

Privileged Means Privileged

by

Sarah Brite Evans, Esq.

Schwartz Semerdjian Haile Ballard & Cauley LLP

In *Costco Wholesale Corporation v. Superior Court* (November 30, 2009) -- Cal.Rptr.3d -, 219 P.3d 736, 2009 WL 4133800, the California Supreme Court made it clear that a confidential communication of legal advice from attorney to client is absolutely privileged and cannot be subject to partial disclosure of the communication or in camera review to determine the privilege issue. Inclusion of unprivileged facts in the confidential communication does not permit disclosure of any portion of the communication containing such unprivileged facts.

BACKGROUND FACTS

In June 2000, Costco retained Sheppard, Mullin, Richter & Hampton to provide legal advice regarding whether certain Costco warehouse managers in California were exempt from California's wage and overtime laws. Sheppard Mullin attorneys eventually drafted a 22-page opinion letter at issue before the Supreme Court, which was based upon conversations with warehouse managers.

Several years later, Costco employees filed a class action against Costco, claiming that from 1999 through 2001 Costco had misclassified some of its managers as "exempt" employees and therefore had failed to pay them the overtime wages they were due as nonexempt employees. In the course of the litigation, plaintiffs sought to compel discovery of the Sheppard Mullin opinion letter, to which Costco objected.

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 claims of attorney-client privilege and work product doctrine. The referee produced a heavily redacted version of the letter, stating her conclusion that although much of it "constitutes attorney client communications and/or the type of attorney observations, impressions and opinions plainly protected as work product," those portions of text involving "factual information about various employees' job responsibilities" are protected by neither the privilege nor the doctrine.

The Supreme Court took up the issue on a writ of mandate, holding that the opinion letter was entirely covered by attorney-client privilege and that Costco could not be required to make an in camera disclosure of the opinion letter for ruling on a claim of privilege. Interestingly, after the briefing was complete, the case settled, but the Supreme Court granted Costco's unopposed request that the Court retain jurisdiction and issue an opinion, which the Court granted.

BACKGROUND PRIVILEGE LAW

Obviously, the attorney-client privilege occupies an important place in our legal system. It "has been a hallmark of Anglo-American jurisprudence for almost 400 years." *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599. Under Evidence Code section 954, the client has the

privilege “to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer....”

THE HOLDING ON THE PRIVILEGE PROTECTION

The Supreme Court noted that the attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material. *Id.* at *3, citing in *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600. At the same time, a client cannot protect unprivileged information from discovery by transmitting it to an attorney. *Id.* at *4, citing *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 397.

Thus, the Court drew a distinction between the whether the privilege protects statements of a corporate employee to the corporation’s attorney (which depends upon the dominant purpose in requiring the employee to make the statement) and whether the privilege protects statements of the corporation’s attorney to the corporation itself.

The Supreme Court held that, without exception, the privilege protects statements of the corporation’s attorney to the corporation itself, regardless of the non-privileged information contained in the attorney’s statement. In fact, the Court summarized its holding as follows: when the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged. In sum, if, as plaintiffs contend, the factual material referred to or summarized in [the] opinion letter is itself unprivileged it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the letter. *Id.* at *5.

Justice George wrote in his concurring opinion that he believes that in order for a communication to be privileged, it must occur “in the course of” the attorney-client relationship and for the purpose of the legal representation. *Id.* at *9. Simply because one of the participants in a communication is a lawyer does not cloak the communication in privilege, he wrote, as there may be circumstances in which the attorney also acts in another capacity for the client, as, for example, the client's agent in a business transaction. *Id.*

The majority opinion noted that its holding on the attorney-client communications privilege is different than it would have been if the issue had been the attorney’s work-product privilege. In fact, even though Evidence Code section 915 also prohibits disclosure of information claimed to be privileged work product under Code of Civil Procedure section 2018.030(b), the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers if the Court is unable to rule on the claim of privilege.

BACKGROUND DISCLOSURE LAW

The Supreme Court then addressed the procedure that the trial court and discovery referee had utilized to make their underlying determination. Evidence Code section 915 provides, with exceptions not applicable here, that “the presiding officer may not require disclosure of information claimed to be privileged under this division ... in order to rule on the

claim of privilege....” Evid.Code, § 915(a). A litigant might be required to reveal some information in camera to enable the court to determine whether a communication is subject to the attorney-client privilege. *Id.* at *6, citing *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1135 and *Cornish v. Superior Court* (1989) 209 Cal.App.3d 467, 480.

THE HOLDING ON THE DISCLOSURE ISSUE

The Supreme Court held that a court may not order disclosure of the communication claimed to be privileged in order to allow rule on the claim of privilege, disapproving of *Martin v. Workers' Comp. Appeals Bd.* (1997) 59 Cal.App.4th 333, 347 and *2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377. The Court cited a similar ruling on the issue of psychotherapeutic communications, where the Court held as follows: when the patient-litigant's information about the contents of a communication might compromise its confidentiality the court may appropriately review the information in camera, we said nothing about reviewing the communication itself. In such instances, however, the party claiming the privilege may choose to reveal the communication in camera to prevent the court from ordering disclosure of private information bearing no relevance to the litigation. *Id.* at *6, citing *In re Lifschutz* (1970) 2 Cal.3d 415, 437 (emphasis in original). While a party may choose to reveal the communication, a party cannot be ordered to do so.

CONCLUSION

This opinion confirms that clients' communications with their attorneys will be protected, regardless of the content of the communication, so long as the attorney is acting in a legal capacity. This is good news for opinion-letter-writers out there, but bad news for plaintiffs' attorneys seeking disclosure of these letters or certain information in them.