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CONFERENCE**

February 3, 2009

McCormick, Barstow, Sheppard, Wayte and Carruth LLP  
Anthony N. DeMaria, Partner

Self Insured Schools of California  
(SISC-II)  
Catherine Jones, Chief Administrative Officer




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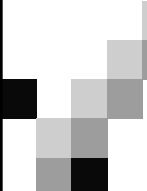
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**Civil Litigation, Investigation and  
Discovery: Protecting Your  
Investigative Materials**

February 3, 2009

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**Overview**

- ✓ Investigating to maximize protection from disclosure.
- ✓ Privileges and protections to protect investigative materials.
  - ✓ Attorney client privilege
  - ✓ Work product protection
  - ✓ CPRA protections
- ✓ Model claim and litigation examples.

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## Investigating To Maximize Protection From Disclosure

- Is this document/investigative material something you ever want the plaintiff or jury to see?
  - Create documents as if they will be exhibits to the jury
- When investigating sensitive matters, utilize forms of protections and privileges against future disclosures as much as possible.

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## Investigating To Maximize Protection From Disclosure

- Legal protections against disclosure of investigative materials:
  - The attorney/client privilege
  - The work product privilege protection
  - California Public Records Act protections

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## Attorney/Client Privilege

- The attorney/client privilege protects communications between the client and the attorney (Evid. Code Section 950-952).
- Communications between an insured and the defending insurance company are subject to the attorney/client privilege (*Travelers Insurance Companies v. Superior Court* (1983) 143 Cal.App. 3d 436-448).
- Communications between self-insured entity risk managers and entity employees can be protected by the attorney/client privilege (*Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529, 534-536).

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## Attorney/Client Privilege (Continued)

- The attorney/client privilege is absolute, and cannot be forced into disclosure regardless of relevance, necessity or other circumstances (see, *Diversified Industries, Inc. v. Meredith* 572 F.2d 596, 602 (8<sup>th</sup> Cir. 1977)).
- The attorney/client privilege applies to matters in litigation and not in litigation (it is not a litigation privilege).

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## Attorney/Client Privilege (Continued)

- The attorney/client privilege applies to in-house counsel as well as outside counsel.
  - In-house counsel must be acting in a legal capacity, not as a business executive, in order for the attorney/ client privilege to apply (*Upjohn Company v. United States* 449 U.S. 383 (1981)).
- When in-house communications are made for the purpose of investigating claims, the attorney/client privilege should apply.

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## Attorney/Client Privilege (Continued)

- Communications between the lawyer and/or client and experts about matters on which the expert's opinion is needed for the lawyer to properly serve the client are protected by the attorney/client privilege (see, e.g., *People v. Lines* (1975) 13 Cal.3d 500; *City and County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 234).
- Such experts would include physicians, engineers and accountants (*Jefferson's California Evidence Benchbook* 3d Ed., Vol. 2, Section 40.12, p. 906).

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## Attorney/Client Privilege (Continued)

- The attorney/client privilege can be applied to claims investigations as follows:
  - Direct communications between the liability claims adjusters and the insured/entity employees;
  - Direct communications between the attorneys (in-house or outside) for legal consultation;
  - Communications between the attorneys and experts for the purpose of conducting attorney work on the matter;
  - Communications between risk managers and employees of the defendant entity/company, under certain conditions.

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## Attorney/Client Privilege (Continued)

- A risk manager of an entity or company, including self-insured entities, can maintain the attorney/client privilege in engaging in communications with its own employees, including statements, through the following:
  - Require that the statements/reports be prepared by entity employees or entity agents as a regular course of the risk management department plan under the directive of its legal advisor (e.g., when an auto accident happens, a report is immediately directed to the risk manager by the driver of the car)

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## Attorney/Client Privilege (Continued)

- Print on the reports/statements themselves that the reports/statements are "confidential" and that they are "attorney/client privilege".
- Provide the reports/statements to the risk manager and/or counsel if they have been retained, with the risk manager being the agent of the attorney (purpose of the statement/report is for transmittal to the attorney and the attorney's agent).

