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FILED

SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

MAY 16 2005

GARY M. BLAIR, Executive Officer

BY *Carrie L. Wagner*
CARRIE L. WAGNER, Deputy Clerk

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

10
11 **THE PEOPLE OF THE STATE OF**
12 **CALIFORNIA,**

13 Plaintiff,

14 vs.

15 **MICHAEL JACKSON,**

16 Defendant.

Case No.: 1133603

POINTS AND AUTHORITIES IN
SUPPORT OF LIMITED WAIVER
OF THE ATTORNEY-CLIENT
PRIVILEGE OR NARROWLY
TAILORING A REMEDY IF AN
IMPLIED WAIVER OF THE
PRIVILEGE IS FOUND

Date: May 20, 2005

Place: SM-2

Time: 8:30 a.m.

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20 Mark J. Geragos submits the following points and authorities in support of the
21 proposition that a privilege holder may execute a limited waiver of the attorney-client
22 privilege. In the alternative, in the event this court deems there has been an implied
23 waiver of the attorney client privilege, the court may narrowly construe the scope of that
24

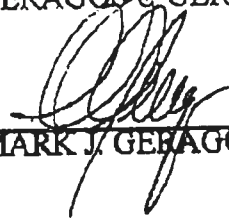
1 waiver in order to protect the competing interests of the defendant, the prosecution, and
2 the law firm of Geragos and Geragos as the holder of the attorney-client work-product
3 privilege.

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Dated: May 15, 2005

Respectfully submitted,
GERAGOS & GERAGOS

By:



MARK J. GERAGOS

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FACTS

On May 13, 2005, Attorney Mark Geragos was called as a witness by the defense in order to testify as to certain events that transpired in February and March 2003, during the course of his representation of Michael Jackson, who is the defendant in the present action. At the beginning of the testimony, Mr. Geragos asserted the attorney-client privilege as a bar to such testimony and asked as a condition precedent to testifying, that defendant provide him with a written waiver of the privilege. At no time did Mr. Geragos waive the attorney-client work-product privilege. (Hickman v. Taylor (1947) 329 U.S. 495.) Defense attorney Tom Mesereau, on behalf of defendant, assured both Mr. Geragos, the court and counsel that Mr. Jackson waived the attorney client privilege. After that waiver was entered on the record, Mr. Geragos testified as to the matters put before him on direct examination.

A period of cross examination ensued before the afternoon break. During the afternoon break, Mr. Mesereau handed Mr. Geragos a written waiver that was limited in that it purported to waive only those attorney-client communications that occurred up until and including the date Michael Jackson was arrested. Thereafter, the prosecution asked Mr. Geragos a question that went beyond the scope of the waiver he was provided. He asserted the attorney-client privilege. The jury was excused, and Mr. Geragos was questioned outside the jury's presence. Based on the waiver document provided by defendant, Mr. Geragos asserted the privilege as to all questions he fairly believed exceeded the scope of the waiver document. The issue arose as to whether such a limited waiver of the attorney-client privilege is permitted under California law, or whether defendant impliedly waived the attorney-client privilege in all respects. Proceedings were adjourned so that the parties could research the issue. As will be shown below, California permits a limited waiver of the attorney-client privilege.

DISCUSSION

1. Limited Waiver

Evidence Code section 912, subdivision (a) provides:

“Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.”

In determining whether a limited waiver of the attorney-client privilege is permissible under California law, the Supreme Court has upheld a trial court's finding that a limited waiver of the attorney-client privilege is appropriate under Evidence Code section 912, subdivision (a).

In People v. Barnett (1998) 17 Cal.4th 1044, Burgess was at the home of Phil Enoingt and Delinda Olson when the defendant arrived, the morning after the murder. At some point, Burgess saw defendant change his clothes in the garage. During cross-examination by the prosecutor, Burgess acknowledged that, in June of 1987, he told both the prosecutor and his own attorney, David Vasquez, that he had seen both of defendant's legs smeared with blood. On redirect, however, defense counsel elicited testimony from Burgess to the effect that he had been pressured by Vasquez to make that previous statement. During subsequent questioning by the prosecutor, Burgess maintained he had not told the truth about having seen blood on defendant because of pressure from Vasquez.

The prosecutor then called Attorney Vasquez to rebut Burgess's testimony that Vasquez pressured Burgess to incriminate the defendant. Vasquez asserted the attorney-client privilege.

