

3 Decisions You Need To Read About Bills And Privilege

By **Andrew Strickler**

Law360, New York (March 29, 2017, 9:59 PM EDT) -- It's generally understood that the bills a lawyer sends a client are privileged communications and can't be pried open through discovery.

After all, legal invoices bear evidence of the client's motives and the attorney's decision-making, or even show how far a lawyer went down an ultimately abandoned strategic path — the kind of bedrock issues for which the attorney-client privilege exists in the first place. Moreover, few would claim that lawyers getting paid isn't an essential part of delivering the very services that trigger the protection.

"I've always looked at invoices as communications covered by the privilege, and maybe even more today than in years past," said litigator John Sullivan of Long & Levit LLP. "Our invoices are pretty detailed because a sophisticated client or an insurance company, if you just say 'legal services rendered, 25 hours,' they're not paying it."

But while most courts are predictably skeptical of arguments that a litigant's legal bills should be discoverable, there have been notable exceptions.

Here are three recent state supreme court cases showing just how far the privilege can or cannot go when it comes to legal bills:

California: No 'Categorical' Protection for Firm Bills

In the most controversial bill privilege decision in recent years, the California high court in December ruled that the privilege does not "categorically" shield everything in a legal invoice from disclosure under the state's open records law.

The decision, stemming from an American Civil Liberties Union public records request to the County of Los Angeles, acknowledged that invoices for pending matters are so closely related to other attorney-client communications that they "implicate the heartland of the privilege."

But the 4-3 majority opinion found considerable leeway for disclosure of bills from closed cases, which the court said contain "little or nothing" about the legal advice itself.

"Invoices for legal services are generally not communicated for the purpose of legal consultation," said Justice Mariano-Florentino Cuéllar. "And, to the extent they have no other purpose or effect, they fall outside the scope of an attorney's professional representation."

The decision in favor of the ACLU reversed a Court of Appeal decision that firm invoices sent to the county for excessive force suits brought by jail inmates are exempt from disclosure.

Tony Parascandola, a product liability and commercial litigator at Bowman and Brooke LLP in Los Angeles, called the majority opinion misinformed on the level of detail included in most litigation invoices.

And the broad language used by the majority, he argued, was a potential threat to the “sacrosanct” privilege for invoices for cases outside the context of open records disputes.

“Legal strategy is inevitably revealed in your bills ... that are supposed to give the client a very valuable understanding of how you’re approaching their case,” he said. “If you suddenly have to hand that over in discovery, you’re clearly breaching the attorney-client privilege, and that’s very concerning.”

The case is Los Angeles County Board of Supervisors et al. v. ACLU of Southern California et al., case number S226645, in the Supreme Court of California.

Florida: When an Insurer’s Legal Bills are Key to a Plaintiff’s Fee Claim

Florida’s high court backed a lower court’s call that bills generated by an insurance company’s counsel were relevant to a question of the reasonableness of the time the company expended on a claim.

The March 2016 decision sprang from an uninsured motorist suit against Geico that resulted in a \$369,000 verdict for plaintiff Kelly Paton and a contested request for attorneys’ fees. As part of the fee fight, Paton also sought comprehensive discovery in her opponent’s billing records.

A district court later quashed a circuit court decision that had allowed Paton access to invoices from which some information deemed privileged was redacted. The higher court reasoned that the opposing counsel’s bills were only sometimes relevant to a fee claim and, even when relevant, should still enjoy broad protection.

On appeal, the state Supreme Court reversed, backing the notion that the time opposing counsel spent defending the case was relevant to the issue of case complexity, a key factor in the plaintiff’s fee claim. The court also concluded Paton had been held to an overly high standard for showing the relevance of the billing information at the district court.

The sought-after records in their entirety “are not privileged, and where the trial court specifically states that any privileged information may be redacted, the plaintiff should not be required to make an additional special showing to obtain the remaining relevant, nonprivileged information,” the court said. “Additionally, even if the amount of time spent defending a claim was privileged, this information would be available only from the defendant insurance company.”

The case is Kelly Paton v. Geico General Insurance Co, case number SC14-282, in the Florida Supreme Court.

Pennsylvania: State Client Identities May Be Open Records

Considering the tension between the confidentiality of legal bills and a state open records law,

the Pennsylvania Supreme Court cracked the privilege barrier enough to allow the names of Senate employees whose legal work was paid for by taxpayers to be revealed.

In a 2013 appeal brought by an Associated Press reporter, the court ruled that under the state's so-called Right-to-Know law, names should not have been blacked out from firm invoices related to work for state employees. The reason: Revealing the client identities would not reveal privileged information or discourage "open communication between attorney and client," the court said.

The reporter, Marc Levy, had requested Senate invoice records relating to Sen. Robert Mellow, who was later charged in a corruption case, and Democratic caucus staffers. A Senate officer supplied Levy with more than 100 pages of firm invoices showing attorney initials, dates and hours worked, and fees charged. But large blocks of text had also been redacted, including client names.

The Senate argued the redactions were necessary to protect attorney-client privileged information. Some redacted information also fell under the work-product, grand jury secrecy and criminal investigation exceptions.

The Supreme Court, affirming an en banc appellate panel decision, agreed that privilege applied in cases where divulging a client's identity would disclose legal advice or otherwise confidential communications. However, because some text related to the specific nature of representation had been previously redacted, there had been no basis for additional redactions of clients' names.

"Application of the exception [to privilege] ... will involve case specific determinations of whether revealing the otherwise nonprivileged identity will result in the disclosure of privileged information based upon what has been previously disclosed," the court said.

The case is Marc Levy v. Senate of Pennsylvania, case number 44 MAP 2012, in the Supreme Court of Pennsylvania.

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