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Legal Malpractice and Discovery of Opinion Work Product in California: The Dilemma Created by Absolute Protection

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American jurisprudence has recognized and respected many legal privileges. The privilege most vigorously asserted and jealously guarded by the legal community is the protection accorded an attorney's work product. In California, an attorney's work product is protected under California Code of Civil Procedure section 2016(b). Section 2016(b) creates both a qualified privilege from discovery of ordinary work product and an absolute privilege for opinion work product. Ordinary work product is only discoverable upon a judicial determination that denial of discovery will unfairly prejudice the party seeking discovery, or will result in an injustice. Section 2016(b) provides that opinion work product is not discoverable under any circumstances. As a
privilege providing absolute immunity from discovery, the protection accorded opinion work product in California conflicts with the policy of liberal discovery.\(^7\)

Expansion of pretrial discovery has been fundamental to the reform of the American adversarial system.\(^8\) Broad discovery rules in California serve two important objectives.\(^9\) The first objective is to expedite litigation through disclosure of evidence.\(^10\) The second objective is to encourage settlement of disputes.\(^11\) While pretrial discovery is intended to take the game element out of trial preparation, discovery is not intended to offend the general adversarial nature of litigation.\(^12\) The protection accorded an attorney's work product is an effort to balance the need for liberal discovery while preserving the adversary system.\(^3\) The tension between protection of an attorney's trial preparation and broad discovery philosophy in California has created confusion and misconception regarding the scope and function of the work product doctrine.\(^13\) This confusion is heightened when an attorney's

\(^7\) Comment, Status of the Work Product Doctrine in California, 6 Sw. L.J. 677, 700 (1974) (the conflict is intensified because the source of discovery and privilege is not stable, because interpretation of the statutes and cases vary from court to court).

\(^8\) Comment, Discovery of Attorney's Work Product, 12 Gonz. L. Rev. 284 (1977). American civil litigation utilizes an adversary rather than inquisitional system. Under the inquisitional system, the judge acts as prosecutor attempting to derive the truth through questioning. Black's Law Dictionary 712 (5th ed. 1979) The adversary system, however, utilizes an impartial judge to preside over the trial. In order to determine the facts, biased presentations are prepared independently by rival parties. The adversarial system has certain shortcomings: (1) relevant facts remain hidden until trial; (2) the element of surprise plays a major part in the outcome of the trial; and (3) the biased presentations sometimes lead to confusion rather than help in the search for justice. Comment, Discovery of Attorney's Work Product, 12 Gonz. L. Rev. 284 (1977).

\(^9\) Wright, California Civil Discovery Practice, §1.2 (1975).

\(^10\) Id. The discovery process expedites litigation by narrowing issues, uncovering facts, preserving evidence, and committing a party or witness to a particular version of the facts. Id. at §1.3.

\(^11\) Id. The discovery process encourages settlement by exposing the strengths and weaknesses of each party's case, thus providing the parties with information necessary to evaluate the merits of the case. Id. at §1.4.

\(^12\) Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 377, 364 P.2d 266, 275, 15 Cal. Rptr. 90, 99 (1961). Permitting broad discovery and thus making evidence available to both parties improves the administration of justice by reducing unfairness inherent in a system in which the quality of the representation available to a party can affect the outcome of a case. Comment, The Work Product Doctrine in Subsequent Litigation, 83 Colum. L. Rev. 412, 414 (1983). Broad discovery, however, is a tool to be used with the advocate's other efficient weapons such as testimony in open court, cross-examination, impeachment, forensic skill, and mastery of legal principles. Greyhound, 56 Cal. 2d at 377, 364 P.2d at 276, 15 Cal. Rptr. at 99-100.

\(^13\) Comment, supra note 8, at 284. See also Hickman v. Taylor, 329 U.S. 495, 497 (1947). The work product doctrine recognizes that an attorney needs a certain degree of privacy in order to properly prepare a client's case and that needless interference by opposing counsel will thwart that effort. Id. at 510-11.

\(^14\) Wolfson, supra note 2, at 249. The work product doctrine is discussed in language that often results in misleading rather than instructing those who seek to apply the doctrine. Id.
former client alleges attorney negligence or misconduct. In this situation, the work product sought to be discovered by the former client may be directly at issue in the subsequent malpractice action.\(^{15}\)

Only recently has legal malpractice developed as a substantive area of law.\(^{16}\) Thus, the procedural rules governing the litigation of legal malpractice claims are still in their incipiency.\(^{17}\) The nature of the fiduciary relationship between the attorney and client imposes evidentiary problems for the client suing a former attorney.\(^{18}\) Much, if not all, evidence of neglect or misconduct may be hidden in the attorney’s working papers.\(^{19}\) Consequently, discovery of an attorney’s work product to be used against that attorney may become a powerful evidentiary tool.

The purpose of this comment is to examine the dilemma created by according absolute protection to an attorney’s opinion work product in legal malpractice actions; and to suggest a proposal to resolve the dilemma. To further this purpose, this comment will briefly recount the history of the work product doctrine in California from the origin of the doctrine in the federal system.\(^{20}\) An initial determination regarding who holds the privilege in California is necessary, followed by a discussion concerning the absoluteness of the privilege.\(^{21}\) This comment will then weigh the policy factors regarding discovery of opinion work product in the legal malpractice setting.\(^{22}\) Finally, a proposal will be offered for limited discovery of otherwise immune work product.\(^{23}\)

**Evolution Of The Work Product Privilege In California**

A. **Origin of the Doctrine: Hickman v. Taylor**

In 1947, the United States Supreme Court announced the work pro-

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15. See e.g., Travelers Ins. Companies v. Superior Court, 143 Cal. App. 3d 436, 191 Cal. Rptr. 871 (1983). In Travelers, plaintiff alleged that her attorney, provided by her insurer, failed to bring a medical malpractice action within the statute of limitations. *Id.* at 440, 191 Cal. Rptr. at 873. Plaintiff also alleged that the attorney fraudulently represented that the case was delayed rather than barred. *Id.* Plaintiff sought attorney's opinion work product in order to show fraud. The appellate court denied discovery on attorney-client privilege grounds. *Id.* at 452, 191 Cal. Rptr. at 881.


17. *Id.* at 119.


19. *Id.*

20. *See infra* notes 25-82 and accompanying text.

21. *See infra* notes 83-142 and accompanying text.

22. *See infra* notes 143-198 and accompanying text.

23. *See infra* notes 199-244 and accompanying text.

24. *See infra* notes 245-254 and accompanying text.
duct doctrine in the seminal case of *Hickman v. Taylor*. In *Hickman*, a party sought discovery of informal witness interviews taken by opposing counsel. The trial court determined that the material was not protected from discovery by the attorney-client privilege and granted a discovery order. Counsel appealed after the trial court found the attorney guilty of contempt for failing to obey the discovery order. The court of appeals reversed the contempt order and introduced the work product concept. The Supreme Court unanimously affirmed the decision of the court of appeals.

