Summer 1994

Attorney-Client Privilege

Ellen Kreitzberg
Santa Clara University School of Law, ekreitzberg@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs
Part of the Law Commons

Recommended Citation
Attorney-Client Privilege, 6 California Defender 2-23 (Summer/Fall 1994)

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
The Attorney-Client Privilege

by

Ellen Kreitzberg, Professor of Law
Santa Clara University School of Law

Copyright 1994 by Matthew Bender & Company.
Reprinted with permission from the California Criminal Trial Guide, to be published Fall, 1994. All rights reserved.

TABLE OF CONTENTS

I. ATTORNEY-CLIENT PRIVILEGE

A. Statutory Authority

B. Attorney-Client Privilege: Rationale and Scope

C. Waiver of Attorney-Client Privilege

D. Laying Foundation to Establish Existence of Attorney-Client Privilege

E. Reciprocal Discovery and the Effects of Proposition 115 on the Attorney-Client Privilege

F. Ethical Considerations

II. ATTORNEY’S WORK PRODUCT PROTECTION

A. Statutory Authority

B. Work Product Protection — General

C. Adoption of Work Product Rule in California

D. Effects of Proposition 115

E. The Constitutionality of the Discovery and Work Product Doctrine

F. Attorney-Client Privilege and Work Product Distinguished

G. Work Product Protection applies to an attorney's impressions, conclusions, opinions, legal research or theories

H. Protection for Opinion Work Product applies only to writings

I. Statements of Witnesses are not protected as work product

J. Work Product protection extends to work of agents of attorney

K. Work Product privilege may be waived

L. The “fraud” exception to attorney-client privilege does not apply to opinion work product

M. Work Product protections continues even after the case is over

N. Laying Foundation to Establish Existence of Work Product Protection

I. ATTORNEY-CLIENT PRIVILEGE [EVIDENCE CODE SECTIONS 950-962]

A. Statutory Authority

1. Evidence Code section 950 (Lawyer Defined) states:

As used in this article, “lawyer” means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

2. Evidence Code section 951 (Client Defined) states:

As used in this article, “client” means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

3. Evidence Code section 952 (Confidential Communication Between Client and Lawyer Defined) states:

As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

4. Evidence Code section 953 (Holder of Privilege Defined) states:

As used in this article, “holder of the privilege” means:
(a) The client when he has no guardian or conservator.
(b) A guardian or conservator of the client when the client has a
5. Evidence Code section 954 (Who May Claim Privilege) states:

Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;
(b) A person who is authorized to claim the privilege by the holder of the privilege; or
(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he [she] is otherwise instructed by a person authorized to permit disclosure. The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word “persons” as used in this subdivision includes partnerships, corporations, associations and other groups and entities.

6. Evidence Code section 955 (When Lawyer Must Claim Privilege) states:

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.

7. Evidence Code section 956 (Services of Lawyer Obtained to Aid in Commission of Crime or Fraud) states:

There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

8. Evidence Code section 956.5 (Reasonable belief that disclosure of confidential communication is necessary to prevent criminal act resulting in death or bodily harm; exception to privilege) states:

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

9. Evidence Code section 957 (Parties Claiming Under Deceased Client) states:

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

10. Evidence Code section 958 (Breach of Duty Arising Out of Lawyer-Client Relationship in Issue) states:

There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

11. Evidence Code section 959 (Intention or Competence of Client Executing Attested Document in Issue) states:

There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document.

12. Evidence Code section 960 (Intention of Deceased Client With Respect to Writing Affecting Property Interest) states:

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

13. Evidence Code section 961 (Validity of Writing Affecting Interest in Property Executed by Deceased Client in Issue) states:

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

14. Evidence Code section 962 (Two or More Clients Retaining Same Lawyer in Matter of Common Interest) states:

Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

B. Attorney-client privilege: Rationale and scope

The attorney-client privilege constitutes a limitation on the admissibility of evidence as a means of preserving the confidentiality of attorney-client com-
munications. As defined by Evidence Code Section 954, the privilege authorizes a client to refuse to disclose and to prevent others from disclosing, information communicated in confidence to and by an attorney. Confidential communication exists when information is transmitted between the attorney and the client in the course of an attorney-client relationship. The communication must be made in confidence by a means which, in so far as the client is aware, discloses the information to no third person other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information for the accomplishment of the purpose for which the lawyer is consulted. Confidential information includes a legal opinion formed and the advice given by the attorney in the course of that relationship.

In People v. Meredith (1981) 29 Cal.3d 682, 175 Cal. Rptr. 612, 631 P.2d 46, the California Supreme Court discussed the policy and rationale behind the attorney client privilege and stated:

The fundamental purpose behind the attorney-client privilege is, of course, to encourage full and open communication between client and attorney. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Given the privilege, a client may make such a disclosure without fear that his attorney may be forced to reveal the information confided to him. ... In the criminal context, as we have recently observed, these policies assume particular significance. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. Thus, if an accused is to derive the full benefit of his right to counsel, he must have the assurance of confidentiality and privacy of communication. (citations omitted) 29 Cal. 3d at 690-691.

1. Attorney-Client privilege protects information transmitted between attorney and client in the course of the attorney-client relationship.

The attorney-client privilege protects only confidential communications between client and attorney. The person who is claiming the privilege has the burden of proving that an attorney-client relationship does exist.

Evidence Code Section 951 defines "client" as a person who directly or through an authorized representative, consults an attorney for the purpose of retaining the attorney or securing legal advice from the attorney in a professional capacity. The definition includes an incompetent who consults a lawyer or whose guardian consults a lawyer on his/her behalf. Evidence Code Section 950 defines "lawyer" as a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation. An attorney-client relationship is prima facie established when a party seeking legal advice consults an attorney and secures advice. The absence of a fee agreement does not prevent the formation of the relationship.

In People v. Canfield, (1974) 12 Cal.3d 699, 117 Cal. Rptr. 81, 527 P.2d 633, the defendant was convicted of auto theft. While the defendant was in jail, he was interviewed by a representative from the public defenders office during which a financial eligibility statement was taken. The prosecution introduced this statement at trial to impeach the testimony of the defendant. The California Supreme Court held that the financial eligibility statement was protected under the attorney client privilege, however, the error did not require reversal. In discussing the scope of the privilege the court stated:

It is clear from the circumstances under which the statement was given it was given in confidence (see Evid. Code Section 952) and that the defendant's purpose was to retain the public defender to represent him in the criminal proceedings against him. Under Evidence Code Section 951 and 954 of the Evidence Code, therefore, any disclosures made by defendant in the course of the interview were privileged and could not be revealed without his consent. The lawyer-client privilege is, indeed, so extensive that where a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not the employment actually results. 12 Cal. 3d at 704-705.

In People v. Gardner (1980) 106 Cal. App.3d 882, 165 Cal. Rptr. 415, the defendant was convicted of first degree murder. During the trial, the prosecution introduced a letter written by him to the public defender which contained an admission of guilt as well as seeking legal advice. The letter was seized from the defendant's jail cell. The court of appeal reversed and held that the letter was protected under the attorney-client privilege even though the letter had not yet been sent and no formal attorney-client relationship had been established. The court held:

It is abundantly clear from the letter itself and from its context that the letter was intended for the office of the local public defender, and that it was written with the (quite reasonable) expectation that [the defendant] would be represented by that office. [The defendant] was an indigent criminal accused, who, ... had been represented by the Monterey County Public Defender at least seven times prior to his arrest in this case. The letter was addressed 'To P.D.', it concluded by requesting advice, ad [the defendant] was in fact represented by the Monterey County Public Defender in this proceeding. 106 Cal. App. 3d at 887.

In Littlefield v. Superior Court (1982) 136 Cal.App.3d 477, 186 Cal. Rptr. 368, Buono and Bianchi were charged with a series of murders. Bianchi entered a plea bargain which included a requirement that he testify against Buono. During the trial of Buono, defense counsel sought to cross-examine Bianchi about conversations which he had with his attorney concerning the plea bargain and to subpoena all notes and records of those conversations from the public defenders office. The trial court ordered the witness to testify and for the public defender to produce the requested documents. The court of appeal issued a peremptory writ prohibiting the trial court from permitting the cross examination and directing the trial court to quash the subpoena to the public defender's office. The court rejected the argument that the privilege is "near an end" since the threat of pun-
ishment to Bianchi had dissipated. The court held that these discussions and notes are protected under the attorney-client privilege:

More significant, unlike the privileges against self-incrimination, the attorney-client privilege continues even after the end of threat of punishment. The purpose of the attorney-client privilege is to preserve the confidentiality of the information. 136 Cal.App.3d at 482.

The court also held that there the attorney-client privilege was not waived merely because the client testified to facts that were possibly a topic of conversations with his defense counsel.

In People v. Velasquez (1987) 192 Cal.App.3d 322, 237 Cal.Rptr.366, the defendant was charged with various charges including murder and robbery. At trial, the government called a witness to testify to conversations that he had with the defendant in the jail, during which the defendant allegedly admitted his participation in the murder. The witness was a “jailhouse lawyer” who consulted with the defendant and agreed to help the defendant file some legal papers in his case. The defense objected, claiming that these conversations were protected under the attorney-client privilege. The court of appeal held that the conversations were not privileged because a jailhouse lawyer does not qualify as an attorney for purposes of the attorney-client privilege.

In enacting section 911 of the Evidence Code the Legislature clearly intended to abolish common law privileges and to keep the courts from creating new nonstatutory privileges as a matter of judicial policy. 192 Cal.App.3d at 317.

To come within the privilege, appellant would have had to believe he was talking to a lawyer. However, appellant never testified, either at trial or the pretrial hearing on the motion to exclude the witness (jailhouse lawyer) from testifying, that he believed (the witness) was an attorney. While use of “jailhouse lawyers” is not prohibited, it is not encouraged or promoted by state action; nor are such communications privileged. 192 Cal.App.3d at 327-29.

In People v. Klvana (1992) 11 Cal.App.4th 1679, 15 Cal.Rptr.2d 512, the court of appeal rejected the defendant’s argument of trial counsel failure to invoke the attorney-client privilege:

“The defendant faults his trial counsel for failing to invoke the attorney-client privilege when an ‘attorney’ with whom he had previously consulted was called to the stand. This assertion is completely meritless since [the witness] testified that, at the time of her conversations with [the defendant], she informed him that she was no longer licensed and did not practice law.” 11 Cal.App.4th at 1724.

