Johnson v. Department of Transportation
2025 DJDAR 2274
(Mar. 17, 2025, No. C099319)

An employee's disclosure of an email to the claimant did not waive attorney-client privilege under Evid. Code, §§ 912, subd. (a), 953, because the employee lacked authority to waive it, and the agency did not fail to use reasonable means to preserve confidentiality.

FACTS/PROCEDURE

Plaintiff Christian L. Johnson sued his employer, defendant California Department of Transportation (Caltrans), based on claims arising out of his employment. While the suit was pending, Paul Brown, an attorney for Caltrans, sent an email about the litigation (the Brown email) to Nicolas Duncan, Johnson's supervisor. Duncan sent an image of the email to Johnson, who shared it with his attorney, John Shepardson. Johnson and Shepardson then shared the email with several retained experts and other individuals.

After extensive meet-and-confer efforts, Caltrans sought a protective order on the ground that the email was covered by the attorney-client privilege. The trial court entered the order. The trial court issued a ruling which concluded that Caltrans had made a showing that the Brown email was covered by the attorney-client privilege. Citing *Upjohn Co. v. United States* (1981) 449 U.S. 383,391, the court determined that the email to Duncan was privileged because its dominant purpose was to obtain relevant information from Duncan and prepare Caltrans's defense in the case. The email was confidential, as indicated by the confidentiality warning at the end. And Caltrans had not waived the privilege through disclosure, delay in bringing the motion, or by other means.

In the months that followed, the parties engaged in a lengthy dispute concerning Johnson's and Shepardson's compliance with the protective order's terms. Eventually, Caltrans filed a motion to enforce the order and later a motion to disqualify Shepardson and three retained experts.

On appeal, Johnson challenges the trial court's disqualification order. Among other arguments, he claims that the Brown email was not protected by the attorney-client privilege, Caltrans waived any privilege through undue delay, and the court abused its discretion in ordering the drastic remedy of disqualification.

HOLDING/DISCUSSION

The court found no merit in Johnson's arguments and affirmed the order. Corporate clients and public entities can claim attorney-client privilege. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*); *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370; see Evid. Code, § 953.) Attorney communications with agents and employees of such entities may be covered by the privilege. (*Upjohn Co. v. United States, supra*, 449 U.S. at pp. 391–393. "[T]o determine whether a communication is privileged, the focus of the inquiry is the dominant purpose of the relationship between the parties to the communication." (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 51.)

The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. Once that party establishes facts necessary to support a prima facie claim of

privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Costco*, *supra*, 47 Cal.4th at p. 733.)

In this case, the trial court concluded that the Brown email was privileged because Brown was an attorney representing Caltrans, the email involved legal advice or information, and the nature of the relationship between Brown and Duncan was that of a Caltrans attorney obtaining information relevant to litigation from a Caltrans employee. Substantial evidence supports these determinations. It is undisputed that Brown was an attorney for Caltrans. Brown stated that he sent the email to investigate Johnson's claims and defend Caltrans in that litigation. Brown also said that he intended his email to be privileged and confidential. The email bore a confidentiality notice. And the only relationship between Brown and Duncan stemmed from Brown's need to defend his client in litigation brought by one of Duncan's supervisees. These facts satisfied Caltrans's prima facie burden of showing the communication was made in the course of an attorney-client relationship.

The burden then shifted to Johnson to show that the Brown email was not confidential or was otherwise unprivileged. Johnson claims that the "dominant purpose" of the email was not to advance Caltrans's legal interests but was instead to impugn him. The trial court rejected this argument, reasoning that the claim was "completely unsupported by any evidence." It concluded that the more likely explanation was that Brown intended to obtain "relevant information from Duncan." The trial court had the discretion to resolve this factual dispute, and the record amply supports its finding.

Johnson additionally argues that communications with Duncan were not covered by the attorney-client privilege because Duncan was only a low-level employee and Caltrans could not unilaterally create an attorney-client relationship. The court of appeals referred to the Supreme Court in *Upjohn*, which explained that it is important for corporate lawyers to be able to exchange information with lower-level employees to adequately represent their corporate clients. (*Upjohn Co. v. United States, supra*, 449 U.S. at pp. 391–393.)

In the case of a corporation, the ability to waive the privilege "belongs to corporate management and is normally exercised by the corporation's officers and directors." (*Melendrez v. Superior Court* (2013) 215 Cal.App.4th 1343, 1353–1354. "The privilege is not waived when the client's agent discloses a privileged communication without the client's authorization." (*DP Pham LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 668.)

Duncan's disclosure of the email to Johnson did not waive the privilege. As noted above, the privilege holder was Caltrans, as represented by its management. Nothing suggests Duncan fell within this group. Nor is there any evidence that Caltrans authorized Duncan to disclose the email. On the contrary, contemporaneous communications from Caltrans's counsel indicated that Duncan did "not have the authority to waive attorney-client privilege on behalf of [Caltrans]."

Rule 4.4 of the California State Bar Rules of Professional Conduct, provides:

"Where it is reasonably apparent to a lawyer who receives a writing relating to a lawyer's representation of a client that the writing was inadvertently sent or produced, and the lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall: [¶] (a) refrain from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and [¶] (b) promptly notify the sender."

The comments to the rule further state, "If a lawyer determines this rule applies to a transmitted writing, the lawyer should return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal." (Rules Prof. Conduct, rule 4.4, com. [1].)