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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

FEB 06 2004

GARY M. BLAIR, Executive Officer

BY *Carrie L. Wagner*

CARRIE L. WAGNER, Deputy Clerk

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SANTA BARBARA**

11
12 **THE PEOPLE OF THE STATE OF**
13 **CALIFORNIA,**

14 Plaintiff,

15 vs.

16 **MICHAEL JACKSON,**

17 Defendant.

Case No.: 1133603

18 **DEFENDANT'S RESPONSE TO**
19 **PLAINTIFF'S MEMORANDUM**
20 **REGARDING DEFENDANT'S**
21 **CLAIM OF ATTORNEY-CLIENT**
22 **AND ATTORNEY WORK**
23 **PRODUCT PRIVILEGES**

24 **[FILED UNDER SEAL]**

Date: February 13, 2004

Place: SM-2

Time: 8:30 a.m.

25
26 Defendant Michael Jackson ("Mr. Jackson") respectfully submits the following
27 response to the "Plaintiff's Memorandum Regarding Defendant's Claim of the Attorney-
28 Client and Attorney Work Product Privileges."

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1 in the initial search warrant for his office and during
2 their search found paperwork indicating that Brad
3 Miller possesses a storage locker at the pre mentioned
4 location and we strongly feel that those items may be
5 being stored there.

6 (See Transcript at 4:16 - 24, emphasis added.)

7 (Given that Mr. Jackson is factually innocent, it is not surprising that Sergeant Robel's
8 second search also yielded nothing and his hunch proved wrong as demonstrated by the
9 November 18, 2003 "Inventory Return of Search Warrant" wherein the sergeant swore
10 under penalty of perjury that "[n]othing was taken/recovered" from the storage locker
11 during this second search.)

12 The above-quoted language raises the question: If the prosecution failed to "find
13 what it was looking for" at Mr. Miller's office, why did they seize Items 811 through 820,
14 (or anything else for that matter)? As set forth below, this Court should not legitimize the
15 prosecution's attempt to circumvent the criminal discovery statute (Penal Code section
16 1534 et seq.) through the use of a search warrant.¹

17 In light of the above, the defense believes the Court (following the defense's in
18 camera showing on impeachment) need not address the work product protection/attorney
19 - client privilege issues during the February 13, 2004 hearing.

20 In any event, given that public disclosure (or disclosure to the prosecution) of the
21 rationale behind Mr. Jackson's and his counsel's theories as to why the Materials are
22 protected and/or privileged might constitute waiver, the defense proposes the following
23 four-step procedure: (1) as ordered by the Court, the unredacted version of this filing will
24 be made under seal; (2) a redacted version of the filing will be separately lodged with the
25 Court; (3) the prosecution will be served the redacted version only; and (4) during the in-

26 _____
27 ¹In fact, as set forth in Section II, the Court lacks the authority to order the disclosure of the
28 defense's impeachment evidence.

1 camera hearing the defense should be permitted to, in the absence of the prosecution, set
2 forth its argument concerning the nondiscoverability of its impeachment evidence and
3 claims of protection and privilege.

4
5 **II.**

6 **COURT-ORDERED DISCLOSURE OF THE DEFENSE'S IMPEACHMENT**
7 **EVIDENCE IS BARRED**

8 Discovery in criminal cases is governed by Penal Code section 1054, et seq.
9 Moreover, Penal Code section 1054, subdivision (e) precludes the courts from
10 "broadening the scope of discovery beyond that provided in the [discovery] chapter or
11 other express statutory provisions, or as mandated by the federal Constitution." (See
12 *People v. Tillis* (1998) 18 Cal.4th 284, 294; Penal Code section 1054, subdivision (e).)
13 Additionally, the courts have held that:

14 [A] prosecutor is not entitled to discovery notes prepared by a
15 defense investigator that relate to an interview of a
16 'prosecution' witness unless and until the defense announces
17 an intent to call the defense investigator as a witness. Stated
18 another way, the defense is not required to disclose statements
19 it obtains from prosecution witnesses that may be used to
20 refute the prosecution's case during cross-examination.

