

PROFESSIONAL LIABILITY UPDATE

ATTORNEY-CLIENT PRIVILEGE

By Glen R. Olson

Anten v. Superior Court (Weintraub Tobin Chediak Coleman Grodin) (2015) 233 Cal.App.4th 1254

The Second District holds one joint client cannot prevent discovery or the introduction of privileged communications created during a joint client representation.

Anten and the Rubins jointly retained attorneys at the Weintraub Tobin firm concerning their prior counsel's tax advice. Weintraub opined the prior lawyers' error precluded the clients from seeking favorable tax treatment on the sale of their business. Anten and the Rubins settled with the IRS for a substantial sum.

Weintraub recommended its clients file a malpractice suit. When Anten chose not to sue, Weintraub terminated Anten's representation and sued the prior tax attorneys on Rubins' behalf. Anten then sued both the prior lawyers and Weintraub for malpractice.

Weintraub resisted discovery requests asserting its attorney-client privilege with the Rubins. The Rubins also refused to waive privilege. The trial court denied Anten access to material covered by the attorney-client privilege.

The Court of Appeal analyzed Evidence Code § 958, pertaining to the privilege in a dispute between attorney and client. Section 958 provides there is no attorney-client privilege for communications relevant to an issue of breach by the lawyer or by the client of a duty arising out of the lawyer-client relationship. The rationale for this exception is it would be unjust to permit a client to accuse his attorney of a breach of duty, yet invoke the privilege to

prevent the attorney from revealing evidence in defense of the charge.

Although § 958 is broadly worded, a legal malpractice defendant cannot invoke the exception to permit the discovery of communications between the plaintiff and the attorney who represents the plaintiff in a malpractice action. Likewise, a legal malpractice plaintiff cannot invoke the exception to permit the discovery of communications between the defendant attorney and the attorney's other clients.

No case addressed the exception where one joint client alleges a breach of duty, but the other joint client does not. Nonetheless, the case falls squarely within the exception of §958. Anten was seeking the production of communications relevant to issues of breach by Weintraub in its duties arising out of the lawyer-client relationship. Both the statute and the policy considerations lead to the conclusion that the privilege should not apply.

Because Anten and the Rubins were Weintraub's joint clients, the Rubins' communications with the firm were not confidential as to Anten. Communications by parties united in a common interest to their joint or common counsel, while privileged against strangers, are not privileged between the parties,

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or between their counsel or any of them. Considerations of fairness similar to those underlying §958 weighed strongly in favor of applying the statute in the joint-client context. Section 958 prohibited the Rubins from invoking the attorney-client privilege in Anten's lawsuit against Weintraub.

Comment: In a typical § 958 scenario, an attorney defending a malpractice case seeks privileged information, because his or her defense would otherwise be impaired. The result in *Anten* is grounded in the principle that there is no privilege between jointly represented clients.