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COUNTY of SANTA BARBARA
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MICHAEL JOE JACKSON, Defendant.	No. 1133603 PLAINTIFF'S MEMORANDUM REGARDING DEFENDANT'S CLAIM OF THE ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES DATE: January 16, 2004 TIME: 8:30 a.m. DEPT: SM 2 (Melville)

Introduction:

On November 18, 2003, a search warrant was served at the Beverly Hills office of one Bradley Miller, a private investigator, in connection with the ongoing investigation of the Michael Jackson matter. While that warrant was being executed, Attorney Daniel Nixon, of the law firm of Byrne & Nixon, came to the premises and asserted an attorney-client privilege and a privilege under the work-product doctrine as to all of the property subject to seizure pursuant to the warrant.

Accordingly, the property seized in obedience to the warrant was sealed and not inspected by the investigating officers, pending a more formal assertion of privilege by counsel

and a determination of the merits of that claim by a judge of this court.

Attorney Nixon later informed the undersigned that the "work-product" privilege properly belongs to Attorney Mark Geragos, because Investigator Miller was employed by him on behalf of Defendant. By a faxed letter dated January 15, 2004, Attorney Geragos asserted both the lawyer-client privilege and the attorney work-product privilege as to all that property

A separate search warrant was executed at "Neverland Ranch," Defendant's residence. Though various of Mr. Jackson's lawyers visited the ranch while the search was in progress, no privilege was asserted as to any of the property at that time. A lawyer from Attorney Geragos' office inspected some of the property seized in that search, in private, and the Sheriff's Department. In his letter of January 15th, Attorney Geragos identified three documents (Items 312, 318 and 328 on the Sheriff's Property List) as protected by both the lawyer-client privilege and the attorney work-product privilege.

The prosecutor requested, several times over the past several weeks, that defense counsel not only formally identify the property as to which a privilege might attach, but state why a given item of property comes within one or another of the claimed privileges. In that connection, the only response from defense counsel are these two sentences in his letter to this office:

> Upon a colorable claim of privilege, the court must first conduct an *in camera* review of such items and rule whether the privilege applies. Support for this position is found in the following cases: *People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703; *People v. Superior Court* (*Bauman & Rose*) (1995) 37 Cal.App.4th 1575, *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1712; *Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 171-172.

With the greatest deference, rather more particularity is required of the lawyer who asserts a privilege in order that opposing counsels may intelligently respond to the claim, and to enable the court to rule on the merits of the claim.

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The discussion that follows is offered for the guidance of opposing counsel and for what assistance it might provide the court.

The Procedure For Evaluating And Ruling Upon Claims Of "Lawyer-Client" And "Attorney Work-Product" Privilege

It appears that a hearing to consider claims of privilege, pursuant to Penal Code section 1536, is appropriate in the circumstances of this case.

Penal Code section 1536 provides:

> All property or things taken on a warrant must be retained by the officer in his custody, **subject to the order of the court** to which he is required to return the proceedings before him, or of any other court in which the offense to which the property or things taken is triable. (Emphasis added.)

In *People v. Superior Court (Laff)*, *supra*, 25 Cal.4th 703, our Supreme Court construed section 1536 as authorizing such a hearing. (*Id.*, at p. 713)

In that case, warrants issued for the searches of the homes and offices of two lawyers suspected of insurance fraud. The lawyers asserted that the materials seized included information protected by the attorney-client privilege and the work-product doctrine. They demanded that the searches be conducted under the supervision of a special master to be appointed by the court. That request was denied. The superior court subsequently ordered the Department of Insurance and the district attorney's office to cease their inspection and copying of the seized materials and placed that material under seal pending further order of the court.

The Supreme Court held that a trial court has a statutory obligation to hold a hearing to determine claims of privilege with respect to materials seized in obedience to a search warrant (*id.*, p. 720), and inherent authority to appoint a special master, if needed, to assist it in examining the documents as to which a claim of privilege has been asserted (*id.*, p. 735.)

In this case, the defendant and Mr. Miller have regained possession of the hard drives taken from the computers seized or accessed in obedience to the search warrants. Their representatives should therefore be able to provide to the court, in camera, copies of such of those documents preserved on the hard drives as, in their view, constitute either lawyer-client

communications, attorney work-product, or both.

In the circumstances, the People doubt there will be a need to appoint a special master to assist the court in reviewing the documents which will be lodged with the court under seal by plaintiff and defendant.

Burden of Proof

1. Work Product Privilege

The attorney is the exclusive holder of the "work product" privilege, at least vis-à-vis third party adversaries attempting to obtain discovery of the attorney's work product. (See *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 272.)

