2d Civil No. B229880

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FIREMAN'S FUND INSURANCE COMPANY, a California Corporation, and NATIONAL SURETY CORPORATION, a California Corporation,

Petitioners,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

FRONT GATE PLAZA, LLC, dba FRONT GATE PLAZA, a limited liability company, RAYMOND ARJMAND, individually and as Trustee for the ARJMAND FAMILY TRUST, PRIMERO MANAGEMENT, INC., a California corporation, and R&A ASSOCIATES, INC., a California corporation

Real Parties in Interest.

Los Angeles Superior Court Case No. MC019168
Honorable Brian Yep, (661) 974-7310; Honorable Arnold Gold, Referee

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APPLICATION OF LOS ANGELES COUNTY BAR ASSOCIATION, BEVERLY HILLS BAR ASSOCIATION AND ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; [PROPOSED] AMICUS CURIAE BRIEF

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow (SBN 51126)
Robert A. Olson (SBN 109374)
Cynthia E. Tobisman (SBN 197983)
Jeffrey E. Raskin (SBN 223608)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811 / Facsimile: (310) 276-5261

Attorneys for Amicus Curiae
LOS ANGELES COUNTY BAR ASSOCIATION, BEVERLY HILLS BAR ASSOCIATION and ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

APPLICATION OF LOS ANGELES COUNTY BAR ASSOCIATION, BEVERLY HILLS BAR ASSOCIATION AND ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

The Los Angeles County Bar Association, Beverly Hills Bar Association and Association of Southern California Defense Counsel (collectively Amici Curiae) apply for leave to file the attached amicus curiae brief.

Interest of Amici Curiae

With over 27,000 members, the Los Angeles County Bar Association is the largest local voluntary bar association in the United States. In addition to meeting the professional needs of its members, LACBA actively promotes the administration of justice, access to the judicial system, and the role of lawyers in facilitating both.

The Beverly Hills Bar Association is one of the largest voluntary metropolitan bar associations in the nation. Its 4,000-plus members are dedicated to providing leadership on major issues affecting the legal profession and the community, to facilitating access to legal services, and to supporting the justice system.

The Association of Southern California Defense Counsel is a voluntary membership association of approximately 1,200 attorney members that includes some of the leading trial lawyers of California's civil defense bar. Its members primarily represent members of the business community, individual defendants, professionals, government agencies, and religious and civic institutions. Its is dedicated to promoting the

administration of justice, providing education to the public about the legal system, and enhancing the standards of civil litigation practice in this state.

Amici Curiae have a significant interest in this matter because issues concerning the scope of the protection afforded by California's attorney-client privilege and attorney work product doctrine impact the attorneys' own rights and the rights of their clients that they seek to protect. Because many of Amici Curiae's members are trial lawyers, they necessarily need to know the specific rules that govern the extent to which their communications with other lawyers and staff in their offices and with outside investigators and consultants, as well as their uncommunicated mental impressions, are protected from disclosure in order to appropriately prepare and try cases. Amici Curiae are gravely concerned about the harm that would be done to our adversary system if the trial court's narrow interpretation of the privilege were adopted.

Rule 520(f) Requirements

Counsel have read the parties' briefs on the merits and believe that the proposed amicus curiae brief will assist the Court in deciding the issue presented.

Petitioners capably demonstrate why the discovery real parties seek is barred by the attorney-client privilege, but do not present any argument based on the work product doctrine. Amici Curiae believe that the work product doctrine applies equally, and provides an alternative path that the Court should explore. Accordingly, the proposed brief demonstrates that the absolute protection of "core" work product—an attorney's impressions, conclusions, opinions, or legal research or theories—protects only to

writings but also the attorney's thought processes and discussions with others in his or her firm, regardless of whether they appear in a writing.

No party, counsel for a party, or anybody other than counsel for amici has authored the proposed brief in whole or in part or funded the preparation of the brief.

