

PROFESSIONAL LIABILITY UPDATE

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ATTORNEY-CLIENT PRIVILEGE

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By Jennifer A. Becker

The Second District holds that a party designated as an expert witness waives the attorney-client privilege unless the designation is withdrawn prior to the disclosure of privileged communications or substantive testimony as an expert.

Shooker v. Superior Court (Winnick) (2003) 111 Cal.App.4th 923

Douglas Shooker sued Gary Winnick over a business dispute. Shooker designated himself as an expert witness but, prior to any substantive testimony, claimed attorney-client privilege at his expert witness deposition. The trial court found that the designation was itself an implied waiver. Shooker then sought to withdraw his designation, which was rejected by the trial court.

The Court of Appeal reversed. Communications and work product exchanged between an expert and attorneys are discoverable. For this reason, designating an expert witness may result in a waiver of the attorney-client privilege; however, the waiver is conditional. Because of the sanctity of the attorney-client privilege, a party may withdraw his designation as an expert witness before any privileged communications are disclosed or before he testifies as an expert. If a party does so, the privilege is secure. Once a privileged communication is disclosed or the party provides substantive testimony

as an expert witness the privilege is waived.

Shooker was entitled to relief because he sought to withdraw his expert designation before he had disclosed any privileged communication or testified to any matter of substance.

Comment: As this case makes clear, the actual testimony of a client as an expert witness is a waiver of the attorney-client privilege and should not be undertaken without careful consideration of the consequences.

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