

Assembly Bill No. 729

Passed the Assembly September 6, 2013

Chief Clerk of the Assembly

Passed the Senate September 3, 2013

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2013, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

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, 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.

This bill would incorporate additional changes to Section 912 of the Evidence Code made by this bill and AB 267, to take effect if both bills are chaptered and this bill is chaptered last.

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

SECTION 1. 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 clergyperson), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(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), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker 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), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, domestic violence

counselor, or union agent was consulted, is not a waiver of the privilege.

SEC. 1.5. 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), 966 (lawyer referral service-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergy member), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker 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), 966 (lawyer referral service-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient

privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, lawyer referral service, physician, psychotherapist, sexual assault counselor, domestic violence counselor, or union agent was consulted, is not a waiver of the privilege.

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

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

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

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

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

Article 9.5. Union Agent-Represented Worker Privilege

1048. (a) Except as required by subdivision (b), and subject to Section 912, a union agent and a represented employee or represented former employee have a privilege to refuse to disclose, in any court or to any administrative board or agency, or in any arbitration or other proceeding, any confidential communication between the employee or former employee and the union agent made while the union agent was acting in his or her representative capacity. A represented employee or represented former employee also has a privilege to prevent another from disclosing a

confidential communication between the employee and a union agent that is privileged pursuant to this section.

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

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

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

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

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

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

(b) "Union agent" means a person employed, elected, or appointed by a labor organization and whose duties include the representation of employees in a bargaining unit in a grievance procedure or in negotiations for a labor agreement and the labor organization. An appointed employee steward is not a union agent except to the extent a represented employee or represented former

employee communicates in confidence to the steward regarding a grievance or potential grievance and the appointed employee steward was a steward at the time the communication was made.

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

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

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

SEC. 4. Section 1.5 of this bill incorporates amendments to Section 912 of the Evidence Code proposed by both this bill and AB 267. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2014, (2) each bill amends Section 912 of the Evidence Code, and (3) this bill is enacted after AB 267, in which case Section 1 of this bill shall not become operative.

Approved _____, 2013

Governor