Introduction

This final edition of 2016 brings two cases addressing the attorney-client privilege and the Public Records Act. In one, a court of appeals upheld the privilege for communications between the Agricultural Labor Relations Board and its general counsel, in spite of a due process challenge. In the second, a divided Supreme Court, with a strong dissent, held that lawyers’ billing invoices are not categorically privileged for purposes of the Act, with a possible gloss on the Evidence Code and its earlier Costco decision on the privilege. Other cases focus on lawyer conduct or, better, misconduct. Finally, the State Bar issued an opinion attempting to reconcile blogging with the current rules and restrictions on lawyer advertising.

As California’s proposed Rules of Professional Conduct complete their final journey to the Board of Trustees and then the Supreme Court—with the many significant changes in the current version—2017 promises to be ethically exciting. Stay tuned!
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16.4.1 Agricultural Labor Relations Board v. Superior Court (2016) 4 Cal.App.5th 675 — Third Appellate District (October 25, 2016)

Issue:
Are communications between the Agricultural Labor Relations Board and its general counsel properly subject to public disclosure?

Analysis:
No. General Counsel of the Agricultural Labor Relations Board serves as the prosecutor in administrative adjudications of complaints about unfair labor practices of agricultural employers and labor organizations. (Labor Code, § 1160.4.) In May 2015, general counsel requested and received conditional board approval for an injunctive relief proceeding. When the target of the proceeding requested the board to disclose the communications between the board and general counsel regarding the matter under the California Public Records Act, the board refused, claiming attorney-client privilege. In the proceeding that followed, the Superior Court ordered public records disclosure pursuant to Government Code section 6253, subdivision (a), of communications between the Agricultural Labor Relations Board and its general counsel.

The Court of Appeal concluded that the Superior Court erred in ordering disclosure of the communications between the board and general counsel relating to the decision to seek injunctive relief because those communications are protected by the attorney-client privilege. Regardless of whether the communications raise due process concerns about the pending administrative proceeding, those concerns do not preclude the attorney-client privilege from attaching to the communications. Because the communications are privileged, they are exempt from disclosure under the California Public Records Act.
16.4.2 Bundy v. United States District Court (9th Cir. 2016) 840 F.3d 1034 — United States Court of Appeals for Ninth Circuit (October 28, 2016)

Issue:
Is a pattern of disregard for local rules, ethics, and decorum sufficient to justify denial of an application for pro hac vice admission?

Analysis:
Yes. An attorney was denied pro hac vice admission in a high-profile criminal trial. The Ninth Circuit concluded that the district court had more than enough reasons to deny admission since the applicant was not candid about his involvement in an ethics proceeding before the District of Columbia Bar; had twice been barred from appearing pro hac vice in other jurisdictions; failed to list other cases in which he had been sanctioned, reprimanded, or denied pro hac vice status; and had a record of personally attacking judges, including the Chief Judge who denied his pro hac vice application here.

In his emergency petition for a writ of mandamus, the attorney claimed that he had “continuously been a member in good standing of the District of Columbia Bar for over 36 years and has never been disciplined” and that even if he was disciplined under the then-pending disciplinary proceedings with the District of Columbia Bar, “that would still not justify denial of [his] application to appear pro hac vice.”

Once the matter was pending before the Ninth Circuit, the district court continued its investigation of the attorney and his fitness to practice. Its research concluded that “the District of Columbia Hearing Committee reviewed the Petition for Negotiated Discipline and rejected it.” This contradicted the lawyer’s representation that he had withdrawn his affidavit because he believed that he had acted ethically. Instead, the court rejected the affidavit because the “agreed-upon sanction of public censure [was] unduly lenient.” So, the attorney had misrepresented the proceedings.

Despite problems in other jurisdictions and the described issues with his candor, the lawyer might have still been admitted had he been more civil. Although one of the judges dissented, the majority concluded that the applicant had not learned from past misdeeds. In particular, they cited his propensity for confronting judicial officers personally, including by claiming that a judge was biased because of that judge’s ethnic origin and because Clinton had appointed him. Here, following denial of the pro hac vice application, he filed a Bivens action—an attack claiming that a government official violated a constitutional right—against Chief Judge Gloria Navarro, President Barack Obama, U.S. Senator Harry Reid, and others, wherein the attorney alleged a conspiracy to violate his civil rights. The majority concluded that the lawyer’s participation in such an action “smack[ed] of intimidation and retaliation.”

