Lawyers for the Profession®

The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

April 2017 | Volume 22 | Issue 2

Attorney-Client Privilege – Invoices to Public Entity Client – Ongoing Litigation

***Los Angeles Cty. Bd. of Supervisors v. Superior Court*, 2 Cal. 5th 282, 386 P.3d 773 (2016)**

Risk Management Issue: May a law firm's invoices to a public entity client be protected from disclosure as privileged notwithstanding a statutory public records disclosure requirement?

The Opinion: In this case, the California Supreme Court addressed the narrow issue of whether invoices from a county's outside legal counsel in connection with pending litigation are exempt from disclosure under the California Public Records Act ("PRA"; Gov Code, ¶ 6250 et seq.) based on the attorney-client privilege that would otherwise apply. The Court held that a public entity's billing statements from outside counsel are privileged *during pending litigation,* but after a case is over, the purpose of the billing entries may no longer be privileged.

In this lawsuit, the ACLU of Southern California sought to obtain invoices relating to nine different lawsuits involving claims for excessive force against jail inmates in the County of Los Angeles, citing the public's interest in ensuring the transparent and efficient use of taxpayer dollars. The County agreed to produce invoices for three lawsuits that were no longer pending, subject to redaction for attorney-client privileged and work product information. The Country refused to produce invoices for the six pending lawsuits based upon certain exemptions under the PRA and the California Evidence Code. The trial court ordered the County to produce the invoices with certain limited privilege redactions. The appellate court reversed, finding that everything in a public agency's invoices for legal services is categorically privileged. The California Supreme Court affirmed the appellate court, but limited the privilege's application to invoices sought relating to pending and active litigation.

According the Court, the key question was whether treating invoices as sometimes non-privileged undermines the fundamental purpose of the attorney-client privilege – *i.e.* the "confidential communication between the client and lawyer." The Court reinforced the principal that, in order for a communication to privileged it must not only be made confidentially, but must also be "made for the purpose of legal consultation, rather than some unrelated ancillary purpose." The Court went on to recognize that billing invoices (and the billing descriptions and fee information contained therein) do not generally qualify as attorney advice or legal strategy subject to the privilege. But, *during the pendency of litigation*, the privilege encompasses everything in an invoice (including aggregate fees) because an uptick in fees can signal investigative efforts and trial strategy. The Court held that while the scope of the attorney-client privilege remains constant over time, the same information may take on different significance if revealed during the course of active litigation.

Comment: While the case considers the implications of a California statute and public entities as clients, the language and analysis may have broader implications. The case highlights the notion that the attorney-client privilege turns on the content and purpose of the communication, rather than just form. It signals an exception to

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the general rule prohibiting categorical privilege assertions to attorney billing statements, and invites critical assessment of whether even limited disclosures of financial and other billing-related information not traditionally viewed as falling under the privilege's purview would, in certain contexts, undermine the privilege's purpose. The ultimate question to be addressed is whether disclosure would improperly divulge confidential legal advice and strategy.

Risk Management Solution: Lawyers should be reminded that because of the possible limitations intrinsic to the definition of what is required to establish the attorney-client privilege, great care should be exercised in the wording of bills to clients of all kinds that may one day be held not to be privileged and be required to be produced.

Conflicts of Interest – Rule 1.7 Conflict of Interest: Current Clients

***Lanard Toys Ltd. v. Dolgencorp LLC*, No. 3:15-cv-849-J-34PDB, slip op. (M.D. Fla. Dec. 16, 2016)**

Risk Management Issue: When a law firm has inadvertently undertaken representation posing a conflict of interest, what steps should be taken to mitigate the conflict, comply with ethical obligations, and prevent disqualification in the matter giving rise to the conflict?

The Case: Attorneys from a national law firm were engaged to prosecute a claim against a toy manufacturer in a Florida federal lawsuit. As a result of human error, the toy manufacturer was not entered into the law firm's conflict tracking system. Four months later, different attorneys from the same law firm were retained as the toy manufacturer's local defense counsel in a separate and entirely unrelated California state lawsuit.