In Hoyt v. Superior Court (1993) 16 Cal.App.4th 712, 20 Cal.Rptr.2d 157, a civil case, the plaintiff’s brother, an attorney, visited the plaintiff while she was in the hospital. He initially came as her brother, but after seeing her condition, returned later with a video camera and began asking her questions about the accident. The court of appeal ruled that substantial evidence supported the trial court’s inference that the ensuing video interview constituted attorney-client communication:

“On January 4, 1990, [plaintiff’s] brother visited her without a video camera. He was a ‘concerned brother.’ On January 6, 1990, her brother came to the hospital with a video camera, a fact she would have noted. When, after only a ‘brief salute,’ her brother began asking her questions (as an attorney gathering information for potential litigation) about the circumstances of her slip and fall—while recording his questions and her answers—it would have been obvious to her that this was not ‘brother-sister talk’ but rather ‘client-lawyer communication.’ Her responsive answers evidenced approval and confirmation of the lawyer-client relationship and its confidentiality.” 16 Cal.App.4th at 718.

2. Attorney-Client privilege protects only those communications which are made and intended to be in confidence.

A confidential communication includes a legal opinion formed and advice given by the attorney in the course of the relationship. A communication need not be exclusively verbal, but may include signs, actions, or the content of papers or reports given to the client. An observation which is the direct product of a confidential communication may also be protected.

In Re Navarro (1979) 93 Cal.App.3d 325, 155 Cal. Rptr. 522, an attorney who represented a defendant in a robbery case was called to testify at the preliminary hearing of that same defendant in a murder charge. The attorney was asked whether she had shown the defendant an arrest report which may have provided the motive for the murder. The magistrate found the attorney in contempt and ordered her to respond finding that the question was not within the attorney-client privilege. The superior court granted a writ of habeas corpus discharging the contempt order. The court of appeal affirmed and held:

Nor are we persuaded by the people’s contention that a publication which is in the public domain is somehow per se nonconfidential. Once an attorney has determined that a particular publication is relevant to his inmate-client’s case, that publication may become an integral part of the attorney’s legal advice or strategy and, as such, it would be entitled to... protection. 93 Cal. App. 3d at 329.

A lawyer’s act of handing a police report to his client (if such be the fact) was a confidential communication privileged under Evidence Code Section 952. [The attorney] was duty bound to raise the privilege on behalf of her client. (Evid. Code Section 955). 93 Cal.App.3d at 330-331.

Communications between an attorney and a client who is in jail or in prison are confidential. In fact, Penal Code 851.5 makes it a misdemeanor for the police to monitor, eavesdrop on, or record a telephone call by an arrested person to a retained attorney, the public defender, or an attorney assigned by the court. Penal Code Section 636 makes it a felony for any person to eavesdrop
on or record by electronic device, without permission from all parties to the conversation, any portion of a conversation between any person in custody or on the property of a law enforcement agency and his or her lawyer, doctor, or religious advisor. Penal Code Section 2601(b) provides that a sentence of imprisonment in state prison does not deprive an inmate of the right to correspond confidentially with any member of the State Bar, provided only that prison officials may open and inspect such mail to search for contraband.

In Barber v. Municipal Court (1979) 24 Cal.3d 742, 760, 157 Cal.Rptr. 658, 598 P.2d 818, the California Supreme Court established that a prisoner has the right to consult with his or her attorney in absolute privacy even when the interests of security in the administration of the prison are considered.

In In re Jordan (1974) 12 Cal.3d 575, 577-578, 116 Cal.Rptr. 371, 526 P.2d 523 the court held that an institutional rule that treated attorney-inmate mail as non-privileged material was invalid because it was inconsistent with the rights afforded prisoners under former Penal Code Section 2600(2) [now see Penal Code section 2601(b)]. The court also held that while the authorities were permitted to open mail to search for contraband, they were not permitted to read the mail to search for “verbal” contraband.

In People v. Meredith (1981) 29 Cal.3d 682, 175 Cal.Rptr. 612, 631 P.2d 46, the defendant was charged with murder and robbery. A defense investigator, at the request of defense counsel, had retrieved the victims’ wallet from behind the defendant’s house, brought it to the attorney, who examined it and turned it over to the police. At trial, the prosecution called the defense investigator to testify as to his observations of the wallet. All parties agreed that the wallet itself was properly admitted into evidence and that any conversations between the defendant, the investigator and the attorney are confidential. The issue was whether the investigators’ observations, which were the product of a privileged communication, are also protected under the attorney-client privilege. The court held that the attorney-client privilege protects not only the initial communications, but extends to information which the attorney learns or receives as a result of that communication. However, the court crafted an exception to the privilege where the defense has altered or removed evidence. The court held:

[We conclude that an observation by defense counsel or his investigator, which is the product of a privileged communication, may not be admitted unless the defense, by altering or removing physical evidence has precluded the prosecution from making the same observation. In the present case the defense investigator, by removing the wallet, frustrated any possibility that the police might later discover it in the trash can. The conduct of the defense thus precluded the prosecution from ascertaining the crucial fact of the location of the wallet. Under these circumstances, the prosecution was entitled to present evidence to show the location of the wallet in the trash can. 29 Cal.3d at 686-687.

The court further stated:

We thus view the defense decision to remove evidence as a tactical choice. If the defense counsel leaves the evidence where he discovers it, his observations derived from the privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege. 29 Cal.3d at 695.

It is not clear whether the California statute, which renders it a misdemeanor willfully to conceal evidence with intent to prevent it from being produced (Penal Code section 135), requires the attorney to disclose the information or whether the attorney’s general duty to protect the client’s secrets prevails. The latter is probably more in keeping with the spirit of the attorney-client relationship.

In People v. Superior Court (Fairbank) (1987) 192 Cal.App.3d 32, 237 Cal. Rptr. 158, the defendant was charged with first degree murder. The government requested the court to order defense counsel to either physically produce or provide information about the murder weapons which he learned about from his client. The trial court would not issue an order. The government petitioned the court of appeal for a writ of mandate to compel the trial court to order production and the court of appeal issued the writ. The court noted that it was optimistic that defense counsel would satisfy his/her obligations to the court, but that the proceedings made clear that the exact nature of that obligation may not have been understood.

The court cited two cases as providing the parameters by which to assess the facts in this case. First, People v. Meredith (1981) 29 Cal.3d 682, 175 Cal.Rptr. 612, 631 P.2d 46, which established two basic principles: first, that the attorney-client privilege is “not strictly limited to communications, but extends to protect observations made as a consequence of protected communications”; and second that whenever defense counsel removes or alters evidence the statutory privilege does not bar disclosure of the original location and condition of that evidence. 192 Cal.App.3d at 35-36.

The second case was Goldsmith v. Superior Court (1984) 152 Cal. App. 3d 76, 199 Cal. Rptr. 366 where the court upheld the attorney-client privilege and did not compel the defense attorney to disclose the whereabouts of a certain weapon where the attorney indicated that he “neither possessed the gun nor had control over it” and there was no indication that he had ever moved or altered it. 192 Cal.App.3d at 36.

The court reasoned that both of those cases differ in certain respect but provide guidance as to what counsel must do:

Defense counsel’s obligations are to the court and their client. Hence, counsel cannot disclose whether they have or do not have the items in questions. If they do not, then that is the end of the issue insofar as the case is concerned. If they are aware of the location of the items, and have not taken possession of the them, then counsel can satisfy their ethical obligations to both the court and their client by leaving the items where they are in accordance with the holding of Meredith. [sic] In the event that defense counsel are in need of the items sought, they can-
not secret or destroy the items. 192 Cal. App.3d at 37.

In People v. Lee (1970) 3 Cal. App.3d 514, 83 Cal. Rptr. 715 the defendant was convicted of murder. After his arrest, the defendant called his father to tell where his bloody shoes were hidden. The father called the defendant’s wife who delivered the shoes to the Public defender’s office who then turned it over to the judge. During trial, the government secured possession of the shoes. The court held that the seizure of the shoes by the government did not violate any attorney-client privilege. The court further held that testimony from representatives of the public defender’s office that they received the shoes from the defendant’s wife and turned them over to the judge was also not protected. 3 Cal. App.3d at 526-527.

3. Attorney-client privilege does not protect disclosures which are made in order to gain assistance for a crime or a fraud.

Evidence Code Section 956 provides that there is no attorney-client privilege if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud. Thus, when a client makes a statement that he or she is about to commit a future criminal act, that statement is not privileged. However, a prima facie showing must be made that the clients purpose in consulting the attorney was to obtain advice concerning the perpetration of a crime or fraud before the communication will be received in evidence over a claim of privilege. Nowell v. Superior Court (1963) 223 Cal.App.2d 652, 657, 36 Cal. Rptr. 21.

This exception is narrower than the corresponding exception to the psychotherapist-patient privilege under Evidence Code Section 1018. Under that exception, the psychotherapist-patient privilege does not apply if the services of the psychotherapist are sought or assist in the planning or commission of a crime or a tort. Under the exception to the attorney-client privilege, the assistance must be sought for a crime or a fraud, and a tort is insufficient.

A party claiming that the services of an attorney were sought for aid in committing a crime or fraud must establish that claim by independent evidence before disclosure of attorney-client communications can be required.

In People v. Pic'l (1981) 114 Cal.App.3d 824, 171 Cal. Rptr. 106, an attorney and another man were found guilty of conspiracy, extortion and receiving stolen property. During trial, the attorney testified to certain matters and was ordered by the court to disclose the name of the client/co-defendant who had telephoned him about making arrangements to return certain stolen property to the victim. The court held that this information was not to be protected within the attorney-client privilege:

The name of the client who consults a lawyer about a criminal matter should, normally, be deemed a confidential communication for the purpose of the lawyer-client privilege... "[The] defendant [attorney] was also foreclosed from validly asserting the lawyer-client privilege by virtue of the crime exception to this privilege, created by Evidence Code Section 956. As discussed previously, the evidence established that [the client] had sought the services of defendant Pic'l, an attorney, to aid in the criminal plan to have the stolen property... returned to [the victim] upon his payment of $2,500 and the execution of a non-prosecution agreement. 114 Cal. App. 3d at 883-884.

