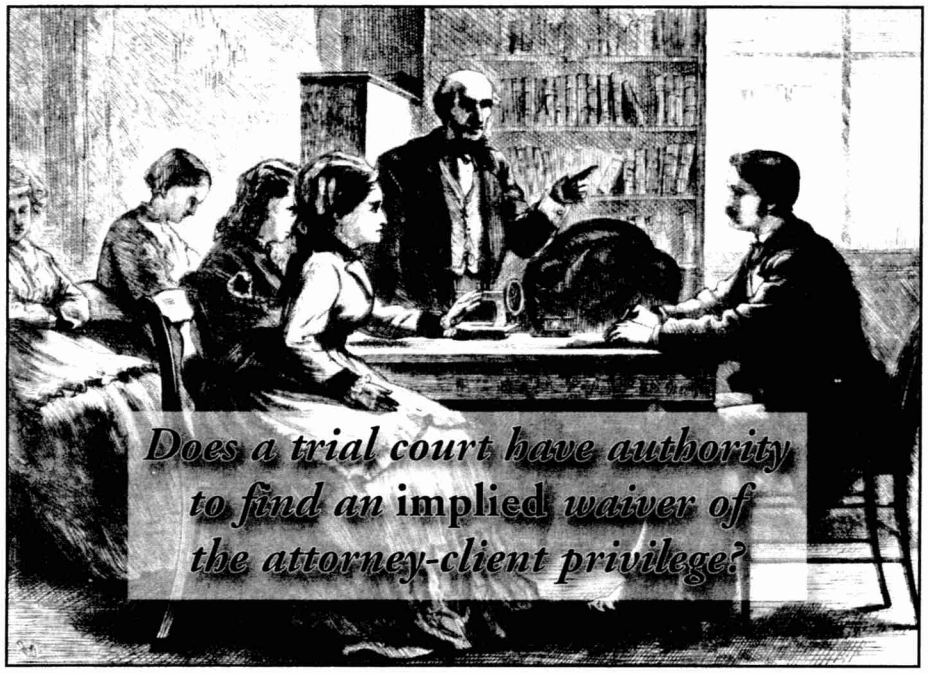
No "Implied Waiver" of the Attorney-Client Privilege



By H. Thomas Watson

This was the issue presented in a recent petition for review from the summary denial of a writ petition challenging a trial court's order that defendants had implicitly waived their attorney-client privilege by stating that their discovery responses had been based in part of the advice they received from defense counsel.

By a vote of 7-0, the California Supreme Court granted that petition for review and transferred the matter back to the Court of Appeal with directions to issue an alternative writ, giving the trial court the option of changing its waiver finding or having that finding reviewed by the appellate court. Because the trial court reversed its own ruling, the matter was never decided by an appellate opinion. But this is an important issue in many cases, and a challenge to any such waiver finding should be asserted at the trial court level so that it may be raised by writ petition or appeal.

There is a long line of California authority stating that the attorney-client privilege is implicitly waived whenever a client states that he or she acted in reliance on advice of counsel or otherwise puts an attorney-client communication "in issue" in the litigation, as an insurer claims it took a coverage position based on the advise of retained coverage counsel. (See, e.g., *Merritt v. Superior Court* (1970) 9 Cal.App.3d 721, 730; *Rockwell Internat. Corp. v. Superior Court* (1994) 26 Cal.App.4th 1255, 1268; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 128; *Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 292; 2,022 *Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, 1395; *Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 105; *Roush v. Seagate Technology, LLC* (2007) 150 Cal. App.4th 210, 222; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) §§ 8:1935, 8:1936, p. 8E-30; Croskey & Heeseman, Cal. Practice Guide: Insurance Litigation (The Rutter Group 2007) § 12:1262, p. 12D-26; see also *Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 40; *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 605.)

Merritt v. Superior Court, supra, 9 Cal.App.3d 721, a case decided nearly four decades ago, is regarded as the origin of the implied waiver doctrine. (See *Southern Cal. Gas Co. v. Public Utilities Com., supra,* 50 Cal.3d at p. 40.) *Merritt* held that the plaintiff had "impliedly waived" his attorney-client privilege because "he had specifically put the state of mind of his attorney at issue by alleging that the defendant's attorney had confused his attorney and impeded his attorney's ability to settle his claim." (*Ibid.*)

However, in *Mitchell v. Superior Court, supra,* 37 Cal.3d at page 605, the Supreme Court observed that many cases had "properly distinguished *Merritt* 'as being limited in its application to the one situation in which a client has placed in issue the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters.'" (Emphasis omitted; see also *Rockwell Internat. Corp. v. Superior Court, supra,* 26 Cal.App.4th at p. 1268.) More recently, the Supreme Court seemingly eviscerated the underpinnings of the *Merritt* implied waiver doctrine when it held that there are *no implied exceptions*

to the attorney-client privilege. (*Wells Fargo Bank v. Superior Court, supra,* 22 Cal.4th at p. 206.)

