one of five topics identified in a deposition notice, even if another person is most qualified to testify on the remaining four topics. The deponent would have unilateral power to exclude relevant information from discovery.

The purpose of discovery rules is to “enhance the truth-seeking function of the litigation process and eliminate trial strategies that focus on gamesmanship and surprise.”¹²

California Practice Guide: Civil Procedure Before Trial, Discovery ¶ 8:1809.1 (2004).

11. If the scope of the requested discovery is unduly burdensome, expensive, or intrusive, the organization can file a motion under Section 2017.020 seeking appropriate limitations.

12. *Williams v. Volkswagenwerk Aktiengesellschaft*, 180 Cal. App. 3d 1244, 1254, 226 Cal. Rptr. 306 (1986).

Revising the one-deposition rule as proposed would promote those goals.¹³

Equal Right to Record a Deposition By Audio or Video Technology

With limited exceptions, Section 2025.330 requires deposition testimony to be stenographically recorded. In addition to recording the testimony stenographically, the party who notices the deposition (the “deposing party”) may also record the testimony by audio or video technology if that party states an intention to do so in the deposition notice, or all parties agree to the recording. The statute further states that “[a]ny other party, at that party’s expense, may make a *simultaneous* audio or video record of the deposition.”¹⁴

That language is ambiguous. It is unclear whether the party who did not notice the deposition (the “non-deposing party”) is entitled to make an audio or video record simultaneously with preparation of the stenographic record, or only simultaneously with preparation of an audio or video record

13. The proposed reform would also be consistent with the language of the provision requiring the organization to designate who will testify. Section 2025.230 requires an organization to designate and produce at the deposition “those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf.” The use of the plural instead of the singular (“the officer, director, managing agent, employee, or agent who is most qualified to testify on its behalf”) suggests that the Legislature intended for the organization to designate as many witnesses as necessary to testify. But see Section 17 (plural includes singular).

Commentary also supports the view that an organization must produce as many witnesses as necessary to testify knowledgeably, even in a case subject to the one-deposition rule:

It is not clear how the “one deposition per adverse party” rule applies where the adverse party is a corporation or other entity. When the deposition notice is addressed to the entity, it must designate the person *or persons* “most qualified” to testify on its behalf. ... Presumably, the party seeking discovery would be entitled to more than one deposition where the entity designates more than one person.

R. Weil & I. Brown, Jr., *supra* note 10, at ¶ 8:1809.1 (emphasis in original).

14. Section 2025.330(c) (emphasis added).

by the deposing party. If the latter is true, the deposing party has full control over whether a deposition is recorded by audio or video technology. The Commission has been unable to find a published case resolving which interpretation of the sentence is correct.

To prevent unnecessary disputes over this issue, the Commission recommends that the word “simultaneous” be deleted from the sentence. This revision would make clear that the non-deposing party is entitled to make an audio or video record regardless of whether the deposing party does so.

There is solid justification for such an approach, and the Commission is aware of nothing in the legislative history of the Civil Discovery Act suggesting that the Legislature intended to prohibit a non-deposing party from audio or video recording a deposition when the deposing party only records the testimony stenographically. Recording a deposition by audio or video technology entails extra cost, but also confers evidentiary benefits that vary depending on the factual context and the perspective of a particular litigant.¹⁵ Each

15. For example, a video record of a deposition often reveals when a witness is nervous and uncomfortable testifying about a subject, while a written transcript generally does not. This might be important in attacking the witness' credibility.

Similarly, impeachment by a video record may be more compelling than impeachment by a written record. As explained in a recent presentation on taking and using a videotaped deposition,

If you carefully ask questions at trial that track questions asked at the deposition, and the witness strays from his deposition answers, you may, by pulling the trigger of a scanner gun, confront the witness with a larger than life video of himself testifying in just the opposite way. It is the rare witness who, having been properly impeached by video once or twice, will not settle down and keep his trial testimony within the bounds of his deposition testimony.

Greenwald, Caruso & Turrill, *Taking Effective Video-Taped Depositions and Using Them Effectively at Trial*, ABA Annual Meeting, ABA Section of Litigation (Aug. 7-10, 2003), at <<http://www.abanet.org/litigation/articles/sfvideodepo.pdf>>. This technique may be especially useful in controlling a witness

party should be able to make its own assessment of whether an audio or video record is desirable under the circumstances of a particular case. Protections are in place to ensure that any audio or video record of a deposition is reliable and accurate.¹⁶ Given these safeguards, there is no need to give the deposing party full control over whether such a record is made. Section 2025.330 should be amended to eliminate uncertainty regarding the authority of a non-deposing party to record a deposition by audio or video technology.

References to “Videotape” and “Audiotape”

In 2002, the Legislature replaced numerous references to “videotape” and “audiotape” in the Civil Discovery Act with terms that reflect advances in technology.¹⁷ References to “videotape” were changed to “video technology,” “video recording,” or “video record.” References to “audiotape” were similarly corrected.

A few references to “audiotape” remain in the Civil Discovery Act.¹⁸ That appears to have been an oversight. The Law Revision Commission therefore recommends conforming the remaining references to “audiotape” in the Civil Discovery Act to the terminology changes made in 2002.

who has a strong motivation to lie about critical facts, but it may be counterproductive if there are only slight discrepancies between the witness’ deposition and trial testimony. *Id.*

16. Section 2025.340 sets forth in detail the procedures that must be followed if the deposition is recorded by audio or video technology by, or at the direction of, a party. Special requirements apply where an expert witness’ testimony is video recorded for use at trial in lieu of live testimony. Section 2025.340(c). If the testimony is recorded both stenographically and by audio or video technology, the stenographic transcript is the official record of the testimony, not the audio or video record. Section 2025.510.

17. 2002 Cal. Stat. ch. 1068.

18. See Code Civ. Proc. §§ 2032.510, 2032.530.

Presuit Discovery

Under specified circumstances, a person who expects to be a party to a lawsuit in a California state court may petition to conduct discovery before the lawsuit is filed. The provisions governing such presuit discovery (Sections 2035.010-2035.060) are ambiguous with respect to (1) whether a petitioner may take presuit discovery when the contemplated lawsuit would be filed by the petitioner's successor in interest instead of by the petitioner, and (2) whether a deposition to perpetuate testimony is admissible in California if it was taken under the laws of a jurisdiction other than California, the United States, or the jurisdiction in which it was held. The Commission recommends that these ambiguities be eliminated.

Suit to be Filed by Petitioner's Successor in Interest

Section 2035.010 authorizes presuit discovery, under specified conditions, by someone who expects to be a *party* to an action. It does not expressly permit a person to engage in presuit discovery in anticipation of a suit by or against the person's successor in interest. For example, it is unclear whether the provision would permit a testator to perpetuate testimony relating to the testator's mental capacity to execute a will and to the circumstances surrounding its execution.

The statutory language does appear to be broad enough to allow presuit discovery under specified conditions by a person who expects to be a party by virtue of being a successor in interest. But this is helpful only to the extent that the successor in interest is identifiable at the time presuit discovery is sought. An unborn child or future assignee, for example, might eventually qualify as a successor in interest as well. As the statute is written, it does not seem to permit anyone to conduct presuit discovery on behalf of such a person. It is conceivable, however, that a court would find

such authority implicit in the statute, even though it is not explicit.

The statute should be amended to eliminate the ambiguity and expressly authorize a petitioner to conduct presuit discovery in anticipation of a lawsuit by the petitioner's successor in interest.¹⁹ Such discovery should be subject to all of the same safeguards as other presuit discovery.

The Legislature developed those safeguards to prevent presuit discovery from being exploited as a means of conducting a broad-ranging "fishing expedition" for information before a lawsuit is filed.²⁰ The key safeguard is Section 2035.010(b), which expressly prohibits use of the statute for purposes of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to a future action. The petitioner must also show a present inability to bring the action or cause it to be brought.²¹ Notice and a contested hearing are required.²² The court must also find that the perpetuation of testimony "may prevent a failure or delay of justice."²³

19. For examples of provisions that authorize presuit discovery in anticipation of a lawsuit by the petitioner's successor in interest, see Ohio R. Civ. Proc. 27; Okla. Stat. Ann., tit. 12, § 3227; Or. R. Civ. Proc. 37; 1959 Unif. Perpetuation of Testimony Act, § 1(a). The Comment to Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act explains that the provision would

permit the petitioner to anticipate an action after his death or after he had assigned his interest in the subject matter. It would, for instance, permit a testator to perpetuate testimony relating to his mental capacity to execute a will and to the circumstances surrounding its execution. The same would be true with respect to the execution of any other kind of written instrument.

20. *Block v. Superior Court*, 219 Cal. App. 2d 469, 477 n.5, 33 Cal. Rptr. 205 (1963) (interpreting former Section 2017, which became Section 2035, the predecessor of Sections 2035.010-2035.060); see also *Hunt-Wesson Foods, Inc. v. County of Stanislaus*, 273 Cal. App. 2d 92, 94, 77 Cal. Rptr. 832 (1969).

21. Section 2035.030(b)(2).

22. Section 2035.040.

23. Section 2035.050(a).

The last requirement is crucial, because it ensures that presuit discovery is not conducted unless a court is convinced that such discovery is in the interests of justice. If a petitioner makes such a showing with respect to presuit discovery on behalf of a successor in interest, it would be inappropriate to deny the requested discovery.

The Commission recommends that these safeguards be added:

- (1) The petition must include a copy of any written instrument, the validity or construction of which may be called into question or is connected with the subject matter of the proposed discovery.²⁴
- (2) If a petitioner seeks presuit discovery in anticipation of a lawsuit by a successor in interest, the petition must show that the successor in interest is presently unable to bring an action or cause it to be brought.²⁵
- (3) When a petitioner seeks presuit discovery in the expectation that a successor in interest will be a party to an action, the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the successor in interest, instead of by the petitioner.

24. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act. The Comment to that provision explains:

[S]ubdivision (b) would require the petitioner to attach a copy of the instrument to the petition. In the case of a will it is perfectly obvious that unless the contents of the will were revealed the heirs and beneficiaries would have no way of knowing the nature of their interest and would be completely in the dark as to whether they should be proponents or contestants. To give them notice so that they might have the right to cross-examine the witnesses whose depositions are to be taken would be an empty gesture indeed if they were not given an opportunity to know in what manner their interests were affected by the will.

25. This requirement is drawn from Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act.

Amending the statute in this manner to cover an anticipated suit by a successor in interest would not be a significant extension of the statute, would be helpful to some petitioners and their successors in interest, and would provide guidance on the point. The existing requirements, in conjunction with the proposed new safeguards, should inhibit any attempt to use the statute for purely investigative purposes.

Law Applicable to a Deposition to Perpetuate Testimony

Section 2035.060 states that a deposition to perpetuate testimony may be used in a subsequent action in California state court if the deposition was taken pursuant to the chapter governing presuit discovery (Sections 2035.010-2035.060), “or under comparable provisions of the laws of another state, or the federal courts, or a foreign nation.” The provision does not make clear whether an out-of-state deposition must have been taken under the laws of the state in which it was taken, or just “another state.”²⁶ This omission leaves open the possibility that a deposition taken in a second state under a third state’s laws regarding presuit discovery could be admissible in California. The provision is similarly ambiguous with regard to the admissibility of a deposition to perpetuate testimony that was taken in another country.

The Commission recommends that the statutory language be clarified to prevent disputes regarding the admissibility of a deposition taken in another jurisdiction. Specifically, Section 2035.060 should be amended to make clear that a deposition to perpetuate testimony may be used in California only if it was taken under California law, federal law, or a comparable provision of the jurisdiction in which it was taken.

26. Weber, *supra* note 1, at 1071.

PROPOSED LEGISLATION

Code Civ. Proc. § 94 (amended). Discovery in economic litigation case

SECTION 1. Section 94 of the Code of Civil Procedure is amended to read:

94. Discovery is permitted only to the extent provided by this section and Section 95. This discovery shall comply with the notice and format requirements of the particular method of discovery, as provided in Title 4 (commencing with Section 2016.010) of Part 4. As to each adverse party, a party may use the following forms of discovery:

(a) Any combination of 35 of the following:

(1) Interrogatories (with no subparts) under Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4.

(2) Demands to produce documents or things under Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4.

(3) Requests for admission (with no subparts) under Chapter 16 (commencing with Section 2033.010) of Title 4 of Part 4.

(b) One oral or written deposition under Chapter 9 (commencing with Section 2025.010), Chapter 10 (commencing with Section 2026.010), and *or* Chapter 11 (commencing with Section 2028.010) of Title 4 of Part 4. *For purposes of this subdivision, a deposition of an organization shall be treated as a single deposition even though more than one person may be designated or required to testify pursuant to Section 2025.230.*

(c) Any party may serve on any person a deposition subpoena duces tecum requiring the person served to mail copies of documents, books or records to the party's counsel at a specified address, along with an affidavit complying with Section 1561 of the Evidence Code.

The party who issued the deposition subpoena shall mail a copy of the response to any other party who tenders the reasonable cost of copying it.

(d) Physical and mental examinations under Chapter 15 (commencing with Section 2032.010) of Title 4 of Part 4.

(e) The identity of expert witnesses under Chapter 18 (commencing with Section 2034.010) of Title 4 of Part 4.

Comment. Subdivision (b) of Section 94 is amended to make clear the proper treatment of a deposition of an organization. Subdivision (b) is also amended to make a stylistic revision.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 94 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 6, 64.

Code Civ. Proc. § 2025.330 (amended). Conduct of deposition

SEC. 2. Section 2025.330 of the Code of Civil Procedure is amended to read:

2025.330. (a) The deposition officer shall put the deponent under oath.

(b) Unless the parties agree or the court orders otherwise, the testimony, as well as any stated objections, shall be taken stenographically.

(c) The party noticing the deposition may also record the testimony by audio or video technology if the notice of deposition stated an intention also to record the testimony by either of those methods, or if all the parties agree that the testimony may also be recorded by either of those methods. Any other party, at that party's expense, may make a simultaneous *an* audio or video record of the deposition, provided that the other party promptly, and in no event less than three calendar days before the date for which the deposition is scheduled, serves a written notice of this intention to make an audio or video record of the deposition testimony on the party or attorney who noticed the deposition, on all other parties or attorneys on whom the deposition

notice was served under Section 2025.240, and on any deponent whose attendance is being compelled by a deposition subpoena under Chapter 6 (commencing with Section 2020.010). If this notice is given three calendar days before the deposition date, it shall be made by personal service under Section 1011.

(d) Examination and cross-examination of the deponent shall proceed as permitted at trial under the provisions of the Evidence Code.

(e) In lieu of participating in the oral examination, parties may transmit written questions in a sealed envelope to the party taking the deposition for delivery to the deposition officer, who shall unseal the envelope and propound them to the deponent after the oral examination has been completed.

Comment. Subdivision (c) of Section 2025.330 is amended to make clear that the right of a non-deposing party to make an audio or video record of deposition testimony is not dependent on the method of recording used by the party noticing the deposition.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2025.330 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2032.510 (amended). Observation of examination by attorney or representative

SEC. 3. Section 2032.510 of the Code of Civil Procedure is amended to read:

2032.510. (a) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by ~~audiotape~~ *audio technology* any words spoken to or by the examinee during any phase of the examination.

(b) The observer under subdivision (a) may monitor the examination, but shall not participate in or disrupt it.

(c) If an attorney's representative is to serve as the observer, the representative shall be authorized to so act by a writing subscribed by the attorney which identifies the representative.

(d) If in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend it to enable the party being examined or producing the examinee to make a motion for a protective order.

(e) If the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order.

(f) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order under this section, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Comment. Subdivision (a) of Section 2032.510 is amended to reflect advances in technology and for consistency of terminology throughout the Civil Discovery Act. See 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in the Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as the context required).

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2032.510 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2032.530 (amended). Recording of mental examination

SEC. 4. Section 2032.530 of the Code of Civil Procedure is amended to read:

2032.530. (a) The examiner and examinee shall have the right to record a mental examination ~~on audiotape~~ *by audio technology*.

(b) Nothing in this title shall be construed to alter, amend, or affect existing case law with respect to the presence of the attorney for the examinee or other persons during the examination by agreement or court order.

Comment. Subdivision (a) of Section 2032.530 is amended to reflect advances in technology and for consistency of terminology throughout the Civil Discovery Act. See 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in the Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as the context required).

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2032.530 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2035.010 (amended). Perpetuation of testimony or preservation of evidence before filing action

SEC. 5. Section 2035.010 of the Code of Civil Procedure is amended to read:

2035.010. (a) One who expects to be a party *or expects a successor in interest to be a party* to any action that may be cognizable in any court of the State of California, whether as a plaintiff, or as a defendant, or in any other capacity, may obtain discovery within the scope delimited by Chapters 2 (commencing with Section 2017.010) and 3 (commencing with Section 2017.710), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), for the purpose of perpetuating that ~~party's~~ *person's* own testimony or that of another natural person or organization, or of preserving evidence for use in the event an action is subsequently filed.

(b) One shall not employ the procedures of this chapter for the purpose either of ascertaining the possible existence of a

cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed.

Comment. Section 2035.010 is amended to permit a person to take presuit discovery on behalf of a successor in interest (i.e., in anticipation of a suit by the person's successor in interest), so long as the statutory requirements for such discovery are satisfied. For similar provisions, see Ohio R. Civ. Proc. 27; Okla. Stat. Ann., tit. 12, § 3227; Or. R. Civ. Proc. 37; 1959 Unif. Perpetuation of Testimony Act, § 1(a) & Comment.

In connection with this reform, several new safeguards have been added to ensure that presuit discovery is conducted only when it is warranted. Under Section 2035.030(b)(2), when a petitioner seeks presuit discovery on behalf of a successor in interest, presuit discovery is permissible only if both the petitioner and the petitioner's successor in interest are unable to bring suit. This requirement is drawn from Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act. Under Section 2035.030(b)(3), a petition for presuit discovery must include a copy of any written instrument connected with the subject matter of the discovery. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act. Under Section 2035.050(a), when a petitioner seeks presuit discovery on behalf of a successor in interest, the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the successor in interest, instead of by the petitioner. This factor is significant but not necessarily determinative.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2035.010 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2035.030 (amended). Petition

SEC. 6. Section 2035.030 of the Code of Civil Procedure is amended to read:

2035.030. (a) One who desires to perpetuate testimony or preserve evidence for the purposes set forth in Section 2035.010 shall file a verified petition in the superior court of the county of the residence of at least one expected adverse party, or, if no expected adverse party is a resident of the State of California, in the superior court of a county where the action or proceeding may be filed.

(b) The petition shall be titled in the name of the one who desires the perpetuation of testimony or the preservation of evidence. The petition shall set forth all of the following:

(1) The expectation that the petitioner *or the petitioner's successor in interest* will be a party to an action cognizable in a court of the State of California.

(2) The present inability of the petitioner *and, if applicable, the petitioner's successor in interest* either to bring that action or to cause it to be brought.

(3) The subject matter of the expected action and the petitioner's involvement. *A copy of any written instrument the validity or construction of which may be called into question, or which is connected with the subject matter of the proposed discovery, shall be attached to the petition.*

(4) The particular discovery methods described in Section 2035.020 that the petitioner desires to employ.

(5) The facts that the petitioner desires to establish by the proposed discovery.

(6) The reasons for desiring to perpetuate or preserve these facts before an action has been filed.

(7) The name or a description of those whom the petitioner expects to be adverse parties so far as known.

(8) The name and address of those from whom the discovery is to be sought.

(9) The substance of the information expected to be elicited from each of those from whom discovery is being sought.

(c) The petition shall request the court to enter an order authorizing the petitioner to engage in discovery by the described methods for the purpose of perpetuating the described testimony or preserving the described evidence.

Comment. Subdivision (b)(1) of Section 2035.030 is amended to reflect the rule that a person may take presuit discovery on behalf of a successor in interest (i.e., in anticipation of a suit by the person's successor in interest), so long as the statutory requirements for such

discovery are satisfied. See Section 2035.010 (perpetuation of testimony or preservation of evidence before filing action).

Subdivision (b)(2) is amended to ensure that if a person seeks presuit discovery on behalf of a successor in interest, a court may authorize such discovery only if both the petitioner and the petitioner's successor in interest are unable to bring suit. This requirement is drawn from Section 1(a) of the 1959 Uniform Perpetuation of Testimony Act.

Subdivision (b)(3) is amended to add the requirement that a petition for presuit discovery include a copy of any written instrument connected with the subject matter of the discovery. This requirement is drawn from Section 1(b) of the 1959 Uniform Perpetuation of Testimony Act.

For an additional safeguard relating to presuit discovery on behalf of a successor in interest, see Section 2035.050(a) (in deciding whether to permit petitioner to take presuit discovery on behalf of successor in interest, court must consider whether requested discovery could instead be conducted by successor in interest).

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2035.030 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2035.050 (amended). Court order

SEC. 7. Section 2035.050 of the Code of Civil Procedure is amended to read:

2035.050. (a) If the court determines that all or part of the discovery requested under this chapter may prevent a failure or delay of justice, it shall make an order authorizing that discovery. *In determining whether to authorize discovery by a petitioner who expects a successor in interest to be a party to an action, the court shall consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the petitioner's successor in interest, instead of by the petitioner.*

(b) The order shall identify any witness whose deposition may be taken, and any documents, things, or places that may be inspected, and any person whose physical or mental condition may be examined.

(c) Any authorized depositions, inspections, and physical or mental examinations shall then be conducted in accordance

with the provisions of this title relating to those methods of discovery in actions that have been filed.

Comment. Subdivision (a) of Section 2035.050 is amended to make clear that when a petitioner seeks presuit discovery on behalf of a successor in interest (i.e., in the expectation that a successor in interest will be a party to an action), the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the successor in interest, instead of by the petitioner. This factor is significant but not necessarily determinative.

For the provision authorizing presuit discovery on behalf of a successor in interest, see Section 2035.010 (perpetuation of testimony or preservation of evidence before filing action). For other safeguards applicable to such discovery, see Section 2035.030 (petition) & Comment.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2035.050 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

Code Civ. Proc. § 2035.060 (amended). Use of presuit deposition to perpetuate testimony

SEC. 8. Section 2035.060 of the Code of Civil Procedure is amended to read:

2035.060. If a deposition to perpetuate testimony has been taken either under the provisions of this chapter, or under comparable provisions of the laws of ~~another state~~ *the state in which it was taken*, or the federal courts, or a foreign nation *in which it was taken*, that deposition may be used, in any action involving the same subject matter that is brought in a court of the State of California, in accordance with Section 2025.620 against any party, or the successor in interest of any party, named in the petition as an expected adverse party.

Comment. Section 2035.060 is amended to make clear that a deposition to perpetuate testimony may be used in California only if it was taken under this section or under a comparable provision of the federal courts or of the jurisdiction in which it was taken.

☞ **Note.** This amendment shows proposed revisions of Code of Civil Procedure Section 2035.060 as operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 23, 64.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Civil Discovery: Correction of Obsolete Cross-References

September 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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September 17, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

The Law Revision Commission recommends that the following provisions be amended to correct obsolete cross-references to civil discovery provisions:

- (1) Business and Professions Code Section 25009.
- (2) Code of Civil Procedure Section 1283.
- (3) Code of Civil Procedure Section 1991.2.
- (4) Education Code Section 44944.
- (5) Government Code Section 12963.3.
- (6) Government Code Section 68097.6.
- (7) Health and Safety Code Section 1424.1.
- (8) Insurance Code Section 11580.2.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

William E. Weinberger,
Chairperson

CIVIL DISCOVERY: CORRECTION OF OBSOLETE CROSS-REFERENCES

The Law Revision Commission is engaged in a study of civil discovery.¹ As a preliminary step, the Commission proposed a nonsubstantive reorganization of the provisions governing civil discovery, to make them more user-friendly and facilitate sound development of the law.² The proposal was enacted.³

In developing that proposal, the Commission discovered a number of statutes with one or more cross-references to civil discovery provisions that were never properly conformed to reflect enactment of the Civil Discovery Act of 1986.⁴ Those provisions are:

- Business and Professions Code Section 25009.
- Code of Civil Procedure Section 1283.
- Code of Civil Procedure Section 1991.2.
- Education Code Section 44944.
- Government Code Section 12963.3.⁵

1. Prof. Gregory Weber of McGeorge School of Law prepared a background study for the Commission. See Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051 (2001).

2. *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

3. 2004 Cal. Stat. ch. 182 [AB 3081, Assembly Committee on Judiciary].

4. 1986 Cal. Stat. ch. 1334.

5. Government Code Section 12963.3 prescribes the procedures for taking a deposition in an action by the Department of Fair Employment and Housing ("DFEH"). Until recently, it included a cross-reference to former Code of Civil Procedure Section 2018(a), which until 1986 governed who could serve as a deposition officer *outside* California. In 2004, the provision was amended to replace that obsolete cross-reference with a reference to Code of Civil Procedure

- Government Code Section 68097.6.
- Health and Safety Code Section 1424.1.
- Insurance Code Section 11580.2.

The Commission recommends updating the obsolete cross-references to civil discovery provisions in these statutes.⁶ This reform would help to prevent confusion and spare courts,

Section 2025, governing who can serve as a deposition officer *inside* California. 2004 Cal. Stat. ch. 647, § 6.

Code of Civil Procedure Section 2025 will be repealed as of July 1, 2005, as part of a nonsubstantive reorganization of the civil discovery provisions. See 2004 Cal. Stat. ch. 182. The new provision governing who can serve as a deposition officer *inside* California will be Code of Civil Procedure Section 2025.320; the new provision governing who can serve as a deposition officer *outside* California will be Code of Civil Procedure Section 2026.010(d). *Id.* The Commission proposes to amend Government Code Section 12963.3 to replace the reference to Code of Civil Procedure Section 2025 with references to both of these new provisions. According to DFEH, that approach will best serve its needs.

6. The Commission also proposes to make a few grammatical corrections and stylistic changes, delete obsolete language in Code of Civil Procedure Section 1991.2, make explicit that letters rogatory or a letter of request are to be obtained when necessary under Code of Civil Procedure Section 1283, and correct the following additional errors in the statutes under consideration, unrelated to civil discovery:

(1) Health and Safety Code Section 1424.1(c) cross-refers to Welfare and Institutions Code Section 9701. The cross-referenced definitions are still located in Welfare and Institutions Code Section 9701, but not in the subdivisions specified in Health and Safety Code Section 1424.1. The proposed amendment to Health and Safety Code Section 1424.1 would delete the subdivision references, making it easier to keep the cross-references up-to-date in the future.

(2) Insurance Code Section 11580.2(c)(5) cross-refers to subdivisions (a), (b), and (c) of Vehicle Code Section 16054. The subdivision references are no longer correct; the pertinent material is now located in subdivisions (a)(1)-(a)(3) of Vehicle Code Section 16054. The proposed amendment to Insurance Code Section 11580.2(c)(5) would delete the subdivision references and simply refer to Vehicle Code Section 16054. This would make it easier to keep the cross-reference up-to-date in the future. It would also expand the scope of the cross-reference to include Vehicle Code Section 16054(a)(4) (proof of financial responsibility by an owner or driver who is involved in an accident while operating a vehicle of less than four wheels).

attorneys, and litigants from unnecessarily expending resources investigating and debating the meaning of the cross-references.⁷

The proposed legislation is based on the recently enacted nonsubstantive reorganization of the civil discovery provisions, which will become operative on July 1, 2005.⁸ A Comment accompanies each proposed amendment. To assist in tracing the history of these provisions, the Comments include citations to sources showing:

- (1) The content of the cross-referenced provision at the time when the cross-reference was inserted.
- (2) Where that material has been relocated.⁹

The Commission's work on civil discovery is continuing. The Commission welcomes suggestions and may propose further reforms in the future.

7. For an example of problems created by the obsolete cross-references, see *Miranda v. 21st Century Ins. Co.*, 117 Cal. App. 4th 913, 921, 12 Cal. Rptr. 3d 159 (2004) (obsolete cross-references in Ins. Code § 11580.2(f)).

8. See 2004 Cal. Stat. ch. 182, § 64 [AB 3081, Assembly Committee on Judiciary].

9. Most of the proposed revisions are straightforward, replacing each outdated cross-reference with the modern equivalent. The proposed amendment of Business and Professions Code Section 25009 would simplify the statute by referring to the Civil Discovery Act generally, rather than to several specific discovery provisions. This nonsubstantive change would make it easier to keep the statute up-to-date in the future.

The legislative history of the provisions referenced in Code of Civil Procedure Section 1283 (former Code Civ. Proc. §§ 2024-2028) is complicated. It is clear from the context, however, that the proper modern references are to Code of Civil Procedure Sections 2026 and 2027, which pertain to the procedures for obtaining a commission for taking an out-of-state deposition.

The amendment of Insurance Code Section 11580.2(f)(5) would reflect that the cross-referenced provision now refers to "a party to the action," rather than "a party to the record of any civil action or proceedings."

PROPOSED LEGISLATION

Bus. & Prof. Code § 25009 (amended). Evidence

SECTION 1. Section 25009 of the Business and Professions Code is amended to read:

25009. Any defendant in any action brought under this chapter or any person who may be a witness therein under ~~Sections 2016, 2018, and 2019~~ *Title 4 (commencing with Section 2016.010)* of the Code of Civil Procedure or Section 776 of the Evidence Code, and the books and records of ~~any such~~ *the* defendant or witness, may be brought into court and the books and records may be introduced by reference into evidence, but no information so obtained may be used against the defendant or ~~any such~~ *the* witness as a basis for a misdemeanor prosecution under this chapter.