The Court first held that the attorney-client privilege had little, if any, role in the delineation of restrictions on discovery of trial preparation materials. At the same time, however, the Court recognized a delicate balance between the right to discover relevant non-privileged subject matter and protection of the adversary system. The Court stated that an attorney, in order to properly prepare a client’s case, needs a certain degree of privacy to assemble information and plan strategy. The Court, however, recognized that necessity, undue hardship, or prejudice must outweigh the policy against invasion of an attorney’s work product in order to protect the liberal goals of discovery under the Federal Rules of Civil Procedure. Thus, the Court created a qualified privilege protecting work product from discovery.

25. 329 U.S. 495, (1947). See McCoy, *California Civil Discovery: Work Product of Attorneys*, 18 Stan. L. Rev. 783, 784 (1966); Comment, supra note 8, at 285; Comment, supra note 7, at 678; Wolfson, supra note 2, at 251 (historical reviews of the *Hickman* decision).
27. Id. at 499.
28. Id. at 500.
29. Id.
30. Id. at 514.
31. Id. at 508. Prior to the *Hickman* decision, any discovery protection accorded an attorney’s work product was covered by the attorney-client privilege. Id. at 498-99, 508. Although the attorney-client privilege and the work product privilege often times overlap in coverage, the privileges serve different policy objectives. Wolfson, supra note 2, at 253. The attorney-client privilege is predicated upon a policy of encouraging full and complete disclosure by a client. Id. The work product doctrine is predicated upon a policy of preventing indiscriminate discovery of an adversary’s trial preparation materials. Id. The work product doctrine evolved from the attorney-client privilege because of the inadequate protection accorded by the limited scope of the attorney-client privilege. See *Hickman*, 329 U.S. at 508.
32. *Hickman*, 329 U.S. at 511. See supra note 8 and accompanying text.
33. *Hickman*, 329 U.S. at 510-11. The Court stated: 

[It] is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from irrelevant facts, prepare his legal theories and plan strategy without undue and needless interference.

Id.
34. Id. at 512. “Were production of written statements and documents to be precluded under [all] circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.” Id. at 511, 512.
35. Id. at 511.
The holding in *Hickman* placed a burden upon the party seeking
discovery to justify invading an attorney's privacy in preparation for
litigation. Following the *Hickman* decision, the California State Bar
became concerned about the potential impact upon existing Califor-
nia law.

**B. The Response to Hickman in California**

Prior to *Hickman*, the general perception in California was that
the attorney-client privilege protected an attorney's working papers
from discovery. In response to the declaration by the United States
Supreme Court in *Hickman* that the attorney-client privilege does not
protect work product from discovery, the California State Bar Com-
mittee on Administration of Justice proposed an Amendment to the
Code of Civil Procedure. The Amendment provided that an attorney's
working papers made in preparation of trial could not be examined
without the consent of the client. The Committee, however, aban-
donned efforts for legislative enactment of the proposed amendment
after the California Supreme Court decided the case of *Holm v.
Superior Court*.

In *Holm*, the California Supreme Court held that the attorney-client
privilege prevented a party from discovering accident reports and
photographs of the scene prepared primarily for transmission to
counsel. As a result, many California judges, legislators, and at-
torneys believed that work product was still protected under the
attorney-client privilege. The protection accorded work product by
the attorney-client privilege in California was absolute rather than sub-
ject to special restrictions, like the federal privilege. Not surpris-
ingly, when the California State legislature proposed adoption of the
Civil Discovery Act of 1957, attorneys became concerned about the
impact the Act would have on the privileged status enjoyed under
existing California law regarding work product.

36. *Id.* at 512.
38. Comment, *California Discovery Since Greyhound: Good Cause For Reflection*, 10 UCLA
40. *Id.*
42. *Id.* at 510, 267 P.2d at 1030.
44. *Id.*
C. Civil Discovery Act of 1957

The proposed Civil Discovery Act of 1957 was modeled closely upon the Federal Rules. Federal Rule 26(b)(3) expressly adopted the Hickman work product doctrine. The State Bar Committee on Administration of Justice, not content with work product protection accorded by the federal rules, recommended that a specific provision regarding privilege be included in the Act. The requested provision was drafted in order to preclude the whittling away of work product protection under the attorney-client privilege as defined in Holm. Acting on the request of the State Bar, the legislature incorporated the last two sentences of section 2016(b) as enacted that year, which stated that the Civil Discovery Act did not change the law regarding privileges in California, nor incorporate any judicial decisions on privilege of any other jurisdiction. Unfortunately, the language of the statute created an all or nothing protection of work product exclusively hinged upon the continued existence and expansion of protection under the Holm rationale. The absolute protection from discovery of work product the legal community enjoyed under Holm was disrupted when the California Supreme Court in Greyhound Corp. v. Superior Court questioned the scope of the attorney-client privilege announced in Holm. Shortly after Greyhound, the California Supreme Court expressly overruled the Holm decision.

D. Greyhound Corp. v. Superior Court

Greyhound involved an action for damages resulting from a bus-
auto collision on an interstate highway.\textsuperscript{56} On the day of the accident, agents of Greyhound obtained accident reports from a number of witnesses and later delivered them to the attorney for Greyhound in anticipation of litigation.\textsuperscript{57} Plaintiffs requested discovery of the reports.\textsuperscript{58} The trial court ordered defendant to produce the reports.\textsuperscript{59} After declining to extend the Holm rationale, the California Supreme Court declared that the work product privilege did not exist in California.\textsuperscript{60} The court construed the language inserted into section 2016(b) as a prohibition against judicial adoption of the federally created privilege in Hickman.\textsuperscript{61} Although the court would not adopt a work product privilege, a work product “concept” was recognized.\textsuperscript{62} Since the witness reports sought to be discovered were not protected by the attorney-client privilege, the reports were open to discovery.\textsuperscript{63} The court decided, however, that the sanctions which protect against abuse of discovery gave courts full discretion to limit or deny discovery when disclosure would be against public policy.\textsuperscript{64} Since Greyhound failed to show sufficient reasons to deny disclosure, discovery was ordered.\textsuperscript{65} The court replaced the privacy argument of the Hickman work product doctrine with an unfairness approach premised on public policy factors and judicial discretion.\textsuperscript{66} In addition, unlike the approach of the federal system, the burden of showing a need to protect the attorney’s work product was placed on the attorney making the assertion.\textsuperscript{67} Prior to Greyhound and its progeny, California attorneys enjoyed greater discovery protection than the federal system provided under Hickman. After Greyhound, California attorneys found themselves with less work product protection than Hickman provided.\textsuperscript{68}

\textsuperscript{56} 56 Cal. 2d 355, 368, 364 P.2d at 270, 15 Cal. Rptr. at 105.
\textsuperscript{57} Id., 364 P.2d at 271, 15 Cal. Rptr. at 106.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 401, 364 P.2d at 291, 15 Cal. Rptr. at 115.
\textsuperscript{61} Id.
\textsuperscript{62} Hogan, \textit{supra} note 37, at 367.
\textsuperscript{63} Greyhound, 56 Cal. 2d at 401, 364 P.2d at 291, Cal. Rptr. at 115.
\textsuperscript{64} Id. The court stated:

This is not to say that discovery may not be denied, in proper cases, when disclosure of the attorney's efforts, opinions, conclusions, or theories would be against public policy, or would be eminently unfair or unjust, or would impose an undue burden.

The California Legislature has designed safeguards for such situations. The sanctions which protect against the abuse of discovery give the trial court full discretion to limit or deny when the facts indicate that one litigant is attempting to take advantage of the other.