In Nowell v. Superior Court (1963) 223 Cal. App. 2d 652, 657, 36 Cal. Rptr. 21, the appellate court vacated a discovery order requiring a defendant in a libel case to disclose information concerning a consultation he had with his attorney. The consultation concerned his contemplated publication of the allegedly libelous material that was the subject of the action. Holding that the discovery order could not be justified on the basis that the defendant had consulted with the attorney for aid in committing a crime or fraud, the court stated:

The attorney-client privilege does not extend to communications between the attorney and client "having to do with the client’s contemplated criminal acts, or in aid of furtherance thereof..." [citations omitted] Similarly, when the client seeks advice that will serve him in the contemplated perpetration of a fraud there is no privilege. [citation omitted] Real party in interest makes charges attempting to bring this case within these exceptions. but it would be destructive of the privilege to require disclosure on the mere assertion of opposing counsel. "Accordingly, evidence should be presented to make a prima facie showing that this was the client’s purpose (to commit a crime) before the communication is received (into evidence)." [citation omitted] 58 American Jurisprudence says: "The mere charge of illegality will not defeat the privilege. There must be prima facie evidence that the illegality has some foundation in fact." 223 Cal.App.2d at 657.

In Dickerson v. Superior Court (1982) 135 Cal.App.3d 93, 185 Cal.Rptr. 97, an attorney petitioned the court of appeal for a writ to set aside an order by the superior court directing him to answer questions at a deposition. Dickerson claimed that the order violates the attorney-client privilege. The court of appeal granted the writ without prejudice for the superior court to review whether the crime-fraud exception to the attorney-client applies pursuant to Evidence Code Section 956. With respect to whether this exception would apply the court observed:

Had the issue been brought before respondent court, it is possible that an exception might have been found in the enactment nullifying the privilege "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." The communications between Chandler and Dickerson were allegedly made in furtherance of a fraud. However, a mere allegation of fraud is insufficient to make the exception applicable. Thus, had a prima facie showing of fraudulent purpose been made, the discovery order would have been proper. 135 Cal.App.3d at 100.

In People v. Clark (1990) 50 Cal.3d 583, 286 Cal.Rptr. 399, 789 P.2d 127, the California Supreme Court held that although
a psychotherapist-patient privilege did not apply when the psychotherapist disclosed a threat made by the defendant during therapy sessions, the attorney-client privilege applied to render the disclosure inadmissible at trial. The court observed that since the psychotherapist had been appointed to assist defense counsel the attorney-client privilege which therefore arose was not waived by the psychotherapist’s disclosure. In discussing the attorney-client privilege, however, the Clark court explained the parameters of the crime/fraud exception to the attorney-client privilege:

The attorney-client privilege does not encompass communications between attorney and client that are intended to further future criminal conduct.

Cases decided since adoption of the Evidence Code recognize the limited nature of the exception to the attorney-client privilege created by Evidence Code section 956: “This exception is invoked only when a client seeks or obtains legal assistance ‘to enable or aid’ one to commit a crime or fraud. The quoted language clearly requires an intention on the part of the client to abuse the attorney-client relationship...”50 Cal.3d 583, 622-623.

4. Attorney-client privilege does not protect disclosures which the attorney believes are necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

In 1993, Evidence Code section 956.5 was added to create an exception to the attorney-client privilege when the lawyer reasonably believes that disclosure of the confidential communication relating to representation of the client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

A comparable provision is that of Evidence Code section 1024, which creates an exception to the psychotherapist-patient privilege if the psychotherapist has reasonable cause to believe that the patient is dangerous to another person and that disclosure of the communication is necessary to prevent the threatened danger. In People v. Clark (1990) 50 Cal.3d 583, 268 Cal.Rptr. 399, 789 P.2d 127, at the request of defense counsel, a psychotherapist was appointed to examine the defendant. In conversations with that psychotherapist, the defendant threatened to kill two people. The psychotherapist consulted with her attorney and arranged for her attorney to inform the potential victims of the threats, thus revealing the communication. The California Supreme Court held that the threats were no longer confidential under the psychotherapist-patient privilege:

Defendant contends that the statements were confidential, and because they were made in a confidential relationship prior to the time [the psychotherapist] told him she might have to reveal them, he had not waived the confidential nature of the communication. We need not decide the waiver question to resolve this claim, however, because at the time of the trial [the psychotherapist] had already revealed the communications that were, therefore, no longer confidential...

A psychotherapist has a professional duty to maintain the confidential character of communications made to him by his patient during the course of the relationship, unless defendant waived the confidential nature of the communication. The purpose underlying Evidence Code section 1014 is not to prevent the use of a defendant’s statement against him in legal proceedings. It exists to prevent the unnecessary disclosure of statements made in confidence in the course of a privileged communication with a therapist and thereby to facilitate treatment. If the statements have been revealed to third persons in a communication that is not itself privileged, however, they are no longer confidential.

The question is not whether the psychotherapist-patient privilege has been waived or the exception that would permit compelled disclosure in a legal proceeding applies, but whether the privilege may be claimed at all once the communication is no longer confidential. Whether the psychotherapist ‘reasonably believes’ (Evid.Code sec. 1024) that revelation of the communication is necessary also becomes irrelevant once the communication has lost its confidential status. The reason for the privilege—protecting the patient’s right to privacy and promoting the therapeutic relationship—and thus the privilege itself, disappear once the communication is no longer confidential. 50 Cal.3d at 619-620.

The Court, however, found that because the psychotherapist had been appointed to assist the defense attorney, the communication was still privileged by the attorney-client privilege:

The attorney-client privilege serves a different purpose. It exists to permit a client to freely and frankly reveal confidential information, including past criminal conduct, to the attorney or others whose purpose is to assist the attorney, and to thereby enable the attorney to adequately represent the client. In a criminal case the privilege also serves to preserve the defendant’s privilege against self-incrimination that might otherwise be deemed to have been waived by his revelation of incriminating information. To make adequate representation possible, therefore, these privileges assure criminal defendants that confidential statements to their attorney will not be admissible in any proceeding.

The Legislature has recognized this distinction on purpose in Evidence Code section 1024, where it provides that there is no [psychotherapist-patient privilege] if the therapist believes it is necessary to disclose the communication. No similar provision reflects an intent that the attorney-client privilege terminate if a communication to an attorney is made public without a waiver of confidentiality by the client. Since defendant’s statements to [the psychotherapist] were also communications made in the attorney-client relationship, unless defendant waived the privilege or did not intend that the statements be confidential, they continued to be privileged notwithstanding the fact that they were no longer confidential at the time of trial. 50 Cal.3d at 620-21.

The 1993 addition of Evidence Code section 956.5 appears to have partially abrogated the latter language in Clark, by providing a statute reflecting an intent that the attorney-client privilege termi-
nate if the attorney believes that disclosure is necessary to prevent death or bodily injury to another person. Thus, it now appears that Clark's rule with regard to the loss of confidentiality from a psychotherapist's disclosure of communication may apply with equal force to a comparable disclosure, under comparable circumstances, by an attorney of a defendant's threat to kill or harm another person.

However, Clark may have survived insofar as it held that when a psychotherapist reveals a threat made by the defendant during therapy sessions, the psychotherapist-patient privilege is no longer applicable but the attorney-client privilege remains applicable. It may now be, that under these circumstances when both privileges are at play, both the psychotherapist and the attorney would have to disclose the threat, or arguably at least both reasonably believe that disclosure is necessary to prevent death or bodily harm, for its confidentiality as to both privileges to be lost. (See F.2.b.: A.B.A. Model Rule 1.6, and F.3., below)

5. Attorney-client privilege does not protect disclosures relevant to an issue of breach.

No privilege protects a confidential communication between an attorney and a client when the communication is relevant to an issue of breach, by either the attorney or the client, of a duty arising out of the attorney-client relationship. (Evidence Code section 958) See Glade v. Superior Court (1978) 76 Cal.App.3d 738, 746-7, 143 Cal.Rptr. 119 Thus, when a criminal defendant fled and claimed after he was apprehended that his attorney had counseled his flight, the attorney-client privilege did not prevent disclosure by the attorney at a hearing on the defendant's motion for a new trial of the defendant's statements to the attorney relevant to his disappearance. People v. Vargas (1975) 53 Cal.App.3d 516, 625-628, 126 Cal.Rptr. 88. In a habeas corpus proceeding arising out of a criminal defendant's claim of incompetence of counsel, the attorney-client privilege between the defendant and the challenged attorney is waived concerning those matters put in issue by the defendant. Inadequate representation of counsel is a charge of a breach of duty arising out of the attorney-client relationship, thus, the privilege does not apply in this context.

6. Attorney-client privilege does not protect disclosures which are made to third persons unless those disclosures are made to persons to further the interest of the client or to accomplish the purpose for which the attorney was consulted.

Under Evidence Code section 952, to be a confidential communication between attorney and client, the communication must not be disclosed to a third person other than one who is present to further the interest of the client in the communication or to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.

The Law Revision Commission Comment to Evidence Code Section 952 states in pertinent part:

Confidential communications also include those made to third parties—such as the lawyer's secretary, a physician, or similar expert—for the purpose of transmitting such information to the lawyer because they are "reasonably necessary for the transmission of the information..."

A lawyer at times may desire to have a client reveal information to an expert consultant in order that the lawyer may adequately advise his client. The inclusion of the words "or the accomplishment of the purpose for which the lawyer is consulted" assures that these communications, too, are within the scope of the privilege. This part of the definition may change existing law...

The words "other than those who are present to further the interest of the client in the consultation" indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person—such as a spouse, parent, business associate or joint client—who is present to further the interest of the client in the consultation. These words refer too, to another person and his attorney who may meet with the client and his attorney in regard to a matter of joint concern.

In Barber v. Municipal Court, etc., the defendant sought a writ of prohibition to dismiss the criminal charges. The defendants alleged that their Sixth Amendment right to counsel had been violated by the presence of a government agent in an undercover capacity at their confidential attorney-client meetings. The California Supreme Court granted the writ and held:

The right to counsel, which embodies the right to private consultation with counsel, is violated when a state agent in an undercover capacity is present at confidential attorney-client conferences...The fact that the petitioners discussed their defenses with joint counsel in a conference type setting rather than in a one-on-one session does not diminish their right of confidentiality. 24 Cal. 3d at 752, 754.

