

## PROFESSIONAL LIABILITY UPDATE

### ATTORNEY-CLIENT PRIVILEGE

By Jennifer Becker

*Los Angeles County Board of Supervisors v. Superior Court (ACLU of Southern California)* 16 C.D.O.S. 13548

*The Supreme Court, in a four to three decision, holds whether an attorney client communication is privileged depends on whether the communication bears some relationship to the attorney's legal services. Invoices, transmitted to allow an attorney to collect a fee, may contain unprivileged information subject to disclosure under the Public Records Act, which requires government agencies to disclose non-privileged portions of public documents.*

Under the Public Records Act (PRA), the ACLU of Southern California demanded the Los Angeles County Board of Supervisors and the Office of the Los Angeles County Counsel produce invoices from law firms who billed for services in nine lawsuits alleging excessive force against jail inmates. The County agreed to produce invoices related to three lawsuits no longer pending, redacting attorney-client privileged and work product information. The County refused to provide invoices for six pending lawsuits as exempt under the act.

The trial court granted the ACLU's petition to compel disclosure, finding the County failed to show the invoices were attorney-client privileged communications. However, the court allowed the County to redact entries reflecting attorney legal opinions or advice, or attorney mental impressions or theories. The County filed a writ of mandate that made its way to the Supreme Court.

The Supreme Court framed the primary question as whether invoices for legal services transmitted to a government agency by outside counsel are categorically protected by the attorney-client privilege, and therefore exempt from disclosure under the PRA. If not, the remaining question is whether the substantive time entries are covered by the privilege.

The PRA and the California Constitution provide the public with a broad right of access to government information by allowing access to public records held by state and local agencies. The PRA broadly defines "public records" to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." By voter initiative, the PRA right of access is enshrined in the State Constitution, which mandates a statute be broadly construed if it furthers the

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people's right of access, and narrowly construed if it limits the right of access.

Two statutory exceptions exist. A catchall provision allows a government agency to withhold a public record if it demonstrates the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. The agency must prove a clear overbalance for nondisclosure. All other exemptions are specifically enumerated in the statute, and are largely concerned with protecting the privacy of persons whose data or documents come into governmental possession.

Public agencies are afforded the same attorney-client privilege as private parties. The PRA contains a specific exemption for records protected by federal or state law, including the attorney-client privilege in the Evidence Code.

The PRA does not authorize a government agency to withhold an entire document because part of it falls within an exemption; reasonably segregable portions remain available for inspection. A public agency must separate privileged portions, but is not required to if the records are not reasonably segregable. This admittedly ambiguous standard must be construed to further the people's right of access.

The fundamental purpose of the attorney-client privilege, codified at Evidence Code § 954, is to safeguard the confidential relationship between clients and attorneys to promote full and frank discussion of facts and tactics in individual legal matters. The privilege includes legal opinions and advice given by the lawyer in that relationship. Authentic attorney-client confidential communications are those made to seek or deliver the attorney's legal advice or representation.

Evidence Code § 952 requires a nexus between the communication and the attorney's professional role. The privilege does not apply to every single communication transmitted confidentially between lawyer and client; it must bear some relationship to the attorney's provision of legal consultation.

Typically invoices do not provide legal advice, they are to collect a fee and fall outside the scope of an attorney's professional representation. They may convey general information about the process, but their purpose is to ensure proper payment for services rendered. An attorney's bills to a client evoke an arm's-length transaction between parties in the market for professional services, not discreet conveyance of facts and advice.

It has long been the case that a client cannot protect unprivileged information from discovery by transmitting it to an attorney. The court observed that communications between an attorney and client, although exchanged privately, would not be protected by the privilege if unrelated to the legal matter.

All attorney client communications are exchanged privately, but that alone does not render them privileged. An invoice listing amounts of fees is not communicated for legal consultation. The inquiry turns on the link between the content and the purpose of the privilege. A privileged communication must occur in the attorney-client relationship and be made for the legal consultation, not an unrelated or ancillary purpose.