\textit{Id.}
\textsuperscript{65} Id. at 401-02, 15 Cal. Rptr. at 115-16, 364 P. 2d 291-92.
\textsuperscript{66} Comment, note 38, at 609.
\textsuperscript{67} Comment, \textit{supra} note 7, at 681.
\textsuperscript{68} See Hogan, \textit{supra} note 37, at 366.
To rectify the loss of work product protection resulting from *Greyhound* and subsequent cases, the State Bar proposed an Amendment to section 2016 in 1963.\(^69\)

**E. The 1963 Amendments to Section 2016**

After *Greyhound*, the State Bar Committee on Administration of Justice proposed Amendments to section 2016(b) in order to fulfill the general intent of the legislature in enacting the Civil Discovery Act of 1957.\(^70\) The proposals were intended to protect the lawyer's normal work processes and establish a more desirable balance between discovery and the right of litigants to obtain advice of experts, make investigations and other acts, without fear of unlimited and indiscriminate disclosures to adversaries.\(^71\) The California State legislature responded to the proposal of the Committee by repealing the provision of section 2016(b) which had precluded the adoption of the *Hickman* doctrine in *Greyhound*.\(^72\) The legislature also amended section 2016(b) to add explicit work product protection.\(^73\) Finally, the legislature added section 2016(h) which set forth the legislative policy of preserving an attorney's right to privacy in the preparation of cases and preventing counsel from taking undue advantage of an opposing attorney's industry or efforts.\(^74\) The policy statement in section 2016(h) adopts both the "privacy" rationale of *Hickman* and the "unfairness" rationale of *Greyhound*.\(^75\) Another major change made by the 1963 Amendment was to place the burden of persuasion on the party seeking

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\(^71\) Id. The Board of Governors recommended that the State Bar:
[S]ponsor and strongly urge enactment of amendments to the Discovery Act in the field of “work product.” Such amendments, in the opinion of the Committee, are needed, first, to fulfill the general intent of the legislature at the time of enactment in 1957, second, to protect the lawyer's normal work processes, third, in other relationships, to establish a more desirable balance between “discovery” and the right of litigants and prospective litigants to obtain advice of experts, make investigations and do other acts, without fear of unlimited or indiscriminate disclosures to, and use by adversaries.


\(^73\) Id. See supra note 3 and accompanying text.

\(^74\) Id. "[T]he policy of this State is (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases, and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts." CAL. CIV. PROC. CODE §2016(h).

\(^75\) Comment, supra note 38, at 609; see supra note 66 and accompanying text.
discovery to show that denial of discovery would unfairly prejudice the party or result in an injustice.\textsuperscript{76}

The work product privilege created by the 1963 Amendments to section 2016 remains in force today. Although comprehensive, section 2016(b) leaves two important areas undefined. First, the section does not define work product.\textsuperscript{77} Second, the section does not state whether the client or the attorney is the holder of the privilege.\textsuperscript{78} California courts have had little difficulty defining work product.\textsuperscript{79} Resolving the issue of who holds the privilege, however, has created confusion.

\textbf{WHO HOLDS THE WORK PRODUCT PRIVILEGE?}

Determining the holder of the work product privilege is essential to the resolution of the problem created when a former client attempts to discover the work product of a former attorney.\textsuperscript{80} If the client holds the work product privilege, an attorney cannot assert the privilege against the client.\textsuperscript{81} California courts have not conclusively resolved this issue. The weight of authority, however, tends to support the conclusion that the attorney is the exclusive holder of the work product privilege.\textsuperscript{82}

Several California appellate courts have addressed the issue regarding who holds the work product privilege.\textsuperscript{83} The cases, however, have created a split of authority on this issue.\textsuperscript{84} Generally, the holdings fall into three broad categories. In the first category, the courts hold that the attorney is the exclusive holder of the privilege.\textsuperscript{85} The courts in the second category hold that the client and the attorney hold the

\begin{itemize}
\item \textsuperscript{76} Cal. Civ. Proc. Code § 2016(b).
\item \textsuperscript{77} Id. § 2016(b). Section 2016(b) sets forth the definition of absolutely protected work product as impressions, conclusions, opinions, or legal research or theories. \textit{Id}.
\item \textsuperscript{78} \textit{Id}.
\item \textsuperscript{79} \textit{See Mack v. Superior Court}, 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280, 283 (1968).
\item \textsuperscript{80} \textit{Lasky, Haas, Cohler, & Munter v. Superior Court}, 172 Cal. App. 3d 264, 270, 218 Cal. Rptr. 205, 208 (1985).
\item \textsuperscript{81} \textit{See Fellows v. Superior Court}, 108 Cal. App. 3d 55, 64-5, 166 Cal. Rptr. 274, 280 (1980). The holder of the privilege also maintains the right to waive the privilege; therefore, if the client holds the privilege, the client can simply waive the privilege on his or her own behalf and demand discovery.
\item \textsuperscript{82} \textit{Lasky}, 172 Cal. App. 3d at 270, 218 Cal. Rptr. at 208.
\item \textsuperscript{83} \textit{See Lasky}, 172 Cal. App. 3d at 278, 218 Cal. Rptr. at 213; \textit{Lohman v. Superior Court}, 81 Cal. App. 3d 90, 101, 146 Cal. Rptr. 171, 178 (1978); \textit{Fellows}, 108 Cal. App. 3d at 65, 166 Cal. Rptr. at 280; \textit{Mack}, 259 Cal. App. 2d at 10, 66 Cal. Rptr. at 282; \textit{Kallen}, 157 Cal. App. 3d at 951, 203 Cal. Rptr. at 885; \textit{Academy of California Optometrists, Inc.}, 51 Cal. App. 3d at 1006, 124 Cal. Rptr. at 672.
\item \textsuperscript{84} \textit{Lasky}, 172 Cal. App. 3d at 270, 218 Cal. Rptr. at 208.
\item \textsuperscript{85} \textit{See infra} notes 88-104 and accompanying text.
\end{itemize}
Finally, the courts in the third category hold that the client owns the work product of an attorney.\(^6\)

A. California Appellate Court Interpretations

1. The Attorney as Holder of the Work Product Privilege

The first resolution of the issue, squarely in the favor of the attorney, was reached in *Lohman v. Superior Court*.\(^8\) The defendants sought discovery of the opinion work product of the plaintiff's former counsel.\(^9\) The plaintiff's former counsel disclosed during a deposition some legal opinions formed while representing the plaintiff.\(^10\) Plaintiff argued that the evidence taken during the deposition should be protected because the work product privilege was intended for the benefit of both the client and the attorney.\(^11\) The court in *Lohman*, however, stated that unlike the attorney-client privilege, the work product privilege was created for the purpose of protecting the attorney.\(^12\) The court declared that the attorney holds the privilege and, thus the attorney alone can claim or waive the privilege.\(^13\) The most recent case deciding who holds the work product privilege, *Lasky, Haas, Cohler & Munter v. Superior Court*,\(^14\) also held in favor of the attorney.

