

No. S 006168

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,)
)
 Appellant,)
)
 vs.)
)
 THE PUBLIC UTILITIES COMMISSION)
 OF THE STATE OF CALIFORNIA,)
)
 Appellee.)
)

No. S 006168
SUPREME COURT
FILED

NOV 1 1988

CLERK

DEPUTY

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF THE AMERICAN CORPORATE
COUNSEL ASSOCIATION IN SUPPORT OF APPELLANT

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October 28, 1988

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SOUTHERN CALIFORNIA GAS COMPANY,)	No. S 006168
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Appellant,)	
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APPLICATION OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION
TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND TO THE ASSOCIATE
JUSTICES OF THE CALIFORNIA SUPREME COURT:

I

Pursuant to Rule 14(b) of the California Rules of Court,
applicant American Corporate Counsel Association ("ACCA")
respectfully requests leave to file the attached amicus curiae
brief in support of the appellant Southern California Gas
Company ("SoCal").

II

The American Corporate Counsel Association is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of law as employees of corporations, partnerships, associations, and other organizations in the private sector. ACCA has approximately 7,400 members who are employed as corporate counsel by some 3,200 organizations. ACCA has three active chapters in California having approximately 1,000 members. ACCA is familiar with the questions involved in this case and the scope of their presentation. ACCA believes that the additional arguments tendered will materially assist the Court in the resolution of this case.

III

The issues presented by this case are of immediate concern to ACCA, as they seriously and adversely affect the ability of corporate counsel to provide legal services to their corporate clients. The decision of the California Public Utilities Commission ("PUC") to abrogate the attorney-client privilege in this case is contrary to this Court's holding in Mitchell v. Superior Court, 37 Cal. 3d 591 (1984), and would virtually eliminate the ability of inside counsel to assist companies

regulated by the PUC. It conflicts with the corporation's right to the assistance of counsel. The ultimate rationale of the decision, that the needs of a regulatory agency for information outweigh traditional protections afforded by the attorney-client privilege, sets a dangerous precedent which could be extended to almost all businesses.

IV

WHEREFORE, Applicant, the American Corporate Counsel Association, respectfully requests leave to file the accompanying amicus curiae brief in these proceedings.

DATED: October 28, 1988.

Respectfully submitted,

KENNETH C. BORNHOLDT
AMERICAN CORPORATE
COUNSEL ASSOCIATION

By 

Kenneth C. Bornholdt
Attorneys for Amicus Curiae
American Corporate Counsel
Association

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BRIEF OF AMICUS CURIAE
AMERICAN CORPORATE COUNSEL ASSOCIATION
IN SUPPORT OF APPELLANT

This case concerns the authority of the Public Utilities Commission of California ("PUC") to abrogate the rights of corporate clients to freely seek the assistance and advice of counsel by improperly restricting the attorney-client privilege. Amicus Curiae, the American Corporate Counsel Association, respectfully requests this Court to reverse the decision of the PUC.

INTEREST OF AMICUS CURIAE

The American Corporate Counsel Association ("ACCA") is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of law as employees of corporations,

partnerships, associations, and other organizations in the private sector. Founded in 1982, ACCA has approximately 7,400 members who are employed as corporate counsel by some 3,200 organizations. ACCA has three active chapters in California and has approximately 1,000 members in the State.

ACCA seeks to promote rules and procedures which allow corporate counsel to diligently manage their client's legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence and professionalism. The PUC's action to restrict the attorney-client privilege of companies regulated by the Commission is of great concern and importance to the members of ACCA and the clients they serve.

The challenged PUC decision improperly usurps the authority of the courts and the legislature to determine the scope and reach of the privilege. In addition, the decision, if allowed to stand, would severely, if not completely, limit the ability of corporate attorneys who counsel regulated industry clients to provide legal advice and otherwise effectively represent those clients.

SUMMARY OF ARGUMENT

More and more corporations rely upon their inside attorneys to provide them with legal counsel and handle litigation. Such reliance is predicated upon the same attorney-client relationship that would exist when using an outside law firm, and it cannot be maintained if the attorney-client privilege is rendered impotent.

The notion that administrative agencies need the authority to compel companies to disclose any and all documents in order to properly discharge their regulatory responsibilities is fundamentally flawed. It conflicts with basic jurisprudence with respect to the right to the assistance of counsel. Further, the contention that an implied waiver of attorney-client privilege occurs whenever other material relevant to the same issue has been submitted is without foundation and is contrary to established case law.

The American Corporate Counsel Association wholeheartedly agrees with the arguments and legal analysis set forth in the brief earlier filed by the Los Angeles County Bar Association in support of the petition for a Writ of Mandate and/or Prohibition. ACCA wishes to emphasize here the decision's negative impact upon the inside counsel-corporate client relationship, and the dangerous precedent it sets for all corporations whose activities are regulated by administrative agencies.

ARGUMENT

I. THE DECISION OF THE PUC CONFLICTS WITH THE RIGHT TO THE ASSISTANCE OF COUNSEL

The California Public Service Commission has ruled that it alone decides when and how the attorney-client privilege is to be applied in proceedings before it. Further, the PUC found that SoCal had implicitly waived its privilege by seeking to recover, through an approved rate increase, expenses associated with terminating a supply contract.

