Decision on Attorney-Client Privilege Spooks Defense Bar

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A closely divided California Supreme Court on Thursday limited the protection afforded to legal bills under the attorney-client privilege when those bills are sent to government entities and sought under the state's Public Records Act.

The court ruled 4-3 that a law firm's invoices to a government agency are exempt from disclosure only when they pertain to active matters. Just how a big a chink that cuts in the privilege for legal bills generated outside government representation isn't immediately clear.

"That's the $1 million question," said Steven Fleischman, a partner at Horvitz & Levy. "Are courts going to find this decision only applies to public records cases? Or are they going to read it as saying attorney bills are no longer privileged once the case ends. I certainly hope it's the former."

In a vigorous dissent, Justice Katheryn Werdegar scolded her colleagues for undermining a "pillar of our jurisprudence" by finding that legal bills aren't universally shielded by attorney-client privilege and accused the majority of twisting California's Evidence Code to "discover a heretofore hidden meaning."

"The majority's decision … is unsupported by law," she wrote.

In a somewhat unlikely alliance, the court's majority opinion was written by Justice Mariano-Florentino Cuéllar and joined by Ming Chin, Goodwin Liu and Leondra Kruger. Cuellar, Liu and Kruger are the court's three newest justices; all graduated from Yale Law School and were appointed by Gov. Jerry Brown. Chin, generally seen as a conservative voice on the court, has held his seat for 20 years.

Werdeger's dissent was joined by Carol Corrigan and Chief Justice Tani Cantil-Sakauye.

Cuéllar acknowledged that the disclosure of a law firm's billing records in an active case may reveal clues about legal strategy but rejected a categorical protection. To be privileged, he wrote, a communication must be made for the purpose of legal consultation.

“While invoices may convey some very general information about the process through which a client obtains legal advice, their purpose is to ensure proper payment for services rendered, not to seek or deliver that attorney’s legal advice or representation,” Cuéllar stated.

The ruling in *Los Angeles County Board of Supervisors v. ACLU of Southern California* reverses a decision by the Court of Appeal finding that invoices sent to the County of Los Angeles by law firms in connection with excessive force suits on behalf of jail inmates are exempt from disclosure. All the matters have now been resolved. Among the Southern California law firms that represented Los Angeles County were Hurrell Cantrall; Collinson Law; Collins Collins Muir and Stewart; and Lawrence Beach Allen and Choi.

"We're pleased that the majority of the court adopted an interpretation that protects the public’s access to information documenting the large amount of money spent by government agencies on outside law firms," Rochelle Wilcox of Davis Wright Tremaine, an attorney for the ACLU, said in a written statement.

Timothy Coates of Greines, Martin, Stein & Richland in Los Angeles, who argued for the county, referred questions to Assistant County Counsel Jennifer Lehman, who did not immediately respond to a phone call Thursday afternoon.

The ACLU filed a petition in 2013 seeking invoices submitted to the county by outside firms based on its assertion that those firms engaged in a “scorched earth” litigation policy, dragging out cases even when a settlement was likely.

The ACLU’s petition was granted in 2014. The Second District Court of Appeal reversed finding the proper inquiry should not consider whether a communication contained an attorney’s advice, but whether an attorney-client relationship exists and whether the communication was transmitted confidentially.

In its ruling, the Supreme Court’s majority took a middle path, distinguishing between invoices related to pending litigation and those related to closed matters. The critical factor, Cuellar wrote, “is the link between the content of the communication and the types of communication that the attorney-client privilege was designed to keep confidential.”

The majority took pains to portray its reasoning as consistent with the court’s 2009 decision in *Costco Wholesale Corp. v. Superior Court*, which said that the retailer did not have to turn over any portion of an advice letter issued by its lawyer that contained both confidential and non-confidential information.

But Werdegar found the exercise unconvincing, saying the majority “strains to distinguish *Costco*, unconvincingly suggesting that when an attorney bills a client for legal services rendered, he or she steps outside the role of a lawyer and into the role of an accountant.”

Jennifer Henning, who submitted an amicus curiae brief on behalf of the California State Association of Counties and the League of California Cities, said the decision’s basic holding that billing records are not subject to disclosure during pending litigation is largely what her group proposed. “That’s really helpful because those billing records do reveal a litigation strategy, while private parties don’t have to do that,” she said.

However, Henning said the ruling is not entirely clear in its application to non-litigation circumstances and how the privilege status of a particular item changes over time.

Fleischman, who filed an amicus brief backing the county for the Association of Southern California Defense Counsel, said his group is happy with the core holding that legal bills are shielded from exposure during active litigation.

As for whether the decision will have impact outside public records requests, Fleischman said “I think we just have to wait and see how that plays out.”

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