"[I]t is the burden of the party asserting the work product privilege to prove that the material in question is work product and therefore privileged. [Citation.]" (*People v. Superior Court (Bauman & Rose)*, *supra*, 37 Cal.App.4th 1757, 1771.)

2. Lawyer-Client Privilege

The client is the holder of the lawyer-client privilege (Evid. Code, § 953, subd. (a)), but "the lawyer who received or made a communication subject to the privilege . . . shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of section 954" (*id.*, § 955).

> While it is generally true that the court cannot compel disclosure of the contents of privileged documents in order to rule on the objection to a discovery request [citations], it can and should determine all of the facts on which the claim of privilege depends. The party claiming the privilege has the burden to show that the communication sought to be suppressed falls within the terms of the claimed privilege. [Citation.] The party opposing the privilege must bear the burden of showing that the claimed privilege does not apply or that an exception exists or that there has been an expressed or implied waiver. [Citation.]

(*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1619, fn. omitted.)

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> In a hearing conducted pursuant to Penal Code section 1524, subdivision (c), the court is authorized to require disclosure, in chambers, of materials claimed to be privileged, if the court determines that there is no other feasible means of ruling upon the validity of the claim. (Evid. Code, § 915.) This authorization constitutes an exception to the general rule prohibiting disclosure of information, claimed to be privileged, in order to rule upon the claim of privilege. (*Id.*, subd. (a).)

(*People v. Superior Court* (*Laff*) , *supra*, 25 Cal.4th 703, 720, n.7.)

"Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115; last sentence.)

Attorney "Work Product" Privilege

The "attorney work-product" privilege is not grounded in either the United States Constitution or the California's Constitution: it is a creature of statute in California and a judicially-articulated policy as well as statute in federal courts. It "is not based on the right to counsel clause; rather, it is 'a form of federally created privilege' based on federal supervisory policy and federal statute. [Citations.] There is no privilege for attorney work product in the California Constitution." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 381, fn. omitted.)

Code of Civil Procedure, section 2018 codifies the attorney work-product doctrine in California. Section 2018 refers to "work product protection" and does not utilize the word "privilege." Nevertheless, reviewing courts have used "doctrine" and "privilege" interchangeably, at least when referring to work product that is made "not discoverable."

The first subdivision of that statute declares that

> (a) It is the policy of the state to: (1) preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and effort.

["]The statute does not define 'work product' and the determination of what is 'work product' must be made by individual courts on a case-by-case basis. [Citation.]["] (*In re Jeanette H.* (1990) 225 Cal.App.3d 25, 32.)

"In California, courts have identified attorney work product as material which is derivative in character, not ultimate facts but material compiled by the attorney in preparation of his or her case. [Citation.]" (*Jeanette H.*, *supra*, 225 Cal.App.3d at p. 32.)

Code of Civil Procedure section 2018, subdivision (a) can be said, then, to articulate the general limits of what decisional law describes as a "qualified privilege" – "qualified," because subdivision (b) places limits on that privilege:

> (b) Subject to subdivision (c), the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

Subdivision (c) articulates what our Supreme Court has described as "'core' work product"[1] (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 382, n. 19). It provides:

> (c) Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

"Core" work product, then, is a specifically-defined subset of work product generally.

Bernard Jefferson, then a Justice of the Court of Appeal for the Second Appellate District, made that distinction with clarity in *Fellows v. Superior Court, supra,* 108 Cal.App.3d 55:

> A document . . . comes within the "absolute" portion of the attorney's work-product privilege if it consists of a "writing that reflects an attorney's impressions, conclusions, opinions or legal research or theories." (Code Civ. Proc., § 2016, subd. (b).) Such a writing "shall not be discoverable under *any* circumstances." (*Ibid.*, italics added.) The language of section 2016, subdivision (b), is

[1]Also referred to as "opinion work product" – *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 63, n. 3, citing *Duplan Corp. v. Moulinage et Retorderie de Chavanoz* (4th Cir. 1974) 509 F.2d 730.

clear and explicit. It offers no opportunity for compromise or variation. There is no authorization for the court to weigh or balance any competing interests between the party seeking disclosure and the party resisting disclosure. Invocation of the attorney's work-product privilege with respect to such a document precludes discovery since such a document "is protected *absolutely* from disclosure by the attorney's work-product privilege . . . ." (*Rodriguez* v. *McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 648 [151 Cal.Rptr. 399].) (Italics in original.)

