Ethics Watch

Recent Developments in Substance and Procedure of the Attorney-Client Privilege

By Nathan M. Crystal

Attorney-client privilege issues arise frequently in litigation. Two recent cases highlight important substantive and procedural aspects of the privilege.

Costco Wholesale Corp. v. Superior Court, 219 P.3d 736 (Cal. 2009), dealt with the issue of when an attorney's opinion letter is subject to the attorney-client privilege. In 2000 Costco retained an employment law firm to provide legal advice as to whether the managers of its warehouses were exempt from California's wage and hour laws. An attorney with the firm interviewed two managers, with the understanding that the conversations would remain confidential. The attorney wrote a 22-page opinion letter, which the attorney and Costco understood would be confidential. Several years later Costco employees filed a class action claiming that Costco had misclassified some of its managers as exempt employees. During discovery plaintiffs sought to compel discovery of the opinion letter. Costco objected on grounds of attorney-client privilege and work product. Plaintiffs argued that the letter contained unprivileged information and that Costco had waived the privileges by placing the letter in issue.

The trial court ordered a discovery referee to review the letter. The referee produced a heavily redacted version that disclosed those portions of the letter involving "factual information about various employees' job responsibilities" because this information was not protected by either the privilege or the work product doctrine. The California Supreme Court reversed the decision of the Court of Appeals. In doing so the Court made three important rulings with regard to the attorney-client privilege.

First, substantively the Court held that the letter was protected in its entirety irrespective of its content:

> [W]hen 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 Hensley's 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. 219 P.3d at 743.

Second, as a matter of trial procedure, the Court held that under the California Evidence Code, the trial court could not order an in camera review of the communication to determine if it was subject to the attorney-client privilege. The Court outlined the proper procedure for dealing with such cases. If a party seeks to obtain material that the possessor claims is subject to the attorney-client privilege, the trial court must first determine based on an analysis of the facts surrounding the communication (but not the communication itself) if the communication was a confidential one between attorney and client. If the party seeking discovery of the communication claims that it was made to an attorney acting in a nonlegal capacity (a member of a board of directors, a business advisor, or a trustee, for example), the court must decide if the dominant purpose of the relationship was legal advice. If not, the privilege does not apply and the communication must be disclosed. Similarly, if a party claims that protection of the attorney-client privilege has been waived (for example, by disclosure to a third party), the court must assess this argument without reviewing the communication itself. The Court noted that the party claiming the privilege could always voluntarily disclose the communication in camera to rebut an argument that the privilege does not apply. In addition, if the trial court finds that the privilege does not apply or has been waived, it can then order an in camera review of the communication to determine if some form of protection is nonetheless warranted.

Finally, as a matter of appellate review, the Court held that use of a prerogative writ to obtain immediate appellate review was proper because the party who is subject to a discovery order requiring it to reveal confidential information would be faced with the intolerable choice to either succumb to an order to disclose the material or refuse to disclose and face possible sanctions for contempt.

While the California Supreme Court in *Costco* allowed immediate appeal of an order directing disclosure of material subject to a claim of attorney-client privilege, the U.S. Supreme Court reached the opposite conclusion as a matter of federal law in *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009). Carpenter brought suit against Mohawk Industries for wrongful termination of his employment relationship. Carpenter claimed that Mohawk fired him because he complained that the company was hiring undocumented aliens. He sought to compel information concerning his meeting with counsel retained by the company and the company's decision to fire him. The district court held that the material was subject to attorney-client privilege but ruled that the company had waived the privilege by contending that Carpenter's termination was justified in connection with a class action suit against the company. The district court refused

to certify the case for interlocutory appeal under 28 U.S.C.§1292(b). Carpenter sought to appeal, but the Court of Appeals dismissed for want of jurisdiction, finding that an order compelling production of material arguably subject to attorney-client privilege was not appealable under the collateral order exception to the final judgment rule for appeals. Resolving a split among the circuit, the Supreme Court affirmed, holding that the collateral order exception did not apply to denial of claims of attorney-client privilege.

The Court recognized the importance of the attorney-client privilege but posed the question as "whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." The Court concluded that post-judgment appeals were generally sufficient to protect the rights of litigants and to maintain the integrity of the attorney-client privilege. Appellate courts can protect against violation of the privilege by reversing trial court decisions on appeal and remanding for new trials in which the privileged material is excluded. In addition, litigants have several potential avenues of appellate review aside from the collateral order exception: First, the district court may be persuaded to certify the question for immediate appeal. Second, the litigant could refuse to comply with the order, incur sanctions or a contempt order, and appeal from these final orders. Third, a litigant could seek review by writ of mandamus. The Court pointed out that any harmful "spillover" effects of disclosure to other related cases could be minimized through protective orders. On the other hand, allowing piece-meal appeals would seriously undermine the efficient administration of justice.

What is the situation under South Carolina law with regard to the substantive and procedural issues raised in these two cases? With regard to appealability, discovery orders, including an order compelling production of material arguably subject to the attorney-client privilege, are interlocutory and therefore are not immediately appealable. *Tucker v. Honda of S.C. Mfg., Inc.,* 354 S.C. 574, 582 S.E.2d 405 (2003). A party may refuse to comply with the order, be held in contempt, and appeal from the final order of contempt. *Id.* However, the Supreme Court has the power to grant a writ of certiorari to consider an appeal based on exceptional circumstances. See *Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009). It should be noted that appellate courts review decisions regarding the attorney-client privilege under a limited abuse of discretion standard. *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (2005). With regard to in camera review, the S.C. Supreme Court has held that trial courts should determine the application of the privilege by examining all the facts and circumstances without first requiring disclosure of the claimed privileged material. *State v. Doster,* 276 S.C. 647, 284 S.E.2d 218 (1981). However, if necessary to determine the application of the privilege, a court may examine the material in camera to make the determination of whether the privilege applies. *Tucker, supra.* With regard to the substantive issue in *Costco,* South Carolina appellate courts have not dealt with the issue of whether an opinion letter from lawyer to client containing factual as well as legal information is subject to the attorney-client privilege in its entirety. If this issue arises, the reasoning of the court in *Costco* is likely to be influential. ■

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