

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 774 (Hertzberg)
Version: March 3, 2021
Hearing Date: April 6, 2021
Fiscal: No
Urgency: No
CK

SUBJECT

Lawyer-client privilege: Department of Fair Employment and Housing

DIGEST

This bill clarifies that the lawyer-client privilege held by the Department of Fair Employment and Housing applies to confidential communications between Department of Fair Employment and Housing attorneys and complainants or other aggrieved persons, as specified.

EXECUTIVE SUMMARY

The lawyer-client privileges provides that a client has the privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and a lawyer. This ensures open and honest communications between clients and lawyers. The Department of Fair Employment and Housing (DFEH) is responsible for receiving, investigating, reconciling, mediating, and prosecuting complaints alleging unlawful housing and employment discrimination and other civil rights violations. Generally, DFEH attorneys prosecute cases in the name of DFEH on behalf of the complainant or aggrieved person, who are the real party in interest.

A recent California appellate court opinion ruled that the attorney-client privilege does not apply to communications between DFEH and complainants. This bill abrogates that holding in part and clarifies that the lawyer-client privilege that exists between DFEH and its attorneys applies to confidential communications between DFEH lawyers and a complainant or other aggrieved person. It further makes clear that DFEH is the holder of the relevant privilege and that the complainant does not have an attorney-client relationship with DFEH. This is declaratory of existing law.

The bill is author sponsored. It is supported by Disability Rights Education & Defense Fund and Public Law Center. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes, pursuant to the California Fair Employment and Housing Act (FEHA), DFEH in the Business, Consumer Services, and Housing Agency. (Gov. Code § 12901.)
- 2) Provides that no person has a privilege to refuse to be a witness; to refuse to disclose any matter or to refuse to produce any writing, object, or other thing, or prevent another person from the same, unless otherwise provided by statute. (Evid. Code § 911.)
- 3) Governs the admissibility of evidence in court proceedings and generally provides a privilege to refuse to testify or otherwise disclose confidential communications made in the course of certain relationships. (Evid. Code §§ 954, 966, 980, 994, 1014, 1033, 1034, 1035.8, 1037.5, 1038.)
- 4) Establishes the lawyer-client privilege, where a client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and a lawyer if the privilege is claimed by the holder of the privilege; a person who is authorized to claim the privilege by the holder of the privilege; or the person who was the lawyer except where no holder exists or the holder instructs otherwise. (Evid. Code § 954.) The client is the holder of the privilege, as specified. (Evid. Code § 953.)
- 5) Defines a “confidential communication between client and lawyer” to mean information transmitted between a client and their lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Evid. Code § 952.)
- 6) Provides that the right of a person to claim specified privileges is waived with respect to a protected communication if the holder of the privilege has disclosed a significant part of that communication or consented to disclosure, without coercion. Existing law provides that a disclosure does not constitute a waiver where it was reasonably necessary to accomplish the purposes for which the lawyer was consulted. (Evid. Code § 912(a), (d).)

- 7) Provides that if two or more persons are joint holders of a privilege, a waiver of a right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the spousal privilege, the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege. (Evid. Code § 912(b).)
- 8) Provides that if a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of a recognized privileged relation, 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 that the communication was not confidential. A communication does not lose its privileged character for the sole reason that it was communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication. (Evid. Code § 917.)

This bill:

- 1) Provides that the lawyer-client privilege, where DFEH is the holder, applies to confidential communications between a lawyer of DFEH and a complainant who files a complaint with DFEH or another person aggrieved by alleged discriminatory practices on whose behalf a complaint is filed.
- 2) States its purpose is only to protect the confidentiality of communications between DFEH's lawyers and complainants or other aggrieved persons. It makes explicit that it does not establish a fiduciary, attorney-client relationship between a DFEH lawyer and a complainant or aggrieved person, nor does it limit DFEH's own rights or its independent authority over how it receives, investigates, conciliates, mediates, or prosecutes complaints.
- 3) Asserts that it is declarative of, and clarifies, existing law and provides that it applies retroactively.

COMMENTS

1. Privileging confidential communications

An evidentiary privilege permits an otherwise competent witness to refuse to testify and/or prevent another from testifying. Privileges are policy exclusions, unrelated to the reliability of the information involved, which are granted because it is considered more important to keep that information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding.

For example, to protect the lawyer-client relationship, it is necessary to prevent disclosure of confidential communications made in the course of that relationship. (Comments to Evid. Code § 910.) Whereas privileges of a witness under the Federal Rules of Evidence are governed by the principles of common law as interpreted by United States district courts in light of “reason and experience,” the only privileges that are recognized in California are those statutory privileges expressly codified in the Evidence Code. (*See* Fed. Rules of Evid., Rule 501; Evid. Code § 911.)