*Lasky* is factually similar to *Lohman*.\(^15\) The plaintiffs were attorneys who represented the trust beneficiaries of J. Paul Getty's estate generally and Gordon Getty specifically.\(^16\) The beneficiaries, as secondary clients, sought discovery of the attorney's opinion work product to facilitate their claim against Gordon Getty for mismanagement of the trust.\(^17\) Plaintiffs refused to produce writings and discussions,

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86. See infra notes 105-120 and accompanying text.
87. See infra notes 121-132 and accompanying text.
89. Id. at 93, 146 Cal. Rptr. at 173.
90. Id. at 99, 146 Cal. Rptr. at 177.
91. Id. at 101, 146 Cal. Rptr. at 177.
92. Id., 146 Cal. Rptr. at 178.
93. Id.
95. Compare *Lasky*, 172 Cal. App. 3d at 264, 218 Cal. Rptr. at 205, with *Lohman*, 81 Cal. App. 3d at 90, 146 Cal. Rptr. at 171 (in both cases the defendant attorney owed a fiduciary duty to the party seeking discovery).
96. *Lasky*, 172 Cal. App. 3d at 268, 218 Cal. Rptr. at 206. Gordon Getty is the sole remaining trustee of the trust established by J. Paul Getty and Sarah C. Getty. Id.
97. Id. at 269, 218 Cal. Rptr. at 207. The plaintiffs contended that since the trustee owes a fiduciary duty to the trust beneficiaries, legal services obtained by the trustee are primarily for their benefit and thus are secondary or joint clients of the trustee's attorney. Id. at 282, 218 Cal. Rptr. at 216. The appellate court, however, decided that the beneficiaries were not secondary clients in this case. Id. at 285-86, 218 Cal. Rptr. at 218-19.
asserting the work product privilege. The trial court determined that a client has the right to require his or her attorney to disclose uncommunicated work product. In addition, the trial court decided that the fiduciary relationship between trustee and trust beneficiaries permits adversarial beneficiaries to compel discovery of the opinion work product of the trustee's attorney. The appellate court in Lasky acknowledged that strong policy considerations favor a client's absolute right of access to all work product generated by attorneys. The appellate court, however, reversed the decision of the trial court holding that the attorney is the exclusive holder of the work product privilege. The court concluded that denial of discovery fully supported the policy justifications for the work product privilege as stated in section 2016(h). The Lasky court, however, adopted a narrow holding and avoided the issue as applied to a client seeking a former attorney's work product in order to prepare a case against that attorney. The Lohman and Lasky decisions are not conclusive on this issue. Several courts have determined that the privilege is for the benefit of both the client and the attorney.

2. The Client and Attorney as Joint Holders of the Work Product Privilege

In Fellows v. Superior Court, the defendant insurance carrier in a bad faith action sought discovery of the work product of the plaintiffs' former attorney. The attorney had represented plaintiffs in their initial dispute with the insurer. Plaintiffs, who were in possession of the work product, asserted the work product privilege on behalf of the absent attorney. The Fellows court agreed that the attorney was the holder of the privilege. The court, however, held that the

98. Id.
99. Id.
100. Id. Both the trustee and the trust beneficiaries benefited from the trust. The trust beneficiaries were adverse to the trustee in regard to management of the trust. Id.
101. Id. at 279, 218 Cal. Rptr. at 214.
102. Id. at 278, 218 Cal. Rptr. at 213.
103. Id. "[T]he policy of this State is (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases, and (ii) to prevent an attorney from taking advantage of his adversary's industry or efforts." CAL. CIV. PROC. CODE §2016(h).
104. Id. at 279, 218 Cal. Rptr. at 214.
106. Id., 166 Cal. Rptr. at 276.
107. Id. at 60, 166 Cal. Rptr. at 277.
108. Id. at 65, 166 Cal. Rptr. at 280.
client may assert the privilege on behalf of the former attorney.¹⁰⁹ The court believed this interpretation to be in accord with the rules governing the various privileges set forth in the Evidence Code.¹¹⁰ Under these evidentiary privileges, a fiduciary may assert the privilege on behalf of the client.¹¹¹

The Fellows rationale is faulty in two respects. First, unlike the evidentiary privileges, no parallel statutory provision is provided in the work product privilege. Thus, the lack of statutory language supports the inference that only the holder of the privilege may assert the privilege.¹¹² Second, the ability to assert the evidentiary privileges on behalf of the client flows naturally from the duty the fiduciary owes the client.¹¹³ The client has no reciprocal fiduciary duty to protect the attorney. Thus, the policy of protecting an attorney’s privacy interest is endangered when a client, who is unskilled in the law, waives the work product privilege.¹¹⁴ The Fellows court appears to have settled on middle ground between the Lohman and Lasky decisions and the holding in Mack v. Superior Court.¹¹⁵

In Mack, the plaintiffs sought discovery of the work product of the defendant’s former attorney.¹¹⁶ Plaintiffs attempted to discover information concerning a real estate appraisal obtained and held by the former attorney.¹¹⁷ Defendants asserted the work product privilege on behalf of the former attorney to prevent discovery of the appraisal.¹¹⁸ The court, without elaborating, held that the work product privilege was created for the protection of the client as well as the attorney.¹¹⁹ The finding in Mack, however, has been criticized by subsequent courts.¹²⁰ Cases which have examined the issue outside

¹⁰⁹. Id.
¹¹². Sands, 2A Sutherland Statutory Construction §51.02 (4th ed. 1984). When a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed. Id.
¹¹³. Model Code of Professional Responsibility EC 4-4 (1981). A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client. Id.
¹¹⁴. Comment, The Work Product Doctrine in Subsequent Litigation, 83 Colum. L. Rev. 412, 433, (1983). The privacy the attorney needs is the privacy to prepare without interference from opponents and without fear that the material might be used against the interests represented. Id.
¹¹⁶. Id. at 9, 66 Cal. Rptr. 281.
¹¹⁷. Id.
¹¹⁸. Id.
¹¹⁹. Id. at 10, 66 Cal. Rptr. at 282.
¹²⁰. Lohman v. Superior Court, 81 Cal. App. 3d at 101, 146 Cal. Rptr. at 178 (the court
of the discovery context have held that the client owns the work product of an attorney.

3. The Client as Owner of the Work Product of an Attorney

The courts holding that the client owns the work product of an attorney address the issue in terms of the ethical duties of a discharged or withdrawing attorney. Under Rule 211(a)(2) of the California Rules of Professional Conduct, a discharged attorney must deliver to the client all papers and property to which the client is entitled. In *Kallen v. Delug*, an attorney refused to execute a substitution of attorney agreement or transmit the client’s files until an arrangement was made regarding fees. The court held that retaining a client’s case file after discharge or withdrawal is a breach of an attorney’s ethical duty.

An attorney’s work product belongs to the client whether or not the attorney has been paid for services rendered. In *Academy of California Optometrists, Inc. v. Superior Court*, an attorney placed a lien on a client’s case file for payment of fees. The file included pleadings, points and authorities, interrogatories, depositions, extensive notes, papers, memos and communications. The court held the lien invalid under Rule 211(a)(2).