In People v. Lines, (1975) 13 C.3d 500, 119 Cal. Rptr 225, 531 P.2d 793, the defendant was charged with the murder of his aunt. He entered pleas of not guilty and not guilty by reason of insanity. After a bifurcated trial, the defendant was found both guilty and sane. The defendant claims that it was error for the court to admit, over objection, the testimony of two court-appointed psychiatrists in violation of his attorney-client privilege. The two doctors were initially appointed by the court under Evidence Code Section 1017. The California Supreme Court held that, pursuant to an appointment under Evidence Code Section 1017, any communication between the defendant and the doctors was protected under the attorney-client privilege:

Where, as here, pursuant to section 1017 of the Evidence Code, a psychotherapist is appointed by the court in a criminal proceeding to examine the defendant in order to provide the defendant's attorney with information for the purposes set forth in said section, the results of such examination, including any report thereof, and all information and communications relating thereto, are protected from disclosure by the attorney-client privilege notwithstanding the fact that the defendant has theretofore or thereafter tendered in said proceeding the issue of his mental or emotional condition. 13 Cal.3d at 514.
The court, however, found that the error was not sufficiently prejudicial to the defendant to warrant reversal. Two other doctors testified at the trial who were appointed pursuant to Penal Code Section 1027 which requires the court to appoint two psychiatrists to examine the defendant after he/she has raised a defense of not guilty by reason of insanity. These psychiatrists may be called by either party or by the court. Any statements made by the defendant to the doctors appointed under Penal Code section 1027 are not privileged under the attorney-client privilege. Since the testimony which was admitted by the doctors appointed pursuant to Penal Code section 1027 was essentially the same as that from the doctors appointed pursuant to Evidence Code section 1017, the Court found no prejudice. The Court, however, did disapprove the practice of appointment by the same doctor under the two Evidence Code sections. Since the communications given under the first appointment are privileged, and those under the second appointment are not, it may impose an impossible task for the doctor to compartmentalize the information and not rely upon or use any information that is deemed privileged.

An expert loses his or her status as a consulting agent of the attorney if the attorney calls the expert to the witness stand. Once the witness is called, neither the attorney-client privilege nor the work-product doctrine apply to matters relied on or considered in the formation of his or her opinion. People v. Milner (1988) 45 Cal.3d 227, 241, 246 Cal.Rptr. 713, 753 P.2d 669.

In People v. Haskett (1990) 52 Cal.3d 210, 276 Cal.Rptr. 80, 801 P.2d 323, the California Supreme Court rejected a claim that calling a psychotherapist to the stand at a first trial did not waive the attorney-client privilege:

In the trial court, defendant invoked only the psychotherapist-patient privilege...The privilege was waived, however, when defendant called [the psychotherapist] to testify on his behalf at the first trial...On appeal, defendant invokes for the first time the attorney-client privilege on the mistaken assumption that it has survived the waiver of the psychotherapist-patient privilege. People v. Clark (1990) 50 Cal.3d 583, discussing the differences between the psychotherapist-patient privilege and the attorney-client privilege, agreed that statements made to a psychotherapist may be made in the attorney-client relationship and, "unless defendant waived the privilege or did not intend that the statements be confidential, they continued to be privileged notwithstanding the fact that they were no longer confidential at the time of trial." The defendant's statements in Clark were revealed to potential victims and were thus no longer confidential at the time of trial, but in Clark, the defendant had at no time waived the privilege.

As the People argue, here defendant did waive the privilege when [the psychotherapist] was called to the stand by the defense in the first trial. 52 Cal.3d at 242-43.

A disclosure may be made for a limited purpose under certain circumstances, thereby not waiving the attorney-client privilege. In People v. Aguilar (1990) 218 Cal.App.3d 1556, 267 Cal.Rptr. 879, a psychological expert was appointed to aid the defense. Pursuant to the requirements of Evidence Code section 795, the defendant underwent hypnosis in the psychological sessions. The defendant later sought to testify at trial, requiring a hearing on the admissibility of his posthypnosis testimony. For these purposes only, the defendant agreed that the prosecutor could review videotapes of the hypnosis sessions. The trial court ruled that the statements made in the videotapes could be used by the prosecutor as impeachment evidence at trial. The court of appeal held that the ruling was error, but that the error was not prejudicial requiring reversal:

The defendant's waiver of the [attorney-client] privilege against disclosure of his interviews with the hypnotist was occasioned by the trial court's erroneous application of Evidence Code section 795 to his testimony. The waiver was not only limited to the hearing on admissibility of his posthypnosis testimony, it was also freely and voluntarily made. However, ...the error was harmless beyond a reasonable doubt. 218 Cal.App.3d at 1565-66.

7. Assertion of the Privilege: The client or his or her attorney may claim the privilege in certain instances the attorney must claim the privilege.

Subject to Evidence Code Section 912, which governs waiver of privileges by disclosure, the claim, whether or not a party to a particular action has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and his or her attorney.

The attorney who received or made a confidential communication must claim the privilege whenever he or she is present when the communication is sought to be disclosed. Thus, while the attorney client privilege belongs only to the client, the attorney is professionally obligated to claim it on the client's behalf whenever the opportunity arises unless the client has instructed otherwise.

C. Waiver of the Attorney-Client privilege

1. The attorney-client privilege may only be waived by the client's uncoerced disclosure of all, or a substantial part, of a privileged communication, or by a failure to claim the privilege when the client has the legal standing and opportunity to assert the claim.

Evidence Code Section 912 provides that a waiver of the attorney-client privilege may be found "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone". Waiver depends upon actual, and not potential disclosure of confidential communications. Failure to object to evidence may constitute a waiver of the privilege.

In Maas v. Municipal Court (1985) 175 Cal.App.3d 601, 221 Cal. Rptr. 245, the defendant was charged with murder by complaint. A witness in the case entered into a plea bargain with the government in which she agreed to testify against the defendant. The attorneys for the defendant issued subpoenas to the lawyers for this witness asking them to produce documents concerning their client arguing that she had waived any attorney-client privilege by entering into the plea agreement. The magistrate ordered the lawyers to produce the documents and...
the Superior Court issued a writ ordering the magistrate to vacate his order. The court of appeal affirmed the writ holding that when the witness entered into a written plea agreement and was granted immunity, she had not waived her attorney-client privilege. The court held:

"The waiver of a privilege must be voluntary and knowing act, done with sufficient awareness of the relevant circumstances and likely consequences, ... while a written immunity agreement might include an unambiguous waiver of the attorney-client privilege among its terms, clearly the agreement at issue in this case did not. 175 Cal. App.3d at 603.

In People v. Tamborrino, (1989) 215 Cal. App.3d 575, 263 Cal. Rptr. 731, the court held that a witness did not waive the attorney-client privilege by testifying to the same facts he related to his attorney. In this robbery prosecution, the defendant testified the victim was accusing him of the robbery to get even with him for selling her fake narcotics. At the conclusion of his testimony the trial judge asked the defendant, "Did you tell your lawyer about the story you just related on the stand?" Defense counsel objected that the answer would violate the defendant's attorney-client privilege. The trial judge overruled the objection but the appellate court held the question was improper. The court stated:

"It was not quite like that". The government called the bailiff as a witness and the defendant made no objection to the testimony as privileged. On appeal the court found no error and stated:

"The failure to object to its admission or to claim the privilege resulted in a waiver thereof (Evid. Code Section 912). 27 Cal.App.3d at 64.

2. Attorney-client privilege is waived as to matters put in issue on any question of breach of a duty arising out of the lawyer-client relationship.

Evidence Code Section 958 provides that there is no privilege as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship. The Law Revision Commission comment to Evidence Code Section 958 states:

It would be unjust to permit a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim. Thus, for example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged.

In re Dudley Gray (1981) 123 Cal.App.3d 614, 176 Cal.Rptr. 72, an attorney was held in contempt for refusing to answer questions at a habeas proceeding brought by a former client who was alleging ineffective assistance of counsel. The court on appeal denied the application for a writ of habeas corpus and held:

We hold that there is no attorney-client privilege as to matters put in issue in a habeas corpus proceeding where the competency of defendant's trial attorney is at issue...[However], we are limiting our holding to matters put in issue by the petition. Therefore, the petitioner is not going to get bushwhacked. The privilege is waived only as to issues raised in the petition he or she elects to file...Of course, if during an evidentiary hearing a defendant discovers that he has opened a real can of worms and that some of the goodies he has imparted to his attorney may come to light, he can protect himself by simply dismissing the petition. 123 Cal.App.3d at 616-17.

D. Laying Foundation to Establish Existence of Attorney-Client Privilege

Disputes over the disclosure of information, or the production of material that may be subject to the attorney-client privilege can arise during trial. To make a prima facie showing that the attorney-client privilege is applicable, the party asserting the privilege has the burden of proof for the foundational requisites. Thus, the party claiming the privilege must establish that (1) the person to whom the client made the communication in dispute was a lawyer authorized to practice law in some state or nation (or someone the client reasonably assumed to be authorized to practice law); (2) the client consulted the lawyer to obtain legal service or advice; and (3) the specific communication in dispute was made in the course of that attorney-client relationship [see Evid. Code §§ 950,952; see also Travelers Ins. Companies v. Superior Court (1983) 143 Cal. App. 3d 436, 447-448, 191 Cal. Rptr. 871...]. In contrast, the proponent of the evidence has the burden of proving that the privilege does not apply because the communication was not made in confidence, was waived, or falls under an exception [see above]. Sometimes, an adequate foundation will already have been laid by previous testimony or, as in a case where a questions calls for communications with a party's attorney of record, matters that may be judicially noticed; if not, the foundation must be established through the examination of a witness.

In many cases, the requisite showing may be made by simply asking the attorney or client whether an attorney-client relationship existed. Collette v. Sarrasin (1920) 194 Cal. 283, 289, 193 P. 571. In other cases, it may be necessary to establish the subject matter of a particular attorney-client relationship and when it came into existence. When a communication was transmitted by or to a third person, the party claiming the privilege
may also be required to show that the third person was acting in a particular capacity. D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 736,739, 36 Cal. Rptr. 468, 388 P.2d 700 (existence of privilege dependent upon whether employee transmitting report was acting as corporate spokesperson).

A party asserting a claim of attorney-client privilege does not waive the privilege by disclosing the existence or subject matter of an attorney-client relationship, the dates on which attorney-client communications occurred, or even the general subject matter of the communications. Mitchell v. Superior Court (1984) 37 Cal. 3d 591, 601,603, 208 Cal. Rptr. 886, 691 P.2d 642; see also Coy v. Superior Court (1962) 58 Cal. 2d 210, 219, 220, 23 Cal. Rptr. 393, 373 P.2d 457. However, a disclosure of any significant part of the content of the communication may result in a waiver. Jutrik Productions, Inc. v. Chester (1974) 38 Cal. App. 3d 807, 811, 113 Cal. Rptr. 527.

