

**FILED**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA BARBARA

APR 01 2004

1 THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY

County of Santa Barbara

2 By: RONALD J. ZONEN (State Bar No. 85094)

Senior Deputy District Attorney

3 GERALD McC. FRANKLIN (State Bar No. 40171)

Senior Deputy District Attorney

4 1105 Santa Barbara Street

Santa Barbara, CA 93101

5 Telephone: (805) 568-2300

6 FAX: (805) 568-2398

GARY M. BLAIR, Executive Officer

BY *Carrie L. Wagner*

CARRIE L. WAGNER, Deputy Clerk

7 Attorneys for Plaintiff

8  
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF SANTA BARBARA**

11 **SANTA MARIA DIVISION**

12  
13 THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

14  
15 v.

16 MICHAEL JOE JACKSON,

17 Defendant.

No. 1133603

18 } PLAINTIFF'S FOLLOW-UP  
19 } MEMORANDUM REGARDING  
20 } DEFENDANT'S CLAIM OF  
21 } ATTORNEY WORK-PRODUCT  
22 } PRIVILEGE FOR "ITEM 818"  
23 } SEIZED IN WARRANTED  
24 } SEARCH OF INVESTIGATOR  
25 } MILLER'S OFFICE

DATE: April 2, 2004

TIME: 8:30 A.M.

DEPT: SM 2 (Melville)

26 Introduction:

27 By its "Findings and Order Re: Claims of Work Product Privilege," filed March 11,  
28 2004, the Court barred access by the prosecution to "Item 818," an audiotape of an interview by  
a defense investigator for Attorney Mark Geragos of unidentified individuals, on the ground  
that because it is "qualified work product," "the balance weighs against release of the  
audiotape" to the prosecution.

The People requested reconsideration by the Court of that aspect of its Findings and  
Order. We argued that lawfully seized, relevant evidence is not protected from inspection by

1 the prosecution in a criminal case because it is "qualified work product." Only "core" work  
2 product is so privileged, we asserted.

3 The Court calendared the request for reconsideration for hearing on April 2, 2004,  
4 and has asked counsel

5 to be prepared to comment on the following possible line of analysis.  
6 Prior to the passage of Proposition 115, the California Supreme  
7 Court held that the work product doctrine applied to criminal cases  
8 and protects the work product of defense investigators. [See People  
9 v. Collie (1981) 30 C3d 43, 59]. Penal Code § 1054.6 and the  
10 Supreme Court's observation at Izazaga v. Sup. Ct. (1991) 54 C.3d  
11 356, 382, fn. 19, have specific references to issues in criminal  
12 discovery. Does, then, the broader protection for qualified work  
product privilege have application before a criminal defendant has  
been held to answer or indicted?

13 This Memorandum is respectfully offered for consideration by the Court and  
14 opposing counsel in anticipation of argument on April 2nd.

15 "ITEM 818" WAS SEIZED IN OBEDIENCE TO A SEARCH  
16 WARRANT, AS EVIDENCE WHICH MIGHT FURTHER A  
17 CRIMINAL INVESTIGATION. THAT INVESTIGATION IS ON-  
18 GOING. UNLESS THE EVIDENCE IS OF SUCH A NATURE  
19 THAT IT MAY NEVER BE CONSIDERED BY THE  
20 PROSECUTION, IT IS MAKES NO SENSE TO BAR THE  
GOVERNMENT'S ACCESS TO IT UNTIL THE DEFENDANT  
HAS BEEN HELD TO ANSWER OR INDICTED

21 In our respectful submission, a careful reading of the Supreme Court's decision  
22 in People v. Superior Court (Laff) (2001) 25 Cal.4th 703 ("Laff") provides an answer to the  
23 Court's question whether the broader protection afforded by the qualified work product  
24 privilege has application to the case of a criminal defendant before he has been held to answer  
or indicted.

25 Laff mandated the procedure – largely modeled on the procedure upheld by the  
26 Court of Appeal in People v. Superior Court (Bauman & Rose) (1995) 37 Cal.App.4th 1757  
27 ("Bauman & Rose") – of an in-camera hearing, even prior to the filing of a complaint in a  
28 criminal case, to determine whether evidence seized pursuant to warrant in a criminal

1 investigation was privileged from disclosure to the government.

2 In doing so, *Laff* rejected the People's argument "that neither the attorney-client  
3 privilege nor the work-product doctrine precludes disclosure of documents properly seized  
4 under a valid search warrant." (*Id.*, at p. 712.)

5 The People claim that the doctrine precludes disclosure of attorney  
6 work product only during *discovery*, and that a search warrant is not  
7 a tool of discovery. Therefore, according to the People, a hearing to  
8 determine the applicability of the work-product doctrine would serve  
9 no purpose. Contrary to the People's position, however, the work-  
product doctrine applies outside the context of formal discovery  
between parties to a pending action.

