Costco Decision Could Significantly Change Scope of Attorney-Client Privilege

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The case of *Costco Wholesale Corporation v. Superior Court*, currently pending before the California Supreme Court, may dramatically affect the manner in which clients interact with and utilize their lawyers. At stake is the potential for the routine *in camera* review of attorney opinion letters and disclosure of "factual" portions to litigation adversaries. A decision to affirm the approach taken by the lower courts in *Costco* could have a profound impact on the way in which lawyers and clients work together and the information they exchange with one another in the course of their legal relationship.

At the heart of the case is an entirely typical engagement of Costco's outside employment attorney. Desiring to ensure that its warehouse managers (*e.g.*, meat, bakery, pharmacy, optical, etc.) were properly classified under California's wage and hour laws, Costco asked its outside counsel to investigate and analyze the job positions. *Costco Wholesale Corporation v. Randall*, 161 Cal. App. 4th 488 (2008). After the attorney's investigation, which included fact-finding interviews with two Costco warehouse managers, the attorney prepared and submitted to Costco a 22-page opinion letter setting forth the investigation results and her legal advice about "the exempt status of certain Costco warehouse managers in California." A year after receipt of the opinion letter, Costco reclassified many of its warehouse managers to non-exempt employees, making them eligible for overtime and other benefits. A year and a half after Costco implemented the change, a group of class action plaintiffs sued, alleging that Costco previously misclassified many of the warehouse managers as exempt employees. The opinion letter from Costco's outside employment counsel became the subject of a contentious discovery dispute when plaintiffs moved to compel its disclosure in the face of Costco's arguments that it was a privileged attorney-client communication. To resolve the dispute – and over Costco's objection – the trial court ordered an *in camera* review of the letter by a discovery referee. After review, the referee took the position that "factual information," including the witness statements obtained by Costco's outside attorney, "should be disclosed because it amounts to recorded statements of prospective witnesses and/or reflections on a non-legal matter." Despite Costco's protest, the trial court adopted the referee's recommendation and ordered production of the redacted opinion letter. Costco then petitioned for writ relief and review.

The Court of Appeal essentially adopted a "no harm, no foul" approach. After examining the redacted opinion letter, the appellate court determined that Costco could not make the requisite "irreparable harm" showing for writ relief because the remaining unredacted portions of the letter were "inconsequential and do not infringe on the attorney-client relationship." The appellate court noted that the unredacted portions of the letters were "factual statements about the employees' responsibilities" and did not reveal legal knowledge, advice or impressions, and stated that the information "is hardly startling and can easily be obtained from interviews, depositions, or from a production request." Costco appealed the ruling and the California Supreme Court granted review.

The California Supreme Court's decision in *Costco* should provide much needed guidance in this complex area of law. More importantly – depending on how the court views the issue – its ruling could significantly impact the scope of attorney-client communications and, by extension, the course of attorney-client relationships as a whole.

A common example illustrates the potential impact of the issues before the court. An employer is sued for alleged violation of various laws. Prior to the filing, the employer procured legal advice from a lawyer regarding the risks of just such a lawsuit, and the assigned lawyer has written a comprehensive opinion letter that synthesizes the significant facts, evaluates important witnesses, analyzes the law and predicts the likelihood of favorable and unfavorable results. During discovery, plaintiff's counsel demands production of all documents relevant to analysis of the employer's liability.

If the approach of the lower courts in *Costco* stands, the court – without any finding of waiver or exception to the attorney-client privilege – is empowered (if

not obligated) to inspect the letter and to parse out "facts." This invasion of the attorney-client privilege is essentially unreviewable so long as an appellate panel, perhaps knowing little about the complexities of the case or even the law governing it, thinks that the facts disclosed are "inconsequential" and that the client has not been "irreparably harmed." Meanwhile, of course, the trial judge has read the lawyer's entire written communication. The party seeking protection has no confidence that the court reading its privileged legal analysis will not be influenced by its lawyer's candid assessments concerning the facts, the law or even the judge in question. The disclosure of "factual communications" in the opinion letter to litigation opponents raises additional issues. Simply knowing what specific facts were communicated between a party and its attorney can provide valuable insight about a case's strengths and weaknesses and possible strategies to address them.

The potential for routine review and disclosure (even partial) of privileged communications may serve to curtail candid and full attorney-client communications. Knowledge that lawyer opinion letters may, at a minimum, be subject to an *in camera* review by a court (or discovery referee), and that all "facts" a client communicates to its lawyer are subject to disclosure to adversaries, could discourage clients from fully engaging attorneys for investigation and evaluation. Absent certainty that communications with their lawyers are entirely confidential, clients may be much less likely to divulge all pertinent information (including "harmful" information) to counsel and may even decide to forego certain lawyer investigations and interviews of employees altogether – putting their lawyers in the position of making important evaluations based on incomplete information, or information that has not been developed through the skill that interviews by seasoned attorneys provide. Lawyers, knowing that portions of their "factual" communications could be subject to discovery, may become similarly constrained in their willingness and efforts to discover relevant facts, and may even feel affirmatively compelled to limit their involvement to protect the interests of their clients. Fear of disclosure could result in opinion letters being severely constricted in their discussion of facts, or the client and lawyer may decide to forego the preparation of a detailed written opinion letter entirely and instead rely upon strictly oral communications.

Clients may also use investigative efforts to advocate a position rather than to ensure compliance with the law. For example, an employer accused of legal violations (and with an eye toward possible litigation) may decide to use an attorney investigation as an opportunity to advocate that no violation occurred, rather than taking a critical look at its current practices and working environment to remedy any possible improper policies or conduct. Instead of a complete, unbiased recitation of operative facts within a privileged lawyer investigative report, facts may be skewed or omitted out of concern that portions of the report may be used as "Exhibit A" in future litigation.

These limitations on full and candid attorney-client interaction may create a new approach to client-lawyer relations. Attorneys may have to develop a new protocol for preparing opinion letters and communicating with their clients, as a greater emphasis may be placed on oral communication. The utilization of an attorney as a preventive counselor may be circumscribed, as clients may no longer be willing to risk the significant involvement of attorneys for their business needs, and instead may view attorneys as having a more limited role (*e.g.*, for dispute resolution, to draft legal documents, etc.). Consultants and investigators who were previously retained by attorneys on behalf of clients to cloak their activity with privilege may no longer be a viable option. Due to the possible reluctance by clients to fully engage their attorneys, attorneys may need to devise creative ways to provide value to their clients.

In light of the significant practical consequences at stake, how the California Supreme Court ultimately decides the *Costco* case will be important to clients and their attorneys. Clients and attorneys who have long relied on the belief that their communications are absolutely privileged may have to adapt their practices to comply with the court's interpretation.

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