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California Supreme Court Reinforces Attorney Client Privilege

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The attorney-client privilege protects certain confidential communications between lawyers and their clients. But the privilege does not apply to every conversation between a lawyer and a company's employees. In Costco Wholesale Corp. v. Superior Court, the state Supreme Court explained how the attorney-client privilege applies to California employers seeking advice from their lawyers.

The Court held lawyers' communications with clients, made for the purpose of giving advice, are absolutely protected from disclosure to adversaries, regardless of whether the communication contains factual or legal content. Also, courts may not require a party to disclose privileged communications, even to the court, to determine whether the attorney-client privilege applies.

Costco Seeks Advice

Costco staffs each warehouse store with hundreds of staff-members and as many as twenty managers. Costco became aware that plaintiff-side lawyers were challenging the classification of retail industry managers as "exempt" from overtime and other wage laws. Anticipating a possible claim, Costco prudently hired a skilled employment lawyer to advise the company whether the stores' managers were properly classified as exempt from overtime.

The classification of employees as exempt or non-exempt depends on what managers actually do, and not an abstract review of the job description. For example, if one calls an employee Assistant Manager, but she spends more than half of her time mopping floors, she will not be considered exempt.

Costco's attorney interviewed several managers to determine whether the managers' day-to-day duties made them exempt from overtime. She analyzed the duties under the applicable legal standards. She then provided Costco's senior management a report detailing her analysis and recommendations. As is typical, the lawyer's opinion contained a recitation of the applicable facts, legal standards, and analysis.

Plaintiffs Want Discovery of Costco's Lawyers' Analysis

As Costco predicted, certain managers sued the company claiming they were misclassified as managers. They sought unpaid overtime, associated penalties, interest and attorney fees. During the litigation, the plaintiff lawyers learned Costco earlier retained the wage-and-hour lawyer and obtained the analysis of the exempt positions.

Costco had not offered the legal opinion as evidence or as a defense to liability. But the plaintiffs tried to discover what Costco's attorney told them anyway. When Costco refused to produce the letter, the matter went before a discovery referee. The referee ordered Costco to produce the letter "in camera," i.e., for the judge to review in private. After reviewing the letter, the judge ordered Costco to produce a redacted version of the letter for the other side, just showing the facts that Costco's wage-and-hour attorney used in her letter.

The state Supreme Court stepped in and clarified two important legal issues: (1) Attorney-client privilege covers all communications between attorneys and clients, even when the communication discusses facts that may be found out

from other sources. (2) A judge cannot make a party reveal its attorney-client communications in order to determine if the communications are privileged. (In other words, the court never should have read Costco's lawyer's letter).

Facts or Legal Advice?

The attorney-client privilege, contained in the Evidence Code, applies to "information transmitted between a client and his or her lawyer in the course of the attorney-client relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is necessary for the transmission of the information of the accomplishment of the purpose for which the lawyer is consulted." Whether the communication takes place "in anticipation of litigation is of no consequence; the privilege attaches to any legal advice given in the course of an attorney-client relationship."

The attorney-client privilege protects the communication itself, but not necessarily the information conveyed. If a woman tells her lawyer where she was last Wednesday, that does not mean she is exempt from later testifying about where she was. But she need not reveal what she told her lawyer.

At the same time, a lawyer cannot be used as a source of information obtained through non-privileged sources. The opposing party may do his or her own work to discover the same non-privileged information the lawyer gleaned. That is, Costco's lawyer may have told Costco what she had seen

regarding how managers perform their duties, or what the managers told her about their work. While her communications to Costco are privileged, the managers' activities are still fair game. The plaintiff attorneys could have observed or spoken to the managers themselves, or may discover what the managers do via other means.

The trial court in Costco confused this issue. Because the facts themselves are not privileged; the trial court decided that the facts contained in the letter to Costco could be revealed. As discussed, that was a mistake because communication between lawyer and client about facts remains privileged.

The privilege covers the transmission of information available to the public, and not merely information in the sole possession of the attorney or client. Discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy.

How to Assess Whether Communications Are Privileged

The California Supreme Court in Costco decided that the lawyer's "entire" analysis letter was privileged, including its summary of factual material. The Court then turned to how a trial court evaluates whether a document is indeed privileged.

The Court reviewed Section 915 of the Evidence Code, which provides that the court "may not require disclosure of

information claimed to be privileged . . . in order to rule on the claim of privilege." Under this provision, the client need not submit information claimed to be privileged to the court. It is not necessary to do so because all the court needs to know is whether the information sought is a communication between a lawyer and a client (and if by including anyone else, the privilege was waived).

Additionally, for the privilege to apply, the "dominant purpose" for communicating with the attorney must be legal advice. Costco hired its lawyer specifically to give a legal opinion about whether managers were properly considered exempt from overtime. The Supreme Court had no trouble finding that the dominant purpose of the communication was legal advice.

Legal Advice Versus Impartial Investigations

Sometimes a lawyer's communications are not privileged because the client waives the privilege's protections. For example, the privilege may not apply when a client wants to use its reliance on a lawyer's communication as a defense to liability or damages.

In the 1997 decision, Wellpoint Health Networks v. Superior Court case, the Court of Appeal decided the attorney client privilege is "waived when the client asserted a defense based on advice of counsel." In that case, the employer used an attorney to investigate harassment and discrimination claims.

The purpose of the investigation was not to give advice to the employer. Rather, the lawyer conducted the investigation to determine whether misconduct occurred and demonstrate the employer made reasonable efforts to protect its employees from harassment.

The Supreme Court in the Costco decision specifically noted that Costco was not asserting an advice of counsel defense. Therefore, the Costco opinion is unlikely to affect the Wellpoint decision.

Guidance for Employers

Employers making policy decisions affecting their employees-- like determining whether to classify job categories as exempt from overtime-- may ask their attorneys to provide candid advice. That advice, along with the facts uncovered by the lawyer, cannot be discovered and used against the employer. In those cases, an employer can confidently use the same law firm to audit compliance as they use to defend any subsequent litigation.

When responding to complaints by or about current employees, employers who may need to take corrective action -- such as disciplining a harasser or moving a complaining employee -- are still well-advised to employ a neutral law firm or private investigator for that purpose. If the investigative report may be used as the basis for a defense, the employer could benefit from waiving any privilege and revealing a thorough investigation and an informed response.

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