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FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA
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GARY M. BLAIR, Executive Officer
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CARRIE L. WAGNER, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MICHAEL JACKSON,

Defendant.

Case No.: 1133603

DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST FOR RECONSIDERATION BY COURT OF ITS FINDINGS AND ORDER RE: CLAIMS OF WORK PRODUCT PRIVILEGE

Date: TBA
Place: SM-2
Time: TBA

Defendant Michael Jackson ("Mr. Jackson") hereby opposes Plaintiff's Request for Reconsideration by Court of Its Findings and Order Re: Claims of Work Product Privilege.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Court's March 11, 2003 Order should not be disturbed. Having reviewed the Order and reasons set forth therein, the defense accepts the Court's determination that that Audiotape No. 818 must not be provided to the People. As noted by the Court of Appeal for the Forth Appellate District in *Dowden v. Superior Court* (4th Dist. 1999) 73 Cal.App.4th 126:

> [Code of Civil Procedure] section 2018 provides a privilege for matter prepared in anticipation of litigation. (See *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 62, 166 Cal.Rptr. 274.) It reads, in part, "[i]t is the policy of this state to (1) preserve the rights 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 efforts." (§ 2018, subd. (a).) Therefore, "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." (§ 2018, subd. (c).) Other types of work product are not discoverable unless "denial of discovery will unfairly prejudice the party seeking discovery ...." (§ 2018, subd. (b).)

(*Dowden v. Superior Court, supra,* 73 Cal.App.4th at p. 129.)

In discussing the history of the development of California's statutory work product protection, the *Dowden* court also noted:

> In 1963, the Legislature adopted the State Bar's amendment [to the Discovery Act] almost verbatim. The amendment reiterated the need to protect the privacy and work efforts of attorneys. (Former Code Civ. Proc., § 2016, subds. (b) & (g), amended by Stats.1990, ch. 207, § 1, pp. 1364-1395.) Since 1963, excluding some cosmetic changes, what is now section 2018 has not changed. "In the absence of any indication of legislative intent ... [the] court should consider the general purpose of the statute, as well as the consequences of alternative constructions, as guides to interpretation." (*In re Marriage of Harris* (1977) 74 Cal.App.3d 98, 101-102, 141 Cal.Rptr. 333.) Since the Legislature enacted the State Bar's proposal almost verbatim, the State Bar's report may be used as an interpretive aid. (See, e.g. *Soles v. Stewart* (1933) 134 Cal.App. 661, 664, 26 P.2d 44.) The report expresses concern over litigants, as well as of attorneys, having unrestrained access by their opponents to materials prepared in anticipation of litigation. [¶] Section 2018's stated purpose and the underlying reasons for its creation emphasize the need to "limit[ ] discovery so that 'the stupid or lazy practitioner may not take undue advantage of his adversary's efforts....' " (Pruitt, *Lawyers' Work Product, supra,* 37 State Bar J. at pp. 240-241.) Such a policy is important not only for attorneys, but also for litigants acting in propria persona. A

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> litigant needs the same opportunity to research relevant law and to prepare his or her case without then having to give that research to an adversary making a discovery request.

(*Dowden v. Superior Court, supra,* 73 Cal.App.4th at p. 133.)

From *Dowden*, it is clear that the Court's Order properly furthers the objectives of the purposes of California's discovery procedures. As the Court noted, the individuals involved are equally if not exclusively available to the People. Consequently, Mr. Jackson respectfully requests that the Court deny the People's motion in its entirety. Alternatively in light of Section I below, Mr. Jackson requests that the Court (1) hold a further in camera hearing during which the defense, in the absence of the People, may explain to the Court why Audiotape No. 818 is "core" work product; or, (2) vacate its March 11, 2004 Order and enter a new order finding that Audiotape No. 818 is "core" work product for the reasons stated therein; and (3) stay entry of a final order on this issue for 10 days during which the adversely affected party may seek appellate relief.

I.

MR. JACKSON INVITES THE COURT TO REVISIT ITS CHARACTERIZATION OF AUDIOTAPE NO. 818

The People's motion questions the Court's interpretation of the attorney work product protection under California law. While Mr. Jackson disagrees with the People's contention, he respectfully urges this Court to revisit its characterization of Audiotape No. 818 in the event the Court should determine the People's motion has any merit. In that regard, Mr. Jackson notes that the parties and the Court agree that "core" work product enjoys absolute protection and "shall not be discoverable under any circumstances." (Code of Civil Procedure section 2018, subdivision (c).) As explained more fully below, the defense believes Audiotape No. 818 is a classic example of "core" work product and must remain unavailable to the People.

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1 **A. *Nacht* and *Kadelbach* may in fact support a finding that Audiotape No.**
2 **818 is "core" work product.**

3 The Court cites two cases for the proposition that "[a]bsolute work product
4 protection will not generally apply to statements recorded from witnesses or to other
5 videotaped material except to the extent that the line of questioning or the form in which
6 the material is compiled or edited might reveal legal theories." (Order at 2:11-16, citing
7 *Nacht & Lewis Architects, Inc. v. Superior Court (McCormick)* (3rd Dist. 1996) 47
8 Cal.App.4th 214, 217-218 and *Kadelbach v. Amaral* (3rd Dist. 1973) 31 Cal.App.3d 814,
9 823.)