Dated: March 2, 2011

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow
Robert A. Olson
Cynthia E. Tobisman
Jeffrey E. Raskin

By _____
Jeffrey E. Raskin
Attorneys for Amicus Curiae
LOS ANGELES COUNTY BAR ASSOCIATION, BEVERLY HILLS BAR ASSOCIATION and ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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INTRODUCTION

The trial court's errors present this Court with an unusual opportunity to establish some crucial points about the operation of the work product doctrine.

The bottom line, we believe, is that lawyers' thoughts—and their communication of those thoughts to others on their legal team, whether partners, associates, co-counsel or others involved in the legal representation—are absolutely protected by a combination of the attorney-client privilege and the work product doctrine. That a highly-experienced retired judge/referee could conclude otherwise says volumes about the need for clarity in this area of the law.

Attorney-client privilege. The referee/trial court generally assumed that the attorney-client privilege covers only communications directly between attorney and client. Petitioners capably demonstrate that the privilege covers both communications with persons to whom disclosure is reasonably necessary for "the accomplishment of the purpose for which the lawyer is consulted" and "legal opinion[s] formed" (Evid. Code, § 952) even if the lawyer never expresses them. (See Petition, p. 18.)

Work product doctrine. To the extent the Court concludes that attorney-client privilege may not absolutely bar discovery of lawyers' thoughts, the work product doctrine's absolute-protection prong fills any gaps. Although the trial court believed that "[t]he 'absolute' work product doctrine only protects writings" (E.g., Ex. 1, p. 8), we will demonstrate that this is an overly narrow reading of the law. It fails to recognize that Code of Civil Procedure section 2018.030 does not *limit* the work product doctrine to writings, but rather only addresses discoverability of work product *that has*

been reduced to written form. It imposes no limitations at all on the protection of a lawyer's thought processes that the lawyer has not reduced to writing. Both the legislative history and a substantial volume of federal law—which the legislative history makes clear California courts should look to for guidance—establish that the attorney's unwritten thoughts are *always* off limits. Unfortunately, though, no published California decision explicitly recognizes this principle. It is time for the bench and bar to have guidance on this point.

ARGUMENT

I.

THE TRIAL COURT MISCONSTRUED THE SCOPE OF THE ABSOLUTE BAR AGAINST THE DISCOVERY OF "CORE" WORK PRODUCT: IT IS PROTECTED FROM DISCLOSURE WHETHER OR NOT IN WRITING.

Even if the attorney-client privilege did not apply to a particular lawyer opinion, the work product doctrine would step in to fill the gap. The trial court grievously erred in finding otherwise.

A. Overview.

Most judges or lawyers, asked for an on-the-spot answer as to whether the work product doctrine absolutely shields an lawyer's impressions, conclusions, opinions, legal research or theories—regardless of their form—would answer "yes."

The trial court saw it differently. In the trial court's view, the key to the work product doctrine's absolute versus qualified protection is whether or not the lawyer's impressions, conclusions, opinions, legal research or theories were reduced to writing. (E.g., Ex. 1, p. 8:11-12 ["The 'absolute' work product doctrine only protects writings].) If not, the trial court thought that they were discoverable, subject only to an appropriate showing that it found real parties had made. (Ex. 1, p. 8:18-22.) Apparently, the trial court would also have concluded that the underlying impressions, conclusions, opinions, legal research or theories would be discoverable by asking for the

substance of that information orally, rather than by asking for the documents themselves.[1]

The trial court's understanding stemmed from its analysis of Code of Civil Procedure section 2018.030.[2] Subdivision (a) of that statute provides an absolute privilege: "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." Subdivision (b) provides that "[t]he work product of an attorney, other than a writing described in subdivision (a)," is subject to only a qualified privilege. From this, the trial court evidently concluded that unless "an attorney's impressions, conclusions, opinions, or legal research or theories" are reduced to writing, they are subject only to the qualified privilege of subdivision (b).[3]

This is not and cannot be the law. As we demonstrate below, the distinction between the absolute and qualified privilege turns on whether the discovery seeks core work product or non-core work product (i.e., work

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[1] In the remainder of this brief, an attorney's "thought processes" means his or her "impressions, conclusions, opinions, or legal research or theories" (Code Civ. Proc., § 2018.030, subd. (a)); "core work product" means attorney thought processes (which some courts describe as "opinion work product"); and "non-core work product" means all other attorney work product.

