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The California Supreme Court Upholds The Attorney-Client Privilege

On November 30, 2009, the California Supreme Court issued its ruling in the matter of Costco Wholesale Corporation v. Superior Court (Randall), S163335, upholding the protection afforded confidential attorney-client communications and affirming the sanctity of the attorney-client relationship. The decision vacated a trial court ruling which ordered that a redacted attorney opinion letter to the client be produced to opposing counsel.

In June 2000, Costco Wholesale Corporation ("Costco") retained counsel to provide legal advice on whether warehouse managers were exempt from California's wage and overtime laws. Costco's counsel produced a 22-page opinion letter based in part on facts from interviews with two warehouse managers. Costco, counsel and the managers all understood and agreed that the communications and opinion letter would remain confidential.

Several years later, a class action lawsuit was filed against Costco alleging that some warehouse managers were misclassified as "exempt" employees from 1999 to 2001 resulting in Costco's failure to pay overtime wages. During the discovery process, the plaintiffs sought to compel the opinion letter. Costco objected arguing attorney-client privilege and attorney work product doctrine. Plaintiffs argued that the letter contained non-privileged information (e.g., the facts gathered from the interviews) and that Costco had placed the contents of the letter in issue, thereby waiving the privilege.

The trial court, over Costco's objection, ordered a discovery referee to conduct an *in camera* review of the opinion letter to determine the merits of Costco's attorney-client privilege and attorney work product doctrine claims. Following an *in camera* review, the referee produced a version of the letter which redacted "attorney client communications and/or the type of attorney observations, impressions and opinions plainly protected as work product." However, the referee declined to redact "factual information about various employees' job responsibilities" asserting that such statements obtained in attorney interviews of corporate employee witnesses generally are not protected by the corporation's attorney-client privilege and do not become cloaked with the privilege by reason of having been incorporated into a later communication between the attorney and the client. The referee further found that Costco's counsel, while interviewing the two warehouse managers, had acted as a fact finder not an attorney. The trial court, without ruling on plaintiffs' assertion that Costco had waived the privilege by placing the contents of the letter at issue, adopted the findings and conclusions of the referee and ordered Costco to produce a version of the letter in the same form as recommended and redacted by the referee.

Costco petitioned the Court of Appeal for a writ of mandate which was denied. Without ruling

on the merits of the trial court's discovery order or its decision to refer the opinion letter to the referee for an *in camera* review, the appellate court concluded that Costco had not demonstrated that disclosure of the unredacted portions of the letter would cause irreparable harm in the action, explaining that the unredacted text simply referred to factual matters easily discoverable by other means.

The Supreme Court reversed the Court of Appeal's ruling and vacated the trial court's order, finding that the attorney-client privilege attached to the opinion letter in its entirety, irrespective of the letter's content. Relying upon Mitchell v. Superior Court, 37 Cal.3d 591, 600 (1984), the Court ruled that even if the factual material cited in an opinion letter is not protected by the attorney-client privilege and may be discoverable by other means, a party may not compel disclosure of the opinion letter. The privilege attaches to any legal advice given in the course of an attorney-client relationship and bars discovery of the communication irrespective of whether it includes non-privileged material.

In addition, the Supreme Court stated that Evidence Code section 915 prohibits a requirement that disclosure of the information claimed to be privileged be made to the court. The Court further stated that no provision of Evidence Code section 915 permits *in camera* disclosure of such information, and that the courts have no power to limit a legislative creation by recognizing implied exceptions. Concern that a party may be able to prevent discovery of relevant information serves as no justification for inferring an exception to Evidence Code section 915. Because the privilege protects a transmission irrespective of its content, there should be no need to examine the content in order to rule on a claim of privilege. See Cornish v. Superior Court, 209 Cal.App.3d 467, 480 (1989).

Lastly, and contrary to the Court of Appeal's holding, the Supreme Court declared that a party seeking extraordinary relief from a discovery order that wrongfully invades the attorney-client relationship need not also establish that its case will be harmed by the disclosure of the evidence. The Court declared that the fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client, and the primary harm in the discovery of privileged material is the disruption of that relationship, not the risk that parties seeking discovery may obtain information to which they are not entitled. Costco was entitled to relief because the trial court's order threatened the confidential attorney-client relationship.

The Costco decision affirms the legislative protection afforded confidential communications between clients and their counsel so as to promote full and open discussion of the facts and strategies surrounding individual legal matters. However, clients and counsel seeking to invoke the attorney-client privilege must ensure that the communication was made for the purpose of legal representation, and not any other purpose. While this decision protects communications containing legal advice to clients, a determination regarding the dominant purpose of the communication arguably remains on case-by-case basis.