

AN ARBITRATOR'S POWERS ARE LIMITED

By Robert M. Heller

There are differences between arbitration and litigation: An arbitrator has no authority to order an *in camera* review of information protected by the attorney-client privilege, the absolute work-product doctrine or the conditional work-product doctrine. Only a judge has the power to conduct any sort of review, and then only on materials subject to the conditional work-product doctrine.

This article focuses on limits to an arbitrator's power when one of three privileges are asserted: (1) the attorney-client privilege, (2) the absolute work-product doctrine and (3) the conditional work-product doctrine. A strong understanding of this distinction can enable an attorney to enhance the cost-effectiveness of arbitration by eliminating any doubt regarding the procedures for ruling on claims of privilege. It can also help an attorney get the most "bang for the buck" from outside consultants by maximizing the use of such consultants while giving comfort to the client that such communications will not be disclosed to the arbitrator.

The key distinction between an arbitrator and a judge when faced with claims of privilege is that a judge can order an *in camera* inspection of information (in limited circumstances) whereas an arbitrator cannot. If a party in arbitration invokes the attorney-client privilege or the absolute work-product doctrine, an arbitrator is prohibited by California Evidence Code § 915(a) from requiring an *in camera* review of the documents to rule on the claim of privilege. If a party in arbitration asserts the conditional work-product doctrine, an arbitrator is prohibited by California Evidence Code § 915(b) from ordering an *in camera* inspection of the documents to rule on that claim of privilege as well.

The Attorney-Client Privilege and the Absolute Work-Product Doctrine

To understand these distinctions, it is useful to review the three types of privileges covered by this article. First, the *attorney-client privilege* protects an attorney's communications with a client regarding, among other things, case strategy and the attorney's advice to the client. California Evidence Code § 954. Second, the *absolute work-product doctrine* protects all communications directly reflecting the attorney's impressions, conclusions, opinions or theories about the case. California Code of Civil Procedure § 2018.030(a).

Both the protection of the attorney-client privilege and the attorney work-product doctrine are "absolute." Furthermore, the communications are protected even if conducted in the presence of third parties (such as experts or consultants), if the purpose of the third parties' presence is to further the interests of the client. California Evidence Code § 952.

The Conditional Work-Product Doctrine

The *conditional work-product doctrine*, on the other hand, is not an “absolute” protection. The conditional work-product doctrine protects attorney work-product that doesn’t expressly contain the attorney’s impressions and opinions of the case. Under the conditional work-product doctrine, information is not discoverable unless a court determines that denial of discovery will unfairly prejudice the party seeking discovery. California Code of Civil Procedure § 2018.030(b).

The important distinction between the conditional and the absolute protections is the need for a court to rule on the issue of prejudice. This is where California law specifically limits the powers of an arbitrator as compared to a judge.

California Evidence Code Section 915

California Evidence Code § 915(a) expressly prohibits the disclosure of privileged information when an adversary challenges a claim of attorney-client privilege or the absolute work-product doctrine. California courts have held that a party claiming either of these privileges is not required to waive the privilege by disclosing the information to assert the privileges.

California Evidence Code § 915(b) provides a procedure by which a judge – not an arbitrator – can conduct an *in camera* review of documents claimed to be privileged under the conditional work-product doctrine. The plain language of § 915(b) reflects the Legislature’s intent to limit *in camera* inspection authority to judges only by using the words “judge” and “the court,” rather than the broader term “presiding officer.” The legislative history of § 915(b) also supports the view that only judges have the authority to order an *in camera* review of documents claimed to be protected by the conditional work-product doctrine.

Practical Applications

Privileges are important protections that enable clients to fully investigate the strengths and weaknesses of various approaches to resolving a legal dispute. If clients had to fear disclosure of their privileged communications, they might be prevented from fully exploring all useful resources for dispute resolution.

Empowering only judges – not arbitrators – to conduct *in camera* reviews of privileged documents is an important safeguard under California law. Understanding this protection may also be the key to winning your next case.

If you’d like more information or if you have questions about this article, please don’t hesitate to contact me at heller@rhellerlaw.com or by phone at (310) 286-1515.