[2] All further undesignated statutory references are to the Code of Civil Procedure.

[3] Subdivision (b) states: "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."

product that does not contain thought processes), *not* on whether it has been written. Every tool of statutory interpretation demands this result.

B. In Order To Avoid Absurd Results And To Carry Out The Legislature's Stated Policy, The Absolute Privilege Must Apply To All Core Work Product, Whether Or Not In Written Form.

A narrow interpretation that limits the absolute protection of opinion work product to writings is directly at odds with the Legislature's stated policy goals and would create absurd results that would effectively do away with the privilege.

The starting point must be the Legislature's unqualified statement of policy, which is to "[p]reserve 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 to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (§ 2018.020.)

The Legislature implemented these policies by protecting two categories of work product:

- It absolutely protected core work product. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1250 ["California courts have held that an attorney's opinion work product is absolutely insulated from discovery by virtue of the 'shall not be discoverable under any circumstances' language"].)

- It provided qualified protection to non-core work product. (§ 2018.030, subd. (b); *2,022 Ranch, L.L.C. v. Superior Court* (2003)

113 Cal.App.4th 1377, 1390, disapproved on another ground in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739-740.) This includes "other aspects of an attorney's work product" that do not reflect an attorney's opinions (*2,022 Ranch, L.L.C., supra*, 113 Cal.App.4th at p. 1390.) but rather are derivative rather than evidentiary, "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 . . . " (*Mack v. Superior Court* (1968) 259 Cal.App.2d 7, 10-11; see *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 68-69 ["An attorney's 'conditional' work product consists of material that is of a derivative or interpretative nature such as diagrams, charts, audit reports of books, papers, or records, and findings, opinions and reports of experts employed by an attorney to analyze evidentiary material," original emphases omitted]).

It is true that both of these protections are framed in terms of writings. That is undoubtedly because that is the form in which adverse parties have traditionally sought an attorney's thought processes. As *Hickman v. Taylor* (1947) 329 U.S. 495 [67 S.Ct. 385, 91 L.Ed. 451] (*Hickman*) put it, the work product doctrine is necessary because otherwise, "[a]n attorney's thoughts, heretofore inviolate, would not be his own" if his memoranda and notes were subject to discovery—and to avoid the problem, "much of what is now put down in writing would remain unwritten," creating inefficiency and lowering the quality of legal services. (*Id.* at p. 511.) But that cannot mean that the Legislature intended to protect thought processes when in written form while allowing discovery of the identical information by compelling the attorney to answer a direct question about what he or she thought.

There are at least two reasons:

First, there is no principled basis for distinguishing between an attorney's written and unwritten thought processes. As our Supreme Court observed in rejecting another effort to drive an interpretational wedge between two statutes in a case concerning judicial disqualification, "the public policy considerations underlying that section are equally applicable to, and compelling for, both challenges for cause and peremptory challenges." (*People v. Hull* (1991) 1 Cal.4th 266, 272 [addressing whether writ relief was the exclusive appellate remedy for both]; *People v. Valladares* (2009) 173 Cal.App.4th 1388, 1393-1394 [the various portions of a statutory scheme "must be read together and harmonized if possible," internal quotation marks omitted].) The same is true here. After all, "'[a]t 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.'" (*People v. Collie* (1981) 30 Cal.3d 43, 59, quoting *U.S. v. Nobles* (1975) 422 U.S. 225, 238 [95 S.Ct. 2160, 45 L.Ed.2d 141].) "'[T]he doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system.'" (*Collie, supra*, 30 Cal.3d at p. 59.) The reasons for protecting an attorney's thought processes do not differ depending on whether the thoughts are in the attorney's head, have been put in a memo, or have been shared orally among members of a law firm.

