LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, JANUARY 23, 2017

PERSPECTIVE

MUNICIPAL MATTERS

Public agency legal bills: Are they privileged?

By Derek P. Cole

When a law firm submits litigation billing invoices to a public agency for payment, are the invoices protected by the attorney-client privilege? Yes and no, said the California Supreme Court in its last published ruling of 2016. In *Los Angeles County Board of Supervisors v. Superior Court,* 2016 DJDAR 12740 (Dec. 29, 2016), a four-member majority of the court held that billing invoices in pending litigation matters are privileged, but that invoices for former litigation matters are not.

Like so many closely divided decisions, *Board of Supervisors* raises more questions than it answers. Most notably, for attorneys who provide services to public agencies, the decision creates uncertainty as to what amount of detail to include in their billing invoices.

The Records Request

In *Board of Supervisors*, the ACLU sought billing records Los Angeles County's outside counsel had sent the county in nine lawsuits involving violence in county-operated jails. The ACLU believed the records would shed light on "scorched-earth" litigation tactics in which the county's counsel had engaged. The ACLU made its request under the California Public Records Act (CPRA).

In its response, the county agreed to provide records for three of the cases, which were no longer pending. But as to the active cases, the county asserted that producing records with description of the work performed, time spent and amount of charges would disclose information protected by the attorney-client privilege. The county relied on the CPRA's incorporation of this privilege as a basis for withholding the billing records. Gov. Code Section 6254(k).

After the ACLU sued, the lower courts split. The superior court ordered the county to release records for all cases, granting only a limited right of redaction to the extent the billing records disclosed legal advice or attorney mental impressions. The Court of Appeal reversed, finding the billing records were categorically subject to the attorney-client privilege.

The Court's Holding and Dissent

A bare majority of the Supreme Court rejected the Court of Appeal's categorical approach. In doing so, the majority articulated what can best be described as a "functionality test." The attorney-client privilege applies, the court held, only to "those communications that bear some relationship to the attorney's provision of legal consultation."

Applying this standard, the majority observed that billing invoices generally are not sent for the purpose of giving legal advice, and would not be privileged simply because they were transmitted from lawyer to client. But the majority noted that in active litigation, the amount of charges during particular points of a case could, if disclosed to litigation opponents, reveal sensitive information such as forthcoming filings or concerns over particular events. The majority thus concluded that billing records in pending litigation matters bear the necessary relationship to the attorney's provision of legal advice to make them privileged. But once litigation has concluded, there no longer is a concern that billing records could disclose attorney strategy and, consequently, there is no further justification for preserving their confidentiality.

Justice Kathryn Werdegar, on behalf of the three-member minority, authored a stern dissent. Endorsing the reasoning of the Court of Appeal, she noted the attorney-client privilege is a creature of statute and that the majority had given the text of the relevant statutory provision, Evidence Code Section 952, "a heretofore hidden meaning." Like the Court of Appeal, the minority read this section's text that the privilege "includes" the giving of legal advice to mean the privilege protects more than just attorney-client communications in which legal advice is given.

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Most pointedly, Werdegar argued the majority's holding was devoid of any limiting principle. In her view, the majority opinion offered no plausible reason for why records, after having attended the protection of the attorney-client privilege, must forfeit that protection simply because litigation has concluded. She counseled that because of the majority's "mischievous" ruling, public-agency attorneys now "must counsel their clients that confidential communications … may be forced into the open by interested parties once the subject litigation has concluded."

Unresolved Questions

While it is clear how to apply the *Board of Supervisors* holding to billing records in litigation matters, how should agencies apply the holding to the billing records of counsel who provide advisory services? For instance, many cities contract with private law firms for their city attorney services. Unlike in litigation, in which a judgment, dismissal or settlement ends a case, municipal advisory matters do not necessarily have finite conclusions. In a particular billing cycle, a contract city attorney may advise on a wide range of matters involving uncertain or contingent outcomes. Contract city attorneys may also provide recurring services, such as regular reviews of contracts or material for public meetings. It is unclear how to apply the *Board of Supervisors* holding to determine when billing descriptions about these matters should no longer be deemed privileged.

Public agencies also regularly retain outside counsel to provide advice on labor and employment matters. If billing records for these matters lose their confidentiality once the matters are completed — for example, when a workplace investigation has been completed — would agencies still have the right to withhold these records to protect employee rights? Other exemptions within the CPRA may address this situation — e.g., Government Code Section 6254(a), exempting "personnel … files … which would constitute an unwarranted invasion of personal privacy." But before *Board of Supervisors*, agencies customarily relied on the attorney-client privilege as the basis for exemption.

To address these concerns, attorneys who provide legal services to public agencies may be inclined to provide less detail in their billing records for fear of revealing sensitive client information. This would be an unfortunate, though understandable, response. In this author's experience, public agency clients scrutinize attorney invoices just as vigorously as do private clients. But recognizing that such invoices will always be subject to disclosure in the future, agencies and their counsel will likely agree to have invoices convey only the minimum detail necessary for payment.

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