Study K-350 February 1, 2008

# Memorandum 2008-8

## Attorney-Client Privilege After Client's Death (Scope of Study)

The Legislature has directed the Commission to study "whether, and if so, under what circumstances, the attorney-client privilege should survive the death of the client." 2007 Cal. Stat. ch. 388, § 2 (AB 403) (Tran). The Commission's report is due on or before July 1, 2009. To meet that deadline, the Commission should issue its tentative recommendation by the end of this year.

This memorandum introduces the topic. First, the memorandum describes the attorney-client privilege and when it survives the client's death. Next, the memorandum explains two doctrines related to the attorney-client privilege: the ethical duty of confidentiality and the work-product rule. Finally, it identifies areas that future memoranda will discuss.

The Commission was assigned this study because the attorney-client privilege provisions were enacted upon the Commission's recommendation. See Senate Committee on Judiciary Analysis of AB 403 (April 16, 2007), p. 6; *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports, 29, 170-78 (1965). The impetus behind the bill appears to stem from a dispute relating to the attorney-client privilege of the late singer, Bing Crosby.

The Commission should be aware that this area is politically sensitive. Issues relating to evidentiary privileges are controversial and difficult to resolve. The Commission should be cautious in proposing any reforms.

All references are to the Evidence Code unless otherwise indicated.

### THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is an evidentiary privilege. Properly invoked, the privilege prohibits compelled testimony of a "confidential communication" between a client and the client's attorney. See Sections 910-911; 950-954. The privilege covers a communication made when the client seeks to retain the attorney or obtain legal service or advice from the attorney in the attorney's

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professional capacity. Sections 951-952. To be "confidential," the communication must be made by a means which, so far as the client is aware, does not disclose the communication to any third person, other than a person "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." Section 952; see *Mission Film Corp. v. Chadwick Pictures Corp.*, 207 Cal. 386, 390 278 P. 855 (1929).

The privilege includes the attorney's confidential advice to the client. Section 952. And, *even if not communicated* to the client, the attorney-client privilege protects the attorney's legal opinion, as well as the attorney's observations made as a result of a confidential communication. Section 952 & Comment (1967); *People v. Meredith*, 29 Cal. 3d 682, 693, 631 P.2d 46, 175 Cal. Rptr. 612 (1981).

The privilege does not protect disclosure of facts that exist independently of a confidential communication. See *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 397, 364 P.2d 266, 15 Cal. Rptr. 90 (1961). For example, suppose a client seeking legal advice tells the client's attorney that the client's house flooded. On cross-examination, the client is asked if the client's house flooded. The client may not invoke the privilege and refuse to answer simply because the client told this information to the client's attorney. However, if the cross-examining attorney asks whether the client told the client's attorney that the client's house flooded, the client may claim the privilege and refuse to answer.

Unlike other evidentiary rules, which generally apply only to court proceedings, the privilege applies to *any* proceeding in which testimony can be compelled (e.g., an administrative proceeding, arbitration, grand jury proceeding, legislative hearing, etc.). See Sections 901-902 & Comments.

The fundamental purpose of the attorney-client privilege, as stated repeatedly by the California Supreme Court, is to encourage a client to fully disclose information to the client's attorney, without fear that the attorney may be forced to reveal that information. See, e.g., *Meredith*, 29 Cal. 3d at 690-91; *Dep't of Public Works v. Donovan*, 57 Cal. 2d 346, 354, 369 P.2d 1, 19 Cal. Rptr. 473 (1962); *Greyhound*, 56 Cal. 2d at 396; *Holm v. Superior Court*, 42 Cal. 2d 500, 506-07, 267 P.2d 1025 (1954).

**Who May Claim the Attorney-Client Privilege?**

The privilege may only be claimed by (1) the client, (2) a person authorized by the client (e.g., a person authorized to claim the privilege on behalf of a

corporation), or (3) the attorney, unless "no holder of the privilege" is in existence, or the attorney "is otherwise instructed by a person authorized to permit disclosure." Section 954.

A "holder of the privilege" may be (1) the client, (2) a guardian or conservator of the client, (3) if the client is dead, the client's personal representative, or (4) a "successor, assign, trustee in dissolution, or similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence." Section 953.

