

AMENDED IN SENATE JUNE 10, 2013

AMENDED IN ASSEMBLY MAY 23, 2013

AMENDED IN ASSEMBLY MAY 6, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

**ASSEMBLY BILL**

**No. 729**

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**Introduced by Assembly Member Roger Hernández**

February 21, 2013

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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 *and does not apply in criminal proceedings*.

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:

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35 Article 9.5. Union Agent-Represented Worker Privilege

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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 either of the following  
 12 circumstances:

13 (1) In actions, ~~civil or criminal~~, against the union agent in his  
 14 or her personal or official representative capacity, or against the  
 15 local union or subordinate body thereof or international union of  
 16 affiliated or subordinate body thereof or any agent thereof in their  
 17 personal or official representative capacities.

18 (2) When, after full disclosure has been provided, the written  
 19 or oral consent of the bargaining unit member has been obtained  
 20 or, if the bargaining unit member is deceased or has been adjudged  
 21 incompetent by a court of competent jurisdiction, the written or  
 22 oral consent of the bargaining unit member’s estate or guardian  
 23 or conservator.

24 (c) A union agent shall use or reveal a confidential  
 25 communication made to the union agent while the union agent was  
 26 acting in his or her representative capacity if required to do so by  
 27 a court order.

28 1048.1. For purposes of this article, the following terms have  
 29 the following meanings:

30 (a) “Confidential communication” means information  
 31 transmitted, by oral or written communication, between a  
 32 represented employee or represented former employee and a union  
 33 agent and in confidence by a means which, so far as the employee,  
 34 former employee, or union agent is aware, discloses the information  
 35 to no third persons other than those who are present to further the  
 36 interest of the employee, former employee, or union agent or those  
 37 to whom disclosure is reasonably necessary for the transmission  
 38 of the information or the accomplishment of the purpose for which  
 39 the communication was made, and includes advice given by a  
 40 union agency in the course of a representational relationship.

1 (b) “Union agent” means a person employed, elected, or  
2 appointed by a labor organization and whose duties include the  
3 representation of employees in a bargaining unit in a grievance  
4 procedure or in negotiations for a labor agreement and the labor  
5 organization. An appointed employee steward is not ~~an~~ a union  
6 agent except to the extent a represented employee or represented  
7 former employee communicates in confidence to the steward  
8 regarding a grievance or potential grievance.

9 1048.2. There is no privilege under this article if the union  
10 agent reasonably believes that disclosure of any confidential  
11 communication is necessary to prevent a criminal act that the union  
12 agent reasonably believes is likely to result in the death of, or  
13 substantial bodily harm to, an individual.

14 1048.3. There is no privilege under this article with respect to  
15 a confidential communication made to enable or aid a person in  
16 committing, or planning to commit, a crime or fraud.

17 1048.4. *The privilege established under this article does not*  
18 *apply in criminal proceedings.*