A document . . . comes within the "conditional" portion of the attorney's work-product privilege if the document meets the definition of "work product" for this privilege but is *not* a writing that reflects the attorney's impressions, conclusions, opinions, or legal research or theories. An attorney's "conditional" work product consists of material that is of a *derivative* or *interpretative* nature such as diagrams, charts, audit reports of books, papers, or records, and findings, opinions and reports of experts employed by an attorney to analyze evidentiary material. (See Jefferson, Cal. Evidence Benchbook (1972) Meaning of "Work Product" for Attorney's Work-Product Privilege, § 41.2, pp. 709-712.)

"Material that is considered of a nonderivative or noninterpretative nature and that is evidentiary in character does *not* constitute the attorney's work product. This distinction between *derivative* and *nonderivative* matter strikes a reasonable balance between the competing policies of encouraging thorough trial preparation by lawyers, by making work product a privilege from disclosure and, at the same time, of permitting broad discovery to prevent trials from constituting games of chance." (*Id.* at p. 711.) (Italics in original.)

"Major categories of nonderivative evidentiary material excluded from the concept of an attorney's work product include (1) the identity or location of evidentiary matter, such as material objects; (2) material objects themselves that constitute admissible evidence; (3) information about prospective or potential witnesses, such as their names, phone numbers, addresses, and occupations; and (4) written or recorded statements of prospective witnesses." (*Id.* at

p. 711.)

(*Fellows v. Superior Court, supra,* 108 Cal.App.3d at pp. 68-69.)

Note, however, that subdivision (c) applies alike to the "impressions, conclusions, opinions, or legal research or theories of an agent of an attorney. (See *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-648.)

Only "Core" Work Product Is Protected In Criminal Cases

Discovery in criminal cases is limited by Part 2, Title 6, Chapter 10, sections 1054 through 1054.9 ("Discovery") of the Penal Code.

Section 1054.6 declares:

> Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product **as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure,** or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States. (Emphasis added.)

In *Izazaga, supra*, our Supreme Court was careful to

> note . . . that [Penal Code] section 1054.6 expressly limits the definition of 'work product' in criminal cases to "core" work product, that is, any writing reflecting "an attorney's impressions, conclusions, opinions, or legal research or theories." Thus, the qualified protection of certain materials under Code of Civil Procedure section 2018, subdivision (b), applicable in civil cases, is no longer applicable in criminal cases. The more recent statute limiting the definition of work product in criminal cases carves out an exception to civil and criminal cases alike. [Citations.]

(54 Cal.3d 356, at p. 382, n. 19.)

Thus, unless the attorney claiming a "work product privilege" as to a given videotape, audio tape or other document seized in this case can persuade the court that it is **"core" work product**, i.e., a "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" with respect to his efforts on behalf of defendant Jackson or another client of his, rather than merely "qualified" work product, that

attorney's claim of a work-product privilege in the seized must be rejected.

There Is Now A "Crime-Fraud" Exception to Even The "Absolute" Protection Afforder "Core" Work Product

As recently amended, Code of Civil Procedure section 2018, subdivision (d) provides:

> (d) This section is intended to be a restatement of existing law relating to protection of work product. It is not intended to expand or reduce the extent to which work product is discoverable under existing law in any action. *However, when a lawyer is suspect of knowingly participating in a crime or fraud, there is no protection of work product under this section in any official investigation by a law enforcement agency or proceeding or action brought by a public prosecutor in the name of the People of the State of California if the services of the lawyer were sought or obtained in order to enable or aid anyone to commit or plan to commit a crime or fraud. Nothing in this section is intended to limit an attorney's ability to request an in camera hearing as provided for in People v. Superior Court (Laff) (2001) 25 Cal.4th 703.*

(Code Civ. Proc., § 2018, subd. (d), as amended by Stats. 2002, ch. 1049 (A.B. 2044), § 1, eff. 9/29/2003; italics highlight recent amendment.)

Examples of privileged "core" work product

-- disclosure of non-expert witnesses' anticipated testimony (*Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 80);

-- law firm's interoffice memo concerning an action that became basis for subsequent action against firm (*Popelka, Alllard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 500);

-- Counsel's decision that an expert who has been consulted should not be called to testify (*People v. Coddington* (2000) 23 Cal.4th 529, 606);

-- attorney's writings, in his role of counselor to insurance company, concerning his investigation of insured's casualty claim and determine coverage under policy (*Aetna Casualty & Surety Co. v. Superior Court* (1984) 153 Cal.App.3d 467, 479)

Examples of "qualified' work product

-- Identity of non-expert witnesses intended to be called at trial (*Long Beach v. Superior Court*, *supra*, 64 Cal.App.3d 65, 72);

-- Material of a derivative or interpretative nature such as diagrams, charts, audit reports of books, papers, or records, and findings, opinions and reports of experts employed by an attorney to analyze evidentiary material. (*Mack v. Superior Court* (1968) 259 Cal.App.2d 7, 10-11.)