10  
11 (*Id.*, at p. 717; italics the court's.)

12 *Laff* noted that "the work-product doctrine is codified in [Code of Civil Procedure]  
13 section 2018. . . . Pursuant to subdivision (c) of section 2018, '[a]ny writing that reflects an  
14 attorney's impressions, conclusions, opinions, or legal research or theories shall not be  
15 *discoverable* under any circumstances.' (Italics added.)" (*Ibid.*)

16 The work-product doctrine expressly is made applicable to criminal  
17 cases by Penal Code section 1054.6, which states: "Neither the  
18 defendant nor the prosecuting attorney is required to disclose any  
19 materials or information which are work product as defined in  
20 subdivision (c) of Section 2018 of the Code of Civil Procedure, or  
21 which are privileged pursuant to an express statutory provision, or  
22 are privileged as provided by the Constitution of the United States."  
(See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 380-382;  
23 *People v. Collie* (1981) 30 Cal.3d 43, 59 [holding, before enactment  
24 of Penal Code section 1054.6, that the work-product doctrine applies  
in criminal cases].)

25 (*Ibid.*)

26 Subdivision (c) defines what is referred to as "core" work product, as distinct from  
27 what is known as "qualified work product," protected in civil cases by subdivision (b) of the  
28 same section. The *Laff* court's reference to "the work-product doctrine . . . applicable to

1 criminal cases" is, then, a reference to "core work product" and only core work product. *Laff*  
2 said nothing that would suggest that qualified work product, as distinct from "core" work  
3 product, was likewise privileged from access by investigators pursuing a criminal investigation.  
4 It cited a number of cases, both state and federal, "holding that materials seized pursuant to a  
5 search warrant, as part of a criminal investigation, are protected by the work-product doctrine"  
6 (*id.*, pp. 718-719). All of those cases involved core work product.

7 The Supreme Court noted that "If law enforcement authorities were permitted to  
8 seize and inspect privileged items *that would be protected against discovery in a criminal*  
9 *proceeding*, the prosecution simply could delay filing charges until a search warrant for those  
10 items is executed. Although the prosecution could not introduce the privileged information  
11 discovered by such a search as evidence in the proceeding, it nevertheless could use the  
12 information in preparing its case and thereby gain an unfair advantage over individuals  
13 intended to be protected by the privilege." (*Id.*, p. 719; italics added.) But of course, only  
14 "core" work product is "protected against discovery in a criminal proceeding" by Penal Code  
15 section 1054.6.

16 The *Laff* court upheld the procedure earlier approved by *Bauman & Rose*: "[T]he  
17 superior court has an obligation to consider and determine claims that materials seized pursuant  
18 to a search warrant . . . are protected by the attorney-client privilege or work-product doctrine  
19 and thus should not be inspected by or disclosed to law enforcement authorities." (*Id.*, p. 720.)  
20 But as noted, the only kind of "work product" that is protected from inspection in a criminal  
21 case is core work product.

22 *Laff* intended that evidence seized pursuant to a warrant and as to which a claim of  
23 privilege had been asserted would be kept from inspection by government investigators until –  
24 and only until – the claim, if contested, could be adjudicated in an in-camera hearing and found  
25 to have merit. The Supreme Court noted that "The superior court did not err in ordering that  
26 the documents seized from the attorneys remain under seal *pending resolution of their claims.*"  
27 (*Id.*, pp. 720-721, n. 8; italics added.)

28 ////

1 In summary, *Laff* held that only "core" work product is "privileged" from disclosure  
2 to and inspection by investigators in criminal cases, because the Legislature has accorded that  
3 privilege only to core work product in a criminal proceeding. In a criminal investigation in  
4 which evidence has been seized pursuant to warrant and a claim is asserted that some or all of  
5 the evidence is protected from disclosure as "attorney work product," the holder of that  
6 privilege is entitled to a prompt, in-camera hearing on the merits of his claim before the seized  
7 evidence may be disclosed to the investigators and inspected by them.

8 The People were mindful of *Laff's* holding when the warrants were sought and  
9 executed in this case. *Laff* involved a search of lawyers' offices, while here the premises  
10 searched belonged to a private investigator. But private investigators frequently work for  
11 attorneys, and there was absolutely no hesitation of the part of the searching officers in this  
12 case to accept Attorney Daniel Nixon's assertion of attorney-client and work product privileges  
13 and in securing the evidence without examining it pending this court's determination of the  
14 validity of his claims.