1 Defense counsel for Barnett also objected, arguing that Burgess had not been fully advised
2 regarding the privilege at the time of his testimony and that any waiver was therefore invalid.
3 **The trial court ultimately found that Burgess had made a limited waiver of the privilege.**
4 Vasquez thereafter testified that Burgess had told him shortly before August of 1986 and then
5 again in June of 1987 that he had seen blood on defendant. Vasquez also stated that at no time
6 did he tell or pressure Burgess to lie about the blood. (*Id.* at p. 1137.)

7 The Supreme Court stated:

8 "As a preliminary matter, we observe that Burgess was the sole holder of
9 the statutory privilege. (Evid. Code, § 953.) Defendant provides no authority
10 supporting his attempt to vicariously assert that privilege on his own behalf for
11 purposes of the claim on appeal. In an analogous context, California courts have
12 held that because the constitutionally based right against self-incrimination is
13 personal, it may not be asserted by another. [Citations.] Defendant offers no basis
14 for distinguishing the logic of such cases.

15 "In any event, the claim is without merit. The right of any person to claim
16 the statutory attorney-client privilege 'is waived with respect to a communication
17 protected by such privilege if any holder of the privilege, without coercion, has
18 disclosed a significant part of the communication' (Evid. Code, § 912, subd.
19 (a).) Defendant does not argue that Burgess's disclosure was insignificant for
20 purposes of a waiver. Nor does he contend that Burgess was coerced into relating
21 his account of having been pressured by Vasquez to lie. Indeed, it was defense
22 counsel who elicited the disputed testimony on defendant's behalf in an effort to
23 minimize the incriminating nature of Burgess's prior statement. Since defendant
24 has cited no authority suggesting that assistance and advisement of counsel was
25 necessary to validate Burgess's waiver of the privilege, we agree with the trial
26 court's assessment that a valid, limited waiver had occurred pursuant to
27 Evidence Code section 912, subdivision (a)." (*Id.* at pp. 1137-1138, emphasis
28 added.)

29 Similarly, in Jones v. Superior Court (1981) 19 Cal.App.3d 534, the issue before the court
30 was whether the holder of the physician-patient privilege could exercise a limited waiver of the
31 privilege under Evidence Code section 912. The Court of Appeal answered the question in the
32 affirmative:

1 "Evidence Code section 912, which provides (in subd. (a)) that the right of
2 a person to claim the privilege 'is waived with respect to a communication
3 protected by such privilege if any holder of the privilege, without coercion, has
4 disclosed a significant part of the communication.' By testifying freely that she
5 ingested DES, and as to certain of the circumstances in which she did so,
6 petitioner has disclosed a 'significant part' of her communication with physicians
7 on that subject, and on the inextricably related subject of her pregnancy with
8 plaintiff. Thus she has waived her statutory privilege as to these matters.

9 "It does not follow that petitioner, by disclosing portions of
10 communications relating to her consumption of DES and her pregnancy with
11 plaintiff, has waived her privilege as to all otherwise protected communications
12 during her lifetime." (*Id.* at pp. 546-547.)

13 A fair reading of Barnett and Jones leads to the conclusion that Michael Jackson, as the
14 holder of the Geragos/Jackson attorney-client privilege (Evid. Code, § 953), may properly waive
15 such privilege with respect to particular communications he had with Mr. Geragos and maintain
16 the privilege as to other communications. Thus, to the extent Michael Jackson has waived the
17 attorney-client privilege as to events that occurred prior to his arrest, this limited waiver does not
18 constitute a waiver of all the communications that occurred within the lifetime of the
19 Geragos/Jackson attorney-client relationship. And, to the extent there was information elicited
20 on direct examination that inadvertently related to events that occurred after Michael Jackson's
21 arrest, any cross-examination would necessarily be limited questions directly relating to the
22 precise communication. Again, the Evidence Code section 912, subdivision (a) privilege speaks
23 to waiver of particular communications, and not a waiver of the attorney-client privilege itself.

24 2. Implied Waiver

25 To the extent the court believes that an implied waiver of the attorney-client privilege
26 occurred, under the "doctrine of implied waiver," it nonetheless may fashion a narrow remedy
27 that serves the interests of all parties, which does not operate to waive the attorney-client
28 relationship itself.

