

PROFESSIONAL LIABILITY UPDATE

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Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim O. Dincel

Edward F. Donohue, III

Kathleen M. Ewins

Howard M. Garfield

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J. Michael Higginbotham

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Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Kevin Whittaker

Irene K. Yesowitch

WORK PRODUCT PRIVILEGE

California Law

By Jennifer A. Becker

*Eddy v. Fields* (2004) 121 Cal.App.4th 29

*The Second District holds that an attorney who discloses work product to counsel for mutual clients waives his or her work product privilege as to those clients. The court reserved for another day the question of whether the work product privilege belongs to the attorney or the client.*

Doris L. Eddy and Bernice J. Smith were co-trustees of a trust. Smith retained James Merzon to assist her in trust matters and both Smith and Eddy retained William E. Fields to perform legal services for the trust. They were replaced by Jacqueline Eddy who requested that Merzon turn over his legal files, but Bernice, Doris, and Fields advised him not to do so. When Merzon filed a petition for instructions regarding the files Fields argued that the documents he had prepared and transmitted to Merzon were protected by the work product privilege. The trial court ruled that appellant had waived his claim of work product privilege by disclosing them to Merzon, who was not Field's co-counsel. The Court of Appeal agreed that the work product privilege had been waived, but for a different reason.

The documents within an attorney's legal file belong to the client. Rule 3-700(D) of the Rules of Professional Conduct requires a terminated attorney

to release the file to the client upon request. The court noted that the statutory work product privilege of C.C.P. § 2018, which protects documents reflecting an attorney's thoughts and impressions, and the client's right to the file set forth in Rule 3-700(D) is in apparent conflict. One line of cases holds that an attorney's work product belongs to the client. Another line of cases holds that the attorney is the holder of the work product privilege for the purpose of adversarial discovery during litigation and work product documents do not need to be disclosed, even to the client.

The court did not resolve this conflict but held that Fields waived any privilege when he disclosed his work product to Merzon. This effectively disclosed the documents to Bernice and Doris and waived the work product privilege with respect to them. Because Jacqueline is a successor trustee, the privilege had been waived as to Jacqueline as well.

While there may be some cases in which an attorney can successfully claim work product privilege as to a client, Fields cannot maintain that that he waived the work product privilege as to Merzon, but not to Merzon's clients, who were also his own clients. Equity demands waiver of the privilege under the circumstances.

If an adversarial third party, rather than a successor to a client of Merzon's, had been seeking the documents the court noted it would have reached a different conclusion.

*Comment:* The question of whether an attorney can assert the work product privilege against a client remains unresolved. In a legal malpractice setting the question is usually moot since in most cases the attorney voluntarily discloses work product to establish the attorney's thought processes.