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Attorney Work Product Crime-Fraud Exception: Chapter 1059

Laura K. Weimer

Code Sections Affected

Civil Procedure Code § 2018, Penal Code §§ 803, 1524 (amended).
AB 2055 (Pacheco); 2002 STAT. Ch. 1059.

I. INTRODUCTION

“[A]s part of a criminal investigation, when the office of a lawyer [or other type of professional] is searched [pursuant to a search warrant], a special master¹ must be employed.”² Then, the individual whose property was searched can request that the superior court hear the “issues surrounding the legality of the warrant.”³ [E]ither the prosecution or the defense [may then] appeal the court’s ruling” on the search warrant, which can eventually lead to “a long appellate review process.”⁴ “In at least two major cases, by the time all appellate remedies had been exhausted, the . . . District Attorney’s office [could no longer prosecute] because the statute of limitations had expired.”⁵ In addition, an attorney whose office was searched could claim that any property taken from his office was work product and therefore subject to the attorney-client privilege.⁶ Therefore investigators were being deprived of the ability to discover materials prepared by a lawyer, even when that lawyer was assisting in the commission of a crime or fraud.⁷ There is no other profession protected by this type of law.⁸ Chapter 1059

1. BLACK’S LAW DICTIONARY 989-90 (7th ed. 1999) (defining “special master” as “[a] master appointed to assist the court with a particular matter or case.”).

2. SENATE COMMITTEE ON JUDICIARY, BACKGROUND INFORMATION REQUEST (on file with the *McGeorge Law Review*), see CAL. PENAL CODE §1524(c) (West 2000) (describing that the search of such an office space must take place under strict conditions).

3. See SENATE COMMITTEE ON JUDICIARY, BACKGROUND INFORMATION REQUEST (on file with the *McGeorge Law Review*) (discussing how an attorney could “request a . . . hearing to litigate issues . . . related to any privilege that would bar disclosure of the items seized.”).

4. *Id.*

5. *Id.*; see *People v. Superior Court (Laff)*, 25 Cal. 4th 703, 708, 23 P.3d 563, 566 (2001), *People v. Superior Court (Bauman & Rose)*, 37 Cal. App. 4th 1757, 1761, 44 Cal. Rptr. 2d 734, 736 (1995) (involving defendant attorney appeals determining the validity of the search warrant for work-product and attorney-client privileged material and demanding that such material be sealed).

6. SENATE COMMITTEE ON JUDICIARY, BACKGROUND INFORMATION REQUEST (on file with the *McGeorge Law Review*); see CAL. EVID. CODE § 954 (West 1995) (stating that “the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer”).

7. See SENATE COMMITTEE ON JUDICIARY, BACKGROUND INFORMATION REQUEST (on file with the *McGeorge Law Review*) (claiming that a lawyer could simply assert claims of attorney work product to avoid discovery of material evidence essential to a criminal investigation).

resolves these problems by amending current law “to provide for a stay of the statute of *limitations* . . . [and] provide[s] that no claim of attorney work product shall prevent disclosure to criminal investigators.”⁹

II. LEGAL BACKGROUND

A. Attorney Criminal Behavior

A crime-fraud exception exists for the attorney-client privilege.¹⁰ The attorney-client privilege is designed to protect the client by not allowing information about a case to become public.¹¹ “Shielding [such information] when an attorney’s services [assist in enabling or committing crimes] undermines the [purpose of the] privilege.”¹² Because of the current work-product exemption, “the Los Angeles District Attorney’s Office was unable to file two major criminal cases.”¹³ The defendants’ attorney in both of those cases hid behind the work-product privilege when evidence he held was necessary for the criminal investigation against his clients.¹⁴ By the time the litigation determined the legality of the evidence, “the statute of limitations for the crimes had expired.”¹⁵ Currently, attorneys who aid or commit crimes can hide behind the privilege that the law provides and retain the evidence needed by investigators that could either indicate their own involvement or the guilt of their client.¹⁶

B. Current Law

The California Evidence Code provides that a client can refuse to disclose, and prevent others from disclosing, a confidential communication between that client and his attorney.¹⁷ The client is the sole holder of this privilege.¹⁸ Furthermore, the law states that a lawyer is required to claim the privilege

8. *Id.*

9. *Id.*

10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 3 (May 7, 2002).

11. See BLACK’S LAW DICTIONARY 1215 (7th ed. 1999) (defining “attorney-client privilege” as “[t]he client’s right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.”).

12. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 3 (May 7, 2002).