The ability of corporations to obtain effective assistance of counsel would be seriously impaired if determination of the attorney-client privilege lies within the sole discretion of an administrative agency. Appellee notes in its reply brief in a similar case involving the production of protected documents, "[a] Commission investigation is not an adversarial proceeding in the common law trial context." In re Application of Pacific Bell, 85-01-034, p. 15. That is, in fact, a major point behind ACCA's objection. The PUC acts as both fact-finder and decision-maker in its proceedings. Unlike the court system, which is a neutral forum for hearing disputes between parties, the PUC is an active party to the dispute. Thus, the PUC will tend to narrowly apply any doctrine or privilege that would prevent discovery of material which it seeks. Judicial

bodies, not regulatory agencies, must ultimately decide when a privilege should lie; regulatory agencies should follow the decisions of the courts and not develop their own divergent standards and rules on attorney-client privilege.

If the attorney-client privilege is left to exist at the sufferance of a regulatory body, then the privilege will inevitably dissipate. Without this privilege, corporations would effectively be denied their right to counsel. No attorney-client relationship can truly exist if matters discussed between the attorney and client lack any assurance of confidentiality. The decision of the PUC thus conflicts with the right to assistance of counsel and should be reversed.

II. THE DECISION OF THE PUC ON THE EXISTENCE OF AN IMPLIED WAIVER OF THE PRIVILEGE IS CONTRARY TO ESTABLISHED LAW

At issue in this case is the reasonableness and prudence of Southern California Gas Company's ("SoCal") termination agreement. The opinions of counsel as to the reasonableness of the agreement's terms or the enforceability of the supply contract are not of themselves, essential to this issue. Both the supply contract and the termination agreement are in evidence and

can serve as the basis for the PUC's review. In Transcontinental Gas Pipeline Corporation, 38 F.E.R.C. ¶63,042 (1987), the attorney-client privilege was upheld under a virtually identical set of circumstances. FERC ruled that the utility's "attorneys' advice is not the sole source of legal evaluation of these contracts." (p. 65,269)

The test for implied waiver in California was set forth in Mitchell v. Superior Court, 37 Cal. 3d 591 (1984). The two-prong test laid down in that case was that (1) the party claiming the privilege had put its attorney communications at issue, and (2) the privileged communication was essential to a fair adjudication of the issue that has been tendered. 37 Cal. 3d at 607-09. Neither part of the test is met here. The issue raised by SoCal when it sought the rate increase was its reasonableness and prudence in entering the termination agreement, not what its attorneys advised. Nor, as was noted in Transcontinental Gas above, does its attorneys' advice need to be known for a fair adjudication of the issue.

ACCA's major concern in this case arises from the significant expansion of the implied waiver doctrine asserted by the PUC. One of the primary functions of corporate counsel is to provide legal advice to management concerning a company's operations and commercial transactions.

In fulfilling this role, inside counsel must be able to ensure their corporate client's confidences. Regulated companies do not forfeit their right to counsel. Nor should that right be impaired by having the attorney-client privilege dependent upon the determinations of any regulatory agency, operating outside the courts' guidance.

Although this case involves the law of California, the principles behind the case are far-reaching. Virtually all industries are regulated to some degree. A myriad of federal and state agencies promulgate regulations requiring corporate compliance. The parameters of the attorney-client privilege are too important to be left to the discretion of such regulatory agencies. Nor should the scope of the privilege change when applied to a company operating in a highly regulated business environment.

ACCA recognizes that abuse of the attorney-client privilege can abrogate its protections. ACCA neither advocates nor condones using the privilege as a means to misrepresent the full facts through selective disclosure or to obfuscate material evidence ordinarily discoverable by instituting sham procedures involving attorneys.

However, the holding of the PUC in this case is not based on such abuse. Instead, the PUC attempts to improperly usurp the corporate client's right to seek and receive confidential advice from counsel.

CONCLUSION

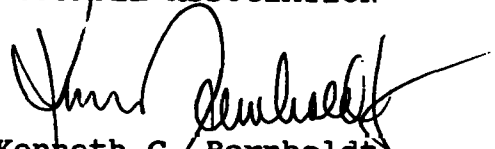
ACCA therefore urges that the decision of the PUC be reversed.

DATED: October 28, 1988.

Respectfully submitted,

KENNETH C. BORNHOLDT
AMERICAN CORPORATE
COUNSEL ASSOCIATION

By


Kenneth C. Bornholdt
Attorneys for Amicus Curiae
American Corporate Counsel
Association

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, declare: I am over 18 years of age, not a party to nor interested in Southern California Gas Company v. Public Utilities Commission, S.F. No. S006168 before the Supreme Court of California, and am employed in the County of Los Angeles, State of California, by Bixby Ranch Company, 523 West Sixth Street, Suite 316, Los Angeles, California 90014.

On November 1, 1988, in Los Angeles, California, I personally deposited in the United States mail a copy of the APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION IN SUPPORT OF APPELLANT to the interested parties shown on the attached list.

The copy was enclosed in a sealed envelope and all postage thereon fully paid.

I certify under penalty of perjury that the foregoing is true and correct.


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