Comment. Section 25009 is amended to reflect revision and relocation of the civil discovery provisions referenced in it (former Code Civ. Proc. §§ 2016, 2018, and 2019). Those provisions were repealed in 1986 and their substance relocated to Code of Civil Procedure Sections 2017, 2018, 2021, and 2025-2028, which were in turn repealed and recodified in 2004, as part of a nonsubstantive reorganization of the Civil Discovery Act. 1986 Cal. Stat. ch. 1334, §§ 1, 2; 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; see *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003); see also 1961 Cal. Stat. ch. 192, § 1 (former Code Civ. Proc. § 2018); 1963 Cal. Stat. ch. 519, § 1 (former Code Civ. Proc. § 2019); 1965 Cal. Stat. ch. 299, § 125 (former Code Civ. Proc. § 2016); 1965 Cal. Stat. ch. 299, § 5 (earlier version of Section 25009). For purposes of simplification and to make it easier to keep the cross-references up-to-date in the future, Section 25009 is amended to refer to the Civil Discovery Act generally, rather than to a list of discovery provisions pertaining to depositions. This is not a substantive change.

Code Civ. Proc. § 1283 (amended). Deposition for use as evidence

SEC. 2. Section 1283 of the Code of Civil Procedure is amended to read:

1283. On application of a party to the arbitration the neutral arbitrator may order the deposition of a witness to be taken for use as evidence and not for discovery if the witness cannot be compelled to attend the hearing or if such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be taken. The deposition shall be taken in the manner prescribed by law for the taking of depositions in civil actions. If the neutral arbitrator orders the taking of the deposition of a witness who resides outside the state, the party who applied for the taking of the deposition shall obtain a commission, *letters rogatory*, or a *letter of request* therefor from the superior court in accordance with ~~Sections 2024 to 2028, inclusive, of this code Chapter 10 (commencing with Section 2026.010) of Title 4 of Part 4.~~

Comment. Section 1283 is amended to reflect revision and relocation of the civil discovery provisions referenced in it. As enacted in 1970, the section referred to Sections 2024-2028. 1970 Cal. Stat. ch. 1045, § 1. That cross-reference is obsolete. See 1986 Cal. Stat. ch. 1334, § 1 (repealing former Sections 2024-2025); 1961 Cal. Stat. ch. 192, §§ 8-10 (repealing former Sections 2026-2028). The modern provisions governing an out-of-state deposition are Sections 2026.010 (oral deposition in another state or territory of the United States) and 2027.010 (oral deposition in a foreign nation).

Section 1283 is also amended to make clear that letters rogatory or a letter of request are to be obtained, when necessary, for a deposition taken in arbitration.

Section 1283 is further amended to delete surplusage.

Code Civ. Proc. § 1991.2 (amended). Application of Section 1991

SEC. 3. Section 1991.2 of the Code of Civil Procedure is amended to read:

1991.2. ~~On and after the ninety-first day after adjournment of the 1959 Regular Session, the~~ *The* provisions of Section 1991 shall *do* not apply to any act or omission thereafter occurring in a deposition taken pursuant to ~~Article 3, Chapter~~

~~3, Title 3, Part 4 (commencing at Section 2016) but the Title 4 (commencing with Section 2016.010). The provisions of Section 2034 shall be Chapter 7 (commencing with Section 2023.010) of Title 4 are exclusively applicable.~~

Comment. Section 1991.2 is amended to delete obsolete language, correct the cross-references, and conform to modern drafting conventions. For the text of former Section 2034, see 1959 Cal. Stat. ch. 1590, § 12. Former Section 2034 was repealed in 1986 and its substance relocated to Section 2023, which was in turn repealed and recodified in 2004, as part of a nonsubstantive reorganization of the Civil Discovery Act. 1986 Cal. Stat. ch. 1334, §§ 1, 2; 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; see *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

Educ. Code § 44944 (amended). Conduct of hearing

SEC. 4. Section 44944 of the Education Code is amended to read:

44944. (a) In a dismissal or suspension proceeding initiated pursuant to Section 44934, if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. However, the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all the power granted to an agency in that chapter, except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court under ~~Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure.~~ Notwithstanding any provision to the contrary, and except for the taking of oral

depositions, no discovery shall occur later than 30 calendar days after the employee is served with a copy of the accusation pursuant to Section 11505 of the Government Code. In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to such *the* continuance. However, the extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section.

If the right of discovery granted under the preceding paragraph is denied by either the employee or the governing board, all the remedies in ~~Section 2034 Chapter 7 (commencing with Section 2023.010) of Title 4 of Part 4~~ of the Code of Civil Procedure shall be available to the party seeking discovery and the court of proper jurisdiction, to entertain his or her motion, shall be the superior court of the county in which the hearing will be held.

The time periods in this section and of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and of ~~Article 3 (commencing with Section 2016) of Chapter 3 of Title 3~~ *Title 4 (commencing with Section 2016.010)* of Part 4 of the Code of Civil Procedure shall not be applied so as to deny discovery in a hearing conducted pursuant to this section.

The superior court of the county in which the hearing will be held may, upon motion of the party seeking discovery, suspend the hearing so as to comply with the requirement of the preceding paragraph.

No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters which occurred

more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

(b) The hearing provided for in this section shall be conducted by a Commission on Professional Competence. One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be an administrative law judge of the Office of Administrative Hearings who shall be chairperson and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. If either the governing board or the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, the failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. When the county board of education is also the governing board of the school district or has by statute been granted the powers of a governing board, the selection shall be made by the Superintendent of Public Instruction, who shall be reimbursed by the school district for all costs incident to the selection.

The member selected by the governing board and the member selected by the employee shall not be related to the employee and shall not be employees of the district initiating the dismissal or suspension and shall hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee.

(c) The decision of the Commission on Professional Competence shall be made by a majority vote, and the

commission shall prepare a written decision containing findings of fact, determinations of issues, and a disposition which shall be, solely:

(1) That the employee should be dismissed.

(2) That the employee should be suspended for a specific period of time without pay.

(3) That the employee should not be dismissed or suspended.

The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors.

The commission shall not have the power to dispose of the charge of dismissal by imposing probation or other alternative sanctions. The imposition of suspension pursuant to paragraph (2) shall be available only in a suspension proceeding authorized pursuant to subdivision (b) of Section 44932 or Section 44933.

The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

The governing board and the employee shall have the right to be represented by counsel.

(d) (1) If the member selected by the governing board or the member selected by the employee is employed by any school district in this state the member shall, during any service on a Commission on Professional Competence, continue to receive salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the district in which the member is

employed, but shall receive no additional compensation or honorariums for service on the commission.

(2) If service on a Commission on Professional Competence occurs during summer recess or vacation periods, the member shall receive compensation proportionate to that received during the current or immediately preceding contract period from the member's employing district, whichever amount is greater.

(e) If the Commission on Professional Competence determines that the employee should be dismissed or suspended, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the administrative law judge. The state shall pay any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations, and forms for the submission of the claims. The employee and the governing board shall pay their own attorney fees.

If the Commission on Professional Competence determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing, including the cost of the administrative law judge, any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited

to, payments or obligations incurred for travel, meals, and lodging, the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee, and reasonable attorney fees incurred by the employee.

As used in this section, “reasonable expenses” shall not be deemed “compensation” within the meaning of subdivision (d).

If either the governing board or the employee petitions a court of competent jurisdiction for review of the decision of the commission, the payment of expenses to members of the commission required by this subdivision shall not be stayed.

In the event that the decision of the commission is finally reversed or vacated by a court of competent jurisdiction, then either the state, having paid the commission members’ expenses, shall be entitled to reimbursement from the governing board for those expenses, or the governing board, having paid the expenses, shall be entitled to reimbursement from the state.

Additionally, either the employee, having paid a portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the governing board for the expenses, or the governing board, having paid its portion and the employee’s portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the employee for that portion of the expenses.

(f) The hearing provided for in this section shall be conducted in a place selected by agreement among the members of the commission. In the absence of agreement, the place shall be selected by the administrative law judge.

Comment. Subdivision (a) of Section 44944 is amended to reflect nonsubstantive reorganization of the Civil Discovery Act. 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; see *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm’n Reports 789 (2003).

Subdivision (a) is also amended to reflect the revision and relocation of former Code of Civil Procedure Section 2034, which pertained to sanctions for discovery misuse. Former Code of Civil Procedure Section 2034 was repealed in 1986 and its substance relocated to Code of Civil Procedure Section 2023. 1986 Cal. Stat. ch. 1334, §§ 1, 2; see also 1974 Cal. Stat. ch. 732, § 4 (former Code Civ. Proc. § 2034); 1976 Cal. Stat. ch. 1010, § 2 (earlier version of Section 44944). Section 44944(a) was not revised at that time to reflect the repeal of former Code of Civil Procedure Section 2034 and the relocation of its substance. It is now amended to reflect that change, as well as the subsequent nonsubstantive reorganization of the provisions governing civil discovery.

The first paragraph of subdivision (e) is amended to make a grammatical correction.

Gov't Code § 12963.3 (amended). Depositions

SEC. 5. Section 12963.3 of the Government Code is amended to read:

12963.3. (a) Depositions taken by the department shall be noticed by issuance and service of a subpoena pursuant to Section 12963.1. If, in the course of the investigation of a complaint, a subpoena is issued and served on an individual or organization not alleged in the complaint to have committed an unlawful practice, written notice of the deposition shall also be mailed by the department to each individual or organization alleged in the complaint to have committed an unlawful practice.

(b) A deposition may be taken before any officer of the department who has been authorized by the director to administer oaths and take testimony, or before any other person before whom a deposition may be taken in a civil action pursuant to ~~Section 2025~~ *Section 2025.320 or subdivision (d) of Section 2026.010* of the Code of Civil Procedure. The person before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the person's direction and in the person's presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed

unless the parties agree otherwise. All objections made at the time of the examination shall be noted on the deposition by the person before whom the deposition is taken, and evidence objected to shall be taken subject to the objections.

Comment. Subdivision (b) of Section 12963.3 is amended to reflect revision and relocation of the civil discovery provision referenced in it (Code Civ. Proc. § 2025, pertaining to a deposition in California) and the civil discovery provision previously referenced in it (former Code Civ. Proc. § 2018(a), pertaining to a deposition outside the state). See 1961 Cal. Stat. ch. 192, § 1 (former Code Civ. Proc. § 2018); see also 1980 Cal. Stat. ch. 1023, § 5 (earlier version of Section 12963.3). Former Code of Civil Procedure Section 2018(a) was repealed in 1986 and its substance relocated to Code of Civil Procedure Section 2026(c). 1986 Cal. Stat. ch. 1334, §§ 1, 2. Section 12963.3(b) was not revised at that time to reflect the repeal of former Code of Civil Procedure Section 2018(a) and the relocation of its substance. In 2004, however, it was revised to refer to the provision governing who is permitted to serve as a deposition officer for an oral deposition taken in California (Code Civ. Proc. § 2025). 2004 Cal. Stat. ch. 647, § 6. The section is now amended to restore the reference to the provision specifying who is permitted to serve as a deposition officer for an oral deposition taken outside California, and to reflect the nonsubstantive reorganization of the civil discovery provisions operative July 1, 2005. See 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

Gov't Code § 68097.6 (amended). Subpoenas for depositions of certain employees

SEC. 6. Section 68097.6 of the Government Code is amended to read:

68097.6. Sections 68097.1, 68097.2, 68097.3, 68097.4, and 68097.5 of this code shall be applicable *apply* to subpoenas issued for the taking of depositions of employees of the Department of Justice who are peace officers or analysts in technical fields, peace officers of the Department of the California Highway Patrol, peace officer members of the State Fire Marshal's office, sheriffs, deputy sheriffs, marshals, deputy marshals, firefighters, or city police officers pursuant to ~~Section 2019~~ *Chapter 9 (commencing with*

Section 2025.010) of Title 4 of Part 4 of the Code of Civil Procedure.

Comment. Section 68097.6 is amended to reflect revision and relocation of the civil discovery provision referenced in it (former Code Civ. Proc. § 2019), which set forth guidelines for taking an oral deposition in the state. Former Code of Civil Procedure Section 2019 was repealed in 1986 and its substance relocated to Code of Civil Procedure Section 2025. 1986 Cal. Stat. ch. 1334, §§ 1, 2; see also 1963 Cal. Stat. ch. 519, § 1 (former Code Civ. Proc. § 2019); 1963 Cal. Stat. ch. 1485, § 10 (earlier version of Section 68097.6). Section 68097.6 was not revised at that time to reflect the repeal of former Code of Civil Procedure Section 2019 and the relocation of its substance. It is now amended to reflect that change, as well as a subsequent nonsubstantive reorganization of the provisions governing civil discovery. See 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

Section 68097.6 is also amended to delete unnecessary language.

Health & Safety Code § 1424.1 (amended). Quality assurance logs

SEC. 7. Section 1424.1 of the Health and Safety Code is amended to read:

1424.1. (a) On and after the effective date of this section, no citation shall be issued or sustained under this chapter for a violation of any regulation discovered and recorded by a facility if all of the following conditions have been met:

(1) The facility maintains an ongoing quality assurance and patient care audit program, which includes maintenance of a quality assurance log which is made available to the state department at the commencement of each inspection and investigation. The facility shall retain this log for the current year and the preceding three years.

(2) The violation was not willful and resulted in no actual harm to any patient or guest.

(3) The violation was first discovered by the licensee and was promptly and accurately recorded in the quality assurance log prior to discovery by the state department.

(4) Promptly upon discovery, the facility implemented remedial action satisfactory to the state department to correct the violation and prevent a recurrence. If the state department determines that remedial action voluntarily undertaken by the facility is unsatisfactory, the state department shall allow the facility reasonable time to augment the remedial action before the condition shall be deemed to be a violation.

(b) Except as otherwise provided in this section, a quality assurance log which meets the criteria of this section shall not be discoverable or admissible in any action against the licensee. The quality assurance log shall be discoverable pursuant to a motion to produce under ~~Section 2031~~ *Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4* of the Code of Civil Procedure and admissible only for purposes of impeachment. However, the court, in a motion pursuant to ~~paragraph (1) of subdivision (b) of Section 2019~~ *Section 2025.420* of the Code of Civil Procedure, or at trial or other proceeding, may limit access to those entries which would be admissible for impeachment purposes.

(c) The quality assurance log shall be made available upon request to any of the following:

(1) Full-time state employees of the Office of the State Long-Term Care Ombudsman.

(2) Ombudsman coordinators, as defined in ~~subdivision (h)~~ of Section 9701 of the Welfare and Institutions Code.

(3) Ombudsmen qualified by medical training as defined in ~~subdivision (g)~~ of Section 9701 of the Welfare and Institutions Code, with the approval of either the State Long-Term Care Ombudsman or ombudsman coordinator.

The licensee may make the quality assurance log available, in the licensee's discretion, to any representative of the Office of the State Long-Term Care Ombudsman, as defined in ~~subdivision (e)~~ of Section 9701 of the Welfare and Institutions Code, without liability for the disclosure. Each

representative of the Office of the State Long-Term Care Ombudsman who has been provided access to a facility's quality assurance log pursuant to this section shall maintain all disclosures in confidence.

Comment. Subdivision (b) of Section 1424.1 is amended to reflect revision and relocation of the civil discovery provisions referenced in it. Former Code of Civil Procedure Section 2019(b)(1) pertained to a motion for a protective order with respect to a deposition. It was repealed in 1986 and its substance relocated to Code of Civil Procedure Section 2025(i). 1986 Cal. Stat. ch. 1334, §§ 1, 2; see also 1982 Cal. Stat. ch. 192, § 1 (former Code Civ. Proc. § 2019); 1985 Cal. Stat. ch. 11, § 10 (earlier version of Section 1424.1). Section 1424.1(b) was not revised at that time to reflect the repeal of former Code of Civil Procedure Section 2019(b)(1) and the relocation of its substance. It is now amended to reflect that change, as well as a subsequent nonsubstantive reorganization of the provisions governing civil discovery. See 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

Subdivision (c) is amended to correct the cross-references to definitions in Welfare and Institutions Code Section 9701.

Ins. Code § 11580.2 (amended). Uninsured and underinsured motorist coverage

SEC. 8. Section 11580.2 of the Insurance Code is amended to read:

11580.2. (a)(1) No policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle, except for policies that provide insurance in the Republic of Mexico issued or delivered in this state by nonadmitted Mexican insurers, shall be issued or delivered in this state to the owner or operator of a motor vehicle, or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle then principally used or principally garaged in this state, unless the policy contains, or has added to it by endorsement, a provision with coverage limits at least equal to the limits specified in subdivision (m) and in no case less than the financial responsibility requirements specified in Section 16056 of the

Vehicle Code insuring the insured, the insured's heirs or legal representative for all sums within the limits that he, she, or they, as the case may be, shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle. The insurer and any named insured, prior to or subsequent to the issuance or renewal of a policy, may, by agreement in writing, in the form specified in paragraph (2) or paragraph (3), (1) delete the provision covering damage caused by an uninsured motor vehicle completely, or (2) delete the coverage when a motor vehicle is operated by a natural person or persons designated by name, or (3) agree to provide the coverage in an amount less than that required by subdivision (m) but not less than the financial responsibility requirements specified in Section 16056 of the Vehicle Code. Any of these agreements by any named insured or agreement for the amount of coverage shall be binding upon every insured to whom the policy or endorsement provisions apply while the policy is in force, and shall continue to be so binding with respect to any continuation or renewal of the policy or with respect to any other policy that extends, changes, supersedes, or replaces the policy issued to the named insured by the same insurer, or with respect to reinstatement of the policy within 30 days of any lapse thereof. A policy shall be excluded from the application of this section if the automobile liability coverage is provided only on an excess or umbrella basis. Nothing in this section shall require that uninsured motorist coverage be offered or provided in any homeowner policy, personal and residents' liability policy, comprehensive personal liability policy, manufacturers' and contractors' policy, premises liability policy, special multiperil policy, or any other policy or endorsement where automobile liability coverage is offered as incidental to some other basic coverage, notwithstanding that the policy may provide automobile or motor vehicle

liability coverage on insured premises or the ways immediately adjoining.

(2) The agreement specified in paragraph (1) to delete the provision covering damage caused by an uninsured motor vehicle completely or delete the coverage when a motor vehicle is operated by a natural person or persons designated by name shall be in the following form:

“The California Insurance Code requires an insurer to provide uninsured motorists coverage in each bodily injury liability insurance policy it issues covering liability arising out of the ownership, maintenance, or use of a motor vehicle. Those provisions also permit the insurer and the applicant to delete the coverage completely or to delete the coverage when a motor vehicle is operated by a natural person or persons designated by name. Uninsured motorists coverage insures the insured, his or her heirs, or legal representatives for all sums within the limits established by law, that the person or persons are legally entitled to recover as damages for bodily injury, including any resulting sickness, disease, or death, to the insured from the owner or operator of an uninsured motor vehicle not owned or operated by the insured or a resident of the same household. An uninsured motor vehicle includes an underinsured motor vehicle as defined in subdivision (p) of Section 11580.2 of the Insurance Code.”

The agreement may contain additional statements not in derogation of or in conflict with the foregoing. The execution of the agreement shall relieve the insurer of liability under this section while the agreement remains in effect.

(3) The agreement specified in paragraph (1) to provide coverage in an amount less than that required by subdivision (m) shall be in the following form:

“The California Insurance Code requires an insurer to provide uninsured motorists coverage in each bodily injury liability insurance policy it issues covering liability arising

out of the ownership, maintenance, or use of a motor vehicle. Those provisions also permit the insurer and the applicant to agree to provide the coverage in an amount less than that required by subdivision (m) of Section 11580.2 of the Insurance Code but not less than the financial responsibility requirements. Uninsured motorists coverage insures the insured, his or her heirs, or legal representatives for all sums within the limits established by law, that the person or persons are legally entitled to recover as damages for bodily injury, including any resulting sickness, disease, or death, to the insured from the owner or operator of an uninsured motor vehicle not owned or operated by the insured or a resident of the same household. An uninsured motor vehicle includes an underinsured motor vehicle as defined in subdivision (p) of Section 11580.2 of the Insurance Code.”

The agreement may contain additional statements not in derogation of or in conflict with this paragraph. However, it shall be presumed that an application for a policy of bodily injury liability insurance containing uninsured motorist coverage in an amount less than that required by subdivision (m), signed by the named insured and approved by the insurer, with a policy effective date after January 1, 1985, shall be a valid agreement as to the amount of uninsured motorist coverage to be provided.

(b) As used in subdivision (a), “bodily injury” includes sickness or disease, including death, resulting therefrom; “named insured” means only the individual or organization named in the declarations of the policy of motor vehicle bodily injury liability insurance referred to in subdivision (a); as used in subdivision (a) if the named insured is an individual “insured” means the named insured and the spouse of the named insured and, while residents of the same household, relatives of either while occupants of a motor vehicle or otherwise, heirs and any other person while in or

upon or entering into or alighting from an insured motor vehicle and any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsement apply; as used in subdivision (a), if the named insured is an entity other than an individual, “insured” means any person while in or upon or entering into or alighting from an insured motor vehicle and any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsement apply. As used in this subdivision, “individual” shall not include persons doing business as corporations, partnerships, or associations. As used in this subdivision, “insured motor vehicle” means the motor vehicle described in the underlying insurance policy of which the uninsured motorist endorsement or coverage is a part, a temporary substitute automobile for which liability coverage is provided in the policy or a newly acquired automobile for which liability coverage is provided in the policy if the motor vehicle is used by the named insured or with his or her permission or consent, express or implied, and any other automobile not owned by or furnished for the regular use of the named insured or any resident of the same household, or by a natural person or persons for whom coverage has been deleted in accordance with subdivision (a) while being operated by the named insured or his or her spouse if a resident of the same household, but “insured motor vehicle” shall not include any automobile while used as a public or livery conveyance. As used in this section, “uninsured motor vehicle” means a motor vehicle with respect to the ownership, maintenance or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident, or there is the applicable insurance or bond but the company writing the insurance or bond denies coverage thereunder or

refuses to admit coverage thereunder except conditionally or with reservation, or an “underinsured motor vehicle” as defined in subdivision (p), or a motor vehicle used without the permission of the owner thereof if there is no bodily injury liability insurance or bond applicable at the time of the accident with respect to the owner or operator thereof, or the owner or operator thereof be unknown, provided that, with respect to an “uninsured motor vehicle” whose owner or operator is unknown:

(1) The bodily injury has arisen out of physical contact of the automobile with the insured or with an automobile that the insured is occupying.

(2) The insured or someone on his or her behalf has reported the accident within 24 hours to the police department of the city where the accident occurred or, if the accident occurred in unincorporated territory then either to the sheriff of the county where the accident occurred or to the local headquarters of the California Highway Patrol, and has filed with the insurer within 30 days thereafter a statement under oath that the insured or his or her legal representative has or the insured’s heirs have a cause of action arising out of the accident for damages against a person or persons whose identity is unascertainable and set forth facts in support thereof. As used in this section, “uninsured motor vehicle” shall not include a motor vehicle owned or operated by the named insured or any resident of the same household or self-insured within the meaning of the Financial Responsibility Law of the state in which the motor vehicle is registered or that is owned by the United States of America, Canada, a state or political subdivision of any ~~such government~~ *of those governments* or an agency of any of the foregoing, or a land motor vehicle or trailer while located for use as a residence or premises and not as a vehicle, or any equipment or vehicle

designed or modified for use primarily off public roads, except while actually upon public roads.

As used in this section, “uninsured motor vehicle” also means an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency. An insurer’s solvency protection shall be applicable only to accidents occurring during a policy period in which its insured’s motor vehicle coverage is in effect where the liability insurer of the tortfeasor becomes insolvent within one year of the accident. In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of the coverage, the insurer making the payment, shall to the extent thereof, be entitled to any proceeds that may be recoverable from the assets of the insolvent insurer through any settlement or judgment of the person against the insolvent insurer.

Nothing in this section is intended to exclude from the definition of an uninsured motor vehicle any motorcycle or private passenger-type four-wheel drive motor vehicle if that vehicle was subject to and failed to comply with the Financial Responsibility Law of this state.

(c) The insurance coverage provided for in this section does not apply either as primary or as excess coverage:

(1) To property damage sustained by the insured.

(2) To bodily injury of the insured while in or upon or while entering into or alighting from a motor vehicle other than the described motor vehicle if the owner thereof has insurance similar to that provided in this section.

(3) To bodily injury of the insured with respect to which the insured or his or her representative shall, without the written consent of the insurer, make any settlement with or prosecute to judgment any action against any person who may be legally liable therefor.

(4) In any instance where it would inure directly or indirectly to the benefit of any workers' compensation carrier or to any person qualified as a self-insurer under any workers' compensation law, or directly to the benefit of the United States, or any state or any political subdivision thereof.

(5) To establish proof of financial responsibility as provided in ~~subdivisions (a), (b), and (c)~~ of Section 16054 of the Vehicle Code.

(6) To bodily injury of the insured while occupying a motor vehicle owned by an insured or leased to an insured under a written contract for a period of six months or longer, unless the occupied vehicle is an insured motor vehicle. "Motor vehicle" as used in this paragraph means any self-propelled vehicle.

(7) To bodily injury of the insured when struck by a vehicle owned by an insured, except when the injured insured's vehicle is being operated, or caused to be operated, by a person without the injured insured's consent in connection with criminal activity that has been documented in a police report and that the injured insured is not a party to.

(8) To bodily injury of the insured while occupying a motor vehicle rented or leased to the insured for public or livery purposes.

(d) Subject to paragraph (2) of subdivision (c), the policy or endorsement may provide that if the insured has insurance available to the insured under more than one uninsured motorist coverage provision, any damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages, and the damages shall be prorated between the applicable coverages as the limits of each coverage bear to the total of the limits.

(e) The policy or endorsement added thereto may provide that if the insured has valid and collectible automobile medical payment insurance available to him or her, the

damages that the insured shall be entitled to recover from the owner or operator of an uninsured motor vehicle shall be reduced for purposes of uninsured motorist coverage by the amounts paid or due to be paid under the automobile medical payment insurance.

(f) The policy or an endorsement added thereto shall provide that the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration. The arbitration shall be conducted by a single neutral arbitrator. An award or a judgment confirming an award shall not be conclusive on any party in any action or proceeding between (i) the insured, his or her insurer, his or her legal representative, or his or her heirs and (ii) the uninsured motorist to recover damages arising out of the accident upon which the award is based. If the insured has or may have rights to benefits, other than nonoccupational disability benefits, under any workers' compensation law, the arbitrator shall not proceed with the arbitration until the insured's physical condition is stationary and ratable. In those cases in which the insured claims a permanent disability, the claims shall, unless good cause be shown, be adjudicated by award or settled by compromise and release before the arbitration may proceed. Any demand or petition for arbitration shall contain a declaration, under penalty of perjury, stating whether (i) the insured has a workers' compensation claim; (ii) the claim has proceeded to findings and award or settlement on all issues reasonably contemplated to be determined in that claim; and (iii) if not, what reasons amounting to good cause are grounds for the arbitration to proceed immediately. The arbitration shall be deemed to be a proceeding and the hearing before the arbitrator shall be deemed to be the trial of an issue therein for purposes of

issuance of a subpoena by an attorney of a party to the arbitration under Section 1985 of the Code of Civil Procedure. ~~Article 3 (commencing with Section 2016) of Chapter 3 of Title 3~~ *Title 4 (commencing with Section 2016.010)* of Part 4 of the Code of Civil Procedure shall be applicable to these determinations, and all rights, remedies, obligations, liabilities and procedures set forth in ~~Article 3~~ *Title 4* shall be available to both the insured and the insurer at any time after the accident, both before and after the commencement of arbitration, if any, with the following limitations:

(1) Whenever in ~~Article 3~~ *Title 4*, reference is made to the court in which the action is pending, or provision is made for application to the court or obtaining leave of court or approval by the court, the court that shall have jurisdiction for the purposes of this section shall be the superior court of the State of California, in and for any county that is a proper county for the filing of a suit for bodily injury arising out of the accident, against the uninsured motorist, or any county specified in the policy or an endorsement added thereto as a proper county for arbitration or action thereon.

(2) Any proper court to which application is first made by either the insured or the insurer under ~~Article 3~~ *Title 4* for any discovery or other relief or remedy, shall thereafter be the only court to which either of the parties shall make any applications under ~~Article 3~~ *Title 4* with respect to the same accident, subject, however, to the right of the court to grant a change of venue after a hearing upon notice, upon any of the grounds upon which change of venue might be granted in an action filed in the superior court.

(3) A deposition pursuant to ~~Section 2016~~ *Chapter 9 (commencing with Section 2025.010) of Title 4 of Part 4* of the Code of Civil Procedure may be taken without leave of court, except that leave of court, granted with or without

notice and for good cause shown, must be obtained if the notice of the taking of the deposition is served by either party within 20 days after the accident.

(4) Paragraph (4) of subdivision (a) of Section 2019 *Subdivision (a) of Section 2025.280* of the Code of Civil Procedure is not applicable to discovery under this section.

(5) For the purposes of discovery under this section, the insured and the insurer shall each be deemed to be “a party to the record of any civil action or proceedings *action*,” where that phrase is used in paragraph (2) of subdivision (b) of Section 2019 *Section 2025.260* of the Code of Civil Procedure.

