



# DISCOVERY

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# DISCOVERY DEVICES

- ▶ Interrogatories: Form & Special

An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. C.C.P. § 2030.010 (b)

- ▶ Request for Production of Documents

- ▶ Request for Admissions

- ▶ Depositions, includes Subpoenas



# THE ZEN OF OBJECTIONS



# Critical Approach to Objections:

- ▶ Proper Objections
- ▶ Improper Objections
- ▶ No Boilerplate Objections

# RELEVANCY

## Code of Civil Procedure § 2017.010

- ▶ Unless otherwise limited by order of the court . . . any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property.

# RELEVANCY

## Go Fish:

- ▶ Discovery “rules are applied liberally in favor of discovery . . . , and (contrary to popular belief), fishing expeditions *are* permissible in some cases.” *Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.
- ▶ Any information sought by the propounding party is relevant if it might reasonably assist a party in evaluating the case, preparing for trial or facilitating settlement. *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1611-1612.
- ▶ However, the court will limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. C.C.P. § 2017.020(a)

# ATTORNEY-CLIENT PRIVILEGE

## Evidence Code § 954 – Attorney-Client Privilege

- ▶ Subject to Section 912 and except as otherwise provided in this article, 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 if the privilege is claimed by:
  - (a) The holder of the privilege;
  - (b) A person who is authorized to claim the privilege by the holder of the privilege; or
  - (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

# ATTORNEY-CLIENT PRIVILEGE

## Evidence Code § 952 – Confidential Communication

- ▶ “Confidential communication between client and lawyer” is defined as “information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.”



# ATTORNEY-CLIENT PRIVILEGE

## Evidence Code § 951 – Who is the “Client”?

- ▶ The “client” is a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

# ATTORNEY-CLIENT PRIVILEGE

## Evidence Code § 175 – Who is a “person”?

- ▶ “Person” includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company or public entity.
- ▶ A “person” does not include a Trust. *See Moller v. Sup. Ct.* (1997) 16 Cal. 4<sup>th</sup> 1124, 1132 n.3.
- ▶ A “person” does not include an Estate. *See Tanner v. Estate of Best* (1940) 40 Cal.App.2d 442, 445; *Estate of Ogier* (1894) 101 Cal. 381.

# ATTORNEY-CLIENT PRIVILEGE

## Evidence Code § 953 – Who is the holder of the privilege?

- ▶ The “holder of the privilege” is “(a) The client, if the client has no guardian or conservator. (b) A guardian or conservator of the client, if the client has a guardian or conservator. (c) The personal representative of the client if the client is dead, including a personal representative appointed pursuant to Section 12252 of the Probate Code. (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.”

# ATTORNEY-CLIENT PRIVILEGE

## Evidence Code § 912 – Waiver of Privilege

- ▶ Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege.
- ▶ A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege) . . . when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not waiver of the privilege.

# ATTORNEY-CLIENT PRIVILEGE

## Waiver of Privilege – Untimely Responses

- ▶ If a party to whom interrogatories are directed fails to serve a timely response, the following rules apply:

The party to whom the interrogatories are directed waives any right to exercise the option to produce writings under Section 2030.230, as well as any objection to the interrogatories, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). C.C.P. § 2030.290.

- ▶ See also C.C.P. § 2031.300(a) related to Request for Production of Documents and C.C.P. § 2033.280(a) related to Request for Admissions.

# ATTORNEY-CLIENT PRIVILEGE

## Exceptions to Attorney-Client Privilege Related to Estate Planning:

- ▶ Evidence Code section 957: No privilege applies to “a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession, nonprobate transfer, or inter vivos transaction.”
- ▶ Evidence Code section 959: No privilege applies to “a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document.”

# ATTORNEY-CLIENT PRIVILEGE

## Exceptions to Attorney-Client Privilege Related to Estate Planning:

- ▶ Evidence Code section 960: No privilege applies to “a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.”
- ▶ Evidence Code section 961: No privilege applies to “a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.”

# WORK PRODUCT DOCTRINE

Code of Civil Procedure § 2018.020:

It is the policy of the state to do both of the following:

(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.

(b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.



# WORK PRODUCT DOCTRINE

Code of Civil Procedure § 2018.030(a):

- ▶ Absolute Protection - A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
- ▶ “Material that includes an attorney's analysis and legal assessment constitutes attorney work product. . . Such writings enjoy absolute protection. *Bank of Am., N.A. v. Superior Court of Orange Cnty.* (2013) 212 Cal. App. 4th 1076, 1100-01.

# WORK PRODUCT DOCTRINE

## Code of Civil Procedure § 2018.030(b):

- ▶ Qualified Protection - The work product of an attorney, other than a writing described in subdivision (a), 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.
- ▶ In balancing the work product privilege against discovery, “the rule predicated on fairness articulated in the decisions is a shield to prevent a litigant from taking undue advantage of his adversary's industry and effort, not a sword to be used to thwart justice or to defeat the salutary objects of the Discovery Act. . . Accordingly, privilege statutes generally are narrowly construed, while discovery statutes are liberally construed.” *Nat’l Steel Prod. Co. v. Sup. Ct.* (1985) 164 Cal.App.3d 476, 487–88.

