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## Recent Legal Developments in Attorney-Client Privilege

In recent months the U.S. Supreme Court, Ninth Circuit Court of Appeals, and California Supreme Court have issued **significant decisions interpreting the attorney-client privilege**.

*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4<sup>th</sup> 725

The **California Supreme Court** firmly upheld the privilege in a case involving an opinion letter prepared by Costco's attorneys relating to wage claims at issue in pending litigation. The Court held that the attorney's letter was entirely protected from disclosure, despite the fact that some information in the letter may have been discoverable through other means. California's highest court embraced the standard that the party seeking to uphold the privilege need only establish the confidential nature of the communication, and not "that its case will be harmed by disclosure." The Court concluded that the latter standard would require disclosure of the confidential communication, which would disrupt the confidential relationship and could even subject the privilege-holder to jail time for contempt should the privilege holder or her lawyer refuse. [Click here for the full opinion.](#)

*Mohawk Industries, Inc. v. Carpenter* (2009) 130 S.Ct. 599

Shortly after California's *Costco* decision, the **United States Supreme Court** issued its own unanimous opinion regarding a privilege-holder's rights. The Court found that there was no right for a litigant to make a collateral appeal of a disclosure order under 28 United States Code section 1291 in federal court, and concluded that post-judgment appeals generally are sufficient to protect the privilege. While federal litigants still can seek relief through a request for certification from the district court for an interlocutory appeal or a petition to the U.S. Court of Appeals for a writ of mandamus, such relief could come years after the information is forcibly disclosed. [Click here for the full opinion.](#)

*United States v. Ruehle* (9<sup>th</sup> Cir. 2009) 583 F.3d 600

Most significantly, the **U.S. Court of Appeals for the Ninth Circuit** issued a decision regarding the scope of the attorney-client privilege. *Ruehle* concerned statements made by a corporate CFO to the corporation's attorneys with the understanding that the attorneys would disclose the information to third-party auditors conducting an internal investigation of corporate stock option-granting practices. Because the CFO repeatedly admitted that he knew his statements to the lawyers would be conveyed to the auditors he had no expectation of confidentiality, and therefore the attorney-client privilege did not apply. Had Ruehle testified that he had an expectation of confidentiality, or that he thought the lawyers were representing him personally, the court's analysis likely would have reached a different result. The Ninth Circuit noted that contrary to California law, under federal common law the party asserting the privilege has the burden of establishing the confidential nature of the communication. This opinion is a cautionary tale about the hazards of representing a corporate entity in an investigative context. The attorney's communications with corporate constituents are not privileged when they are made for the purpose of providing information to auditors or other third parties for analysis. [Click here for the full opinion.](#)

These decisions illustrate how the standard of review and opportunity for immediate appeal of disclosure orders may depend on whether one is practicing in state or federal court. Regardless of these recent holdings, California Business and Professions Code section 6068(e) requires that all California-licensed attorneys "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

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