CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Anten v Superior Court 1/30/15
Legal Malpractice; Attorney-Client Privilege; Evidence Code section 958

Lewis Anten and Arnold and Lillian Rubin jointly retained Marvin Gelfand and Allan Kirios of the law firm Weintraub Tobin Chediak Coleman Grodin (Weintraub) to advise and represent them concerning incorrect tax advice given by their former lawyers (hereafter tax lawyers) and to represent them in the tax audit arising from that advice. The Weintraub lawyers advised Anten and the Rubins that the tax lawyers' error barred the favorable tax treatment they had sought for the sale of their business, and the Weintraub lawyers further advised that the error could not be cured. On the basis of Weintraub's advice, Anten and the Rubins settled with the Internal Revenue Service, paying over $1,000,000.

The Weintraub lawyers further advised Anten and the Rubins that the tax lawyers had committed malpractice and recommended that Anten and the Rubins sue them. At that time, Anten did not want to sue "but rather sought to pursue resolution by means of settlement." Weintraub subsequently "fired Anten as a client" and represented the Rubins in filing suit against the tax lawyers. Anten later filed the instant suit against both the tax lawyers and Weintraub.

In October 2013, Anten moved to compel Weintraub to produce further responses to certain form interrogatories and requests for production of documents. Weintraub opposed the motion on the ground that it could not provide further responses without violating the attorney-client privilege, which the Rubins had expressly declined to waive. On December 12, 2013, the trial court ordered Weintraub to produce "further responses in the form of documents for which work product privilege is asserted" but ordered that the documents be produced "only to Anten and Rubin." The court granted no other relief. The court's minute order does not address the claim of attorney-client privilege, and the record before us does not contain a transcript of the hearing.

In late December 2013, Anten served additional discovery on Weintraub. Weintraub objected on multiple grounds including the Rubins' assertion of the attorney-client privilege. Anten again moved to compel further responses. On June 30, 2014, the court sustained Weintaub's objection based on the Rubins' assertion of the attorney-client privilege. Largely on that basis, the court denied Anten's motion in its entirety.

Anten petitioned the Second District Court of Appeal for a writ of mandate, seeking to overturn the trial court's discovery ruling of June 30, 2014. It issued an order to show cause. The case raises the following issue: When joint clients do not sue each other but one of them sues their former attorney, can the nonsuing client prevent the parties to the lawsuit from discovering or

introducing otherwise privileged attorney-client communications made in the course of the joint representation? Anten argued that the trial court abused its discretion by sustaining Weintraub's objection based on the Rubins' assertion of the attorney-client privilege and by denying Anten's motion to compel on that basis.

In a lawsuit between an attorney and a client based on an alleged breach of a duty arising from the attorney-client relationship, attorney-client communications relevant to the breach are not protected by the attorney-client privilege. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 786; Evid. Code, § 958.) Also, **if multiple clients retain or consult with an attorney on a matter of common interest and the joint clients later sue each other, then the communications between either client and the attorney made in the course of that relationship are not privileged in the suit between the clients.** (*Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1294; § 962.) But in general, one joint client cannot waive the attorney-client privilege for another joint client. (*American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 595.)

The Justices began their opinion by citing **Evidence Code Section 958** which provides **that "there is no attorney-client privilege under this article as to a communication 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 the exception is that 'it would be unjust to permit a client . . . to accuse his attorney of a breach of duty and to invoke the privilege to prevent the

attorney from bringing forth evidence in defense of the charge . . . .' (*Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 463-464; see also *Glade v. Superior Court* (1978) 76 Cal.App.3d 738, 746 (*Glade*).) For example, it would be "fundamentally unfair for a client to sue a law firm for the advice obtained and then to seek to forbid the attorney who gave that advice from reciting verbatim, as nearly as memory permits, the words spoken by his accuser during the consultation." (*Solin*, 89 Cal.App.4th at p. 463.) Similarly, a written fee contract between an attorney and a client is itself a privileged communication (*Dietz*, 177 Cal.App.4th at p. 786), but it would be unfair to allow the client to invoke the privilege in order to exclude the contract in an action by the attorney for unpaid fees.