# WORK PRODUCT DOCTRINE

## Attorney Controls Work Product

- ▶ The work-product privilege is held exclusively by the attorney in all circumstances and that there is no exception to this rule as between attorney and client. *Lasky, Haas, Cohler & Munter v. Super. Ct.* (1985) 172 Cal.App.3d 264, 270.
- ▶ The attorney's absolute work product protection continues as to the contents of a writing delivered to a client in confidence. This is because the client has an interest in the confidentiality of the work product. *Wells Fargo Bank, N.A. v. Super. Ct.* (2000) 22 Cal.4<sup>th</sup> 201, 214.
- ▶ An attorney's right to assert a work product protection in the contents of a writing after it is delivered to the client strengthens the attorney-client relationship by enabling the attorney to evaluate his client's case and to communicate his opinions to the client without fear that his opinions and theories will thereafter be exposed to the opposing party or to the public in general for criticism or ridicule. *BP Alaska Expl., Inc. v. Super. Ct.* (1988) 199 Cal.App.3d 1240, 1260.

# WORK PRODUCT DOCTRINE

## Waiver:

- ▶ The work product protection may be waived by the attorney's voluntary disclosure or consent to disclosure of the writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing. *BP Alaska Expl., Inc. v. Super. Ct.* (1988) 199 Cal.App.3d 1240, 1261.
- ▶ A claim of work product may also be waived by failure to object or otherwise raise the claim, by tendering certain issues or by conduct between discovery and trial that is inconsistent with the doctrine. *BP Alaska Expl., Inc. v. Super. Ct.* (1988) 199 Cal.App.3d 1240, 1261.
- ▶ Work product loses statutory protection when used as an offensive weapon for cross-examination or to refresh the recollection of a witness. *Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814, 821–822.
- ▶ See also C.C.P. § § 2030.290(a), 2031.300(a), and 2033.280(a).

# PRIVACY

Discovery of information protected by a right of privacy is only discoverable if the information sought is directly relevant to the issue in litigation, and the need for the information outweighs the privacy interest at issue. Hence, the court must carefully balance the right of privacy against the need for discovery. *See Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal. 4th 1, 34-35; *Williams v. Superior Court*, 3 Cal. 5th 531, 553.

# THE ART OF WRITING MEET & CONFER LETTERS

- ▶ Required prior to filing a motion to compel. You must state facts showing “reasonable and good faith attempt” to resolve informally the issues presented by the motion before filing the motion. C.C.P. §§ 2016.040, 2030.300(b), 2031.310(b), 2033.290(b).
- ▶ Substance & Length – A practitioner’s viewpoint



# PRECEPTS OF SANCTIONS

# MISUSE OF THE DISCOVERY PROCESS

Code of Civil Procedure § 2023.010(a)-(i). The discovery statutes broadly define what constitutes such a misuse of the discovery process, including:

- ▶ Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.
- ▶ Using a discovery method in a manner that does not comply with its specified procedures.
- ▶ Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
- ▶ Failing to respond or to submit to an authorized method of discovery.
- ▶ Making, without substantial justification, an unmeritorious objection to discovery.



# MISUSE OF THE DISCOVERY PROCESS

Code of Civil Procedure § 2023.010(a)-(i). The discovery statutes broadly define what constitutes such a misuse of the discovery process, including:

- ▶ Making an evasive response to discovery.
- ▶ Disobeying a court order to provide discovery.
- ▶ Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.
- ▶ Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery.

# MISUSE OF THE DISCOVERY PROCESS

## Failure to Confer:

- ▶ A failure to confer is a separate basis for monetary sanctions. The court may award sanctions under Code of Civil Procedure § 2023.020, which provides: “Notwithstanding the outcome of the particular discovery motion, the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.”

# MISUSE OF THE DISCOVERY PROCESS

## Failure to Provide Responses:

- ▶ By failing to provide timely responses, you expose yourself to sanctions and waive any objections, including those based on any privilege or attorney work product. C.C.P. §§ 2030.290(a), 2031.300(a) and 2033.280(a).

# MISUSE OF THE DISCOVERY PROCESS

## Inadequate Responses:

- ▶ If you provide evasive, incomplete or insufficient responses, fails to produce all non-privileged responsive documents or objects without merit, the propounding party may also move to compel and seek sanctions against you and your client.  
C.C.P. §§ 2030.300, 2031.310 and 2033.290.

# MISUSE OF THE DISCOVERY PROCESS

## What Constitutes Monetary Sanctions:

- ▶ The court cannot award beyond the propounding party's reasonable expenses, including attorney's fees and costs for researching and preparing the motion and appearing at the hearing. *Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262.
- ▶ Note: Pro Pers are not awarded attorney's fees – only costs.



Thank you!  
Go forth and discover!