Second, the trial court's narrow interpretation of the protections afforded to core work product would create an absurd result: The same thought processes that could never be obtained in a writing could be elicited by simply propounding an interrogatory or asking a question during

a deposition. No matter how unambiguous section 2018.030 may seem in its references to writings, a broader judicial construction is appropriate when literal interpretation "would lead to absurd results thereby violating the presumed intent of the Legislature." (*Foxgate Homeowners' Assn. v. Bramalea California, Inc*. (2001) 26 Cal.4th 1, 14.)

C. On Its Face, Section 2018.030's Qualified Privilege Does Not Apply To Core Work Product In Unwritten Form.

In fact, however, the literal text of section 2018.030, subdivision (b) in no way undercuts the above interpretation. Properly understood, both subsections of that statute concern *only* written work product, and they draw their distinction *only* between *written* core work product and *written* non-core work product.

"[I]t is well established that chapter and section headings [of an act] may properly be considered in determining legislative intent [citation], and are entitled to considerable weight. [Citation.]" (*People v. Hull*, *supra*, 1 Cal.4th at p. 272, internal quotation marks omitted.) The heading to section 2018.030 is "Writings and written documentation." So, when subdivision (b) creates a qualified privileged for "work product of an attorney, other than a writing described in subdivision (a)," it refers *only* to *writings* that do not "reflect[] an attorney's impressions, conclusions, opinions, or legal research or theories . . . ." In other words, the Legislature intended to create the qualified privilege for non-core written work product (see pp. 5-6, *ante*)—not to permit discovery of core work product just because it is not written down.

D. The Legislative History Makes Clear That The Legislature Intended To Protect All Attorney Thought Processes—Not Just Those In Writing.

1. The Legislature intended no distinction between written and unwritten core work product.

We have found nothing in the legislative history suggesting that the Legislature intended to provide less protection to non-written core work product than to written. Just the opposite: The Senate Committee on Judiciary's analysis of SB 24 states without qualification that "[u]nder no circumstances could the 'mental impressions, conclusions, opinions or legal theories' of an attorney be reached." (Request for Judicial Notice (RJN) Ex. A, LIS-3, p. 27 [Analysis and Final Action of the Measures Considered By Senate Judiciary Committee During the 1963 Regular Session].)

2. The Legislature intended to adopt *Hickman v. Taylor* and intended that California courts interpret the work product doctrine in accordance with federal cases—which uniformly apply the same standard to all core work product, whether or not in writing.

Federal courts have already addressed this issue, uniformly holding that the same protections apply to core work product regardless of whether it takes written form, even though the Federal Rules of Civil Procedure appear to phrase work product protection as applying only to "documents and things." The legislative history of sections 2018.020 et seq. confirm that the Legislature intended courts to follow these federal understandings of the scope of protected work product. In fact, the Legislature intentionally left

some things unsaid so that the law could develop by reference to developments in federal courts.

a. Legislative intent to incorporate federal interpretations of the work product doctrine.

California law initially follows Hickman v. Taylor. In the wake of *Hickman, supra,* 329 U.S. 495 the California Legislature and California judiciary attempted to craft something akin to the work product doctrine announced in that case.

In 1952, the State Bar Committee on Administration of Justice proposed an amendment to former section 1881 to protect "an attorney's working papers . . . ." (State Bar Committee on Administration of Justice, *Committee Reports*, (1952) 27 State Bar J. 175, 191; McCoy, *California Civil Discovery: Work Product of Attorneys* (1966) 18 Stan. L.Rev. 783, 787-788.) But this effort was abandoned as unnecessary when, in *Holm v. Superior Court* (1954) 42 Cal.2d 500 (*Holm*), disapproved in *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 176, "California's Supreme Court created a privilege similar to the federal work product privilege, but based on the attorney-client privilege." (*Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 130 (*Dowden*); McCoy, *California Civil Discovery: Work Product of Attorneys, supra*, 18 Stan. L.Rev. at p. 788.) In *Holm*, the Court held that photographs and an accident report prepared for counsel's assistance in defending an action were within the attorney-client privilege. (*Holm*, supra, 42 Cal.2d at p. 510; see *Dowden*, *supra*, 73 Cal.App.4th at p. 130.)

