

APPELLATE BRIEFS

By: Paul Georgeson, McDonald Carano

COURT OFFICIALLY ADOPTS COMMON INTEREST RULE

In the recent case of *James J. Cotter, Jr. v. Eighth Judicial District Court*, 134 Nev. Adv. Op. 32, the Court was faced with the question as to whether the disclosure of work-product documents to third parties constitutes a waiver of the work-product privilege. Upon review, the Court formally adopted the common interest rule, which allows attorneys to share work-product with third parties that have a common interest in litigation without waiving work-product protection.

In *Cotter*, James Cotter was the CEO and Chairman of the Board of Directors of Reading International, Inc. After Reading terminated him, he filed a complaint in district court alleging breach of fiduciary duties against several members of Reading's Board of Directors. At the same time, a number of Reading's shareholders filed a separate derivative action in district court against the same Director Defendants related to Cotter's firing. The district court consolidated the two actions.

During discovery, the Director Defendants sought discovery from Plaintiffs regarding communications among the Plaintiffs. Counsel for the Plaintiffs withheld some of their email communications on the basis that they were subject to work-product protection. The Defendants objected, arguing that Plaintiffs waived the work-product privilege by sharing the communications with each other. They also noted that there was no written joint prosecution or confidentiality agreement between Cotter and the derivative action Plaintiffs that protected the exchange of any such information.

The district court agreed with the Defendants, finding that the Plaintiffs failed to show a common interest between

Cotter and the derivative Plaintiffs. The district court therefore ordered the production of the emails. Cotter and the derivative action Plaintiffs filed a writ petition with the Supreme Court to prevent the disclosures.

The Supreme Court first addressed the issue of whether writ relief was appropriate. The Court noted that it does not ordinarily accept writ relief for discovery matters. However, the Court noted that where suitably privileged information would irretrievably lose its confidential and privileged quality, writ relief may be appropriate. Here, the Court found that absent writ relief, the resulting prejudice would be irreparable and significant. Therefore, the Court agreed to accept the writ petition.

The Court then turned to the work-product privilege and the common interest privilege. The Court noted that the work-product doctrine protects attorneys' mental impressions, conclusions, or legal theories concerning litigation. The Court clarified that, rather than protecting the confidential relationship between attorney and client, the work-product privilege exists to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent. Thus, unlike the attorney-client privilege, selective disclosure of work-product to some, but not others, is permitted. Consequently, disclosure to third parties does not automatically or necessarily waive the privilege.

The Court further noted that numerous jurisdictions recognize a broad common interest rule that allows attorneys to share work-product with counsel for other clients with the same interests, without waiving the privilege. Based on that review and discussion, the

Court took the opportunity to formally adopt the common interest rule as an exception to the waiver of the work-product privilege.

The Court then went on to define when the common interest rule would apply. First, the transferor and transferee of the information must "anticipate litigation against a common adversary on the same or similar issues." Second, those parties must have "strong common interests in sharing the fruit of the trial preparation efforts." If those requirements are met, then the sharing of such information does not constitute a waiver of the work-product privilege.

In addition, the Court clarified that this the rule is not narrowly limited to co-parties. Thus, it can apply even if the transferor and transferee of the information are not parties to the same litigation. Further, the Court held that a written agreement is not required to protect the privilege. Instead, the common interest may be implied "from conduct and situation." For example, this would include attorneys exchanging confidential communications from clients who are, or potentially may be, co-defendants or share a common interest in litigation.

However, the Court ruled that common interest privilege is not without limits. The privilege can be waived if material is disclosed to an adversary. Further, even if it is not disclosed directly to an adversary, the privilege may be waived when disclosures to third parties will "substantially increase the opportunities for potential adversaries to obtain the information."

In the case before it, the Court found that all conditions were met with respect to the information shared between

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so I told my “Nina”. I did not imagine she would have such fury and anger. My family fell apart. My molester became the victim. “How dare I lie about him? During the holidays, my mother looked at me with hatred in her eyes, like telling me to get out, stop making my brother uncomfortable. My father began having strokes, we did not know what was going on, but he couldn’t help me. I fell apart, hating those that supported “my pedophile.” My father died in 2012. I had no one. Even my brother had a family now, but I had no one. I had no reason to live. For years, I used beer and double-shot tequila to drown my pain.

This brought me to the COD court program. They sent me to a female for my evaluation. She was the first person to whom I really explained my secrets. She promised to find me the right help, and she did. Quest Counseling assigned me to women therapists for groups and individual counseling. They made me feel safe and comfortable, and I began to share. Judge Holmes was right, they were here to help me. They worked with my 12-hour shifts, and set my drug-testing so it didn’t interfere with my work. I met Sgt. Stone and she scared me at first, but we always talked. She told me never to lie to her and I didn’t want to disappoint her.

I’ve been broken, knocked down, felt pain most could not handle. But I looked fear in the face. From this program, I take courage and strength. I stand tall and strong, and now face challenges. I have a life of happiness, smiles, no silence. It feels awesome. I’m free now. I’m at peace. I can be happy, I deserve to be happy.”

Judge Dorothy Nash Holmes presides over Dept. 3 in Reno Municipal Court. She is adjunct faculty at TMCC and UNR, and teaches a course on Specialty Courts for the online Justice Management Master’s Degree Program at UNR.



Appellate Briefs Continued

counsel for Cotter and counsel for the derivative action Plaintiffs. Therefore, it concluded that the district court erred in ruling that the commonly interested Plaintiffs must disclose the emails and held that the common interest rule protected those communications.

Thus, while it is always advisable to have some sort of written common interest agreement, it is now clear that a written agreement is not necessary to protect work-product communications between those who anticipate litigation against a common adversary on the same issue or issues when they have strong common interest in sharing the fruits of trial preparation efforts. However, the common interest rule is not unlimited, and counsel still must use caution in disclosing work-product information to third parties.

Paul Georgeson is a partner at McDonald Carano and practices primarily in the areas of commercial litigation, construction law, and appellate law. He is a member of the firm’s Appellate Practice Group and regularly handles appeals and writ proceedings in state and federal courts.



FEDERAL CJA PANEL APPLICATIONS

The United States District Court for the District of Nevada is accepting applications for appointments of new Federal Criminal Justice Act (CJA) Panel attorneys (appointment of counsel for indigent defendants) for the Unofficial Northern Division of the District of Nevada. Attorneys interested in appointment to the CJA Panel must submit an application in PDF format to Jennifer_Cotter@nvd.uscourts.gov by September 1, 2018. Attorneys applying for the Appeal Panel must also submit a writing sample. Appointments for the new Panel will be effective November 1, 2018.

Applications are available on the Court’s website at www.nvd.uscourts.gov, or by contacting Jennifer Cotter at the above email address. Applicants must be members in good standing of the bar of the Federal Court and must have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the Federal Sentencing Guidelines. Attorneys on the CJA Panel also must have demonstrated an interest in providing criminal defense services and a reputation for competent and vigorous representation. Members of the Panel are required to participate in six hours of training in federal criminal practice, with at least three of the six hours on the Federal Sentencing Guidelines, per year which shall be provided through the Federal Public Defender’s Office or other Court approved provider of Continuing Legal Education.

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