

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

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

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Seth E. Watkins

Gerald G. Weisbach

Kevin Whittaker

Irene K. Yesowitch

ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

California Law

By Jennifer A. Becker

Laguna Beach County Water District v. Superior Court (Woodhouse) (2004)
124 Cal.App.4th 1453

The Fourth District holds that an affirmative defense concerning an attorney's investigation prior to a construction project does not waive the attorney-client privilege as to investigations that occur after the construction project is complete. Further, the work product protection is not waived when an attorney responds to audit inquiries providing information about pending or threatened litigation that might affect a client's financial condition.

Violet Woodhouse sued the Laguna Beach County Water District and others for allegedly defective construction of a reservoir near her home. The Water District alleged it had no knowledge or notice of any dangerous conditions, either at all or in sufficient time to take precautionary measures.

The Water District belonged to a risk pool that retained Robert Gokoo as defense counsel. Woodhouse served document subpoenas on the risk pool requesting agreements to cover claims against the Water District arising out of the construction, and documents related to the Water District's potential liability. Woodhouse also subpoenaed documents from the risk pool's accounting firm that conducted audits of the Water District.

The Water District filed a motion to quash the subpoenas and for a protective

order asserting the documents were protected by the attorney-client privilege and work product doctrine. The trial court ruled that any applicable attorney-client privileges and work product protections had been waived and ordered defendant to produce six letters from Gokoo to the risk pool and two letters from Gokoo to the accountants.

Woodhouse contended a waiver occurred when the Water District asserted affirmative defenses in which it touted its investigation or lack of knowledge of defects in the construction of the reservoir. Woodhouse reasoned that where the defendant injects an issue concerning the adequacy of an attorney's investigation, it waives the attorney-client privilege and work product doctrine.

The Court of Appeal disagreed that privileges had been waived by the affirmative defenses. The documents at issue dealt with defendant's post-construction investigation, which has nothing to do with the affirmative defenses that raised the Water District's knowledge about the property and the project prior to and at the time of the construction.

Some transmittal letters were not protected because documents that are not originally protected do not become so by being provided to or transmitted by an attorney.

Two letters to the accountants were responses to audit inquiries where Gokoo, as counsel for the Water District, was asked to provide information about pending or threatened litigation that might affect the Water District's financial condition. An attorney responding to an audit inquiry is asked for explanations, opinions, and conclusions about pending matters, contain his or her thoughts and ideas about pending actions, and are clearly work product

The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship. Work product protection is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation.

The audit responses made it clear Gokoo did not intend to waive work product protection because each letter contained the notation "*ATTORNEY--CLIENT AND ATTORNEY WORK PRODUCT*"

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COMMUNICATION." Disclosure of the information was not casual, unthinking, or voluntary and would not have occurred except for the Water District's request and a duty to comply with the request.

Disclosure operates as a waiver only when information is divulged to a third party who has no interest in maintaining the confidentiality of a significant part of the work product. The accountant did not intend to waive the confidentiality of the information and the contents of the two letters were not disclosed in the audits. Although the accountant was performing a public function it does not follow that it would divulge protected information.

Federal courts have come down on both sides of the issue of whether work product loses its protection if it is disclosed to an auditor in an audit response letter. However, the cases finding against the protection are distinguishable. The federal work product doctrine is more limited than California's because its protection extends only to documents prepared in anticipation of litigation or for trial. In California the work product production is not limited to writings created by a lawyer in anticipation of a lawsuit; it applies as well to writings prepared by an attorney while acting in a nonlitigation capacity.

Comment: This case illustrates that courts remain vigilant about protecting the attorney-client privilege and work-product doctrine.