These statutory rules regarding who may claim or hold the privilege are not to be expanded or constricted by courts. See Section 911 & Comment (privileges are purely statutory); *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 206, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000); *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 373, 853 P.2d 496, 20 Cal. Rptr. 2d 330 (1993) (stating that deference to Legislature is "particularly necessary" with evidentiary privileges, and that courts can only expand them if required by constitutional law). For cases that could be viewed as derivations from this general rule, see *People v. Meredith*, 29 Cal. 3d at 694 (stating that "courts must craft an exception to the protection extended by the attorney-client privilege in cases in which counsel has removed or altered evidence"); *Moeller v. Superior Court*, 16 Cal. 4th 1124, 1127, 1134, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997) (holding predecessor trustee cannot assert attorney-client privilege, as successor trustee has power to assert privilege for confidential communications between predecessor trustee and attorney relating to legal advice on predecessor trustee's administration of trust in fiduciary capacity); see also *Moeller*, 16 Cal. 4th at 1139, 1141 (J. Chin, dissenting) (arguing that Legislature controls attorney-client privilege and that attorney-client privilege provisions do not allow successor trustee to usurp predecessor trustee's attorney-client privilege).

**Exceptions to the Attorney-Client Privilege**

There are several exceptions to the attorney-client privilege, where testimony of a confidential communication may be compelled.

The attorney-client privilege does not apply:

- If the attorney's services were used to commit a crime or fraud. Section 956.
- If the attorney believes that disclosure is reasonably necessary to prevent a criminal act likely to cause death or serious harm. Section 956.5.

- When the client is deceased, and the communications are relevant to a dispute between parties who all claim through the decedent (i.e., all parties claim an interest in the deceased client's estate), "regardless of whether the claims are by testate, intestate, or an inter vivos transaction." Section 957.
- To an issue relating to a breach, by the client or the attorney, of the attorney-client relationship. Section 958.
- When the attorney was an attesting witness and there is an issue concerning the client's competence or intent, or the execution or attestation of the document. Section 959.
- After the client's death, when there is a question relevant to the client's intent relating to the client's will, deed, or other writing purporting to affect a property interest. Section 960.
- After the client's death, when there is a question relevant to the validity of a client's will, deed, or other writing purporting to affect a property interest. Section 961.
- To a dispute among former joint clients. Section 962.
- To a criminal defendant's communication about the location or condition of evidence, if the attorney moves or otherwise alters the evidence. *Meredith*, 29 Cal. 3d at 695.

In addition to the exceptions above, the privilege also does not apply if the privilege has been waived. The privilege is waived:

- If the client, "without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Section 912.
- If client places in issue the attorney's "decisions, conclusions, and mental state," and the attorney will be called as a witness to testify to those matters. *Southern California Gas Company v. Public Utilities Comm'n*, 50 Cal. 3d 31, 43, 784 P.2d 1373, 265 Cal. Rptr. 801 (1990).

**Survival of the Attorney-Client Privilege After the Client's Death**

When the client is a natural person (as opposed to a trustee, corporation, etc.), and the person dies, the attorney-client privilege can only be claimed if there is a personal representative. Sections 953-954 & Comments. Then the deceased client's personal representative holds the privilege, and may claim or waive it. Sections 953(c), 954(a). An attorney may only assert the attorney-client privilege if a "holder of the privilege" is in existence. See Section 954(c). Therefore, after the client dies, the attorney may only assert the privilege when there is a personal representative. Sections 953(c), 954(c).

After "the client's estate is fully distributed and [the client's] personal representative is discharged," the privilege ceases to exist. Section 954 Comment.

> Although there is good reason for maintaining the privilege while the estate is being administered — particularly if the estate is involved in litigation — there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged.

*Id.* (Note that even if there is a personal representative, the privilege would not apply if one of the exceptions, enumerated further above, is met. For example, in an action in which the deceased client's testamentary intent is at issue, there is no privilege for communications relevant to that issue. See Section 960.)

A relatively recent California Supreme Court case, the "Bing Crosby case," involved the survival of the privilege following the client's death. That decision appears to have prompted the bill assigning the Commission this study.

