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8 Company

FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

FEB 13 2004

GARY M. BLAIR, Executive Officer
BY *Carrie L. Wagner*
CARRIE L. WAGNER, Deputy Clerk

10 SUPERIOR COURT, STATE OF CALIFORNIA
11 FOR THE COUNTY OF SANTA BARBARA

13 THE PEOPLE OF THE STATE OF
14 CALIFORNIA,

15 Plaintiff,
16 vs.

17 MICHAEL JOE JACKSON,
18 Defendant.

Case No.: 1133603

**OPPOSITION OF THE ACCESS
PROONENTS TO: (1) DEFENDANT'S
MOTION FOR ORDER SEALING
DEFENDANT'S RESPONSE TO
PLAINTIFF'S MEMORANDUM
REGARDING DEFENDANT'S CLAIM OF
ATTORNEY-CLIENT AND ATTORNEY
WORK PRODUCT PRIVILEGES; AND (2)
PLAINTIFF'S MOTION FOR ORDER
SEALING PLAINTIFF'S REPLY TO
DEFENDANT'S RESPONSE TO
PLAINTIFF'S MEMO RE: PRIVILEGE
CLAIMS**

Date: Friday, February 13, 2004
Time: 8:30 a.m.
Place: Department SM9,
Judge Rodney S. Melville

[VIA FACSIMILE]

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OPPOSITION OF THE ACCESS PROONENTS TO: (1) DEFENDANT'S MOTION FOR ORDER SEALING DEFENDANT'S RESPONSE TO
PLAINTIFF'S MEMORANDUM REGARDING DEFENDANT'S CLAIM OF ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT
PRIVILEGES; AND (2) PLAINTIFF'S MOTION FOR ORDER SEALING PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO
PLAINTIFF'S MEMO RE: PRIVILEGE CLAIMS

1 The Access Proponents¹ respectfully oppose both Defendant Jackson's Motion for Order
2 Sealing Defendant's Response to Plaintiff's Memorandum Regarding Defendant's Claim of
3 Attorney-Client and Attorney Work Product Privileges and the District Attorney's Motion for Order
4 Sealing Plaintiff's Reply to Defendant's Response to Plaintiff's Memo Re: Privilege Claims.

5 Neither motion satisfies the exacting requirements of Rules of Court 243.1 and 243.2, which
6 codify the constitutional requirements set forth in the Supreme Court's decision in *NBC Subsidiary*
7 (*KNBC-TV, Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999)), for the sealing of court records.

8 Although this Court did instruct the prosecution and defense to "fil[e]" "all motions regarding
9 materials" that the Defendant claims to be protected by the "Attorney-Client privilege" "under seal,"
10 Jan 16., 2004 Minute Order at 4, this Court "further ordered that the Court rule re: redaction shall be
11 followed." *Id.* That "rule"—Rules 243.1 and 243.2—requires parties seeking to file court records
12 under seal to show, through "a memorandum of points and authorities and a declaration," "facts
13 sufficient to justify the sealing," viz., "facts that establish":

- 14 (1) There exists an overriding interest that overcomes the right of public access to the record;
- 15 (2) The overriding interest supports sealing the record;
- 16 (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- 17 (4) The proposed sealing is narrowly tailored; and
- 18 (5) No less restrictive means exist to achieve the overriding interest.

19 Cal. R. Ct. 243.2 (b)(1), 243.1(d).

20 Here, there does not appear to be any discussion of factual material or allegations covered by
21 the attorney-client privilege in either the prosecution's or the defense's motion. Rather, the publicly
22 filed redacted version of Defendant Jackson's Response contains only a discussion of the attorney
23 work-product doctrine and of this Court's alleged lack of authority to disclose the defense's
24 impeachment evidence. Even if this Court's January 16 order was meant to extend not only to factual
25 material covered by the attorney-client privilege, but also the protection accorded attorney work-

26 ¹ The "Access Proponents" refer to National Broadcasting Company, Inc.; CBS Broadcasting Inc.;
27 Fox News Network L.L.C.; ABC, Inc.; Cable News Network LP, LLLP; Courtroom Television
28 Network LLC; The Associated Press; *Los Angeles Times*; and The New York Times Company.

1 product, there has not been a sufficiently specific showing in either the prosecution or the defense's
2 motion that the contents of the documents that the prosecution and defense seek to file under seal—
3 including the redacted portions of the publicly filed version of Defendant's Response—contain only
4 factual materials covered by the protection afforded attorney work-product.