E. Reciprocal Discovery and the Effects of Proposition 115 on the Attorney-Client Privilege

1. Statutory Authority

Proposition 115, passed in June, 1990, amended the California Constitution by permitting reciprocal discovery in criminal cases. Furthermore, Proposition 115 added Chapter 10 to the California Penal Code. This Chapter (listed below) enumerates the specific items of evidence that the prosecution and defense must make available upon request.

Penal Code section 1054.1. Prosecuting attorney; disclosure of materials to the defendant

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial;

(b) Statements of all defendants;

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged;

(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

Penal Code section 1054.2. Disclosure of address or telephone number of victim or witness; prohibition; exception

No attorney may disclose or permit to be disclosed to a defendant the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1 unless specifically permitted to do so by the court after a hearing and a showing of good cause.

Penal Code section 1054.3. Defense counsel; disclosure of information to prosecution

The defendant and his or her attorney shall disclose to the prosecuting attorney:

(a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

(b) Any real evidence which the defendant intends to offer in evidence at the trial.

Penal Code section 1054.4. Non-testimonial evidence

Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining non-testimonial evidence to the extent permitted by law on the effective date of this section.

Penal Code section 1054.5. Criminal cases; discovery orders; informal request; testimony of witnesses; prohibition

(a) No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the discovery or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.

(b) Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

(c) The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States.

Penal Code section 1054.6. Work product privilege

Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

**NOTE: This section and its relation to work product are dealt with more extensively below.**
Penal Code section 1054.7. Disclosure of information; time limitations

The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim records shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

2. Validity

In Izazaga v. Superior Court, the California Supreme Court affirmed the constitutionality of the above sections, holding that Penal Code section 1054 et seq., does not compel a criminal defendant to be a witness against himself in violation of the Fifth Amendment to the Constitution. In this case the defendant was charged with rape and kidnapping. The prosecutor moved for discovery of the defense witnesses and the trial court granted the motion. The defense filed a writ of mandate or Prohibition that the court of appeals summarily denied. The California Supreme Court upheld the denial of the writ by the court of appeals and concluded that the discovery provisions of Proposition 115 are valid under the state and federal constitutions. The Court further held that Penal Code section 1054 et seq., affords defendants sufficient rights of reciprocal discovery to meet the requirements of the 14th Amendment Due Process Clause as it provides that the defendant will have the opportunity to discover the prosecutor's rebuttal witnesses (and their statements) following discovery of defense witnesses by the prosecutor.

The Izazaga court rejected the defense challenge that the discovery provision violates the 6th Amendment right to counsel by chilling the defense counsel's preparation:

"...Under the new discovery chapter, a criminal defendant need disclose only those witnesses (and their statements) the defendant intends to call at trial. It is logical to assume that only those witnesses defense counsel deems helpful to the defense will appear on a defendant's witness list. The identity of damaging witnesses that the defense does not intend to call at trial need not be disclosed. 54 Cal.3d at 379.

3. Scope of disclosure

Hobbs v. Municipal Court (1991) 233 Cal.App.3d 670, 284 Cal.Rptr. 655, decided the same year as Izazaga, also upheld the constitutionality of the discovery provisions of Proposition 115. Hobbs, charged in a felony complaint with residential burglary, had his charge reduced to a misdemeanor at the conclusion of the preliminary hearing. He attacked the constitutionality of the discovery provisions of Proposition 115, and also argued that the discovery provisions of Proposition 115 violate the work product doctrine. In striking down these arguments, as well as the one the Proposition 115 should not apply in misdemeanor cases, the court stated:

"The language of Proposition 115 makes no distinction between felony and misdemeanor cases. Rather, it repeatedly refers to the "criminal justice system," and "criminal cases." The Penal Code includes misdemeanors as well as felonies in its definitions of crimes... We also find significant the fact that in the area of discovery, Proposition 115 repealed both the misdemeanor statute and part of the felony statute that required discovery of police reports. Thus, where there were specific discovery statutes concerning felonies and misdemeanors, the initiative dealt with both categories of crime. We conclude this is strong evidence of legislative intent to include misdemeanors as well as felonies within the discovery provisions of the measure. 233 Cal.App.3d at 696.

Rodriguez v. Superior Court (1993) 14 Cal.App.4th 1260, 18 Cal.Rptr.2d 120, held that, in a prosecution for rape, robbery, burglary, and first degree murder, defendant's statement to a psychologist, made at his counsel's behest for purposes of evaluation in preparation of the defense case, came within Evidence Code section 952, a privileged communication under the attorney-client privilege. The court further held that under Penal Code section 1054.6, information within the statutory attorney-client privilege is not subject to disclosure at the time a witness is designated pursuant to Penal Code section 1054.3:

"We conclude that the privilege provision of section 1054.6 is meant to modify and affect the blanket disclosure provisions of section 1054.3. Accordingly, we interpret section 1054.3 as requiring disclosure of information when the witness is designated unless that information is privileged unless that information is privileged by "express statutory provision" or otherwise protected as work product. Such an interpretation construes each statutory provision (1054.3 and 1054.6) in light of the other, is an harmonious interpretation, is reciprocal in effect, and does not render section 1054.6 a nullity. 14 Cal.App.4th at 1269.

Therefore, even though the psychologist was designated as a defense witness, the defense did not have to disclose prior to trial the psychologist's report of defendant's remarks concerning the charged offenses. The court also held that the partial disclosure to the prosecution before trial of defendant's psychological report did not waive the attorney-client privilege with respect to a deleted section of the report. [This section contained defendant's remarks to the psychologist concerning the charged offenses.] The court reasoned that since the disclosure was done pursuant to a court order and was not voluntary, the waiver of the privilege as to one aspect of a protected relationship does not necessarily waive the privilege as to other aspects of the privileged relationship. The court cited the defense's good faith efforts to comply with the court's order and cooperate with the prosecutor without wai...
ing any privilege regarding defendant’s statements about the alleged offense.

Citing the Rodriguez opinion, the court in Sandefuer v. Superior Court (1993) 18 Cal.App.4th 672, 22 Cal.Rptr.2d 261, held that the trial court exceeded its jurisdiction under Penal Code section 1054.5, subd. (b) (court may make any order necessary to enforce discovery provisions), by directing defense counsel to disclose the identity of the expert and produce the expert’s documents despite defense counsel’s representations that he had not yet made a decision as to whether to call the expert as a witness at trial. The determination of whether to call a witness, the court held, is peculiarly within the discretion of counsel, and even when counsel appears to be unreasonably delaying the publication of the decision to call a witness, it is not within the province of the trial judge to step into counsel’s shoes. The court further held that an order requiring an expert witness in a criminal case to produce his or her “notes” in most instances goes beyond the specification of discoverable items set forth in Penal Code section 1054, subd. (e). This section provides that discovery of information pertaining to expert witnesses shall include any reports or statements of the expert made in connection with the case, as well as the results of physical or mental examination, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at trial.

In People v. Superior Court (Sturm) (1992) 9 Cal.App.4th 172, 11 Cal.Rptr.2d 652, the court held that Penal Code section 1054.3, subd. (a) [requiring the defense to disclose to the prosecution the witnesses it intends to call “at trial,”] includes those witnesses the defense intends to call during the penalty phase of a capital trial. The court held that Penal Code section 190.3, which requires exclusion of aggravating evidence prof ered by the prosecution in the penalty phase of a homicide prosecution unless the defense has been given notice of it, does not control penalty phase discovery procedures so as to preempt the reciprocal discovery provisions of Penal Code section 1054 et seq. The court further held that to interpret the reciprocal discovery provisions to require the disclosure of defense witnesses to be called in the penalty phase does not violate the due process rights of capital defendants or deny them equal protection.

Regarding the juvenile court context, the court in Robert S. v. Superior Court of Sonoma County (1992) 9 Cal.App.4th 1417, 12 Cal.Rptr.2d 489, held that reciprocal discovery provisions applicable in criminal proceedings did not apply in juvenile delinquency proceedings, but that the juvenile court had discretionary authority to enter reciprocal discovery order.

In the more recent case of People v. Sanchez (1994) W.L. 157932 (Cal.App. 2 Dist.), the court held that once some incriminating writings had been delivered to the trial court, the trial court could furnish those writings to the prosecutor without violating either the defendant’s privilege against self-incrimination or the reciprocal discovery statute (Penal Code sections 1054-1054.7). In this case, the Public Defender representing Sanchez, who was charged with murder, was given some inculpatory writings done by the defendant. The writings were not given to the lawyer by the defendant, but by a third party. The Public Defender placed the writings in a sealed envelope, and without informing the prosecutor, delivered them to the clerk of the court. (Although counsel never did explain why he turned these papers over to the court, the court surmised that he may have felt some professional obligation to do so). The court specifically did not hold that counsel had a duty to turn over such writings, but limited its holdings to the actions of the court once the writings were disclosed.

F. Ethical Considerations Regarding Attorney-Client Privilege and the Confidentiality of Information

1. Statutory Authority

All persons licensed to practice law in California are bound by the statutes comprising the State Bar Act (Business and Professions Code sections 6000-6228) and the Rules of Professional Conduct (Rules 1-100 - 5-320). An attorney who willfully breaches any of the Rules of Professional Conduct can be disciplined by public or private reproval, or by suspension from practice (Bus. & Prof. Code sec. 6077). Similarly, an attorney can be disbarred or suspended for any of the following:

(1) Willful disobedience or violation of a court order which the attorney ought in good faith to obey;

(2) Violation of the oath taken by the attorney to defend the Constitution and the laws of the state and nation; or

(3) Violation of the duties of an attorney (Bus. & Prof. Code sec. 6103)

RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

Rule 1-100 - Rules of Professional Conduct, in General.

(A) Purpose and Function

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, section 6000 et seq.) and opinions of California Courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

(B) Definitions

(1) "Law Firm" means:
(a) two or more lawyers whose activities constitute the practice of
law, and who share its profits, expenses, and liabilities; or
(b) a law corporation which employees more than one lawyer; or
(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or
(d) a publicly funded entity which employs more than one lawyer to perform legal services.