To date, California has codified numerous evidentiary privileges, recognizing the need to protect the confidentiality of certain communications. Among these are: the lawyer-client privilege, lawyer referral service-client privilege, spousal privilege, confidential marital communications privilege, physician-patient privilege, psychotherapist-patient privilege, clergyman-penitent privilege, sexual assault counselor-victim privilege, domestic violence counselor-victim privilege, and human trafficking caseworker-victim privilege. Yet other statutory privileges protect official information acquired in confidence by a public employee and the identity of informants, protect persons from having to reveal their votes in public elections, and protect against disclosure of trade secrets. (Evid. Code § 930 et seq.)

The lawyer-client privileges provides that a client has the privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and a lawyer. (Evid. Code § 954.) A “confidential communication between client and lawyer” is defined as:

information transmitted between a client and [their] lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

(Evid. Code § 952.) The privilege can be claimed by the client who is the holder of the privilege; a person who is authorized to claim the privilege by the holder of the privilege; or the person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if the lawyer is otherwise instructed by a person authorized to permit disclosure.

2. DFEH enforcement of Californians' civil rights

FEHA states the policy of California:

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

(Gov. Code § 12920.) Charged with effectuating this policy is DFEH. Among a multitude of duties, DFEH is responsible for receiving, investigating, reconciling, mediating, and prosecuting complaints alleging unlawful housing and employment discrimination and other civil rights violations. (Gov. Code § 12930.) Generally, DFEH will file these civil actions in the name of the department, on behalf of the aggrieved person as a real party in interest. (*See e.g.*, Gov. Code §§ 12981, 12965.) The aggrieved person may participate as a party to any civil action brought by DFEH and be represented by their own counsel. (*Ibid.*)

This bill deals with confidential communications between aggrieved persons that file a complaint, or on whose behalf a complaint is filed, and DFEH attorneys. It clarifies that such communications are protected by the attorney-client privilege that exists between DFEH and its lawyers.

This issue was recently addressed in *Wood v. Superior Court* (2020) 46 Cal.App.5th 562, a case prompting the need for the clarification provided by this bill. At issue was an email

between Wood and DFEH lawyers during the latter's investigation of a complaint Wood made against the defendant, Crunch. The issue presented to the court was whether the email was protected by the attorney-client privilege. The court concluded that no such privilege attached.

Wood's arguments and the court's decision largely focused on whether Wood established the requisite attorney-client relationship with DFEH for the privilege to apply, arguing that she was seeking legal advice and that DFEH was representing her interests and therefore the privilege should apply. The court was unpersuaded. Wood also cited to analogous federal law, where courts have found the privilege applies for communications between EEOC lawyers and complainants even though no attorney-client relationship exists. (*See e.g., United States EEOC v. Pioneer Hotel, Inc.* (D.Nev. Oct. 6, 2014, No. 2:11-cv-01588-LRH-GWF) 2014 U.S. Dist. LEXIS 142735, at *15-16 [citing various federal court decisions finding confidential communications between EEOC attorneys and complainants protected despite lack of an attorney-client relationship].)

The court ultimately ruled: "Wood had no attorney-client relationship with DFEH lawyers. They represented DFEH, not Wood, and her discussion of legal matters with them is insufficient to create an attorney-client relationship under the circumstances here. Wood has not shown the trial court erred by ordering her to produce the e-mail in question." (*Wood*, 46 Cal.App.5th at 588.)

Many believe that the Wood case was improperly decided and that communications between DFEH lawyers and complainants are covered by the lawyer-client privilege. Specifically, that such communications are covered by the attorney-client relationship that exists between DFEH and its own lawyers.

"It is well settled that a public entity enjoys an attorney-client relationship with its lawyers and the attorney-client privilege protects communications made in the course of that relationship." (*Wood*, 46 Cal.App.5th at 576.) While the communications at issue here are between DFEH lawyers and the complainant, admittedly not DFEH's client, California privilege law extends such privilege to communications when they are intended to be confidential and when disclosure of the communication is reasonably necessary to further the interests of the litigant while also making clear that these confidential communications do not constitute a waiver of that privilege. (Evid. Code §§ 912(d), 952.)

Section 952 of the Evidence Code defines "confidential communication between client and lawyer" as:

information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation *or those to whom disclosure is*

reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (emphasis added.)

Section 912 provides that privilege is not waived when a confidential disclosure of a privileged communication is made “when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted.”

The official Law Revision Commission Comments to Sections 952 and 912 elaborate. The comments to Section 952 indicate that privilege can be maintained when the client and attorney are meeting with another party “in regard to a matter of joint concern.” The comments to Section 912 assert that the relevant provision was “designed to maintain the confidentiality of communications in certain situations where the communications are disclosed to others in the course of accomplishing the purpose for which the lawyer . . . was consulted.” This forms the basis for the common-interest doctrine, which provides that, “in limited situations, the alignment of the parties’ common interests may mean disclosures between them are reasonably necessary to accomplish the purposes for which they are consulting counsel.” (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 916; *see also STI Outdoor v. Superior Court* (2001) 91 Cal.App.4th 334, 341 [finding disclosure of privileged documents was “reasonably necessary to further the interests of both parties in finalizing negotiations for the license agreement” and finding a valid assertion of attorney-client privilege].)

