

AMENDED IN ASSEMBLY MAY 23, 2013

AMENDED IN ASSEMBLY MAY 6, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 729

Introduced by Assembly Member Roger Hernández

February 21, 2013

An act to amend Sections 912 and 917 of, and to add Article 9.5 (commencing with Section 1048) to Chapter 4 of Division 8 of, the Evidence Code, relating to evidentiary privileges.

LEGISLATIVE COUNSEL'S DIGEST

AB 729, as amended, Roger Hernández. Evidentiary privileges: union agent-represented worker privilege.

Existing law governs the admissibility of evidence in court proceedings and generally provides a privilege as to communications made in the course of certain relations, including the attorney-client, physician-patient, and psychotherapist-patient relationship, as specified. Under existing law, the right of any person to claim those evidentiary privileges 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 a disclosure made by anyone.

This bill would provide that a union agent, as defined, and a represented employee or represented former employee have a privilege to refuse to disclose any confidential communication between the employee or former employee and the union agent while the union agent was acting in his or her representative capacity, except as specified. The bill would provide that a represented employee or represented

former employee also has a privilege to prevent another person from disclosing a privileged communication, except as specified. The bill would further provide that this privilege may be waived in accordance with existing law.

Vote: majority. Appropriation: no. Fiscal committee: no.
 State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 912 of the Evidence Code is amended to
 2 read:

3 912. (a) Except as otherwise provided in this section, the right
 4 of any person to claim a privilege provided by Section 954
 5 (lawyer-client privilege), 980 (privilege for confidential marital
 6 communications), 994 (physician-patient privilege), 1014
 7 (psychotherapist-patient privilege), 1033 (privilege of penitent),
 8 1034 (privilege of clergyperson), 1035.8 (sexual assault
 9 counselor-victim privilege), 1037.5 (domestic violence
 10 counselor-victim privilege), or 1048 (union agent-represented
 11 worker privilege) is waived with respect to a communication
 12 protected by the privilege if any holder of the privilege, without
 13 coercion, has disclosed a significant part of the communication or
 14 has consented to disclosure made by anyone. Consent to disclosure
 15 is manifested by any statement or other conduct of the holder of
 16 the privilege indicating consent to the disclosure, including failure
 17 to claim the privilege in any proceeding in which the holder has
 18 the legal standing and opportunity to claim the privilege.

19 (b) Where two or more persons are joint holders of a privilege
 20 provided by Section 954 (lawyer-client privilege), 994
 21 (physician-patient privilege), 1014 (psychotherapist-patient
 22 privilege), 1035.8 (sexual assault counselor-victim privilege),
 23 1037.5 (domestic violence counselor-victim privilege), or 1048
 24 (union agent-represented worker privilege) a waiver of the right
 25 of a particular joint holder of the privilege to claim the privilege
 26 does not affect the right of another joint holder to claim the
 27 privilege. In the case of the privilege provided by Section 980
 28 (privilege for confidential marital communications), a waiver of
 29 the right of one spouse to claim the privilege does not affect the
 30 right of the other spouse to claim the privilege.

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

3 (d) A disclosure in confidence of a communication that is
4 protected by a privilege provided by Section 954 (lawyer-client
5 privilege), 994 (physician-patient privilege), 1014
6 (psychotherapist-patient privilege), 1035.8 (sexual assault
7 counselor-victim privilege), 1037.5 (domestic violence
8 counselor-victim privilege), or 1048 (union agent-represented
9 worker privilege), when disclosure is reasonably necessary for the
10 accomplishment of the purpose for which the lawyer, physician,
11 psychotherapist, sexual assault counselor, domestic violence
12 counselor, or union agent was consulted, is not a waiver of the
13 privilege.

14 SEC. 2. Section 917 of the Evidence Code is amended to read:

15 917. (a) If a privilege is claimed on the ground that the matter
16 sought to be disclosed is a communication made in confidence in
17 the course of the lawyer-client, physician-patient,
18 psychotherapist-patient, clergy-penitent, husband-wife, sexual
19 assault counselor-victim, domestic violence counselor-victim, or
20 union agent-represented worker relationship, the communication
21 is presumed to have been made in confidence and the opponent of
22 the claim of privilege has the burden of proof to establish that the
23 communication was not confidential.