**Issue:**
Should a prosecutor be sanctioned for inserting a false question and answer into an interview transcript and then delaying before disclosing it was a “joke”?

**Analysis:**
Yes. A district attorney charged a man with five counts of lewd and lascivious conduct with a child. The defendant primarily spoke Spanish during his police interview. He admitted to hugging the girl, touching her breasts, and making verbal overtures, but denied having sex with her. The prosecutor was initially convinced that he would ultimately be able to show that penetration had occurred and stated so during plea negotiations. But ultimately he realized that he did not have that evidence and became frustrated.

Before transmitting a copy of the transcript of the police interview to the public defender, the prosecutor added two lines implying penetration.

[Officer]: You’re so guilty, you child molester.
[Defendant]: I know. I’m just glad she’s not pregnant like her mother.

Because the victim’s mother was, in fact, pregnant at the time, the statement had some suggestion of truthfulness. The public defender did not realize a joke was being played on him and questioned his client about the statement, which the defendant denied making. The public defender then sought a continuance of trial. Nine days after the falsified transcript was sent, the public defender requested a copy of the recording that the transcriber had used. That morning, the prosecutor divulged that he had added the two lines.

Although the prosecutor insisted that he was not trying to deceive the public defender and that the addition was a joke, the State Bar Court believed that the conduct prejudiced the defendant’s right to a fair trial, compromised the case, resulted in a dismissal of criminal charges, undermined the public’s confidence, and shocked the conscience of the court. As a result, the Review Department recommended the prosecutor be suspended for one year.

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Comments:
In its opinion, the Review Department noted that the criminal court's findings related to the prosecutor's conduct during the motion to dismiss—even though by then the prosecutor no longer worked on the matter—was entitled to great weight. Specifically, it concluded that while the prosecutor was not a party, his office opposed the motion and defended his conduct. So, the situation was analogized to a sanction proceeding against an attorney who is involved in a case, but not a named participant in the caption. This footnote could signal a new procedural trend in disciplinary prosecutions.
**Issue:**
May a claim of conspiracy between client and attorney preclude the litigation privilege?

**Analysis:**
No. A tenant sued her landlords, their son, and their former attorneys for tenant harassment and other causes of action arising out of allegedly illegal entries into the tenant’s apartment. After new counsel began representing the landlords, the tenant amended her pleadings to name the landlords’ new attorney as a defendant, alleging that he had aided and abetted their wrongful entries. The attorney filed an anti-SLAPP motion (special motion to strike under Code of Civil Procedure section 425.16), arguing that the only activities in which he had engaged were representing his clients, which he claimed was protected conduct. The trial court denied the motion, concluding that the tenant’s action did not arise out of protected activity, but instead that the gravamen of the allegations centered on the underlying wrongful intrusions. So, the trial court concluded that the tenant had established a probability of prevailing on the merits of her complaint, and it granted the tenant’s motion for sanctions because the attorney’s motion was frivolous.

The Court of Appeal reversed and remanded the matter. The tenant’s cause of action against the attorney arose out of protected activity, because the only actions that the tenant alleged that the attorney took were communicative acts representing clients concerning the litigation. Specifically, he gave advice to his clients and wrote a letter to opposing counsel. Such acts are protected petitioning activities. Bare allegations of aiding and abetting or conspiracy do not suffice to remove protection afforded for those acts.

Because the attorney’s communicative acts were within the scope of the litigation privilege codified in Civil Code section 47, subdivision (b), the tenant could not demonstrate a probability of prevailing on the merits of her cause of action. The Court of Appeal refused to infer a conspiracy from the mere existence of an attorney-client relationship. And because the motion should have been granted, it was not frivolous, and sanctions against the attorney were inappropriate. Rather, the attorney was entitled to recover his fees as the prevailing party on the anti-SLAPP motion.
16.4.5 Los Angeles County Board of Supervisors v. Superior Court (2016) 2016 Cal.LEXIS 9629; WL 7473802 — Supreme Court of California (December 29, 2016)

**Issue:**
Are an outside law firm’s invoices for work on currently pending litigation within the scope of the attorney-client privilege and thus exempt from disclosure under the California Public Records Act?

