

PROFESSIONAL LIABILITY UPDATE

ATTORNEY-CLIENT PRIVILEGE
LITIGATION PRIVILEGE
PRIVITY

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Kerner v. Superior Court (Widom) (2012) 206 Cal.App.4th 84

The Second District holds there is no implied waiver when a client's medical condition precludes assertion of the attorney-client privilege. When both an attorney and a client declare the existence of the relationship in uncontroverted declarations, the court should acknowledge the relationship even if the attorney does not appear as counsel of record. The absolute litigation privilege applies to a non-communicative act that relates to later communicative, privileged, conduct. The attorney-client relationship does not create privity for collateral estoppel purposes.

Richard Widom, a partner in Stockwell, Harris, Widom, Woolverton & Muehl (Stockwell), married his associate, Lisa Kerner. Their separation unleashed a torrent of accusations and litigation.

Kerner filed a petition for dissolution and accused Widom of domestic violence. The family law court found Kerner's testimony not credible and refused to issue a permanent restraining order against Widom.

Kerner filed a separate civil action based on allegations of assault and battery. The trial court concluded that Kerner was collaterally estopped by the decision of the family law court from asserting Widom had abused her, and she dismissed her action.

A jury absolved Widom in a criminal case instigated by Kerner.

The Stockwell firm terminated Widom and

he filed a complaint against the firm and individual attorneys George Woolverton, Steven Harris, and Edward Muehl alleging that the firm terminated his employment without cause to avoid paying him deferred compensation. The Stockwell firm filed a cross-complaint, alleging Widom had appropriated firm assets, associates, and clients, and had exposed the firm to liability by assaulting and battering Kerner.

Numerous discovery disputes arose in the Widom-Stockwell litigation.

Attorney-Client Privilege

Stockwell withheld its communications with Kerner as protected by her attorney-client privilege with the firm. Widom challenged the claim of attorney-client privilege, asserting that in a motion to compel in the Kerner-Widom action Kerner and her counsel Jacob George submitted

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declarations stating that Stockwell, not Kerner, had determined what was privileged.

Both Kerner and Stockwell attorney Woolverton submitted declarations to the effect that material redacted included attorney-client privileged communications related to Kerner's divorce. Stockwell's attorney Heather McCloskey informed the court that she asked Kerner's counsel George to determine which communications were privileged and provided the potentially privileged e-mails between Kerner and Woolverton. When George did not respond McCloskey continued to protect the privileged communications. Stockwell did not claim any privilege of its own as to any of the communications.

A discovery referee prepared a Report and Recommendations finding that Kerner's counsel had prepared privilege logs and that Stockwell maintained that it was not in a position to disclose communications in light of Kerner's assertion of privilege. The Referee noted that Kerner did not file objections in the Kerner-Widom civil suit and that her counsel took the position in that action that Stockwell's counsel had created the privilege log. The referee ordered Kerner to file written objections within five days, or he would order certain documents on the privilege logs disclosed.

Widom immediately served the report on Kerner and Stockwell's attorneys. At the same time McCloskey substituted in as Kerner's counsel. Kerner objected to the five day limitation to make objections because shortly before the hearing she had been attacked in her home and left unconscious for two to three days. The court adopted the referee's report and recommendations without oral argument.

Widom filed two motions to compel Kerner to respond to questions that her counsel had instructed her not to answer at deposition based on the attorney-client privilege. He argued Kerner had waived claims of privilege. Stockwell responded that Kerner's medical condition rendered her unable to meaningfully participate in preparing an opposition. They also disagreed with Widom's characterization about privilege and waiver.

The discovery referee issued a Report and Recommendations denying the request to defer ruling since Kerner had made her position clear at her deposition. He noted that neither Kerner nor Woolverton had asserted an attorney-client relationship prior to discovery disputes, and that Woolverton had testified that his services were limited to hiring a private investigator and accompanying Kerner to the prosecutor's office. Stockwell objected to the Report arguing that prior to the discovery disputes there was reason to claim the attorney-client privilege. Woolverton filed a declaration stating that Kerner had consulted him for legal advice and that both understood that an attorney-client relationship existed between them, despite the fact that he was not Kerner's counsel of record in any proceeding. The trial court granted the motions.