DFEH lawyers are retained to carry out the public policy of the state, namely protecting the civil rights of all Californians. In specific actions, that is carried out by redressing the wrongs of specific aggrieved persons who file complaints with DFEH. When investigating and prosecuting actions pursuant to FEHA based on the complaint of an aggrieved person, there is an intimate *alignment* of interests between DFEH and the complainant such that confidential communications between them are *reasonably necessary* to accomplish the purposes for which DFEH secures counsel and to address a matter of *joint concern*. Courts have asserted that “parties aligned on the same side in an investigation or litigation may, in some circumstances, share privileged documents without waiving the attorney-client privilege.” (*McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1238.) Not only are they aligned in interests, but the underlying statutes also explicitly state that DFEH’s actions are brought “in the name of [DFEH] on behalf of the person claiming to be aggrieved.” (Gov. Code § 12965.)

The author posits: “Section 952 extends DFEH’s own attorney-client privilege to its attorneys’ communications with complainants because these communications further the interests of DFEH attorneys’ client – the department – and are not merely reasonably necessary, but essential, to their representation of the department in fulfilling its duties under the FEHA.”

The need to maintain the privilege of such communications cannot be understated. Public Law Center, writing in support, makes the case:

Protecting the confidentiality of communications between DFEH complainants and attorneys is essential to the agency's efforts to litigate effectively on behalf of Californians victim to discrimination. Without the benefit of privileged communication, victims are less likely to come forward in the first place, and even if they do, they are disadvantaged in a civil action where communications between the defendant and defense attorney enjoy absolute attorney-client privilege. The potential chilling effect is especially acute for the many people who endure discrimination but lack means to obtain private counsel.

In its amicus curiae letter urging the California Supreme Court to review the decision in *Wood*, the California Employment Lawyers Association wrote:

The DFEH directly serves—and litigates claims on behalf of—California workers who lack the financial resources to retain private counsel. A California worker should be able to seek advice from and provide confidential information to a lawyer at the DFEH who is prosecuting their claim without fear that such confidences will be disclosed to the employer during litigation. The contrary rule adopted by the Court of Appeal disincentivizes employees from consulting with the DFEH and weakens civil rights enforcement in this State.

Public Counsel also wrote in support of the petition for review:

The lower court's *revocation* of privilege from communications between the DFEH and those whose interests it represents impedes access to justice by raising a barrier between legal service providers and DFEH attorneys. Public Counsel relies on collaboration with DFEH's legal team to expand our capacity. This decision drives a wedge between service providers and the DFEH, and effectively renders this cooperation impossible. The removal of privilege between Public Counsel's client and the DFEH creates a reality where neither our attorneys nor DFEH's counsel can speak frankly, for fear of compromising client privacy. The resulting information gap will render DFEH unable to wholly prepare for litigation. Application of the attorney-client privilege to communications between complainants and DFEH's counsel is crucial to ensure access to justice for a greater number of Californians, and is "warranted and necessary, as it promotes full and candid discourse with a public agency whose purpose is to protect the public from illegal activity." (emphasis added.)

This bill partially abrogates the holding in *Wood* and clarifies that the attorney-client privilege applies to communications between DFEH attorneys and aggrieved persons. The bill makes clear that the holder of the privilege is DFEH rather than the aggrieved person communicating with them, as the relevant attorney-client relationship is between DFEH and its own attorneys.

To be clear, no new privilege is being established by the bill, rather, the protective ambit of the existing privilege between DFEH and its lawyers over these confidential communications between these specific parties is being clearly defined, given the contrary holding in *Wood*. The bill explicitly states that it is declaratory of, and clarifies, existing law. It also, perhaps unnecessarily, states that it applies retroactively. Given this is the state of existing law, such a provision is likely superfluous.

SUPPORT

Disability Rights Education & Defense Fund
Public Law Center

OPPOSITION

None known

RELATED LEGISLATION

Prior Legislation:

AB 418 (Kalra, 2019) would have established an evidentiary privilege from disclosure for communications between a union agent and a represented employee or represented former employee. This bill died on the Senate Inactive file.

AB 1735 (Bauer-Kahan, Ch. 197, Stats. 2019) amended the human trafficking caseworker privilege in various ways, including changes to definitions, the scope of the privilege, and the parties covered.

AB 1290 (Oberholte, Ch. 475, Stats. 2018) specifies, for purposes of the lawyer-client privilege, that if a guardian or conservator has an actual or apparent conflict of interest with the client, then the guardian or conservator does not hold the privilege.