10 While Mr. Jackson concurs that *Nacht* is dispositive (indeed, Mr. Jackson so
11 argued in prior filings), he believes *Nacht* is consistent with a finding that Audiotape No.
12 818 is "core" work product. A brief explanation of what the defense believes Audiotape No.
13 818 to represent may facilitate the Court's review. Audiotape No. 818 was "compiled or created
14 at the direction of defense counsel by an investigator for that purpose" as noted by the Court.
15 (Order at 2:25-26.) Audiotape No. 818 "records an interview conducted by a defense
16 investigator for Attorney Geragos in early 2003." The defense believes that the questions asked
17 by Investigator Miller (at the direction of Attorney Geragos) clearly implicate Messers. Geragos's
18 and Miller's impressions, conclusions, opinions, and theories of the case. As noted above, one of
19 the alternative dispositions Mr. Jackson has requested of the Court is a further in camera hearing
20 during which the defense might provide further explanation as to why Audiotape No. 818 is core
21 work product.

22 A summary of the relevant facts of *Nacht* is helpful. In *Nacht*, the plaintiff had
23 propounded various form interrogatories to the defendant therein, including Judicial
24 Council approved form interrogatory number 12.2 which requested the identities of
25 individuals interviewed concerning the incident and form interrogatory 12.3 which
26 requested the identities of individuals from whom written or recorded statements obtained
27 concerning the incident. The defendant provided identical responses to the two
28

interrogatories: "Counsel for the Defendants has conducted interviews of employees of Nacht & Lewis Architects. The information from the interviews is protected by the attorney-client privilege and work product doctrine." (*Nacht* at 216-217.) The trial court granted plaintiff's motion to compel further responses to both interrogatories. Defendant appealed and the Court of Appeal provided a well thought out explication as to the scope of the attorney work product protection and its application to the facts:

> We agree the respondent court erred in compelling further response to interrogatory 12.2. Compelled production of a list of potential witnesses interviewed by opposing counsel would necessarily reflect counsel's evaluation of the case by revealing which witnesses or persons who claimed knowledge of the incident (already identified by defendants' response to interrogatory 12.1) counsel deemed important enough to interview. (Cf. *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 73, 134 Cal.Rptr. 468 [compelled production of list of witnesses to be called at trial impermissibly reveals counsel's evaluation of the strengths and weaknesses of his case].) [FN1]
>
> > FN1. Although the precise issue of interrogatory responses revealing the identities of persons interviewed by opposing counsel has not been addressed in a published opinion in this state, federal decisions have uniformly reached the conclusion that we reach here. (See, e.g., *Laxalt v. McClatchy* (D.Nev.1987) 116 F.R.D. 438, 443; *Commonwealth of Mass. v. First Nat. Supermarkets, Inc.* (D.Mass.1986) 112 F.R.D. 149, 152-154; *Board of Educ. of Evanston v. Admiral Heating & Ventilating, Inc.* (N.D.Ill.1984) 104 F.R.D. 23, 32.)
>
> The issue is more subtle as to interrogatory 12.3. In their response to that interrogatory defendants did not state that their attorney took notes or otherwise recorded his interviews with employees of Nacht & Lewis, but that their attorney collected information from the interviews. Though imprecise, the language is susceptible to the interpretation that defendants' counsel collected from the employees statements the employees had previously written or recorded themselves.
>
> The distinction is significant. A list of the potential witnesses interviewed by defendants' counsel which interviews counsel recorded in notes or otherwise would constitute qualified work product because it would tend to reveal counsel's evaluation of the case by identifying the persons who claimed knowledge of the incident from whom counsel deemed it important to obtain statements. Moreover, any such notes or recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's "impressions, conclusions, opinions, or legal research or theories" within the meaning of Code of Civil Procedure section 2018, subdivision (c). (*People v. Boehm* (1969) 270 Cal.App.2d 13, 21-22, 75 Cal.Rptr. 590.)
>
> On the other hand, a list of potential witnesses who turned over to counsel

> their independently prepared statements would have no tendency to reveal counsel's evaluation of the case. Such a list would therefore not constitute qualified work product. Moreover, unlike interview notes prepared by counsel, statements written or recorded independently by witnesses neither reflect an attorney's evaluation of the case nor constitute derivative material, and therefore are neither absolute nor qualified work product. (See, e.g., *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-648, 151 Cal.Rptr. 399; *Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814, 822- 823, 107 Cal.Rptr. 720; *People v. Boehm, supra,* 270 Cal.App.2d at p. 21, 75 Cal.Rptr. 590.) The respondent court should compel further response to interrogatory 12.3 only to the extent the court determines defendants' counsel obtained an independently written or recorded statement from one or more of the employees interviewed by counsel.

(*Nacht & Lewis Architects, Inc. v. Superior Court (McCormick), supra,* 47 Cal.App.4th at pp. 217-218, emphasis added.)

