

Memorandum 2008-29

**Attorney-Client Privilege After Client's Death
(Comments of Los Angeles County Public Defender)**

The Commission is studying whether the attorney-client privilege should survive the client's death. This memorandum discusses comments by Michael Judge, the Los Angeles County Public Defender, in the attached letter. See Exhibit p. 1.

Mr. Judge disagrees with the staff's description of two exceptions to the attorney-client privilege in Memorandum 2008-8.

Prevention of Certain Criminal Acts

Mr. Judge objects to the portion of the memorandum that states:

The attorney-client privilege does not apply:

....

- If the attorney believes that disclosure is reasonably necessary to prevent a criminal act likely to cause death or serious harm. Section 956.5.

CLRC Memorandum 2008-8, p. 3.

Mr. Judge believes this point is misleading. He correctly says that Rules of Professional Conduct and the Business and Professions Code "give the attorney complete discretion to disclose, and expressly disclaim imposition of any duty to [disclose]." See Exhibit p. 1. He concludes, therefore, that Section 956.5 must mean that "an attorney cannot be *compelled* to testify under this exception unless he/she makes the initial determination to disclose the communication and in fact does disclose it." *Id.*

Evidence Code Section 956.5 states:

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act

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that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

If the attorney chose *not* to disclose, whether Section 956.5 applies seems unlikely to arise. In practice, therefore, it appears an attorney would have decided to disclose, based on the requisite belief of necessity, and would have actually made the disclosure before the exception would apply. The staff appreciates Mr. Judge's clarification of this point.

Moved or Altered Evidence

Mr. Judge also expresses concern about the portion of the memorandum that states:

The attorney-client privilege does not apply:

...

- To a criminal defendant's communication about the location or condition of evidence, if the attorney moves or otherwise alters the evidence. *Meredith*, 29 Cal. 3d at 695.

CLRC Memorandum 2008-8, pp. 3-4.

The quote above says that a criminal defendant's *communication* about the location or condition of evidence is not privileged if the attorney moves or otherwise alters evidence. That does appear to oversimplify it.

As the excerpt below from *People v. Meredith*, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981) explains, if the attorney moves or otherwise alters the evidence, its location and condition loses the protection of the privilege. But in a footnote, also excerpted below, the Court explains that the prosecution should try to avoid revealing the content of communications or the original source of the information. The Court stated:

We therefore conclude that whenever defense counsel removes or alters evidence, the statutory privilege does not bar revelation of the original location or condition of the evidence in question.^{8/} We thus view the defense decision to remove evidence as a tactical choice. If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege. Applying this analysis to the present case, we hold that the trial court did not err in admitting the investigator's testimony concerning the location of the wallet.

Fn 8/ In offering the evidence, the prosecution should present the information in a manner which avoids revealing the content of attorney-client communications or the original source of the information. In the present case, for example, the prosecutor simply asked Frick where he found the wallet; he did not identify Frick as a defense investigator or trace the discovery of the wallet to an attorney-client communication. In other circumstances, when it is not possible to elicit such testimony without identifying the witness as the defendant's attorney or investigator, the defendant may be willing to enter a stipulation which will simply inform the jury as to the relevant location or condition of the evidence in question. When such a stipulation is proffered, the prosecution should not be permitted to reject the stipulation in the hope that by requiring defense counsel personally to testify to such facts, the jury might infer that counsel learned those facts from defendant. (Cf. *People v. Hall* (1980) 28 Cal. 3d 143, 152 [167 Cal. Rptr. 844, 616 P.2d 826].)

Meredith, 29 Cal. 3d 682, 695, 695 n.8.

The staff apologizes for the oversimplification. The staff would like to thank Mr. Judge for bringing his concerns to our attention.

Respectfully submitted,

Catherine Bidart
Staff Counsel



MICHAEL P. JUDGE
PUBLIC DEFENDER

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EXECUTIVE OFFICE

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Law Revision Commission
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FL _____

Re: ATTORNEY-CLIENT PRIVILEGE AFTER CLIENT'S DEATH (STUDY K-350)

Dear California Law Commission:

At my direction, my Appellate Department has reviewed the Staff Memorandum to the California Law Revision Commission entitled "Attorney-Client Privilege After Client's Death (Scope of Study)" (Memorandum 2008-8). After such review, we have determined that the Memorandum contains two errors which should be brought to your attention and corrected. Those errors are listed below.

1. At page 3, under the heading "Exceptions to the Attorney-Client Privilege," the author states that there are several exceptions to the attorney-client privilege "where testimony of a confidential communication may be compelled." Listed thereafter is the following situation: "If the attorney believes that disclosure is reasonably necessary to prevent a criminal act likely to cause death or serious harm." (See Evid. Code § 956.5; see also Bus. & Prof. Code § 6068, subd. (e); Rule Prof. Conduct 3-100.) As phrased, the previous two statements are misleading. The attorney cannot be *compelled* to testify under this exception unless he/she makes the initial determination to disclose the communication and in fact does disclose it. This is the only logical interpretation when Section 956.5 is read in conjunction with Business and Professions Code section 6068, subdivision (e) and Rule of Professional Conduct 3-100, both of which give the attorney complete discretion to disclose, and expressly disclaim imposition of any duty to do so. Thus, if the attorney elects not to disclose the communication, it remains confidential and protected by the evidentiary privilege.
2. At page 4, under the same heading described above, the following additional exception to the attorney-client privilege is listed as a situation where testimony about a confidential communication may be compelled: "To a criminal defendant's communication about the location or condition of evidence, if the attorney moves or otherwise alters the evidence." This statement is similarly misleading. The case of *People v. Meredith* (1981) 29 Cal. 3d 682 is cited as the authority for the statement, but *Meredith* establishes no such rule. To the contrary, *Meredith* goes to great pains to prevent the jury from discerning that the criminal defendant was probably the source of the information about the location/condition of moved or

EX 1

altered evidence by requiring that “the information [be presented] in a manner which avoids revealing the content of attorney-client communications or the original source of the information;” by suggesting the matter be handled by stipulation if there is a risk of confidential communication being disclosed; and by forbidding the prosecution from rejecting a proffered stipulation for the purpose of getting the defendant’s confidential communication before the jury by inference. (*Id.* at p. 695, fn. 8.)

I have designated Terri Towery of my office to act as our contact on this issue. Ms. Towery can be reached at 590 Hall of Records, 320 West Temple Street, Los Angeles, CA 90012, by telephone at (213) 893-2545, or by email at Ttowery@pubdef.lacounty.gov.

Thank you for your consideration of this issue, and we look forward to the opportunity to provide further input on this important topic.

Sincerely,


MICHAEL P. JUDGE
Public Defender

MPJ:REK:fn
xc: Terri Towery