California Court Confirms Application of Common Interest Doctrine: Joint Defense Agreements Do Not Waive Attorney-Client Privilege

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In an opinion issued yesterday, *Meza v. H. Muehlstein & Co*., the Second District Court of Appeal confirmed that defense counsel who represent different defendants in a civil case can share information, strategy, and protected information with one another, without the risk of waiving attorney-client privilege, so long as they are all working toward a common interest.

The "Common Interest Doctrine" question came before the Second District due to an interesting, albeit unusual, factual/procedural situation. A single plaintiff named 17 different defendants in one action for exposure to dangerous chemicals. One of those defendants was Jack's Plastics, who was represented by an attorney named Brett Drouet. The trial court in that action entered judgment in defendants' favor. The plaintiff appealed. While the case was on appeal, Mr. Drouet left his firm that was representing Jack's Plastics and joined the firm that was representing the plaintiff in the underlying action. In other words, one of the defendant's attorneys was now employed by the plaintiff's attorney, while the appeal was still pending. Nothing would have likely resulted if the Court of Appeal had upheld the judgment in favor of the defendants in the underlying case. However, the Court of Appeal vacated the judgment in favor of the defendants and the case was back in front of the trial court. Upon learning that one of the former defense attorneys was now working at the firm representing the plaintiff, one of the defendants filed a motion to disqualify the plaintiff's firm from the case (i.e., if granted, the plaintiff would need to get new counsel). The motion was based upon the theory that the information disclosed to the former defense counsel needed to be protected from disclosure to plaintiff's counsel.

In response, the plaintiff's firm argued that any attorney-client privileged information that their new hire knew was no longer protected because that privilege was waived when it was discussed among the 17 different defense counsel. Typically, when attorney-client information is told to a third party or made public, one cannot later claim that the information is privileged. This is deemed a "waiver." So, in essence, here, the plaintiff's firm argued that the 17 defendants had each "waived" their right to the attorney-client privilege when they entered into a joint defense agreement and freely exchanged what would be typically attorney-client privileged information.

The trial court disagreed with the plaintiff's firm and confirmed that when defense counsel enter into a joint defense agreement, so long as the disclosure of privileged information is done in connection with a common defense interest, that information remains protected. Because the court found there was no waiver, i.e., that the information known by Drouet was privileged, the court needed to ensure that this information was protected and could not be utilized by plaintiff against the defendants. The court found that the proper means of ensuring that the defendants were not adversely affected by Drouet's employment with plaintiff's firm (and likely sending a message to firms' hiring partners everywhere) was to disqualify the plaintiff's firm from representing plaintiff.

The Second District agreed with the findings and found that the trial court acted reasonably in disqualifying the firm. The import of the court's decision is that it reaffirms the application of the Common Interest Doctrine in stating, "work product protection 'is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation.'" In other words, the court found that under the common interest doctrine, an attorney can disclose work product to an attorney representing a separate client without waiving the attorney work product privilege if (1) the disclosure relates to a common interest of the attorneys' respective clients; (2) the disclosing attorney has a reasonable expectation that the other attorney will preserve confidentiality; and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted.

Thus, when an insurer - or any defendant - is involved in multi-defendant litigation and counsel recommends coordination/cooperation with other defendants, under California law, there is little to fear with regard to waiving attorney-client privilege. This is evidenced by the above opinion, where the courts went to great lengths to ensure that there was no potential for adverse effects. In practice, cooperation and coordination with other defense counsel is often the best course. It presents: (1) the opportunity to share the burden and costs of preparing arguments and briefing; (2) the ability to share and collaborate on potentially winning arguments; and possibly most importantly (3) presents the defendants to the court as a unified entity, which can have powerful influential effect. Our clients have recently found great success in such agreements and defenses, but to ensure our clients' security, we certainly always recommend a Joint Defense Agreement that specifically addresses the fact that discussion among counsel will do nothing to waive or limit the client's valuable protection of the attorney-client privilege.