The underlined passages above indicate that under *Nacht* (1) even the identities of the individual(s) participating in the Audiotape No. 818 interview(s) is/are "core" work product; and, (2) the recorded statements themselves are "core" work product as well.

Mr. Jackson believes *Kadelbach* also supports a finding that Audiotape No. 818 is "core" work product. In *Kadelbach*, certain witnesses had given tape-recorded statements to defense counsel. Plaintiff moved to compel production thereof. The trial court denied the motion for discovery with the caveat that if either of the tape-recorded witnesses were called by the plaintiff, plaintiff would be permitted to review the tapes prior to cross examination by the defense. Subsequently the trial court modified its order so it provided "prior to the examination of either [taped witness] by [defense counsel], he will be expected to advise the opposition as to whether or not he intends to reveal his work produce as a piece of impeaching evidence subject to discovery, whether they are being examined on direct, under [Evidence Code section] 776, or on cross examination at the time." (*Kadelbach v. Amaral, supra,* 31 Cal.App.3d at p. 820.) Thereafter, one of the taped witnesses took the stand and prior to the defense's cross-examination a lengthy (70 pages of the record) discussion was had concerning the tape. Ultimately, following an in camera review of the tape, the trial court refused all of plaintiff's requests for access to the tape even though the trial court found that the tape contained statements having

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relevance to the issue in dispute. (*Kadelbach* at p. 820-821.)[1]

On appeal, the defendants in *Kadelbach* argued that as a matter of law, written or recorded statements of witnesses made to an attorney are protected against discovery as attorney work product. The Court of Appeal rejected this contention and in citing an apparent contradiction between two prior cases stated, "[t]o clear up this contradiction, we hereby disapprove our holding in [citation], that statements of witnesses come within the definition of protected derivative material." (*Kadelbach* at p. 823.) The court continued:

> The tape recording has not been made a part of the record on appeal. Defendants' counsel has not augmented the record by including it therein. <u>This court has no means of ascertaining whether the whole or any part of the tape was entitled to protection as work product</u> or, if so, whether defendants' rights would have suffered any prejudice had opposing counsel been permitted to hear it.

(*Kadelbach* at p. 823, emphasis added.)

From the foregoing two facts are clear about the opinion in *Kadelbach*. First, to the extent the Third Appellate District in *Kadelbach* (1973) determined that recorded statements generated by counsel were not protected derivative material, that determination was superseded or, at a minimum, called into question by the same court in *Nacht* (1996) wherein the court determined that such materials are "core" work product. Second, despite the disapproval of a prior case in *Kadelbach* it is clear the court of appeal contemplated that the tape may have been protected work product, but since the tape was not a part of the record the court could not pass on that issue. Notwithstanding these two cases, this Court has correctly noted that : The Court finds nothing on the tape that

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[1]Although it is not expressly nor clearly set out in the opinion, it appears that defense counsel interpreted the trial court's rulings as meaning the witness could not be questioned as to statements made on the tape without disclosing the contents of the tape. ("At no time during [the taped witness's] cross examination, re-direct, or recross-examination did the court or any counsel use or in any way refer to the tape recording. [¶]. . .In fact, from the moment the court ruled that no part of the tape would be made available to plaintiff's attorney, it was never again mentioned." (*Kadelbach* at. 821.))

threatens a miscarriage of justice if not revealed. The defense observes that, generally, evidence that might impeach prosecution witnesses is not discoverable. While this is not a standard applicable to seizures pursuant to a search warrant, it is a factor to consider in evaluating the question of prejudice." This Court's determination is well reasoned and should not be disturbed. However, if the Court does feel so compelled, Mr. Jackson respectfully urges the Court to revisit its determination that Audiotape No. 818 is not "core" work product.

CONCLUSION

WHEREFORE, Mr. Jackson respectfully requests that the People's motion be denied or that the Court grant one of the alternative forms of relief requested herein.

Respectfully submitted,

Dated: March 19, 2004

GERAGOS & GERAGOS

By: [signature]

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 S. Grand Avenue, 39th Floor, Los Angeles, California 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST FOR RECONSIDERATION BY COURT OF ITS FINDINGS AND ORDER RE: CLAIMS OF WORK PRODUCT PRIVILEGE

_____ placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, to the attorneys and their perspective addresses listed below, in the United States Mail at Los Angeles, California.

__X__ transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.

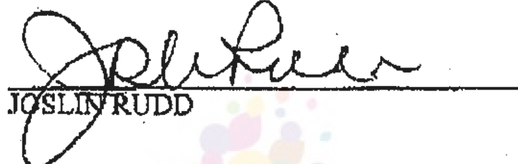
_____ personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

PARTIES SERVED BY FAX:

Judge Rodney S. Melville Fax No.: 805-346-7616	DA Thomas Sneddon Fax No.: 805-568-2398	DDA Gerald Franklin Fax No.: 805-568-2398
Benjamin Brafman Fax No.: 212-750-3906	Steve Cochran Fax. No.: 310-712-8455	Robert M. Sanger Fax. No.: 805-963-7311

Executed on MARCH 19, 2004, at Los Angeles, California.

I declare under penalty of perjury that the above is true and correct.



JOSLIN RUDD

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