Defending your work product

Understanding what work product is, how it differs from privilege, and how it is protected

By Jerome Fishkin

Opposing counsel often push the envelope to secure confidential information about you and your clients. This article focuses on the attorney work-product doctrine as applied by California state courts and how it differs from attorney-client privilege.

Overview

Communications between attorney and client, to include necessary third parties, are protected by the attorney-client privilege under Evidence Code section 952. Confidential information is protected by Business and Professions Code section 6068(e) and Rule 3-100 of the Rules of Professional Conduct. Work product is protected by section 2018.030 of the Code of Civil Procedure. Work product is not a "privilege," so it is therefore treated somewhat differently from the treatment of privileged information.

The basics

There are two kinds of work product – "Brain Work" and everything else.

Brain work is not discoverable.

> A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

(Code Civ. Proc., § 2018.030(a).)

All other work product is conditionally protected.

> The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

(Code Civ. Proc., § 2018.030 (b).)

What is work product anyhow?

Work product is not defined by statute and is therefore determined on a case-by-case basis. (*City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 71.) In a series of cases culminating with *Coito v. Superior Court* (2012) 54 Cal.4th 480, the courts have determined that witness statements obtained by attorneys or their agents are work product. If an attorney's notes or impressions are "inextricably intertwined" with that statement, then the statement is treated as absolutely protected under section 2018.030(a). However, it is the attorney's burden to show that disclosure of a witness statement would reveal impressions, etc., protected by section 2018.030(a).

Similarly, *Coito* distinguishes between disclosures that an attorney has a witness statement, versus the criteria for withholding it. Opposing counsel doesn't simply get a free ride on the work of the first attorney. There must be a showing of such criteria as witness unavailability or some other prejudice, to get the interview. Further, if the list of witnesses itself would disclose attorney impressions, then the attorney has a legitimate basis to assert work product.

In *Tien v. Superior Court* (2006) 139 Cal.App.4th 528, plaintiff obtained from defendant employer, a list of workers likely to be members of a putative class. Counsel sent a letter to all of them. The court ruled that work-product protection did not extend to a list of people who responded to the letter, though the right of privacy did.

Privilege trumps the discovery statute

When corporate counsel showed an employee an otherwise protected report in preparation for a deposition, the work product protection was waived (*Kerns Construction v. Superior Court* (1968) 266 Cal.App.2d 405, 410.) However, *Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64, 66, exempted a statement made by a client to an attorney, reviewed for deposition, under the attorney-client privilege. The distinction is that the attorney-client privilege trumps the discovery statute.

Transmission of an unprotected document to an attorney does not convert it into a protected document. *Coito* holds that a statement independently prepared by a witness is not a protected document. *Bank of America v. Superior Court* (2013) 212 Cal.App.4th 1076, 1100, holds that the transmittal is privileged. It also reminds us that the analysis of the transmittal and the enclosure have to be done separately.

Unlike privileged documents, courts can require the in camera production of work product to determine if the item is protected; and where relevant, whether the assertion of absolute or conditional work product should be upheld. (*Bank of America,* supra.) Thus, both the privilege and the work product should be asserted separately, and the courts should rule first on the privilege issue. (*Costco v. Superior Court* (2009) 47 Cal.4th 725, 737.)

How far does the protection go?

The work-product protection extends to expert consultants (*Scotsman Mfg. Co v. Superior Court* (1966) 242 Cal.App.2d 527, 530). It applies to

nonlitigation matters as well as litigation. (*Rumac v. Bottomley* (1983) 143 Cal.App.3d 810, 815.) It applies to employees and agents of the attorney. (*Rodriguez v. McDonnell Douglas* (1978) 87 Cal.App.3d 626, 647-648).

There is no crime-fraud exception to work product protection (*BP Alaska v. Superior Court* (1988) 199 Cal.App.3d 1240, 1249), unless the attorney is being investigated by a public prosecutor for knowingly participating in the crime or the fraud (Code Civ.Proc., § 2018.050). However, the attorney is still entitled to a hearing on assertions of work product. (*People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703.)

The work-product protection is not waived by delivering the product to the client. (*Wells Fargo Bank v. Superior Court* (*Boltwood*) (2000) 22 Cal.4th 201, 214.) Nor does the protection terminate at the end of the representation. *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 61-62 overruled on other grounds in *Coito*. Nor can the client obtain the absolutely protected work product over the attorney's objections. (*Rumac*, supra.)

A trustee has the ultimate fiduciary duties to beneficiaries, but an attorney for the trustee has duties only to his trustee client. Thus, the work-product opinion of the attorney for the trustee is subject to absolute work-product privilege, regardless of competing interests of the beneficiaries in other litigation. (*Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264.)

However, under Code of Civil Procedure section 2018.080, there is no work-product protection when the attorney and client are adverse in litigation involving a breach of duty. Nor is there any protection in an attorney disciplinary case initiated by the former client. (Code Civ. Proc., § 2018.070.)

But the work-product protection is not limited to civil discovery. (*People v. Superior Court* (2001) 25 Cal.4th 703, 719.) Thus, the attorney can assert the protection during a criminal investigation and prosecution.

Is work product relevant to discovery or trial?

In *Seahaus La Jolla Owners Assn. v. Superior Court* (2014) 224 Cal.App.4th 754, 761, the court denied discovery of opposing counsel's legal advice and opinions, on the basis that such would not likely lead to the discovery of admissible evidence. This sort of threshold objection, if upheld, eliminates the need to determine all the other criteria. Attorneys should be vigilant when opposing counsel is using a discovery device to dig out strategy rather than unprotected information.

Conclusion

The protection accorded attorney work product is technically not a "privilege." However, the protection is much broader than the attorney-client privilege. Work product often overlaps with privileged communications, confidential information, and information subject to client privacy rights. It is thus proper to assert all of them when applicable, even though the applicable law may be somewhat different.


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