(6) Interrogatories under Section 2030 *Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4* of the Code of Civil Procedure and requests for admission under Section 2033 *Chapter 16 (commencing with Section 2033.010) of Title 4 of Part 4* of the Code of Civil Procedure may be served by either the insured or the insurer upon the other at any time more than 20 days after the accident without leave of court.

(7) Nothing in this section limits the rights of any party to discovery in any action pending or that may hereafter be pending in any court.

(g) The insurer paying a claim under an uninsured motorist endorsement or coverage shall be entitled to be subrogated to the rights of the insured to whom the claim was paid against any person legally liable for the injury or death to the extent that payment was made. The action may be brought within three years from the date that payment was made hereunder.

(h) An insured entitled to recovery under the uninsured motorist endorsement or coverage shall be reimbursed within the conditions stated herein without being required to sign any release or waiver of rights to which he or she may be entitled under any other insurance coverage applicable; nor

shall payment under this section to the insured be delayed or made contingent upon the decisions as to liability or distribution of loss costs under other bodily injury liability insurance or any bond applicable to the accident. Any loss payable under the terms of the uninsured motorist endorsement or coverage to or for any person may be reduced:

(1) By the amount paid and the present value of all amounts payable to him or her, his or her executor, administrator, heirs, or legal representative under any workers' compensation law, exclusive of nonoccupational disability benefits.

(2) By the amount the insured is entitled to recover from any other person insured under the underlying liability insurance policy of which the uninsured motorist endorsement or coverage is a part, including any amounts tendered to the insured as advance payment on behalf of the other person by the insurer providing the underlying liability insurance.

(i)(1) No cause of action shall accrue to the insured under any policy or endorsement provision issued pursuant to this section unless one of the following actions have been taken within two years from the date of the accident:

(A) Suit for bodily injury has been filed against the uninsured motorist, in a court of competent jurisdiction.

(B) Agreement as to the amount due under the policy has been concluded.

(C) The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested. Notice shall be sent to the insurer or to the agent for process designated by the insurer filed with the department.

(2) Any arbitration instituted pursuant to this section shall be concluded either:

(A) Within five years from the institution of the arbitration proceeding.

(B) If the insured has a workers' compensation claim arising from the same accident, within three years of the date the claim is concluded, or within the five-year period set forth in subparagraph (A), whichever occurs later.

(3) The doctrines of estoppel, waiver, impossibility, impracticality, and futility apply to excuse a party's noncompliance with the statutory timeframe, as determined by the court.

(4) Parties to the insurance contract may stipulate in writing to extending the time to conclude arbitration.

(j) Notwithstanding subdivisions (b) and (i), in the event the accident occurs in any other state or foreign jurisdiction to which coverage is extended under the policy and the insurer of the tortfeasor becomes insolvent, any action authorized pursuant to this section may be maintained within three months of the insolvency of the tortfeasor's insurer, but in no event later than the pertinent period of limitation of the jurisdiction in which the accident occurred.

(k) Notwithstanding subdivision (i), any insurer whose insured has made a claim under his or her uninsured motorist coverage, and the claim is pending, shall, at least 30 days before the expiration of the applicable statute of limitation, notify its insured in writing of the statute of limitation applicable to the injury or death. Failure of the insurer to provide the written notice shall operate to toll any applicable statute of limitation or other time limitation for a period of 30 days from the date the written notice is actually given. The notice shall not be required if the insurer has received notice that the insured is represented by an attorney.

(l) As used in subdivision (b), "public or livery conveyance," or terms of similar import, shall not include the operation or use of a motor vehicle by the named insured in

the performance of volunteer services for a nonprofit charitable organization or governmental agency by providing social service transportation as defined in subdivision (f) of Section 11580.1. This subdivision shall apply only to policies of insurance issued, amended, or renewed on or after January 1, 1976.

(m) Coverage provided under an uninsured motorist endorsement or coverage shall be offered with coverage limits equal to the limits of liability for bodily injury in the underlying policy of insurance, but shall not be required to be offered with limits in excess of the following amounts:

(1) A limit of thirty thousand dollars (\$30,000) because of bodily injury to or death of one person in any one accident.

(2) Subject to the limit for one person set forth in paragraph (1), a limit of sixty thousand dollars (\$60,000) because of bodily injury to or death of two or more persons in any one accident.

(n) Underinsured motorist coverage shall be offered with limits equal to the limits of liability for the insured's uninsured motorist limits in the underlying policy, and may be offered with limits in excess of the uninsured motorist coverage. For the purposes of this section, uninsured and underinsured motorist coverage shall be offered as a single coverage. However, an insurer may offer coverage for damages for bodily injury or wrongful death from the owner or operator of an underinsured motor vehicle at greater limits than an uninsured motor vehicle.

(o) If an insured has failed to provide an insurer with wage loss information or medical treatment record releases within 15 days of the insurer's request or has failed to submit to a medical examination arranged by the insurer within 20 days of the insurer's request, the insurer may, at any time prior to 30 days before the actual arbitration proceedings commence, request, and the insured shall furnish, wage loss information

or medical treatment record releases, and the insurer may require the insured, except during periods of hospitalization, to make himself or herself available for a medical examination. The wage loss information or medical treatment record releases shall be submitted by the insured within 10 days of request and the medical examination shall be arranged by the insurer no sooner than 10 days after request, unless the insured agrees to an earlier examination date, and not later than 20 days after the request. If the insured fails to comply with the requirements of this subdivision, the actual arbitration proceedings shall be stayed for at least 30 days following compliance by the insured. The proceedings shall be scheduled as soon as practicable following expiration of the 30-day period.

(p) This subdivision applies only when bodily injury, as defined in subdivision (b), is caused by an underinsured motor vehicle. If the provisions of this subdivision conflict with subdivisions (a) through (o), the provisions of this subdivision shall prevail.

(1) As used in this subdivision, “an insured motor vehicle” is one that is insured under a motor vehicle liability policy, or automobile liability insurance policy, self-insured, or for which a cash deposit or bond has been posted to satisfy a financial responsibility law.

(2) “Underinsured motor vehicle” means a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person.

(3) This coverage does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of the payment is submitted to the insurer providing the underinsured motorist coverage.

(4) When bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, the maximum liability of the insurer providing the underinsured motorist coverage shall not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury.

(5) The insurer paying a claim under this subdivision shall, to the extent of the payment, be entitled to reimbursement or credit in the amount received by the insured from the owner or operator of the underinsured motor vehicle or the insurer of the owner or operator.

(6) If the insured brings an action against the owner or operator of an underinsured motor vehicle, he or she shall forthwith give to the insurer providing the underinsured motorist coverage a copy of the complaint by personal service or certified mail. All pleadings and depositions shall be made available for copying or copies furnished the insurer, at the insurer's expense, within a reasonable time.

(7) Underinsured motorist coverage shall be included in all policies of bodily injury liability insurance providing uninsured motorist coverage issued or renewed on or after July 1, 1985. Notwithstanding this section, an agreement to delete uninsured motorist coverage completely, or with respect to a person or persons designated by name, executed prior to July 1, 1985, shall remain in full force and effect.

(q) Regardless of the number of vehicles involved whether insured or not, persons covered, claims made, premiums paid or the number of premiums shown on the policy, in no event shall the limit of liability for two or more motor vehicles or two or more policies be added together, combined, or stacked to determine the limit of insurance coverage available to injured persons.

Comment. Subdivision (c)(5) of Section 11580.2 is amended to correct the cross-reference to Vehicle Code Section 16054. See 1974 Cal.

Stat. ch. 1409, § 8 (former Veh. Code § 16054(a)-(c)); 1990 Cal. Stat. ch. 314, § 5 (reorganizes Veh. Code § 16054 and adds paragraph on proof of financial responsibility by owner or driver involved in accident while operating vehicle of less than four wheels). As amended, subdivision (c)(5) encompasses proof of financial responsibility by the means formerly set forth in Vehicle Code Section 16054(a)-(c), which are now codified as Vehicle Code Section 16054(a)(1)-(3). Subdivision (c)(5) also encompasses proof of financial responsibility by an owner or driver who is involved in an accident while operating a vehicle of less than four wheels, as provided in Vehicle Code Section 16054(a)(4).

Subdivision (f)(1)-(2) & (6) and the introductory paragraph of subdivision (f) are amended to reflect nonsubstantive reorganization of the Civil Discovery Act. 2004 Cal. Stat. ch. 182, §§ 22, 23, 23.5, 61, 62; see *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003).

Subdivision (f)(3) is amended to reflect revision and relocation of the civil discovery provision referenced in it (former Code Civ. Proc. § 2016), which pertained to deposition procedure. See 1961 Cal. Stat. ch. 2067, § 1 (former Code Civ. Proc. § 2016); see also 1963 Cal. Stat. ch. 1750, § 1 (earlier version of Ins. Code § 11580.2 — see subdivision (e)(3)). Former Code of Civil Procedure Section 2016 was repealed in 1986 and its substance relocated, with revisions, to Code of Civil Procedure Section 2025, which in turn was repealed and recodified as part of the nonsubstantive reorganization of the Civil Discovery Act in 2004. See 1986 Cal. Stat. ch. 1334, §§ 1, 2.

Subdivision (f)(4) is amended to reflect revision and relocation of the civil discovery provision referenced in it (former Code Civ. Proc. § 2019(a)(4)), which pertained to attendance of specified persons at a deposition without service of a subpoena. See 1963 Cal. Stat. ch. 519, § 1 (former Code Civ. Proc. § 2019(a)(4)); see also 1963 Cal. Stat. ch. 1750, § 1 (earlier version of Ins. Code § 11580.2 — see subdivision (e)(4)). Former Code of Civil Procedure Section 2019 was repealed in 1986 and its substance relocated, with revisions, to Code of Civil Procedure Section 2025(h)(1), which in turn was repealed and recodified as part of the nonsubstantive reorganization of the Civil Discovery Act in 2004. See 1986 Cal. Stat. ch. 1334, §§ 1, 2.

Subdivision (f)(5) is amended to reflect revision and relocation of the civil discovery provision referenced in it (former Code Civ. Proc. § 2019(b)(2)), which pertained to the location of a deposition of “a party to the record of any civil action or proceedings.” See 1961 Cal. Stat. ch. 192, § 2 (former Code Civ. Proc. § 2019(b)(2)); see also 1963 Cal. Stat. ch. 1750, § 1 (earlier version of Ins. Code § 11580.2 — see subdivision (e)(5)). Former Code of Civil Procedure Section 2019(b)(2) was repealed

in 1986 and its substance relocated, with revisions, to Code of Civil Procedure Section 2025(e)(3), which in turn was repealed and recodified as part of the nonsubstantive reorganization of the Civil Discovery Act in 2004. See 1986 Cal. Stat. ch. 1334, §§ 1, 2.

Section 11580.2 is also amended to make a stylistic revision in subdivision (b)(2).

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

Ownership of Amounts Withdrawn
from Joint Account

June 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Ownership of Amounts Withdrawn from Joint Account*, 34 Cal. L. Revision Comm'n Reports 199 (2004). This is part of publication #221.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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June 10, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

The Law Revision Commission recommends that the California Multiple-Party Accounts Law be revised to make clear that ownership of funds withdrawn from a joint account is based on the proportionate contributions of the parties to the account. This would reverse the rule of *Lee v. Yang*, 111 Cal. App. 4th 481, 3 Cal. Rptr. 3d 819 (2003), holding that a party who withdraws funds from a joint account owns the funds regardless of their source. The Commission further recommends clarification of the existing rule that withdrawal of sums on deposit in a joint account severs the right of survivorship in the amounts withdrawn to the extent of the ownership interest of the withdrawing party. The proposed revisions would not affect the law relating to spousal rights in a joint account, which are governed by a separate provision.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

Frank Kaplan
Chairperson

OWNERSHIP OF AMOUNTS WITHDRAWN FROM JOINT ACCOUNT

The California Multiple-Party Accounts Law¹ was enacted on recommendation of the Law Revision Commission.² The law governs rights and duties of parties to a multiple party account and of the financial institution that holds the account.

Probate Code Section 5301(a) states:

An account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

This section does not apply to an account between married persons, which is governed by a separate provision.³

A recent appellate decision, *Lee v. Yang*,⁴ interprets Probate Code Section 5301(a) to confer ownership of funds withdrawn from a joint account on the withdrawing party, regardless of the source of the funds. The Law Revision Commission recommends that the statute be revised to make clear that ownership of funds withdrawn from a joint account is determined by the net contributions of the parties to the account, thereby reversing the rule of *Lee v. Yang*.⁵ The Commission further recommends clarification of the existing rule that withdrawal of sums on deposit in a joint account

1. Prob. Code §§ 5100-5407.

2. See *Recommendation Relating to Nonprobate Transfers*, 16 Cal. L. Revision Comm'n Reports 129 (1982); see also *Recommendation Relating to Multiple-Party Accounts in Financial Institutions*, 20 Cal. L. Revision Comm'n Reports 95 (1990).

3. See Prob. Code § 5305 (community property presumption).

4. 111 Cal. App. 4th 481, 3 Cal. Rptr. 3d 819 (2003).

5. See proposed amendment to Prob. Code § 5301 *infra*.

severs the right of survivorship in the amounts withdrawn to the extent of the ownership interest of the withdrawing party.⁶

CALIFORNIA MULTIPLE-PARTY ACCOUNTS LAW

The purpose of the Multiple-Party Accounts Law is to provide rules governing the ownership of a multiple party account in a bank or other financial institution, to clarify rights of creditors of the parties, and to simplify the procedure for transfer of funds by the bank or other financial institution following the death of the depositor. The law enacts the substance of Part VI of the Uniform Probate Code.

The law distinguishes a joint account, which is payable on request of any party, from a pay on death account or a trust account, to which a beneficiary has restricted access. Under the law, the parties to a joint account have unrestricted withdrawal rights, regardless of ownership interests, and a financial institution may pay out to a withdrawing party without fear of liability that the withdrawing party may be taking out a greater share than that party's actual ownership interest in the account. A joint account belongs, during the lifetime of all the parties, to the parties in proportion to the net contribution by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.⁷

The general principle of ownership based on net contributions changed the rule under former law. Until enactment of the Multiple-Party Accounts Law, each party to a joint account was presumed to have an equal interest in the account.⁸ The change was intended to capture the normal expectations of a depositor — a person who deposits funds in

6. See proposed amendment to Prob. Code § 5303 *infra*.

7. Prob. Code § 5301.

8. *Wallace v. Riley*, 23 Cal. App. 2d 654, 667, 74 P.2d 807 (1937).

a joint account normally does not intend to make an irrevocable present gift of the funds deposited, and many people believe that depositing funds in a joint account in a bank or savings and loan association has no effect on ownership of the funds until their death.⁹

LEE V. YANG

In *Lee v. Yang*, the parties had commingled their funds in several joint accounts in contemplation of marriage. When their marriage was called off, one party withdrew from the accounts an amount in excess of that party's net contributions to the sums on deposit. The other party sued to recover the excess withdrawal.

Majority Opinion

The court of appeal in *Lee v. Yang* noted enactment of the rule that an account belongs to the parties in proportion to the net contribution by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. The court distinguished sums remaining on deposit from sums withdrawn. "This proportionate ownership rule, however, does not articulate a rule of ownership as to funds withdrawn by a party, irrespective of that party's net contribution."¹⁰

The court concluded that the law is unclear as to ownership of funds that have been withdrawn and are therefore no longer on deposit. The court noted the federal gift tax rule that a gift of funds in a joint account is effective when funds are withdrawn rather than when they are deposited.¹¹ The court

9. *Multiple-Party Accounts in Financial Institutions*, *supra* note 2, at 108. This explanation parallels the Commission's earlier explanation in *Nonprobate Transfers*, *supra* note 2, at 138.

10. *Lee*, 111 Cal. App. 4th at 481, 3 Cal. Rptr. 3d at 826.

11. Treas. Reg. § 25.2511-1 (1958). This rule is cited in the Law Revision Commission recommendation as consistent with the rule under the Multiple-

reasoned that withdrawal should be deemed a gift to the extent there is no independent legal obligation requiring the party to account for the proceeds. The court concluded that in this case there was substantial evidence that there was no agreement between the parties restricting the amount the parties could withdraw from the account. “The inescapable inference is that likewise there was no restriction on the use of the withdrawn funds and hence no legal obligation to account for or return them.”¹² By virtue of the withdrawing party’s unrestricted right to withdraw and apply funds to the party’s own benefit, ownership of the funds passed to the withdrawing party by way of gift.

Dissent

The dissent in *Lee v. Yang* noted that the core distinction between ownership of the funds and the power of withdrawal is clearly articulated in the law and in the legislative background of the law.¹³ The dissent pointed out that a rule allowing a party to an account to withdraw and keep 100% of the funds is contrary to the purpose of the Multiple-Party Accounts Law, which was adopted to avoid the imputation of a gift of sums deposited into a joint tenancy account.

Party Accounts Law. *Multiple-Party Accounts in Financial Institutions*, *supra* note 2, at 108.

12. *Lee*, 111 Cal. App. 4th at 493, 3 Cal. Rptr. 3d at 828.

13. The Law Revision Commission’s recommendation states that the net contribution rule applies to amounts withdrawn as well as to amounts on deposit. The recommendation notes that “the source of the funds deposited is taken into account in determining the interests in funds deposited in or withdrawn from a joint account.” *Multiple-Party Accounts in Financial Institutions*, *supra* note 2, at 105 (citing Prob. Code § 5301(a)). The Commission’s letter of transmittal of the recommendation to the Governor and Legislature addresses this point in further detail: “The multiple-party accounts law . . . permits a person having the present right of withdrawal to sever the joint tenancy by withdrawing the funds from the account. Withdrawal of the funds does not, however, affect the ownership rights of the parties to the funds withdrawn.” *Id.* at 97-98.

The dissent also noted the Uniform Probate Code's commentary to UPC § 6-103, which is the source of, and identical to, the California statute:

Th[is] section does not undertake to describe the situation between parties if one withdraws more than he is then entitled to as against the other party. [Other sections] protect a financial institution in such circumstances without reference to whether a withdrawing party may be entitled to less than he withdraws as against another party. Presumably, overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner as a debtor or trustee. Of course, evidence of intention by one to make a gift to the other of any sums withdrawn by the other in excess of his ownership should be effective.

Finally, the dissent argued that the majority's reliance on the federal gift tax rule is misplaced. That rule only determines the timing of a transfer of ownership for taxation purposes, not whether a transfer of ownership has occurred at all. Whether there is a transfer of ownership is determined by state property law, not federal gift tax law.

The dissent concluded:¹⁴

In the majority's view, a joint tenancy account holder with an urgent need for cash, or merely harboring a vengeful motive, can wipe out an entire account with impunity unless the owner of the funds can prove that there had been a prior, enforceable agreement restricting the power of withdrawal or the use of the funds. This approach — requiring an owner of funds to prove he has *not* made a gift — is contrary to the presumption of ownership and burden of proof set forth in section 5301; is contrary to general notions of property law (see, e.g., *Blonde v. Estate of Jenkins* (1955) 131 Cal.App.2d 682, 686, 281 P.2d 14 [“[t]he donee has the burden to prove the gift”]); and is

14. *Lee*, 111 Cal. App. 4th at 500-01, 3 Cal. Rptr. 3d at 834 (emphasis in original).

contrary to the Commission's comments that "[w]ithdrawal of . . . funds does not . . . affect the ownership rights of the parties to the funds withdrawn" and that "the source of the funds deposited is taken into account in determining the interests in funds deposited in *or withdrawn from* a joint account." (1990 Recommendation, *supra*, 20 Cal. Law Revision Com. Rep., at pp. 98, 105, italics added, fn. omitted.)

Critique

The Commission believes *Lee v. Yang* was incorrectly decided.¹⁵ The effect of the decision is the opposite of that intended by the law. Under prior law the depositor was presumed to own an equal share of funds withdrawn from a joint account. The Multiple-Party Accounts Law presumes the depositor owns funds withdrawn based on the depositor's net contributions. *Lee v. Yang*, however, presumes the depositor owns none of the funds withdrawn.

The decision in the case appears to be based on a misconstruction of the federal gift tax rule. Under the federal rule, a gift occurs on withdrawal of funds from a joint account by the nondepositor *to the extent* the nondepositor has no obligation to account to the depositor for the proceeds.¹⁶ Whether or not a nondepositor has an obligation to account is determined by state property law, not by the federal gift tax law. As the dissent in *Lee v. Yang* rightly points out, the court's reliance on federal estate tax law for its answer to the state property law issue begs the question.¹⁷

15. See also Comment, 25 Est. Plan. & Cal. Prob. Rep. 60 (2003) ("The dissent appears to have the better reading skills."); Granberg, *What's Yours is Mine, in Joint Bank Accounts, 'Lee' Decides*, S.F. Daily Journal, May 14, 2004, at 5 ("dissent presented compelling arguments").

16. Treas. Reg. § 25.2511-1 (1958).

17. *Lee*, 111 Cal. App. 4th at 499-500, 3 Cal. Rptr. 3d at 833-34.

The California statute is drawn from the Uniform Probate Code provisions on multiple party accounts.¹⁸ A majority of states have enacted the same statute. California law requires that a statute based on a uniform act must be uniformly construed.¹⁹ When confronted with the issue of overwithdrawal by a party to a joint account, the courts of other states that have enacted the uniform act have invariably concluded that the withdrawing party's ownership right must be limited to the party's net contribution.²⁰

POLICY CONSIDERATIONS

The Law Revision Commission recommends that the statute be revised to clearly state what rule applies if a cotenant withdraws more than the cotenant's share of funds from a joint account. Relevant policy considerations include the intention of the parties and proof issues involved in tracing.

Intention of the Parties

A depositor may add the name of another party to an account for a variety of reasons. The depositor may want to facilitate use of the funds for the mutual benefit of the parties. The depositor may want to enable the named party to engage in transactions on behalf of the depositor — in effect a power of attorney. Or a depositor may add another party's name to

18. Unif. Prob. Code § 6-103. The multiple party account provisions were revised in 1989 and made part of a larger article in the Uniform Probate Code on nonprobate transfers; the relevant provision on ownership rights is now Section 6-211. The National Conference of Commissioners on Uniform State Laws has also promulgated the statute as a free standing act apart from the Uniform Probate Code. See Uniform Multiple Person Accounts Act (§ 11(b)) and Uniform Nonprobate Transfers on Death Act (§ 211(b)).

19. Prob. Code § 2(b).

20. See, e.g., *Erhardt v. Leonard*, 104 Idaho 197, 657 P.2d 494 (Idaho Ct. App. 1983); *Vaughn v. Bernhardt*, 345 S.C. 196, 547 S.E.2d 869 (S. C. 2001); *In re Estate of Maxfield*, 856 P.2d 1056 (Utah 1993).

the account so that the property will pass to the joint owner free of probate, with no intention to make a lifetime gift.

In the case of a marital account, the parties may well intend to commingle their funds, and to allow each to apply the funds to both their individual and common benefit. The vast number of joint tenancy accounts are marital accounts. The Multiple-Party Accounts Law deals with a marital account separately. Under Probate Code Section 5305, the net contribution of married persons to a joint account is presumed to be and remain their community property. The community property laws impose fiduciary obligations on the spouses in the management and control of the community property, and preserve equal ownership interests in the property.

Before enactment of the Multiple-Party Accounts Law, nonmarital parties to a joint account were also presumed to own the account in equal shares. This was the law not only in California but also the prevailing view throughout the country.²¹ The purpose of the Multiple-Party Accounts Law was to change the presumption from equal ownership between nonmarital parties to ownership based on net contributions.²²

The presumption of ownership based on net contributions effectuates the policy of recognizing the normal situation involved in establishing a nonmarital joint account. The dissent in the *Lee v. Yang* articulates this policy:²³

21. Joint accounts were presumed to be vested in the parties as equal contributors and owners in the absence of evidence to the contrary. The presumption was rebuttable, the intention of the parties being the controlling factor. See 10 Am. Jur. 2d *Banks & Financial Institutions* § 671 (1997).

22. “The multiple-party accounts law conforms to the common understanding of depositors by presuming that funds in a joint account belong to the parties during lifetime in proportion to their net contributions.” *Multiple-Party Accounts In Financial Institutions*, *supra* note 2, at 97.

23. *Lee*, 111 Cal. App. 4th at 501, 3 Cal. Rptr. 3d at 834.

[I]f a cotenant removes more than his or her share of funds from a joint account, the [Multiple-Party Accounts Law] properly places on that person the burden of proving, by clear and convincing evidence, ownership rights in those funds by gift or otherwise. This burden of proof comports with the ethical principle that those who are added as cosignatories on a joint account — invariably persons in close, trusting personal relationships — will respect the other party's ownership of deposited funds.

Tracing

A problem with basing ownership on net contributions is the difficulty of proof — the painstaking tracing and accounting of funds that is required. The court in *Lee v. Yang* articulates this policy consideration in support of its conclusion that the withdrawing party should be presumed to own the funds withdrawn.

The Multiple-Party Accounts Law recognizes potential tracing problems, and deals with them directly. In the absence of proof otherwise, the net contribution of each of the parties is deemed to be an equal amount.²⁴

This rule does not apply in the case of a marital account. That is where most commingling of funds occurs. The spousal equal ownership presumption of Probate Code Section 5305 avoids the problems inherent in attempting to disentangle the interests of the marital partners who may have commingled their funds over an extended period. A spouse may rebut the presumption by tracing to separate property deposits or by proving a contrary written agreement.

In the case of an account between domestic partners, there may likewise be substantial commingling of funds. A clear set of rules governs ownership interests among registered domestic partners. Until January 1, 2005, a rule of proportionate ownership applies, absent a written agreement

24. Prob. Code § 5134(b).

that specifies the rights of the parties.²⁵ After that date the ownership interests of the parties are governed by a community property regime.²⁶

Probate Code Section 5301 will ordinarily come into play only in the case of an account to which one depositor adds the name of another for the purpose of caring for the depositor in old age or for the purpose of transferring the funds at the death of the depositor. Commingling of funds is relatively rare in those circumstances, and tracing is not ordinarily a problem. Where tracing is not possible, the Multiple-Party Accounts Law provides a rough measure of justice through its presumption of equal ownership.

RECOMMENDATION

Overwithdrawal

The Multiple-Party Accounts Law does not directly answer the question of liability for overwithdrawal by a party. The commentary to the uniform act from which the California statute is drawn suggests that the law should impose liability for overwithdrawal.²⁷ Cases in other jurisdictions that have enacted the uniform act have consistently concluded that the net contribution rule applicable to determination of property interests in a joint account should also apply to amounts withdrawn from the account.

Determination of rights between parties to a joint account in the case of overwithdrawal is not a simple matter. Parties

25. Fam. Code § 299.5(e) (“Any property or interest acquired by the partners during the domestic partnership where title is shared shall be held by the partners in proportion of interest assigned to each partner at the time the property or interest was acquired unless otherwise expressly agreed in writing by both parties.”).

26. Fam. Code § 297.5; see also Fam. Code § 299.3 (notice by Secretary of State).

27. Unif. Prob. Code § 6-103 cmt.

make deposits and withdrawals from an account; some of the withdrawals may be intended for common benefit, others may be intended for individual benefit. Where common benefit ends and individual benefit begins is not always clear. There may be unspoken agreements and understandings. The court in *Lee v. Yang* was appropriately concerned about the potential impact of a rule that requires tracing.

On the other hand, the Multiple-Party Accounts Law takes into account the complexities involved in properly accounting for deposits and expenditures. The law provides that in determining the net contribution of the parties, the net contribution is presumed to be an equal amount in the absence of proof otherwise.²⁸ Moreover, the law provides special rules for handling ownership rights in a marital or domestic partnership account, where the commingling issue is most likely to arise.

The Commission recommends that the law make explicit the presumption that the withdrawing party owns the funds withdrawn only to the extent of the party's net contribution. Overwithdrawal should not transfer ownership of the funds absent a showing by clear and convincing evidence of the depositor's intent to make a gift of them. Although that approach may require tracing, this should not be a substantial problem because of the presumption of equal ownership in the absence of proof otherwise and because of the relative rarity of cases where tracing is a significant issue.

Severance of Joint Tenancy

Ownership of funds in a joint account during the lifetime of the parties is based on net contributions of the parties. But at death of a party, the funds in the account pass by right of survivorship to the surviving parties, regardless of net

28. Prob. Code § 5134.

contributions.²⁹ It is a common practice for a depositor to name a party to a joint account with the intention to pass that property outside of probate on the depositor's death.

Several cases have arisen in other jurisdictions where the survivor has withdrawn funds from the joint account before the depositor's death. On the depositor's death, the depositor's estate has recaptured the funds because they were withdrawn during the lifetime of the parties, when ownership was based on net contributions. Moreover, the funds withdrawn do not pass to the survivor on the depositor's death because only "sums on deposit" at the time of death pass by survivorship, and withdrawn funds are no longer on deposit.³⁰

While facially correct, the effect of these cases is to defeat the intention of a depositor who creates a joint account for the express purpose of passing funds at death to the other parties to the account. The joint account is ill-designed for that purpose. A significant reason for enactment of the Multiple-Party Accounts Law was to provide a vehicle to enable a person to pass funds in an account to a beneficiary without conferring on the beneficiary a present withdrawal right. The law authorizes a P.O.D. (pay on death) account in which the depositor names a beneficiary to receive funds remaining in the account on the death of the depositor, without creating any present rights in the beneficiary.