5 Indeed, given what Defendant Jackson's own lawyers have publicly disclosed and given the
6 publicly available materials that have been filed and/or released (with redactions) in this case, there
7 does not appear to be any basis for sealing any of the motions or briefs pertaining to the defense's
8 assertion of attorney work-product and attorney-client privilege, except possibly the particular
9 portions thereof (if any) containing assertedly work-product or attorney-client privileged factual
10 material itself—something that the defense in their motion to file their Response under seal has not
11 claimed or demonstrated. After all, Defendant's lead counsel, Mr. Geragos, has himself publicly
12 disclosed on CNN's Larry King Live that he and his investigators have taped statements of the
13 accuser and members of his family. See Plaintiff's Reply at 9-10 (quoting transcript of Dec. 18, 2003
14 broadcast of "Larry King Live"). Second, it is public knowledge that Bradley Miller is one of those
15 investigators, as is amply demonstrated by Mr. Miller's publicly-filed Joinder in Defendant's
16 Response. Third, the redacted search-warrant records released by this Court on February 2 make
17 clear that videotapes and audiotapes were seized from Mr. Miller's office (Items 811 through 820 of
18 the original search warrant). Finally, the prosecution's and defense's legal arguments indicate that
19 they are arguing about attorney work-product claims regarding taped statements from witnesses.
20 Given all of these facts in the public domain, it is difficult to fathom how the sealing of any of the
21 motions or briefs pertaining to the defense's assertion of attorney work-product and attorney-client
22 privilege would be warranted given the weighty First Amendment considerations in favor of having
23 these legal arguments debated and considered in public. See, e.g., *In re Motions of Dow Jones &*
24 *Company, Inc.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (citations omitted); *In re North*, 16 F.3d 1234,
25 1245 (D.C. Cir. 1994).

26 As for Defendant's request for an "in-camera hearing [during which] the defense should be
27 permitted to, in the absence of the prosecution, set forth its argument concerning the

1 nondiscoverability of its impeachment evidence and claims of protection and privilege," Defendant's
2 Response at 3-4, the Access Proponents respectfully submit that such an in-camera hearing, to the
3 extent such a hearing is even necessary, should be narrowly circumscribed and limited to only the
4 *factual* components of any assertions of attorney-client privilege and, possibly, attorney work-product
5 protection—*i.e.*, only those portions of the hearing that might address any discussion of the actual
6 contents of the seized videotapes that Defendant Jackson claims is protected by the attorney work-
7 product doctrine. All legal arguments over the applicability of the attorney-client privilege, the
8 protection afforded attorney work-product, and the defense's alleged impeachment evidence in this
9 case should be conducted in open court and on the public record, and every effort should be made to
10 afford the maximum public access thereto possible. As the Supreme Court made clear in *NBC*
11 *Subsidiary*, such an in-camera hearing, to the extent such a hearing is justified, must be "*narrowly*
12 *tailored* . . . [and] supported by *sufficient findings*, made after notice and a hearing, and coupled with
13 prompt release of transcripts." 20 Cal. 4th at 1224 (emphases added).

14
15 DATED: February 12, 2004

16 Respectfully submitted,

17 GIBSON, DUNN & CRUTCHER LLP
18 Theodore J. Boutros, Jr.
19 Julian W. Poon

20 By: *Theodore J. Boutros, Jr.*
Theodore J. Boutros, Jr.

21 Attorneys for National Broadcasting Company, Inc.;
22 CBS Broadcasting Inc.; Fox News Network L.L.C.;
23 ABC, Inc.; Cable News Network LP, LLLP; Courtroom
24 Television Network LLC; The Associated Press; *Los*
Angeles Times; and The New York Times Company

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CERTIFICATE OF SERVICE

MAIL, COMMERCIAL OVERNIGHT MESSENGER, FAX, HAND DELIVERY

I, Lindie S. Joy, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed in the office of Julian W. Poon, a member of the bar of this Court, and at his/her direction, on February 12, 2004, I served the following:

OPPOSITION OF THE ACCESS PROPONENTS TO: (1) DEFENDANT'S MOTION FOR ORDER SEALING DEFENDANT'S RESPONSE TO PLAINTIFF'S MEMORANDUM REGARDING DEFENDANT'S CLAIM OF ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES; AND (2) PLAINTIFF'S MOTION FOR ORDER SEALING PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MEMO RE: PRIVILEGE CLAIMS

on the interested parties in this action, by:

[X] Service by Mail: placing true and correct copy(ies) thereof in an envelope addressed to the attorney(s) of record, addressed as follows:

Thomas W. Sneddon
District Attorney
Santa Barbara County
1105 Santa Barbara Street
Santa Barbara, CA 93101-2007

Mark John Geragos
Geragos & Geragos
350 S. Grand Avenue, Suite 3900
Los Angeles, CA 90071-3480

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

[] Service by Commercial Overnight Messenger: placing true and correct copy(ies) thereof in an envelope addressed to the attorney(s) of record, addressed as follows:

and after sealing said envelope I caused same to be delivered to the aforementioned attorney(s) by qualified commercial overnight messenger.

1 Service by Fax: causing a true copy thereof to be sent via facsimile to the attorney(s) of
2 record at the telecopier number(s) so indicated, addressed as follows:

3 Attorney Name & Address

Fax and Callback Number

4 Thomas W. Sneddon
5 District Attorney
6 Santa Barbara County
7 1105 Santa Barbara Street
8 Santa Barbara, CA 93101-2007

Facsimile: (805) 568-2398
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8 Mark John Geragos
9 Geragos & Geragos
10 350 S. Grand Avenue, Suite 3900
11 Los Angeles, CA 90071-3480

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12 and that the transmission was reported as completed and without error.

13 Service by Hand Delivery: delivering true and correct copy(ies) thereof and sufficient
14 envelope(s) addressed to the attorney(s) of record, addressed as follows:

15 to a messenger or messengers for personal delivery.

16 I certify under penalty of perjury that the foregoing is true and correct, that the foregoing
17 document(s), and all copies made from same, were printed on recycled paper, and that this Certificate
18 of Service was executed by me on February 12, 2004 at Los Angeles, California.

19 
20 Lindie S. Joy

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