

SENATE THIRD READING
SB 774 (Hertzberg)
As Amended March 3, 2021
Majority vote

SUMMARY

In order to facilitate the work of the Department of Fair Employment and Housing (DFEH), this bill clarifies that the lawyer-client privilege applies to the confidential communications of the department's lawyers with complainants and other persons on whose behalf a complaint is filed.

Major Provisions

- 1) Provides that, subject to existing provisions of the Evidence Code dealing with privileges (specifically including Section 912, providing that disclosure of confidential communications to third parties does not waive a privilege under specified circumstances), the lawyer-client privilege applies to confidential communications between a lawyer of the Department of Fair Employment and Housing and a complainant who files a complaint with the department or another person aggrieved by alleged discriminatory practices on whose behalf a complaint is filed.
- 2) Provides that pursuant to existing law and subject to 3), below, a complainant or aggrieved party shall assert the privilege described in subdivision (a) on behalf of the department, but shall not assert the privilege over the objection of the department.
- 3) States that the complainant or aggrieved party shall not waive the lawyer-client privilege without the written consent of the department.
- 4) Provides that the purpose of 1), above, is to protect the confidentiality of communications between the department's lawyers and complainants or other aggrieved persons to further the department's enforcement of civil rights laws; confidentiality of such communications is reasonably necessary for the department to conduct its investigations and prosecutions under state and federal antidiscrimination laws, vigorously enforce such laws on behalf of the department and the public interest, and remedy, deter, and prevent violation of such laws, and for the department's lawyers to represent the department.
- 5) Clarifies the following about 1), above:
 - a) It does not establish a fiduciary attorney-client relationship between a department lawyer and a complainant or aggrieved person.
 - b) It does not limit the department's own rights under this article, or its independent authority over how it receives, investigates, conciliates, mediates, or prosecutes complaints or the effective remedies available for violations of state and federal civil rights laws.
- 6) Provides that the bill is declarative of, and clarifies, existing law and applies retroactively.
- 7) Defines, for purposes of this bill, "department" to mean the Department of Fair Employment and Housing.

COMMENTS

This bill seeks to clarify existing law to ensure that confidential communications between attorneys for DFEH and individuals who file administrative complaints through the agency (or on whose behalf complaints are filed) are protected by the attorney-client privilege. According to the author, this clarification is necessary to reassure complainants that the information they provide to DFEH will remain confidential, assist DFEH in conducting its investigations, and carry out the Legislature's intent that DFEH vigorously enforce the state's civil rights laws.

DFEH - Enforcing Californians' Civil Rights. The Fair Employment and Housing Act or FEHA, set forth in Government Code Section 12920 *et seq.*, states that the following is 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.

...

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. (Government Code Section 12920.)

FEHA makes DFEH responsible for, among other things, receiving, investigating, reconciling, mediating, and prosecuting complaints alleging unlawful housing and employment discrimination and other civil rights violations. (Government Code Section 12930.) Generally, DFEH files these civil actions in the name of the department, but on behalf of the aggrieved person as the real party in interest. (See e.g., Government Code Sections 12981, 12965.) The aggrieved person may participate as a party to any civil action brought by DFEH and may be represented by their own counsel. (*Ibid.*)

Evidentiary Privileges and the Lawyer-Client Privilege. An evidentiary privilege allows an otherwise competent witness to refuse to testify, prevent another person protected by the privilege from testifying, and object to the disclosure of privileged communications. Privileges are policy exclusions, unrelated to the reliability of the information involved, which are granted because, as a matter of public policy, it is considered more important to keep the information confidential than to require disclosure of the information, even though they may be relevant to the issues in a pending proceeding.

To encourage clients to have frank and open discussions with their attorneys, California law recognizes the attorney-client privilege (referred to as the "lawyer-client" privilege in the Evidence Code) and gives the client the right to 1) refuse to disclose confidential communications made between the attorney and the client; and 2) prevent another from

disclosing confidential communications made between the attorney and the client. (*People v. Meredith* (1981) 29 Cal.3d 682, 690.) Although the act of a party invoking the attorney-client privilege results in the withholding of information from the court, as a matter of public policy, the legal system allows for the privilege because it promotes adequate client-representation, and the enforcement of personal rights. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1206-07.)

The lawyer-client privilege 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. (Evidence Code Section 954.) The privilege can be asserted 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 the holder of the privilege or person who is authorized to act on the holder's behalf. (See (Evidence Code Sections 952 – 954.)

Wood v. Superior Court. The issue addressed by this bill – whether communications between DFEH and complainants or aggrieved persons is protected from disclosure by the attorney-client privilege – was recently addressed, at least to some extent, in *Wood v. Superior Court* (2020) 46 Cal.App.5th 562. In that case, Wood filed a complaint with DFEH because Crunch, a fitness club, refused to allow her to use the club's locker facilities that corresponded with her gender identity. At issue in that case was an email between Wood and DFEH lawyers sent during DFEH's investigation of Wood's complaint. The issue presented to the court was whether Wood (not DFEH) was compelled to produce the email, or whether the email was, as Wood alleged, protected by the attorney-client privilege. The court concluded that Wood was required to produce the email because it was not a privileged communication between Wood and her attorney; Wood did not have an attorney-client relationship with DFEH and therefore could not claim the attorney-client privilege. (*Id.* at 588.)

