

SENATE THIRD READING  
SB 774 (Hertzberg)  
As Amended September 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 and requires the complainants to assert the privilege on behalf of DFEH.

### Major Provisions

- 1) Provides that, for purposes of this bill, "department" and "client" mean the Department of Fair Employment and Housing.
- 2) Provides that, as used in the relevant portions of the Evidence Code, "confidential communication between client and lawyer" includes information transmitted between the department and its lawyers in the course of that relationship and in confidence by a means which, so far as the department is aware, discloses the information to no third persons other than those who are present to further the interest of the department 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, including, but not limited to, confidential information transmitted between a department lawyer and a complainant who files a complaint with the department or other person aggrieved by alleged discriminatory practices or other violations on whose behalf a complaint is filed, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.
- 3) Requires a complainant or aggrieved person to assert the privilege over confidential information transmitted between a department lawyer and a complainant or aggrieved person.
- 4) Prohibits, except as provided in 5), the complainant or aggrieved person from disclosing the confidential information described in 2), above, over the objection of the department unless the department has been given advance reasonable notice of at least 30 days, an opportunity to object, and a court finds that the interests of the complainant or aggrieved person in disclosure outweigh the department's interest in maintaining the confidentiality of the information and that the disclosure is not prevented by any other law, privilege, or doctrine, including, but not limited to, the attorney work product doctrine.
- 5) As an exception to 4), above, provides that a complainant or aggrieved person need not provide the department with notice of disclosure of confidential information transmitted between a department lawyer and the complainant or aggrieved person if disclosure of the confidential information is made to any government entity that has oversight over the department or its attorneys' conduct.
- 6) Prohibits the department from disclosing any confidential information transmitted from a complainant or aggrieved person to a department lawyer that would reveal the identity of the complainant or aggrieved person unless the complainant or aggrieved person consents; disclosure is required by law, court order, or a work-sharing agreement with another government agency; or the department consents to disclosure as part of an enforcement

action, including, but not limited to, an investigation or civil action, of the department or other government agency.

- 7) Provides that 2), above, is declarative of, and clarifies, existing law and that the bill applies retroactively.
- 8) Provides that the bill shall remain in effect only until January 1, 2027, and as of that date is repealed.

## 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.)

*This bill* does not 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*. It also authorizes (and requires) a complainant or aggrieved party to assert the privilege on behalf of DFEH. The bill explicitly states that it is declaratory of, and clarifies, existing law. It also, perhaps unnecessarily, states that it applies retroactively. The most recent amendments to the bill add a sunset provision to the bill so that its usefulness in DFEH investigations and prosecutions can be evaluated by the Legislature.

### **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**

The most recent amendments to this bill have removed all opposition.

## **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

### ASSEMBLY FLOOR: 59-18-2

**YES:** Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Bryan, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Cooley, Cooper, Daly, Frazier, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Lee, Levine, Low, Maienschein, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, O'Donnell, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Stone, Ting, Villapudua, Ward, Akilah Weber, Wicks, Wood, Rendon

**NO:** Bigelow, Chen, Choi, Cunningham, Davies, Flora, Fong, Gallagher, Kiley, Lackey, Mathis, Nguyen, Patterson, Seyarto, Smith, Valladares, Voepel, Waldron

**ABS, ABST OR NV:** Megan Dahle, Gray

## UPDATED

VERSION: September 3, 2021

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

FN: 0001759