The Legislature then enacted the Discovery Act of 1957, which included provisions intended to preserve the broad scope of the absolute

privilege against the invasion of work product. (McCoy, *California Civil Discovery: Work Product of Attorneys*, *supra*, 18 Stan. L.Rev. at pp. 788-789.) At least arguably, the Legislature intended to offer greater protection than the federal work product doctrine, but it did not expressly refer to the work product doctrine or to the decision in *Holm.* (*Dowden*, *supra*, 73 Cal.App.4th at p. 131.) Rather, it adopted language stating that "[a]ll matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction." (Former § 2031 (Stats. 1957, ch. 1904, § 3, at 3323); see *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 395 (*Greyhound*).)

***Greyhound* refuses to recognize the work product doctrine.** The State Bar warned that courts might interpret this amendment as decreasing, rather than increasing, the protection of work product. (McCoy, *California Civil Discovery: Work Product of Attorneys*, *supra*, 18 Stan. L.Rev. at p. 789.) That is just what happened. In *Greyhound*, *supra*, 56 Cal.2d 355, our Supreme Court, finding that the Legislature intended to "creat[e] in California a system of discovery procedures less restrictive than those then employed in the federal courts" (*id*. at pp. 375, , original emphasis omitted), concluded "that the work product privilege does not exist in this state" (*id*. at p. 401; see also *id.* at pp. 395-396). Instead, trial courts were to consider the concerns underlying the work product doctrine as one of many factors in exercising discretion whether to permit discovery. (*Id*. at pp. 392-393, 401.)

The 1963 statute rejects Greyhound. In 1963, the State Bar and the Legislature responded to *Greyhound* and its progeny. (*Dowden, supra*, 73 Cal.App.4th at p. 132.) This resulted in Senate Bill 24, which was enacted as Code of Civil Procedure section 2016. It accomplished two things: It removed the language that precluded the consideration of "judicial decision on privilege of any other jurisdiction"; and it enacted the absolute and qualified work product privileges that have since been recodified at Code of Civil Procedure section 2018.020 et seq. (See RJN at LIS-1a, Sen. Bill No. 24 (1963) Reg. Sess. § 1 [as introduced Jan. 8, 1963] [striking and replacing language of section 2016, subdivision (b)].)

The legislative history of SB 24 is replete with references to the Legislature's intent to "establish in California substantially the same rule as announced by the United States Supreme Court in the case of *Hickman v. Taylor*, 329 U.S. 495, and the numerous decisions of other United States courts in interpreting and applying that rule. (RJN Ex. B at LIS-2 p. 2 [memorandum from file of bill's proponent], LIS-4 p. 2 [letter from bill's proponent to Governor Brown], LIS-5 p. 2 [letter from Representative Matthews to Governor Brown].) In fact, the Legislature intentionally deleted the definition of the term "work product" because it believed that this would "enable [California courts] to interpret the law in accordance with the large body of case law that has developed in the federal courts and elsewhere." (Stats. 1963, ch. 1744, § 3 ["The amendments to this act during the course of its passage shall not constitute evidence that the Legislature intended thereby to limit the courts in their interpretation of what constitutes the work product of an attorney"]; RJN Ex. B at LIS-2 pp. 1-2 [memorandum from file of bill's proponent], LIS-4 pp. 1-2 [letter from bill's

proponent to Governor Brown], LIS-5 pp. 1-2 [letter from Representative Matthews to Governor Brown].)

Accordingly, it is essential to consider federal authority. As we now demonstrate, that authority admits of no doubt: Core work product is absolutely protected regardless of its form.

b. *Hickman v. Taylor* made clear that the work product doctrine protects core work product regardless of its form.

Hickman, supra, 329 U.S. 495 was the genesis of the work product doctrine. It repeatedly made clear that the doctrine applies equally to written and unwritten work product.