15 To paraphrase *Laff*, this Court has "resolved the claims," in precisely the fashion  
16 approved by the *Bauman & Rose* decision and mandated by *Laff*. It forthrightly declared that  
17 "None of the tapes at issue in this proceeding qualify for absolute work product protection."  
18 (Order 2:18-19.)

19 That being the case, the investigation properly interrupted by the timely assertion of  
20 the only privileges that apply in a criminal prosecution to evidence seized from a third party –  
21 the privilege against disclosure of attorney-client communications and "absolute" attorney  
22 work product – should now be permitted to proceed in the usual fashion.

23 Evidence entitled to the status of "qualified work product" is not privileged from  
24 disclosure in a criminal investigation or a later prosecution, because the Legislature has made it  
25 crystal-clear that only "core work product" enjoys that privileged protection from disclosure in  
26 a criminal case.

27 The answer to this Court's question, "Does . . . the broader protection [of the]  
28 qualified work product privilege have application before a criminal defendant has been held to

1 answer or indicted" must, then, be "No." The qualified work-product privilege applies only to  
2 discovery in civil cases. Prosecutorial discovery in criminal cases is limited by Penal Code  
3 section 1054.3 and, with respect to "work product," by section 1054.6 ("core" work product  
4 only). The government's access to work-product evidence seized in a warranted search enjoys  
5 no greater protection.

6 For purposes of an ongoing investigation, access to evidence seized in a warranted  
7 search is limited by *Laff* and earlier cases, and by statute, only to evidence of attorney-client  
8 communications and to core work product. *Laff* mandates an in-camera hearing expressly for  
9 the important but limited purpose of obtaining a judicial determination whether core work  
10 product had been seized. "Qualified" work product may well further a criminal investigation,  
11 but it is not protected from inspection for that reason. If the Supreme Court had intended in  
12 *Laff* to have qualified work product as well as core work product identified in the hearing and  
13 thereafter shielded from disclosure until the target of the investigation had been indicted or  
14 held to answer, it surely would have said so.

15 DATED: April 1, 2004

16 Respectfully submitted,

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

19   
20 Gerald McC. Franklin, Senior Deputy

21 Attorneys for Plaintiff  
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2  
3 **PROOF OF SERVICE**

4 STATE OF CALIFORNIA  
5 COUNTY OF SANTA BARBARA } SS

6 I am a citizen of the United States and a resident of the County aforesaid; I am over  
7 the age of eighteen years and I am not a party to the within-entitled action. My business  
8 address is: District Attorney's Office; Courthouse; 1105 Santa Barbara Street, Santa Barbara,  
9 California 93101.

10 On April 1, 2004, I served the within PLAINTIFF'S FOLLOW-UP  
11 MEMORANDUM REGARDING DEFENDANT'S CLAIM OF ATTORNEY WORK-  
12 PRODUCT PRIVILEGE FOR "ITEM 818" SEIZED IN WARRANTED SEARCH OF  
13 INVESTIGATOR MILLER'S OFFICE on Defendant, by MARK JOHN GERAGOS, and on  
14 associated counsel, by faxing a true copy to counsel at the facsimile number shown with the  
15 address of each on the attached Service List, and then by causing to be mailed a true copy (two  
16 true copies, to Attorney Geragos) to each counsel at that address.

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

18 Executed at Santa Barbara, California on this 1st day of April, 2004.

19  
20   
21 \_\_\_\_\_  
22 Rosemary Moll  
23  
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1  
2 **SERVICE LIST**  
3

4 **MARK JOHN GERAGOS, ESQ.**  
5 Geragos & Geragos, Lawyers  
6 350 S. Grand Avenue, Suite 3900  
7 Los Angeles, CA 90071-3480  
8 FAX: (213) 625-1600  
9 Attorney for Defendant Michael Jackson

10 **DANIEL V. NIXON, ESQ.**  
11 Byrne & Nixon LLP  
12 350 S. Grand Avenue, 39th Floor  
13 Los Angeles, CA 90071-3480  
14 FAX: (213) 620-8012  
15 Attorney for Bradley Miller

16 **ROBERT SANGER, ESQ.**  
17 Sanger & Swysen, Lawyers  
18 233 E. Carrillo Street, Suite C  
19 Santa Barbara, CA 93001  
20 FAX: (805) 963-7311  
21 Co-counsel for Defendant

22 **STEVE COCHRAN, ESQ.**  
23 Katten, Muchin, Zavis & Rosenman, Lawyers  
24 2029 Century Park East, Suite 2600  
25 Los Angeles, CA 90067-3012  
26 FAX: (310) 712-8455  
27 Co-counsel for Defendant

28 **BENJAMIN BRAFMAN, ESQ.**  
Brafman & Ross P.C.  
767 Third Avenue, 26th Floor  
New York City, NY 10017  
FAX: (212) 750-3906  
Co-Counsel for Defendant