

California Legal Bills: Privileged Until They Aren't?

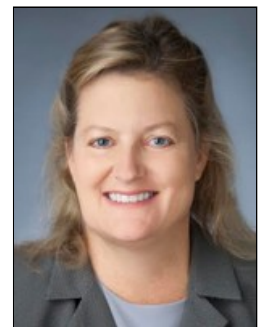
By **Steven Fleischman, Lisa Perrochet and Matthew Samet, Horvitz & Levy LLP**

Law360, New York (January 10, 2017, 4:51 PM EST) -- Attorneys communicate with their clients through various means, including in-person meetings, telephone calls, emails and letters. Attorneys also communicate with their clients through their bills for legal services rendered. The bills reflect what the attorneys have done for the client, recounting legal theories explored and pursued or abandoned, names of percipient and expert witnesses who were investigated or interviewed, documents that were drafted, and the amount of time spent by each of the legal professionals doing these tasks. Bills thus reveal counsel's analytical approach to representing the client.



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But whether and to what extent attorney bills are protected by the attorney-client privilege was an issue never squarely addressed by the California Supreme Court until that court's decision last month in *Los Angeles County Board of Supervisors v. Superior Court of Los Angeles County*.^[1] This new opinion addresses a dispute between the American Civil Liberties Union and its government entity opponent (the county of Los Angeles) over the ACLU's demand for disclosure of the county's legal bills under the Public Records Act (PRA).



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Rejecting categorical protection of those bills, the 4-3 majority opinion crafts new legal principles based on a perception about attorney invoices that does not match up with how and what lawyers communicate with their clients about the work for which they are retained. In particular, the majority likens invoices to communications that have nothing to do with providing legal representation (such as inviting a client to an open house or charity fundraiser), even though legal bills are drafted and sent exclusively because an attorney is directly engaged in representing the client, in a confidential and fiduciary relationship. The majority expresses the view that not all communications *in the course of* a representation are necessarily privileged — although that was the customary phrasing the court previously used to characterize the scope of the privilege — and might be discoverable if they are in some sense not “for the purpose of” legal consultation.

At the end of the day, however, the court holds the county's invoices *are* privileged, at least during the life of a representation, even though one part of the invoices (aggregate total expenditure figures) “may” later be subject to involuntary disclosure, unless such disclosure threatens to reveal communications made “for the purpose of legal consultation.”

With those qualifications on provisionally lifting the privilege for this category of attorney-client communications, the majority's apparent unfamiliarity with the dynamic reflected in and fostered by invoice information probably will not do too much harm unless courts in the future use the opinion to further erode the attorney-client relationship by ordering more than extremely limited disclosures of fee totals on matters that ended “long ago” (in the majority's words) and that have no potential bearing on the client's pending or future matters. Because that danger exists, the Legislature should step in to reinforce the privilege that, until now, extended to the *entirety* of communications made in the scope of representation, and continued unabated even after the representation ended. As Justice Kathryn Werdegar explained in her dissenting opinion, the

majority opinion improperly adds an "additional, nonstatutory element to the Legislature definition of a 'confidential communication'" which is an issue "more properly consigned to the discretion of the Legislature and not this court." [2]

Whatever the Legislature may do in response to the Los Angeles County opinion, two key questions remain to be answered:

1. Whether and how does this opinion apply outside the context of PRA requests for disclosure of government entity client's invoices from outside counsel?
2. How do courts in the future decide whether information on invoices for completed litigation contain information which "risk[s] exposing information that was communicated" for the purpose of legal consultation?

Applicability Outside of the PRA

While the Los Angeles County case is now dispositive in the context of bills sent by a lawyer or law firm to a public entity client under the PRA, its application to non-PRA civil cases is far from certain. The majority opinion did not specify whether its holding applies to the attorney-client privilege in general, or only when the attorney-client privilege is implicated as a statutory exemption under the PRA. Since the Supreme Court primarily interpreted the Evidence Code, and the PRA protects records from disclosure only to the extent they are privileged under the Evidence Code, the holding might at first blush apply broadly to all civil cases.

However, in refusing to adopt a categorical privilege for all attorney invoices, language in the Supreme Court's opinion appears to limit its holding to the PRA context only. The opinion's introduction phrases the issue in terms of whether the "attorney-client privilege ... shield[s] everything in a billing invoice from PRA disclosure." [3] The opinion also emphasized that the PRA requires disclosure of any unprivileged information within a document that is "reasonably segregable," even if it also contains privileged material. [4] In contrast, in the non-PRA context, even if a portion of a document is not privileged, if the document itself is privileged it is protected from disclosure. [5]

The crux of the court's holding is that, while "an invoice listing amounts of fees is not communicated for the purpose of legal consultation" [6], bills for pending cases are nonetheless privileged because they inform the client "of the nature or amount of work occurring in connection with a pending legal issue" which "lies in the heartland of the attorney-client privilege." [7]

The court contrasts "fee totals in legal matters that concluded long ago" because a "cumulative fee total for a long-completed matter does not always reveal the substance of legal consultation." [8] The distinction between pending and completed litigation — an issue not pressed by the parties in their briefing or discussed in detail at oral argument — reflects the majority's concern with balancing the need for transparency in government operations against the obvious recognition that bills do contain confidential information.