24 (b) A communication between persons in a relationship listed
25 in subdivision (a) does not lose its privileged character for the sole
26 reason that it is communicated by electronic means or because
27 persons involved in the delivery, facilitation, or storage of
28 electronic communication may have access to the content of the
29 communication.

30 (c) For purposes of this section, “electronic” has the same
31 meaning provided in Section 1633.2 of the Civil Code.

32 SEC. 3. Article 9.5 (commencing with Section 1048) is added
33 to Chapter 4 of Division 8 of the Evidence Code, to read:

34

35 Article 9.5. Union Agent-Represented Worker Privilege

36

37 1048. (a) Except as required by subdivision (b), and subject
38 to Section 912, a union agent and a represented employee or
39 represented former employee have a privilege to refuse to disclose,
40 in any court or to any administrative board or agency, or in any

1 arbitration or other proceeding, whether civil or criminal, any
2 confidential communication between the employee or former
3 employee and the union agent made while the union agent was
4 acting in his or her representative capacity. A represented employee
5 or represented former employee also has a privilege to prevent
6 another from disclosing a confidential communication between
7 the employee and a union agent that is privileged pursuant to this
8 section.

9 (b) A union agent may use or reveal a confidential
10 communication made to the union agent while the union agent was
11 acting in his or her representative capacity in ~~any~~ *either* of the
12 following circumstances:

13 ~~(1) To the extent it appears necessary to prevent the commission~~
14 ~~of a crime that is likely to result in a clear, imminent risk of serious~~
15 ~~injury or death of another person.~~

16 ~~(2)~~

17 (1) In actions, civil or criminal, against the union agent in his
18 or her personal or official representative capacity, or against the
19 local union or subordinate body thereof or international union of
20 affiliated or subordinate body thereof or any agent thereof in their
21 personal or official representative capacities.

22 ~~(3) When required by court order.~~

23 ~~(4)~~

24 (2) When, after full disclosure has been provided, the written
25 or oral consent of the bargaining unit member has been obtained
26 or, if the bargaining unit member is deceased or has been adjudged
27 incompetent by a court of competent jurisdiction, the written or
28 oral consent of the bargaining unit member’s estate or guardian
29 or conservator.

30 (c) *A union agent shall use or reveal a confidential*
31 *communication made to the union agent while the union agent was*
32 *acting in his or her representative capacity if required to do so by*
33 *a court order.*

34 1048.1. For purposes of this article, ~~“union”~~ *the following terms*
35 *have the following meanings:*

36 (a) *“Confidential communication” means information*
37 *transmitted, by oral or written communication, between a*
38 *represented employee or represented former employee and a union*
39 *agent and in confidence by a means which, so far as the employee,*
40 *former employee, or union agent is aware, discloses the*

1 *information to no third persons other than those who are present*
2 *to further the interest of the employee, former employee, or union*
3 *agent or those to whom disclosure is reasonably necessary for the*
4 *transmission of the information or the accomplishment of the*
5 *purpose for which the communication was made, and includes*
6 *advice given by a union agency in the course of a representational*
7 *relationship.*

8 (b) “Union agent” means a person employed, elected, or
9 appointed by a labor organization and whose duties include the
10 representation of employees in a bargaining unit in a grievance
11 procedure or in negotiations for a labor agreement and the labor
12 organization. An appointed employee steward is not an union agent
13 except to the extent a represented employee or represented former
14 employee communicates in confidence to the steward regarding a
15 grievance or potential grievance.

16 1048.2. *There is no privilege under this article if the union*
17 *agent reasonably believes that disclosure of any confidential*
18 *communication is necessary to prevent a criminal act that the*
19 *union agent reasonably believes is likely to result in the death of,*
20 *or substantial bodily harm to, an individual.*

21 1048.3. *There is no privilege under this article with respect to*
22 *a confidential communication made to enable or aid a person in*
23 *committing, or planning to commit, a crime or fraud.*