

## Management Alert

# The California Supreme Court Upholds the Attorney-Client Privilege for Outside Counsel's Communications to a Corporate Client

On November 30, 2009, in a highly anticipated ruling, the California Supreme Court strongly preserved the sanctity of the attorney-client privilege in *Randall et al. v. Costco*. The Court held that: 1) the attorney-client privilege protects the entire communication between outside counsel and corporate counsel, regardless of the communication's content; 2) a trial court may not order disclosure of an attorney-client communication in order to rule on the claim of privilege; and, 3) a party seeking writ relief for a discovery order that seeks to invade the attorney-client relationship does not need to show that its case will be harmed by disclosure of the communication, as irreparable harm is caused by the disclosure itself.

### *Background*

Costco retained outside counsel to provide legal advice regarding the classification of certain managers as exempt from California's overtime laws. Outside counsel conducted manager interviews and engaged in various fact-gathering activities. The research culminated in an opinion letter from outside counsel to Costco on the relevant issues. The opinion letter included summaries of factual information.

Several years later, a class of Costco managers sued Costco alleging that they were misclassified as exempt employees. During the litigation, they sought disclosure of the earlier opinion letter. Costco asserted that the opinion letter was protected by the attorney-client privilege. Over Costco's objections, the trial court ordered in camera review by a discovery referee. The referee redacted the letter, concluding that although most of the letter was privileged, the portions of the letter containing purely factual information were not and should be produced. The trial court adopted the findings of the discovery referee and ordered Costco to produce the redacted version of the letter.

Costco sought a writ of mandate from the Court of Appeal, arguing that the trial court had erred in ordering in camera review and then in ordering disclosure of the opinion letter. The Court of Appeal denied relief, concluding that Costco had failed to demonstrate that disclosure of the redacted letter would cause irreparable harm because the factual portions were discoverable through other means. Costco then filed a petition for review with the California Supreme Court. The Supreme Court reversed.

### *The Attorney-Client Privilege Protects the Entire Communication From Outside Counsel to Corporate Counsel.*

The Supreme Court explained that the fundamental purpose of the attorney-client privilege “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 [even when the] exercise of the privilege may occasionally result in the suppression of relevant evidence.” Accordingly, the attorney-client privilege attaches to confidential communications between attorney and client, given in the course of the attorney-client relationship, and is an absolute bar to discovery regardless of whether the communication includes unprivileged material. The fact that information is transmitted from attorney to client in the course of the attorney-client relationship triggers the protection, not the content of the communication. The protection exists even if the transmission only contains information readily available to the public. In a concurring opinion, Justice George cautioned that the privilege should not be applied to every communication where the dominant purpose of the relationship is attorney-client (as opposed to another capacity), but should be limited to communications where the purpose of the communication is the seeking or rendering of legal advice or representation.

### *A Trial Court May Not Order In Camera Review of an Attorney-Client Communication to Determine Whether the Privilege Exists.*

Plaintiffs argued that a litigant may be compelled to reveal some information in camera to determine whether a communication is subject to the attorney-client privilege. The Court explained that plaintiffs were correct to the extent a court may compel a litigant to reveal some information to support the privilege, but that information is limited to the type that could help the court determine whether the attorney-client privilege existed in the first place—not the communication itself.

Plaintiffs raised the concern that, if the trial court’s order did not stand, defendants could prevent discovery of relevant information simply by claiming attorney-client privilege. The Court explained, “it has long been understood that ‘[t]he privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.’” In other words, the Court held that the public policy considerations behind the privilege outweighed plaintiffs’ concerns.

Further demonstrating the extent to which the Court was willing to protect the attorney-client privilege, the Court suggested that some protection may remain even where the privilege has been waived. In some instances, the Court explained, courts may conduct in camera review of a communication at issue to determine if, waiver notwithstanding, some protection is still warranted.

### *Irreparable Harm is Caused by the Disclosure of an Attorney-Client Communication.*

The Supreme Court also clarified the availability of extraordinary relief where a trial court orders disclosure of an attorney-client communication. The Court of Appeal had denied Costco’s petition for writ of mandate based on Costco’s failure to demonstrate it would be irreparably harmed by the release of the redacted letter because much of the remaining material could easily be obtained by other means. The Supreme Court disagreed, finding that the potential harm was not tempered by the fact that the party seeking disclosure could obtain the information elsewhere, but that the discovery of privileged material would disrupt the attorney-client relationship. Costco was entitled to writ relief “because the trial court’s order threatened the confidential relationship between Costco and its attorney.”

*What Randall Means for California Employers.*

*Randall* confirms that employers' communications with counsel in the course of the attorney-client relationship will be protected, regardless of the content of the communication—be it factual or opinion. Employers must keep in mind, however, that the privilege may not in some circumstances attach to communications with their attorneys, as the Court left open the possibility that communications will be subject to disclosure if the attorney is not truly acting in such capacity, or if the communication is not in furtherance of the attorney-client relationship. *Randall* represents a significant victory for employers, with some important notes of caution.

For more information, please contact the Seyfarth attorney with whom you work, or any [Labor and Employment](#) attorney on our website.



Breadth. Depth. **Results.**

[www.seyfarth.com](http://www.seyfarth.com)