13. See *id.* at 4 (citing the background information provided by the Los Angeles District Attorney’s Office).

14. *Id.*

15. *Id.*

16. See Interview with Mike Kimball, Senior Assistant, Assemblymember Robert Pacheco in Sacramento, Cal. (July 28, 2002) [hereinafter Kimball Interview] (notes on file with the *McGeorge Law Review*) (discussing the state of the current legal system and the purpose of Chapter 1059).

17. CAL. EVID. CODE §§ 953-955 (West 1995).

18. See *id.* § 953 (defining “holder of the privilege”).

whenever information from a confidential communication is requested.¹⁹ In addition, no attorney-client privilege exists when an attorney's services are sought in order to aid or enable a person to commit a crime or fraud.²⁰

Attorney work product is generally not discoverable.²¹ Work product is defined as "an attorney's impressions, conclusions, opinions, or legal research or theories."²² The information classified as attorney work product "is not discoverable *unless* the court determines that denial of discovery will unfairly prejudice the party seeking discovery."²³

In addition, the State Bar may discover work product if an attorney is facing disciplinary charges, but only after obtaining client approval.²⁴ Also, if there is any action between an attorney and his client, or former client, the work-product privilege does not exist.²⁵ It is designed to protect the integrity of the attorney's work and to encourage diligent lawyering.²⁶

Sections 803 and 1524(c) of the Penal Code regulate the statute of limitations during the pendency of litigation involving a special-master warrant.²⁷ Section 1054.6 of the Penal Code "provides that neither a defendant nor a prosecuting attorney is required to disclose any writing that reflects" what would be considered work product.²⁸ In addition, search warrant issuance is limited when the "evidence [is] in the possession or . . . control of any person who is a lawyer, physician, psychotherapist, or clergyman."²⁹ The law specifies that such a person must also not be suspected of engaging in or having engaged in any criminal activity related to the evidence for which the warrant was requested unless there is a special master to seal, and not disclose, the information.³⁰

III. CHAPTER 1059

The purpose of Chapter 1059, according to the author, "is to create an exception to the work product rule, and to provide that the statute of limitations will be tolled during the time when issues relating to the attorney-client privilege

19. *Id.* § 955.

20. *Id.* § 956 (West 1995).

21. CAL. CIV. PROC. CODE § 2018 (West 1998).

22. *Id.* § 2018(c).

23. *Id.* § 2018(b)(emphasis added).

24. *Id.* § 2018(e).

25. *Id.*

26. *See* CAL. CIV. PROC. CODE § 2018(a) (West 1998) (outlining the policies of the State of California to "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 unfavorable aspects of those cases").

27. CAL. PENAL CODE §§ 803 (West 1995 & Supp. 2003), 1524 (West 2000).

28. *Id.* § 1054.6 (West Supp. 2003); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 3 (June 11, 2002).

29. CAL. PENAL CODE § 1524(c).

30. *Id.*

or the work product privilege are litigated.”³¹ Chapter 1059 “provides that the statute of limitations in a criminal proceeding should be tolled for the period of time that work product and attorney-client privilege issues are litigated.”³² This tolling is limited to cases where the criminal proceeding relies heavily on the evidence obtained through office searches or evidence that could be considered attorney work product.³³ Chapter 1059

provides that for any crime, the proof of which depends substantially upon evidence that was seized under a warrant, but which is unavailable to the prosecuting authority because they are under seal by the court while it determines whether or not the documents are privileged or attorney work product, shall be tolled until final disclosure of the evidence to the prosecuting attorney.³⁴

This means that the statute of limitations for the original crime does not run until a decision regarding the evidence seized is determined.³⁵

Chapter 1059 provides that when a lawyer is suspected of a crime or fraud, he cannot hide behind the work-product protection to avoid investigation by a law enforcement agency.³⁶ However, nothing in this law is designed “to limit the attorney’s ability to request an in camera hearing.”³⁷ An in camera hearing is one which takes place in a judge’s chambers and away from the courtroom.³⁸ In fact, the new law is designed to create “an exception to the work product doctrine to allow” the evidence in question to be obtained by a criminal prosecutor or investigator if the attorney is suspected of engaging in criminal activity or assisting a client in such activities.³⁹

Chapter 1059 “reiterates a California Supreme Court ruling that any attorney [can] request [an in camera] hearing” when a question about the legality of privileged information exists.⁴⁰ “In *People v. Superior Court (Laff)*, the California Supreme Court ruled that an attorney is entitled to an in camera

31. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 2 (June 11, 2002). See Kimball Interview, *supra* note 16 (discussing the need for Chapter 1059 to re-align the privileges of attorney-client privilege and work product).

32. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 8 (June 11, 2002).

33. *Id.*

34. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2055, at 3 (August 5, 2002).

35. *Id.*

36. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 2 (June 11, 2002).

37. *Id.*; see *Laff*, 25 Cal. 4th at 712, 23 P.3d at 567 (stating that attorneys requested an in camera hearing to determine whether the seizure of the material fell within the attorney client work product privilege after law enforcement officers seized documents from their offices because the lawyers were suspected of criminal activity).

38. See BLACK’S LAW DICTIONARY 1221 (7th ed. 1999) (defining “in camera proceeding” as “[a] proceeding held in a judge’s chambers or other private place.”).

39. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 7 (June 11, 2002).

40. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 4 (May 7, 2002).

judicial hearing to determine whether certain materials seized pursuant to a search warrant during a criminal investigation are privileged under the attorney-client privilege or work product."⁴¹ Chapter 1059 codifies the need for an exception to the attorney-client privilege in California law.⁴²

IV. ANALYSIS OF THE NEW LAW

"The work product doctrine [prior to Chapter] 1059 provide[d] that the work product of an attorney [was] not discoverable . . . unless the court" decided it would unfairly prejudice the opposing party.⁴³ Case law held that although the California Evidence Code has an exception for crime or fraud when matters pertain to attorney-client privilege, "there is no such exception for attorney work product."⁴⁴ The problem is that an attorney can prohibit a criminal investigator's access to vital information by claiming that the information is a form of work product.⁴⁵

This issue is illustrated most clearly in a recent case by the San Bernardino County District Attorney's Office.⁴⁶ "In *People v. Oleesky*, an attorney and co-defendant, is alleged to have used his law office to . . . loot[] more than [ten] million [dollars] in food intended for the California Association for Blind Athletes" by "embezzl[ing] funds through his office bank accounts."⁴⁷ Existing law would not have allowed the District Attorney's office to use the 450 boxes of evidence taken from the attorney's office because he could claim that it was work product.⁴⁸ Chapter 1059, however, will not allow him to hide behind work product and will make the information accessible to the District Attorney.⁴⁹

The Los Angeles County District Attorney's Office strongly supports Chapter 1059 because the "loophole in California law should be closed."⁵⁰ Attorneys should not be able to use work product as an excuse for hiding evidence in cases where they are suspected of misconduct.⁵¹ "The federal court system has already created a crime-fraud exception to the attorney work product

41. *Id.* at 4 (citation omitted); see *Laff*, 25 Cal. 4th at 713, 23 P.3d at 569 (discussing the right of an attorney to request an in-camera hearing).

42. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2055, at 3-4 (May 7, 2002).

43. *Id.* at 3.

44. Letter from Steve Cooley, District Attorney, Los Angeles County District Attorney's Office, Sacramento Legislative Office, to Bruce McPherson, Chair, Senate Public Safety Committee (June 6, 2002) [hereinafter Cooley Letter] (on file with the *McGeorge Law Review*).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

rule.”⁵² “In . . . *Murphy*, [the Eighth Circuit] stated ‘a court may conclude that opinion work product is not immune if it contains inculpatory evidence of the attorney’s own illegal or fraudulent activities.’”⁵³ Chapter 1059 does not take away the privileges and protections allowed under the current work product doctrine.⁵⁴ It only applies if an attorney is suspected of fraud or illegal activity.⁵⁵

V. CONCLUSION

Chapter 1059 assists all District Attorney’s Offices in their prosecution of criminals because it creates an exception to the protection of attorney work product.⁵⁶ It only affects attorneys who are suspected of fraud or misconduct, so it does not take away the privilege that work product was designed to protect, which is the private relationship between a client and his attorney.⁵⁷ Chapter 1059 furthers the purpose of the work-product privilege without disclosing legitimate work-product efforts by creating an exception that only applies to attorneys who abuse their positions and are suspected of criminal activity.⁵⁸

52. *Id.*; see *In re Murphy*, 560 F.2d 326, 336 n.19 (8th Cir. 1977).

53. Cooley Letter, *supra* note 44 (citation omitted).

54. CAL. CIV. PROC. CODE § 2018 (amended by Chapter 1059).

55. *Id.*

56. *Supra* Part III.

57. *Supra* Part IV.

58. See Kimball Interview, *supra* note 16 (discussing the purpose of Chapter 1059 is to align the two privileges, in that Chapter 1059 goes after those people who are trying to commit crimes while maintaining the purpose of work product in disallowing access to legitimate work-product information).