

Confidentiality

Invoices for Legal Services Aren't Always Privileged, California Says

The attorney-client privilege doesn't categorically shield all invoices sent to a government agency from its outside litigation counsel, a sharply divided California Supreme Court held Dec. 29 (*Los Angeles Cty. Bd. of Supervisors v. Superior Court of Los Angeles Cty. ex rel. ACLU of S. Cal.*, 2016 BL 434018, Cal., No. S226645, 12/29/16).

The 4-3 majority said "the contents of an invoice are privileged only if they either communicate information for the purpose of legal consultation or risk exposing information that was communicated for such a purpose."

Invoices for work in pending and active legal matters meet this test and are therefore privileged, but the contents of invoices may not be privileged after the litigation ends, according to the majority opinion by Justice Mariano-Florentino Cuéllar.

Justice Kathryn Mickle Werdegar dissented, calling the majority decision "mischievous in the extreme." From now on California lawyers must warn clients that third parties may eventually force confidential lawyer-client communications out into the open, Werdegar said.

The case reveals deep discord within the highest court of the nation's most populous state—with 190,021 state bar members on active status—on how the attorney-client privilege applies to attorney invoices.

This case involved public records requests for fee invoices that Los Angeles County received from its outside counsel in nine lawsuits alleging excessive force against inmates in the county jail system.

The ACLU said it needed the invoices to see if the county's outside law firms are wasting taxpayer money on "scorched earth" litigation tactics in prisoners' excessive-force suits.

Crack in Privilege Wall? Bloomberg BNA sought comment on the decision from several California lawyers known for their expertise in the law governing lawyers.

Longtime legal ethics guru Diane L. Karpman of Karpman & Associates, Beverly Hills, said the case is the first "crack" in California's complete privilege wall. "It's a major decision showing a significant divide" in the California Supreme Court, Karpman told Bloomberg BNA.

It's interesting that both sides cited *Costco Wholesale Corp. v. Superior Court*, 2009 BL 258941, 101 Cal. Rptr.

3d 758, 25 Law. Man. Prof. Conduct 675 (Cal. 2009), as support, Karpman said.

Karpman specializes in advising lawyers and their firms, and also serves as an expert witness and consultant in malpractice cases.

Merri A. Baldwin, a shareholder in Rogers Joseph O'Donnell PC, San Francisco, told Bloomberg BNA she believes that, in practical terms, the decision won't significantly change how the privilege protects most attorney invoices. However, because certain aspects of the court's analysis are difficult to understand, it may give rise to discovery disputes, she said.

Baldwin is a current advisor and former chair of the state bar's Committee on Professional Responsibility and Conduct. She co-chairs her firm's Attorney Liability and Conduct Practice Group.

Ellen A. Pansky, a partner at Pansky Markle Ham LLP, said the case leaves an interesting, unanswered question: What mechanism will courts use to resolve a privilege claim when a party asserts attorney-client privilege to only portions of invoices previously transmitted in a completed prior matter? *Costco* indicated that a court may not compel disclosure of attorney-client communications, even *in camera*, to rule upon a claim of privilege, she noted.

Pansky is a past president of the Association of Professional Responsibility Lawyers and in August 2016 received the group's Charles W. Kettlewell Legal Ethics Advisor Award for excellence in and dedication to the field of legal ethics and professional responsibility.

Seminal Privilege Decision. In Karpman's view, the decision is a seminal ruling on attorney-client privilege.

Karpman noted that lots of California cases say California's statutory privilege "brooks no exception." The dissent's view of the privilege is more consistent with California precedent, she said.

"Privilege has never been based on timing," Karpman said. Tying the privilege to timing "takes a scalpel to the California idea of privilege and throws *Costco* out," she said.

Karpman said that legal bills do provide a road map to the client's representation. By looking at attorneys' bills, "you don't need a Ouiji board to see their play-book," she said.

She also said the ruling shows a divide on the court between newly appointed justices, who joined the majority, and justices who have been on the court for a longer time, who dissented. Justice Chin is siding with the newcomers, she said. (Justice Ming Chin was appointed to the court in 1996.)

Most Invoices Should Still Be Privileged. Baldwin said the basic rule the court articulates is that whether or not an invoice is privileged depends on its content. “As applied to attorney invoices, that seems relatively unobjectionable and consistent with how many courts have applied the privilege,” she said.

On the other hand, Baldwin said she finds certain aspects of the court’s analysis hard to comprehend, especially its distinction between invoices in active matters and invoices in concluded matters. “It’s difficult to understand how the fact that litigation is over could affect whether the information is privileged, other than in certain, very limited factual contexts” she said.

Baldwin noted that the majority opinion describes invoices that simply list fee amounts or cumulative fee totals. The court’s distinction might make sense for invoices containing only such bare-boned information, but most invoices aren’t that limited, she said.

Rather, most invoices typically contain substantive information about what was done for the client, and information that could reflect the attorney’s approach and thoughts about the case, Baldwin said. That information would still be privileged after this decision, in her view.

