
UNFINISHED BUSINESS

Bill No: SB 774
Author: Hertzberg (D)
Amended: 9/3/21
Vote: 21

SENATE JUDICIARY COMMITTEE: 9-2, 4/6/21

AYES: Umberg, Caballero, Durazo, Gonzalez, Hertzberg, Laird, Stern,
Wieckowski, Wiener

NOES: Borgeas, Jones

SENATE FLOOR: 27-10, 4/22/21

AYES: 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

NOES: Bates, Borgeas, Dahle, Glazer, Grove, Jones, Melendez, Nielsen, Ochoa
Bogh, Wilk

NO VOTE RECORDED: Allen, Limón, Stern

ASSEMBLY FLOOR: Not available

SUBJECT: Lawyer-client privilege: Department of Fair Employment and
Housing

SOURCE: Author

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

Assembly Amendments rework the bill’s provisions, place restrictions on when an aggrieved person can disclose such communications, and insert a sunset date of January 1, 2027.

ANALYSIS:

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 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. (Evid. Code § 917.)

This bill:

- 1) Clarifies that a “confidential communication between client and lawyer” includes information transmitted between DFEH 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 DFEH lawyer and a complainant who files a complaint 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. It asserts that this provision is declarative of, and clarifies, existing law and provides that it applies retroactively.
- 2) Requires, notwithstanding Section 954 of the Evidence Code, a complainant or aggrieved person to assert the privilege over confidential information transmitted between a DFEH lawyer and an aggrieved person. It further prohibits an aggrieved person from disclosing the information over the objection of DFEH unless DFEH has been given advance reasonable notice of at least 30 days, an opportunity to object, and a court finds that the interests of the aggrieved person in disclosure outweigh DFEH’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.
- 3) Provides that this notice is not required where disclosure is made to a government entity that has oversight over DFEH or its attorneys’ conduct.
- 4) Prohibits DFEH from disclosing any confidential information transmitted from an aggrieved person to a DFEH lawyer that would reveal the identity of the aggrieved person unless the person consents; disclosure is required by law, court order, or a work-sharing agreement with another government agency; or

DFEH consents to disclosure as part of an enforcement action, including an investigation or civil action, of DFEH or other government agency.

5) Remains in effect only until January 1, 2027, and as of that date is repealed.

Comments

Privileging Confidential Communications

An evidentiary privilege permits an otherwise competent witness to refuse to testify and prevent another from testifying. They are policy exclusions, unrelated to the reliability of the information involved, and 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.

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.) 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, except as specified.

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.

...

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 Equal Employment Opportunity Commission (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 federal 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 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.”

This bill partially abrogates the holding in *Wood* and clarifies that the attorney-client privilege applies to confidential communications between DFEH attorneys and specified aggrieved persons. To be clear, no new privilege is being established by this 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*. This bill explicitly states that the provisions extending this privilege to such communications 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. The bill also requires an aggrieved person to assert the privilege over such communications and restricts the ability of the aggrieved person to disclose the information over the objection of DFEH, except as specified. The bill provides aggrieved persons a process, after providing DFEH notice and an opportunity to object, to disclose such information over the objection of DFEH. The bill sunsets January 1, 2027.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 9/8/21)

California Rural Legal Assistance Foundation
Centro Legal de la Raza
Disability Rights Education & Defense Fund
National Center for Lesbian Rights
Public Law Center
Western Center on Law and Poverty

OPPOSITION: (Verified 9/8/21)

None received

ARGUMENTS IN SUPPORT: The Public Law Center writes: “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.”

Prepared by: Christian Kurpiewski / JUD. / (916) 651-4113
1/5/22 15:49:41

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