(2) "Member" means a member of the State Bar of California.

(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any U.S. court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

(4) "Associate" means an employee or fellow employee who is employed as a lawyer.

(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

(C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

(2) As to lawyers from other jurisdictions who are not members:

These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

(E) These rules may be cited and referred to as "Rules of Professional Conduct of the State Bar of California.

Rule 1-110. Disciplinary Authority of the State Bar.

A member shall comply with conditions attached to public or private reprovals or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 956, California Rules of Court.

Business and Professions Code section 6068. Duties of attorney.

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confined to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States or any other constitutional or statutory privileges.

(j) To comply with the requirements of Section 6002.1. (Official membership records; maintenance of information; service of notice initiating proceedings; availability of information on records; form for reports)

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonable informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

The attorney also has a duty to provide copies to the client of certain documents under time limits and as prescribed by the Rules of Professional Conduct (Bus. & Prof. Code section 6068(n)). Under specified conditions, such as the bringing of an indictment charging a
felony against the attorney, the attorney must make written reports to the State Bar (Bus. & Prof. Code section 6068(o)).

2. Professional Relationship with Clients
   a. Scope of Representation

RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

Rule 3-110: Failing to Act Competently
(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, “competence” in any legal service shall mean to apply to the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Rule 3-210: Advising the Violation of Law
A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See People v. Meredith (1981) 29 Cal.3d 682, 175 Cal.Rptr. 612.) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner’s agreement not to report the theft to the police or prosecutorial authorities. (See People v. Pic’ (1982) 31 Cal.3d 731, 183 Cal.Rptr. 685).

A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.2 Scope of Representation
(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

COMPARISON - A.B.A. MODEL CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rule 7-102: Representing a Client Within the Bounds of the Law
(A) In his representation of a client, a lawyer shall not:
   (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
   (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
   (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
   (4) Knowingly use perjured testimony or false evidence.
   (5) Knowingly make a false statement of law or fact.
   (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
   (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
   (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:
   (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.
   (2) a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

*NOTE: Disciplinary Power: The Model Code makes no attempt to prescribe either the disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The Model Code seeks only to specify conduct for which a lawyer should be disciplined by courts.
and governmental agencies which have adopted it.

b. Confidentiality of Information
See Business and Professions Code section 6068(c).

A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the client in a controversy between the lawyer and the client, to establish a defense to a criminal charge or a civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

A.B.A. MODEL CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rule 4-101 Preservation of Confidences and Secrets of a Client

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(D) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associations against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal information allowed by DR 4-101(C) through an employee.

The California Rules of Professional Conduct, based in part on the old A.B.A. Model Code, are unaffected by the new A.B.A. Model Rules, and there are no current plans for adoption of the Model Rules in this state. It is likely, however, that California courts and lawyers will find the Model Rules both helpful and persuasive in situations where the coverage of the California Rules of Professional Conduct is unclear or inadequate.

The Comment to the A.B.A. Model Rule 1.6 states that a lawyer may foresee that the client intends serious harm to another, but if disclosure is required or permitted the client will be inhibited from revealing facts which would enable the lawyer to counsel against wrongful action. If further goes on to advise that where practical, the lawyer should seek to persuade the client to take suitable action; and in any case disclosure should be no greater than the lawyer reasonably believes necessary.

The Comment also distinguishes several situations: (1) A lawyer may not counsel or assist in conduct that is criminal or fraudulent, or use false evidence; (2) A lawyer innocently involved in past criminal or fraudulent conduct has not violated Rule 1.2(d) (above); i.e., "counsel or assist" requires knowledge of the criminal or fraudulent character; (3) A lawyer who learns that a client intends prospective criminal conduct likely to result in imminent death or substantial bodily harm has discretion to reveal the information when he reasonably believes that this purpose will be carried out.

3. Client's Intention to Commit a Future Crime

Any communication made by the defendant to his or her attorney of an inten-
tion to commit a crime is not privileged under California law. (Evidence Code section 956.5) Under the American Bar Association's Professional Responsibility Code and Model Rules, such a communication may and perhaps should be revealed by the attorney, as well as any information necessary to prevent the crime. (See A.B.A. Model rules of Professional Conduct, Rules 1.6(b)(1) [above], 3.3(a)(2); A.B.A. Code of Professional Responsibility, DR 4-101(C)(3) [above])

Thus, the California Supreme Court has approved of a defense attorney's request to speak to the trial judge in camera, and informing the judge that the defendant may attempt to escape and that it might be wise to order the defendant handcuffed during the trial. (People v. Cox (1991) 53 Cal. 3d 618, 651-52, 280 Cal. Rptr. 692, 809 P. 2d 351 attorney's revealing of rumor, although permitted and perhaps obligated, was insufficient to constitute manifest need, thus shackling and handcuffing should not have been ordered without a greater showing)

Nothing in the California Codes places an affirmative duty upon the attorney to reveal his client's intention to commit a crime. (See B.4., above)

II. ATTORNEY'S WORK PRODUCT PROTECTION

A. Statutory Authority

1. Penal Code section 1054.6 provides: Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subsection (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

2. California Code of Civil Procedure section 2018 provides in pertinent part:
   (a) It is the policy of the 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.
   (c) Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

B. Work Product Protection—General

A claim of work product operates like a privilege to prevent disclosure of particular information. Under most circumstances, it protects the private work of an attorney from discovery. It is defined in the Cal. Code Civil Procedure, section 2018(c) as any writing that reflects an attorney's impressions, conclusions, opinions, legal research or theories. However, without any more guidance as to the meaning of "work product" material, a determination must be made by the court on a case by case basis as to whether a writing falls within its protection.

The United States Supreme Court in Hickman v. Taylor, (1947) 329 U.S. 495, 91 L. ed. 451, 67 S. Ct. 385, stated:

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways- aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer'. 329 U.S. at 511.

In California, courts have identified attorney work product "as material which is derivative in character, not ultimate facts but material compiled by the attorney in preparation of his or her case". In re Jeannette H. (1990) 225 Cal. App. 3d 25, 32, 275 Cal. Rptr. 9.

C. Adoption of Work Product Rule in California

California was slow to adopt the principles of the work product rule. In an early case, the California Supreme Court held that the work product rule was not applicable in California. Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 401, 15 Cal. Rptr. 364 P.2d 266. Greyhound was a personal injury suit arising from a collision with a bus. Plaintiffs' counsel was unable to locate witnesses to the accident despite diligent efforts and sought an order requiring defendant to disclose the written statements of witnesses collected at the scene by defendant's investigators. In upholding the trial court's discovery order, the California Supreme Court held that the work product privilege was not applicable in California and refused to apply the Hickman work product rule, stating:

This is not to say that discovery may not be denied, in proper cases, when disclosure of the attorney's efforts, opinions, conclusions or theories would be against public policy... or would be eminently unfair or unjust, or would impose an undue burden.

Even though the doctrine was never officially recognized, between the Greyhound decision in 1961 and the adoption of the Civil Discovery Act in 1963, the work product rule became de facto law in California. In court cases, the concept of work product was recognized, not as an absolute bar to discovery, but as one circumstance to be considered by a court in exercising its discretion to determine whether or not discovery was fair and equitable under the circumstances.

D. PROPOSITION 115

The work product rule was held to apply to criminal cases even before the passage of Proposition 115 codified the protection in the Penal Code. In People v. Collie, (1981) 30 Cal. 3d 43, 177 Cal. Rptr. 458, 634 P.2d 534, the defendant was charged with attempted first degree murder of his wife and attempted second degree murder of his child. During trial, a defense witness testified that she had spoken with a defense investigator prior to trial. The prosecution moved for discovery of the notes prepared by the investigator. Over the defense objection on ground of the work-product doctrine and attorney-client privilege, the court ordered production of those notes and the defendant was convicted. The California Supreme Court reversed the conviction on other grounds, but found that the trial court violated the work product privilege in granting the prosecution's
discovery motion. This error was found to be harmless. The court discussed the applicability of the work product doctrine as follows:

We have never explicitly held the work product doctrine applicable to criminal cases and neither has the Legislature, although it has codified the rule as to civil trials. (Code Civ. Pro. section 2016(b)). There is little reason, however, to withhold its protection from the criminally accused. As the United States Supreme Court held in Nobles: “Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.” 30 Cal.3d at 59.

Proposition 115 passed by the voters in California in June of 1990 created a new “reciprocal discovery” provision for criminal cases by the addition of sections 1054 - 1054.7 to the Penal Code. Penal Code section 1054.6 explicitly provides for the application of the work product doctrine to criminal discovery. This provision states that neither the defendant nor the prosecution can be required to disclose any material or information that is work product as defined in Code Civ. Pro. section 2018(c). This included any writing or communications and statements that reflect an attorney’s impressions, conclusions, opinions, or legal research or theories is provided absolute protection. The work product doctrine for criminal cases, therefore, does not include the conditional protection afforded civil litigants under Code Civil Pro section 2018(b) that protects any product of an attorney unless the protection will result in an injustice.

Penal Code section 1054.6 does not appear to change the law with respect to the absolute protection of the work product privilege, but only to codify existing law. Therefore, counsel should be able to rely upon earlier precedents in determining the scope and meaning of the doctrine. In addition, since the Penal Code specifically cites to the definition of work product in the Code of Civil Procedure, counsel should examine and cite to the vast body of cases in the civil context that have attempted to define the meaning of “work product”.

However, counsel must examine the earlier cases carefully to determine the basis for the court finding that material is protected as “work product”. If the court found the writing to fall within the “absolute” work product protection under Code Civ. Procedure 2018(c), (absolute protection for impressions, opinions, etc), then this finding would be relevant to a determination in the criminal context. However, if the court found a writing to be conditionally protected under Code Civ. Procedure 2018(b), (qualified protection which must be disclosed to avoid injustice), than this material would not be protected under the criminal code.

E. The Constitutionality of the Discovery and Work Product doctrine

Proposition 115 created a new “reciprocal discovery” system in criminal prosecutions in California. Penal Code section 1054 - 1054.7. Prior to this provision, the work product doctrine had little application in criminal prosecutions since the prosecution had few rights to discovery of defense material. However, with the passage of Proposition 115, the work product doctrine will be an important means by which each party will attempt to resist disclosure of material.