California case law is clear that a party to a joint account may sever survivorship rights in that party's own property by withdrawal of funds from the account.³¹ The statutory embodiment of this principle is not so clear, however:³²

29. Prob. Code § 5302.

30. *Shourek v. Stirling*, 621 N.E.2d 1107, 1110 (Ind. 1993); *Vaughn v. Bernhardt*, 345 S.C. 196, 547 S.E.2d 869 (S. C. 2001).

31. *Estate of Propst*, 50 Cal. 3d 448, 461-62, 268 Cal. Rptr. 114, 788 P.2d 628 (1990) ("Accordingly, we hold that in the absence of prior contrary agreement, a joint tenant of personal property may unilaterally sever his or her

Withdrawal of funds from the account by a party with a present right of withdrawal during the lifetime of a party also eliminates rights of survivorship upon the death of that party with respect to the funds withdrawn.

Broadly read, the provision is susceptible to the interpretation that a withdrawing party may affect survivorship rights of others in the amounts withdrawn even though the party has no ownership interest in the amounts withdrawn.

The Law Revision Commission recommends tightening the statute to more clearly address the issue. A party's ability to terminate survivorship rights in funds withdrawn from a joint account should be limited to the party's ownership interest in the account; the withdrawing party should not be able to alter survivorship rights in funds over which the party has withdrawal rights but no ownership interest. The statute should be revised to state clearly that, "Withdrawal of funds from the account by a party also eliminates rights of survivorship with respect to the funds withdrawn to the extent of the party's net contribution to the account."

Protection of Financial Institution

The Multiple-Party Accounts Law is designed to facilitate transactions in a multiple party account. To this end, a financial institution may honor a withdrawal by an authorized person without inquiry as to the source of the funds withdrawn or their proposed application; nor is the financial institution obligated to determine the withdrawing party's net contribution or to prevent an overwithdrawal.³³ Payment by the financial institution to a party having a withdrawal right discharges the financial institution from claims for the funds

own interest from the joint tenancy and thereby nullify the right of survivorship, as to that interest, of the other joint tenant or tenants without their consent.").

32. Prob. Code § 5303(c).

33. Prob. Code § 5401(c).

withdrawn, whether or not payment is consistent with beneficial ownership of the funds; the payment has no bearing on the rights of parties among themselves.³⁴

In conjunction with clarification of the rule that ownership of amounts withdrawn is based on net contributions, the law should make clear that no new accounting or monitoring obligation is imposed on a financial institution. The financial institution should not be required to make inquiry concerning the source or use of funds withdrawn or be obligated to trace net contributions of the parties.³⁵

34. Prob. Code § 5405.

35. See proposed revision to Prob. Code § 5401(c).

PROPOSED LEGISLATION

Prob. Code § 5301 (amended). Ownership during lifetime

5301. (a) An account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each ~~to the sums on deposit~~, unless there is clear and convincing evidence of a different intent.

(b) In the case of a P.O.D. account, the P.O.D. payee has no rights to the sums on deposit during the lifetime of any party, unless there is clear and convincing evidence of a different intent.

(c) In the case of a Totten trust account, the beneficiary has no rights to the sums on deposit during the lifetime of any party, unless there is clear and convincing evidence of a different intent. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

Comment. Section 5301 is amended to avoid the implication that the net contribution rule is used only to determine the ownership interests of the parties in sums remaining on deposit. See Section 5150 (“sums on deposit” defined). The net contribution rule is used also to determine whether a party has withdrawn from the account an amount in excess of the party’s ownership interest. The amendment reverses the holding of *Lee v. Yang*, 111 Cal. App. 4th 481, 3 Cal. Rptr. 3d 819 (2003) (withdrawing party owns funds withdrawn from joint account regardless of source of funds). In the absence of proof otherwise, the net contribution to an account of each of the parties having a present right of withdrawal is deemed to be an equal amount. Section 5134 (“net contribution” defined).

Prob. Code § 5303 (amended). Right of survivorship and terms of account

5303. (a) The provisions of Section 5302 as to rights of survivorship are determined by the form of the account at the death of a party.

(b) Once established, the terms of a multiple-party account can be changed only by any of the following methods:

(1) Closing the account and reopening it under different terms.

(2) Presenting to the financial institution a modification agreement that is signed by all parties with a present right of withdrawal. If the financial institution has a form for this purpose, it may require use of the form.

(3) If the provisions of the terms of the account or deposit agreement provide a method of modification of the terms of the account, complying with those provisions.

(4) As provided in subdivision (c) of Section 5405.

(c) During the lifetime of a party, the terms of the account may be changed as provided in subdivision (b) to eliminate or to add rights of survivorship. Withdrawal of funds from the account by a party ~~with a present right of withdrawal during the lifetime of a party~~ also eliminates rights of survivorship ~~upon the death of that party~~ with respect to the funds withdrawn *to the extent of the party's net contribution to the account*.

Comment. Section 5303 is amended to make clear that, although a party may sever the right of survivorship in a joint account by withdrawal of funds, the severance is limited in the case of an overwithdrawal. A party's ownership interest in an account, and the concomitant power to terminate a right of survivorship by withdrawing funds from the account, is determined by the party's net contribution to the account. See Section 5301 (ownership during lifetime). This codifies the rule in *Estate of Propst*, 50 Cal. 3d 448, 461-62, 268 Cal. Rptr. 114, 788 P.2d 628 (1990) ("Accordingly, we hold that in the absence of prior agreement, a joint tenant of personal property may unilaterally sever his or her own interest from the joint tenancy and thereby nullify the right of survivorship, as to that interest, of the other joint tenant or tenants without their consent.").

Prob. Code § 5401 (amended). Rights of financial institution

5401. (a) Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be

paid, on request and according to its terms, to any one or more of the parties or agents.

(b) The terms of the account or deposit agreement may require the signatures of more than one of the parties to a multiple-party account during their lifetimes or of more than one of the survivors after the death of any one of them on any check, check endorsement, receipt, notice of withdrawal, request for withdrawal, or withdrawal order. In such case, the financial institution shall pay the sums on deposit only in accordance with such terms, but those terms do not limit the right of the sole survivor or of all of the survivors to receive the sums on deposit.

(c) A financial institution is not required to do any of the following *pursuant to Section 5301, 5303, or any other provision of this part*:

(1) Inquire as to the source of funds received for deposit to a multiple-party account, or inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

(2) Determine any party's net contribution.

(3) Limit withdrawals or any other use of an account based on the net contribution of any party, whether or not the financial institution has actual knowledge of each party's contribution.

(d) All funds in an account, unless otherwise agreed in writing by the financial institution and the parties to the account, remain subject to liens, security interests, rights of setoff, and charges, notwithstanding the determination or allocation of net contributions with respect to the parties.

Comment. Subdivision (c) of Section 5401 is amended to state expressly that a financial institution has no duty with respect to tracing net contributions of a party under either Section 5301 (ownership during lifetime) or 5303 (right of survivorship and terms of account). This is not a change in, but is declarative of, existing law.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Emergency Rulemaking Under the
Administrative Procedure Act

June 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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June 10, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

This recommendation would make clear which provisions of administrative rulemaking law apply when an agency is using the emergency rulemaking procedure provided in Government Code Section 11346.1. The proposed law would also make nonsubstantive technical improvements to Government Code Section 11350.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

Frank Kaplan
Chairperson

EMERGENCY RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act governs the adoption, amendment, or repeal of a state agency regulation.¹ Under specified emergency conditions, an expedited rulemaking procedure replaces the regular procedure.²

Existing law provides that the adoption, amendment, or repeal of an emergency regulation is not subject to any provision of the rulemaking chapter other than Sections 11346.1 (emergency rulemaking procedure) and 11346.9 (Office of Administrative Law review of proposed emergency regulation).³ That exemption is too broad. It could be read to preclude the application of a number of provisions that clearly should apply to emergency rulemaking.⁴ The Commission recommends that Section 11346.1 be revised to correctly state the scope of the emergency rulemaking exemption.

The proposed law would also make minor nonsubstantive improvements to the law governing judicial review of an emergency regulation.

1. See Gov't Code §§ 11340-11361.

2. See Gov't Code § 11346.1.

3. See Gov't Code § 11346.1(a).

4. See, e.g., Gov't Code §§ 11340.85(c)(10) (Internet publication of emergency regulation), 11343 (filing of regulation with Secretary of State), 11344.1(a)(3) (publication of emergency regulation decisions in California Regulatory Notice Register), 11349.5 (gubernatorial review of emergency rulemaking decisions), 11350 (judicial review of emergency regulation).

PROPOSED LEGISLATION

Gov't Code § 11346.1 (amended). Emergency rulemaking

SECTION 1. Section 11346.1 of the Government Code is amended to read:

11346.1. (a) The adoption, amendment, or repeal of an emergency regulation is not subject to any provision of this chapter ~~except this section and Section~~ *article or Article 6 (commencing with Section 11349), except this section and Sections 11349.5 and 11349.6.*

(b) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

Any finding of an emergency shall include a written statement which contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific facts showing the need for immediate action. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.

The statement and the regulation or order of repeal shall be filed immediately with the office.

(c) Notwithstanding any other provision of law, no emergency regulation that is a building standard shall be filed, nor shall the building standard be effective, unless the building standard is submitted to the California Building Standards Commission, and is approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety Code.

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified

by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal.

(e) No regulation, amendment, or order of repeal adopted as an emergency regulatory action shall remain in effect more than 120 days unless the adopting agency has complied with Sections 11346.2 to 11347.3, inclusive, either before adopting an emergency regulation or within the 120-day period. The adopting agency, prior to the expiration of the 120-day period, shall transmit to the office for filing with the Secretary of State the adopted regulation, amendment, or order of repeal, the rulemaking file, and a certification that Sections 11346.2 to 11347.3, inclusive, were complied with either before the emergency regulation was adopted or within the 120-day period.

(f) In the event an emergency amendment or order of repeal is filed and the adopting agency fails to comply with subdivision (e), the regulation as it existed prior to the emergency amendment or order of repeal shall thereupon become effective and after notice to the adopting agency by the office shall be reprinted in the California Code of Regulations.

(g) In the event a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with subdivision (e), this failure shall constitute a repeal thereof and after notice to the adopting agency by the office, shall be deleted.

(h) The office shall not file an emergency regulation with the Secretary of State if the emergency regulation is the same as or substantially equivalent to an emergency regulation previously adopted by that agency, unless the director expressly approves the agency's readoption of the emergency regulation.

Comment. Subdivision (a) of Section 11346.1 is amended to make clear that the exemption of emergency rulemaking from the requirements of this chapter only applies to the procedures provided in this article and

in Article 6 (commencing with Section 11349). Former subdivision (a) could be read to preclude application of a number of sections that should apply to an emergency regulation. See, e.g., Sections 11340.85(c)(10) (Internet publication of emergency regulation), 11343 (filing regulation with Secretary of State), 11344.1(a)(3) (publication of emergency regulation decisions in California Regulatory Notice Register), 11350 (judicial review of emergency regulation), 11350.3 (judicial review of emergency regulation decisions).

Gov't Code § 11350 (amended). Judicial review

SEC. 2. Section 11350 of the Government Code is amended to read:

11350. (a) Any interested person may obtain a judicial declaration as to the validity of any regulation or order ~~or~~ *of* repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure. The right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition filed pursuant to Section 11340.7 before the agency promulgating the regulation or order of repeal. The regulation or order of repeal may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order of repeal, upon the ground that the facts recited in the ~~statement~~ *finding of emergency* prepared pursuant to subdivision (b) of Section 11346.1 do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation or order of repeal may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

(c) The approval of a regulation or order of repeal by the office or the Governor's overruling of a decision of the office disapproving a regulation or order of repeal shall not be considered by a court in any action for declaratory relief brought with respect to a regulation or order of repeal.

(d) In a proceeding under this section, a court may only consider the following evidence:

(1) The rulemaking file prepared under Section 11347.3.

(2) The ~~written statement~~ *finding of emergency* prepared pursuant to subdivision (b) of Section 11346.1.

(3) An item that is required to be included in the rulemaking file but is not included in the rulemaking file, for the sole purpose of proving its omission.

(4) Any evidence relevant to whether a regulation used by an agency is required to be adopted under this chapter.

Comment. Subdivision (a) of Section 11350 is amended to correct a typographical error. Subdivisions (a) and (d)(2) are amended to make clear that it is the entire finding of emergency that is subject to review, and not just the "written statement" that is required as part of the finding of emergency. See Section 11346.1(b). These are nonsubstantive changes.

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

Unincorporated Association Governance

September 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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September 17, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

Existing law provides rules for the governance, merger, and dissolution of specific types of unincorporated associations (for example, a business partnership or unincorporated homeowners association). However, there are no general rules for the governance of an unincorporated association. In the absence of such rules, the members and officers of an unincorporated association are often unsure of how to address fundamental matters of governance. Burdensome common law procedures may govern these matters. The Law Revision Commission recommends the creation of a set of basic governance rules for an unincorporated association, which would yield when a situation is covered by a more specific statute.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

William E. Weinberger,
Chairperson

UNINCORPORATED ASSOCIATION GOVERNANCE

An unincorporated association may be a social club, charitable group, mutual aid society, homeowners association, political group, religious society, or other similar group.¹ Although some unincorporated associations are legally sophisticated, others are small, informal groups, without legal counsel. It is important that the law governing an unincorporated association be clear and understandable to a layperson.

Existing law provides detailed rules for the governance, merger, and dissolution of specific types of unincorporated associations.² However, there are no rules governing unincorporated associations generally. The members and officers of an unincorporated association are often unsure of how to deal with an issue that is not addressed in the governing documents of the association.

The lack of structural guidance can also subject an association to burdensome common law procedures. For example, when an unincorporated association is created its founders may not anticipate and provide rules for its eventual dissolution. In the absence of such rules, unanimous member consent is required to dissolve the association.³ Such a high

1. See Corp. Code §§ 18020 (“nonprofit association” defined), 18035 (“unincorporated association” defined).

2. See, e.g., Corp. Code §§ 16100-16962 (partnership), 17000-17655 (limited liability company).

3. See *Holt v. Santa Clara County Sheriff’s Benefit Ass’n*, 250 Cal. App. 2d 925, 930, 59 Cal. Rptr. 180 (1967).

threshold makes it difficult for a defunct association to wind up its affairs.⁴

The Law Revision Commission recommends that basic governance rules be added to the law of unincorporated associations. In large part, the proposed law would provide default rules that would only apply to the extent that the governing documents of an association are silent. In some cases, the proposed law would provide mandatory rules, either to guarantee minimal fairness⁵ or to standardize relations with other organizations.⁶

Pursuant to existing Corporations Code Section 18060, the proposed law would yield to any statute governing a specific type of unincorporated association.⁷ For example, existing law provides specific rules for amendment of the governing documents of an unincorporated homeowners association.⁸ Those entity-specific rules would control over the general rules for amendment of a governing document provided in the proposed law.⁹

SUMMARY OF PROPOSED LAW

The proposed law would fill gaps in the law governing unincorporated associations, in six areas: (1) director duties,

4. The proposed law would allow dissolution by a majority of the membership, providing a measure of flexibility that an unincorporated association would likely have provided for itself, had it foreseen the need to do so. See proposed Corp. Code § 18410 (dissolution) *infra*.

5. See proposed Corp. Code § 18320 (expulsion or suspension of membership where membership affects economic interest) *infra*.

6. See proposed Corp. Code §§ 18360-18400 (merger) *infra*.

7. Corp. Code § 18060 (“If a statute specific to a particular type of unincorporated association is inconsistent with a general provision of this title, the specific statute prevails to the extent of the inconsistency.”).

8. See Civ. Code §§ 1355-1356.

9. See proposed Corp. Code §18340 (amendment of governing documents) *infra*.

(2) termination of membership, (3) member voting procedures, (4) amendment of governing documents, (5) merger, and (6) dissolution. The proposed changes in those areas are summarized below.

Director Duties

Existing law does not provide a standard of care for a director of an unincorporated association. This omission leaves a director of an unincorporated association unsure of his or her duties and potential liability. Absent a statutory rule, the courts must decide the applicable standard on a case-by-case basis.

The proposed law would fill the gap in existing law by adding a default standard of care for a director of an unincorporated association. The proposed standard is based on existing standards applicable to similar entities, whether incorporated or unincorporated.¹⁰ It would require that a director act “in good faith, in a manner the director believes to be in the best interests of the association, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”¹¹ An unincorporated association would be allowed to impose a stricter standard of care, but could not set a more lenient standard.

Existing provisions that impose a standard of care on a director of an incorporated or unincorporated entity also provide limited immunity from liability for a director who satisfies the standard. A director is not liable for an alleged failure to discharge that person’s obligations as a director.

10. See, e.g., Civ. Code § 13657.7 (homeowners association, whether incorporated or unincorporated); Corp. Code §§ 309 (general corporation), 5231 (nonprofit public benefit corporation), 7231 (nonprofit mutual benefit corporation), 9241 (nonprofit religious corporation), 24001.5 (unincorporated nonprofit medical association).

11. See proposed Corp. Code § 18300 *infra*.

That is appropriate for a director of an unincorporated association as well. A person who has satisfied the governing standard of care should not be subject to a claim that the person has not fulfilled his or her obligation to the association. The proposed law includes protection against such a claim.

Termination or Suspension of Membership

Existing law is silent on what events will terminate membership within an unincorporated association. In case of a dispute, it can be unclear whether a person continues to be entitled to membership benefits and subject to member duties. The proposed law would add a default rule on what events terminate a membership and what effect termination of a membership has on rights and duties that arose before termination.¹²

Nonprofit corporation law requires basic procedural fairness before a membership can be suspended or terminated.¹³ The proposed law includes a similar requirement.¹⁴ In order to avoid state interference with free association, the scope of the proposed requirement would be limited. It would not apply to a religious association and would only apply to a non-religious association if termination or suspension of membership would affect a property right or an “important, substantial economic interest.”¹⁵

12. See proposed Corp. Code § 18310 *infra*.

13. See Corp. Code § 7341.

14. See proposed Corp. Code § 18320 *infra*.

15. See generally *Potvin v. Metropolitan Life Ins. Co.*, 22 Cal. 4th 1060, 997 P.2d 1153, 95 Cal. Rptr. 2d 496 (2000) (expulsion of doctor from list of insurance company’s preferred providers could impair ability of competent physician to practice medicine and affected “important, substantial economic interest”). See also *Swital v. Real Estate Comm’r*, 116 Cal. App. 2d 677, 254 P.2d 587 (1953) (member may not be expelled from local realty board without fair procedure).

Voting Procedure

Existing law does not provide a procedure for conducting a vote of the membership of an unincorporated association. If a vote is contested, there are no clear standards for determining its validity. The proposed law provides a default voting procedure. Advance notice of a vote would be required. Voting could be by written ballot or by vote at a member meeting. Approval of a measure would require the affirmative votes of a majority of a quorum of the membership.¹⁶

Amendment of Governing Documents

Existing law does not specify a procedure for amending the governing documents of an unincorporated association. This can lead to a dispute about whether an attempted amendment is effective. The proposed law provides a default rule, requiring that a proposed amendment be approved by a vote of the membership.¹⁷

Merger

Existing law provides rules for the merger of various types of entities, whether with another entity of the same type, or with an entity of a different type.¹⁸ These rules govern the consequences of a merger and provide procedures for approval of a merger.

There are no general merger rules for an unincorporated association. As a result, the members and officers of an unincorporated association may be unsure whether a merger is permitted and, if so, how it should be conducted.

16. See proposed Corp. Code § 18330 *infra*.

17. See proposed Corp. Code § 18340 *infra*.

18. See, e.g., Corp. Code §§ 8010-8022 (nonprofit mutual benefit corporation), 16901-16917 (partnership), 17550-17556 (limited liability company).

The proposed law would expressly authorize merger¹⁹ and would provide basic rules for the merger of an unincorporated association with another entity.²⁰ The proposed rules are drawn from existing law governing the merger of other types of entities.

Dissolution

Under existing law, if the governing documents of an unincorporated association do not provide a procedure for dissolving the association, a decision to dissolve must be made by a unanimous vote of the membership.²¹ This can create a significant problem for an association that did not have the foresight to include a procedure for dissolution in its governing documents. A single hold-out could prevent dissolution even though the association no longer serves a useful purpose.

The proposed law provides a default rule for making a decision to dissolve an unincorporated association.²² If the association does not have its own procedure for dissolution, the association could be dissolved by a majority vote of the total membership. If the association has been inactive for at least three years, it could be dissolved by a vote of its board of directors or by court order.

The proposed law also includes basic guidance on the steps to be completed in winding up the affairs of an unincorporated association, including paying any known debts or liabilities and disposing of remaining assets.²³

19. See proposed Corp. Code § 18360 *infra*.

20. See proposed Corp. Code § 18370-18400 *infra*.

21. See *Holt v. Santa Clara County Sheriff's Benefit Ass'n*, 250 Cal. App. 2d 925, 930, 59 Cal. Rptr. 180 (1967).

22. See proposed Corp. Code § 18410 *infra*.

23. See proposed Corp. Code § 18420 *infra*.

Contents

Corporations Code

TITLE 3. UNINCORPORATED ASSOCIATION	243
PART 1. GENERAL PROVISIONS	243
CHAPTER 1. DEFINITIONS	243
Corp. Code § 18003 (added). Board	243
Corp. Code § 18005 (amended). Director	243
Corp. Code § 18008 (added). Governing documents	243
Corp. Code § 18010 (amended). Governing principles	244
CHAPTER 6. GOVERNANCE	245
Article 1. Director Duties	245
§ 18300. Director duties	245
Article 2. Termination or Suspension of Membership	246
§ 18310. Termination of membership	246
§ 18320. Expulsion or suspension of membership	247
Article 3. Member Voting	249
§ 18330. Member voting	249
Article 4. Amendment of Governing Documents	250
§ 18340. Amendment of governing documents	250
Article 5. Merger	251
§ 18350. Definitions	251
§ 18360. Merger authority	251
§ 18370. Merger procedure	251
§ 18380. Effect of merger	253
§ 18390. Record ownership of real property	254
§ 18400. Future transfers	254
Article 6. Dissolution	255
§ 18410. Dissolution	255
§ 18420. Procedure on dissolution	255

PROPOSED LEGISLATION
CORPORATIONS CODE
TITLE 3. UNINCORPORATED
ASSOCIATION

PART 1. GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS

Corp. Code § 18003 (added). Board

SEC. _____. Section 18003 is added to the Corporations Code, to read:

18003. “Board” means the board of directors or other governing body of an unincorporated association.

Comment. Section 18003 is new. See also Sections 18005 (“director” defined), 18035 (“unincorporated association” defined).

Corp. Code § 18005 (amended). Director

SEC. _____. Section 18005 of the Corporations Code is amended to read:

18005. “Director” means a natural person serving as a member of the board or other representative governing body of the unincorporated association.

Comment. Section 18005 is amended to make clear that “director” includes a person who serves on a governing body regardless of whether that body is a representative body. For example, a director may be appointed to serve on the governing body rather than elected by the membership of the unincorporated association. See also Section 18035 (“unincorporated association” defined).

Corp. Code § 18008 (added). Governing documents

SEC. _____. Section 18008 is added to the Corporations Code, to read:

18008. “Governing document” means a constitution, articles of association, bylaws, or other writing that governs the purpose or operation of an unincorporated association or the rights or obligations of its members.

Comment. Section 18008 is new. See also Sections 18015 (“member” defined), 18035 (“unincorporated association” defined).

Corp. Code § 18010 (amended). Governing principles

SEC. _____. Section 18010 of the Corporations Code is amended to read:

18010. “Governing principles” means the principles stated ~~in the constitution, articles of association, bylaws, regulations or other writing that governs the purpose or operation of an unincorporated association or the rights or obligations of its members~~ *the governing documents of an unincorporated association*. ~~If there is no written an association has no governing documents or the governing documents do not include a provision governing an issue, the association’s governing principles relating to that issue may be inferred from its established practices. For the purpose of this section, “established practices” means the practices used by an unincorporated association without material change or exception during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence.~~

Comment. Section 18010 is amended to reflect the definition of “governing documents” provided in Section 18008. See also Sections 8 (“writing” defined), 18015 (“member” defined), 18035 (“unincorporated association” defined).

Corp. Code §§ 18300-18410 (added). Governance

SEC. _____. Chapter 6 (commencing with Section 18300) is added to Part 1 of Title 3 of the Corporations Code, to read:

CHAPTER 6. GOVERNANCE

Article 1. Director Duties

§ 18300. Director duties

18300. (a) A director of an unincorporated association shall perform the duties of a director, including duties as a member of a committee of the board, in good faith, in a manner the director believes to be in the best interests of the association, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b) A director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, that is prepared or presented by any of the following persons or committees, so long as the director believes that the person or committee is reliable and competent in the matters presented:

(1) An officer or employee of the unincorporated association.

(2) An attorney, independent accountant, or other expert.

(3) A committee of the board upon which the director does not serve, as to matters within its designated authority.

(4) If the unincorporated association has a religious purpose, a religious authority, such as a minister, priest, or rabbi, as to matters the director believes to be within that person's designated authority.

(c) The governing documents of an unincorporated association may establish a higher standard of conduct, but shall not establish a lower standard of conduct, than is provided in subdivisions (a) and (b).

(d) A person who performs the duties of a director in accordance with this section is not liable for an alleged failure to discharge that person's obligations as a director, including

any act or omission that exceeds or defeats any purpose to which the unincorporated association, or assets held by it, may be dedicated.

Comment. Section 18300 is new. *Cf.* Sections 309 (general corporation), 5231 (nonprofit public benefit corporation), 7231 (nonprofit mutual benefit corporation), 9241 (nonprofit religious corporation). See also Sections 18003 (“board” defined), 18005 (“director” defined), 18008 (“governing documents” defined), 18025 (“officer” defined), 18035 (“unincorporated association” defined).

A director decision that satisfies the standard provided in this section may be entitled to judicial deference. See, e.g., *Lamden v. La Jolla Shores Clubdominium*, 21 Cal. 4th 249, 265, 980 P.2d 940, 87 Cal. Rptr. 2d 237 (1999) (“[W]here a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development’s common areas, courts should defer to the board’s authority and presumed expertise.”).

Article 2. Termination or Suspension of Membership

§ 18310. Termination of membership

18310. (a) Unless otherwise provided by an unincorporated association’s governing principles, membership in the unincorporated association is terminated by any of the following events:

- (1) Resignation of the member.
 - (2) Expiration of the fixed term of the membership, unless the membership is renewed before its expiration.
 - (3) Expulsion of the member.
 - (4) Death of the member.
 - (5) Termination of the legal existence of a member that is not a natural person.
- (b) Termination of membership does not relieve a person from an obligation incurred as a member before termination.

(c) Termination of membership does not affect the right of an unincorporated association to enforce an obligation against a person incurred as a member before termination, or to obtain damages for its breach.

Comment. Section 18310 is new. Subdivision (b) makes clear that termination of membership does not relieve a former member from an obligation incurred before termination of membership. Such an obligation might include an obligation for a charge, assessment, fee, or dues, or an obligation for a service or benefit rendered before termination. See also Sections 18015 (“member” defined), 18035 (“unincorporated association” defined).

§ 18320. Expulsion or suspension of membership

18320. (a) This section only applies if membership in an unincorporated association includes a property right or if expulsion or suspension of a member would affect an important, substantial economic interest. This section does not apply to an unincorporated association that has a religious purpose.

(b) Expulsion or suspension of a member shall be done in good faith and in a fair and reasonable manner. A procedure that satisfies the requirements of subdivision (c) is fair and reasonable, but a court may also determine that another procedure is fair and reasonable taking into account the full circumstances of the expulsion or suspension.

(c) A procedure for expulsion or suspension of a member that satisfies the following requirements is fair and reasonable:

(1) The procedure is included in the governing documents of the unincorporated association.

(2) The member to be expelled or suspended is given notice, including a statement of the reasons for the expulsion or suspension. The notice shall be delivered at least 15 days before the effective date of the expulsion or suspension.

(3) The member to be expelled or suspended is given an opportunity to be heard by the person or body deciding the

matter, orally or in writing, not less than five days before the effective date of the expulsion or suspension.

(d) A notice pursuant to this section may be delivered by any method reasonably calculated to provide actual notice. A notice delivered by mail shall be sent by first-class, certified, or registered mail to the last address of the member shown on the unincorporated association's records.

(e) A member may commence a proceeding to challenge the expulsion or suspension of the member, including a claim alleging defective notice, within one year after the effective date of the expulsion or suspension. The court may order any relief, including reinstatement, it determines is equitable under the circumstances. A vote of the members or of the board may not be set aside solely because a person was wrongfully excluded from voting by virtue of the challenged expulsion or suspension, unless the court determines that the wrongful expulsion or suspension was in bad faith and for the purpose, and with the effect, of wrongfully excluding the member from the vote or from the meeting at which the vote took place, so as to affect the outcome of the vote.

(f) This section governs only the procedure for expulsion or suspension and not the substantive grounds for expulsion or suspension. An expulsion or suspension based on substantive grounds that violate contractual or other rights of the member or are otherwise unlawful is not made valid by compliance with this section.

