

PROFESSIONAL LIABILITY UPDATE

July 15, 2002

Issue No. 127

Jennifer A. Becker

David P. Borovsky

Shoshana Y. Chazan

Chip Cox

Edward F. Donohue, III

Kathleen M. Ewins

Kathleen A. Foley

Bruce N. Furukawa

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

William L. Jacobson

Farand C. Kan

Anna Kapetanakos

Joseph P. McMonigle

Douglas J. Melton

Robin M. Pearson

Jessica B. Rudin

Richard J. Sciaroni

Steven Sharafian

Jennifer W. Suzuki

Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Irene K. Yesowitch

ATTORNEY-CLIENT PRIVILEGE

California Law

By William L. Jacobson

A necessary disclosure to a third party does not waive the attorney-client privilege.

STI Outdoor LLC v. Superior Court (2001) 91 Cal.App.4th 334

The Los Angeles Metropolitan Transit Authority (“LAMTA”) solicited proposals for the installation and maintenance of 10 automatic public toilets in exchange for the use of advertising space on LAMTA property. Eller Media Company (“Eller”) evaluated the request for proposals, but decided not to submit a bid because it was allegedly told only 35 subway sites were available.

STI Outdoor LLC (“STI”) submitted the only bid, and retained Manatt, Phelps & Phillips (“the Manatt firm”) to negotiate a license agreement with LAMTA. After the agreement was completed Eller learned it gave STI about 80 highly desirable freeway-viewable advertising locations. Eller requested, but was denied, all LAMTA documents regarding the solicitation of proposals for the project. Eller sued under the California Public Records Act.

LAMTA opposed Eller’s superior court petition as to three documents. One was a January 1999 memo from LAMTA’s general counsel’s office to its director of real estate in response to the latter’s request for legal advice for an inquiry by

601 Montgomery Street, Suite 900
San Francisco, California 94111
Telephone (415) 397-2222
Facsimile (415) 397-6392
www.longlevit.com

STI. Another was the January 1999 letter from the director to the president of STI transmitting the general counsel’s memo. The director testified she sent the memo to STI to help them better understand each other’s position. The third document was an August 1998 Manatt firm memo that STI shared with LAMTA concerning a legal opinion about the project. LAMTA asserted the attorney-client and work product privileges as to the first two documents; STI asserted the attorney-client privilege as to the third.

Eller argued that until LAMTA formally voted to award the contract and negotiate with STI, LAMTA and STI could not have had any shared interest in legal advice. Accordingly, the documents exchanged between them three months earlier could not be privileged. The trial court largely agreed. It found the Manatt memo was not privileged because it was prepared at a time when the parties were dealing with each other at arm’s length and was not prepared for their joint benefit. The trial court also found that no other privilege or exemption applied.

The appellate court reversed, focusing
3130 Wilshire Boulevard, 2nd Floor
Santa Monica, California 90403-2300
Telephone (310) 829-0977
Facsimile (310) 829-0991
www.longlevit.com

on Evidence Code §§ 912, subdivision (d) (protecting disclosures “reasonably necessary for the accomplishment of the purpose for which the lawyer ... was consulted”), and 952 (confidential communications include those made to third persons “present to further the interest of the client” and disclosures reasonably necessary for “the accomplishment of the purpose for which the lawyer was consulted”).

The court of appeal rejected Eller’s argument that only “legal” communications were privileged, not “business” communications. The court noted that the statutes do not use the terms “litigation” or “legal communication” to describe the privilege. They refer to “the accomplishment of the purpose” for which the lawyer was consulted, which can be for many reasons other than litigation.

At the time of the communications, the parties were bound by an offer and acceptance in contemplation of a binding, detailed license agreement. The disclosures here were reasonably necessary to further the parties’ interest in completing their negotiations. Thus, the attorney-client privilege for the documents was not waived as a result of LAMTA and STI exchanging them.

Comment: Previous decisions protected shared communications in the course of a government investigation and litigation. The *STI Outdoor* decision makes clear that the attorney-client privilege may apply regardless of whether litigation is contemplated, so long as the communication is reasonably necessary to accomplish the client’s purpose in consulting the attorney.