Upon discovering the conflict, the toy manufacturer's lead attorney in the Florida case demanded that the law firm withdraw as plaintiff's counsel in the Florida case. In response, the law firm denied the existence of a conflict based upon the limited nature of its representation in the California case, advised that it would either secure a conflict waiver from the toy manufacturer or move to withdraw as its local counsel in the California case, suggested that the conflict was asserted to gain a tactical advantage in the Florida case, and refused to withdraw as plaintiff's counsel in the Florida case.

The law firm promptly filed a motion to withdraw from the California case, which was granted. Subsequently, the toy manufacturer filed a motion to disqualify the law firm from representing the plaintiff in the Florida case. The toy manufacturer advanced an unsupported belief that the law firm obtained confidential information during the California case representation, including information regarding the toy manufacturer's approach for defending against unfair competition cases. The toy manufacturer further argued that the law firm violated Rule 4-1.7 of Florida's rules of professional conduct, which requires undivided loyalty to current and former clients, and exacerbated the issue by responding "cavalierly" to the conflict, treating the toy manufacturer antagonistically when it requested that the law firm cease prosecuting the Florida case, and allegedly misrepresenting the extent of the law firm's involvement in the California case.

In opposition to the motion, the law firm argued that the violation resulted from inadvertent "human error," that its attorneys quickly remedied the conflict by withdrawing from the California case, that the Florida case and California case were unrelated, and that disqualification would significantly prejudice the plaintiff. The law firm also furnished affidavits from its attorneys stating that the law firm's involvement in the California case was limited to finalizing and filing the toy manufacturer's answer to the complaint at the direction of the toy manufacturer's lead counsel; that the law firm and the toy manufacturer had never spoken to each other before the conflict was raised; that no retention agreement was entered with the toy manufacturer; and no confidential information was obtained relevant to the Florida case or regarding the toy manufacturer's general defense approach to unfair competition cases. However, there were some inconsistencies among the attorneys' affidavits and other statements regarding the extent and nature of the law firm's representation in the California case. Finally, the law firm requested an

evidentiary hearing on the toy manufacturer's motion to disqualify so it could present testimony from an ethics expert in support of its position.

Ultimately, the court found the law firm's representation of the toy manufacturer in both the California and Florida lawsuits plainly violated Rule 4-1.7 – a fact which the law firm never disputed. Even so, the court determined that "balancing the interests between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, [including] the litigant's right to freely chosen counsel", disqualification was not warranted. Significant consideration was given to the prejudice the plaintiff would suffer if the counsel of its choosing was disqualified. The court reasoned that the plaintiff presumably chose its attorney based upon its long-standing relationship with the attorney as well as his expertise; that plaintiff played no part in causing the violation; and that plaintiff would suffer a substantial hardship if the law firm was disqualified, since that would require the plaintiff to retain new counsel to repeat or review the law firm's work, which included "hundreds of hours of document review and numerous depositions, and would further delay the already two-and-a-half year old case." In addition, the court observed that the violation was the result of inadvertent human error as opposed to deliberate action by the law firm. Finally, the court implicitly accepted the law firm's declarations that it did not directly communicate with the toy manufacturer, nor did it receive or share any confidential information from the toy manufacturer; moreover the representation lasted only a month, during which time the law firm was not the toy manufacturer's primary counsel.

Nevertheless, the court's decision was critical of the law firm's conduct. The court noted that "[t]he conflict itself was not too dismaying…[b]ut the handling of it was, making an otherwise easy decision on the disqualification motion harder and leaving one to wonder who [the toy manufacturer's] local advocate and champion was in the California Case after the conflict alert but before the court-approved withdrawal." The court viewed the law firm's response to the conflict as aggressive and "unapologetically in disregard of the duty of loyalty" owed to its former client, based upon its denial that a conflict existed, its failure to fully disclose the extent of its involvement in the matter posing a conflict, and its refusal to voluntarily provide its former client with information arguably relevant to the disqualification motion.

