



Two California Courts Trim Attorney-Client Privilege

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Introduction

Within the past month, two California courts¹ have entered orders trimming the scope—and power—of the attorney-client privilege. In the first case, the California Supreme Court held that legal billing statements were not categorically protected by the attorney-client privilege from disclosure through the California Public Records Act. In the second case, a federal magistrate judge in the Northern District of California found that a whistleblower, who had served as former general counsel for a life-sciences company, could use privileged information to support his claim that he was wrongfully retaliated in response to his whistleblowing activity. Together, these cases raise concerns that a weakened attorney-client privilege—a hallmark of American jurisprudence that encourages full and honest participation in the judicial process by clients and leads to better representation by counsel—may have far-reaching and unanticipated impacts on our legal system.

California Supreme Court Rules Legal Invoices to Public Entities not Subject to “Categorical” Exemption from California Public Rights Act

L.A. Cnty. Bd. of Supervisors v. Superior Court concerns a dispute between the American Civil Liberties Union of Southern California (“ACLU”) and the County of Los Angeles (the “County”) over numerous law suits alleging excessive force used against inmates in the Los Angeles County jail system. In connection with these suits, the ACLU submitted a California Public Records Act (“PRA”) request for billing invoices received by the County from outside counsel.² Unable to reach an agreement on this issue, the ACLU filed a petition for writ of mandate with the superior court. Following rulings by the superior and appellate courts, and appeals from these decisions, the California Supreme court took the matter under review to answer the following question:

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, and if not, whether any of the information sought by the ACLU is nonetheless covered by the privilege.³

The Court ultimately held that “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.”⁴ Accordingly, billing records do not automatically qualify as privileged under California law, and therefore are not *categorically* exempt from disclosure under the PRA.⁵ Rather, information contained in billing records is privileged only to the extent it is conveyed for



the purpose of legal representation.⁶ In the words of the Court, “the privilege turns on [the] content and purpose, not the form” of the communication.

Under this holding, invoices are not assumed to be privileged because “they are communicated for the purpose of billing,” not for legal consultation.⁷ But invoices for ongoing legal matters are privileged in their entirety, because they have an additional purpose—legal representation—that may be compromised if publicly disclosed.⁸ These billing records could contain fees “show[ing] a sudden uptick in spending” which might reveal “an impending filing or outsize concern about a recent event,” thereby divulging the legal consultation protected by the attorney-client privilege.⁹ In contrast, billing records for completed legal work “do[] not always reveal the substance of legal consultation” because this privileged information is more difficult to infer outside the context of ongoing litigation.¹⁰

This decision denotes a shift in California case law, which has not typically required the production of invoices, towards federal court precedent.¹¹ Indeed, the Court’s analysis is similar to Ninth Circuit precedent holding that information “reveal[ing] the motive of the client in seeking representation, litigation strategy, or the specific nature of services provided” is privileged, even if contained in “bills, ledgers, statements, [or] time records”¹² The Ninth Circuit does not appear, however, to have a blanket rule preventing the disclosure of invoices for ongoing legal matters.¹³

This case has clear implications for public agencies and their counsel, who should craft billing records with future publication via the PRA in mind. Without careful attention to tailoring narratives included in billing records, agency counsel are at risk of divulging roadmaps of their legal strategies to adversaries who submit PRA requests for past billing. It remains to be seen how this decision will impact private litigants, but the Court’s analysis of the California statutes that establish the state’s attorney-client privilege opens the door to discovery disputes over past billing records.¹⁴

SEC Asserts that Federal Rules Trump State Privileges

The second case, pending in the federal court in San Francisco, *Wadler v. Bio-Rad Labs., Inc.*, concerns a dispute between the plaintiff, a former general counsel who later acted as a whistleblower for possible Foreign Corrupt Practices Act (“FCPA”) violations, and his former employer. The former general counsel claimed he was fired for being a whistleblower, while his former employer contended he was fired for poor temperament and incompetence.¹⁵ The federal magistrate judge allowed the plaintiff to use at trial communications protected by the attorney-client privilege in support of his claim for wrongful retaliation.¹⁶

The court avoided creating a bright-line rule governing the use of privileged information that is reasonably necessary to prove a claim or defense in a whistleblower retaliation lawsuit. Instead, the court supported a case-by-case analysis balancing Congress’ intent to encourage and protect whistleblowers against clients’ privacy interests.¹⁷ Of particular concern was the magistrate judge’s finding that, at least in this case, the Sarbanes-Oxley Act (“SOX”) pre-empts California’s rules regarding attorney-client privilege. Perhaps more alarmingly, the Securities and Exchange Commission (“SEC”), which was not a party to the case, submitted an amicus brief on behalf of the former general counsel taking the broad view that rules the SEC promulgated pursuant to SOX always pre-empt conflicting state-based attorney ethics rules prohibiting an attorney from revealing a client’s privileged or confidential information.