Hickman framed the question this way: "We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and *the mind of the attorney* . . . ." (329 U.S. at p. 509, emphasis added.) It involved an attempt to obtain discovery not only of "secure written statements [and] private memoranda" but also of "personal recollections prepared *or formed* by an adverse party's counsel in the course of his legal duties." (*Id.* at p. 510, emphasis added.) The Court held that "as to oral statements made by witnesses to [the attorney], *whether presently in the form of his mental impressions or memoranda*, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, *forcing an attorney to repeat or write out* all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness." (*Id.* at pp. 512-513, emphases added.)

Moreover, "[p]roper 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 clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, *mental impressions, personal beliefs*, and countless other tangible *and intangible ways*" that all constitute protected work product. (*Id.* at p. 511, emphases added.)

Indeed, the Supreme Court spoke as if it should be a foregone conclusion that an attorney's unwritten thought processes must be kept private and that the work product doctrine was only necessary to make clear that *writings* memorializing those thought processes were *equally* private: "Were such [written] materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." (*Ibid.*)

c. Federal courts have consistently held that the protections afforded to core work product must apply to unwritten thought processes although the Federal Rules of Civil Procedure literally speaks only in terms of "documents and tangible things."

Like section 2018.030, on its face the work product rule in the Federal Rules of Civil Procedure seems to address only the discovery of "documents and tangible things," creating an absolute privilege for written core work product and a qualified privilege for other general work product. (Fed. Rules Civ. Proc., rule 26(b)(3); see, e.g., *Lake Shore Radiator, Inc. v. Radiator Express Warehouse* (M.D. Fla., Mar. 19, 2007, No. 3:05-cv-1232-J-12MCR) 2007 WL 842989, at *4.) Nonetheless, a long line of federal district court decisions has consistently held that the work product protections apply equally to intangible ideas and to the attorney's oral communications that contain his or her opinions, including communications between lawyers at a firm and between lawyers and investigators.

"While on its face, Rule 26(b)(3) appears to apply only where 'documents and things' are sought, such a construction is contrary to the general policy against invading the privacy of an attorney's preparation of litigation as noted in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385. Thus, the courts have rejected an interpretation of Rule 26(b)(3) that provides protection only for an attorney's mental impressions that are contained in 'documents and tangible things.'" (*Connolly Data Systems, Inc. v. Victor Technologies, Inc.* (S.D. Cal. 1987) 114 F.R.D. 89, 96 [prohibiting deposition questions that would "reveal [the] attorney's mental impressions,

theories, conclusions or opinions concerning the case"]; see *Laxalt v. McClatchy* (D.Nev. 1987) 116 F.R.D. 438, 441-442 [core work product may exist as "intangible thoughts of a party's counsel. Opposing counsel cannot be allowed to gain access to 'opinion work product' simply because of the fact that they have not been reduced to a tangible form"]; *Lott v. Seaboard Systems Railroad, Inc.* (S.D. Ga. 1985) 109 F.R.D. 554, 558 ["'The Rule in no way implies that mental impressions not embodied in documents are otherwise discoverable'"]; *Phoenix National Corp., Inc. v. Bowater United Kingdom Paper Limited* (N.D. Ga. 1983) 98 F.R.D. 669, 671 ["The rule does not imply that mental impressions which are not embodied in documents are discoverable"]; *Eoppolo v. National Railroad Passenger Corp.* (E.D. Pa. 1985) 108 F.R.D. 292, 294 [privilege applicable to core work product applies to interrogatories to the extent they seek counsel's view of the case and other mental impressions]; *Ford v. Philips Electronics Instruments Co.* (E.D. Pa. 1979) 82 F.R.D. 359, 360 [deposition questions inquiring into discussions between deponent and plaintiff's counsel infringe on plaintiff's counsel's evaluation of the case, a contrary interpretation "would fly in the face of 'the general policy against invading the privacy of an attorney's

course of preparation'" of the case that was enunciated in *Hickman*].)[4]