*HLC Properties v. Superior Court (the "Bing Crosby case")*

In *HLC Properties v. Superior Court*, 35 Cal. 4th 54, 105 P.3d 560, 24 Cal. Rptr. 3d 199 (2005), the Court held that the attorney-client privilege does not survive after the client's death if there is no personal representative.

The case arose out of a dispute between a record company, MCA Records, Inc. ("MCA"), and heirs to recording contracts of the late singer, Bing Crosby. *HLC Properties*, 35 Cal. 4th at 58. HLC Properties, a partnership created by Crosby's heirs during probate of his estate, owned Crosby's songs. See *id.* Nearly twenty years after the estate had closed and the personal representative had been discharged, HLC Properties sued MCA alleging underpaid royalties. *Id.* at 58. MCA sought discovery from HLC Properties and Crosby's former attorneys of written communications between Crosby and his former attorneys relating to the contracts. *Id.* at 58-59. HLC Properties and Crosby's former attorneys refused to turn over these documents, claiming they were protected by the attorney-client privilege. *Id.*

The trial court determined that Crosby held the privilege, and the privilege ceased after his death. *Id.* at 59. The trial court rejected the claim that an unincorporated organization Crosby formed during his life to help him manage his business (informally called "Bing Crosby Enterprises") was a privilege holder. *Id.* at 57, 59. The court of appeal reversed, finding that "Bing Crosby Enterprises" held the privilege, that HLC was a successor to that entity, and as

such, HLC held the privilege. *Id.*; see Section 953(d) (providing that successor to entity no longer in existence holds former entity's privilege).

The California Supreme Court reversed. It stated that a reviewing court is not to disturb the trial court's finding "if there is any substantial evidence to support it." *HLC Properties*, 35 Cal. 4th at 63. The Court determined that there was substantial evidence in the record supporting the trial court's finding that Bing Crosby himself, and *not* his unincorporated organization, held the privilege. *Id.* at 64. Accordingly, the Court stated that "when Crosby died, his privilege transferred to the executor of his estate and thereafter ceased to exist upon the executor's discharge." *Id.* at 68.

Despite this ruling, it appears that HLC Properties and Crosby's former attorney didn't have to turn over the requested documents. After the Court issued its decision, HLC Properties had a personal representative appointed who, once appointed, asserted the privilege. Burford & Nunan, *Dead Man Talking: Is There Life After Death for the Attorney-Client Privilege?*, 11 Cal. Trusts & Estates Q. 17, 21 (2006). The appointment appears to have been pursuant to Probate Code Section 12252, which at the time provided that "[i]f subsequent administration of an estate is necessary after the personal representative has been discharged because other property is discovered *or because it becomes necessary or proper for any cause*," a court shall appoint a personal representative. (Emphasis added.)

*Appointment of a Personal Representative*

Because the privilege survives when there is a personal representative, it will be important to identify all of the situations in which a personal representative may exist. For example, a personal representative may exist to administer a client's estate, but may also exist as a substitute for a deceased party in an action that survives the party's death. See Code Civ. Proc. Section 377.31; Prob. Code Section 58. The staff will research this issue and address it in a future memorandum.

*Amendment to Probate Code Section 12252*

Probate Code Section 12252, relating to the appointment of a personal representative, was recently amended in the same bill that assigned this study to the Commission. As amended, the Section provides that a court shall appoint a personal representative if "disclosure is sought of a communication deemed privileged under [Sections 950-962] of the Evidence Code." 2007 Cal. Stat. ch. 388,

§ 1 (AB 403). The apparent intent is to require appointment of a personal representative whenever a person seeks disclosure of information that was protected by the attorney-client privilege during the decedent's life.

This amendment would have been relevant to the Crosby case. But, because HLC Properties achieved the appointment of a personal representative to assert the attorney-client privilege *before* this amendment, it appears that it was already possible to have a personal representative appointed for the sole purpose of asserting a deceased person's attorney-client privilege (if "necessary or proper" under former Section 12252). (It may have been "necessary or proper" because if HLC Properties had been unable to assert Crosby's privilege, his confidential communications would have been available to MCA, while MCA could keep its own confidential communications secret. See former Prob. Code § 12252.)