The Court recognized, however, that time entries can contain information within the scope of the privilege. Where billing information is conveyed to inform the client of the nature or amount of work occurring in

a pending legal issue, or more general information such as the aggregate spent on continuing litigation during a period, it may come close enough to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The privilege protects the confidentiality of information even if transmitted in a document not categorically privileged. For pending and active matters, the privilege encompasses everything in an invoice, including aggregate fees. Although the money paid for legal services is generally not privileged, spending patterns may reveal a government agency's investigative efforts and trial strategy.

By contrast, a cumulative fee total for a long-completed matter does not always reveal the substance of legal consultation. The privilege turns on whether amounts reveal anything about the legal consultation; a cumulative amount spent on long concluded litigation may communicate little or nothing about the substance of legal consultation.

This does not suggest, as expressed in the dissent, that the privilege somehow wanes with the termination of the litigation. The attorney client privilege remains constant over time, but the information may take on a different significance if it is revealed during active litigation. Information revealed during litigation, such as monthly litigation spending, can threaten the confidentiality of legal consultation by revealing legal strategy. Passing time may render the same information non-confidential because it no longer provides any insight into litigation strategy or legal consultation.

Focus on content and purpose over form to define the privilege follows common law and the Evidence Code, which incorporated prior common law on the attorney-client

privilege. Business and Professions Code § 6148 discusses both fee agreements and invoices. Section 6149 explicitly protects fee agreements as privileged communications, but is silent on invoices. The Legislature's decision to define both fee agreements and billing statements in one section, while in the next section subject only the former to the attorney-client privilege, suggests that the privilege was not intended to protect both fee agreements and invoices in the exact same way.

California courts have generally presumed invoices for legal services are not categorically privileged. Disclosure of billing invoices is the norm in California federal courts where fee information is generally not privileged.

The Court concluded the contents of an invoice are privileged only if they either communicate information for legal consultation or risk exposing information communicated for such a purpose.

The dissent expressed alarm that the majority's decision would undermine the privilege by ruling invoices, although initially protected by the attorney-client privilege, may lose protection once the litigation is concluded, contrary to the plain words of the Evidence Code.

The dissent characterized the majority as adding a consideration of a communication's purpose as an additional, non-statutory element to the Legislature's definition of a "confidential communication," a departure unsupported in law. The privilege is a creature of statute, and courts cannot add to statutory privileges except as required by state or federal constitutional law, nor imply unwritten exceptions to existing statutory privileges.

The Court had recently rebuffed an attempt to weaken the privilege for portions of a document containing non-privileged facts obtained from witnesses. Even documents available to the public, not merely information in the sole possession of the attorney or client, is privileged if transmitted between attorney and client, because the fact of transmission could reveal a legal strategy.

Evidence Code § 954 prohibits courts from parsing communications between lawyer and client to disclose non-privileged material. When a communication is transmitted confidentially between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged.

The dissent disagreed with what it characterized as the majority's suggestion the protective scope of the privilege wanes with the termination of the litigation. The protective power of the attorney-client privilege is not reduced simply because the attorney-client relationship has ended. The dissent warned attorneys must now counsel their clients that confidential communications between lawyer and client may be forced into the open by interested parties once the litigation has concluded.

Nor was reliance on federal law persuasive. California's attorney client privilege is governed entirely by its own statutory scheme.

*Comment:* The Court could have limited the analysis to public agencies subject to the PRA, but set forth a general rule defining a privileged communication as one pertaining to the purpose of the representation. The opinion does not reflect the reality of modern practice, where clients often demand specificity in invoices to evaluate the reasonableness of fees. It is premature to

opine how this opinion will affect protection of the relationship going forward. Invoices in ongoing matters are still largely protected. Typically, interest in invoices, and reasons for opposing parties to acquire them, end with the matter.