In *Wells Fargo Bank*, the California Supreme Court expressly rejected (albeit in a different context) the notion that the attorney-client privilege could be implicitly waived. (22 Cal.4th at p. 206.) The *Wells Fargo* court explained that because the "privileges set out in the Evidence Code are legislative creations; *the courts of this state have no power* to expand them *or to recognize implied exceptions.*" (*Id.* at p. 206, emphases added.) It follows that there can be no implied waiver of the attorney-client privilege because, "[i]f the Legislature had intended to restrict a privilege of this importance, it would likely have declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork." (*Id.* at p. 207.) *Wells Fargo Bank* held certain sections of the Probate Code did not implicitly required disclosure of information that was otherwise protected by the attorney-client privilege. (*Ibid.*) Nevertheless, the court's analysis and conclusion rejecting the implied waiver of the attorney-client privilege should apply to other types of implied waiver claims, as some Court of Appeal decisions have done. (See *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 745 ["California courts are powerless to judicially carve out exceptions" to the attorney-client privilege]; *Estate of Kime* (1983) 144 Cal.App.3d 246, 258.)

As the Supreme Court recognized in *Wells Fargo Bank*, had the Legislature wanted the attorney-client privilege to be waived whenever a litigant presented an issue regarding the attorney's advice, it certainly knew how to do so. For example, by statute the physician-patient and psychotherapist-patient privileges may not be asserted in lawsuits concerning the patient's physical or mental condition. (See, e.g., Evid. Code, §§ 996, 1016.) And while the Legislature created an exception to the attorney-client privilege for litigation concerning a lawyer's breach of duty to the client (*Id.*, § 958), it created no exception where privileged communications are relevant in other types of lawsuits. The absence of any such statutory provision is strong evidence supporting the *Wells Fargo Bank* conclusion that no such waiver exists. (Cf. *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1251 [the absence of a statutory crime-fraud exception to the attorney work product privilege shows the Legislature did not intend any such exception to exist]; see also *Venegas v. County of Los Angeles* (2007) 153 Cal. App.4th 1230, 1246 ["there is abundant evidence showing that if the California Legislature wanted to immunize police officers from liability for unreasonable searches based on reasonable mistakes it knew how to say so"]; *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 360-361 [no implied waiver of the statutory mediation privilege].)

Estate of Kime, supra, 144 Cal. App.3d 246, reached that same conclusion. There, although the petitioner "neither disclosed 'a significant part' of the communications at issue nor manifested his consent to such disclosure, the trial court, reasoning by analogy from the statutory patient-litigant exception to the physician-patient privilege (Evid. Code, § 994), held that [he] waived the attorney-client privilege by tendering the issue . . . ." (*Id.* at p. 258.) The Court of Appeal found the analogy inapt. "The difficulty with applying the foregoing rationale is that, for reasons of public policy, Evidence Code section 996 specifically establishes an exception to the physician-patient privilege, but, also for policy reasons, *there is no similar statutory exception to the attorney-client privilege.*" (*Ibid.*; but see *Merritt v. Superior Court, supra,* 9 Cal. App.3d at p. 730 [rejecting the identical argument].)

Accordingly, court have held that "[t]he *exclusive means* by which the attorney/client privilege may be waived are specified in section 912 of the Evidence Code. These are (1) when the holder of the privilege, without coercion, and in a non-confidential context, discloses a *significant*

part of the communication or consents to such disclosure by anyone, and (2) when there is a failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to do so." (*Motown Record Corp. v. Superior Court* (1984) 155 Cal.App.3d 482, 492, emphases added.)

Court have also stressed that the attorney-client privilege "'is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege.'" (*Blue Ridge Ins. Co. v. Superior Court, supra*, 202 Cal.App.3d at p. 345.) Accordingly, no waiver of the privilege occurs under section 912 until the client discloses "enough *substantive information* as to reveal the specific content of the alleged confidential communication." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, *supra*, § 8:1900, p. 8E-15, original emphasis.) The test is whether the disclosure is "'wide enough in scope and deep enough in substance to constitute "a significant part of the communication."'" (*Alpha Beta Co. v. Superior Court* (1984) 157 Cal.App.3d 818, 830; accord, *People v. Hayes* (1999) 21 Cal.4th 1211, 1265, fn. 14; *Mitchell v. Superior Court, supra*, 37 Cal.3d at pp. 602-603.)

Thus, the "mere disclosure of the fact that a communication between client and attorney had occurred [regarding a certain topic] does *not* amount to disclosure of the specific content of that communication, and as such does not necessarily constitute a waiver of the privilege." (*Mitchell v. Superior Court, supra*, 37 Cal.3d at p. 602.) Indeed, there is no waiver of the attorney-client privilege even when the client discloses the *purpose* of the privileged communication and the attorney's conclusions regarding a particular issue, provided the details of the communication are not disclosed. (See *Southern Cal. Gas Co. v. Public Utilities Com., supra*, 50 Cal.3d at pp. 46-49; see also *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1092-1093 ["Under Evidence Code section 912, ... [e]ven when a [client] has revealed the *purpose* of [the privileged consultation], no waiver of the privilege occurs. [Citation.] 'There is a vast difference between disclosure of a general description of the object of . . . [the privileged communications], and the disclosure of all or a part of the [client's] actual communications'"].)