With the amendment to Probate Code Section 12252, there's no need to show a "necessary or proper" purpose. By enabling the appointment of a personal representative to assert the privilege on behalf of a deceased person, the amendment enables the privilege to survive well after the client's estate is wound up. That goes beyond the original intent of the attorney-client privilege provisions. See Section 954 Comment.

In conducting its study, the Commission should evaluate this amendment. Although just enacted, it was made in conjunction with the assignment to the Commission. Assessing its merits squarely falls within that assignment: the Commission is responsible for determining the circumstances, if any, in which the attorney-client privilege should survive after the client's death. See 29 C.E.B. Est. Planning & Cal. Prob. Rptr. at 93 (2007) (stating that amendment to Probate Code Section 12252 is "apparently viewed as a temporary measure" because of bill's contemporaneous assignment to Commission).

**Other Considerations**

As explained above, evidentiary privileges are creatures of statute and their contours are to be defined by the Legislature, not the courts. Nonetheless, in *Moeller*, 16 Cal. 4th at 1127, 1134, the Court held that a successor trustee of a private express trust assumes the predecessor trustee's powers and is entitled to access the attorney-client communications that the predecessor made in a fiduciary capacity as trustee relating to trust administration matters. The Court subsequently explained that *Moeller* did not "create or recognize any exceptions to the privilege," but "merely identified the current holder of the privilege."

*Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 209, 990 P.2d 591, 91 Cal. Rptr. 2d 716 (2000).

Practitioners have cited *Moeller* to suggest a way for the attorney-client privilege to survive a person's death, avoiding the threat of disclosure in a situation akin to the Crosby case. These practitioners point out that the attorney-client privilege might have survived in the Crosby case if Crosby had held his assets differently. See Burford & Nunan, *Dead Man Talking: Is There Life After Death for the Attorney-Client Privilege?*, 11 Cal. Trusts & Estates Q. 17, 22 (2006). They explain that, if Crosby had transferred his contracts into a trust, acted as trustee, and after his death, HLC Properties had been formed by the successor trustee (rather than in probate), the successor trustee might be able to claim the privilege. *Id.* Also, after the trust terminated, HLC Properties itself might claim the privilege. *Id*.

The practitioners suggest that a living trust could be used to achieve immortality of the attorney-client privilege that a natural person could not. *Id.* That immortality, however, would be limited to a confidential communication relating to legal advice that the trustee, acting in a fiduciary capacity, sought "*for guidance in administering the trust*." *Moeller*, 16 Cal. 4th at 1127, 1134 (emphasis in original). *Moeller* did *not* affect the privilege as to a natural person seeking advice in that person's personal capacity. See *Borissoff v. Taylor & Faust*, 33 Cal. 4th 523, 533-34, 93 P.3d 337, 15 Cal. Rptr. 3d 735 (2004) (citing *Moeller* and stating that "[S]ucessor fiduciary does not become the holder of the privilege for confidential communications that occurred when a predecessor fiduciary in his or her *personal* capacity sought an attorney's advice." (emphasis added)).

The staff has been unable to find any case in which a person has achieved (or attempted to achieve) "immortality" of the privilege as posited by these practitioners.

## OTHER CONFIDENTIALITY DOCTRINES RELATED TO THE ATTORNEY-CLIENT PRIVILEGE

The confidentiality of the attorney-client relationship is not just protected by the attorney-client evidentiary privilege. Two other doctrines, the ethical duty of confidentiality and the work-product rule, also protect certain information produced in the course of an attorney-client relationship.

It appears that both of these other doctrines survive the client's death. Therefore, in examining whether the attorney-client evidentiary privilege should survive the death of the client, and if so, in what circumstances, the Commission should keep in mind these other two doctrines. They are explained below.

### THE DUTY OF CONFIDENTIALITY

The attorney's duty of confidentiality is codified in the State Bar Act and set forth by the Rules of Professional Conduct, which are promulgated by the State Bar and the California Supreme Court. See Code Civ. Proc. §§ 6000 ("State Bar Act"); 6068 (duty of confidentiality); Rules of Professional Conduct, rules 1-100(A); 3-100. An attorney is subject to discipline by the Bar for a violation of a rule of professional conduct. Vapnek *et al*, California Practice Guide: Professional Responsibility, *Confidentiality and Privilege* §§ 7:162-7:165 (2007). In addition, an attorney may be liable for a breach of duty that causes damages. *Id.* at §§ 6:215-6:218.

