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Is a Prospective Client Entitled to Attorney Work Product Developed in the Course of Deciding Whether to Accept the Engagement?

By Joel A. Osman and Kevin Mohr. Joel A. Osman is senior counsel at Parker Shumaker Mills LLP in Los Angeles, where he concentrates his practice on litigation and trials; and is a former chair of LACBA's Professional Responsibility and Ethics Committee. Kevin Mohr is a professor at Western State College of Law in Fullerton, where he teaches contracts, law practice management, and professional responsibility; and is the vice chair of LACBA's Professional Responsibility and Ethics Committee. The opinions expressed by the authors are their own.

Lawyers regularly take a careful look at new clients and new matters before accepting a new representation. At a minimum, a review is necessary to clear conflicts. Frequently, a diligent practitioner will also undertake some preliminary investigation of the matter's merits or of the client itself before deciding to accept a particular engagement. If the practitioner declines the engagement, is the prospective client entitled to the attorney work product upon which the declination is based?

Consider the following scenarios:

1) **Prospective client X** calls Lawyer (L1) to discuss L1's representation of X in an employment discrimination case against X's former employer. L1 warns X not to disclose any confidential information to L1, noting that the firm must first check to see if there are any conflicts of interest that might preclude the representation. L1 checks for conflicts and discovers there are none.

However, L1 also checks a case service and learns that X filed similar lawsuits against two previous employers. Both suits were dismissed. L1 downloads the information and e-mails it to the firm's managing partner, M. M replies, "I wouldn't touch this client with a barge pole." L1 then calls X and informs him that L1 and the firm will not represent X. X asks if there was a conflict. L1 responds no, but the firm will not represent X. X requests that L1 provide him with the file the firm developed in determining whether to represent X. L1 refuses.

2) **Prospective client Z** meets with Lawyer (L3), to discuss L3's representation of Z in a case asserting a physical disability claim against Z's former employer. L3 explains that the firm must first check to see if there are any conflicts of interest that might preclude the representation. Z responds that he understands. Z also says he has medical reports from his

doctor supporting his claim. He asks L3 to take them so that if there are no conflicts, L3 can immediately begin work on the case. L3 explains that no work is done until a retainer agreement is signed, and that can't occur until after conflicts are cleared. Nevertheless, L3 accepts the medical records, which he places in an envelope and seals in Z's presence.

A conflicts check reveals none. Before reviewing Z's medical records to determine if the firm should accept the matter, however, L3 runs an Internet search and learns Z has a Facebook page. L3 discovers in Z's public Facebook area a series of photographs from a ski outing that Z had gone on the week before meeting with L3. L3 drafts a memo explaining his discovery and the reasons for rejecting the matter. He then places Z's sealed medical records in a mailing envelope that he mails with a non-engagement letter in which L3 states the firm has decided not to accept Z's representation. A few days later, Z calls and requests that L3 provide him with any file the firm developed in determining whether to represent Z. L3 refuses.

The idea that an attorney's work product should receive protection from discovery was first recognized by the U.S. Supreme Court in *Hickman v. Taylor*, which held: "In performing his various duties...it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[1] In succeeding decades, there were numerous efforts in California to codify the principles addressed in *Hickman*,[2] resulting in the current law under which an attorney's work product is protected by statute.[3] Absolute protection is afforded to writings that reflect "an attorney's impressions, conclusions, opinions, or legal research or theories."[4] All other work product receives qualified protection; such material "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice."[5]

The work product doctrine is inapplicable to disputes between an attorney and a client where "the work product is relevant to an issue of breach by the attorney of a duty to the client arising out of the attorney-client relationship."[6] Such **is not** the case in the scenarios set out above where no attorney-client relationship was formed, and thus there was no duty to have been breached.[7] Therefore the work product doctrine **does** provide a basis for denying the prospective clients' requests in each of these scenarios.

The attorney is the holder of the work product privilege.[8] Code of Civil Procedure Section 2018.020 provides: "It is the policy of the state to…(a) 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 the unfavorable aspects of those cases…." Logically, attorneys should be entitled to the same degree of privacy to investigate the pros and cons of prospective cases as they are in cases already pending. This is particularly true where, as in each of these scenarios, the prospective client has not paid any fee for the work product generated in the attorney's review of the prospective engagements.

Given the frequent criticisms leveled at the legal profession for its perceived role in helping create an overly litigious society, it is appropriate that practitioners be encouraged to

carefully review prospective engagements by protecting such reviews with the work product doctrine.

[1] Hickman v. Taylor, 329 U.S. 495, 510 (1947).

[2] For a thorough discussion of the legislative history, see the discussion in *Coito v. Superior Court*, 54 Cal. 4th 480, 488-93 (2012).

[3] Code Civ. Proc. §§2018.010 et seq.

[4] Code Civ. Proc. §2018.030 (a).

[5] Code Civ. Proc. §2018.030 (b).

[6] Code Civ. Proc. §2018.080.

[7] Although the duty of confidentiality is owed to prospective clients, (*see, e.g.*, State Bar Formal Ethics Op. 2003-161 and cases cited therein), each of the scenarios is carefully drawn to indicate that the duty was not breached.

[8] There are circumstances in which a client has standing to assert the privilege on behalf of a former attorney who is absent from the litigation. Meza v. H. Muehlstein & Co., 176 Cal. App. 4th 969 (2009).