The holdings in *Kallen* and *Academy of California Optometrists* have questionable precedential value for determining who holds the work product privilege, for several reasons. First, the courts did not stated that the reasoning in *Mack* was faulty because the thrust of the work product doctrine is to provide a privilege for the attorney, protecting the fruits of labor from discovery. The legislature could have given the client work product protection by simply stating so in §2016. *But see Fellows*, 108 Cal. App. 3d at 64-5, 166 Cal. Rptr. at 280 (the Fellows court criticized the Lohman decision for misreading the holding of *Mack*; *Mack* only held that in the attorney’s absence, the client may assert the privilege on the attorney’s behalf).

121. *See Kallen*, 157 Cal. App. 3d at 951, 203 Cal. Rptr. at 885; *Academy of California Optometrists, Inc.*, 51 Cal. App. 3d at 1006, 124 Cal. Rptr. at 672; *Weiss*, 51 Cal. App. 3d at 599, 124 Cal. Rptr. at 304.

122. CAL. RULES OF PROF. CONDUCT Rule 211(a)(2) states:

In any event, a member of the State Bar shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

123. *Id.* at 951, 203 Cal. Rptr. at 885.


125. *Id.*

126. *Id.* at 999, 1001, 124 Cal. Rptr. 668, 669 (1975).

127. *Id.* at 1004, 124 Cal. Rptr. at 671.

128. *Id.* at 1006, 124 Cal. Rptr. at 672.
discuss the issue of who holds the privilege in the discovery context. Second, the courts made reference to work product not as a client privilege but rather as client property. Finally, the extent to which the client is entitled to papers and property was not determined.

Examination of appellate court decisions in California does not conclusively resolve the issue regarding who holds the work product privilege. Lasky, the most recent case on point, concluded that the attorney is the exclusive holder of the work product privilege. The outcome in Lasky also seems to be supported by the apparent legislative intent of section 2016.

B. Legislative Intent

Unlike other statutory privileges, section 2016 is silent on the issue of who is the holder of the privilege. The legislative intent of the work product doctrine in section 2016, however, may be derived by comparing the proposed version of the Amendment with the version actually enacted by the legislature. The proposal of the State Bar Committee stated: [I]t is the policy of this state (i) to preserve the rights of parties and their attorneys to prepare cases... and (ii) to so limit discovery that one party or his attorney may not take undue advantage... (emphasis added). At the request of Judicial Council, the term parties was amended out of the proposal to insure that protection was accorded to attorneys. The enacted version of the policy statement reflects the request of Judicial Coun-
The absence of a specific declaration stating that the client holds the privilege, together with the enacted version of the Committee's proposal suggests that the attorney is the exclusive holder of the work product privilege.

In light of the *Lasky* and *Lohman* decisions and the legislative intent behind the 1963 Amendments to section 2016, the work product privilege appears to be held exclusively by the attorney. Since the client does not hold the work product privilege, the client cannot obtain discovery of a former attorney's work product without consent of the attorney. Clearly, however, under section 2016(b), a client can obtain ordinary work product by making the requisite showing of prejudice or injustice.

Discovery of opinion work product is not permitted, even by a former client, if the absolute protection accorded by section 2016(b) truly is absolute.

**IS OPINION WORK PRODUCT ABSOLUTELY PRIVILEGED?**

Section 2016(b) purports to create an absolute privilege against discovery of opinion work product. California appellate courts have interpreted the protection accorded opinion work product as being absolute. Moreover, the statutory language and legislative intent of the work product doctrine under section 2016(b) supports the conclusion that opinion work product is absolutely protected.

**A. California Appellate Court Interpretations**

California appellate courts have unanimously interpreted the protection accorded opinion work product as absolute. Two courts,
however, have expressed reservations about an attorney asserting absolute protection against a former client. In Rumac, Inc. v. Bottomley, the court held that an attorney's opinion work product is protected absolutely. Craig and Rumac were opposing parties in litigation. Craig served his former attorney, Bottomley, with a subpoena *duces tecum*. Bottomley moved for a protective order asserting that the documents were protected as opinion work product. Both Craig and Rumac opposed the motion. The trial court granted the motion with respect to some of the documents. Rumac appealed. The appellate court noted that since Craig, the attorney's former client, was not a party to the appeal, the court would not address the attorney's liability for asserting the privilege against the client's wishes. Asserting the absolute privilege against a former client would be statutorily correct. The court suggested, however, that an attorney asserting the privilege against a former client's wishes may be liable for damages proximately caused by the assertion of the privilege.

In Lasky, Haas, Cohler & Munter v. Superior Court, the court stated that strong public policy considerations exist for concluding that a client has a right of access to all work product generated by an attorney representing the client's interests. The court, however, stated that the language of section 2016(b) compelled the conclusion that the protection of opinion work product is absolute. The court narrowed the holding by acknowledging that far stronger public policy considerations are involved in discovery when the client seeks a former attorney's work product to prepare a case against that attorney. Other appellate courts have not expressed the same concern as the court in Lasky.


147. Id. at 813, 192 Cal. Rptr. at 105.
148. Id.
149. Id.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id. at 812 n.3, 192 Cal. Rptr. at 105 n.3.
155. Id.
156. Id.
158. Id.
159. Id.
While no California case exists which is directly on point,\textsuperscript{160} dicta in several cases suggest that a client may not compel discovery of a former attorney’s opinion work product. In \textit{Popelka, Allard, McCowan & Jones v. Superior Court}, attorneys from a law firm being sued for malicious prosecution were deposed concerning the prior case.\textsuperscript{161} Defendants asserted the absolute work product privilege under section 2016(b).\textsuperscript{162} The trial court entered an order compelling a member of the firm to answer the deposition questions.\textsuperscript{163} The appellate court, reversing the trial court, stated that filing a malicious prosecution action or, by the same logic a malpractice action, should not automatically open an attorney’s file to a prior action.\textsuperscript{164} The court stated further that an attorney, anticipating a future suit for malpractice or malicious prosecution, would hesitate to commit doubts about a case to paper.\textsuperscript{165} The concern expressed by the court regarding possible hesitation about recording thoughts was one of the primary reasons behind the work product doctrine enunciated in \textit{Hickman}.\textsuperscript{166} The precedential value of the \textit{Popelka} opinion as to discovery by a former client is limited. The party seeking discovery in \textit{Popelka} was an alleged victim of malicious prosecution, rather than a former client.\textsuperscript{167}

In \textit{Aetna Casualty & Surety v. Superior Court}, petitioner sought discovery of the opinion work product of the insurer’s former attorney.\textsuperscript{168} The petitioner claimed that the privilege against discovery was not absolute when a party establishes a compelling need.\textsuperscript{169} As an example, the petitioner claimed that discovery should not be denied when the attorney’s work product is the only evidence on an issue.\textsuperscript{170} The court agreed that ordinary work product is potentially discoverable, but held that opinion work product is absolutely protected.\textsuperscript{171} The potential discovery of opinion work product when the work product is the issue, however, was not addressed in \textit{Aetna}.\textsuperscript{172} Courts inter-

\textsuperscript{161} 107 Cal. App. 3d 496, 498, 165 Cal. Rptr. 748, 750 (1980).
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.} at 499, 165 Cal. Rptr. at 750.
\textsuperscript{164} \textit{Id.} at 501, 165 Cal. Rptr. at 751.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Hickman}, 329 U.S. at 511.
\textsuperscript{167} Id.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
interpreting the privilege accorded opinion work product have determined that the privilege is absolute. The language and legislative intent of the work product doctrine in California generally supports the conclusions of the courts.