Comment. Section 18320 is new. It requires good faith and use of a fair procedure before terminating or suspending membership in an unincorporated association, where membership involves a property right or where expulsion or suspension of a member would affect "an important, substantial economic interest," for example, the right to carry on one's trade or profession. See generally *Potvin v. Metropolitan Life Ins. Co.*, 22 Cal. 4th 1060, 997 P.2d 1153, 95 Cal. Rptr. 2d 496 (2000) (expulsion of doctor from list of insurance company's preferred providers could impair ability of competent physician to practice medicine and affected "important, substantial economic interest"). See

also *Swital v. Real Estate Comm'r*, 116 Cal. App. 2d 677, 254 P.2d 587 (1953) (member may not be expelled from local realty board without fair procedure).

Nothing in this section affects the common law right of fair procedure as it applies to a decision to exclude a person from membership in a private association. See *Pinsker v. Pacific Coast Soc’y of Orthodontists*, 12 Cal. 3d 541, 550, 116 Cal. Rptr. 245, 526 P.2d 253 (1974) (“Taken together, these decisions establish the common law principle that whenever a private association is legally required to refrain from arbitrary action, the association’s action must be both substantively rational and procedurally fair.”); *Pinsker v. Pacific Coast Soc’y of Orthodontists*, 1 Cal. 3d 160, 81 Cal. Rptr. 623, 460 P.2d 495 (1969).

To avoid state interference with the free exercise of religion, this section does not apply to an unincorporated association with a religious purpose. *Cf.* Section 7341 (expulsion, suspension, or termination of membership in nonprofit mutual benefit corporation). See also Sections 18003 (“board” defined), 18008 (“governing documents” defined), 18015 (“member” defined), 18035 (“unincorporated association” defined).

Article 3. Member Voting

§ 18330. Member voting

18330. Except as otherwise provided by statute or by an unincorporated association’s governing principles, the following rules govern a member vote conducted pursuant to this chapter:

(a) A vote may be conducted either at a member meeting at which a quorum is present or by a written ballot in which the number of votes cast equals or exceeds the number required for a quorum. Approval of a matter voted on requires an affirmative majority of the votes cast.

(b) Notice of the vote shall be delivered to all members entitled to vote on the date of delivery. The notice shall be delivered or mailed or sent electronically to the member addresses shown in the association’s records a reasonable time before the vote is to be conducted. The notice shall state

the matter to be decided and describe how and when the vote is to be conducted.

(c) If the vote is to be conducted by written ballot, the notice of the vote shall serve as the ballot. It shall set forth the proposed action, provide an opportunity to specify approval or disapproval of any proposal, and provide a reasonable time within which to return the ballot to the unincorporated association.

(d) One-third of the voting power of the association constitutes a quorum.

(e) The voting power of the association is the total number of votes that can be cast by members on a particular issue at the time the member vote is held.

Comment. Section 18330 is new. Subdivision (a) provides a default rule for the number of votes required for approval of a matter. A statute providing a different standard controls over subdivision (a). See, e.g., Sections 18370(c) (unanimous approval required for merger if members of association would become liable for obligations of other constituent entity), 18410(b) (majority of total voting power of association required for dissolution of association).

See also Sections 18010 (“governing principles” defined), 18015 (“member” defined), 18035 (“unincorporated association” defined).

Article 4. Amendment of Governing Documents

§ 18340. Amendment of governing documents

18340. If the governing principles of an unincorporated association do not provide a procedure to amend the governing documents of the association, the governing documents may be amended by a vote of the members.

Comment. Section 18340 is new. See also Sections 18008 (“governing documents” defined), 18010 (“governing principles” defined), 18015 (“member” defined), 18035 (“unincorporated association” defined), 18330 (member voting procedure).

An amendment of the governing documents of an unincorporated association may not impair an existing contract right without the consent of the person whose right would be affected. See *Hogan v. Pacific Endowment League*, 99 Cal. 248, 250, 33 P. 924 (1893). However, if the

governing documents reserve the power to make future changes to member benefits, an association may amend its governing documents in a way that impairs those benefits so long as the change is substantively reasonable. An association cannot use its power of amendment to repudiate its fair and just obligations. See *Power v. Sheriff's Relief Ass'n of Los Angeles County*, 57 Cal. App. 2d 350, 134 P.2d 827 (1943).

Article 5. Merger

§ 18350. Definitions

18350. The following definitions govern the construction of this article:

(a) "Constituent entity" means an entity that is merged with one or more other entities and includes the surviving entity.

(b) "Disappearing entity" means a constituent entity that is not the surviving entity.

(c) "Surviving entity" means an entity into which one or more other entities are merged.

Comment. Subdivision (a) of Section 18350 is drawn from Section 5044. Subdivision (b) is drawn from Section 5048. Subdivision (c) is drawn from Section 5074. See also Section 18035 ("unincorporated association" defined).

§ 18360. Merger authority

18360. An unincorporated association may merge with any other unincorporated association, domestic corporation, foreign corporation, or other business entity that is authorized by law to effect a merger with an unincorporated association. As used in this section, the term "other business entity" has the meaning provided in Section 5063.5.

Comment. Section 18360 is new. An "unincorporated association" includes a nonprofit association. See Sections 18020 ("nonprofit association" defined), 18035 ("unincorporated association" defined).

§ 18370. Merger procedure

18370. A merger involving an unincorporated association is subject to the following requirements:

(a) Each party to the merger shall approve an agreement of merger. The agreement shall include the following provisions:

(1) The terms of the merger.

(2) Any amendments the merger would make to the articles, bylaws, or other governing documents of the surviving entity.

(3) The name, place of organization, and type of entity of each constituent entity.

(4) The name of the constituent entity that will be the surviving entity.

(5) If the name of the surviving entity will be changed in the merger, the new name of the surviving entity.

(6) The disposition of the memberships or ownership interests of each constituent entity.

(7) Other details or provisions, if any, including any details or provisions required by the law under which a constituent entity is organized.

(b) The principal terms of the merger agreement shall be approved by the board, the members, and any person whose approval is required by the governing documents of the association. Unless otherwise provided in the governing documents, the members shall approve the agreement in the manner provided for amendment of the governing documents of the association. The members may approve the agreement before or after the board approves the agreement.

(c) A merger agreement that would cause the members of an unincorporated association to become individually liable for an obligation of a constituent or surviving entity shall be approved by all of the members of the unincorporated association. Approval by all members is not required under this subdivision if the agreement of merger provides for purchase by the surviving entity of the membership interest of a member who votes against approval of the merger agreement.

(d) A merger agreement may be amended by the board, unless the amendment would change a principal term of the agreement, in which case it shall be approved as provided in subdivision (b).

(e) Subject to the contractual rights of third parties, the board may abandon a merger without the approval of the members.

Comment. Section 18370 is new. *Cf.* Sections 8011-8019 (merger of nonprofit mutual benefit corporation). See also Sections 18003 (“board” defined), 18005 (“director” defined), 18008 (“governing documents” defined), 18015 (“member” defined), 18035 (“unincorporated association” defined).

§ 18380. Effect of merger

18380. (a) Merger pursuant to this article has the following effect:

(1) The separate existence of the disappearing entity ceases.

(2) The surviving entity succeeds, without other transfer, to the rights and property of the disappearing entity.

(3) The surviving entity is subject to all the debts and liabilities of the disappearing entity. A trust or other obligation governing property of the disappearing entity applies as if it were incurred by the surviving entity.

(b) All rights of creditors and all liens on or arising from the property of each of the constituent entities are preserved unimpaired, provided that a lien on property of a disappearing entity is limited to the property subject to the lien immediately before the merger is effective.

(c) An action or proceeding pending by or against a disappearing entity or other party to the merger may be prosecuted to judgment, which shall bind the surviving entity, or the surviving entity may be proceeded against or substituted in its place.

(d) Merger does not affect an existing liability of a member, director, officer, or agent of a constituent unincorporated

association for an obligation of the unincorporated association.

Comment. Subdivisions (a)-(c) of Section 18380 are drawn from Section 8020. Subdivision (d) is new. See also Sections 18005 (“director” defined), 18015 (“member” defined), 18025 (“officer” defined), 18035 (“unincorporated association” defined).

§ 18390. Record ownership of real property

18390. If, as a consequence of merger, a surviving entity succeeds to ownership of real property located in this state, the surviving entity’s record ownership of that property may be evidenced by recording in the county in which the property is located a copy of the agreement of merger that is signed by the president and secretary or other comparable officers of the constituent entities and is verified and acknowledged as provided in Sections 149 and 193.

Comment. Section 18390 is drawn from Section 8021.

§ 18400. Future transfers

18400. A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance that is made to a disappearing entity and that takes effect or remains payable after the merger inures to the benefit of the surviving entity. A trust obligation that would govern property if transferred to the disappearing entity applies to property that is instead transferred to the surviving entity under this section.

Comment. Section 18400 is drawn from Section 8022. The second sentence is added to make clear that property that would be impressed with a trust if transferred to a disappearing entity does not avoid that trust as a result of transfer to a surviving entity under this section. See *Lynch v. Spilman*, 67 Cal. 2d 251, 260, 431 P.2d 636, 62 Cal. Rptr. 12 (1967) (“[P]roperty transferred to a corporation or other institution organized for a charitable purpose without a declaration of the use to which the property is to be put, is received and held by it ‘in trust to carry out the objects for which the organization was created.’”) (citations omitted).

Article 6. Dissolution

§ 18410. Dissolution

18410. An unincorporated association may be dissolved by any of the following methods:

(a) If the governing documents of the association provide a method for dissolution, by that method.

(b) If the governing documents of the association do not provide a method for dissolution, by the affirmative vote of a majority of the voting power of the association.

(c) If the association's operations have been discontinued for at least three years, by the board or, if the association has no incumbent board, by the members of its last preceding incumbent board.

(d) If the association's operations have been discontinued, by court order.

Comment. Section 18410 is new. Subdivision (a) is consistent with case law. See *Holt v. Santa Clara County Sheriff's Benefit Ass'n*, 250 Cal. App. 2d 925, 930, 59 Cal. Rptr. 180 (1967). An unincorporated association that is subordinate to another organization may be subject to dissolution by order of the superior organization. *Id.* See also Sections 18003 ("board" defined), 18005 ("director" defined), 18008 ("governing documents" defined), 18015 ("member" defined), 18035 ("unincorporated association" defined), 18330 (member voting procedure).

§ 18420. Procedure on dissolution

18420. Promptly after commencement of dissolution of an unincorporated association, the board or, if none, the members shall promptly wind up the affairs of the association, pay or provide for its known debts or liabilities, collect any amounts due to it, take any other action as is necessary or appropriate for winding up, settling, and liquidating its affairs, and dispose of its assets as provided in Section 18130.

Comment. Section 18420 is new. See also Sections 18003 (“board” defined), 18015 (“member” defined), 18035 (“unincorporated association” defined).

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

Nonprofit Association Tort Liability

November 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Nonprofit Association Tort Liability*, 34 Cal. L. Revision Comm'n Reports 257 (2004). This is part of publication #221.

STATE OF CALIFORNIA

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November 19, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

Under existing law, a member, director, officer, or agent of an unincorporated nonprofit association is not liable for a tort of the association merely because of that person's status as a member, director, officer, or agent. The proposed law would make clear that this does not immunize a member, director, officer, or agent of an unincorporated nonprofit association from tort liability that exists for reasons other than the person's status as a member, director, officer, or agent. This would provide guidance to a layperson involved in an unincorporated nonprofit association, who might otherwise not understand the scope of potential liability.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

William E. Weinberger
Chairperson

NONPROFIT ASSOCIATION TORT LIABILITY

Many private nonprofit associations are not organized as corporations. Such groups could include a charitable group, mutual aid society, social club, homeowners association, political group, or religious society. Although some unincorporated nonprofit associations are legally sophisticated, others are small, informal groups, without legal counsel. It is important that the law governing these groups be as clear and understandable to a layperson as is practicable.

Under existing law, a member, director, officer, or agent of an unincorporated nonprofit association is not liable for a tort of the association merely because of that person's status as a member, director, officer, or agent.¹ However, this does not preclude liability existing for reasons other than the person's status. For example, an agent of a nonprofit association would be liable if the agent's own conduct causes an injury. This would be in addition to any vicarious liability of the nonprofit association as the agent's principal.²

The proposed law would make clear that a member, director, officer, or agent of a nonprofit association may be liable for a tort of the association for reasons other than the person's status as a member, director, officer, or agent. This would provide guidance to a layperson involved in an

1. See Corp. Code §18605 (added by 2004 Cal. Stat. ch. 178, § 11). See also *Security First National Bank of Los Angeles v. Cooper*, 62 Cal. App. 2d 653, 667, 145 P.2d 722 (1944) (“[M]embership, as such, imposes no personal liability for the debts of the association”); *Orser v. George*, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967) (“[M]ere membership does not make all members liable for unlawful acts of other members without their participation, knowledge or approval”).

2. See Civ. Code § 2343(3) (agent liable as principal for agent's own wrongful conduct in the course of agency). See also 2 B. Witkin, *Summary of California Law Agency* § 149 (9th ed. 1990).

unincorporated nonprofit association, who might not otherwise understand the scope of potential liability.

The proposed law would codify existing grounds for liability, in a nonexclusive list. It would not foreclose any existing common law basis for liability.

PROPOSED LEGISLATION

Corp. Code § 18620 (added). Tort liability

18620. A member, director, officer, or agent of a nonprofit association is not liable for injury, damage, or harm caused by an act or omission of the association or an act or omission of a director, officer, or agent of the association, unless one or more of the following conditions is satisfied:

(a) The member, director, officer, or agent expressly assumes liability for injury, damage, or harm caused by particular conduct and that conduct causes the injury, damage, or harm.

(b) The member, director, officer, or agent engages in tortious conduct that causes the injury, damage, or harm.

(c) The member, director, officer, or agent is otherwise liable under another statute or under the common law.

Comment. Section 18620 is consistent with existing law. A member, director, officer, or agent of a nonprofit association is not vicariously liable for a tort of the association merely because of the person's status as a member, director, officer, or agent of the association. See Section 18605 (no liability based solely on membership or agency). A member, director, officer, or agent of a nonprofit association is liable for a tort of the association if that person expressly assumes liability or that person's own tortious conduct causes the injury. The term "tortious conduct" is intended to be construed broadly and includes such conduct as negligent entrustment of a vehicle. See, e.g., *Steuer v. Phelps*, 41 Cal. App. 3d 468, 116 Cal. Rptr. 61 (1974). Tortious conduct also includes directing or authorizing an agent to engage in tortious conduct. See Cal. Jur. *Agency* § 136 (3d ed. 2004) (liability based on personal responsibility). See also *Orser v. George*, 252 Cal. App. 2d 660, 670-71, 60 Cal. Rptr. 708 (1967) (nonprofit association member may be liable for "personal participation in an unlawful activity or setting it in motion").

Subdivision (c) makes clear that the grounds for liability provided in subdivisions (a) and (b) are not exclusive. Other grounds for liability may exist. For example, the members of an unincorporated homeowners association who own property as tenants in common may be liable in tort for an injury that results from negligent maintenance of that property,

even if the members' own conduct was not responsible for the injury. Such liability derives from the law governing tenancy in common. See *Ruoff v. Harbor Creek Community Ass'n*, 10 Cal. App. 4th 1624, 13 Cal. Rptr. 2d 755 (1992); but see Civ. Code § 1365.9 (tort action arising from common ownership must be brought against association, and not against individual members, if liability insurance is maintained in specified amount).

Other provisions of law may expressly limit the liability of a member, director, officer, or agent of a nonprofit association. See, e.g., Civ. Code § 1365.7 (limitation of liability of officer or director of homeowners association); Corp. Code § 24001.5 (limitation of liability of officer or director of nonprofit medical association). Nothing in this section affects the application of such law. See Section 18060 ("If a statute specific to a particular type of unincorporated association is inconsistent with a general provision of this title, the specific statute prevails to the extent of the inconsistency.").

See also Sections 18005 ("director" defined), 18015 ("member" defined), 18020 ("nonprofit association" defined), 18025 ("officer" defined).

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

Waiver of Privilege By Disclosure

November 2004

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Waiver of Privilege By Disclosure*, 34 Cal. L. Revision Comm'n Reports 265 (2004). This is part of publication #221.

STATE OF CALIFORNIA

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November 19, 2004

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

Evidence Code Section 912 governs waiver of the lawyer-client privilege, physician-patient privilege, and certain other evidentiary privileges. The Law Revision Commission recommends that this provision 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. This 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 following reforms would further clarify and improve the law in this area:

- Codify case law establishing that when the holder of a privilege specified in Section 912 waives the privilege by voluntarily and intentionally making or authorizing a disclosure of a significant portion of a privileged communication, a court may require additional disclosure in the interest of fairness, even though the

privilege holder did not intend to permit such additional disclosure.

- Revise the provision governing waiver of a privilege in a deposition by written questions (Code Civ. Proc. § 2028.050) 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.

These reforms would help prevent disputes over whether a privilege has been waived, and would facilitate just and consistent resolution of disputes that do arise.

This recommendation was prepared pursuant to Resolution Chapter 92 of the Statutes of 2003.

Respectfully submitted,

William E. Weinberger
Chairperson

Contents

Waiver of Privilege By Disclosure	271
Section 912	272
Waiver as Opposed to Initial Existence of a Privilege	274
General Rule	276
Exceptions	277
Waiver By Putting a Matter in Issue	279
Approaches to Inadvertent Disclosure	280
Strict Liability for Disclosure	280
Subjective Intent of the Holder	282
Multifactor Balancing Test	285
Cases Interpreting California Law on Inadvertent Disclosure	286
Court of Appeal Decisions on Inadvertent Disclosure	287
Federal Decisions Interpreting California Law on Inadvertent Disclosure	290
California Decisions That Support Use of the Subjective Intent Approach But Do Not Squarely Resolve the Effect of an Inadvertent Disclosure	292
Potential Sources of Confusion	294
The <i>Jasmine</i> Case	300
Proposed Approach to Inadvertent Disclosure	303
Codification of the Subjective Intent Approach	304
Intent to Disclose Versus Intent to Waive the Privilege	308
Failure to Object at Trial	309
Coordination of the Proposed Approach With Civil Discovery Provisions	311
Nonexclusivity of Section 912	312
Privilege Waiver Under the Civil Discovery Provisions	313
Privilege Waiver in a Deposition by Written Questions	315
Partial Disclosure and Selective Disclosure	317
Partial Disclosure	317
Selective Disclosure	320
Types of Privileges Covered	322
The Right to Truth-in-Evidence	324
Need for the Proposed Reforms	326
Proposed Legislation	329
Code Civ. Proc. § 2028.050 (amended). Privilege objection in deposition by written questions	329
Evid. Code § 912 (amended). Waiver	330

WAIVER OF PRIVILEGE BY DISCLOSURE

Evidence Code Section 912 governs waiver of the privileges for communications made in confidence between persons in specified relationships (“confidential communication privileges”).¹ The Law Revision Commission recommends that this provision be revised to make clear how it applies to inadvertent disclosure of a privileged communication.

Specifically, the Commission proposes 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. This standard finds strong support in cases applying the provision to an inadvertent disclosure. Codifying it would help ensure that it is consistently applied, and would spare courts, attorneys, and litigants from having to expend significant resources researching the appropriate standard. Such guidance is needed because inadvertent disclosure is an increasingly frequent problem due to the use of new technologies such as email and voicemail.

The Commission also recommends that (1) Section 912 be amended to provide statutory guidance regarding the effect of a partial disclosure of a privileged communication, and (2) the

1. The confidential communication privileges include the lawyer-client privilege, marital communications privilege, physician-patient privilege, psychotherapist-patient privilege, clergy-penitent privilege, sexual assault counselor-victim privilege, and domestic violence counselor-victim privilege. Evidence Code Section 912 expressly applies to all of these privileges.

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

provision governing waiver of a privilege in a deposition by written questions (Code Civ. Proc. § 2028.050) be amended 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. The Commission addresses these issues after describing the law on inadvertent disclosure and explaining how it should be changed.

Section 912

Section 912, the key provision on waiver of a privilege by disclosure, applies to the following privileges:

- The lawyer-client privilege, which is held by the client.²
- The marital communications privilege, which is held by both the husband and the wife.³
- The physician-patient privilege, which is held by the patient.⁴
- The psychotherapist-patient privilege, which is held by the patient.⁵

2. For the provisions establishing the lawyer-client privilege and its exceptions, see Sections 950-962. The lawyer is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 955.

3. For the provisions establishing the marital communications privilege and its exceptions, see Sections 980-987.

4. For the provisions establishing the physician-patient privilege and its exceptions, see Sections 990-1007. The physician is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 995.

5. For the provisions establishing the psychotherapist-patient privilege and its exceptions, see Sections 1010-1027. The psychotherapist is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 1015.

- The clergy-penitent privilege, which is held by both the clergy member and the penitent.⁶
- The sexual assault counselor-victim privilege, which is held by the victim.⁷
- The domestic violence counselor-victim privilege, which is held by the victim.⁸

Each of these privileges is intended to foster free-flowing communication between persons in a socially beneficial relationship.⁹ With exceptions that vary depending on the

6. For the provisions establishing the clergy-penitent privilege, see Sections 1030-1034.

7. For the provisions establishing the sexual assault counselor-victim privilege, see Sections 1035-1036.2. The sexual assault counselor is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 1036.

8. For the provisions establishing the domestic violence counselor-victim privilege, see Sections 1037-1037.8. The domestic violence counselor is authorized to and obligated to claim the privilege when disclosure of a confidential communication is sought. Section 1037.6.

9. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (purpose of attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader interests in the observance of law and administration of justice”); *People v. Superior Court (Laff)*, 25 Cal. 4th 703, 23 P.3d 563, 107 Cal. Rptr. 2d 323, 332 (2001) (lawyer-client privilege is “fundamental to our legal system,” protecting right of every person to fully confer and confide in legal expert, so as to obtain adequate advice and proper defense); *People v. Gilbert*, 5 Cal. App. 4th 1372, 1391, 7 Cal. Rptr. 2d 660 (1992) (purpose of sexual assault counselor-victim privilege is to encourage sexual assault victims to make full and frank reports so they may be advised and assisted); *People v. Johnson*, 233 Cal. App. 3d 425, 438, 284 Cal. Rptr. 579 (1991) (marital communications privilege seeks to preserve the confidence and tranquility of a marital relationship); *Board of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678-79, 156 Cal. Rptr. 55 (1979) (physician-patient privilege creates zone of privacy to preclude humiliation of patient due to disclosure of ailments, and to encourage patient to inform physician of all matters necessary for effective diagnosis and treatment); Section 1014 Comment (A broad privilege should apply to psychiatrists and certified psychologists, because psychoanalysis and psychotherapy depend on “the fullest revelation of the most intimate and embarrassing details of the patient’s life.”); Section 1034 Comment (underlying reason for clergy-penitent privilege is that “the law will not compel a clergyman to violate — nor punish him for refusing

particular relationship, if a communication between persons in one of these relationships was confidential when made, the holder of the privilege is entitled to refuse to disclose the communication in any legal proceeding,¹⁰ and to prevent another from disclosing it.¹¹ By protecting their confidential communications from forced disclosure, the privileges allow participants in the relationships to talk without worrying about what might happen if their words were revealed under compulsion of law.

Section 912 makes clear, however, that under certain circumstances disclosure of a privileged communication can waive the privilege, precluding subsequent assertion of the privilege with regard to the communication. It is important to understand the scope and substance of this provision, its exceptions, and the related doctrine of waiver by putting a matter in issue.

Waiver as Opposed to Initial Existence of a Privilege

Section 912 is limited in scope. It does not govern whether a communication between persons in a privileged relationship is initially considered privileged or unprivileged.

to violate — the tenets of his church which require him to maintain secrecy as to confidential statements made to him in the course of his religious duties.”); M. Méndez, *Evidence: The California Code and the Federal Rules* § 26.01, at 788 (3d ed. 2004) (purpose of domestic violence counselor-victim privilege is to promote effective counseling by encouraging full disclosure by the victim).

10. For this purpose, “proceeding” is broadly defined to include “any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.” Section 901.

11. Sections 954 (lawyer-client privilege), 980 (marital communications privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033-1034 (clergy-penitent privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege).

That depends on whether the communication was confidential when originally made, or the circumstances of the communication were such that it was not confidential and thus not privileged at all.¹² Another provision, Section 917, governs that issue. It establishes a presumption that a communication between persons in certain privileged relationships (the same ones covered by Section 912) is confidential when made.

The presumption of confidentiality can be overcome if the facts show that the communication was not intended to be kept confidential.¹³ For instance, evidence that others could easily overhear the communication is a strong indication that the communication was not intended to be confidential and is thus unprivileged.¹⁴

While Section 917 focuses on whether a communication is initially privileged, Section 912 focuses on whether the privilege attaching to a communication was subsequently waived. In particular, Section 912 focuses on whether a communication that was privileged when made should later be stripped of its privileged status because it was disclosed to persons outside the privileged relationship. The circumstances of the disclosure are determinative.

12. Each of the confidential communication privileges applies only to a *confidential* communication between persons in the privileged relationship. Sections 954 (lawyer-client privilege), 980 (marital communications privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1032-1034 (clergy-penitent privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege).

13. Section 917 Comment (1965).

14. *Id.* For a case applying this rule, see *North v. Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. (1972) (marital communication was privileged even though it occurred while husband was incarcerated, because husband and wife were lulled into thinking their conversation would be confidential).

General Rule

Section 912(a) states the general rule that 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 disclosed a significant part of the communication or has consented to disclosure made by anyone.” The provision further states that 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.”

That language makes clear that a disclosure must be uncoerced to constitute a waiver. For example, no waiver occurs when privileged tapes are seized by the police.¹⁵ Likewise, in some circumstances an intentional disclosure, made under a mistaken but reasonable belief that disclosure was legally required (e.g., because it was formally demanded in a legal proceeding and the precise scope of a privilege was unclear), is not a waiver of the privilege.¹⁶

The provision also makes clear that disclosure of a significant part of a privileged communication is necessary for waiver to occur. Disclosure of a privileged communication does not waive the privilege if the disclosure is insignificant, such as when a patient reveals simply that the patient consulted a psychiatrist and certain subjects were not discussed.¹⁷

15. See *Menendez v. Superior Court*, 3 Cal. 4th 435, 455, 456 & n.18, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992).

16. See *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000) (no waiver where disclosure of privileged communications was based on mistaken but honest and reasonable belief that it was legally required).

17. *People v. Perry*, 7 Cal. 3d 756, 782-83, 499 P.2d 129, 103 Cal. Rptr. 161 (1972); see also *People v. Hayes*, 21 Cal. 4th 1211, 1265 n.14, 989 P.2d 645, 91

It is likewise clear that it is the holder of the privilege who controls whether a privilege is waived.¹⁸ The holder may, however, authorize another person in the privileged relationship to disclose privileged information.¹⁹

What is not obvious from the statutory language is whether inadvertent disclosure of a privileged communication constitutes a waiver of the privilege. The statute does not state whether a disclosure must be intentional to waive the privilege, as opposed to reckless, negligent, or without fault.

Exceptions

There are several exceptions to the general rule of Section 912(a). In particular, if a privilege is jointly held, a disclosure resulting in waiver by one of the holders does not affect the right of another holder to assert the privilege.²⁰

Further, disclosure of a privileged communication does not waive the privilege if the disclosure is itself privileged.²¹ For example, no waiver occurs if a husband tells his wife in confidence what his attorney advised.²²

Cal. Rptr. 2d 211 (2000); *Southern Cal. Gas Co. v. Public Utilities Comm'n*, 50 Cal. 3d 31, 46-49, 784 P.2d 1373, 265 Cal. Rptr. 801 (1990); *Mitchell v. Superior Court*, 37 Cal. 3d 591, 602, 691 P.2d 642, 208 Cal. Rptr. 886 (1984).

18. See, e.g., *People v. Gionis*, 9 Cal. 4th 1196, 1207, 892 P.2d 1199, 40 Cal. Rptr. 2d 456 (1995) (client holds attorney-client privilege and “only the holder may waive it.”); *Menendez*, 3 Cal. 4th at 448-49 (only patient has power to waive psychotherapist-patient privilege); *Roberts v. Superior Court*, 9 Cal. 3d 330, 341, 508 P.2d 309, 107 Cal. Rptr. 309 (1973) (physician-patient privilege and psychotherapist-patient privilege belong to patient, not physician).

19. See, e.g., *People v. Hayes*, 21 Cal. 4th 1211, 1265, 989 P.2d 645, 91 Cal. Rptr. 2d 211 (2000); *Rudnick v. Superior Court*, 11 Cal. 3d 924, 932, 523 P.2d 643, 114 Cal. Rptr. 603 (1974).