We have not found any federal decision stating otherwise.[5]

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[4] See also *Byrd v. Wal-Mart Transp., LLC* (S.D. Ga. 2009) 2009 WL 3055303, at *1-2; *Lake Shore Radiator, Inc. v. Radiator Express Warehouse, supra*, 2007 WL 842989, at *5; *D'Alonzo v. Hunt* (E.D. Pa., Dec. 4, 2006, No. 06-1997) 2006 WL 3511712, at * 3; *Ecrix Corp. v. Exabyte Corp.* (D. Colo. 2000) 95 F.Supp.2d 1155, 1158; *Coleman v. General Electric Co.* (E.D. Pa., June 8 1995, No. 94-CV-4740) 1995 WL 358089, at *2; *Russell v. General Electric Co.* (N.D. Ill. 1993) 149 F.R.D. 578, 581-582; *United States v. District Council of New York* (SDNY, Aug. 18, 1992, No. 90 CIV. 5722) 1992 WL 208284, at * 7-8; *Koch v. Koch Industries, Inc.* (D.Kan., Aug. 24, 1992, No. 85-1636-C) 1992 WL 223816, at *13; *Miller Oil Co. v. Smith Industries* (W.D. Mich. Dec. 13, 1990) 1990 WL 446502, at *5; *Barrett Industrial Trucks, Inc. v. Old Republic Insurance Co.* (N.D. Ill. 1990) 129 F.R.D. 515, 518; *Protective National Insurance Co. of Omaha v. Commonwealth Ins. Co.* (D.Neb. 1989) 137 F.R.D. 267, 283; *Klages v. Sperry Corp.* (E.D. Pa., July 8, 1986, No. 83-3295) 1986 WL 7636, at fn. 5; *EEOC v. Anchor Hocking Corp.* (S.D. Ohio, Dec. 16, 1981, No. C-2-81-1) 1981 WL 27112.

[5] Close review eliminates apparently contrary statements. For example, in *Fisher v. National Railroad Passenger Corp.* (S.D.Ind. 1993) 152 F.R.D. 145, 156, the court stated that "[w]ork product protection is limited to 'documents and tangible things,' and has consistently been held not to prohibit discovery of mere facts. *E.g., Dunn v. State Farm Fire & Cas. Co.*, 122 F.R.D. 507, 510 (N.D.Miss.1988); *Laxalt v. McClatchy*, 116 F.R.D. 438, 442 (D.Nev.1987); *Ford v. Philips Elec. Instr. Co.*, 82 F.R.D. 359, 360 (E.D.Pa.1979)." But the actual question before the court in *Fisher* and in the cases it cites did not concern whether the materials were written or unwritten—the discovery sought only writings—but rather whether the work product was core or non-core. In fact, *Ford, supra*, 82 F.R.D. 359 is one of the seminal cases holding that core work product must be treated the same regardless of whether it is written down. (*Id.* at p. 360.)

II.

BETWEEN THEM, THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE BAR ALL INQUIRY INTO ATTORNEY THOUGHT PROCESSES.

The attorney-client privilege and work product doctrine are "companion, and yet separate privilege[s] . . . ." (*American Mutual Liability Insurance Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 594.) Together, they are a complete shield against the discovery of attorney thought processes in whatever form they may exist. They apply far more broadly then the trial court interpreted them.

Although the two privileges overlap, this does not mean a court should interpret either of the two privileges narrowly. The overlap is salutary, not surplusage.

One reason is that the privileges belong to different people. "While the lawyer-client privilege is prompted by the need for confidentiality of the *client*, the work product rule is designed to satisfy the *attorney's* requirement for privacy." (*Ibid.*, emphasis in original.) Thus, "[t]he client holds the attorney-client privilege" and "the attorney is the holder of the work product privilege . . . ." (*State Comp. Ins. Fund v. Superior Court* (2001) 91 Cal.App.4th 1080, 1087; *Meza v. H. Muehlstein & Co.* (2009) 176 Cal.App.4th 969, 977; Evid. Code, § 953, subd. (a).) The lawyer cannot waive the client's attorney-client privilege by choosing to waive his or her own separate right to prevent the disclosure of work product, and vice-versa.