B. Legislative Intent

According to section 2016(b), the opinion work product of an attorney "shall not be discoverable under any circumstances."\(^{173}\) The language providing for absolute protection of an attorney's opinion work product is clear and explicit.\(^{174}\) When the language of a statute is clear on its face, legislative intent as an aid to interpretation is unnecessary.\(^{175}\) Moreover, since the language of section 2016(b) offers no opportunity for compromise or variation, courts are not authorized to weigh or balance any competing interests between the party seeking discovery and the party resisting disclosure.\(^{176}\) Following these general principles of statutory interpretation, courts will inevitably hold that the protection accorded opinion work product is absolute.\(^{177}\)

Although establishing legislative intent is not necessary to determine whether the protection accorded opinion work product is absolute, legislative intent does support absolute protection. The language creating an absolute protection against discovery of opinion work product was drafted into the initial proposal submitted by the California State Bar.\(^{178}\) The proposal by the State Bar was modeled closely upon the proposal drafted by the Advisory Committee on Federal Rules of Civil Procedure, in 1946.\(^{179}\) The federal proposal, however, was

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177. See, Hogan, supra note 37, at 443 (the language of §2016(b) is so explicit that arguing that the immunity conferred on opinion work product is anything other than absolute is difficult).
178. Committee Report Administration of Justice, 37 Cal. St. B.J. 586 (1962). The proposal stated in pertinent part: "any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories shall not be discoverable under any circumstances." Id.
179. Comment, supra note 38, at 609. The proposal by the Advisory Committee on Federal Rules of Civil Procedure stated:

The court shall not order the production of inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial or production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.

Id. at 610.
never adopted by the United States Supreme Court. The Court chose to announce the work product doctrine in Hickman. The Hickman decision does not provide for absolute protection of opinion work product. The legislature is presumed to be cognizant of the meaning ascribed to words or phrases construed in earlier judicial decisions. Since the 1963 Amendments to section 2016 contain express language regarding absolute protection of opinion work product not present in the Hickman decision, the legislature is presumed to have intended to establish an absolute protection for an attorney's opinion work product.

The language and legislative intent behind the work product doctrine as interpreted by California courts support the conclusion that an attorney's opinion work product is absolutely protected. The decisional law has not created any clear-cut exceptions to the privilege. Any temperance of the absolute protection must come from legislative enactment or judicial development of the waiver principle.

C. Waiver As A Method For Discovery of Opinion Work Product

Since the attorney holds the work product privilege, only the attorney can waive the privilege. No statutory provision exists, however, for waiver of the attorney's work product privilege. Thus, development of waiver principles has come from decisional law.

The appellate court in Kerns Construction Co. v. Superior Court opened the door to discovery of opinion work product by holding that an attorney may not assert the work product privilege after effectively waiving the privilege. The attorney in Kerns revealed work product to a witness in order to refresh the witness' memory during

180. Id. at 609.
181. See supra notes 25-37 and accompanying text.
182. See supra note 35 and accompanying text.
184. But see Comment, supra note 38, at 611. Prior to enactment of the 1963 Amendments to §2016, one commentator suggested that the intention to treat opinion work product specially was to merely restore the status of witness statements taken by attorneys to the pre-Greyhound era. Id.
185. See supra notes 174-184 and accompanying text.
187. Id.
188. Lohman, 81 Cal. App. 3d at 101, 146 Cal. Rptr. at 178.
189. Jefferson, supra note 186, at §41.2.
190. Id.
a deposition.\textsuperscript{192} Opposing counsel sought discovery of the reports on the waiver theory.\textsuperscript{193} The court, permitted discovery and stated that waiver of the privilege serves the principle of the work product doctrine.\textsuperscript{194} In order to waive the work product privilege, an attorney must do more than tender the content of the work product in the litigation.\textsuperscript{192} Waiver only occurs when an attorney increases the opportunity of an adversary to obtain the information.\textsuperscript{196} Thus, waiver provides only a limited method for discovery of opinion work product.

Opinion work product is absolutely immune from discovery. Moreover, waiver principles do not readily permit access to opinion work product by a client.\textsuperscript{197} Strong policy considerations exist, however, when a client seeks a former attorney's work product.\textsuperscript{198} The competing policies regarding discovery of opinion work product must be evaluated to determine whether discovery should be compelled and in what circumstances discovery would be appropriate.

### COMPETING POLICIES REGARDING DISCOVERY OF OPINION WORK PRODUCT

#### A. Evidentiary Interest

The absolute protection accorded an attorney's opinion work product has created a dilemma for the client seeking discovery of a former attorney's work product in a legal malpractice action. Most legal malpractice claims are brought under tort theory.\textsuperscript{199} Therefore, to recover damages the plaintiff must show a fiduciary relationship giving rise to a duty, a breach of that duty, and that the breach proximately caused the plaintiff's injury.\textsuperscript{200} The fiduciary relationship, however, creates evidentiary problems for the plaintiff.\textsuperscript{201} First, the client may be unable to recognize the negligence of the attorney. The attorney-

\textsuperscript{192} Id. at 408, 72 Cal. Rptr. at 75.

\textsuperscript{193} Id. at 409, 72 Cal. Rptr. at 76.

\textsuperscript{194} Id. at 410, 72 Cal. Rptr. at 76.

\textsuperscript{195} See Schlumbarger Limited v. Superior Court, 115 Cal. App. 3d 386, 393, 171 Cal. Rptr. 413, 417 (1981); see also Popelka, Allard, McCowan & Jones v. Superior Court, 107 Cal. App. 3d 496, 502, 165 Cal. Rptr. 748, 752 (1980) (in both cases the content of the work product was tendered into issue by suing the attorney for malpractice or malicious prosecution).

\textsuperscript{196} Wolfson, \textit{supra} note 2, at 269. As a result, attorneys must be cautious about permitting clients or third parties to see their opinion work product. Hogan, \textit{supra} note 37, at 445.

\textsuperscript{197} See supra notes 143-196 and accompanying text.

\textsuperscript{198} Lasky, 172 Cal. App. 3d at 277, 218 Cal. Rptr. at 214.


\textsuperscript{200} Id. at §3:1.

\textsuperscript{201} Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 188, 491 P.2d 421, 428, 98 Cal. Rptr. 837, 844 (1971).
client relationship is generally an association of a professional and a layperson.\(^{202}\) The obligation of an attorney is to use the skill, prudence, and diligence commonly exercised by practitioners in the profession.\(^{203}\) A corollary to the professional’s skill is the layperson’s inability to recognize negligence of the professional.\(^{204}\) Discovery of the attorney’s working papers, including those containing opinion work product, may help the client recognize negligence. Access to a former attorney’s work product gives the client the opportunity to scrutinize the work performed at each stage of the representation with the aid of another attorney.\(^{205}\) Thus, issues regarding the attorney’s conduct may be efficiently narrowed to specific acts, rather than examining the representation as a whole. Narrowing of issues before trial is a recognized goal of the discovery process.\(^{206}\)

Second, not only may the client fail to recognize negligence, but often the client will lack the opportunity to view evidence of neglect.\(^{207}\) Much of an attorney’s work must be performed out of the client’s view.\(^{208}\) For example, a plaintiff suing for legal malpractice claiming that the attorney failed to research adequately\(^{209}\) might find that all the evidence is in the hands of the plaintiff’s former lawyer and protected as opinion work product.\(^{210}\) If discovery is not permitted, the client may not have a viable cause of action.\(^{211}\) Discovery is intended to assist in the administration of justice.\(^{212}\) Discovery should not be used to create injustice.

