

# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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### *Costco v Superior Court (11/30/09)*

#### **Attorney-Client Privilege; Transmission of confidential information**

In 2000, Costco retained attorney Hensley, a wage and hour law expert, to provide legal advice regarding whether or not certain of its warehouse managers were exempt from California's wage and hour laws. Following conversations with two warehouse managers, she produced a 22 page opinion letter, which is at issue in this case. Costco, the managers, and Hensley understood the conversations were and would remain confidential. Costco and Hensley also understood the opinion letter was and would remain confidential.

Several years later, several Costco employees filed a class action against Costco, claiming that between 1999 and 2001, Costco had misclassified some of its managers as "exempt," and therefore failed to pay them overtime wages they were due as nonexempt employees. Plaintiffs eventually sought to compel production of the letter and Costco objected on the grounds of attorney-client privilege. Plaintiffs claimed Costco had placed the contents of the letter in issue, thereby waiving the privilege.

The trial court ordered a discovery referee to conduct an in-camera review of Hensley's opinion letter to determine the merits of Costco's claims of attorney-client privilege. The referee found that while interviewing Costco employees, Hensley acted not as an attorney, but as a fact finder. The referee then produced a heavily redacted version of the letter providing for disclosure of those portions of the text involving factual information about various employees' job responsibilities. She explained such material does not become cloaked with the attorney-client privilege by reason of having been incorporated in a later communication between the attorney and the client. The trial court ordered production of this redacted version by Costco.

Costco petitioned for a writ of mandate, and the Court of Appeal denied the petition, concluding that Costco had not demonstrated that disclosure of the

un-redacted portions of the letter would cause it **irreparable harm**. Costco then sought relief with the California Supreme Court.

The attorney-client privilege, in **Evidence Code section 954**, confers a privilege on the client “to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer...” Its fundamental purpose is to “safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.” The privilege is given on grounds of public policy in the belief that the benefits derived there from justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.” (*Mitchell v Superior Court* (1984) 37 Cal.3d 591)

The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise. Once that party establishes facts necessary to support a *prima facie* claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. (*D.I. Chadbourne, Inc. v Superior Court* (1964) 60 Cal.2d 723)

Here, Costco engaged Hensley to provide it with legal advice, and the opinion letter was a “communication” between them. The letter provided information transmitted between a client and his or her lawyer in the course of the attorney-client relationship and in confidence by means which disclosed the information to no third persons other than those present to further the interest of the client in the consultation. That Hensley’s letter may not have been prepared in anticipation of litigation is of no consequence; the privilege attached to any legal advice given in the course of an attorney-client relationship. (*Roberts v City of Palmdale* (1993) 5 Cal.4<sup>th</sup> 363) The undisputed facts thus make out a *prima facie* case of privilege.

The Justices observed that neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between “factual” and “legal” information. (*Mitchell*, at p. 600) **The privilege protects the *transmission* of information, and it does not become unprivileged if it contains material that could be discovered by some other means.**

Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney. Plaintiffs insist Hensley’s interviews were simple fact gathering that could have been done by a non-attorney, but they

never disputed that Costco retained her for legal advice. Hensley was presented with a question requiring legal analysis and was asked to investigate the facts she needed to render a legal opinion. Thus, the Court finds, when the communication is a confidential one between attorney and client, the entire communication, including a summary of factual material, is privileged. If, as plaintiffs maintain, the factual material is itself unprivileged, it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the letter.

Plaintiffs also point to **Evidence Code section 915** which allows the court to require the person from whom disclosure of attorney work product is sought to disclose the information in chambers, out of the presence and hearing of all persons except the person authorized to claim the privilege. No similar provision exists for the attorney-client privilege, although plaintiffs argue in support of the trial court's ruling, authorizing such disclosure to a discovery referee. The Supreme Court notes the key distinction: Evidence Code section 915 does not prevent a court from reviewing the facts asserted as the basis for the privilege to determine whether the privilege applies.

Accordingly, although section 915 allows the court to force revelation of some information to permit evaluation of the claim of privilege, it does not allow an order of in-camera disclosure of the allegedly privileged information itself. Certainly a party may choose to make an in-camera disclosure of the content of a communication to respond to an argument or tentative decision that the communication is not privileged, without violating the Evidence Code. (see, *In re Lifschutz* (1970) 2 Cal.3d 415) Ultimately, because the privilege protects a transmission irrespective of its content, there should be no need to examine the content in order to rule on a claim of privilege. (*Cornish v Superior Court* (1989) 209 Cal.App.3d 467)

The Justices noted in discussing another opinion disapproved in this opinion, "The corporation... was free to request an in-camera review of the communications to aid the trial court in making that determination but the trial court could not order disclosure of the information over the corporation's objection. If the trial court determined the communications were made during the course of an attorney-client relationship, the communications, including any reports of factual material would be privileged even though the factual material might be discoverable by some other means. (disapproving, *2,022 Ranch v Superior Court* (2003 ) 113 Cal. App. 3d 1377)

The Court went on to explain that the fundamental purpose of the privilege is the preservation of the confidential relationship between attorney and client and the primary harm in the discovery of privileged material is the disruption of the relationship, (*Roberts v Superior Court* (1973) 9 Cal.3d 330) not the risk that parties seeking discovery may obtain information to which they are not entitled. Accordingly, Costco is entitled to relief because the trial court's order threatened the confidential relationship between Costco and its attorney. Costco was not also required to demonstrate that its ability to present its case would be prejudiced by the discovery of the opinion letter.

The judgment of the Court of Appeal is reversed. That court is directed to issue a writ of mandate vacating the trial court's order compelling discovery and to remand the case to the trial court.