21 (*Hubbard v. Superior Court* (2nd Dist. 1997) 66 Cal.App.4th 1163, 1165, review granted,
22 then dismissed and this opinion ordered published - - see 78 Cal.Rptr.2d 818, 963 P.2d
23 1005.)

24 The *Hubbard* court also noted that "a trial court should not attempt to embroider
25 the discovery statute to provide greater discovery rights for the prosecution. Lest there be
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27
28

1 any confusion, we adopt the language of footnote 14 of *Izazaga* as our holding.²² More
2 precisely, “[p]rosecutorial discovery is a pure creature of statute, in the absence of which,
3 there can be no discovery [citations] In criminal proceedings, under the reciprocal
4 discovery provisions of [Penal Code] section 1054 et seq., all court-ordered discovery is
5 governed exclusively by - - and is barred except as provided by - - the discovery chapter.”
6 (See *Hubbard v. Superior Court*, *supra*, 66 Cal.App.4th at 1167, internal citations and
7 quotation marks omitted, emphasis in original.)

8 Clearly, upon a proper in camera showing that the Materials represent
9 impeachment evidence gathered by the defense, this Court has no authority to order
10 disclosure.³

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16 ²In *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 377 at fn14, the Supreme Court stated:

17 We note the near mirror-image symmetry under California’s new
18 discovery chapter. Following disclosure of the prosecution’s
19 witnesses, on demand the defense must disclose *only the witnesses*
20 (and their statements) it intends to call in refutation of the
21 prosecution’s case, rather than all the evidence developed by the
22 defense in refutation. (See [Penal Code] §§ 1054.1, 1054.3.) Thus,
the defense is not required to disclose any statements it obtains from
prosecution witnesses it may use to refute the prosecution’s case
during cross-examination. Were this otherwise, we would be
presented with a significant issue of reciprocity.

23 ³Indeed, even if the Court believes the impeachment issue is a close call, the California courts
24 have provided guidance. For example, in *People v. Tillis* (1998) 18 Cal.4th 284, 295, the Supreme
25 Court stated “[r]eciprocity requires a fair trade, defense witnesses for prosecution witnesses, and
26 nothing more.” Additionally, in *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at 377, the seminal
27 Proposition 115 case, the Supreme Court concluded “that the new discovery chapter enacted by
28 Proposition 115 creates a nearly symmetrical scheme of discovery in criminal cases, with any
imbalance favoring the defendant as required by reciprocity under the due process clause.” In the
instant case, permitting the prosecution to conduct discovery-by-warrant would clearly be antithetical
to the Supreme Court’s opinions in *Tillis* and *Izazaga*.

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III.

THE ATTORNEY WORK PRODUCT PROTECTION ATTACHES TO
ALL OF THE MATERIALS

A. California law governing attachment of the attorney work product protection is well-established and, in this case, undisputed

The prosecution correctly notes that the attorney work product protection is codified in the California Code of Civil Procedure. (Memorandum at 5:12-18.) Specifically, Code of Civil Procedure section 2018, subdivision (c) provides:

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

(See Code of Civil Procedure section 2018)

The prosecution also correctly states that subdivision (c) of Section 2018 sets forth what the California Supreme Court has characterized as "core" work product. (Memorandum at 6:12 - 16, citing *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 382 at n. 19.) Also noted by the prosecution is the fact that *Izazaga* determined that Penal Code section 1054.6 expressly limits the definition of "work product" in criminal cases to "core" work product as defined in Code of Civil Procedure section 2018, subdivision (c).

In light of the well-established (and agreed upon) California law governing the application of the attorney work product protection to criminal cases, the Court must resolve only one issue: *Are the Materials "core" attorney work product?* A review of applicable case law and the facts specific to this case demonstrates that they are.