The Court of Appeal noted that the attorney-client privilege, codified at Evidence Code § 954, authorizes a client to refuse to disclose, and prevent others from disclosing, confidential communications between a client and his or her attorney. The privilege is absolute and prevents disclosure of communications regardless of relevance, necessity, or other circumstances peculiar to the case. Evidence Code § 951 defines a client as a person who consults a lawyer for

the purpose of retaining the lawyer or securing legal services or advice in the lawyer's his professional capacity. Section 952 defines a "confidential communication" as information disclosed in confidence to the attorney to further the interests of the client and that is not knowingly transmitted to a third party. The purpose of the privilege is to protect the confidential relationship between client and attorney to promote open discussion regarding legal matters. It can be claimed only by the client, a client's representative, or the lawyer. A lawyer is obligated to claim the privilege in the client's absence.

A waiver occurs if the client consents to disclose a significant part of the communication without coercion. Consent can be implied if the holder knowingly fails to claim the privilege in a proceeding where the holder has standing and opportunity.

Although Kerner had instructed Stockwell's attorney to withhold all communications between Kerner and Woolverton as potentially privileged, she did not identify the particular privileged documents. When the referee gave Kerner five days to file objections, he was unaware of the attack. Kerner and Stockwell's joint counsel filed an objection and lodged Kerner's medical records under seal. However, the trial court did not state whether it considered and rejected Kerner's physical condition as an excuse before ruling. The Court of Appeal found that the circumstances were unusual and remanded the case for express findings on Kerner's objection to the referee's report and to determine whether she knowingly waived her privilege.

The Court of Appeal determined there was evidence of an attorney-client relationship between Stockwell and Kerner. An

attorney-client relationship does not require a formal agreement or compensation. However, no relationship is formed when a person consults an attorney for non-legal services or as a friend, which is a question of fact. Kerner testified she sought legal advice from Woolverton on all her legal matters, and that Woolverton gave her advice on her civil cases and on the criminal prosecution of Widom. In a declaration Woolverton acknowledged the attorney-client relationship, and explained earlier seemingly inconsistent statements about his efforts on Kerner's behalf as being unrelated to the question of representation.

The Court of Appeal found Kerner's and Woolverton's statements were consistent, plausible, and not inherently unbelievable. The uncontroverted evidence was that Kerner had sought and received legal advice from Woolverton in connection with various legal matters involving Widom. The discovery referee did not find Kerner had waived the privilege, but that she had no attorney-client relationship with Stockwell. However, prior to the discovery dispute, Kerner and Woolverton were never directly questioned about the existence of an attorney-client relationship and thus had no reason to disclose it.

Litigation Privilege

Widom made a motion for discovery of Stockwell's net worth under California's punitive damages statute. The discovery referee granted the motion finding that Widom would likely prevail on his claim for punitive damages. The referee found that Stockwell, Woolverton, and Harris did not believe Kerner's claims of abuse but used it as a pretext to fire him and avoid a deferred compensation obligation. Further, they acted with malice to destroy Widom's reputation

by encouraging Kerner to file criminal charges; hiring a private investigator to investigate Widom; and lobbying the Police and City Attorney to file charges. They also made disparaging remarks to potential clients.

The referee rejected Stockwell's argument that their actions regarding their interaction with the police and city attorney, as well as hiring a private investigator, were protected by the litigation privilege, Civil Code § 47(b). The trial court adopted the referee's report and recommendations.

The Court of Appeal found the litigation privilege applied to Stockwell's actions. The privilege applies to any communication made in any legislative proceeding, judicial proceeding, official proceeding, or in the initiation or course of any other proceeding authorized by law. The privilege is absolute and applies regardless of malice. It is interpreted broadly to further its principal purpose of affording litigants and witnesses the utmost freedom of access to the courts and to other official proceedings.

Communications to governmental agencies requesting an investigation of wrongdoing are absolutely privileged as communications made in an official proceeding authorized by law. This serves the important public interest of securing open channels of communication between citizens and law enforcement personnel and other public officials.

The privilege applies to all communicative conduct. The court must determine if the gravamen of the action relates to conduct essentially communicative in nature or related to the communicative conduct. The privilege does not apply to non-communicative conduct independent of any

privileged communication.

The trial court found that punitive damages were warranted because of Stockwell's efforts to encourage the city attorney to prosecute Widom for domestic violence. The efforts included hiring private investigators; conveying information to the police and city attorney; and encouraging the authorities to prosecute Widom.