Uncovering facts and narrowing issues for trial are recognized goals of the discovery process.\(^{213}\) Thus, an important evidentiary interest is preserved by permitting discovery of an attorney’s opinion work

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\(^{202}\) Id.

\(^{203}\) Id. One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade. Restatement (Second) of Torts §299A (1965).

\(^{204}\) Neel, 6 Cal. 3d at 188, 491 P.2d at 428. 98 Cal. Rptr. at 844.

\(^{205}\) Id.

\(^{206}\) Wright, supra note 9, at §1.3.

\(^{207}\) Neel, 6 Cal. 3d at 188, 98 Cal. Rptr. at 844, 491 P. 2d at 428.

\(^{208}\) Id.

\(^{209}\) See Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (plaintiff alleged that attorney did not research adequately).

\(^{210}\) Neel, 6 Cal. 3d at 188, 491 P.2d at 428. 98 Cal. Rptr. at 844.

\(^{211}\) The doctrine of res ipsa loquitur has been found inapplicable in a legal malpractice action. See Wright v. Williams, 47 Cal. App. 3d 802, 810 n.3, 121 Cal. Rptr. 194, 200 n.3 (1975); see also, 7 C.J.S. 494 Attorney & Client §270 (1973). Res ipsa loquitur aids a plaintiff who is unable to sustain the requisite burden of proof due to the circumstances resulting in the injury. RESTATEMENT (SECOND) OF TORTS §328D (1965).

\(^{212}\) Comment, supra note 114, at 414.

\(^{213}\) Wright, supra note 9, at §1.3.
product by a former client preparing a malpractice case against that attorney. While strong evidentiary reasons exist to compel limited disclosure of an attorney's opinion work product, ethical obligations should also be considered.

B. Ethical Interests

An attorney asserting the privilege against a former client is no longer protecting the client's interests. The work product doctrine protects the interests of the attorney as an attorney. Thus, individual interests of the attorney are beyond the scope of the doctrine.

As a fiduciary, an attorney embraces an obligation to render full and fair disclosure to the client of all the facts that affect the client's rights and interests. Disclosure must be complete, and any material concealment or misrepresentation amounts to fraud. Thus, an attorney asserting the work product privilege against a former client may have already breached the fiduciary obligation to disclose. Compelling discovery of an attorney's opinion work product by a former client prevents the attorney from benefiting from a previous ethical violation by denying the client a cause of action. In addition, the California Rules of Professional Conduct state that an attorney may not attempt to exonerate him or herself from, or limit, in any way, personal liability for malpractice. Denying a former client evidence to prepare a case against an attorney by claiming work product protection is clearly an attempt to limit or prevent personal liability. Condoning a violation of an attorney's ethical duties is contrary to the public policy of California. Absolute protection of an attorney's opinion work product from disclosure to a former client preparing a case against that attorney condones the breach of an attorney's ethical duties. Respecting attorneys' ethical obligations is an important policy consideration favoring limited disclosure of opinion work product. Ethical interests, however, must be balanced against an attorney's proprietary interest in work product.

214. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free from compromising influences and loyalties. Model Code of Professional Responsibility EC 5-1 (1981).
216. Comment, supra note 114, at 431.
217. Neel, 6 Cal. 3d at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844.
218. Id. at 189, 491 P.2d at 429, 98 Cal. Rptr. at 845.
219. Id.
220. Id.
C. Proprietary Interests

The work product doctrine protects an attorney's proprietary interest in work expended on a case.\(^{223}\) The attorney has an economic interest in work product, therefore, subjecting the work to discovery by an opponent would be inequitable.\(^{224}\) In California, however, an attorney's proprietary interest is secondary to the interests of the client.\(^{225}\) Work product is prepared on behalf of a client and the client's proprietary interest is superior to the attorney's, even if the client has not paid for the work.\(^{226}\) Thus, discovery of an attorney's opinion work product should not be denied to a former client in order to further an attorney's proprietary interest.\(^{227}\) Although protecting an attorney's proprietary interest is not highly regarded in California, protection of the adversary system is a recognized interest favoring absolute protection of opinion work product.

D. Adversarial Interests

The work product privilege is a delicate balance between the competing interests of liberal discovery and protection of the adversary system.\(^{228}\) The doctrine prevents an incompetent or lethargic practitioner from taking advantage of an adversary's efforts.\(^{229}\) By concentrating on each party's unique interests in a lawsuit, opposing attorneys raise all relevant facts and possible interpretations of those facts at trial.\(^{230}\) Opinion work product merits special protection because after all the facts of a case are exposed, the only aspect that keeps the trial adversarial is the independent strategy and thoughts of each attorney.\(^{231}\) Protecting the attorney as an advocate protects the adversary system.\(^{232}\) Thus, the scope of the work product doctrine should be limited to the protection necessary to preserve the attorney's role

\(^{223}\) Comment, supra note 114, at 429.
\(^{224}\) Comment, supra note 8, at 292.
\(^{225}\) See Kallen, 157 Cal. App. 3d at 951, 203 Cal. Rptr. at 885; Academy of California Optometrists, Inc., 51 Cal. App. 3d at 1006, 124 Cal. Rptr. at 672; Weiss, 51 Cal. App. 3d at 599, 124 Cal. Rptr. at 304. See supra notes 121-132 and accompanying text.
\(^{226}\) See id.; see also Opinions of the Committee on Legal Ethics of the L.A. County Bar Assn. Opn. No. 330 (1972).
\(^{228}\) Comment, supra note 8, at 284. See also, Hickman, 329 U.S. at 497.
\(^{230}\) Comment, supra note 114, at 428.
\(^{231}\) Id. at 428-29.
\(^{232}\) Id. at 432.
as an advocate.\textsuperscript{233} The attorney in an individual capacity does not need protection.\textsuperscript{234} Thus, if denying discovery of work product serves the attorney's individual interest, rather than the attorney's interest as an advocate, the protection is overinclusive. An attorney is protecting individual interests when asserting the privilege against a former client preparing a case against that attorney. Consequently, the adversary system is not protected by an attorney asserting absolute protection of opinion work product against a former client. Moreover, an attorney's interest in trial preparation is not harmed by limited disclosure of opinion work product.