20. Section 912(b); see also Section 1034 Comment (clergy member may claim privilege even if penitent waives it).

21. Section 912(c).

22. A number of statutes might be viewed as implementing this rule in a specific context. See Gov't Code § 11045(f)(3) (disclosures made pursuant to statute governing employment of outside counsel by state agency “are deemed to be privileged communications for purposes of subdivision (c) of Section 912 of

Importantly, the statute also makes clear that disclosure of a privileged communication does not waive the privilege if the disclosure is “reasonably necessary for the accomplishment of the purpose” of the privileged relationship.²³ Thus, for example, no waiver occurs when a patient presents a doctor’s prescription to a pharmacist²⁴ or when a defendant shares attorney-client communications with a codefendant in preparing a joint defense.²⁵

the Evidence Code, and shall not be construed to be a waiver of any privilege”); Health & Safety Code §§ 103850(a), (e) (information collected for purposes of birth defects monitoring program is confidential and furnishing confidential information in accordance with program shall not be considered waiver of any privilege), 103885(g)(1), (6) (information collected for purposes of statewide cancer reporting system is confidential and furnishing confidential information in accordance with system shall not be considered waiver of any privilege); Welf. & Inst. Code §§ 103850(c)(5), (h) (information collected for purposes of CALWORKs pilot program is private and confidential and provision governing release of record protected by evidentiary privilege “shall not be construed to waive any right of privilege contained in the Evidence Code, except in compliance with Section 912 of that code.”), 18986.46(j), (m) (information collected for purposes of children’s multidisciplinary services teams is private and confidential and provision governing sharing of information between team members “shall not be construed to waive any right of privilege contained in the Evidence Code, except in compliance with Section 912 of that code.”).

23. Section 912(d). A number of statutes might be viewed as implementing this rule in a specific context. See Civ. Code §§ 1375.1(c) (homeowners association does not waive any privilege by disclosing certain information to its members when it settles dispute with builder regarding defects in common interest development), 2860(d) (no waiver of privilege when insured or independent counsel disclose privileged information to insurer); Section 754.5 (“Whenever an otherwise valid privilege exists between an individual who is deaf or hearing impaired and another person, that privilege is not waived merely because an interpreter was used to facilitate their communication.”).

24. Section 912 Comment. Similarly, no waiver occurs when a patient’s medical records are disclosed to a medical insurer. See *Blue Cross v. Superior Court*, 61 Cal. App. 3d 798, 132 Cal. Rptr. 635 (1976).

25. See *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 9 Cal. Rptr. 3d 621 (2004); *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1237-38, 9 Cal. Rptr. 3d 812 (2004); *Raytheon Co. v. Superior Court*, 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (1989).

Waiver By Putting a Matter in Issue

In some instances a privilege may be waived or otherwise rendered inapplicable by putting a matter in issue. For example, the Evidence Code expressly provides that the lawyer-client privilege does not apply to a communication relevant to an issue of breach, by either a lawyer or a client, of a duty arising out of the lawyer-client relationship.²⁶ The code includes similar provisions with regard to the marital communications privilege,²⁷ physician-patient privilege,²⁸ and the psychotherapist-patient privilege.²⁹

In some circumstances, courts have also found that a litigant impliedly waived a privilege by raising an issue in litigation, even though there is no express statutory basis for such a determination.³⁰ The theory is that the holder of the privilege has put the otherwise privileged communication directly at issue and disclosure is necessary for fair adjudication of the case.³¹

The doctrine of waiver by putting a matter at issue is distinct from the doctrine of waiver by disclosure. The

26. Section 958.

27. Section 984.

28. Section 1001.

29. Section 1020.

30. See *Southern Cal. Gas Co. v. Public Utilities Comm'n*, 50 Cal. 3d 31, 39-45, 784 P.2d 1373, 265 Cal. Rptr. 801 (1990) (discussing implied waiver doctrine but holding it inapplicable to case at hand) & cases cited therein; *Mitchell v. Superior Court*, 37 Cal. 3d 591, 603-09, 691 P.2d 642, 208 Cal. Rptr. 886 (1984) (same); but see *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 373, 853 P.2d 496, 20 Cal. Rptr. 2d 330 (1993) (“Courts may not ... imply unwritten exceptions to existing statutory privileges.”); *McDermott, Will & Emery v. Superior Court*, 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622 (2000) (Shareholder derivative action cannot proceed because corporation did not waive privilege and “creation of any shareholder right to waive the privilege in a derivative action should be left to the California Legislature.”).

31. *Southern Cal. Gas*, 50 Cal. 3d at 40.

Commission has not studied the former doctrine and does not propose any changes with regard to it at this time.

Approaches to Inadvertent Disclosure

There is no nationwide consensus on whether inadvertent disclosure of a privileged communication waives the privilege. Courts use three main approaches: (1) strict liability for disclosure, (2) subjective intent of the holder, and (3) a multifactor balancing test.³²

Strict Liability for Disclosure

In some jurisdictions, disclosure of a privileged communication waives the privilege, regardless of the circumstances of the disclosure.³³ The holder of the privilege is expected to zealously guard the secrecy of privileged communications and any breach of that secrecy destroys the privilege.³⁴ Once the secret is out, it no longer warrants protection, because it is impossible to “unring the bell.”³⁵

32. The three approaches described in the text are the main ones in use. See, e.g., Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: State Law*, 51 A.L.R. 5th 603, at § 2 (1997). There are variations on these approaches and there are also a variety of other approaches to inadvertent disclosure of a communication protected by a confidential communications privilege. See, e.g., *id.* at §§ 6-8; Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure: Federal Law*, 159 A.L.R. Fed. 153, at §§ 3-5 (2000).

33. See, e.g., *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 883 (1st Cir. 1995); *Harmony Gold USA, Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D. Ill. 1996); *FDIC v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992); Scott, *Inadvertent Disclosure of Documents: Penalties and Remedies*, SJ037 ALI-ABA 1061, 1064-66 (2003); Talton, *Mapping the Information Superhighway: Electronic Mail and the Inadvertent Disclosure of Confidential Information*, 20 Rev. Litig. 271, 291-93 (2000).

34. *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (If a client “wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels — if not crown jewels.”).

35. Talton, *supra* note 33, at 292.

This strict liability approach is identified with renowned evidence scholar John Wigmore, who stressed the importance of making relevant evidence readily available to all parties. Under this theory, privileges impede access to evidence and the search for truth, so they should be narrowly circumscribed.³⁶ The strict liability approach also spares courts from having to differentiate between degrees of voluntariness or intent in determining whether a privilege has been waived.³⁷

But the approach has been criticized as unduly harsh.³⁸ It penalizes a client for even a faultless disclosure³⁹ and it undermines the policies advanced by the confidential communication privileges.⁴⁰ Further, although confidentiality can never be restored to a disclosed communication, a court can repair much of the damage done by disclosure by

36. *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 279 N.J. Super. 442, 444, 652 A.2d 1273 (1994).

37. See *In re Sealed Case*, 877 F.2d at 980 (Under strict liability approach, court does not have to “distinguish between various degrees of ‘voluntariness’ in waivers of the attorney-client privilege.”).

38. See, e.g., *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999, 1004 (1987); Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 Wash. U. L.Q. 961, 984 (2003); Simko, *Inadvertent Disclosure, the Attorney-Client Privilege, and Legal Ethics: An Examination and Suggestion for Alaska*, 19 Alaska L. Rev. 461, 469 (2002). Because the consequences of waiver are so harsh, “the strict responsibility approach promotes overexpenditure to avoid waiver.” Bruckner-Harvey, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, 46 Baylor L. Rev. 385, 389 (1994); see also Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1609-14 (1986).

39. “The privilege for confidential communications can be lost if papers are in a car that is stolen, a briefcase that is lost, a letter that is misdelivered, or in a facsimile that is missent.” *Berg Electronics, Inc. v. Molex, Inc.*, 875 F. Supp. 261, 262 (D. Del. 1995). As one commentator put it, “Clearly action does not always reflect intent. The test converts what is at best a forfeiture into a waiver.” Mosteller, *supra* note 38, at 984.

40. Marcus, *supra* note 38, at 1615-16.

preventing or restricting use of the communication in a trial or other legal proceeding.⁴¹

Subjective Intent of the Holder

At the other end of the spectrum, some courts focus on the subjective intent of the holder of a privilege in determining whether the privilege has been waived.⁴² The test is phrased differently by different courts, and sometimes different formulations are intermingled within the same opinion. In particular, the courts sometimes fail to differentiate between whether the critical factor is intent to *disclose a privileged communication*, as opposed to intent to *waive the privilege* (which cannot occur unless the holder of the privilege is aware of the privilege and the consequences of disclosure).⁴³

Under either of these formulations, however, there is a high threshold for waiver. Mere inadvertent disclosure will not defeat a privilege.⁴⁴ The subjective intent approach thus protects the policies underlying the confidential

41. *Manufacturers & Traders*, 522 N.Y.S.2d at 1004; see also ABA Standing Committee on Ethics & Professional Responsibility, Formal Opinion No. 92-368 (Nov. 10, 1992) (hereafter, “ABA Ethics Opin. No. 92-368”) (even where lawyer examines inadvertently disclosed materials, there are benefits to maintaining what confidentiality remains).

42. See, e.g., *Berg Electronics*, 875 F. Supp. at 263; *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938-39 (S.D. Fla. 1991); *Mendenhall v. Barber-Green Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982); *Connecticut Mutual Life Insurance Company v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1955); *Trilogy Communications*, 652 A.2d at 1275; Scott, *supra* note 33, at 1071-73; Rest, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 Case W. Res. L. Rev. 309, 332 (1998).

43. See, e.g., *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 196 F.R.D. 375, 380 (S.D. Cal. 2000); compare *Berg Electronics*, 875 F. Supp. at 263 (focusing on intent to disclose communication) with *Connecticut Mutual*, 18 F.R.D. at 451 (focusing on intent to waive privilege).

44. *Trilogy Communications*, 652 A.2d at 1276; Talton, *supra* note 33, at 293; see also ABA Ethics Opin. No. 92-368, *supra* note 41 (lawyer who receives privileged materials under circumstances where disclosure was obviously inadvertent must return materials to opponent).

communication privileges, fostering free-flowing discussion between persons in a socially valuable relationship.⁴⁵

The approach is sometimes criticized, however, for not creating enough incentives to protect against accidental disclosure of privileged communications.⁴⁶ This criticism is not entirely persuasive, because disclosure of a communication can be very harmful even if the communication remains inadmissible at trial.⁴⁷ In addition, ethical rules compel attorneys, doctors, and others to maintain

45. *Leibel v. General Motors Corp.*, 250 Mich. App. 229, 241, 646 N.W.2d 179 (Mich. Ct. App. 2003); *Trilogy Communications*, 652 A.2d at 1276-77; Simko, *supra* note 38, at 471.

46. See, e.g., *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996) (subjective intent test “creates little incentive for lawyers to maintain tight control over privileged material.”); Simko, *supra* note 38, at 471-72 (“If there is no threat of waiver or sanctions, the lawyer has no incentive to protect her client’s confidential documents.”).

A related criticism is that the approach “ignores the importance of confidentiality, which, when lost, eliminates much of the purpose of the privilege.” Mosteller, *supra* note 38, at 983. Although a communication has been disclosed, however, there may still be benefits to restricting its use. See note 41 *supra* and accompanying text.

47. *Harold Sampson Children’s Trust v. Linda Gale Sampson 1979 Trust*, 271 Wis. 2d 610, 631, 679 N.W.2d 794 (2004) (“[I]nformation obtained from the documents before the plaintiffs made any objection to the disclosure cannot easily be erased from the minds of defense counsel or the defendants with whom the documents were shared.”); Bruckner-Harvey, *supra* note 38, at 392 (“[W]hile a recipient may not be allowed to keep the document or introduce it into evidence, he still receives a windfall from the mere knowledge of its contents.”); Simko, *supra* note 38, at 470 (Under subjective intent approach, although disclosed documents cannot be used at trial without showing of intent to disclose, “the information contained in them can be used for strategic purposes during trial.”); Rand, *What Would Learned Hand Do?: Adapting to Technological Change and Protecting the Attorney-Client Privilege on the Internet*, 66 Brook. L. Rev. 361, 419 (2000) (“A bell may be un-rung in a court of law, but not in the outside world.”); see also *Legal or Not, Leaks are Hard to Stop*, S.F. Daily J. 2 (April 29, 2004) (describing impact of disclosing attorney-client privileged documents regarding effectiveness of electronic voting machines).

confidentiality of their records and client communications.⁴⁸ These rules provide incentives to prevent accidental disclosure of such material even though waiver of the applicable evidentiary privilege would not result.⁴⁹

Another criticism of the subjective intent approach is that the burden of proving intent is too hard to meet.⁵⁰ Whether one agrees with this criticism largely depends on how much value one places on the policies underlying the confidential communication privileges. It is clear, however, that the burden of proving another person's subjective intent is not insurmountable. Prosecutors routinely prove the defendant's subjective intent beyond a reasonable doubt in criminal cases. It is similarly feasible for a party in a civil or criminal case to prove another person's 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).⁵¹ That is

48. See, e.g., Bus. & Prof. Code § 6068(e) (duty of attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client").

49. Bruckner-Harvey, *supra* note 38, at 392.

50. See, e.g., Mosteller, *supra* note 38, at 983-84.

51. Under California law, 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); *State Farm Fire & Casualty Co. v. Superior Court*, 54 Cal. App. 4th 625, 639, 62 Cal. Rptr. 2d 834 (1997); Méndez, *California Evidence Code — Federal Rules of Evidence, III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 1003, 1016 (2003). In meeting that burden, the party can invoke the statutory presumption that a communication between persons in a relationship covered by Section 912 was made in confidence. Evid. Code § 917; *National Steel Products Co. v. Superior Court*, 164 Cal. App. 3d 476, 483, 210 Cal. Rptr. 535 (1985).

"Once 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." *Federal Deposit Ins. Corp.*, 196 F.R.D. at 380; Section 405 Comment. Thus, when a

particularly evident because such intent must only be proved by a preponderance of the evidence.⁵²

Multifactor Balancing Test

Still other courts use a balancing test to determine whether an inadvertent disclosure constitutes a waiver of a confidential communication privilege. These courts examine factors such as (1) the 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 the disclosure, and (5) the overriding issue of fairness.⁵³ An apparent majority of jurisdictions follow this approach.⁵⁴ The applicable standard of care (negligence in making the disclosure, as opposed to recklessness) is not always clear.

This balancing test seeks to protect the policies underlying the confidential communication privileges, yet also provide adequate incentives to protect communications from disclosure.⁵⁵ It is a highly flexible approach, under which judges have broad discretion to achieve justice in varied circumstances.

party proffers privileged evidence on the ground that the privilege was waived, that party bears the burden of establishing that waiver occurred. *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 894, 9 Cal. Rptr. 3d 621 (2004); *Wellpoint Health Networks v. Superior Court*, 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844, 852-53 (1997); *People v. Superior Court (Broderick)*, 231 Cal. App. 3d 584, 591, 282 Cal. Rptr. 418 (1991). This preliminary fact issue is to be resolved by the court under Section 405(a). See Section 405 Comment.

52. See Méndez, *supra* note 51, at 1019-20; see also Section 115 (except as otherwise provided by law, burden of proof requires proof by preponderance of evidence).

53. See, e.g., *Gray*, 86 F.3d at 1483-84; *Alldread*, 988 F.2d at 1433-34; *Local 851 of the Int'l Bhd. of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127, 131 (E.D.N.Y. 1999); *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999); *Scott*, *supra* note 33, at 1066-70.

54. *Alldread*, 988 F.2d at 1434; *Talton*, *supra* note 33, at 294.

55. *Alldread*, 988 F.2d at 1434; see also *Talton*, *supra* note 33, at 295.

That flexibility also makes the approach unpredictable and creates a danger of inconsistent results.⁵⁶ The lack of predictability can undercut the effectiveness of the evidentiary privileges. As the United States Supreme Court has repeatedly explained, if an evidentiary provision is to effectively encourage communication, persons communicating must be able to predict with some certainty whether a particular discussion will be protected.⁵⁷

The approach also places heavy demands on the courts.⁵⁸ It requires courts to examine circumstances of each communication and delve into the details of the communication methods used. This increases litigation costs for the parties and consumes scarce judicial resources.⁵⁹ It can be especially burdensome where a case involves voluminous materials or numerous communications.⁶⁰

Cases Interpreting California Law on Inadvertent Disclosure

There is no California Supreme Court decision squarely resolving the effect of an inadvertent disclosure of a communication protected by one of the confidential

56. Scott, *supra* note 33, at 1066; Simko, *supra* note 38, at 476; Talton, *supra* note 33, at 295. As one commentator explains:

[T]he balancing test is cumbersome because it requires a court to weigh five different factors to determine whether there was a waiver of the attorney-client privilege. Often, there is considerable overlap among these factors themselves. More significantly, courts are not uniform in their application of each factor.

Stanoch, Comment, “*Finders ... Weepers?*” *Clarifying a Pennsylvania Lawyer’s Obligations to Return Inadvertent Disclosures, Even After New ABA Rule 4.4(B)*, 75 Temp. L. Rev. 657, 671-72 (2002) (footnotes omitted).

57. *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996); *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

58. Scott, *supra* note 33, at 1066; Talton, *supra* note 33, at 295.

59. Bruckner-Harvey, *supra* note 38, at 391; Simko, *supra* note 38, at 476.

60. One could also argue that “such procedures would result in more distrust of the legal system as a whole, since lawyers would be seen as quibbling over secondary issues instead of pursuing real justice.” *Id.*

communication privileges. As discussed below, published decisions of the courts of appeal and federal courts interpreting California law consistently follow the subjective intent approach. Other decisions, including several California Supreme Court decisions, also lend support to that approach. There are potential sources of confusion, however, suggesting that statutory guidance would be helpful.

In particular, a recent court of appeal opinion conflicted with the prevailing line of authority. It was superseded when the California Supreme Court granted review in the case.⁶¹ As explained below, however, it may be futile to wait for the Court to provide guidance, because there is no assurance that it will address the issue of waiver by inadvertent disclosure, or even hear argument in the case in question.

Court of Appeal Decisions on Inadvertent Disclosure

The first court of appeal decision addressing inadvertent disclosure appears to have been *People v. Gardner*,⁶² in which a probation report included confidential information from a patient's medical record. A hospital had provided the information to the probation officer at the officer's request. Over objection at the sentencing hearing, the trial court permitted the information to remain in the probation report.

The court of appeal ruled that this was error, but that the error was harmless. The court of appeal based its decision on Welfare and Institutions Code Section 5328, which prohibits disclosure of certain medical information. In reaching that decision, however, the court explained:

As in other privileges for confidential communications, the physician-patient privilege precludes a court disclosure of a communication, even though there has been an accidental or unauthorized out-of-court disclosure of such

61. Cal. R. Ct. 976; see *infra* notes 109-18 and accompanying text.

62. 151 Cal. App. 3d 134, 198 Cal. Rptr. 452 (1984).

communication. Thus, an eavesdropper or other interceptor is not allowed to testify to an overheard or intercepted communication, otherwise privileged from disclosure, because it was intended to be confidential. Subdivision (f) of section 5328 does not authorize the court to order disclosure of matter which the Evidence Code makes privileged.⁶³

Although the court did not mention Section 912, these comments indicate that an inadvertent disclosure of confidential physician-patient communication does not waive the privilege.

A later case, *O'Mary v. Mitsubishi Electronics America, Inc.*,⁶⁴ makes the point more forcefully. In that case, counsel responding to a document request inadvertently produced documents that were subject to the attorney-client privilege. The trial court ruled that this disclosure did not waive the privilege.

On appeal, the proponent of the evidence contended that the documents were admissible because any uncoerced disclosure of privileged material waives the privilege. The court of appeal disagreed, stating that the proponent

forgets that discovery is coercion. The force of law is being brought upon a person to turn over certain documents. 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 through voluminous files and records in preparation for a document production may have missed something. [The proponent] invites us to adopt a "gotcha" theory of waiver, in which an underling's slipup in a document production becomes the equivalent of actual consent. We decline. The substance of

63 *Id.* at 141.

64. 59 Cal. App. 4th 563, 69 Cal. Rptr. 2d 389 (1997).

an inadvertent disclosure under such circumstances demonstrates that there was no voluntary release.⁶⁵

The court of appeal thus made clear that an inadvertent disclosure of a privileged communication does not result in waiver. In reaching that conclusion, it focused on the holder's intent regarding disclosure of the documents, rather than on intent to waive the privilege.

The facts of *State Compensation Ins. Fund v. WPS, Inc.*⁶⁶ were similar. Again, counsel responding to a document request inadvertently produced documents that were subject to the attorney-client privilege. As in *O'Mary*, the court of appeal upheld the trial court's ruling that this disclosure did not waive the attorney-client privilege.

The court of appeal focused on whether any statement or conduct of the client indicated that the client consented to counsel's disclosure.⁶⁷ It explained that a "trial court called upon to determine whether inadvertent disclosure of privileged information constitutes waiver of the privilege must examine both the subjective intent of the holder of the privilege and the relevant surrounding circumstances for any manifestation of the holder's consent to disclose the information."⁶⁸

The court concluded that there had been no waiver in the case before it, because it was "clearly demonstrated that [the holder of the privilege] had no intention to voluntarily relinquish a known right."⁶⁹ The court thus framed the test as whether the holder of the privilege intended to waive the

65. *Id.* at 577 (citation omitted).

66. 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799 (1999).

67. *Id.* at 652.

68. *Id.* at 652-53.

69. *Id.* at 653.

privilege.⁷⁰ In describing its holding, however, the court spoke only in terms of disclosure: “[W]e hold that ‘waiver’ does not include accidental, inadvertent disclosure of privileged information by the attorney.”⁷¹

Federal Decisions Interpreting California Law on Inadvertent Disclosure

Three federal decisions also conclude that under California law, inadvertent disclosure of a privileged communication does not waive the privilege.

In *KL Group v. Case, Kay & Lynch*,⁷² the Ninth Circuit considered the impact of inadvertent production of an attorney-client letter in discovery. The court concluded that under “either Hawaii or California law, [the client] did not waive its attorney-client privilege by [counsel’s] production of the letter.”⁷³ The Ninth Circuit therefore upheld the district court’s issuance of a protective order.⁷⁴

A more extensive discussion of the issue appears in *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*⁷⁵ Again, counsel inadvertently produced attorney-client communications during document discovery. The district court determined that “[t]o the extent the disputed documents fall within the scope of the [attorney-client] privilege, California law requires they remain privileged notwithstanding their inadvertent disclosure during discovery.”⁷⁶ The court explained that under California law, “waiver of the attorney-client privilege depends entirely on whether the client provided knowing and

70. *Id.* at 653 & n.2.

71. *Id.* at 654.

72. 829 F.2d 909 (9th Cir. 1987).

73. *Id.* at 919.

74. *Id.*

75. 196 F.R.D. 375 (S.D. Cal. 2000).

76. *Id.* at 380.

voluntary consent to the disclosure.”⁷⁷ That statement suggests that the critical factor in assessing whether waiver occurred is the client’s intent regarding disclosure. But the court also stated that “nothing in the record suggests that the counsel’s inadvertent disclosure of allegedly privileged documents manifested [the client’s] knowing and voluntary relinquishment of its attorney-client privilege.”⁷⁸ That statement suggests that the critical factor is not the client’s intent regarding disclosure, but rather the client’s intent regarding waiver of the privilege. The decision is thus an example of a case in which the court intermingles these two different standards. Either way, however, it is clear that the court is focusing on the subjective intent of the holder of the privilege in determining whether the privilege has been waived under Section 912.

Similarly, *Cunningham v. Connecticut Mut. Life Ins.*⁷⁹ involved counsel’s inadvertent production during document discovery of a letter protected by the attorney-client privilege. The district court concluded in dictum⁸⁰ that this did not waive the privilege under California law. It explained:

Courts generally use three approaches to resolve whether inadvertent disclosure constitutes a waiver: (1) an evaluation of all the circumstances surrounding the disclosure, (2) the client is held strictly responsible for any disclosure, and (3) the client’s intent to disclose is controlling. California appears to follow the subjective approach to waiver by a privilege holder.⁸¹

77. *Id.*

78. *Id.*

79. 845 F. Supp. 1403 (S.D. Cal. 1994).

80. The court pointed out that counsel not only inadvertently produced the letter, but also failed to list the letter on its privilege log, a matter governed not by California law but by federal common law. *Id.* at 1408-10. The court relied on this ground in holding that the privilege had been waived. *Id.* at 1412.

81. *Id.* at 1410.

Again, the court clearly endorsed the subjective intent approach, but did not clearly differentiate between intent to disclose a privileged communication and intent to waive the privilege. While the statement quoted above refers to “intent to disclose,” elsewhere in its opinion the court stated that under the subjective approach, “the client must affirmatively waive the privilege.”⁸²

California Decisions That Support Use of the Subjective Intent Approach But Do Not Squarely Resolve the Effect of an Inadvertent Disclosure

A number of California cases contain language that tends to support the subjective intent approach, without squarely ruling on whether an inadvertent disclosure of a privileged communication waives the privilege.

For example, in *Roberts v. Superior Court*⁸³ the California Supreme Court considered whether a form consent was effective to waive a patient’s psychotherapist-patient privilege. The Court said there was no waiver under the circumstances of the case, because the “waiver of an important right must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences.”⁸⁴ The Court did not have to resolve the impact of an inadvertent disclosure, but its reference to a “knowing act” suggests that a disclosure must be intentional to constitute a waiver.

Similarly, in *Menendez v. Superior Court*⁸⁵ the California Supreme Court considered whether the psychotherapist-

82. *Id.* at 1411.

83. 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973).

84. *Id.* at 343. This portion of *Roberts* was quoted in *Maas v. Municipal Court*, 175 Cal. App. 3d 601, 606-07, 221 Cal. Rptr. 245 (1985), in which the court held that an immunity agreement did not waive the attorney-client privilege because “consent to disclosure must be unambiguously manifested.”

85. 3 Cal. 4th 435, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992).

patient privilege was waived as to tapes that had been seized by the police. The Court ruled that one of the tapes fell within the dangerous patient exception to the psychotherapist-patient privilege,⁸⁶ but the other tapes were privileged when made and remained privileged, because there had been no “intentional waiver” or waiver by operation of law.⁸⁷ The Court’s reference to an “intentional waiver” is suggestive of a subjective intent standard, but the Court did not have to confront the issue of waiver by voluntary but inadvertent disclosure.

Likewise, in *Wells Fargo Bank v. Superior Court*⁸⁸ the California Supreme Court stated that “a waiver is the intentional relinquishment of a known right.”⁸⁹ The Court held that the attorney-client privilege was not waived by disclosure of attorney-client communications in discovery, because the disclosure was based on a mistaken but honest and reasonable belief that it was legally required.⁹⁰ The case thus exemplifies the already-codified principle that a coerced disclosure does not constitute a waiver.⁹¹ The Court’s reference to an “intentional relinquishment” suggests that a disclosure must be intentional as well as uncoerced to waive the privilege, but the Court did not have to decide whether an unintentional disclosure constitutes a waiver.

A few court of appeal decisions provide further support for the subjective intent approach, without relying on it as the

86. Section 1024.

87. *Id.* at 455, 456 & n.18.

88. 22 Cal. 4th 201, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000).

89. 22 Cal. 4th at 211, *quoting* BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240, 1252, 245 Cal. Rptr. 682 (1988).

90. 22 Cal. 4th at 211-12.

91. Section 912(a); see also *Andrade v. Superior Court*, 46 Cal. App. 4th 1609, 1613-14, 54 Cal. Rptr. 2d 504 (1996); *Rodriguez v. Superior Court*, 14 Cal. App. 4th 1260, 1270, 18 Cal. Rptr. 2d 120 (1993).

basis for a holding. These include *Cooke v. Superior Court*⁹² and *Houghtaling v. Superior Court*.⁹³

Potential Sources of Confusion

Given the foregoing authorities, California law on inadvertent disclosure seems relatively clear. There are, however, some potential sources of confusion. These include an unnecessary and unclear discussion in *People v. Von Villas*,⁹⁴ dicta in a number of cases stating that a privilege is lost once disclosed, misleading language in cases in which the holder of a privilege agreed to disclose a privileged communication but did not do so, a depublished decision that was relied on in commentary, and the superseded opinion in

92. 83 Cal. App. 3d 582, 147 Cal. Rptr. 915 (1978). *Cooke* was a marital dissolution proceeding in which a servant for the husband surreptitiously copied attorney-client privileged documents and mailed them to the wife, who gave them to her attorney. The trial court prohibited the wife from using the documents; the court of appeal upheld the trial court's determination that the documents remained privileged despite the surreptitious disclosure. *Id.* at 588. The court of appeal explained that aside from the surreptitious disclosure, the documents had only been disclosed to attorneys who represented the husband or "members of his family or business associates who were legitimately kept informed of the progress of a lawsuit that directly involved the business with which they were associated." *Id.* The court said that the latter disclosures did not defeat the privilege, because they were "reasonably necessary to further the interests" of the husband in the litigation. *Id.*; see Section 912(d). Without directly stating as much, the court also implicitly determined that a surreptitious, unauthorized disclosure of a privileged communication is insufficient to waive the privilege. The case is thus consistent with the subjective intent approach.

93. 17 Cal. App. 4th 1128, 21 Cal. Rptr. 2d 855 (1993). In dictum, the court in this case cautioned that the small claims court must "be vigilant to prevent disclosure of possibly privileged material through inadvertence, and to ensure that the parties and witnesses are aware of their rights in this respect." *Id.* at 1138 n.8. The court went on to say: "We do not believe that silence, on the part of a layman, should be deemed a waiver of any privilege, and the court should elicit an *informed, express waiver* before such evidence is admitted." *Id.* (emphasis added). These comments indicate that at least where a person is self-represented in small claims court, the court should examine the subjective intent of the holder of the privilege in determining whether a privilege is waived.

94. 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992).

the inadvertent disclosure case that is now pending before the California Supreme Court.

