

RESOLUTION 3-10-2002

DIGEST

Discovery: Application of Attorney Work Product Privilege

Amends Code of Civil Procedure section 2018 to expand the work product privilege and to provide a warning to out-of state attorneys concerning the practice of law in California.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 10-5-2001, which was approved in principle.

Reasons:

This resolution amends Code of Civil Procedure section 2018 to expand the work product privilege and to provide a warning to out-of-state attorneys concerning the practice of law in California. This resolution should be approved in principle because it clarifies the application of the work product protection to out-of-state attorneys.

With increasing globalization, clients are now more likely to be involved in other states and nations. To represent these clients, local counsel may need the assistance of counsel in different jurisdictions. These out-of-state and foreign attorneys may generate work product that needs to be protected for the benefit of the mutual clients. However, as the work-product privilege is currently defined in Code of Civil Procedure section 2018, it is not clear whether the work product of attorneys outside of California is protected. This resolution cures that ambiguity by expressly defining "attorney" to include out-of-state and foreign attorneys.

In reporting on last year's Resolution 10-05-01, the State Bar's Professional Competence Unit recommended that the resolution be amended to warn attorneys who are not members of the California Bar that the extension of the work-product privilege does not permit them to practice of law in California. This resolution includes the recommended language.

Although the Committee on Administration of Justice has taken a position of disapproval, their arguments are not on point. The issue is not whether out-of-state attorneys have duties similar to attorneys in California but whether clients receive the benefit of the work product doctrine regardless of whether their attorneys are California attorneys or out-of-state attorneys.

SECTION/COMMITTEE REPORTS

THE STATE BAR OF CALIFORNIA (Professional Competence Unit)

Recommendation: APPROVE

Reasons:

As indicated in connection last year's similar resolution, no. 10-05-2001, the problem identified by the sponsor concerning the lack of protection for out-of-state attorney work product is a valid one and the proposed legislative solution is appropriate and promotive of client protection. It is worth noting that the sponsor's effort to expand out-of-state attorney work product privilege is a timely initiative given that the California Supreme Court Advisory Task Force on Multijurisdictional Practice has issued its January 7, 2002 Final Report and Recommendations endorsing an expansion of certain practice of law activities by non-California lawyers.

The California Rules of Court clearly recognize that certain limited practice of law in California by non-California lawyers is permissible. These circumstances include: Counsel Pro Hac Vice (Rule of Court 983); Appearances by Military Counsel (Rule of Court 983.1); and Out-of-State Attorney Arbitration Counsel (Rule of Court 983.4). Of these three permitted circumstances, only Rule 983.1, Rules of Court authorizing certain limited practice of law in connection with the representation of persons in military service addresses the issue of a work product privilege for a non-California judge advocate. Subdivision (d) of rule 983.1, in part, states that a judge advocate, "shall be subject to the rights and obligations with respect to . . . work-product privilege, and other professional privileges to the same extent as a member of the State Bar of California." This language is precedent for the policy sought by the sponsor's proposed statutory amendment.

The sponsor has taken a friendly amendment suggested by the State Bar's Office of Professional Competence in connection with last year's proposal. The sponsor's proposal has been amended to clarify that "nothing in this

section is intended to authorize the practice of law in California by persons who are not active members of the State Bar of California except as otherwise permitted by law.” This suggested language is comparable to language found in rule 1-100(D)(2) of the Rules of Professional Conduct of the State Bar and would help avoid potential misinterpretation of the sponsor’s proposed statutory amendment.