In Izazaga v. Superior Court (1991) 54 Cal. 3d 356, 285 Cal. Rptr. 231, 815 P.2d 304, the California Supreme Court found these discovery provisions to be constitutional. In this case the defendant was charged with rape and kidnapping. The prosecutor moved for discovery of the defense witnesses and the trial court granted the motion. The defense filed a writ of mandate or prohibition that the court of appeals summarily denied. The California Supreme Court upheld the denial by the court of appeals and concluded that the discovery provisions of proposition 115 are valid under the state and federal constitutions. The court rejected the defense challenge that the discovery provision violates the sixth amendment right to counsel provision as enunciated in Hickman v. Taylor (1947) 329 U.S. 495. The court reasoned:

The doctrine developed in Hickman and applied in the context of discovery in criminal cases in Nobles, supra, 422 U.S. 225, is not based on the right to counsel clause; rather it is a form of federally created privilege based upon federal supervisory policy and federal statute. (Citations omitted). There is no privilege for attorney work product in the California Constitution. Because the work product doctrine is not constitutionally founded, there is no basis for a facial challenge to the constitutionality of the new discovery chapter on work product grounds.

Moreover, we note the new discovery chapter expressly provides that attorney work product is nondisclosable. Because there is no constitutional basis for a work product privilege, any protection in California of the work product of an attorney must be based on state common or statutory law. 54 Cal. 3d at 381.

F. Attorney-Client Privilege and Work Product distinguished

California Evidence Code sections 950-962 govern the privilege between lawyer and client. It preserves the confidentiality of communications between the lawyer and the client with the purpose of encouraging full disclosure and open communications within this relationship.

This privilege should be distinguished from an attorney’s work-product rule which protects the “work-products” of the attorney from discovery by opposing counsel. This protection is governed by the Code of Civil Procedure section 2018. Under this section any writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances. Other matters that may constitute an attorney’s work product may be discoverable if the court deems that denial of the discovery will (1) unfairly prejudice the party seeking discovery or (2) result in an injustice. Code Civ. Proc. Section 2018(b).

In many situations the attorney-client privilege and the work product rule overlap, as for instance, when an investigator for the attorney obtains information from the client and transmits a report to the attorney. The two are, however, separate and distinct and differ in several important respects: (1) statutory basis, (2) purposes, and (3) holders.

The attorney-client privilege exists to protect confidential communications, to assure the client that any statements [the client] makes in seeking legal advice will be kept strictly confidential between [the client and the client’s] attorney; in effect, to protect the attorney-client relationship. By contrast, the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent. The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation.

The attorney-client privilege belongs to the client and only the client can waive the privilege. In contrast, the work product protection belongs to the attorney, not the client, although a client may be able to assert the work product rule in the attorney’s absence. *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal. App. 3d 264, 218 Cal. Rptr. 205; *Kerns Constr. Co. v. Superior Court* (1968) 266 Cal. App. 2d 405, 411, 72 Cal. Rptr. 74.

### G. Work Product protection applies to an attorney’s impressions, conclusions, opinions, legal research or theories.

*Hobbs v. San Diego Mun. Court (People)* (1991) 233 Cal. App.3d 670, 284 Cal. Rptr. 655, involved a misdemeanor prosecution for burglary. The prosecutor filed a notice and motion for discovery of a complete list of defense witnesses. The trial court granted the motion and the defense filed a writ of mandate Superior court. The court denied the writ and held that Penal Code section 1054.3 was constitutional as applied to misdemeanors and

that a witness list is not protected under the work product doctrine. The court of appeals upheld this ruling and discussed the scope of the work product doctrine in criminal cases stating:

[T]o the extent that witnesses’ statements and reports of witness interviews reflect merely what the witness said they are not work product. As the high court said in *Nobles* 422 U.S. at p. 238, “At its core, the work product doctrine shields the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case. (citations omitted) To the extent that a report of a witness interview reflects an attorney’s mental processes, it is exempted from discovery by section 1054.6 and a party can seek a protective order to that effect. (see Code Civ. Proc. section 2031(c) or an in camera review in which the privileged material can be excised. 233 Cal. App.3d at 693.

The court then contrasted the application of the work product doctrine in criminal and civil cases and observed that in the criminal context, the Initiative limited its scope to provide only an absolute privilege to those writings that reflect “an attorney’s impressions, opinions, or legal research, or theories”. The provision did not embrace the broader, qualified work product privilege set forth in the Code of Civil Proc. 2018(c).

In *Rumac Inc. v. Bottomly* (1983) 143 Cal. App.3d 810, 192 Cal. Rptr. 104, plaintiff landowners subpoenaed certain documents that were prepared and in the possession of the attorney who had represented the defendant landowners during negotiations. The trial court granted the defendant’s motion for a protective order finding that these documents were absolutely protected from discovery as they represented the attorney’s impressions, conclusions, opinions, etc. The court also found that the privilege applies even when the lawyer is not preparing for trial but acting only as a consultant or a negotiator. The court held:

Neither the text of the statute nor the policy underlying the creation of the absolute privilege warrants a class distinction between the lawyer-negotiator and the lawyer-litigator. There is also no valid reason to differentiate between the writing reflecting the private thought processes of a lawyer acting on behalf of a client at the beginning of a business deal and the thoughts of a lawyer when that business deal goes sour with resultant litigation. 143 Cal. App.3d at 812.

The court went on to reason:

In light of the legislative effort devoted to the statute, it is reasonable to believe that had the Legislature intended to limit the privilege to litigation only it would have said so. The Legislature not only failed to provide for any such limitation but in section 3 declared its intent that the courts were not to be constrained in their interpretation of the attorney’s absolute work product privilege. 143 Cal. App.3d at 815.

In *Fellows v. Superior Court* (1980) 108 Cal. App. 3d 55, 68, 166 Cal. Rptr. 274, the defendants in an insurance bad faith case sought to discover the entire legal file of the attorney who represented the plaintiffs in the underlying action. Holding the material in the file to be absolutely protected from discovery, the court stated:

The language of [the statute] is clear and explicit. It offers no opportunity for compromise or variation. There is no authorization for the court to weigh or balance any competing interests between the party seeking disclosure and the party resisting disclosure. Invocation of the attorney’s work product privilege with respect to such a document precludes discovery since such a document “is protected absolutely from disclosure by the attorney’s work product privilege...” [emphasis in original; citation omitted]

In *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal. App. 3d 626, 646, 648, 151 Cal. Rptr. 399, the court of appeal held that the work product rule precluded the introduction at trial of the portion of the notes of an investigator employed by a codefendant’s attorney that reflect the investigator’s comments about a witness’s statements. The investigator interviewed a witness and recorded the witness’s statements together with the investigator’s comments about those statements. The witness subse-
quentiy left the jurisdiction, and the witness's deposition was read at trial. Another codefendant called the investigator as a witness and cross-examined the investigator on the contents of the notes. The appellate court held that the portions of the notes that recorded the witness's statements are nonderivative or noninterpretative in nature, and thus are not protected by the work product rule. The portions of the notes that constitute the investigator's comments about the witness's statements are absolutely protected from disclosure as a writing that reflects an attorney's (or attorney's agent's) impressions, conclusions, opinions, legal research, or legal theories. The appellate court held that comments of the attorney's investigator, which are protected under the attorney-client privilege, were so intertwined with the witness's recorded statements, which are unprotected under the attorney-client privilege, that all the notes on the matter should be protected by the absolute portion of the attorney's work product privilege.

H. Protection for Opinion Work Product Applies Only to Writings

The term "writing," as used in Code of Civil Procedure section 2018(c), is defined in Evidence Code section 250. The term has been broadly defined to include most forms of tangible expression, see, e.g., People v. Estrada, (1979) 93 Cal. App. 3d 76, 100, 155 Rptr. 731 (tape recordings); People v. Moran, (1974) 39 Cal. App. 3d 398, 408, 410, 114 Cal. Rptr. 413, (photograph records).

Unlike the federal rule which protects an attorney's mental impressions (Fed. Rules Civ. Proc., rule 26(b)(3)), California's absolute protection for opinion work product applies, on its face, only to writings that reflect the attorney's opinion. In practice, this limitation may not be significant. A legal opinion, including the attorney's impressions and conclusions, formed during the course of an attorney-client relationship is privileged under Evidence Code section 952, regardless of whether or not the opinion has been communicated to the client. Lohman v. Superior Court, (1978) 81 Cal. App. 3d 90, 99, 146 Cal. Rptr. 171, but see Merritt v. Superior Court, (1970) 9 Cal. App. 3d 721, 731, 88 Cal. Rptr. 337 (court allowed discovery of materials that appear to constitute opinion work product on ground that it was not in writing, and held that the attorney-client privilege had been waived).

I. Statements of Witnesses are Not Protected as Work Product

Under the new Penal Code sections 1054-1054.7 (passed as Proposition 115) the new reciprocal discovery provisions are set forth. These sections specifically provide for the discovery of statements of witnesses that one side intends to call at trial. Since section 1054.6 states that the work product of counsel is protected, it is clear that the legislation did not intend to include witness statements to fall within the work product protection. However, in a response to a discovery request from the prosecution, the defense could always raise a constitutional objection to the disclosure of any material including statements of witnesses.

Counsel should review earlier cases where the defense made discovery requests and faced government objections to disclosure based upon "work-product" doctrine. In People v. Williams (1979) 93 Cal. App. 3d 40, 155 Cal. Rptr. 414, the defendant was convicted of forcible rape and aiding and abetting a rape. Prior to trial, the defendant made a discovery motion requesting notes of the prosecutors interview with the victim. The trial court denied the request finding that these notes were work product. The court of appeals reversed finding that the trial court erred in admitting the trial testimony of the victim from an earlier trial. The court also found that it was error for the trial court to deny the defendant's discovery request. The court stated:

It is well settled that there is no attorney's work product privilege for statements of witnesses since such statements constitute material of a non-derivative or non-interpretive nature. (citations omitted). 93 Cal. App. 3d at 64-65.

In People v. Alexander (1982) supra, the court applied the work product protection as defined in the Code of Civil procedure section 2018. It appears that the court did not find the material was absolutely protected under 2018(c), but rather that its disclosure could not be compelled under 2018(b). Under the new Penal Code section 1054.6, work product is protected only if it falls within the absolute protection as defined in Code Civ. Pro. 2018(c). It is therefore not clear how the court will handle this type of request in the future.