Von Villas concerned the admissibility of a husband-wife conversation that occurred while the husband was in jail. The trial court admitted the evidence over the husband's objection that the conversation was protected by the marital communications privilege.

The court of appeal upheld that ruling, pointing out that the husband and wife

were speaking very loudly to one another — loudly enough to be heard beyond the plexiglass which separated them.

They knew *or reasonably should have known* that third parties in the person of sheriff's deputies were present.⁹⁵

The court offered three alternate bases for its decision. First, the court concluded that the conversation was not made "in confidence" and thus never became privileged.⁹⁶ That was a correct and sufficient basis for its decision; there was no need for the court to say anything more.⁹⁷ As an alternate basis for decision, however, the court also said that the conversation could be viewed as satisfying the "crime or fraud" exception to the marital privilege.⁹⁸ As yet another alternate basis for decision, the court said that "the trial court was faced with sufficient evidence to warrant the conclusion that even if the December 20 conversation was privileged, any such privilege was waived pursuant to Evidence Code section 912."⁹⁹

That statement, coupled with the court's earlier observation that the husband and wife "knew or reasonably should have

95. *Id.* at 223 (emphasis added).

96. *Id.* at 220-22, 223.

97. See discussion under "Waiver as Opposed to Initial Existence of a Privilege" *supra*.

98. *Id.* at 222-23.

99. *Id.* at 223.

known” that their conversation was being overheard, could be interpreted to mean that a negligent disclosure by the holder of a privilege is sufficient to waive the privilege. Alternatively, the statement could be construed to indicate that the trial court had “sufficient evidence to warrant the conclusion” that the disclosure was intentional and thus the privilege was waived. The latter interpretation is consistent with the subjective intent approach, but the former is not. Thus, this dictum in *Von Villas* might, but need not necessarily, be construed to conflict with that approach.

Another potential source of confusion is language in several cases to the effect that once a privileged communication is disclosed, the privilege is lost.¹⁰⁰ The implication of those statements is that an inadvertent or other unintentional disclosure of a privileged communication waives the privilege, not just an intentional disclosure by or with the consent of the holder of the privilege. But none of the cases involved a ruling on an inadvertent or unintentional disclosure, so the statements in them are only dicta.

Similarly, in a number of cases the holder of a privilege agreed to, or otherwise took steps to, disclose privileged communications, but no disclosure actually occurred. Those cases interpret Section 912 to require actual disclosure, or a reasonable certainty of disclosure, before waiver occurs. Mere intent to disclose, by itself, is not enough.¹⁰¹

100. See *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 668 (9th Cir. 2003) (Under California law, “once confidential communications are disclosed to a third party the privilege is forever lost.”); *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 744, 104 Cal. Rptr. 2d 803 (2001) (attorney-client privilege “once lost, can never be regained”); *PSC Geothermal Services Co. v. Superior Court*, 25 Cal. App. 4th 1697, 1708, 31 Cal. Rptr. 2d 213 (1994) (“It is true that once documents are disclosed, the privilege is waived”).

101. The leading decision on this point is *Lohman v. Superior Court*, 81 Cal. App. 3d 90, 146 Cal. Rptr. 171 (1978), in which a client (through her current attorney) caused subpoenas to be issued to four of her former attorneys, seeking records regarding their representation of the client. No such records were

That principle is fully consistent with the subjective intent approach, under which waiver requires both intent to disclose and actual disclosure. But some of the language in this line of cases might be misinterpreted to mean that the holder's intent is unimportant in determining whether waiver occurred. For example, one court said that "the focal point of privilege waiver analysis should be the holder's disclosure of privileged communications to someone outside the attorney-client relationship, not the holder's intent to waive the privilege."¹⁰² Although such a statement downplays the importance of intent to disclose, it is dictum and the holding of the case is consistent with the subjective intent approach.

Still another potential source of confusion is *Kanter v. Superior Court*,¹⁰³ a depublished court of appeal decision that adopted the multifactor balancing test for waiver of privilege by disclosure. Although the case is not good law, a fairly recent student publication on inadvertent disclosure discusses

actually disclosed in response to the subpoenas, but the client's adversary argued that the client waived the attorney-client privilege as to those records simply by issuing the subpoenas. The court of appeal disagreed, explaining that "waiver occurs only when the holder of the privilege has, *in fact*, voluntarily disclosed or consented to a disclosure made, *in fact*, by someone else." *Id.* at 95 (emphasis added). The court went on to say that "[p]ut another way, the *intent to disclose* does not operate as a waiver, waiver comes into play after a disclosure has been made." *Id.* (emphasis added).

For similar decisions, see *Shooker v. Superior Court*, 111 Cal. App. 4th 923, 4 Cal. Rptr. 3d 334, 336 (2003) (privilege is not waived if expert witness designation is withdrawn before party discloses significant part of privileged communication or before it is known with reasonable certainty that party will actually testify as expert); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996) (agreement to waive attorney-client privilege, without actual disclosure, does not waive privilege under federal law or under Section 912, to which court looked for guidance).

102. *Tennenbaum*, 77 F.3d at 341.

103. 253 Cal. Rptr. 810 (1988). Another depublished decision on inadvertent disclosure is *Magill v. Superior Court*, 103 Cal. Rptr. 2d 355, 385 (2001).

it extensively,¹⁰⁴ refers to the depublication only in a footnote,¹⁰⁵ and states in the text that in California “there is clear guidance from the *Kanter* case.”¹⁰⁶ The piece thus gives the misleading impression that *Kanter* is the leading California decision on waiver of privilege by disclosure.¹⁰⁷

Because these authorities are potentially confusing and require research to properly understand, statutory guidance on inadvertent disclosure would be useful.¹⁰⁸ The circumstances

104. Stuart, Comment, *Inadvertent Disclosure of Confidential Information: What Does a California Lawyer Need to Know*, 37 Santa Clara L. Rev. 547, 548-51 (1997).

105. *Id.* at 548 n.8.

106. *Id.* at 565.

107. The piece also prominently discusses two California cases that involve disclosure of privileged documents but do not interpret Section 912. See *id.* at 552-54 (discussing *Aerojet-General Corp. v. Transport Indemnity Ins.*, 18 Cal. App. 4th 996, 22 Cal. Rptr. 2d 862 (1993), and *McGinty v. Superior Court*, 26 Cal. App. 4th 204, 31 Cal. Rptr. 2d 292 (1994)). In addition, the piece refers to four Ninth Circuit decisions on inadvertent disclosure that were tried in federal district court in California but do not apply California law. See *id.* at 554-57 (discussing *United States v. De La Jara*, 973 F.2d 746 (9th Cir. 1992), *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part & vacated in part*, 491 U.S. 554 (1989), *Weil v. Investment/Indicators, Research & Management Inc.*, 647 F. 2d 18 (9th Cir. 1981), and *Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d 646 (9th Cir. 1978)). The piece does not discuss any of the published decisions on inadvertent disclosure described here, some but not all of which were decided after the piece was written.

108. Other potential sources of confusion include a 1976 law review article and the California Supreme Court’s decision in *People v. Clark*, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990). There are also two federal district court decisions on inadvertent disclosure that were tried in California but decided under federal common law, not California law. *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179 (N. Dist. Cal. 1990); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N. Dist. Cal. 1985).

In the law review article, the authors state that Section 912

does not require ... that the holder have known or intended waiver to be a consequence of his actions. If he voluntarily performed an act upon which consent to disclosure may be predicated, waiver occurs regardless of the holder’s subjective intent to preserve the confidentiality of the privileged communication.

surrounding the inadvertent disclosure case pending before the California Supreme Court — *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*¹⁰⁹ — underscore the need for such a reform.

Pickering & Story, *Limitations on California Professional Privileges: Waiver Principles and the Policies They Promote*, 9 U.C. Davis L. Rev. 477, 496 (1976) (emphasis added; footnotes omitted); see also *id.* at 498. The authors rely on John Wigmore’s treatise as support for this assertion, but that treatise predates the enactment of Section 912. See *id.* at 477 n.1, 496 n.98.

In *Clarke*, the California Supreme Court ruled that the defendant could not claim the psychotherapist-patient privilege because the “reason for the privilege — protecting the patient’s right to privacy and thus promoting the therapeutic relationship — and thus the privilege itself, disappear once the communication is no longer confidential.” *Id.* at 620. The Court viewed the question not as whether the defendant waived the psychotherapist-patient privilege or whether the dangerous patient exception applied, but “whether the privilege may be claimed at all once the communication is no longer confidential.” *Id.* Although the Court did not couch its ruling in terms of waiver, its language suggests that *any* disclosure of a confidential psychotherapist-patient communication (inadvertent, unknown to the privilege holder, or otherwise) defeats the privilege.

The Court firmly rejected that notion in a later case, however, explaining that “*Clark* holds only that when a psychotherapist discloses a patient’s threat to the patient’s intended victim ..., *the disclosed threat* is not covered by the privilege.” *Menendez v. Superior Court*, 3 Cal. 4th 435, 447, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992) (emphasis added). According to the Court, the dangerous patient exception applies to the threat itself, but other communications between the psychotherapist and the patient remain privileged, despite the disclosure of the threat. *Id.* at 447-49; see also *San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (2001).

Thus, although *Clark* contains broad language regarding the psychotherapist-patient privilege that could be considered inconsistent with the subjective intent approach to inadvertent disclosure, it is clear from *Menendez* that such an interpretation of *Clark* is incorrect. Moreover, the discussion of the attorney-client privilege in *Clark* is consistent with, and in fact tends to support, the principle that only an *intentional* disclosure of a privileged communication is sufficient to waive a privilege listed in Section 912. See 50 Cal. 3d at 621 (defendant’s response to psychotherapist’s warning did not waive privilege, because “there was no clear intent to waive the privilege in that statement”).

109. No. S124914 (review granted July 21, 2004).

The Jasmine Case

In *Jasmine*, a group of officers and lawyers for a corporation called an officer for another corporation and left a message on her voicemail. After they left the message, they failed to hang up the speakerphone, and proceeded to have a conversation among themselves that was also recorded on her voicemail. In subsequent litigation, their corporation sought to preclude use of that conversation, claiming that it was protected by the attorney-client privilege. The trial court agreed, but the court of appeal reversed, advancing two bases for its decision.¹¹⁰

First, the court of appeal determined that the privilege had been waived, even though the recording of the conversation was inadvertent.¹¹¹ Citing *State Compensation Ins. Fund*, the court acknowledged that “an attorney’s inadvertent disclosure does not waive the privilege absent the privilege holder’s intent to waive.”¹¹² The court distinguished that situation, however, pointing out that in the case before it “the *privilege holder* inadvertently disclosed the information.”¹¹³ The court then asserted that there “is no requirement in the statute itself, nor in the cases interpreting the statute that the privilege holder intend to disclose the information when ... the holder makes an uncoerced disclosure.”¹¹⁴ Accordingly, the court concluded that it was unimportant whether the corporation intended to disclose the information; it was enough that the

110. The court of appeal decision was formerly published at 117 Cal. App. 4th 794 (2004). The decision was superseded when the California Supreme Court granted review. It may no longer be cited as precedent. Cal. R. Ct. 976, 977. The decision can be found at 12 Cal. Rptr. 3d 123 (2004).

111. The court apparently assumed that the conversation was privileged when made and remained privileged until the voicemail was played, at which time the privilege was waived.

112. 12 Cal. Rptr. 3d at 128 (emphasis added).

113. *Id.* (emphasis added).

114. *Id.*

corporation “was not coerced in any way to make the disclosure, and as such, its disclosure falls squarely within the meaning of section 912, subdivision (a).”¹¹⁵

As an alternate basis for its decision, the court concluded that “[e]ven if the attorney-client privilege were not waived in this case, the voicemail is not protected, because it falls within the crime-fraud exception to the attorney-client privilege stated in section 956.”¹¹⁶ The court explained that there was sufficient evidence to satisfy a prima facie case of fraud.¹¹⁷

The court’s comments on privilege waiver were thus unnecessary to its decision. In addressing the issue, the court fashioned a new variant of the waiver doctrine: A two-pronged rule in which the strict liability approach applies to a disclosure by the holder of a privilege, while the subjective intent approach applies to disclosure by a representative of the holder. Previous decisions made no mention of such a two-pronged approach. The decision thus generated further potential for confusion in an area that already warranted clarification.

That problem was alleviated to some extent when the California Supreme Court granted review and the decision was superseded. But considerable uncertainty remains. Although the court of appeal decision can no longer be cited as precedent,¹¹⁸ nothing would prevent a future litigant from arguing for its two-pronged approach.

115. *Id.* at 129.

116. *Id.*

117. *Id.* at 132. The court was careful to point out 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.” *Id.* at 129 n.7.

118. Cal. R. Ct. 976, 977.

Further, there is no assurance 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 Court ordered the briefing in *Jasmine* deferred pending consideration and disposition of a related issue in *Rico v. Mitsubishi Motors Corp.*¹¹⁹ or further order of the court.¹²⁰ 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.¹²¹

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."¹²² 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...."¹²³ 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,¹²⁴ but was clearly covered by the work-

119. No. S123808 (review granted June 9, 2004).

120. 94 P.3d 475, 16 Cal. Rptr. 3d 33 (July 21, 2004).

121. The court of appeal decision in *Rico* can be found at 10 Cal. Rptr. 3d 601 (2004). It was formerly published at 116 Cal. App. 4th 51 (2004).

122. 10 Cal. Rptr. 3d at 603.

123. *Id.*

124. The court reasoned that the attorney-client privilege was inapplicable because the document "did not memorialize any attorney-client communication and ... the document was not transmitted between an attorney and his client." *Id.* at 605-06.

product privilege,¹²⁵ which had not been waived.¹²⁶ 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."¹²⁷ The court further concluded that disqualification was the only effective sanction for plaintiffs' counsel's failure to follow that rule.¹²⁸

It is unclear when the California Supreme Court will decide *Rico*,¹²⁹ and whether that decision will provide any guidance that is relevant to privilege waiver under Section 912. 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*. It may thus be counterproductive to await guidance from the Court on the appropriate standard for waiver under Section 912.

Proposed Approach to Inadvertent Disclosure

The Commission recommends amending Section 912 to provide statutory guidance on inadvertent disclosure.

125. *Id.* at 603.

126. *Id.* at 607.

127. *Id.* at 613 (footnote omitted).

128. *Id.* at 603.

129. As of December 7, 2004, briefing of the *Rico* appeal was in progress. Oral argument was not yet scheduled.

Expressly stating the rule in the statute would prevent disputes over the applicable rule and thus save adversaries, attorneys, and courts the expense and effort entailed in researching, debating, and resolving the matter.

Codification of the Subjective Intent Approach

Specifically, the Commission proposes to codify the subjective intent approach with regard to all disclosures, whether by the privilege holder or by someone else. Section 912(a) would be amended to provide that subject to the 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.”¹³⁰ 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.”¹³¹

This approach has a number of advantages. First, it avoids drawing a distinction between a disclosure by a privilege holder and a disclosure by someone else. The apparent rationale for such a distinction is to make the privilege holder strictly accountable for the holder’s own actions, but avoid penalizing the holder for another person’s lack of vigilance in protecting the confidentiality of privileged material. Under this rationale, the status of in-house counsel is unclear; it is possible that an inadvertent disclosure by in-house counsel in a document production would be deemed a waiver while a similar disclosure by outside counsel would not. The two-

130. See proposed Section 912 *infra* (emphasis added).

131. *Id.* (emphasis added).

pronged approach also leads to other questionable results. For instance, the physician-patient privilege would be waived if a dyslexic patient sent medical records to the wrong address, but not if a dyslexic physician did the same thing. Such a harsh result as waiver should not turn on who happens to transpose digits or make a similar accidental error. This would not occur if the subjective intent approach applied to all disclosures.

Second, the subjective intent approach is most consistent with the case law interpreting Section 912.¹³² Codifying the approach would not be a break with past practice and precedent, but would simply maintain the longstanding status quo.

Third, the subjective intent approach is most consistent with the statutory scheme governing the confidential communication privileges. With regard to each such privilege, subjective intent is determinative in assessing whether a communication is initially considered privileged or unprivileged.¹³³

For instance, a “confidential communication between client and lawyer” is defined 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*

132. See discussion under “Cases Interpreting California Law on Inadvertent Disclosure” *supra*.

133. See discussion under “Waiver as Opposed to Initial Existence of a Privilege” *supra*. The Comment to Section 917 states that if a communication *was not intended* to be kept in confidence the communication is not privileged. See *Solon v. Lichtenstein*, 39 Cal. 2d 75, 244 P.2d 907 (1952). And the fact that the communication was made under circumstances where others could easily overhear is a strong indication that the communication *was not intended* to be confidential and is, therefore, unprivileged. See *Sharon v. Sharon*, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889); *People v. Castiel*, 153 Cal. App. 2d 653, 315 P.2d 79 (1957).

(Emphasis added.)

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”¹³⁴ The focus is on whether the client knew, and therefore can be presumed to have intended, that the communication was being disclosed to a third person at the time it was made.

It would not be appropriate to use a subjective intent approach in determining whether a communication is initially privileged, yet use a different approach in determining whether the privilege attaching to a communication was subsequently waived. The subjective intent approach should apply in both situations, because protection of the policies underlying the confidential communication privileges is equally important in both situations.

Fourth, the subjective intent approach does not unduly impede the search for truth in a trial or other legal proceeding. The approach does not insulate a special category of information from use at trial. Rather, it only ensures that information protected by a confidential communication privilege remains privileged unless the holder of the privilege chooses to disclose the information. The doctrine is thus no more of a burden on the use of evidence than the privilege itself,¹³⁵ which was created in recognition that the search for

134. Section 952 (emphasis added). Similarly, a “confidential communication between patient and physician” is defined as “information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, *so far as the patient is aware, discloses the information to no third persons* other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted” Section 992 (emphasis added). See also Sections 1012 (psychotherapist-patient privilege), 1032 (clergy-penitent privilege), 1035.4 (sexual assault counselor-victim privilege), 1037.2 (domestic violence counselor-victim privilege).

135. As one commentator explained,

truth is sometimes less pressing than the policies served by the privilege.¹³⁶

Most importantly, the subjective intent approach is good policy. In contrast to the multifactor balancing approach, it establishes a clear standard, yields predictable results, and thus is readily-administered instead of routinely requiring court adjudication. Further, it safeguards the important policies underlying the confidential communication privileges. Effective functioning of the relationships in question (e.g., lawyer-client, psychotherapist-patient) is crucial to our society, helping to ensure, for instance, that the correct person goes to jail or that a mentally ill person receives appropriate treatment and does not become a safety threat.¹³⁷ By protecting the confidentiality of communications between persons in these relationships, the privileges promote the free-flowing communication that is considered essential for such effective functioning.¹³⁸ A low threshold for waiver

The criticism that [the subjective intent] approach may undermine justice stems from the concern that a privileged document may contain information which could go to the merits of a case, such as an admission of guilt, and it would be excluded from evidence. A close scrutiny of this criticism, however, shows that it lacks merit, for this analysis does no more to undermine justice than the attorney-client privilege. The [subjective intent] approach merely allows the sending counsel to keep the privileged document out of evidence. It gives no greater protection to the incriminating evidence than the document has already received from the attorney-client privilege.

Bruckner-Harvey, *supra* note 38, at 392; See also Simko, *supra* note 38, at 471 (The subjective intent approach “does not hamper zealous advocacy any more than the attorney-client privilege does. Although the receiving attorney may not introduce inadvertently disclosed documents into evidence, this is no greater an imposition than if the documents remained undisclosed.”) (footnotes omitted).

136. *Venture Law Group v. Superior Court*, 118 Cal. App. 4th 96, 12 Cal. Rptr. 3d 656 (2004).

137. See, e.g., *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985) (lawyer-client privilege “encourages observance of the law and aids in the administration of justice.”).

138. See note 9 *supra*.

would undercut that effect, jeopardizing the functioning of the privileged relationships.¹³⁹ The subjective intent approach restricts waiver to situations in which it is clear that disclosure of the privileged communication is acceptable to the holder of the privilege. Consequently, there is no disincentive to free-flowing communication in the privileged relationship, and the relationship can continue to function effectively.

Intent to Disclose Versus Intent to Waive the Privilege

Significantly, the proposed standard would focus on intent to disclose the privileged communication to a third person, not intent to waive the applicable privilege.¹⁴⁰ 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

139. See *supra* notes 40 & 46 and accompanying text.

140. That is clear from the proposed statutory language, which repeatedly refers to an intentional *disclosure*, not an intentional *forfeiture of a legal right*:

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 counselor-victim privilege), or 1037.5 (domestic violence counselor-victim 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 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.

(Emphasis added.)

Commission deliberately deleted the Uniform Rules' requirement that the holder of a privilege make a disclosure "with knowledge of his privilege."¹⁴¹ The proposed amendment of Section 912 would continue that approach.

Failure to Object at Trial

Numerous cases find that a privilege was waived due to failure to object at trial.¹⁴² The results of these cases should be the same under the Commission's proposed amendment of Section 912. In conducting a trial, a party's attorney speaks for the party¹⁴³ and the attorney's intent is presumed to mirror the party's intent.¹⁴⁴ If an attorney fails to object to disclosure

141. *Tentative Recommendation Relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 262 (1964) (hereafter "Tentative Recommendation on *Privileges*"); Chadbourn, *A Study Relating to the Privileges Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm'n Reports 301, 509-10 (1964).

142. See, e.g., *People v. Barnett*, 17 Cal. 4th 1044, 1123-24, 954 P.2d 384, 74 Cal. Rptr. 2d 121 (1998); *Calvert v. State Bar of California*, 54 Cal. 3d 765, 819 P.2d 424, 1 Cal. Rptr. 2d 684 (1991); *People v. Haskett*, 52 Cal. 3d 210, 242-43, 801 P.2d 323, 276 Cal. Rptr. 80 (1990); *People v. Gillard*, 57 Cal. App. 4th 136, 162 n.16, 66 Cal. Rptr. 2d 790 (1997); *People v. Poulin*, 27 Cal. App. 3d 54, 64, 103 Cal. Rptr. 623 (1972).

143. "[A]n attorney is an agent of the client ..., and the client as principal is bound by the acts of the attorney-agent within the scope of the attorney's actual (express or implied) or apparent or ostensible authority, or by unauthorized acts ratified by the client." 1 B. Witkin, *California Procedure Attorneys* § 261, at 326 (4th ed. 1996). If a client is represented by an attorney in a proceeding, "the client has no direct control over the proceeding." *Id.* § 265, at 330. Rather, "[a]ll legal steps must ordinarily be taken by the attorney." *Id.* Adverse parties must deal with the attorney, not the client. *Id.* § 266, at 331.

144. There is a strong presumption that acts taken by the attorney in conducting the litigation are within the scope of the attorney's authority. *Gagnon Co., Inc. v. Nevada Desert Inn*, 45 Cal. 2d 448, 459-60, 289 P.2d 466 (1955); *Security Loan & Trust Co. v. Estudillo*, 134 Cal. 166, 169, 66 P. 257 (1901); *Ford v. State*, 116 Cal. App. 3d 507, 516-17, 172 Cal. Rptr. 162 (1981); *Clark Equipment Co. v. Wheat*, 92 Cal. App. 3d 503, 523, 154 Cal. Rptr. 874 (1979); *City of Fresno v. Baboian*, 52 Cal. App. 3d 753, 757-58, 125 Cal. Rptr. 332 (1975); *Dale v. City Court of Merced*, 105 Cal. App. 2d 602, 607-08, 234 P.2d 110 (1951); Witkin, *supra* note 143, § 263, at 328-29. The client retains

of privileged information at trial, the attorney would be presumed to have intended the ordinary consequences of that voluntary act.¹⁴⁵ The ordinary consequences of failure to object to evidence at trial are introduction of the evidence (i.e., disclosure of the privileged information) and waiver of the objection.¹⁴⁶

Thus, it would be presumed that an attorney who failed to claim the privilege at trial intended to disclose the privileged information.¹⁴⁷ That presumption would be difficult to

authority to fire the attorney at any time and to give the attorney instructions, which may or may not be binding on the attorney, depending on the circumstances. *Id.* § 269, at 334. The client also retains authority to make certain major decisions, such as whether to settle the case and whether to stipulate to binding arbitration. *Id.* §§ 272-283, at 336-52. But the attorney “is relatively free from control by the client in ordinary procedural matters” *Id.* § 271, at 336; see also *id.* § 270, at 334-36.

As a general rule, a decision regarding whether to interpose an evidentiary objection in the course of a legal proceeding, even an objection based on a privilege, would seem to fall into that category. After all, it is the attorney and not the client who voices objections in court (even when the client is testifying), at depositions, and in documents such as a discovery response or a summary judgment opposition. The attorney is presumed to speak for the client on those matters; the attorney’s intent is presumed to mirror the client’s intent.

In some circumstances, however, that presumption might be overcome. Case law on this point appears sparse. At a minimum, it would seem reasonable to accord such relief when the attorney deliberately acts contrary to the client’s best interest. *Cf.* *Carroll v. Abbott Laboratories, Inc.*, 32 Cal. 3d 892, 898, 654 P.2d 775, 187 Cal. Rptr. 592 (1982) (court may set aside judgment against client when attorney’s conduct resulting in entry of judgment was so extreme as to constitute positive misconduct). Further clarification of this point is beyond the scope of this study.

145. Evid. Code § 665.

146. Witkin, *supra* note 143, §§ 367, 371, at 454, 459-61.

147. It is important to differentiate between a litigation setting in which a lawyer is required to voice objections for the client (e.g., a deposition), and other settings in which the lawyer may act. For example, *People v. Hayes*, 21 Cal. 4th 1211, 989 P.2d 645, 91 Cal. Rptr. 2d 211 (2000), involved a conversation between defense counsel and the attorney for an adverse witness, in which the witness’ attorney allegedly disclosed an attorney-client communication to defense counsel. The Court’s opinion does not fully describe the facts of that interchange, but the conversation does not seem to have occurred while the witness’ attorney was taking a formal litigation step for his client. 21 Cal. 4th at

overcome, particularly if the failure to object resulted in a tactical benefit or otherwise appeared strategically motivated.¹⁴⁸ Moreover, absent unusual circumstances, the attorney's intent would be attributed to the client, thus satisfying the proposed requirement that the "holder of the privilege, without coercion, has *intentionally* disclosed a significant part of the communication or has consented to disclosure made by anyone."¹⁴⁹

Coordination of the Proposed Approach With Civil Discovery Provisions

The Civil Discovery Act contains a number of provisions on privilege waiver.¹⁵⁰ Those provisions would not conflict with the Commission's proposed amendment of Section 912.

1265. In such circumstances, there does not seem to be any presumption that the attorney acts for the client with regard to disclosure of a privileged communication. Rather, the Court concluded that the communication remained privileged because nothing in the record suggested that the adverse witness authorized his attorney to disclose the communication to defense counsel. *Id.* at 1265.

148. In *Barnett*, for instance, the court noted that the failure to object "might have reflected a reasonable strategic decision." 17 Cal. 4th at 1124-25.

149. See proposed Section 912 *infra* (emphasis added).

150. A nonsubstantive reorganization of the Civil Discovery Act was enacted in 2004 on recommendation of the Law Revision Commission. 2004 Cal. Stat. ch. 182. The reorganization will become operative on July 1, 2005. *Id.* at § 64. In the Civil Discovery Act as reorganized, the provisions on privilege waiver are:

- (1) Code Civ. Proc. § 2025.460 (former Section 2025(m)(1)).
- (2) Code Civ. Proc. § 2028.050 (former Section 2028(d)(2)).
- (3) Code Civ. Proc. § 2030.280 (former Section 2030(k)).
- (4) Code Civ. Proc. § 2031.300 (former Section 2031(l)).
- (5) Code Civ. Proc. § 2033.280 (former Section 2033(k)).

Unless otherwise specified, all further references to civil discovery provisions are to the provisions as reorganized and operative on July 1, 2005 (Code Civ. Proc. §§ 2016.010-2036.050), not to the civil discovery provisions that will be repealed on that date (Code Civ. Proc. §§ 2016-2036).

Nonexclusivity of Section 912

On its face, Section 912 does not purport to be the exclusive means of waiving the seven privileges to which it applies. Subdivision (a) specifies circumstances under which disclosure of a privileged communication results in waiver. Subdivisions (b)-(d) set forth exceptions to that rule. Nowhere does the provision say that making such a disclosure is the only way to waive the specified privileges.

Nonetheless, a couple of cases seem to indicate as much.¹⁵¹ One of these was decided before enactment of the Civil Discovery Act of 1986, however, and the other involved an incident that occurred before the operative date of that Act.

It is true that courts “may not add to the statutory privileges except as required by state or federal constitutional law, nor may courts imply unwritten exceptions to existing statutory privileges.”¹⁵² But there is nothing to prevent the Legislature from adding a new *statutory* means of waiving a privilege. If that occurs, the preexisting waiver statute is no longer exclusive.

That appears to be the situation with regard to Section 912. After the Civil Discovery Act of 1986 became operative, Section 912 was no longer the only statute specifying means

151. See *Motown Record Corp. v. Superior Court*, 155 Cal. App. 3d 482, 492, 202 Cal. Rptr. 482 (1984) (the “exclusive means by which the attorney/client privilege may be waived are specified in Section 912 of the Evidence Code.”); see also *Blue Ridge Ins. Co. v. Superior Court*, 202 Cal. App. 3d 339, 345, 248 Cal. Rptr. 346 (1988) (“Notwithstanding civil discovery statutes, Evidence Code governs waiver of attorney/client privilege.”).