Risk Management Solution: There are several critical lessons from this decision. The importance of performing a thorough conflicts check prior to every engagement, and of preparing an engagement letter that clearly defines the scope of representation, cannot be overstated. This case also illustrates the significance of an attorney's response once alerted to a potential conflict. Rather than responding dismissively to allegations of a conflict, attorneys owe an ethical obligation to meaningfully respond to their client's concerns, investigate the alleged conflict of interest, and disclose information and materials germane to the client's motion to disqualify (in the absence of appropriate grounds for withholding). As the court pointed out, attorneys owe their clients a duty of undivided loyalty even where the conflicting representation is temporally brief, limited in scope, unrelated to the current representation and involved neither direct communications between the law firm and the former client nor receipt of the former client's confidential information. Moreover, this duty exists even if the surrounding circumstances suggest that tactical gamesmanship is at play.

Representing Constituents of Entity Clients – Suing for Fees – Legal Malpractice Counterclaims by Non-Client Entities

***Exeter Law Group LLP v Wong*, 2016 NY Slip Op 32425(U), 12/9/ 2016, Supreme Court, New York County**

Risk Management Issue: To what extent may an ambiguous engagement agreement with the constituents of an entity client expose lawyers to malpractice and fiduciary breach claims by the non-client entity?

The Case: Two individuals engaged a law firm to assist with transactions involving two corporations in which the individuals held shares, over an approximate three-year period. The law firm eventually sued both its clients (the individuals) and the corporations to recover fees. The clients and corporations asserted counterclaims in response, including claims for legal malpractice and breach of fiduciary duty, among others. The firm moved to dismiss the counterclaims.

As to the legal malpractice claim, the firm argued the shareholders had no standing to bring a direct action for injuries allegedly suffered by the corporations. The firm also argued that the corporations lacked standing to bring a legal malpractice claim because neither corporation engaged the firm and no privity existed.

The Court permitted the claims of both the shareholders and the corporations to proceed to trial. The Court explained that to the extent that the shareholders were bringing claims as individuals who were harmed when they relied on alleged negligent representation in structuring and forming their business ventures, they could state a claim for legal malpractice. With respect to the corporations' claims, the lack of a retainer agreement was not dispositive on the issue of whether there was an attorney-client relationship. Further, the Court found it significant that, despite the fact that the corporations were not parties to an engagement agreement, the firm asserted claims against the corporations for unjust enrichment and quantum meruit and sought to recover fees.

As to the breach of fiduciary duty claim, the shareholders and corporations argued the firm and one of its attorneys disclosed confidential and privileged information with another attorney outside the firm in order to coerce payment to the firm. The firm and attorney moved to dismiss on the grounds that the engagement letter explicitly authorized the firm to confer with the outside attorney. In addition, they argued the claim should be dismissed because New York Rule of Professional Conduct ("NYRPC") 1.6(b)(4) and 1.6(b)(b)(ii) authorized them to reveal client confidences in consulting with other lawyers. Finally, they argued counterclaimants failed to state a claim because there is no private right of action for a violation of the NYRPC.

The Court permitted the fiduciary breach claim to proceed to trial as well. The Court found that while the engagement letter might have permitted the attorney and firm to consult with the outside lawyer on certain matters, it did not "flatly contradict" the shareholder's allegations that this lawyer may have disclosed confidential communications without authorization. Further, the Court explained that the alleged coercive nature of the communication may rise to the level of a breach of a fiduciary duty. Finally, the Court determined that a claim for breach of fiduciary duty can be stated where the defendant lawyer is alleged to have used confidential information to disadvantage a former client.

Risk Management Solution: The ruling underscores the critical importance of specificity in engagement agreements particularly as to who is – or is not – the client. Had the agreement specified that it did not create an attorney-client relationship with the corporations, the corporations' claims may have been dismissed. The breach of fiduciary duty claim may also have been disposed of had the agreement detailed what information counsel was authorized to disclose. Finally, the decision highlights the danger of pursuing fees from clients, and especially from non-clients, regardless of the causes of action. Doing so may imply that specific tasks were undertaken for the benefit of the non-client and permit the non-client to state claims notwithstanding the fact that it was never a party to the engagement agreement.

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