While it remains to be seen whether other courts will follow the ruling in *Wadler v. Bio-Rad Labs., Inc.* or the SEC’s expansive view on the subject, the ruling and the SEC’s position create a significant risk



to clients that privilege will be cast aside when an attorney alleges whistleblower retaliation under SOX.

Conclusion

Both *L.A. Cnty. Bd. of Supervisors v. Superior Court* and *Wadler v. Bio-Rad Labs., Inc.* signal that clients and their counsel should re-assess whether certain of their communications are privileged and will remain so. Changes in circumstance—whether the end of an actively litigated matter or an attorney who becomes a whistleblower—may cause a once-privileged communication to lose that privilege. Accordingly, a new level of caution may be required in billing practices and communication with in-house counsel.

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¹ First, on December 20, 2016, Magistrate Judge Joseph C. Spero published his Order Denying Defendants' Motion to Exclude Protected Information from the Trial of this Action ("Bio-Rad Labs. Dec. 20, 2016 Order") (Dkt. No. 139) in *Wadler v. Bio-Rad Labs., Inc., et al.*, Case No. 15-cv-02356-JCS. Second, on December 29, 2016, the California Supreme Court published Justice Mariano-Florenino Cuellar's opinion, joined by Justices Ming Chin, Goodwin Liu, and Leandra Kruger, in *L.A. Cnty. Bd. of Supervisors v. Superior Court*, No. S226645, 2016 Cal. LEXIS 9629 (Dec. 29, 2016).

² The PRA "provides the public with a broad right of access to government information," effectively allowing the public access to "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency" The PRA does contain an exemption allowing agencies to withhold records that may not be disclosed "pursuant to federal or state law including . . . [provisions] relating to privilege." This right, along with this exception, was later enshrined in the state Constitution. *L.A. Cnty. Bd. of Supervisors*, 2016 Cal. LEXIS 9629, at *7-*9.

³ *Id.* at *7.

⁴ *Id.* at *28.

⁵ *Id.* at *16-*17, *20-*21.

⁶ *Id.* at *22-*23.

⁷ *Id.* at *16-*17.

⁸ The Court also specified that "aggregate figures" concerning spending in an ongoing legal matter are also protected by the attorney-client privilege. *Id.* *22-*23.

⁹ *Id.* at *23-25.

¹⁰ *Id.* ("[D]isclos[ing] the cumulative amount it spent on long-concluded litigation—with no ongoing litigation to shed light on the context from which such records are arising—may communicate little or nothing about the substance of legal consultation.")

¹¹ As the Court itself noted, "disclosure of billing invoices is the norm in the federal courts of California." *Id.* at 27 (citing to *Federal Sav. & Loan Ins. Corp. v. Ferm*, 909 F.2d 372, 374 (9th Cir. 1990) and *Tornay v. U.S.*, 840 F.2d 1424, 1426 (9th Cir. 1988)).

¹² *Clarke v. Am. Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992).

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13 See *In re Ken Mizuno*, No. 97-56689, 1999 WL 273159, at *1 (9th Cir. April 30, 1999) (requiring attorney to disclose “amount and source” of fee payments received in criminal representation to bankruptcy court overseeing involuntary bankruptcy of his client).

14 See *id.* at *10-*16.

15 Bio-Rad Labs. Dec. 20, 2016 Order (Dkt. No. 139), at 2:4-13

16 The court’s decision was based on the untimeliness of the defendants’ motion, so the more substantive legal conclusions it reached are contained in dicta. See *id.* at 18:12-14 (“Because Bio-Rad’s Motion constitutes a dispositive motion that was filed after the Court’s deadline and without the Court’s consent, the Motion is DENIED.”).

17 *Id.* at 25:9-11 (“[T]he Court may need to take some special measures when [the plaintiff] seeks to introduce sensitive communications and to be vigilant in ensuring that such evidence is admitted only when plaintiff’s belief that it is necessary to prove a claim or defense is *reasonable*.”) (emphasis in original).