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Lawyers, Guns & Money: California Supreme Court Introduces More Subjectivity into Attorney-Client Privilege Determinations

By Andrew B. Downs

Litigants have long sought discovery of the invoices and billing records of their opponents' attorneys. It's disruptive. It puts opposing counsel's personal conduct (and financial self-interest) under scrutiny. It can drive a wedge between opposing counsel and his or her client.

Over the years, courts have formulated some general rules: (a) Attorney invoices are not per se privileged, and (b) The *content* of the invoices can be privileged. On December 29, the Supreme Court of California issued an opinion which is likely to be read as narrowing the scope of the attorney-client privilege, thus encouraging more attempts to discover opposing counsel's fee invoices.

Los Angeles County Board of Supervisors v. Superior Court, No. S226645 (12/29/2016), involved an attempt by the ACLU to obtain production of invoices (money) sent by the County's outside counsel (lawyers) in connection with the defense of a series of lawsuits alleging the use of excessive force against jail inmates (guns). At issue were invoices in ongoing matters as well as matters that had been concluded.

In the long run, what is important about this decision is not the court's reaffirmation that attorney's invoices are not per se privileged, but how the court delineated the boundary between confidential *privileged* communications between attorneys and clients and confidential *non-privileged* communications between attorneys and clients.

The Supreme Court held the attorney-client privilege applies only to confidential communications for the purpose of legal consultation. It recognized that while the amount of money paid for legal services is generally not privileged, invoices may contain information that is privileged, including information that reveals areas of concern to the attorney and client and litigation strategy, including when in relation to external events the amount of attorney activity changes. As the Court explained "[E]ven though the amount of money paid for legal services is generally not privileged, an invoice which shows a sudden uptick in spending 'might well reveal much of [client]'s investigative efforts and trial strategy.'"

The Supreme Court then introduced time and context factors – information that is privileged in a pending case would not necessarily be privileged for a closed matter. Holding "the privilege turns on whether those amounts reveal anything about the legal consultation," the court drew a distinction between ongoing litigation and long-concluded litigation. It explained: "Asking an agency to disclose the cumulative amount it spent on long-concluded litigation – with no ongoing litigation to shed light on the context from which such records are arising – may communicate little or nothing about the substance of legal consultation." As the court summarized its thought process, "the privilege turns on content and purpose, not form."

By emphasizing the contextual and subjective nature of the privilege analysis, the Supreme Court is likely to be opening the door to additional discovery battles regarding the content of attorney's invoices. It is important to note that California does *not* permit a judge to conduct an *in camera* review of material to decide whether or not it is privileged. California Evidence Code § 915. The Supreme Court did not explain how the party with the burden of establishing the privilege is expected to meet that burden under the "content and purpose" standard without the inappropriate revelation of information.



Several months ago we commented that the Supreme Court of California appeared to be swinging back towards a more pro-plaintiff viewpoint. *Los Angeles County Board of Supervisors* is another step in that direction.