For example, where an officer of a corporate defendant verifies an answer to a complaint on information and belief, and then admits that all of the pertinent information the officer believes came from communications with defense counsel, there is no waiver of the privilege under Evidence Code section 912. This is because "'a disclosure by a client that he has made a communication to his lawyer about a particular subject is not a disclosure of a significant part of the content of such communication, which is the disclosure required for a waiver of the privilege under Evid C § 912.'" (*Alpha Beta Co. v. Superior Court, supra*, 157 Cal.App.3d at pp. 823-824, 830; see also *Travelers Ins. Companies v. Superior Court* (1983) 143 Cal.App.3d 436, 444-445 [vague interrogatory answers regarding attorney-client communications did not waive the privilege under section 912]; *People v. Kor* (1954) 129 Cal.App.2d 436, 444-445.)

Under Evidence Code section 912, "any waiver [of a privileged communication] must be narrowly construed and limited to matters 'as to which, based upon [the client's] disclosures, it can reasonably be said [the client] no longer retains a privacy interest.'" (*San Diego Trolley, Inc. v. Superior Court, supra*, 87 Cal.App.4th at p. 1092.) Accordingly, the "[d]isclosure of a significant part of a privileged communication waives the privilege only with respect to that communication." (See Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, supra, § 8:1907, p. 8E-17, original emphasis.) "Other privileged communications in the same relationship are unaffected . . . even if they relate to the same subject matter." (*Ibid.*, emphasis added,

citing San Diego Trolley, at pp. 1190-1092 and *Owens v. Palos Verdes Monaco* (1983) 142 Cal.App.3d 855, 870; accord, *Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal.App.3d 1047, 1053 [disclosing an attorney's opinion letter as justification for filing a declaratory relief action does not justify waiver of the attorney-client privilege beyond the content of that letter].)

Accordingly, any waiver under section 912 with respect to some discrete communications should be limited to those discrete communications, not the entire subject matter discussed in the disclosed communications. (See *Owens v. Palos Verdes Monaco* (1983) 142 Cal. App.3d 855, 870-871 ["waiver under Evidence Code section 912 relates to the particular communication . . . revealed and *not to all communications concerning the subject matter*" (emphasis added)]; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, *supra*, § 8:1907, p. 8E-17.)

Although there can be no implied waiver of the attorney-client privilege under the above authority, the assertion of that privilege probably waives a litigant's right to assert certain claims or defenses that can be proved only by privileged evidence. (Cf. *Hartbrodt v. Burke* (1996) 42 Cal. App.4th 168, 173-175 [terminating sanctions are appropriate where the plaintiff asserts the 5th Amendment privilege against self-incrimination as a basis for withholding discovery of information relevant to the litigation]; *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554, 559 [a litigant must dismiss his lawsuit in order to assert a privilege to withhold information relevant to the litigation].) And if a litigant asserts an advice of counsel defense, but then refuses to disclose the information counsel relied upon when forming that opinion, it would probably be proper to instruct the jury, under CACI No. 203, to distrust the asserted advise of counsel defense.

Moreover, the implied waiver issue is far from settled. Courts and commentators continue to interpret *Merritt* and its progeny as authorizing courts to find an implied waiver of the attorney-client privilege under the limited circumstances where a litigant asserts an "advice of counsel" defense or otherwise places its attorney-client communications "in-issue" in the litigation. (E.g., *Roush v. Seagate Technology, LLC, supra*, 150 Cal.App.4th 210, 222; *Venture Law Group v. Superior Court, supra*, 118 Cal.App.4th at p. 105; 2,022 *Ranch v. Superior Court, supra*, 113 Cal.App.4th 1377, 1395; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, supra, §§ 8:1935, 8:1936, at p. 8E-30; Croskey & Heeseman, Cal. Practice Guide: Insurance Litigation, *supra*, § 12:1262, at p. 12D-26.)

Indeed, the implied waiver issue has become so confused that one Court of Appeal recently took both positions in the same case. (See *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal. App.4th 1229, 1236 ["*The courts of this state have no power to expand it or to recognize implied exceptions*" to the attorney-client privilege (emphases added)], 1239 ["Waiver of work product protection, though not expressly defined by statute, is generally found under the same set of circumstances as waiver of the attorney-client privilege—by failing to assert the protection, *by tendering certain issues*, and by conduct inconsistent with claiming the protection" (emphasis added)].)

Eventually, the Supreme Court will need to grant review and resolve the issue. Until then, counsel should preserve the issue in the trial court and, where appropriate, seek writ relief and/or appellate review.

H. Thomas Watson is an attorney with Horvitz & Levy LLP