**Analysis:**
Yes, but. In a 4-3 split, the Supreme Court held that the attorney-client privilege does not **categorically** shield everything in a law firm’s invoice from Public Records Act disclosure. Rather, the contents of an invoice are privileged only if they either communicated information for the purpose of legal consultation or risk exposing information that was communicated for such a purpose. Invoices for work in pending and active legal matters are so closely related to attorney-client communications that they implicate the core of the privilege and thus are exempt from disclosure, at least while the matters are pending and active.

The ACLU sought invoices showing how much outside law firms had billed the County in connection with nine different lawsuits alleging excessive force against jail inmates. The County agreed to produce invoices related to three lawsuits that were no longer pending—with attorney-client privileged and work product information redacted. But the County declined to provide invoices for the six remaining lawsuits, which were still pending—claiming privilege under the Evidence Code and a disclosure exemption under the Government Code.

A trial court ordered release of the billing statements, allowing redaction of legal opinions or advice or a lawyer’s mental impressions or theories of a case. A court of appeal reversed and, relying on Costco Wholesale Corporation v. Superior Court (2009) 47 Cal.4th 725, held that the invoices constituted information the law firms transmitted to the County in the course of the representation in confidence and thus were confidential communications within the meaning of the Evidence Code.

In interpreting the Evidence Code provision, the majority held that the attorney-client privilege does not apply to every communication between lawyer and client. “Rather, the heartland of the privilege protects those communications that bear some relationship to the attorney’s provision of legal consultation.” Invoices for legal services are generally not intended for legal consultation; rather, their purpose is to bill the client and, “to the extent they have no other purpose or effect, they fall outside the scope of an attorney’s professional representation.”

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But when it comes to pending matters, “the privilege encompasses everything in an invoice, including
the amount of aggregate fees . . . because, even though the amount of money paid for legal services
is generally not privileged, an invoice that shows a sudden uptick in spending ‘might very well reveal
much of [a government agency]’s investigative efforts and trial strategy.’”

That would not necessarily be the case with matters concluded long ago. There, the privilege would turn
on whether those amounts reveal anything about legal consultation.

The majority cited, among other authority, a provision of the State Bar Act. Business and Professions
Code section 6149 makes fee agreements confidential communications within the meaning of the
Evidence Code and Business and Professions Code section 6068, subdivision (e)(1), but does not
expressly provide for similar treatment of billing statements.

The dissent argued that the majority had misread the Court’s Costco holding that everything in a
confidential communication between lawyer and client—facts as well as legal advice—was privileged;
had added an impermissible condition to the Evidence Code; and had reached the untenable conclusion
that a communication once privileged—an invoice for an active matter—could lose its privileged status
with the passage of time.

Comments:
If this remains a “one-off” decision, limited to the amount of fees in lawyers’ invoices, its application
may be narrow. If, however, lower courts see it as an opening to carve further exceptions in the
attorney-client privilege, or weaken or disregard the core holding of Costco, then the privilege may be in
for a rough ride. It will depend on future opinions what “not categorically privileged” means in light of
the facts presented. One caveat for lawyers is to weave “reasoning” and “advice” into the descriptions on
billing invoices to allow the client to invoke the privilege.

1 Justice Cuéllar wrote the majority opinion, joined by Justices Chin, Liu and Kruger.
2 Justice Werdegar, joined by the Chief Justice and Justice Corrigan.
16.4.6 State Bar of California Formal Opinion No. 2016-196

Issue:
When is “blogging” by a lawyer a “communication,” subject to the requirements and restrictions of the rules of Professional Conduct and State Bar Act provisions regulating lawyer advertising?

Analysis:
A lawyer’s “blog” may be a communication subject to the advertising requirements and restrictions if it expresses the lawyer’s availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services the lawyer offers, detailed descriptions of case results, or both. A blog that is an integrated part of a lawyer’s or law firm’s professional website will be a communication subject to the advertising rules to the same extent as the website of which it is a part.

A “stand-alone” blog—one that exists independently of any website, even if it discusses legal topics within the lawyer’s area of practice—is not a communication subject to the advertising rules unless it directly or implicitly expresses the lawyer’s availability for professional employment. A stand-alone blog on a non-legal topic is not a communication subject to those rules and restrictions, even if it has a link to the lawyer’s professional website.

The opinion gives five examples of lawyer blogs and analyzes each to determine whether it is a “communication” for purposes of the advertising rules. The opinion parallels Formal Opinion No. 2012-186, which addressed postings on social media and the advertising rules.