

PROFESSIONAL LIABILITY UPDATE

ATTORNEY-CLIENT PRIVILEGE

By Jennifer Becker

County of Los Angeles Board of Supervisors v. Superior Court (2017) 12 Cal.App.5th 1264 rev. den. (Oct. 11, 2017)

The Second District, on remand from the California Supreme Court, holds a government entity need not disclose any invoices in pending litigation under the Public Records Act. Disclosures in closed matters required under the act are limited to fee totals, if a trial court concludes it would not reveal litigation strategy. A trial court cannot review redacted portions of attorney invoices to rule on the government entity's claim the information in the invoice is privileged.

The ACLU requested the invoices of law firms defending the County in police brutality cases under the Public Records Act (PRA). The County agreed to produce invoices for three cases no longer pending, redacting attorney-client privileged and work product information. It refused to produce invoices for pending cases based on attorney-client privilege and work product under PRA exemptions.

The case made its way to the California Supreme Court, which reasoned the PRA should increase freedom of information. The attorney-client privilege is to safeguard the confidential relationship between client and attorney. The Supreme Court concluded the privilege turned on the content and purpose of the communications, not their form. Only communications seeking or delivering the attorney's legal advice or representation are privileged, because E.C. § 952 suggests a nexus between the communication and the attorney's professional role. The Evidence Code

references to “consultation” between attorney and client, underscores the privilege does not apply to every single communication transmitted confidentially between lawyer and client. The “heartland” of the privilege protects communications that bear some relationship to the attorney's provision of legal consultation.

Invoices are not transmitted for legal consultation, but to bill the client, a function unrelated to an attorney's professional representation. Invoices evoke an arm's-length transaction between parties, not communication of facts and advice. But information in invoices can be within the scope of the privilege if it informs the client of the nature or amount of work in a pending case. Even more general information, such as the amount spent on litigation, may come close enough to the “heartland” of the privilege to threaten the confidentiality of information relevant to an attorney's distinctive role. The attorney-client privilege protects the confidentiality of information in

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both categories, even if transmitted in a document not categorically privileged. The contents of an invoice are privileged only if they contain information revealing a legal consultation, or risks exposing such information.

For pending legal matters, the entire invoice is privileged including the aggregate fees. Although fee amounts are not inherently privileged, documents revealing a pattern of spending could reveal legal strategy.

Although the attorney-client privilege remains constant over time, information can lose its significance after a case is concluded. The PRA requires disclosure of non-privileged information in legal invoices. Public agencies must redact privileged information and disclose unprivileged portions of documents, unless the records are not “reasonably segregable. Ambiguities in this standard are construed to further the people’s right to access. Fee totals in concluded matters may not reveal the substance of legal consultation.

On remand, the Court of Appeal reviewed the trial court’s original decision, given these principles. The Court held that the County did not have to disclose invoices in pending matters.

The Court rejected the ACLU’s request the trial court review the redacted portions of invoices in closed matters. The County claimed the redacted information was privileged, and a trial court may not require disclosure of privileged information to rule on a claim. The Court observed a typical billing invoice’s time entries convey substantive information about the amount and nature of work performed, privileged information. The Supreme Court’s decision did not intrude into the “heartland” of the privilege.

The Court remanded the case to the trial court to determine if the aggregate fees in concluded matters must be disclosed. This depended on whether aggregate totals would reveal anything about the legal consultation or provide insight into litigation strategy. A trial court is likely equipped to rule on whether fee totals in concluded litigation is privileged given the passage of time without reviewing privileged information.

Comment: There was a lot of concern about the Supreme Court’s prior decision compromising California’s historically robust protection of the attorney-client privilege. This case demonstrates lower courts will not make it easy to walk back California’s commitment to strong protection of attorney-client privileged information.