The author and supporters of this bill believe that the holding in *Wood* was incorrect and confusing because communications between DFEH lawyers and complainants are covered by the lawyer-client privilege, but not because of the relationship between Wood and DFEH. Instead, the communications are covered by the attorney-client privilege because of the relationship that exists between DFEH and its own lawyers. While the communications at issue in *Wood* were between DFEH lawyers and the complainant (admittedly not DFEH's client), California law extends the lawyer-client privilege to communications with third parties when those communications are intended to be confidential and disclosure of attorney-client communication is reasonably necessary to further the interests of the client, or accomplish the purpose for which the lawyer was consulted. ((Evidence Code Sections 912(d), 952.)

Why This Bill is Necessary. Despite the seemingly clear statutory and decisional law about the attorney-client privilege extending to confidential communications with third parties, the *Wood* case has been used as a cudgel against DFEH. According to the author, defendants in DFEH enforcement actions routinely cite *Wood* for the proposition that DFEH communications with complainants and aggrieved parties are never protected by the attorney-client privilege.

This bill seeks to clarify that confidential communications between attorneys for the DFEH and individuals who file administrative complaints through the agency (or on whose behalf complaints are filed) are protected by the attorney-client privilege. It does not, however, establish a new privilege, or create an attorney-client relationship between DFEH and complainants or

aggrieved persons. Rather, it seeks to make clear that the existing privilege between DFEH and its lawyers over these confidential communications between these specific parties is being clearly defined, given the confusing and problematic 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.

According to the Author

[P]eople alleging discrimination through DFEH are often deterred from sharing critical case details with DFEH attorneys, as any communication between the two parties can be obtained by the alleged wrongdoer. . . . By confirming that the attorney-client privilege applies to these communications, SB 774 restores balance to litigation involving DFEH, protects victims of discrimination, and bolsters California's commitment to ensuring civil rights for all.

Arguments in Support

Supporters of this bill observe that protecting the confidentiality of communications between DFEH complainants and attorneys is essential to assisting the agency's efforts to litigate effectively on behalf of Californian victims to discrimination. They observe that, without the benefit of privileged communication, victims are less likely to come forward to complain about workplace conditions and, and even if they do, they and DFEH would be disadvantaged in a civil action because the defendant would be able to obtain communication between DFEH and their clients that is assumed and intended by both DFEH and their clients to be protected by the attorney-client privilege.

For example, Western Center on Law and Poverty and the California Rural Legal Assistance Foundation, writing in a joint letter about their strong support of the bill, observe that without clarification of existing law to ensure that DFEH communications with complainants is protected by the attorney-client privilege, "[t]he potential chilling effect is especially acute for the many people who endure discrimination but lack means to obtain private counsel." Further, they note the following:

Our clients will lose a critical tool for access to justice if their conversations with DFEH, an agency committed to addressing civil rights violations, are discoverable. When our clients file discrimination complaints, they rely on a protected and confidential relationship with DFEH as they frequently share traumatic and emotional experiences of discrimination and harassment as well as sensitive information about the nature of their situation.

Arguments in Opposition

Opponents are concerned that the language of this bill may not adequately protect the rights of complainants and aggrieved parties.

These parties, who generally represent the interests of complainants or aggrieved parties and often litigate those parties' claims in cooperation with DFEH, contend that the legislation would bar complainants from disclosing any and all communications between themselves and DFEH attorneys. They worry that this limitation would also apply to disclosures that may be necessary to address the violation of a law or regulation (including but not limited to the California Code of Professional Conduct); unauthorized contacts made with represented aggrieved parties; and inappropriate communications that discourage aggrieved parties from retaining their own counsel or making their own individual or class claims, causing them to fail to exhaust administrative remedies or to timely make claims.

FISCAL COMMENTS

None

VOTES

SENATE FLOOR: 27-10-3

YES: Archuleta, Atkins, Becker, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Gonzalez, Hertzberg, Hueso, Hurtado, Kamlager, Laird, Leyva, McGuire, Min, Newman, Pan, Portantino, Roth, Rubio, Skinner, Umberg, Wieckowski, Wiener

NO: Bates, Borgeas, Dahle, Glazer, Grove, Jones, Melendez, Nielsen, Ochoa Bogh, Wilk

ABS, ABST OR NV: Allen, Limón, Stern

ASM JUDICIARY: 8-3-0

YES: Stone, Chau, Chiu, Lorena Gonzalez, Holden, Kalra, Maienschein, Reyes

NO: Gallagher, Davies, Kiley

UPDATED

VERSION: March 3, 2021

CONSULTANT: Alison Merrilees / JUD. / (916) 319-2334

FN: 0001047