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PROFESSIONAL RESPONSIBILITY

Attorney bills vs. client privileges

By Emily H. Wood

On April 13, the 2nd District Court of Appeal issued an opinion in *County of Los Angeles Board of Supervisors et al. v. Superior Court,* 235 Cal. App. 4th 1154 (2015), interpreting whether attorney billing statements constitute "confidential communications" within the meaning of California's attorney-client privilege and are categorically exempt from disclosure under the California Public Records Act (CPRA).

The case arose from a CPRA request filed by the ACLU of Southern California, which sought the billing records that outside law firms has submitted to Los Angeles County in connection with nine police brutality lawsuits. The ACLU requested these records to determine the scope, quality and efficiency of the law firms' work because "[i]t is believed that the selected law firms may have engaged in 'scorched earth' litigation tactics" using taxpayer money. While the ACLU was willing to allow the county to redact billing descriptions reflecting an attorney's legal opinion and advice, mental impressions or theories of the case, the ACLU asserted that "the remainder of an attorney's billing records is not protected from disclosure at all." The county rejected the CPRA request as to those lawsuits that were currently still active on the grounds that the billing records in their entirety were privileged and therefore exempt from disclosure.

The Court of Appeal noted that this issue raised a matter of first impression in California and that there was no controlling case law on "whether billing statements qualify as privileged communications" under California Evidence Code Section 952, which codifies the attorney-client privilege. In resolving this matter, the court made two key holdings in connection with the issue of privilege. First, and most importantly, the court held that the billing records at issue constituted confidential communications protected by the attorney-client privilege.

In reaching this conclusion, the court analyzed the language of Section 952, which defines "confidential communications" as: "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

At issue was whether the final clause limited privileged communication to those containing a "legal opinion." The court concluded that this clause was "not [intended] to restrict privileged communications to those containing a legal opinion, but to protect uncommunicated opinions." The court noted that if it adopted the ACLU's position, then communications originating from a client to his or her attorney would not be privileged — but they clearly are. The court also noted that nothing in the legislative history of Section 952 indicates that the language at issue was intended "to restrict privileged communications to those containing a legal opinion."

The court substantially relied on *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725 (2009), emphasizing that "the proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the relationship is one of attorney-client and whether the communication was confidentially transmitted in the course of that relationship." The court further noted that Costco "did not distinguish between the factual or legal aspects of the communications .... [I]t made clear that the privilege protects a 'transmission irrespective of its content.'" In this regard, County of Los Angeles expands upon the principle set forth in Costco — namely, that the focus of privilege inquiries is on the nature of the transmission, rather than the substance of the transmission.

Having determined that billing statements are privileged, the court next

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ruled that the scope of that privilege applied to the entirety of the statements. Following the reasoning in Costco, the court emphasized that redactions would not resolve privilege issues because "when the communication is a confidential one between attorney and client, the entire communication" is privileged. The court rejected the ACLU's argument that any privilege issues could be resolved via redactions. Having found the billing statements to be privileged, the court concluded that the county did not need to produce them in response to the ACLU's CPRA request.

In contrast to the Court of Appeal's opinion, federal courts have generally applied a narrower interpretation of privilege as it applies to billing statements. In *Clarke v. American Commerce National Bank*, 974 F.2d 127, 130 (1992), the 9th U.S. Circuit Court of Appeals held that attorney billing statements which only contained a description of "the general nature of the services performed," along with the amount of the fee, identity of the client and case name, were not protected by privilege. The 9th Circuit concluded that "nothing in the statements … reveal[] specific research or litigation strategy."

And federal courts have done what the County of Los Angeles court specifically rejected — order the production of redacted billing records. See, e.g., *U.S. v. Landon*, 06-3734 (N.D. Cal. Oct. 30, 2006) ("Respondent therefore must provide Petitioners with the requested billing records and invoices, but may redact any privileged information which speaks to the specific nature or substance of the services provided or reveals client motives or litigation strategy."); *Adobe Systems v. St. Paul Fire & Marine Ins. Co.*, 07-00385 (N.D. Cal. Apr. 9, 2008) (ordering production of billing statements because they "should merely provide a general description of work done, which are not privileged and [are] relevant to the reasonableness of fees incurred.").

The County of Los Angeles opinion provides strong support for application of the attorney-client privilege to materials exchanged between client and counsel during the course of the attorney-client relationship. However, in various contexts, attorneys or their clients may want to rely on and submit into evidence billing statements, such as when a party is attempting to recover fees. The general practice of submitting redacted billing statements to support requests for fee awards may now result in a privilege waiver. Parties will need to consider whether production may result in a waiver and, if so, whether any given situation warrants waiving the privilege and what the potential scope of that waiver may be. Alternatively, parties unwilling to waive the privilege can attempt to prove the reasonableness of fees without submitting billing statements. California courts have discretion to award fees based on attorney declarations and the court's own view of how many hours is reasonable. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 n.4 (2000); *Lunada Biomed. v. Nunez*, 230 Cal. App. 4th 459, 487 (2014) (time records not required; counsel's declaration sufficient). Even with this approach, however, parties attempting to recover fees still have the burden of proving the reasonableness of the hours spent, and the specific details of how those hours were spent may be crucial to a successful fee application.

Emily H. Wood *is an associate with Arnold & Porter LLP in its litigation group. Her practice focuses on complex commercial litigation, intellectual property litigation and antitrust matters, including advising entities in connection with CPRA and FOIA requests.*


EMILY WOOD
Arnold & Porter LLP