

PROFESSIONAL LIABILITY UPDATE

ATTORNEY CLIENT PRIVILEGE
WORK PRODUCT

By John B. Sullivan

Fireman's Fund Insurance Company v. Sup.Ct. (Front Gate Plaza, LLC) (2011) 196 Cal.App.4th 1263

The Second District holds that communications among attorneys at a law firm are protected by the attorney-client privilege. Unwritten work product is absolutely protected.

Front Gate Plaza, LLC sued Fireman's Fund Insurance Company (FFIC) for bad faith in handling property damage claims. Sunil Chand, an employee of Primero Management, Inc., a Front Gate service provider, contacted FFIC's counsel, Melissa Dubbs, of Carlson, Calladine & Peterson, LLP (CCP). Chand claimed to be a whistleblower in possession of evidence demonstrating Front Gate's insurance claims were fraudulent. He met with Dubbs to deliver documents he had copied from Front Gate's files.

The trial court ordered Dubbs to answer questions about Chand's declaration drafted by CCP attorney Robert Peterson, as well as internal communications with CCP's private investigator about Chand's testimony and payment of his travel expenses. The trial court ruled that the attorney-client privilege applies only to communications directly between attorney and client, but does not extend to communications outside the client's presence between counsel. It also held the absolute work product privilege applies only to work product reduced to written form.

The Court of Appeal granted FFIC's writ of mandate. The attorney-client privilege is not limited to communications directly between attorney and client. The privilege included communications among the CCP attorneys related to Dubbs's evaluation of Chand and his usefulness to FFIC's case. Peterson's communications with Dubbs about his legal opinions in drafting the Chand declaration were also confidential. The information did not lose its confidential characterization when it was shared with other attorneys at CCP.

The Court of Appeal disagreed that the work product protection statute, Code of Civil Procedure § 2018 *et. seq.* provides absolute work product protection only to written work product. The statute provides absolute protection to written opinion work, with the implicit understanding that unwritten work product is already entitled to absolute protection. The Legislature intended to establish in California the same rule as set forth by a United States Supreme Court case holding unwritten opinion work product inviolate. Moreover, the Legislature sought absolute protection for all opinion work product, and did not intend unwritten opinion work product be

open to discovery. Finally, the Court held that interpreting the statute to provide absolute protection to written work product but only a qualified protection to unwritten work product produces an absurd result.

Comment: This case reinforces the strength of the attorney client privilege, and also provides robust protection for attorney impressions, thoughts, and opinions.