Moreover, the Legislature had good reason to provide overlapping protection. The 1967 amendment of Evidence Code section 952 expanded three existing privileges so as to include uncommunicated opinions: the

attorney-client privilege, the physician-patient privilege, and the psychotherapist-patient privilege. (Stats. 1967, ch. 650, §§ 3-5 [amending Evidence Code sections 952, 992, and 1012].) This expansion was unquestionably necessary for the physician-patient and psychotherapist-patient privileges because neither of those relationships had an equivalent to the work product doctrine that would cover uncommunicated opinions. But expanding only these two privileges might well have been misinterpreted as an indication that the Legislature did not intend to protect an attorney's uncommunicated opinions. After all, the recent history of the work product doctrine had already shown how Legislative intent could be misconstrued in this important area. (See pp. 10-12, *ante*.) So it is hardly surprising that the Legislature acted consistently with respect to all three privileges even though there might be some overlap between the attorney-client and work product privileges.

The present case highlights a particularly important overlap that occurs when lawyers in a firm discuss a matter with one another. The trial court apparently thought that intra-office conversations were not covered by either the attorney-client privilege (because they did not involve communications with clients) or the work product doctrine (because they were not in writing). In fact, however, these communications come under either or both of the attorney-client privilege or work product doctrine. They are off limits no matter what.

Solo lawyers think through their clients' issues by themselves. Their conclusions are off limits to discovery as uncommunicated opinions covered by the attorney-client privilege. And as attorney thought processes, they are core work product and therefore off limits under the work product doctrine.

It is unthinkable under any reading of either privilege that opposing counsel could take the lawyer's deposition and ask about these thought processes.

In a law firm, the same thinking-through process occurs in individual lawyers, but it also occurs *among* the lawyers: A firm thinks through its client's issues, at least in part, through discussions among its lawyers. These discussions are the firm's collective thought process. The same is true when a client is represented by lawyers from different firms. (See, e.g., *Johnson v. Univ. Col. of Univ. of Ala. in Birmingham* (11th Cir. 1983) 706 F.2d 1205, 1208 ["The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work"].) These attorneys need to share with each other their ideas, strategies, and even doubts about the case with absolute candor, and without fear of a later deposition.

There is no principled difference between multi-lawyer discussions and the solo lawyer's internal dialogue. If one cannot depose the solo lawyer about his or her thought processes, one should not be able to get to the law firm equivalent of discussions among the lawyers. This is all the more true in light of the fact that the client has an attorney-client relationship not just with the individual lawyers at a firm but also with the firm as an entity. (Evid. Code, § 954.)

Individual and collective lawyer thought processes should be absolutely off limits to any kind of discovery, regardless of the reason.

CONCLUSION

The Legislature intended to absolutely protect an attorney's thought processes—his or her core work product. It did so through the twin devices of the attorney-client privilege and work product doctrine, which together cover the full gamut of these thought processes. Any other construction of the privileges would be contrary to the Legislature's express policy intent and would virtually destroy the privileges.

The trial court's ruling contravenes these principles. The Court should order the trial court to vacate its order compelling discovery.

Dated: March 2, 2011

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow
Robert A. Olson
Cynthia E. Tobisman
Jeffrey E. Raskin

By _____
Jeffrey E. Raskin
Attorneys for Amicus Curiae
LOS ANGELES COUNTY BAR ASSOCIATION, BEVERLY HILLS BAR ASSOCIATION and ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

CERTIFICATION

Pursuant to Rules 8.204(c)(1) & (4) and 8.520(c) of the California Rules of Court, I certify that this **APPLICATION OF LOS ANGELES COUNTY BAR ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; [PROPOSED] AMICUS CURIAE BRIEF** contains 5,558 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: March 2, 2011

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Jeffrey E. Raskin