E. Trial Preparation Interests

The work product privilege is intended to influence an attorney's behavior as a client representative.\textsuperscript{235} In California, the policy of the privilege is to preserve the degree of privacy necessary to encourage attorneys to prepare cases thoroughly.\textsuperscript{236} Furthermore, attorneys should investigate the favorable and unfavorable aspects of each case.\textsuperscript{237}

In \textit{Hickman}, the Court stated that open discovery of work product would discourage lawyers from producing written material.\textsuperscript{238} As a result, lawyers would become overly dependent on memory.\textsuperscript{239} The legal profession, interests of clients, and the cause of justice would be poorly served.\textsuperscript{240}

File organization and maintenance is crucial in preventing many of the errors that result in malpractice claims.\textsuperscript{241} Arguably, potential discovery of opinion work product by a former client may lead attorneys to disregard the importance of file maintenance.\textsuperscript{242} Thus, compelling discovery may increase the likelihood of malpractice. One of the principal purposes of the work product doctrine is to promote

\begin{itemize}
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id. at 434.
\item \textsuperscript{235} Id. at 431-32.
\item \textsuperscript{236} CAL. CIV. PROC. CODE §2016(h).
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Hickman, 329 U.S. at 511.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Duplan Corp. v. Moulinage et Retorderie de Chavaroz, 509 F.2d 730, 736 (1974).
\item \textsuperscript{241} Smith, Preventing Legal Malpractice, at 10 (1981).
\item \textsuperscript{242} Popelka, 107 Cal. App. 3d at 501, 165 Cal. Rptr. at 751.
\end{itemize}
file maintenance and trial preparation. The need for adequate preparation, however, can be promoted by means other than the privilege against discovery of opinion work product. Self-protection is a strong incentive affecting the attitude and manner in which attorneys approach their responsibilities. Since trial preparation is protected by an attorney's self-interest, as well as by the work product doctrine, limited discovery of opinion work product will not jeopardize society's interest in thorough trial preparation.

Many competing interests exist regarding the discovery of an attorney's opinion work product by a former client preparing a case against that attorney. Perhaps the most compelling interest is that absolute protection may sustain breaches of an attorney's ethical duties to a client. Undeniably, however, protecting the adversary system and an attorney's ability to prepare a case thoroughly are important objectives. A compromise discovery procedure serving the interests of the client and the legal profession would be beneficial to each. Injured clients would have the means to obtain evidence necessary to bring a cause of action. The legal profession would avoid the appearance of impropriety caused by asserting a privilege against a former client.

Proposal

The California legislature expressly enacted an exception to the attorney-client privilege when the subject matter of the confidential communication is sought in an action arising from a breach of duty between client and attorney. A similar exception to the absolute protection of opinion work product should be enacted if the legislature determines that the policy justifications for compelling discovery outweigh the benefits of absolute protection. When an attorney's opinion work product is at issue, the need for discovery is great and an exception to the special protection accorded opinion should be available. The policies militating against discovery, however, must not be ignored. Opinion work product should remain absolutely privileged unless the party seeking discovery shows that: (1) the subject of the work product is at issue, (2) evidence of the negligence or misconduct is unavailable through any other source, (3) denial of

243. Id.
244. Mallen, supra note 16, at 130.
245. CAL. EVID. CODE §958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship. Id.
246. Comment, supra note 227, at 118.
discovery will leave the party with no other reasonable recourse, and (4) ethical breaches of duty are likely to occur.

Each requirement of this proposal is an attempt to limit the application of the exception to very unique circumstances. Requiring that the content of the work product be at issue ensures that discovery of opinion work product may only take place when attorney negligence or misconduct is an issue. Discovery of opinion work product should be allowed only in rare circumstances.247 When an attorney’s opinion work product in not an issue in the litigation the need for discovery is less than the putative interests to deny discovery.248

Requiring the plaintiff to show that evidence of neglect or misconduct is not available through any other source ensures that the plaintiff has exhausted all the possible sources for evidence. One of the policy objectives behind the work product doctrine is to promote thorough investigation of cases.249 This proposal is not meant to be used to enhance an injured party’s case. The proposal only provides the injured party with a viable cause of action. The plaintiff, however, still must present the case and sustain the burden of proof.250

Requiring a showing that the party has no other reasonable recourse recognizes that injustice must be the result if discovery is denied. Discovery principles were developed to improve the administration of justice.251 Injustice results when an injured party is uncompensated for an injury. The work product privilege should not be used to create an injustice.

Finally, requiring a showing of a breach of an ethical duty in order to allow discovery recognizes that an attorney owes a fiduciary duty to a client. State law must not condone breaches of an attorney’s ethical duty.252 When an attorney fully discloses relevant information affecting the client’s rights and interests, discovery of the attorney’s opinion work product in unnecessary. When an attorney does not disclose information to the client and further asserts the work product privilege against that client respect for the legal community is

247. In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977). Under Federal Rule 26(b)(3), opinion work product is not absolutely protected. Opinion work product, however, is accorded substantially higher protection than ordinary work product. Id. The court in Murphy stated that a crime or fraud exception might justify discovery of opinion work product. Id. at 337. The party seeking discovery of opinion work product under the crime or fraud exception must show (1) counsel was aware of crime or fraud, and (2) the documents sought bear a close relationship to the crime or fraud. Id. The party seeking discovery in Murphy, however, did not make the requisite showing and discovery was denied. Id.

248. See generally, Comment, supra note 227, at 118.

249. Wright, supra note 9, at §1.3.


251. Comment, supra note 114, at 414.

in jeopardy. Integrity in the legal profession is fostered by the fiduciary relationship, and therefore the relationship must not be compromised.\footnote{253}{Comment, \textit{supra} note 114, at 427.}

**CONCLUSION**

The absolute protection accorded an attorney's impressions, conclusions, opinions, or legal research and theories under section 2016(b) has the potential of creating a gross injustice to a client seeking discovery of a former attorney's work product. While the cases are inconclusive, if taken together with the legislative intent of section 2016(b), the attorney is the exclusive holder of the work product privilege in California. The protection accorded opinion work product under section 2016(b) is absolute. Strong public policy considerations suggest that in certain situations, the overall policy of liberal discovery and fair judicial determination of legal controversies require discovery of otherwise immune opinion work product. The California State legislature should incorporate a limited exception to the absolute protection accorded an attorney's opinion work product.\footnote{254}{At the time of this writing, the California State Legislature has introduced AB 169, which would amend much of the discovery provisions in the Code of Civil Procedure. The proposed provisions regarding work product retain the absolute protection accorded an attorney's impressions, conclusions, opinions, or legal research or theories provided by existing law. The January 8, 1986 version of AB 169 restates the policy provision as follows:

\begin{quote}
It is the policy of the state to assure to each party to an action, and to each party's attorney, insurer, consultant, surety, indemnitor, and agent, that degree of privacy for the product of their work in anticipation of litigation for trial that will (1) provide an incentive for thorough preparation of their case for trial (2) promote the investigation of not only the strengths but also the weaknesses of their case, and (3) prevent one party from taking unfair advantage of another party's industry and efforts.
\end{quote}

This author does not believe that the proposed amendments to existing law regarding work product will assist discovery of opinion work product by a former client. Since the Discovery Act is being rewritten, however, the time is ripe for legislative enactment of the proposal offered by this comment.}

A standard for discovery of opinion work product has been proposed that protects the interests of the client and the legal profession. This proposal is intended to create a very narrow exception to the absolute protection accorded an attorney's opinion work product. This proposal not only considers the fundamental concerns that underly the work product doctrine and the goals of the litigation process, but also considers the realities of modern discovery. The standard does not provide absolute certainty at the expense of practical considerations that pervade each case. The ultimate focus of any discovery standard must be fundamental fairness.

\textit{Thomas W. Hiltachk}