

SAN LUIS OBISPO COUNTY BAR ASSOCIATION PROBATE SECTION PRESENTATION
MARCH 28, 2018

ATTORNEY CONDUCTED INVESTIGATIONS: CONFIDENTIALITY, ETHICS AND “THE ART OF THE COLD CALL” BY SCOTT JURETIC

I. Attorney Investigation Confidentiality

A. City of Petaluma v Superior Court (2016) 248 CA 4th 1023

1. Attorney – Client Privilege (Evidence Code Sections 950-954)

a. Evidence Code Section 951

“Client”- a person who consults a lawyer for the purpose of retaining the lawyer or securing **legal service OR advice**.

b. An attorney-client relationship may exist when an attorney provides a legal service without also providing advice. “The rendering of legal advice is not required for the privilege to apply.” City of Petaluma, at page 1034.

c. “The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.” Upjohn Co. v United States (1981) 449 U.S. 383, 390-391.

d. Fact-finding which pertains to legal advice counts as “professional legal services.” U.S. v Rowe (9th Cir. 1996) 96 F.3d 1294,1297

e. The initial focus is on the “dominant purpose of the relationship,” rather than on the purpose served by the individual communication. Communications made during the course of the attorney-client relationship, including reports of factual material, are privileged, even if the factual material is discoverable by other means. Costco Wholesale Corp v Superior Court (2009) 47 C. 4th 725, 739-740.

f. The Attorney-Client Privilege is absolute (Evidence Code Section 954)

2. Attorney Work Product Doctrine (CCP Sections 2018.010 – 2018.030)

- a. “Work Product” is not defined by statute in California – It is open to judicial interpretation
 - 1. Witness statements obtained through attorney conducted interviews are work product. Hickman v Taylor (1947) 329 U.S. 495, 510-512
- b. “Client” is defined as in Evidence Section 951 (CCP 2018.010)
- c. Qualified privilege for general work product. May be overcome by showing of unfair prejudice or resulting injustice. (CCP 2018.030(b))
- d. Absolute privilege if a writing reflects an attorney’s “**impressions, conclusions, opinions or legal research or theories**”. (CCP 2018.030(a))
- e. “Writings” include any form of recorded information, including audio recordings, emails and photographs. Evidence Code Section 250, CCP Section 2016.020(c).
- f. “Witness statements **procured by an attorney** are entitled, **as a matter of law**, to at least qualified work product protection.” Coito v Superior Court (2012) 54 C. 4th 480, 496. Absolute protection is determined case by case. Coito, at page 495.
- g. Can recorded interviews conducted by non- attorneys be protected work product?
“...witness statements obtained as a result of interviews conducted by an attorney, **or by an attorney’s agent at the attorney’s behest**, constitute work product protected by Section 2018.030.” Coito, at page 494.

II. Ethical Considerations Re: Witness Contact and Interviews

A. Disclosures To Witnesses

- 1. Duty To Disclose? Identity, Representation?
- 2. False Disclosures
 - a. California Business and Professions Code Section 6128(a)

An attorney is guilty of a misdemeanor who “Is guilty of any deceit or collusion or consents to any deceit or collusion, **with intent to deceive the court or any party.**”

b. Fraud/Deceit

B. Contacting Party Employee Witnesses

1. Civil Litigation Cases

a. Former Employees

2. Workers Compensation Cases

a. Current Employees- Generally

b. Exceptions

C. Compensating Witnesses

1. California Rule of Professional Conduct 5-310(B)

“A member shall not: Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness **contingent upon the content of the witness’ testimony or the outcome of the case.**”

III. “The Art of the Cold Call”

A. Establishing Trust

1. Transparency

2. Courtesy

3. Cooperation

B. Standard Cold Call Voice Message

C. Dividends

IV. Closing Remarks