J. Work Product Protection Extends to Work of Agents of the Attorney

In People v. Collie (1981) 30 Cal. 3d 43, 177 Cal. Rptr. 458, 634 P.2d 534, the defendant was charged with attempted first degree murder of his wife and attempted second degree murder of his child. During trial, a defense witness testified that she had spoken with a defense investigator prior to trial. The prosecution moved for discovery of the notes prepared by the investigator. Over the defense objection on the basis of the work product doctrine and attorney-client privilege, the court ordered production of those notes and the defendant was convicted. The California Supreme Court reversed the conviction based on the issue of an improper jury instruction on the issue of intent for second degree murder. However, the court did find that the trial court violated the work product privilege in granting the prosecution's discovery motion although this error was found to be harmless. In discussing the application of the work product doctrine to criminal cases, the court quoted United States v. Nobles, 422 U.S. 225, and stated:

[The] work product privilege should extend not just to the attorneys
work product, but to the efforts of those who work with him to prepare the defense: 'At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys must often rely on the assistance of investigators and other agents in the compilation of materials for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.' 30 Cal. 3d at 59.

In People v. Miltner (1988) 45 Cal. 3d 243, 246 Cal. Rptr. 713, the defendant was convicted of first degree murder and sentenced to death. At trial, at the request of the prosecutor, defense counsel voluntarily turned over transcripts of three interviews conducted with the defendant by Dr. Solomon. Dr. Solomon was called as a defense witness at trial. On appeal, the defense alleges that trial counsel was ineffective in turning over material that he was under no obligation to disclose; specifically that these transcripts were protected under the attorney-client privilege and the work product doctrine. The court of appeals disagreed finding that Dr. Solomon was not an agent of the attorney. The court held:

Section 721, subdivision (a) of the Evidence Code provides that an expert witness may be fully cross examined as to ...(3) the matter upon which his opinion is based and the reasons for his opinion." Once the defendant calls an expert to the stand, the expert loses his status as consulting agent of the attorney, and neither the attorney client privilege nor the work product doctrine applied to matters relied on considered in the formation of his opinion. 45 Cal. 3d at 722.

In Grand Jury v. Superior Court (Harrison) (1989) 259 Cal. Rptr. 404 (Cal.App. 4 Dist), the grand jury was investigating the death of Harrison's ex-wife. During these proceedings, Harrison was referred to as the prime suspect. He was represented by an attorney who retained an investigator. Braxton. Braxton was subpoenaed to the grand jury and asked to identify a witness to events immediately preceding the murder. Braxton refused to answer and the court ruled that this information was protected under the attorney-client privilege. On appeal the defense alleges that the government may not extract information from an accused or one of his/her agents based upon attorney-client privilege, confidential communications between attorney and client, the privilege against self-incrimination, and a defendant's right to counsel. The court of appeals concluded that under the circumstances of the case, neither the attorney nor his investigator can be required by the grand jury to give testimony concerning the investigation. The court held:

We hold, however, that the Sixth Amendment right of representation of counsel, unimpeded by interference of the prosecution, together with the privilege against self-incrimination, preclude the questioning sought by the district attorney in this case. A criminal investigator's work product relating to a criminal investigation is privileged and once it has been established that the investigator was retained by legal counsel hired to represent a suspect, the investigator cannot be forced to reveal the product of his investigation. 259 Cal. Rptr. at 413.

K. Work Product privilege may be waived

In United States v. Nobles, (1975) 422 U.S. 225, the defendant was convicted in Federal court on charges arising from an armed robbery of a bank. In preparing for trial, a defense investigator interviewed the two government witnesses and prepared reports reflecting these conversations. These reports were used during cross examination of these witnesses. During the defense case, the investigator was called to testify about these conversations and complete the impeachment of the witnesses. When the defense refused to disclose these written reports to the prosecutor, the trial court would not allow the investigator to testify. The Ninth Circuit Court of Appeals reversed the trial court and the U.S. Supreme Court found that the Ninth Circuit Court erred. The Court held that while the work product doctrine applies to criminal litigation, its protection was unavailable in this case. The court stated:

We need not, however, undertake here to delineate the scope of the [work product] doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protection.

The privilege derived from the work product doctrine is not absolute. Like other qualified privileges, it may be waived. Here, [the defendant] sought to adduce the testimony of the investigator and contrast his recollection of the contested statements with that of the prosecution's witnesses. [Defendant], by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony. [Defendant] can no more advance the work product doctrine to sustain a unilateral testimonial use of work product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross examination on matters reasonably related to those brought out in direct examination. 422 U.S. at 239-240.

In People v. Melton (1988) 44 Cal. 3d 713, 244 Cal. Rptr. 867, 750 P.2d 741, the defendant was convicted of first degree murder, burglary and robbery and was sentenced to death. At trial, the defense investigator testified about information he learned from a government witness about who had committed the killing. On cross examination, the prosecutor questioned the investigator about what was done upon learning this information. The defense objected and argued that questions concerning investigatory efforts violated the attorney work product privilege. The court allowed some inquiry into action not taken by the investigator and sustained the other defense objections. On appeal, the defense renewed their objection on work product grounds. The court upheld the conviction and found that to the extent the privilege applied, it was waived by the defense. The court stated:

Insofar as the [work product] privilege applies to actual testimony in a criminal trial, defendant waived it when he called his investigator to impeach [the government witness] Boyd's trial testimony and to bolster the claim that [someone else], not defendant, was DeSousa's killer. Having done so, [the defendant] could not suppress, as privileged, damaging evidence which was
within the scope of his direct examination. (citations omitted). He could not use the privilege to preserve a false aura of veracity for his investigators testimony. 44 Cal. 3d at 743.

In Korns Constr. Co. v. Superior Court, (1968) 266 Cal. App. 2d 405, 411, 72 Cal. Rptr. 74, the defendant’s employee prepared investigation and accident reports for the defendant concerning the accident. The employee had the reports in his possession at the time of his deposition and referred to them in order to answer questions indicating that he was otherwise unable to respond. Following the deposition, an opposing party, moved for inspection of the documents, but the trial court refused to order disclosure. The appellate court directed the trial court to compel production on the ground that by allowing the employee to use the documents to refresh his memory at the deposition, counsel for the defendant employer had waived the work product protection for the documents. The court stated:

Having no independent memory from which the witness could answer the questions; having had the papers and documents produced by the attorney’s attorney for the benefit and use of the witness; having used them to give the testimony [that the witness] did give, it would be unconscionable to prevent the adverse party from seeing and obtaining copies of them. We conclude there was a waiver of any privilege which may have existed.

If, as claimed, the reports were privileged under the work product rule, the privilege rested with the attorney and was waived by the attorney when he [she] produced the reports to the witness upon which to premise his testimony. The attorney cannot reveal his work product, allow a witness to testify therefrom and then claim work product privilege to prevent the opposing party from viewing the document from which he testified.

L. The “fraud” exception to the attorney-client privilege does not apply to opinion work product

In BP Alaska Explorations, Inc. v. Superior Court, (1988) 199 Cal. App. 3d 1240, 245 Cal. Rptr. 682, the plaintiff, an oil exploration company, sued BP Alaska on numerous theories arising from BP Alaska’s allegedly unauthorized use of confidential oil exploration data furnished to it by plaintiff in a three-party arrangement that excluded the plaintiff. During discovery, plaintiff sought documents prepared by or at the direction of BP Alaska’s attorneys. Although plaintiff conceded that this material constituted opinion work product, plaintiff argued that it was not entitled to work product protection because the material was obtained in furtherance of a fraudulent misrepresentation to plaintiff by BP Alaska. Plaintiff based this argument on Evidence Code section 956, which creates an exception to the attorney-client privilege when the legal services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud. The trial court granted the motion to compel, holding that the plaintiff had established a prima facie case of fraud. The appellate court disagreed, holding that the absolute protection for opinion work product is not subject to the crime-fraud exception applicable to the attorney-client privilege. The court stated:

[The absence of a statutory crime-fraud exception to the work product rule implies that the exception does not apply to work product documents. In addition, the language of [Code of Civil Procedure section 2018(c)] is absolute.

M. Work Product protection continues even after the case is over

In Fellows v. Superior Court, (1980) 108 Cal. App. 3d 55, 62, 166 Cal. Rptr. 274, the court held that the privilege should not be held to terminate simply because the litigation or matter in which the attorney’s work product was created has come to an end.

The court mentioned the policy behind the creation of the attorney’s work product privilege in support of their holding, describing the policy as two-fold:

Nondisclosure of his work product is deemed desirable (1) to encourage the attorney to make a thorough preparation for trial, including the analysis of unfavorable aspects of his case, as well as the favorable aspects, and (2) to prevent one attorney from taking undue advantage of another’s industry and efforts. (citations omitted) 108 Cal.App.3d at 63.

In Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 502, 165 Cal. Rptr. 748, the plaintiff sued a law firm and its former client for malicious prosecution and sought information from the law firm’s inter-office memoranda concerning the prior case. The court held the work product protection afforded these documents did not end when the case terminated. Reasoning that the primary purpose of the rule—encouraging full and fair representation of a client and being able to prepare a case without fear of subsequent scrutiny by opposing parties—was not sufficiently served by a privilege that lived only until termination of the action, the court stated:

The instant case illustrates the force behind such reasoning and we therefore hold that the privilege extends beyond the termination of the litigation for which the documents were prepared.

N. Laying Foundation to Establish Existence of Work Product Privilege

To make a prima facie showing that the absolute work product privilege is applicable, a person claiming the work product protection must establish the following preliminary facts: (1) that a client sought the attorney’s legal counsel, (2) that the matter sought to be protected is derived from the attorney’s initiative in the course of providing legal counsel, (3) that the matter sought to be protected reflects the attorney’s impressions, conclusions, opinions, legal research, or legal theories, and (4) that the matter sought to be protected is in writing. Williamson v. Superior Court of Los Angeles, (1978) 21 Cal. 3d 829, 834, 148 Cal. Rptr. 39, 582 P.2d 126; Aetna Casualty & Surety Co. v. Superior Court, (1984) 153 Cal. App. 3d 467, 478, 200 Cal. Rptr. 471; Merritt v. Superior Court, (1970) 9 Cal. App. 3d 721, 731, 88 Cal. Rptr. 33; see Mize v. Atchison, T. & S. F. Ry. Co., (1975) 46 Cal. App. 3d 436, 447, 120 Cal. Rptr. 787 (party claiming protection must allege preliminary facts showing existence of work product).