The State Bar Act provides that an attorney has a duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus. & Prof. Code § 6068(e)(1). The Rules of Professional Conduct provide that an attorney may "not reveal information protected from disclosure" by the State Bar Act. Rules of Professional Conduct, rule 3-100.

The duty of confidentiality is very broad, and has been described as "absolute." See *People v. Singh*, 123 Cal. App. 365, 370, 11 P.2d 73 (1932). However, the duty doesn't apply in certain circumstances.

For example, the duty doesn't prevent disclosure authorized by the client. See *Commercial Std. Title Co., Inc. v. Superior Court*, 92 Cal. App. 3d 934, 945, 155 Cal. Rptr. 393 (1979). The duty also appears to yield to a court order compelling disclosure. See Bus. & Prof. Code § 6103 (attorney subject to discipline for violating court order); Rules of Professional Conduct, rule 5-220 (attorney may not suppress evidence that attorney has legal obligation to reveal); *cf. People v. Kor*, 129 Cal. App. 2d 436, 447, 277 P.2d 94 (1954) (J. Shin, concurring) (stating that attorney shouldn't comply with disclosure order and should risk contempt to challenge order on appeal); C. Wolfram, *The U.S. Law of Client Confidentiality: Framework for an International Perspective*, 15 Fordham Int'l L. J. 529, 536 (1992)

(criticizing J. Shin's concurring opinion and stating no other authority "supports such a monstrous requirement").

Further, an attorney may, but is not required to, disclose information that the attorney believes is reasonably necessary to prevent death or substantial bodily harm. Bus. & Prof. Code § 6068(e)(2); Rules of Professional Conduct, rule 3-100. An attorney may make a similar disclosure to the Securities and Exchange Commission if the attorney reasonably believes disclosure is necessary to prevent a material violation likely to cause substantial harm to investors, among other things. See 17 C.F.R. § 205.3(d)(2). But other SEC-related disclosures may be required. See 17 C.F.R. § 205.3(b).

**Duty of Confidentiality Compared with Attorney-Client Privilege**

The duty of confidentiality operates in a broader context than the attorney-client privilege. The attorney-client privilege only affords protection from *compelled* disclosure. But the duty of confidentiality prohibits *voluntary* disclosure of the client's confidences.

Opinions by the State Bar, while not binding, provide that the duty covers more information than the attorney-client privilege. See Eth. Op. 2007-13 at *4 (2007). These opinions state that the duty includes "*any* information related to the representation of the client, *from any source*, which a client does not want disclosed" or information that "would be embarrassing or likely be detrimental to the client." *Id.* (emphasis added).

Like the attorney-client privilege, the duty of confidentiality exists to protect the client. Tuft, *For Your Eyes Only*, 25 L.A. Law. 26, 28 (2002). The duty and the privilege have shared goals of "encouraging clients to rely upon attorneys, enhancing lawyers' ability to operate effectively in the adversarial system, fostering client dignity and autonomy, and enabling lawyers to find out about and dissuade clients from engaging in misconduct." Zacharias, *Privilege and Confidentiality in California*, 28 U.C. Davis L. Rev. 367, 369-70 (1995). The duty encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Rules of Professional Conduct, rule 3-100, discussion para. 1.

**Duty of Confidentiality After Client's Death**

The duty to keep a client's secrets continues even after the attorney-client relationship ends. *Dept. of Corporations v. SpeeDee Oil Change Systems*, 20 Cal. 4th 1135, 1147, 980 P.2d 371, 86 Cal. Rptr. 2d 816 (1999). This duty lasts even after the

client's death. Vapnek *et al*, California Practice Guide: Professional Responsibility, *Confidentiality and Privilege* §§ 7:35-7:36 (2007). To illustrate, the duty of confidentiality prohibits an attorney from writing a book divulging the information learned in the course of representing a client, even after the client has died. See R. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 Ky. L.J. 1165, 1179-80 (1999).