B. The materials clearly represent "core" attorney work product

Generally, Items 811 through 820, inclusive, listed on the Sheriff's "Property Form" dated November 18, 2003 are audio and videotapes taken by investigator Bradley

1 G. Miller ("Mr. Miller"). Mr. Miller has at all relevant times acted as an investigator hired
2 to verify the accuracy of Mr. Geragos' impressions, conclusions, opinions, and theories of
3 the case.⁴ Specifically, a key issue to be litigated in this case will be the veracity and
4 credibility of the alleged minor victim and his family. Given that the minor victim and his
5 family are potential witnesses, the defense has endeavored to make a record that would
6 either establish or undermine the veracity and credibility of these individuals. The
7 interviews of the witnesses are not only not discoverable as impeachment material but are
8 the result of work product by an investigator working on this matter.⁵

9 The California Court of Appeal for the Third Appellate District has properly found
10 that notes or recorded statements taken by counsel while interviewing potential witnesses
11 are "core" work product as defined in Code of Civil Procedure section 2018, subdivision
12 (c). (See *Nacht & Lewis Architects, Inc. et al. v. Superior Court (McCormick)* (3rd Dist.
13 1996) 47 Cal.App.4th 214, 217. ("*Nacht*") *Nacht* makes it clear that when an attorney
14 questions or otherwise seeks out information from potential witnesses, recordings thereof
15 are absolutely protected from disclosure. Since Mr. Miller was merely a conduit thorough
16 which Mr. Jackson's attorneys questioned/observed the potential witness it follows that
17 the recordings made by Mr. Miller represent core work product of Mr. Jackson's
18 attorneys.

19 The soundness of the *Nacht* court's reasoning cannot be disputed since questions
20 posed by an attorney (or the attorney's agent at the direction of the attorney) will
21 necessarily reveal the attorney's impressions, conclusions, opinions, or legal research or
22 theories. Indeed, while the prosecution's Memorandum sets forth examples of "core" and
23 "qualified" work product, it fails to cite any authority for the proposition that items such

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25 ⁴During the in camera hearing, the defense will make a comprehensive oral offer of proof as
26 to why each video or audio tape constitutes core work product and/or represents a privileged
attorney-client communication.

27 ⁵As the prosecution knows, the use of investigators to conduct witness interviews and
28 observation is a well-established method of preparing a case.

1 as the Materials are not "core" work product. (See Memorandum at 9:18 - 10:7.) In fact,
2 the prosecution example (disclosure of non-expert witnesses' anticipated testimony) most
3 closely resembling the Materials at issue herein was found to be "core" work product.
4 (See Memorandum at 9:18-20.) Consequently, this Court should find, following the in
5 camera offer-of-proof, that each item of the Materials comes within the ambit of the
6 attorney work product protection and/or attorney-client privilege.

7
8 **IV.**

9 **CONCLUSION**

10 In light of the foregoing, it is clear that the Materials are impeachment material for
11 which there is no reciprocal discovery requirement. This Court should reject the
12 prosecution's attempted "discovery-by-search-warrant". Additionally, the Materials
13 represent protected work product that is not discoverable. Consequently, Mr. Jackson
14 requests that (1) the Materials should remain under seal and lodged with the Court, and
15 (2) the defense should be provided with copies of the Materials immediately.

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18 Dated: February 3, 2004

Respectfully Submitted,
GERAGOS & GERAGOS

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20 By: 

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PROOF OF SERVICE BY FAX

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 N. 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 RESPONSE TO PLAINTIFF'S MEMORANDUM REGARDING DEFENDANT'S CLAIM OF ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES [unredacted version]

_____ 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.

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 | Robert M. Sanger Fax. No.: 805-963-7311 |
| Benjamin Brafman Fax No.: 212-750-3906 | Steve Cochran Fax. No.: 310-712-8455 |

Executed on February 6, 2004, at Los Angeles, California.

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



RAFFI NALJIAN