

PROFESSIONAL LIABILITY UPDATE

ATTORNEY CLIENT AND WORK PRODUCT PRIVILEGE

By Jennifer A. Becker

Hernandez v. Tanninen et al., (2010 9th Cir.) 604 F.3d 1095

The Ninth Circuit holds that a claim dependent upon attorney-client or work product information constitutes an implied waiver as to all communications on the specific topic of the claim, but not a blanket waiver as to all attorney-client or work product privileged information.

Rolando Hernandez filed suit against the City of Vancouver and Mark Tanninen asserting claims for race and national origin discrimination based on disparate treatment, retaliation, and a hostile work environment, as well as conspiracy to conceal proof of his claims. Hernandez told his first attorney, Ferguson, that Tanninen witnessed the discrimination and would corroborate his story. In speaking with Ferguson, Tanninen did initially corroborate Hernandez's claims and agreed to provide a signed statement to that effect. However, after Tanninen spoke to a superior he declined to get involved. Because he was a witness to Tanninen's conduct, Ferguson referred the case to another attorney who amended the complaint to allege the conspiracy claim.

Hernandez claimed attorney-client or work product protection for thirty-five documents. When the City moved for summary judgment, Hernandez attached an affidavit including Ferguson's handwritten notes as evidence in opposition to the motion. The district

court granted summary judgment but the Court of Appeal reversed based, in part, on Ferguson's notes and Hernandez's affidavit.

On remand the City asserted that all privileges were waived and it was entitled to Ferguson's entire file because Hernandez relied on Ferguson as a witness. The district court agreed and ordered the thirty-five documents produced.

The Court of Appeal noted that the attorney-client privilege is intended to encourage clients to make full disclosure to their attorneys because sound advice depends upon the lawyer being fully informed by the client. The work product doctrine is a qualified privilege that protects certain materials prepared by an attorney acting for his or her client in anticipation of litigation.

Both privileges may be waived. Disclosing a privileged communication or raising a claim that requires disclosure of a protected communication results in waiver as to all other communications on the same subject.

Hernandez disclosed communications between himself and Ferguson about Tanninen, as well as favorable portions of Ferguson's communications with Tanninen. Hernandez thus waived privileges as to all communications and information on that topic.

However, the waiver only extended to communications and work product about Tanninen. It was clear error for the district court to hold that Hernandez's limited attorney-client and work product privilege waivers were a blanket waiver of the attorney-client and work product privileges as to the entire case. Thus, the Court of Appeal granted the writ to correct the district court's overbroad privilege ruling.

Comment: The court struck a balance between allowing a claim based on attorney-client and work product information, and protecting these privileges from blanket disclosure. If a claim relies on privileged information, the privilege is waived as to all communications and information on that subject matter. This precludes the claimant from disclosing only favorable information. At the same time, the fact that a claim has resulted in an implied waiver, does not automatically lead to a blanket waiver as to unrelated topics.