

PROFESSIONAL LIABILITY UPDATE

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DISCOVERY

CALIFORNIA LAW

By Jennifer A. Becker

Carehouse Convalescent Hospital v. Superior Court (Sims) (2006) 143 Cal. App.4th 1558

The Fourth District precludes the deposition of counsel in a dispute because the proponent failed to show extremely good cause.

Carehouse Convalescent Hospital (Carehouse) operates a skilled nursing facility where Richard Sims was a patient. His children sued Carehouse for wrongful death and elder abuse. In discovery Carehouse admitted that required staffing ratios were not met. In further discovery requesting specific numbers about the staffing ratio, Carehouse directed Sims to records from which the staffing ratio could be calculated.

In response to a motion to compel the specific numbers, Carehouse raised the attorney work product doctrine. Carehouse’s attorney Wroten stated that her office had calculated the staffing ratio from the staffing logs and sign-in sheets. In doing so she used her judgment in applying regulations concerning the definition of staff.

The trial court issued an order granting the motion, and directing that the response be provided by Wroten’s deposition. The court reasoned that Wroten’s exercise of judgment made her

an expert witness entitling plaintiff to depose her.

The Court of Appeal noted that depositions of opposing counsel are presumptively improper, severely restricted, and require “extremely” good cause. Deposing counsel runs counter to the adversarial process and to the policy of preventing attorneys from taking undue advantage of their adversary’s industry and efforts.

The practice also impedes proper trial preparation, as the attorney must be prepared to be both a responsive witness and a partisan advocate, difficult tasks to accomplish simultaneously. Collateral disputes arise about what is protected and it increases the possibility that the lawyer may be called as a witness at trial. Attorney depositions chill the attorney-client relationship, impede civility, and easily lend themselves to gamesmanship and abuse.

California applies a three-part test to determine the propriety of attorney

depositions: whether there are other practicable means to obtain the information; whether the information is crucial to the preparation of the case; and whether the information is subject to a privilege. Each part is an independent hurdle that could bar access to an attorney's deposition. The proponent of the deposition must establish the first two prongs; the opponent must establish the third.

Sims did not rebut the presumption against noticing Wroten's deposition. He failed to show a lack other practicable means of obtaining the information or that the information was crucial to the case.

The court was not persuaded by the argument that it was easy for Wroten to provide the information, since she had already done the work. Ease does not constitute extremely good cause, and discovery is not a vehicle to access counsel's work product.

Wroten did not become an expert by doing her own calculations. Such reasoning would inevitably permit the deposition of any attorney who used his or her impressions, conclusions, opinions, legal research or theories to assist in preparing a client's discovery responses. Wroten remains an advocate, not an expert witness.

Carehouse established that the information was protected work product. Wroten detailed the subjectivity of her decision making process regarding how to classify Carehouse's employees. She derived the information from underlying documentation and the information did not exist independent of her efforts.

Plaintiffs failed to show "extremely good cause" for Wroten's deposition. There was a high likelihood she could assert claims of work product and attorney-client privilege, rendering the usefulness of the procedure questionable."

Comment: Courts will protect the role of attorneys as advocates.