152. *Roberts v. City of Palmdale*, 5 Cal. 4th at 373 (citations omitted); see also Section 911 & Comment; *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 206-09, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000); *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 888-89, 9 Cal. Rptr. 3d 621 (2004).

of waiving the privileges to which it applies; other means were specified in the Civil Discovery Act.¹⁵³

Privilege Waiver Under the Civil Discovery Provisions

The pertinent civil discovery provisions include one of the sections pertaining to an oral deposition in California and a number of provisions relating to written discovery.

Under the section governing waiver of an objection in an oral deposition in California, the right to assert a privilege with regard to a communication “is waived unless a specific objection to its disclosure is timely made during the deposition.”¹⁵⁴ Unlike other provisions of the Civil Discovery Act, the statute does not specify any circumstances under which a party can obtain relief from such a waiver.

Although that rule may initially seem more harsh than the Commission’s proposed amendment of Section 912, results under the two provisions are generally likely to be the same. As at trial, if a party at a deposition (through counsel, or directly if self-represented) fails to object to a question calling for privileged information, the party would be presumed to have intended the ordinary consequences of that action, including disclosure of the privileged information.¹⁵⁵ That presumption would be difficult to overcome, because a person representing someone at a deposition normally pays close attention to what is happening and is unlikely to be able to successfully claim inadvertence.¹⁵⁶

153. See *Korea Data Systems Co. Ltd. v. Superior Court*, 51 Cal. App. 4th 1513, 1517, 59 Cal. Rptr. 2d 925 (1997).

154. Code Civ. Proc. § 2025.460.

155. See discussion under “Failure to Object at Trial” *supra*.

156. It is possible that privileged information would be disclosed at a deposition due to a mistaken belief that the disclosure was legally required (e.g., if the deponent was represented by a new associate who did not know that there was a privilege for a confidential communication between a domestic violence victim and a counselor). That would be an instance in which the disclosure was

Moreover, finding a waiver in such circumstances appears appropriate. Excusing a failure to object at a deposition would reduce incentives to handle depositions competently, and would be highly detrimental to the party who took the deposition, because that party may have pursued other lines of questioning had an objection been properly interposed in the first place. The Commission sees no need to revise the provision governing privilege waiver at a deposition.

The waiver provisions relating to interrogatories, inspection demands, and requests for admission take a different approach. Each of those provisions states that failure to file a timely response to a discovery request waives any objection to the request, including an objection based on privilege. For example, the provision governing interrogatories states that if a party to whom interrogatories are directed fails to serve a timely response, that party “waives ... any objection to the interrogatories, including one based on privilege”¹⁵⁷ Each of the provisions also allows a court to grant relief from such a waiver, on motion, upon determining that (1) the party from whom discovery was sought subsequently served a response in substantial compliance with the applicable discovery requirements, and (2) the party’s failure to serve a timely

intentional but perhaps would be considered “coerced” within the meaning of Section 912. See *Wells Fargo*, 22 Cal. 4th 201 (no waiver where disclosure of privileged communications was based on mistaken but honest and reasonable belief that it was legally required). It is thus conceivable that the disclosure would be considered a waiver under Code of Civil Procedure Section 2025.460 but not under Section 912. The statutes are not in conflict, however, because Section 912 is not the exclusive statement of means by which waiver of the specified privileges can occur. Further, the Commission’s proposed amendment would have no bearing on the situation, because the requirement that a disclosure be uncoerced to constitute a waiver is already codified in Section 912.

157. Code Civ. Proc. § 2030.290. See also Code Civ. Proc. §§ 2031.300 (If party to whom inspection demand is directed fails to serve timely response, that party “waives any objection to the demand, including one based on privilege”), 2033.280 (If party to whom requests for admission are directed fails to serve timely response, that party “waives any objection to the requests, including one based on privilege”).

response was the result of mistake, inadvertence, or excusable neglect.¹⁵⁸

The Commission does not propose any change in these provisions at this time. Although they establish an additional way to waive a privilege, they mitigate the potential harm to privileged relationships by providing a means of seeking relief from such a waiver if the failure to timely respond to the discovery request was inadvertent. It is important to maintain incentives to timely comply with discovery obligations. The provisions governing interrogatories, inspection demands, and requests for admission appear to strike a fair balance between that objective and the competing goal of protecting the policies underlying the confidential communication privileges.

Privilege Waiver in a Deposition by Written Questions

The Civil Discovery Act also includes a provision governing a deposition by written questions, which states that

A party who objects to any question on the ground that it calls for information that is privileged ... shall serve a specific objection to that question on all parties entitled to notice of the deposition within 15 days after service of the question. A party who fails to timely serve that objection waives it.¹⁵⁹

Like the statute governing an oral deposition, this provision does not specify any circumstances under which a party can obtain relief from such a waiver.

At first glance, it might seem appropriate to apply the same privilege waiver rule to both types of depositions. But there are distinctions that warrant different treatment.

158. Code Civ. Proc. §§ 2030.290 (interrogatories), 2031.300 (inspection demand), 2033.280 (requests for admission).

159. Code Civ. Proc. § 2028.050.

Specifically, a failure to timely object to a question calling for disclosure of privileged information is more likely to stem from inadvertence in a deposition by written questions than in an oral deposition. Counsel may simply let the 15-day deadline accidentally slip by. That would waive the objection under the Civil Discovery Act, but there would be no intent to disclose.

Further, the harm from failure to timely object to a written deposition question calling for disclosure of privileged information almost certainly will be less severe than the harm from failure to timely object to a similar question at an oral deposition. In contrast to an oral deposition, a party taking a written deposition is unlikely to immediately act in reliance on the failure to object, shaping follow-up questions based on the response. A delay in receiving an objection to a written question could as easily stem from a delay in mail service as from failure to timely serve the objection. The impact on the party taking the deposition would be the same but the latter scenario would result in waiver of the privilege while the former would not.

The confidential communication privileges foster socially valuable relationships and should not be abrogated for a minor technical mistake.¹⁶⁰ Other remedies exist to encourage proper compliance with the discovery requirements.¹⁶¹ A discovery sanction “cannot go farther than is necessary to

160. As one court explained, the attorney-client privilege

is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege.

Blue Ridge Ins. Co. v. Superior Court, 202 Cal. App. 3d 339, 345, 248 Cal. Rptr. 346 (1988), *quoting* *People v. Kor*, 129 Cal. App. 2d 436, 447, 277 P.2d 94 (1954) (Shinn, P.J., concurring); see also *Fortunato v. Superior Court*, 114 Cal. App. 4th 475, 8 Cal. Rptr. 3d 87 (2004) (explaining that waiver of privilege must be narrowly rather than expansively construed to protect purpose of privilege).

161. *Korea Data Systems Co. Ltd. v. Superior Court*, 51 Cal. App. 4th 1513, 1517, 59 Cal. Rptr. 2d 925 (1997).

accomplish the purpose of discovery”¹⁶² The Commission therefore recommends that the provision governing privilege waiver in a deposition by written questions be amended to track the comparable provisions governing other forms of written discovery. Like those provisions, it should provide a means for obtaining relief from a privilege waiver based on failure to timely object to a question.¹⁶³

Partial Disclosure and Selective Disclosure

In addition to studying the law governing an inadvertent disclosure of a privileged communication, the Commission considered two types of intentional disclosure: (1) partial disclosure and (2) selective disclosure.

Partial Disclosure

Sometimes a privileged communication is partially disclosed, meaning that a significant portion but not the entirety of the communication is revealed to a person outside the privileged relationship. This may confer an unfair tactical advantage, as when a privilege holder discloses favorable portions of a privileged document, but withholds unfavorable portions. Case law establishes, however, that if the holder of a privilege voluntarily and intentionally makes a partial disclosure (or voluntarily and intentionally permits another person to do so), and the situation is not covered by one of the exceptions to Section 912,¹⁶⁴ a court may require additional disclosure in the interest of fairness, even though the holder did not intend to permit such additional disclosure.

162. *Newland v. Superior Court*, 40 Cal. App. 4th 608, 613, 47 Cal. Rptr. 2d 24 (1995); see also *Motown Record Corp. v. Superior Court*, 155 Cal. App. 3d 482, 490, 202 Cal. Rptr. 482 (1984).

163. See proposed Code Civ. Proc. § 2028.050 *infra*.

164. Section 912(b)-(d), which are discussed under “Exceptions” *supra*.

For example, the defendant in *People v. Worthington*¹⁶⁵ disclosed a marital communication in which the defendant's wife supposedly confessed to a murder and described the details of the crime. Having presented his version of the conversation, the defendant could not preclude his wife from testifying that the conversation occurred as he said, except it was he who confessed not she.¹⁶⁶

Similarly, in *Kerns Construction Co. v. Superior Court*,¹⁶⁷ a witness used privileged reports, provided by the holder of the privilege, to refresh his recollection before testifying, because he could not have testified on the subject otherwise. The privilege holder sought to exclude the reports themselves, but the court ruled that “[w]hen, with knowledge of their intended use, the privileged records were furnished to the witness, which act was not required to be performed, and the witness gave testimony from them, the privilege was waived.”¹⁶⁸ The court explained that fairness required that result:

It would be unconscionable to allow a rule of evidence that a witness can testify to material contained in a report, though not verbatim, and then prevent a disclosure of the reports. As is stated in 8 Wigmore, Evidence, section 2327 (McNaughton rev. 1961), “There is always also the objective consideration that when his [holder of the privilege] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease *whether he intended that result or not*. He cannot be allowed, *after disclosing as much as he pleases*, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final.”¹⁶⁹

165. 38 Cal. App. 3d 359, 114 Cal. Rptr. 322 (1974).

166. *Id.* at 365-66.

167. 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (1968).

168. *Id.* at 413-14.

169. *Id.* at 414 (emphasis added).

Even when a holder voluntarily and intentionally makes a significant disclosure, however, the privilege is not necessarily waived as to all of the communications between the persons in the privileged relationship. For example, a patient's disclosure that she ingested DES while pregnant did not waive the physician-patient privilege as to her full medical history.¹⁷⁰ Similarly, voluntary production of some attorney-client communications is not necessarily a waiver of the attorney-client privilege as to all communications having anything to do with the subject matter of a case.¹⁷¹ Although a court may rule that the scope of a waiver is broader than what the privilege holder intended when making a partial disclosure, the waiver should only be as broad as fairness requires.

Section 912 should be revised to codify that concept, so that the rule is clear on the face of the statute. The Commission recommends adding a new subdivision stating that “[i]f the holder of a privilege waives the privilege as to a significant part of a confidential communication pursuant to subdivision (a), the court may order disclosure of another part of the communication or a related communication to the extent necessary to prevent unfairness from partial disclosure.”¹⁷²

170. *Jones v. Superior Court*, 119 Cal. App. 3d 534, 547, 174 Cal. Rptr. 148 (1981); see also *People v. Superior Court*, 231 Cal. App. 3d 584, 589-91, 282 Cal. Rptr. 418 (1991) (trial court erred in finding general waiver of psychotherapist-patient privilege).

171. *Owens v. Palos Verdes Monaco*, 142 Cal. App. 3d 855, 870, 191 Cal. Rptr. 381 (1983); see also *Travelers Ins. Cos. v. Superior Court*, 143 Cal. App. 3d 436, 445, 191 Cal. Rptr. 871 (1983) (inadvertent disclosure of two attorney-client letters did not waive privilege as to other items and privilege was not claimed as to those two letters).

172. Proposed Section 912(e) *infra*.

Selective Disclosure

Selective disclosure is the 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. For example, a man might tell a friend about a discussion he had with his psychiatrist, but ask the friend to keep the matter confidential. Or the target of a governmental investigation might share privileged information with the investigating agency, on the understanding that it will not be shared with others, such as potential civil litigants. The investigating agency may even offer a reduced penalty or other incentive to encourage such a disclosure.¹⁷³

California law is unsettled as to whether a selective disclosure constitutes a waiver of the applicable privilege, such that a court or other tribunal could compel disclosure of the once-privileged communication to persons other than the holder's chosen confidant.¹⁷⁴ The federal courts are also

173. See, e.g., Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why it is Misguided)*, 48 Vill. L. Rev. 469, 534-48, 564-86, 590-92 (2003); Symchych, *Selective Waiver of Attorney-Client Privilege*, 60 Minn. Bench & Bar 17, 19-20 (Oct. 2003).

174. Compare *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), with *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (2004), *review denied* No. S123727 (June 9, 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). A few statutes authorize selective disclosure of a privileged communication in a specific situation. 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

divided on the issue of selective disclosure,¹⁷⁵ and there has been extensive scholarly debate on the topic.¹⁷⁶ Much has

Victim Compensation and Government Claims Board does not waive privilege by making disclosure that Board deems necessary for verification of application).

175. Some decisions hold that a selective disclosure of privileged information in confidence does not waive the applicable privilege. See, e.g., *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (government's selective disclosure of tapes was not harmful to persons seeking access to them and did not result in waiver of law enforcement investigatory privilege, even though government did not obtain confidentiality agreement before making disclosure); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (party does not waive attorney-client privilege by nonpublic disclosure of privileged material to government).

Of the federal circuit courts that have considered whether a privilege holder can selectively waive the privilege, however, a majority have rejected such claims. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 302 (6th Cir. 2002) ("we reject the concept of selective waiver, in any of its various forms"), *cert. dismissed sub nom. HCA, Inc. v. Tennessee Laborers Health & Welfare Fund*, 124 S. Ct. 27 (2002); *Genentech, Inc. v. United States International Trade Commission*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (waiver of attorney-client and work product privileges, which resulted from disclosure of documents in district court, was not limited to that forum but applied in other forums as well); *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 684-86 (1st Cir. 1997) (party who voluntarily disclosed documents to Department of Defense could not assert attorney-client privilege when IRS sought same documents); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1418, 1423-1427 (3d Cir. 1991) (by disclosing documents to Securities and Exchange Commission and Department of Justice, Westinghouse waived attorney-client and work-product privileges with respect to those documents, despite confidentiality agreements); *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988) (by disclosing privileged material to Department of Justice and Department of Defense, company waived attorney-client privilege and non-opinion work product privilege); *In re John Doe Corp.*, 675 F.2d 482, 488-89 (2d Cir. 1982) (disclosure of report prepared by company's lawyers to counsel representing underwriter waived attorney-client privilege because company cannot invoke pick and choose theory of privilege); *Permian Corp. v. United States*, 665 F.2d 1214, 1220-22 (D.C. Cir. 1981) (by disclosing privileged information to Securities and Exchange Commission, corporation waived attorney-client privilege and thus could not assert that privilege in subsequent administrative litigation); see also *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993) (rejecting selective waiver of work product privilege on facts presented, but declining to resolve whether selective waiver is permissible when privilege holder enters into confidentiality agreement with person to whom privileged

been written about the competing policy considerations.¹⁷⁷ The issue is hot and the debate is evolving in light of recent events such as the war on terrorism and high profile corporate scandals.¹⁷⁸

At some point, it may be necessary to curtail the debate by providing express statutory guidance on the issue. The Commission believes that it would be premature to propose such legislation at this time. The Commission might make a recommendation on this matter at a later date.

Types of Privileges Covered

By its terms, Section 912 applies only to the confidential communication privileges, not to other privileges such as the privilege against self-incrimination, the trade secret privilege, the spousal testimony privilege, the secret vote privilege, the official information privilege, or the privilege for the identity of an informer. Further, the text of the provision treats all of the confidential communication privileges the same way, rather than establishing different waiver standards for different privileges.

The Commission believes this treatment is appropriate. The Commission carefully explored what privileges to include in Section 912 when it originally drafted the provision in the

material is disclosed); *United States v. Billmyer*, 57 F.3d 31, 37 (1st Cir. 1995) (rejecting selective waiver of attorney-client privilege on facts presented, but declining to resolve whether selective waiver is permissible when information is disclosed in confidence to government).

176. See, e.g., Symchych, *supra* note 173; Pinto, *Cooperation and Self-Interest are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation*, 106 W. Va. L. Rev. 359 (2004).

177. For a good example of the debate on the competing policy considerations, see the majority and dissenting opinions in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), *cert. dismissed sub nom.* *HCA, Inc. v. Tennessee Laborers Health & Welfare Fund*, 124 S. Ct. 27 (2002).

178. E.g., the Enron collapse and the WorldCom bankruptcy.

early 1960's.¹⁷⁹ The decision to exclude other privileges was deliberate.¹⁸⁰

In applying the various privileges and other provisions protecting confidential information, courts have recognized that Section 912 was only meant to pertain to the privileges enumerated in it.¹⁸¹ In some instances, however, a court construing another privilege may find this section useful by analogy.¹⁸²

The California Supreme Court has also made clear that the same waiver principles apply to all of the privileges enumerated in Section 912. At one point, the Court appeared to endorse a lower threshold for waiver of the

179. See, e.g., Tentative Recommendation on *Privileges*, *supra* note 141, at 260; Chadbourn, *supra* note 141, at 514-15.

180. For example, the privilege against self-incrimination was excluded because waiver of this privilege "is determined by the cases interpreting the pertinent provisions of the California and United States Constitutions." Section 940 Comment; see also Tentative Recommendation on *Privileges*, *supra* note 141, at 260; Chadbourn, *supra* note 141, at 514-15.

181. For example, in *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351, 362-63, 134 Cal. Rptr. 2d 716, 719-20, 723-24 (2003), the court rejected the argument that Section 912 governed waiver of the confidentiality of mediation communications and materials. Similarly, in *University of Southern California v. Superior Court*, 45 Cal. App. 4th 1283, 1292, 53 Cal. Rptr. 2d 260 (1996), the court decided that "Section 912's privilege waiver provisions ... do not apply to section 1157's discovery exemption." Likewise, in *City of Fresno v. Superior Court*, 205 Cal. App. 3d 1459, 1473, 253 Cal. Rptr. 296 (1988), the court determined that waiver of the privilege protecting the privacy of peace officer personnel records (Sections 1043-1047; Penal Code §§ 832.7-832.8) was governed by different rules than waiver of the privileges listed in Section 912.

182. See *Fortunato v. Superior Court*, 114 Cal. App. 4th 475, 480 n.3, 8 Cal. Rptr. 3d 82 (2003) ("Although the statutory privileges and their exceptions are not applicable to privacy claims or the tax-return privilege, they may provide analogous reasoning in the appropriate case."); *Brown v. Superior Court*, 180 Cal. App. 3d 701, 711, 226 Cal. Rptr. 10 (1986) (court looks to Section 912 for guidance in the particular context before it, but acknowledges that waiver of privilege against self-incrimination is subject to constitutional constraints and Section 912 does not list that privilege).

psychotherapist-patient privilege than for other privileges,¹⁸³ but the Court later clarified that this was not the case.¹⁸⁴

The Commission is reluctant to disrupt this scheme, which seems to have functioned well for many years. For purposes of clarification, however, the Commission recommends adding language to Section 912 stating that the provision is not intended to imply anything regarding waiver of privileges other than the ones listed in it.¹⁸⁵ This would help to ensure that the proposed reforms are not applied in an inappropriate context.¹⁸⁶

The Right to Truth-in-Evidence

The Truth-in-Evidence provision of the California Constitution states:

(d) Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. *Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.*¹⁸⁷

183. See *People v. Clark*, 50 Cal. 3d 583, 620-21, 789 P.2d 127, 268 Cal. Rptr. 399 (1990).

184. See *Menendez v. Superior Court*, 3 Cal. 4th 435, 446-49, 834 P.2d 786, 11 Cal. Rptr. 2d 92 (1992); *San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 1090-91, 105 Cal. Rptr. 2d 476 (2001).

185. See proposed Section 912(f) *infra*.

186. In conducting this study, the Commission only analyzed the privileges enumerated in Section 912. At some point, the Commission may study the rules governing waiver of other privileges, if its resources permit.

187. Cal. Const. art. I, § 28(d) (emphasis added).

It is important to consider whether the two-thirds vote requirement of the Truth-in-Evidence provision would apply to the Commission's proposed amendment of Section 912.

The Commission does not believe that the two-thirds vote requirement applies. By its terms, the Truth-in-Evidence provision had no impact on "any existing statutory rule of evidence relating to privilege." Section 912 is a rule of evidence relating to privilege, and it was enacted long before the voters approved the Truth-in-Evidence provision.¹⁸⁸ Consequently, the constitutional exemption for "any existing statutory rule of evidence relating to privilege" may be a sufficient basis for finding the Commission's proposal consistent with the right to Truth-in-Evidence.

It is possible, however, that a court might consider the constitutional exemption inapplicable, because it refers to any *existing* statutory rule of evidence relating to privilege. A court could conclude that the exemption does not encompass a reform proposed after enactment of the Truth-in-Evidence provision, even if the reform is merely a modification of a privilege rule predating that provision.

If a court interprets the Truth-in-Evidence provision in that manner, the two-thirds vote requirement still should not apply to the proposed amendment of Section 912. The Truth-in-Evidence provision is only triggered by a reform that narrows the admissibility of relevant evidence in a criminal case. The proposed amendment would not do that.

Rather, the proposed codification of the subjective intent approach to inadvertent disclosure would merely make express what a strong majority of courts have said is already

188. Section 912 was enacted in 1965. 1965 Cal. Stat. ch. 299, § 2. The Truth-in-Evidence provision was an initiative measure approved by the voters on June 8, 1982.

implicit in the statute.¹⁸⁹ The proposed new subdivision on partial disclosure is likewise consistent with existing interpretations of the statute.¹⁹⁰

Need for the Proposed Reforms

The proposed codification of the subjective intent approach would provide clear and readily accessible guidance to courts, litigants, and other persons dealing with an inadvertent disclosure of a confidential communication protected by one of the privileges specified in Section 912. Instead of having to research case law to discover that only an intentional disclosure waives the privilege under the statute, such persons would find that standard stated in the statutory text and the key cases would be cited in the corresponding Comment.

It would not be necessary to engage in exhaustive research and analysis such as the Commission has undertaken in preparing this report. The danger of misinterpretation due to potentially confusing case law,¹⁹¹ and misleading commentary¹⁹² would also be reduced.

Although document discovery in litigation is a context in which inadvertent disclosure of a privileged communication typically occurs, such a disclosure can readily result from use of new technologies such as email, fax, and voicemail.¹⁹³ Common situations in which the problem can arise include:

189. See discussion under “Cases Interpreting California Law on Inadvertent Disclosure” *supra*.

190. See discussion under “Partial Disclosure” *supra*.

191. See discussions under “Potential Sources of Confusion” and “The *Jasmine Case*” *supra*.

192. See discussion under “Potential Sources of Confusion” *supra*.

193. As a recent article explains:

While the inadvertent production of privileged or protected documents has always been a concern for legal practitioners, the increasing frequency and volume of digital exchanges has made it a more pressing issue. Why? Because it often is difficult to discern exactly

- A person accidentally directs a fax, email message, or voicemail to the wrong recipient.
- A person forgets to hang up the phone after a phonecall is completed, then has a conversation that is overheard or recorded at the other end of the line.
- A person forwards an email message, not realizing that a confidential communication is attached.
- A person “deletes” a computer file or “erases” a tape, not realizing that the material in question is recoverable.
- A person unintentionally stores an email message containing a confidential communication in a manner in which a third party can obtain access.¹⁹⁴

what is contained in an electronic file or on a storage device, privileged documents may end up in the hands of opposing counsel despite reasonable steps and protocols constructed to prevent such an event. This problem is related not only to the inadvertent inclusion of a document that should not appear, but also to the failure to remove metadata and comments from documents in native formats (such as the “date created” and “last modified dates” associated with most files). In addition, what appears to be a blank tape or disk may instead contain reams of “deleted” documents that are recoverable with the help of special programs and skills.

Redgrave & Nimsger, *Electronic Discovery and Inadvertent Productions of Privileged Documents*, 49 Fed. Lawyer 37, 37 (2002).

194. See Formanek, *Giving Legal Advice Via E-Mail May Result in Loss of Privilege*, San Francisco Daily J. 5 (Sept. 12, 2003); M. Overly, *Overly on Electronic Evidence in California* *Discovery of Electronic Evidence* § 5.2 (2003 ed.); Dodge, *Honoring Confidentiality When Communications Take a Wrong Turn*, 37 Ariz. Att’y 14 (Feb. 2001); Bruckner-Harvey, *supra* note 38, at 385.

Google is offering a free new email service, which electronically scans a message and generates a pop-up ad relating to the content of the message. Editorial, *If Google ogles your e-mail, will Ashcroft be far behind?*, S. Jose Mercury News (April 15, 2004). This might be another way in which unintended disclosure of a privileged communication occurs. For example, it might be possible to deduce the content of a message, at least in part, from the content of the pop-up ad.

The frequency of such situations highlights the need for the guidance that the proposed amendment would provide.¹⁹⁵

The proposed reform relating to partial disclosure would also help prevent confusion in determining whether a privilege has been waived. The Legislature could forestall disputes and save both litigant and judicial resources by stating the applicable rule in the text of the statute as proposed.

195. Another context in which a privileged communication might be disclosed is when an employer monitors employee email, which is a common business practice. See, e.g., Adams, Scheuing & Feeley, *E-Mail Monitoring in the Workplace: The Good, the Bad and the Ugly*, 67 Def. Couns. J. 32, 32 (2000); DiLuzio, *Workplace E-Mail: It's Not as Private as You Might Think*, 25 Del. J. Corp. L. 741, 743 (2000); McIntosh, *E-Monitoring@Workplace.com: The Future of Communication Privacy in the Minnesota Private-Sector Workplace*, 23 Hamline L. Rev. 539, 543 n.11 (2000). The circumstances of such monitoring may differ significantly from one instance to another. In particular, notice of monitoring may vary greatly in content, timing, and format, and it may provoke different reactions. An employee might not read a notice, or might not be notified of monitoring at all. Where an employee sends or receives an otherwise privileged email message at work, the proposed legislation would direct a court to focus on the holder's intent regarding disclosure in determining whether the privilege was waived due to employer monitoring. Evidence that the holder was notified of monitoring in advance, and evidence of the nature of such notice, bears on the holder's intent.

PROPOSED LEGISLATION

Code Civ. Proc. § 2028.050 (amended). Privilege objection in deposition by written questions

SECTION 1. Section 2028.050 of the Code of Civil Procedure is amended to read:

2028.050. (a) A party who objects to any question on the ground that it calls for information that is privileged or is protected work product under Chapter 4 (commencing with Section 2018.010) shall serve a specific objection to that question on all parties entitled to notice of the deposition within 15 days after service of the question. A party who fails to timely serve that objection waives it. *The court, on motion, may relieve a party from a waiver under this subdivision on the court's determination that the party has subsequently served an objection in substantial compliance with this subdivision and that the party's failure to serve a timely objection was the result of mistake, inadvertence, or excusable neglect.*

(b) The party propounding any question to which an objection is made on ~~those~~ *those grounds of privilege or work product* may then move the court for an order overruling that objection. This motion shall be accompanied by a meet and confer declaration under Section 2016.040. The deposition officer shall not propound to the deponent any question to which a written objection on those grounds has been served unless the court has overruled that objection.

(c) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to overrule an objection, unless it finds that the one subject to the sanction acted with substantial

justification or that other circumstances make the imposition of the sanction unjust.

Comment. Subdivision (a) of Section 2028.050 is amended to follow the same approach to privilege waiver that is used for other forms of written discovery. See Sections 2030.290 (written interrogatories), 2031.300 (inspection demand), 2033.280 (requests for admission). Subdivision (b) is amended to improve clarity.

Evid. Code § 912 (amended). Waiver

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

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

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of

another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

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

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

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

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

Comment. Subdivision (a) of Section 912 is amended 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. This codifies the majority view in case law applying the provision to an inadvertent disclosure. *See* State Compensation Ins. Fund v. Telanoff, 70 Cal. App. 4th 644, 654, 82 Cal. Rptr. 2d 799 (1999) (Waiver “does not include accidental, inadvertent disclosure of privileged information by the attorney.”); *O’Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal. App. 4th 563, 577, 69 Cal.

Rptr. 2d 389 (1997) (“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 through voluminous files and records in preparation for a document production may have missed something.”); *People v. Gardner*, 151 Cal. App. 3d 134, 141, 198 Cal. Rptr. 452 (1984) (“As in other privileges for confidential communications, the physician-patient privilege precludes a court disclosure of a communication, even though there has been an accidental or unauthorized out-of-court disclosure of such communication”) (dictum); *see also* *KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 919 (9th Cir. 1987) (under either Hawaii or California law, client did not waive attorney-client privilege by counsel’s inadvertent production of letter); *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 196 F.R.D. 375, 380 (S.D. Cal. 2000) (under California law, “waiver of the attorney-client privilege depends entirely on whether the client provided knowing and voluntary consent to the disclosure.”); *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1410-11 (S.D. Cal. 1994) (California appears to follow subjective approach to waiver by a privilege holder, under which “the client’s intent to disclose is controlling.”) (dictum). It disapproves what could be construed as contrary dictum in *People v. Von Villas*, 11 Cal. App. 4th 175, 223, 15 Cal. Rptr. 2d 112 (1992) (marital privilege was waived when husband and wife “knew or reasonably should have known” that their conversation was being overheard) (one of three alternate bases for decision).

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

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

a report, though not verbatim, and then prevent a disclosure of the reports.”).

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

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