Lawyer-Client Privilege

The attorney-client privilege is "one of the oldest privileges in our jurisprudence . . . ." (*Titmas v. Superior Court* (2001) 87 Cal.App.3d 738, 739.) It is founded on "public policies of paramount importance" (*In re Jordan* (1972) 7 Cal.3d 930, 941), and it is "vital to the effective administration of justice." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380, quoted in *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 715.) But what the Legislature denominates the "lawyer-client privilege" (Evid. Code, § 954) is only a statutory privilege, not an extension of the Sixth Amendment. (*People v. Godlewski* (1993) 17 Cal.App.4th 940, 945.) The privilege, as an obstruction to the search for all relevant evidence, is to be strictly construed (*City & County of San Francisco v. Superior Court* (1951) 31 Cal.2d 227, 235), insofar as the issue of the existence of a lawyer-client relationship is concerned. But where that relationship is established, the basic policy behind the privilege supports a liberal construction in favor of the exercise of the privilege. (*People v. Velasquez* (1987) 192 Cal.App.3d 319, 327 and n. 4.)

What Is Protected By The Lawyer-Client Privilege?

"It is essential to a claim of privilege that there be a communication. (*Grand Lake Drive In, Inc. v. Superior Court* (1960) 179 Cal.App.2d 122, 125-126 [holding that an expert who conducted "slipperiness tests" on the drive-in's sidewalk could be compelled to testify concerning his own observations and methodology; the discoverability of his report to the attorney who hired him was not at issue].)

Moreover, the "communication" must be between the lawyer and his client, though it may be by either one to the other (Evid. Code, § 952).

See *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, which involved the question whether motion pictures taken of civil plaintiff by investigator for defendant's counsel in anticipation of litigation came within the lawyer-client privilege. Held: It did not.

> It is quite clear that although the investigator, the attorney and his client may have intended the films to be confidential, to be privileged they must constitute a "communication made by the client to [the attorney]" as that phrase is used in [Code of Civ. Proc.] section 1881. The film here involved obviously was not such a "communication." It is simply a physical object transmitted to the attorney either with or without an accompanying report or letter of transmittal. As already pointed out, transmission alone, even where the parties intend the matter to be confidential, cannot create the privilege if none, in fact, exists.
>
> Moreover, even if the picture itself were to be deemed a "communication," it cannot be said to be one from client to the attorney. This is so not because the transmittal was from the investigator and not from the client, for there are many situations in which a communication made by an agent for the client is deemed to be the communication of the client for the purpose of determining the privilege.
>
> The matter is privilege if the agent is required to communicate to the attorney something *from* the client himself which the latter is unable to communicate himself, or where the communication can better be transmitted through a specialist. . . .
>
> Here, the film cannot be said to be a communication made by the agent of something the client would have transmitted himself had he been in a position so to do. The films are not a graphic representation of the defendants, their activities, their mental impressions, anything within their knowledge, or anything owned by them. The films are representations of the plaintiff, not the defendants. If they can be said to be a "communication" in any sense of the word, they represent an unconscious and unintended

> "communication" from plaintiff. Certainly, there is nothing in subdivision 2 of section 1881 of the Code of Civil Procedure (or in the cases interpreting it) than can be said to create a privilege in a communication from a litigant to his adversary's attorney.

(*Suezaki v. Superior Court, supra*, 58 Cal.2d at pp. 176-177; emphasis the court's.)

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And see *People v. Meredith* (1981) 29 Cal.3d 682, in which the Supreme Court held that defense counsel's investigator could be required to testify concerning his act of retrieving a robbery/homicide victim's wallet from a trash can behind defendant's house and turning it over to the police, though he could not be required to testify that the defendant had told his lawyer where he had dumped it.

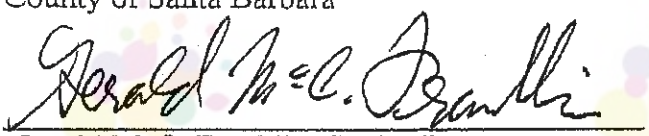
The "Communication" Must Be Made In Confidence

A communication must have been intended to be confidential if it is to come within the lawyer-client privilege. It may be transmitted *by* third parties who are employed for that purpose. But if the communication is made to be conveyed to a third person who is not an agent of the attorney, it is not privileged. Neither is it privileged if it is conveyed to the lawyer in the presence of third person, other than those "to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the lawyer is consulted," or those "who are present to further the interest of the client in the consultation." (Evid. Code, § 952.)

DATED: January 16, 2004

Respectfully submitted,

THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY
County of Santa Barbara



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