## THE WORK-PRODUCT RULE

The work-product rule, also referred to as the work-product privilege, protects certain materials from discovery.

The policy behind the work-product rule is to:

> (a) 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.
>
> (b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.

Code Civ. Proc. § 2018.020.

With respect to an attorney's "core" work product — i.e., "[a]ny writing that reflects the attorney's impressions, conclusions, opinions, or legal research or theories" — the work-product rule provides nearly absolute protection. See Code Civ. Proc. § 2018.030(a); Penal Code § 1054.6 (work-product protection in Code Civ. Proc. § 2018.030(a) applies in criminal cases); see, e.g., *Rico v. Mitsubishi*, 42 Cal. 4th 807, 815, 171 P.3d 1092, 68 Cal. Rptr. 3d 758 (2007) (determining work-product rule absolutely protects attorney's notes about witness's statement because notes reflect attorney's and legal team's ideas about their case).

In civil cases, non-core work-product (e.g., appraisals, audit reports, or an expert opinion resulting from an attorney's request) is also protected from discovery, unless a court determines that it would unfairly prejudice the other party or cause an injustice. Code Civ. Proc. § 2018.030(b); *Williamson v. Superior Court*, 21 Cal. 3d 829, 834, 582 P.2d 126, 148 Cal. Rptr. 38 (1978). But in criminal cases, non-core work-product is not protected. See Penal Code § 1054.6; *Izazaga v. Superior Court*, 54 Cal. 3d 356, 382 n.19, 815 P.2d 304, 285 Cal. Rptr. 231 (1991).

Material that is not protected by the work-product rule includes "[i]nformation regarding events provable at trial, or the identity and location of physical evidence. *Mack v. Superior Court*, 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280

(1968). Such material "cannot be brought within the work product privilege simply by transmitting it to the attorney." *Id.* But "material of a derivative character, such as diagrams prepared for trial, audit reports, appraisals, and other expert opinions, developed as a result of the initiative of counsel in preparing for trial," are work product. *Id.* Also, work product includes a writing created before litigation arose. See *Rumac, Inc. v. Bottomley*, 143 Cal. App. 3d 810, 812, 192 Cal. Rptr. 104 (1983) (holding work-product privilege applies to writings not made in preparation of trial).

There are a few exceptions to the work-product privilege. The work-product privilege does not apply:

- When an attorney is suspected of knowingly advising a client that sought the attorney's services to commit a crime or fraud. Code Civ. Proc. § 2018.050.
- In a State Bar disciplinary investigation relating to a breach of an attorney's duty. Code Civ. Proc. § 2018.070. If the client did not initiate the investigation, there must be client approval. *Id.*
- In an action between an attorney and client (or former client) relating to a breach of the attorney's duty to the client. Code Civ. Proc. § 2018.080.
- To the report of an expert who is designated as a witness to testify at trial. *Williamson*, 21 Cal. 3d at 834-35.
- To a prosecutor's work product that becomes relevant to a civil action, if the prosecutor has stated no further action will be taken, and the prosecutor is not a party to the civil litigation. *Shepherd v. Superior Court*, 17 Cal. 3d 107, 122, 550 P.2d 161, 130 Cal. Rptr. 257 (1976). Disclosure of prosecutor's work product is governed instead by provisions on official information. *Id.*
- To a study, done at an attorney's request, where disclosure is sought by a non-party that is a government official with significant need for the study. *Kizer v. Sulnick*, 202 Cal. App. 3d 431, 441, 248 Cal. Rptr. 712 (1988).

Courts may expand these exceptions. They may also do the reverse, and expand the privilege. See *In re Jeanette H.*, 225 Cal.App.3d 25, 33, 275 Cal. Rptr. 9 (1990) (stating that work-product doctrine is not limited to discovery statutes but consists of case law too, and applying work-product privilege in juvenile case).

It is not entirely clear to what extent the work-product privilege can be asserted at trial. In *Mize v. Atchison*, 46 Cal. App. 3d 436, 448, 120 Cal. Rptr. 787 (1975), the court said "[i]t seems doubtful if the alleged work product privilege can ever be claimed at the time of trial." The court went on to hold that the work-

product privilege doesn't protect material used to refresh a witness's recollection. *Id.* at 449.