The private investigators' communications conveyed information to the authorities and were protected by the "official proceeding" privilege. Thus, hiring private investigators was related to the protected, communicative conduct and was also protected conduct.

The Court of Appeal directed the trial court to reconsider its order.

Attorney-Client Privity

Widom filed a *motion in limine* to exclude evidence or argument that he had committed any act of violence against Kerner based on the finding in the family law action. He claimed that the finding was binding on Stockwell under the doctrine of collateral estoppel. Widom asserted that the Stockwell-Kerner attorney-client relationship conferred a common interest between them in the family law proceeding; Stockwell's interests were adequately represented; and the Stockwell firm should have had a reasonable expectation that it would be bound by the determination in that proceeding.

Although the trial court had found in the context of discovery motions that there was no Stockwell-Kerner attorney client relationship, it ruled Stockwell was bound by the finding against Kerner in the family law action. The court reasoned that Stockwell and Kerner had common interests

in the family law proceeding, the civil action, and the criminal proceeding because Kerner asserted an attorney-client relationship and Stockwell retained a private investigator. If Widom had been convicted, Stockwell would have obtained the benefit of collateral estoppel against him. Applying collateral estoppel against Stockwell would preserve the integrity of the judicial system, promote judicial economy, and protect Widom from harassment by vexatious litigation.

The Court of Appeal reviewed the principles of collateral estoppel. The factual issue must be identical to that decided in a former proceeding; the issue must have been actually litigated in the former proceeding; the issue must have been necessarily decided in the former proceeding; the issue must be a final decision on the merits; and the party to be estopped must be the same as, or in privity with, the party to the former proceeding. Even if the requirements are met, courts will not apply the doctrine if considerations of policy or fairness outweigh the doctrine's purposes in a particular case, or if the party to be estopped had no full and fair opportunity to litigate the issue in the prior proceeding.

Turning to privity, the Court noted it is not a concept susceptible of uniform definition. Traditionally it refers to an interest in the subject matter of litigation acquired after a judgment through a party by inheritance, succession, or purchase. The concept was expanded to refer to a mutual or successive relationship to the same rights of property, or to identification in interest of one person with another as to represent the same legal rights. More recently it has been further expanded to include a relationship between a current party and an unsuccessful party in a prior litigation which is sufficiently close to

justify application of the doctrine of collateral estoppel.

The application of collateral estoppel requires due process. The party to be estopped must have an identity or community of interest with, and adequate representation by, the losing party in the first action. In addition the party to be estopped should reasonably have expected to be bound by the prior adjudication. The court must balance the rights of the party to be estopped against the need to apply collateral estoppel to promote judicial economy, to minimize repetitive litigation, to prevent inconsistent judgments, or to protect against vexatious litigation.

A non-party who controls an action is bound by the adjudications of litigated matters if the non-party has a proprietary or financial interest in the judgment or in the determination of a question of fact or law with reference to the same subject matter or transaction.

Stockwell could only be bound if it was in privity with Kerner. The Court of Appeal found that the existence of an attorney-client relationship does not establish privity for purposes of collateral estoppel. An attorney owes a duty of loyalty and to use skill, prudence and diligence. Yet an attorney is not the client and does not share the client's legal rights and interests. Attorney control of litigation is on behalf of the client, not in service of the attorney's interests.

Imposing collateral estoppel based on the existence of an attorney-client relationship would cause attorneys to consider not only the client's best interests but their own, a potential conflict of interest.

The Court of Appeal rejected precedent that

recognized privity for the purpose of collateral estoppel between attorney and client. Prior cases applied the concept to favor an attorney as defendant, and did not meaningfully analyze the privity issue. It agreed with a commentator's analysis of attorney-client privity as "bogus privity" which clouds reasoning when courts confront real privity questions.

Comment: The unfortunate circumstance of the Kerner-Widom dissolution has provided a case rich in issues that impact the attorney-client relationship. Implied waiver of the attorney-client privilege is suspect when the client is unavailable to knowingly assert the privilege. An attorney-client relationship acknowledged by both parties to the relationship should be respected even if the attorney does not appear as counsel of record. The litigation privilege protects non-communicative conduct that relates to later communicative, privileged, conduct. There is no privity for collateral estoppel purposes created by the attorney-client relationship.