The three-justice dissent reflects the more traditional view that exploring the content and purpose of a communication made in the course of legal representation is not justified as a means to balance competing goals, and that any concerns in this regard are better addressed to the California Legislature. [9]

Given the foregoing, it is likely that courts will limit the application of Los Angeles County to PRA requests made to governmental entities. However, it is possible that courts in the future may apply Los Angeles County to ordinary civil disputes and hold that legal bills sent from outside counsel to a client in litigation "completed long ago" may no longer be considered privileged.

Such a holding would be problematic in several respects. For example, in bad faith insurance litigation, where insureds' counsel frequently seek discovery of an insurance company's practices and procedures, counsel might serve subpoenas on an insurer's outside counsel for bills in other completed cases to learn the insurer's strategy for defending certain types of litigation. One can imagine similar tactics used against other institutional litigants (retailers, manufacturers, hospitals

and the like).

How to Address Future Non-Pra Claims for Attorney Invoices in Completed Litigation Consistent With the Prohibition in In-Camera Inspections of Privileged Materials and an Attorney's Fiduciary Duty of Confidentiality

Under the broad privilege codified in Evidence Code section 954, any communication made in the course of an attorney-client relationship is "presumed to have been made in confidence" and the burden shifts to the party seeking disclosure to demonstrate that the communication was not confidential, or that the privilege does not apply for other reasons.[10] By statute, courts are prohibited from conducting an in camera hearing to determine if disputed documents are privileged. "Evidence Code section 915 prohibits disclosure of the information claimed to be privileged as a confidential communication between attorney and client 'in order to rule on the claim of privilege.'"[11] In camera inspection is permitted only when requested by the party claiming the privilege.[12]

Los Angeles County did not disapprove this principle. Thus, a party seeking disclosure of invoices in completed litigation will have to demonstrate that disclosure poses no threat to confidences communicated made for the purpose of legal representation *without looking to the content of the bills themselves*. How this can be done without speculation on the court's part about what the invoices would reveal is not clear.

In addition, Los Angeles County did not abrogate an attorney's fiduciary duty to maintain confidentiality after the attorney-client relationship ends. Under *Oasis West Realty LLC v. Goldman*[13], the Supreme Court definitively stated that an attorney has a continuing duty of confidentiality to current clients as well as former clients. The duty of confidentiality includes protecting matters governed by the attorney-client privilege. Thus, confronted with a subpoena for bills in a completed matter, attorneys must continue to object to disclosure of the bills.

Solution: Legislative Fix

Given the problems with the Supreme Court's decision, the California Legislature should adopt a legislative fix to explicitly protect attorney invoices in both pending and completed litigation from disclosure under the attorney-client privilege. The Legislature has corrected other Supreme Court decisions in the past where the court has strayed from the Legislature's intent. For example, in *Van Horn v. Watson*[14] the Supreme Court ruled that "good Samaritans" who render emergency care at the scene of an emergency are entitled to statutory immunity only when aid is rendered in the face of a "medical emergency," even though the immunity statute contained no such condition. [15] The Legislature promptly modified the Health and Safety Code to reiterate that the immunity applied to non-medical emergencies as well.

Here, there are two ways the Legislature could bring the law more in line with the views expressed by the dissent rather than the majority in Los Angeles County. First, it could amend the PRA to provide that the exemption for matters for privileged communications extends to both pending and completed litigation. Second, it could amend the Evidence Code's definition of the attorney-client privilege to explicitly provide that the privilege extends to communications made in connection with completed matters to the same extent as pending matters. In connection with either, the Legislature could make clear that it was its intent to overrule Los Angeles County's distinction between pending and completed litigation.

Conclusion

Practicing lawyers who draft and send invoices to their clients know that clients read the invoices for the substance of the information contained, rely on the invoice to supplement their understanding of the lawyer's activity in representing the client, and make strategic decisions based on the information — including cost information that helps the client direct the lawyer in what evidence to pursue and what litigation steps to take. The majority opinion in the Los Angeles County case does at least seem to recognize that all information other than aggregate cost totals are categorically privileged. What remains to be seen is how judges in the future implement the limited exception to the privilege envisioned by the majority opinion. While some judges may have

little or no experience with the back and forth over private practitioners' bills to clients, those with such experience will likely appreciate the confidential significance of even redacted bills, and will largely hold the line on disclosure of invoice information.

DISCLOSURE: Authors Steven Fleischman and Lisa Perrochet submitted an amicus curiae brief on behalf of the Association of Southern California Defense Counsel in the Los Angeles County v. Superior Court case.

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[1] Dec. 29, 2016, No. S226645 __ Cal.5th __ [2016 WL 7473802] (Los Angeles County)

[2] Typed opn. 4, 10 (dis. opn. of Werdegarr, J.).

[3] Typed opn. 1.

[4] Typed opn. 19.

[5] Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725, 734.

[6] Typed opn. 13

[7] Typed opn. 15

[8] Typed opn. 15.

[9] Typed opn. 1-2, 6-7, 10 (dis. opn. of Werdegarr, J.)

[10] Costco, supra, 47 Cal.4th at p. 733.

[11] Id. at pp. 731-732.

[12] Id. at p. 740.

[13] (2011) 51 Cal.4th 811, 822-823

[14] (2008) 45 Cal.4th 322

[15] Id. at pp. 324, 334.