“The decision should not significantly change how the privilege is applied to protect confidential information in attorney invoices, but it could throw a monkey-wrench into the analysis and potentially give rise to arguments about discoverability that we might not have had before,” Baldwin said.

Baldwin also said the majority decision could be read as inconsistent in certain respects with *Costco*, which adopted a bright-line prohibition on in camera review for communications between the lawyer and client for the purpose of seeking legal advice. Under *Costco*, those are deemed privileged irrespective of content.

Here, Baldwin said, the court found that invoices are not for the purpose of seeking legal advice, which is true in the sense that the invoices document work performed and charges for that work rather than contain legal advice themselves. But opening that door could open others, and dim the *Costco* “bright line,” she said.

Where Majority and Dissent Agree. Pansky noted that the dissent objects to the differentiation of the application of the attorney-client privilege based on whether the representation has already concluded, and emphasizes that it is settled in California that the privilege outlasts the termination of the attorney-client relationship or the conclusion of the representation.

“However, I do not read the majority opinion as suggesting that the privilege terminates once the representation ends,” Pansky said.

“To the contrary, the majority opinion stresses that the application of the privilege rests upon the content of the communication rather than its form, and rejects the assertion that every entry in a billing statement relating to a fully concluded case must necessarily be deemed to be privileged,” she said.

Pansky also pointed out that in a footnote the dissent concurs in the majority’s conclusion that the attorney-

client privilege doesn’t categorically protect every aspect of attorney billing invoices.

“Thus, all 7 Justices agree that the privilege protects all communications in billing invoices—past and present—that relate to the scope of the legal representation being provided in pending matters, and that not every billing entry is privileged,” Pansky said.

It’s noteworthy that Los Angeles County had agreed to release redacted billing statements in three prior, concluded lawsuits, and did not assert a categorical privilege to those invoices, she said.

‘Heartland’ of Privilege. The appeals court held that the invoices from the county’s outside counsel were covered by California’s statutory lawyer-client privilege—and thus exempt from disclosure under the state public records act—because they were confidentially transmitted in the course of an attorney-client relationship.

The supreme court rejected that categorical approach. The privilege doesn’t apply to every single communication transmitted confidentially between lawyer and client, the majority said.

“Rather, the heartland of the privilege protects those communications that bear some relationship to the attorney’s provision of legal consultation,” Cuéllar said.

The primary purpose of the privilege is to protect the confidential attorney-client relationship and promote frank discussion between them, and the statutory definition of the privilege links it to communications that bear some relationship to giving legal advice, the court said.

“The attorney-client privilege only protects communications between attorney and client made for the purpose of seeking or delivering the attorney’s legal advice or representation,” Cuéllar said.

No Categorical Shield for Invoices. Invoices for legal services are generally not communicated for the purpose of legal consultation, but rather just for the purpose of billing and getting paid, the majority said.

Therefore, the attorney-client privilege doesn’t categorically shield everything in a billing invoice from public records disclosure, it said.

On the other hand, “invoices for work in pending and active legal matters are so closely related to attorney-client communications that they implicate the heartland of the privilege,” Cuéllar said.

Some billing information may be conveyed for the purpose of legal representation, such as to inform the client of the nature or amount of work occurring in connection with a pending legal issue, the court said. Even general information such as aggregate figures could reveal an impending filing or outsized concern about a recent event, it noted.

“The privilege therefore protects the confidentiality of invoices for work in pending and active legal matters,” the majority said.

However, some information that can threaten the confidentiality of consultation during active litigation—

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such as fee totals—may not reveal anything about legal consultation in legal matters that ended long ago, Cuéllar said. There may come a point when that same information no longer communicates anything privileged, because it no longer provides any insight into litigation strategy or legal consultation, she said.

Justices Ming W. Chin, Goodwin Liu and Leandra R. Kruger joined Cuéllar's opinion.

Dissent: Privilege Doesn't Wane. Justice Werdegar, joined by Chief Justice Tani Gorre Cantil-Sakauye and Justice Carol Corrigan, said the majority's conclusion conflicted with the court's interpretation of the privilege in *Costco*, and that the majority was wrong to require consideration of a communication's purpose in determining whether the privilege applies. The court isn't free to add elements and prerequisites to a statutory evidentiary privilege, she said.

Even more pernicious, Werdegar said, was the majority's suggestion that the scope of the privilege somehow wanes after litigation is over. Nothing in the stat-

ute supports the notion that the reach of the privilege is different for pending litigation versus concluded legal matters, she said.

Timothy T. Coates and Barbara W. Ravitz of Greines, Martin, Stein & Richland, Los Angeles, represented the Office of the County Counsel and the Los Angeles County Board of Supervisors. Jonathan C. McCaverty, Office of County Counsel, also represented his office.

Rochelle L. Wilcox, Jennifer L. Brockett and Colin D. Wells of Davis Wright Tremaine LLP, Los Angeles, and Peter J. Eliasberg, ACLU Foundation of Southern California Inc., Los Angeles, represented the ACLU and Eric Preven.

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