1 Most often, an implied attorney-client waiver is found in the situation where a client
2 asserts a claim or defense that places at issue the nature of the privileged material. In criminal
3 law, the issue often arises where a petitioner in a habeas proceeding asserts an ineffective
4 assistance of counsel claim – in order to prevail on such a claim, privileged material must be
5 disclosed. In the event a retrial is ordered, the question arises whether the prosecution can use
6 any of the information elicited in the retrial. Under the doctrine of implied waiver, the question
7 is answered in the negative.

8 In Bittaker v. Woodford (9th Cir. 2003) 331 F.3d 715, the State of California claimed that
9 Bittaker would completely waive his attorney-client privilege as to any communications he
10 disclosed in litigating his ineffective assistance of counsel claims. The Ninth Circuit disagreed.
11 It looked to the doctrine of implied waiver, which allows the courts to determine the scope of the
12 waiver: “The court imposing the waiver does not order the disclosure of the materials
13 categorically; rather, the court directs the party holding the privilege to produce the materials *if* it
14 wishes to go forward with its claims implicating them. The court thus gives the holder of the
15 privilege a choice: If you want to litigate this claim, then you must waive your privilege to the
16 extent necessary to give your opponent a fair opportunity to defend against it. [Citations].
17 Essentially, the court is striking a bargain with the holder of the privilege by letting him know
18 how much of the privilege he must waive in order to proceed with his claim.” (*Id.* at p. 720.)

19 It continued: “If the federal courts were to require habeas petitioners to give up the
20 privilege categorically and for all purposes, attorneys representing criminal defendants in state
21 court would have to worry constantly about whether their casefiles and client conversations
22 would someday fall into the hands of the prosecution. In addition, they would have to consider
23 the very real possibility that they might be called to testify against their clients, not merely to
24 defend their own professional conduct, but to help secure a conviction on retrial. A broad waiver
25 rule would no doubt inhibit the kind of frank attorney-client communications and vigorous
26 investigation of all possible defenses that the attorney-client and work-product privileges are
27 designed to promote.” (*Id.* at p. 722.)

1 The court continued: "Nor would a narrowly tailored waiver unfairly prejudice the
2 prosecution. State law precludes access to materials in the defense lawyer's casefile and
3 commands the lawyer to stand mute if he has information damaging to his client. The fortuity
4 that defendant's initial trial was constitutionally defective gives the prosecution no just claim to
5 the lawyer's casefile or testimony. To the contrary, allowing the prosecution at retrial to use
6 information gathered by the first defense lawyer – including defendant's statements to his lawyer
7 – would give the prosecution a wholly gratuitous advantage. It is assuredly not consistent with
8 the fairness principle to give one side of the dispute such a munificent windfall for use in
9 proceedings unrelated to the matters litigated in federal court." (Id. at p. 724.)

10 The Ninth Circuit concluded: "We are not alone in our concern about the effect of a broad
11 waiver on the fairness of state criminal trials. In one case that has been brought to our attention,
12 the California Supreme Court, during the course of a state habeas proceeding, entered an order
13 very similar to the one here. While the order is not published, and therefore presumably not
14 binding in future cases, it does seem to strike the same balance among the competing interests as
15 we do. Significantly, the order specifically bars the use of privileged materials at petitioner's
16 possible retrial. While we can only infer the court's rationale, we believe it must have been
17 similar to our own." (Id. at pp. 724-725.)

18 The doctrine of implied waiver is a means by which the court is empowered to limit the
19 prosecution from gaining an unfair advantage in the event there is a retrial here. Indeed, the
20 prosecution has not been precluded from fully questioning Mr. Geragos as to communications
21 that were waived. By urging this court to open all facets of the Geragos/Jackson attorney-client
22 relationship, the prosecution would unfairly receive a windfall of privileged information and it
23 would have a chilling effect on the ability of Mr. Jackson to fairly present a defense. Finally, the
24 doctrine of implied waiver is completely consistent with the limited waiver of the attorney-client
25 relationship that is currently permitted under California law. In both, exposing some
26 communications does not put all communications in the glare of the prosecutor's spotlight.
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1 **CONCLUSION**

2 For all of the foregoing reasons, it is respectfully submitted that Michael Jackson may
3 expressly execute a limited waiver of the Geragos/Jackson attorney-client privilege, and that even
4 under the doctrine of implied waiver, the court is obligated to limit the waiver in a manner
5 exposes only those communications waived to cross-examination.
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9 Dated: May 15, 2005

Respectfully submitted,

GERAGOS & GERAGOS

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12 By: 

13 MARK J. GERAGOS
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