In contrast, in *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 648, 151 Cal. Rptr. 399 (1978), the court held an attorney's use of work product to impeach a witness improper. The court explained that "[t]he attorney's work-product privilege is applicable at trial as well as at pretrial discovery proceedings." *Id.* at 648-49. As a practical matter, the admissibility of work product is not likely to be raised at trial very often. For that to occur, the attorney seeking admission of opposing counsel's work product would need possession of the document. The attorney generally wouldn't have possession unless the document had been handed over during discovery.

**Work-Product Rule Compared with Attorney-Client Privilege**

Work product may sometimes be closely related to information that is covered by the attorney-client privilege. For example, compare Section 952 (attorney-client privilege protects attorney's uncommunicated legal opinion) with Code of Civil Procedure Section 2018.030 (work product protects writing reflecting attorney's opinion). Some information may be protected by both the work-product privilege and the attorney-client privilege. To illustrate, if discovery is sought of an attorney's personal notes and memoranda, the work-product rule applies. If the notes and memoranda reflect a confidential communication, the attorney-client privilege also applies. See *Upjohn v. U.S.*, 449 U.S. 383, 400-01 (1981); *cf. San Diego Prof'l Ass'n v. Superior Court*, 58 Cal. 2d 194, 373 P.2d 448, 23 Cal. Rptr. 384 (1962) (determining that engineer's report requested by attorney was protected work product, but was not protected by attorney-client privilege because report didn't emanate from client).

Unlike the attorney-client privilege, which belongs to the client (but may be asserted by the attorney on the client's behalf), the work-product privilege belongs to the attorney. In the attorney's absence, however, the client may assert the work-product privilege. *Lasking, Haas, Cohler & Munter v. Superior Court*, 172 Cal. App. 3d 264, 278, 218 Cal. Rptr. 205 (1985); *Fellows v. Superior Court*, 108 Cal. App. 3d 55, 62, 166 Cal. Rptr. 274 (1980).

The work-product privilege focuses on discovery, but might apply at trial as well. The attorney-client privilege applies in more situations than the work-product privilege. It prevents disclosure anytime testimony can be compelled.

**Termination of the Work-Product Rule**

It is unclear when, if ever, the work-product rule ends. It "survives the termination of the litigation or matter in which the work product is prepared." *Fellows*, 108 Cal. App. 3d at 62. And it "may be claimed in subsequent litigation," whether related to the prior matter or not, "to preclude disclosure of the attorney's work product." *Id.* at 62-63 (reasoning that such longevity is required to support rule's policy).

It appears that the work-product rule survives the death of the attorney. See *Petterson v. Superior Court*, 39 Cal. App. 3d 267, 273, 114 Cal. Rptr. 20 (1974) ("arguably the work product privilege attaches to the client upon the attorney's death or resignation from the case," unless attorney first waived privilege with client's approval).

The staff could find no direct authority on whether the work-product privilege survives the death of the client. From the above principles, however, including the rule that the work-product privilege belongs to the *attorney*, it is reasonable to conclude that the work-product privilege lasts after the client's death.

## NEXT STEP

The staff will research other issues relevant to assessing whether the attorney-client privilege should survive the client's death. Future memoranda will:

- Explore arguments for and against survival of the attorney-client privilege after the client's death.
- Identify the circumstances in which a personal representative may exist (because the privilege provisions tie survival of the privilege to the existence of a personal representative).
- Evaluate the recent revision of Probate Code Section 12252, which directs the court to appoint a personal representative when disclosure is sought of a communication that is deemed privileged.
- Compare how long the attorney-client privilege survives when it belongs to a natural person versus a corporation, trustee, etc.
- Compare California law on the attorney-client privilege to the law of other jurisdictions.
- Discuss the longevity of other confidential evidentiary privileges, such as the physician-patient privilege.

The Commission and interested persons should notify the staff of any other issues that deserve attention. After these issues have been explored, the

Commission will be in a good position to identify the circumstances, if any, in which the attorney-client privilege should continue after the client's death.

Respectfully submitted,

Catherine Bidart
Staff Counsel