The wording of section 958 is broad, but case law has clarified that the exception is limited to communications between the lawyer charging or charged with a breach of duty, on the one hand, and the client charging or charged with a breach of duty, on the other. (See *Schlumberger Limited v. Superior Court* (1981) 115 Cal.App.3d 386, 392-393) Thus, a legal malpractice defendant cannot invoke the exception in order to permit discovery of communications between the plaintiff and the attorney who represents the plaintiff in the malpractice action. Likewise, a legal malpractice plaintiff cannot invoke the exception in order to permit discovery of communications between the defendant attorney "and other clients of his not privy to the relationship between" the defendant and the plaintiff. (*Glade*, 76 Cal.App.3d 746) But there is no case law addressing the

scenario presented in the instant case, in which one *joint client* charges the attorney with a breach of duty, but other joint clients do not.

Anten seeks production of communications relevant to issues of breach by Weintraub of duties arising out of the lawyer-client relationship. Thus, under the plain language of section 958, the attorney-client privilege does not apply to those communications. Moreover, although we recognize that, for reasons of public policy, a literalistic application of the statute is not always appropriate, here both the plain language of the statute and policy considerations lead to the same result.

The Appellate Court noted that first, because Anten and the Rubins were joint clients of Weintraub, the Rubins' communications with Weintraub were not confidential as to Anten. "In a joint client situation, confidences are necessarily disclosed." (*Zado*, 31 Cal.App.4th 1285) Consequently, "communications made by parties united in a common interest to their joint or common counsel, while privileged against strangers, are not privileged as between such parties nor as between their counsel and any of them, when later they assume adverse positions." (*Croce v. Superior Court* (1937) 21 Cal.App.2d 18, 20; see also *Clyne v. Brock* (1947) 82 Cal.App.2d 958, 965) Weintraub's joint representation of Anten and the Rubins, with their knowledge and consent and on a matter of common interest, thus distinguishes this case from *Glade*, which declined to apply section 958 to communications between the defendant attorney and other, *unrelated* clients. In *Glade*, the communications at issue were privileged as to the very

plaintiffs who were seeking their disclosure. Here, in contrast, the communications at issue are not confidential as to Anten.

Second, considerations of fundamental fairness that are similar to those underlying section 958 as a whole weigh strongly in favor of applying the statute in this context. For example, if one of two joint clients breached an attorney fee agreement but the other joint client did not, and the attorney sued the breaching client, then it would be unjust to allow the nonbreaching client to thwart the attorney's suit by invoking the privilege to prevent introduction of the fee agreement itself. Moreover, the risk of collusion between the joint clients would be substantial. Similarly, if an attorney breached a duty to one of two joint clients but breached no duties to the other, and the wronged client sued the attorney, then it would be unjust to allow the nonsuing client to thwart the other client's suit by invoking the privilege to prevent introduction of relevant attorney-client communications made in the course of the joint representation. Again, the risk of collusion between the attorney and the nonsuing client would be substantial—indeed, the risk would be particularly significant if the alleged breach were that the attorney had favored the interests of the nonsuing client over those of the suing client.

For all of these reasons, the unanimous Court concluded that section 958 prohibits the Rubins (and Weintraub on behalf of the Rubins) from invoking the attorney-client privilege in Anten's lawsuit against Weintraub with respect to relevant attorney-client communications made in the course of the joint

representation. Because Weintraub's opposition to Anten's motion to compel was based entirely on the attorney-client privilege, it was an abuse of discretion to deny Anten's motion to compel. Accordingly the 2nd District granted the petition and directed the court to grant Anten's motion.The superior court's order of June 30, 2014, denying Anten's motion to compel further responses, was vacated, and the superior court was directed to enter a new and different order granting the motion. The Petitioner is to recover his costs of the writ proceeding.

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