Regarding the proposed new language intended to clarify that the scope of the work product privilege extends to work product generated by agents of attorneys, the State Bar take no position on this change other than to encourage the members of the Conference representing the State Bar’s Litigation Section, the State Bar’s Standing Committee on Administration and Justice, and other relevant State Bar groups to consider thoroughly this aspect of the proposal.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 2018 to read as follows:

- 1 §2018
- 2 (a) It is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial
- 3 with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to
- 4 investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys
- 5 from taking undue advantage of their adversary's industry and efforts.
- 6 (b) Subject to subdivision (c), the work product of an attorney is not discoverable unless the
- 7 court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing
- 8 that party's claim or defense or will result in an injustice.
- 9 (c) Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research
- 10 or theories shall not be discoverable under any circumstances.
- 11 (d) This section is intended to be a restatement of existing law relating to protection of work
- 12 product. It is not intended to expand or reduce the extent to which work product is discoverable under
- 13 existing law in any action.
- 14 (e) The State Bar may discover the work product of an attorney against whom disciplinary
- 15 charges are pending when it is relevant to issues of breach of duty by the lawyer, subject to applicable
- 16 client approval and to a protective order, where requested and for good cause, to ensure the
- 17 confidentiality of work product except for its use by the State Bar in disciplinary investigations and its
- 18 consideration under seal in State Bar Court proceedings. For purposes of this section, whenever a client
- 19 has initiated a complaint against an attorney, the requisite client approval shall be deemed to have been
- 20 granted.
- 21 (f) In an action between an attorney and his or her client or former client, no work product
- 22 privilege under this section exists if the work product is relevant to an issue of breach by the attorney of
- 23 a duty to the attorney's client arising out of the attorney-client relationship.
- 24 (g) For purposes of this section, "attorney" means a person authorized to practice law in any
- 25 state, territory, or possession of the United States or any other nation, or such person's agent in
- 26 conducting that practice. Nothing in this section is intended to authorize the practice of law in California
- 27 by persons who are not active members of the State Bar of California except as otherwise permitted by
- 28 law.
- 29 For purposes of this section, "client" means a client as defined in Section 951 of the Evidence
- 30 Code.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: Existing law protects state attorneys from having their adversaries take advantage of their efforts by preventing discovery of such work product. Existing law does not apply to attorneys who belong to out-of-state, territorial, or international bars.

This Resolution: This proposal simply corrects oversights in former resolution 10-05-2001. First, it extends the work product protection to the overlooked attorneys: those from territories and possessions of the United States.

Second, it forewarns all out-of-state attorneys about the unauthorized practice of law so unwitting attorneys are not misled by the extended protection. Finally, it correctly distinguishes between the work product privilege and the attorney-client privilege rather than treating them as identical in crafting the proposed language.

The Problem: Although perhaps a drafting oversight, this law discriminates against out-of-state attorneys by excluding them from the protections afforded local attorneys: freedom from adversaries taking advantage of their work product. Yet, no rational reason exists to discriminate among attorneys' work product based on the jurisdiction in which the attorney is licensed. Undoubtedly, clients expect to benefit from similar treatment of their attorney regardless of where their attorney is licensed. Evidence Code section 950 defines "lawyer" for purposes of the attorney-client privilege as "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." No case law addresses whether the term "attorney" in the work product statute includes attorneys not licensed in California.

In 2001, this Conference approved a similar resolution, 10-05-2001, yet to be adopted by the legislature. That resolution embraced this concept but was limited to only attorneys in other "states or nations," omitted the precaution recommended by The State Bar of California Committee on Professional Responsibility and Conduct, and effectively treated the work product privilege identical to the attorney client privilege when they are different in fact. The proponent, Women Lawyers Association of Los Angeles, explained that "courts have declared the term "attorney" vague and stretched it to include a party appearing in propria persona (*Dowden v. Superior Court* (1993) 3 Cal. App. 4th 126, 132-135) and agents of an attorney. *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-648 (investigator working for attorney who interviewed witnesses and made notes is agent of attorney; his thoughts and impressions were absolutely privileged); *Scotsman Manufacturing v. Superior Court* (1966) 242 Cal. App. 2d 527, 530 (non-testifying expert's written report is protected work product); *Insurance Co. of North America v. Superior Court (GAF Corp.)* (1980) 108 Cal. App. 3d 758, 771 (paralegal's notes recording strategy meeting between attorney and employees of client are "work product of [the] law firm" and so absolutely protected.)" These cases support expanding the work product protections to agents of licensed attorneys because these efforts are part of the attorney's efforts, not because the client reasonably believes these agents are authorized to practice law.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute, or rule.

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