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## Attorney/Client Privilege (Continued)

- Keep the reports/statements confidential and limit the number of people who see them.
  - See, *Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529, 534, 536.

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## Attorney/Client Privilege (Continued)

- For corporation use of the attorney/client privilege by its employee communications to corporation attorneys, see, *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723.

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## Attorney/Client Privilege (Continued)

- Use of the *Scripps* rule by public entities:
  - Have a standing rule in place that matters of potential liability are required to be reported immediately to the in-house risk manager, for the risk manager's communication to the attorney (if there is in-house counsel, then the communication is to the in-house counsel).
  - The communication is marked "confidential" and "attorney/client privilege", and is not shared outside if the risk manager and legal counsel.

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## Work Product Privilege and Protection

- The work product privilege and protection protects writings that reflect the impressions, conclusions, opinions, legal research and theories of the attorney or the attorney's agent (CCP Section 2018).
- These work product materials include:
  - Notes, reports, sketches and writings of investigators and experts of the attorney

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## Work Product Privilege and Protection (Continued)

- Reports and tests generated by experts retained by the attorney.
- Communications, reports and written opinions of the attorney and the attorney's investigator (see, *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626; *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480).

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## Work Product Privilege and Protection (Continued)

- The work product doctrine protects materials "interpretive" of the attorney's strategy, intended lines of proof, evaluation of strengths and weaknesses, inferences and critical information from interviews and statements (CCP Section 2818; *State Farm File & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625; *Hickman v. Taylor*, 329 U.S. 495, 510-511, 1947).

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## Work Product Privilege and Protection (Continued)

- In California state court cases, the work product privilege and protection applies to both litigated cases (matters prepared in anticipation of litigation) and to non-litigated matters (see, e.g., *Aetna Casualty & Sur. Co. v. Superior Court* (1984) 153 Cal.App.3d 467) (see, Fed. Court Rule, requiring "anticipation of litigation"; FRCP 26(b)(3)).

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## Work Product Privilege and Protection (Continued)

- Writings that reflect the attorney's impressions, conclusions, opinions, legal research or theories are subject to an absolute work product privilege (such as the attorney's legal research memos, writings that show the attorney's legal theories and conclusions) (CCP Section 2018.030(a)).

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## Work Product Privilege and Protection (Continued)

- Work product materials that are only derivative of the attorney's impressions and conclusions, such as diagrams or charts, audit reports and photographs, are subject only to a qualified work product privilege, and the plaintiff may obtain these documents by proving to a court that there is "good cause" to obtain the materials because either the plaintiff will be unfairly prejudiced (and cannot obtain those documents or materials himself) or that there will be a resultant injustice of the materials are not turned over (CCP Section 2018.030(b); *Jefferson's California Evidence Benchbook*, 3d Ed., Vol. 2, Section 41.1, p. 938). (As applies to civil cases.)

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## Work Product Privilege and Protection (Continued)

- Recorded statements of independent witnesses (non-employee witnesses) are subject to a trial preparation (good cause) requirement, which is a showing by the plaintiff that the plaintiff cannot obtain these statements himself (see, e.g., *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2<sup>nd</sup> 355, 389-391, 399-401).
- - Recorded statements are not subject to the work product privilege or protection, but are protected by the required showing of good cause.

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## Work Product Privilege and Protection (Continued)

- Material that is not subject to the work product privilege or protection:
  - The identity or location of material objects or evidence (names or identities of witnesses)
  - Material objects that are themselves admissible into evidence (the actual rock over which someone tripped)
  - Written or recorded statements of prospective witnesses (though the separate trial preparation "good cause" requirement does protect these statements)

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## Work Product Privilege and Protection (Continued)

- Expert reports are also subject to the work product privilege, except that when the expert is put forth as an expert witness who will testify at trial under CCP Section 2034, all of that expert's work and communications are open for discovery to the plaintiff.
- The work product privilege and protection applies to agents of the attorney, including investigators, who perform work at the attorney's direction (see, e.g., *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626; *Jefferson's California Evidence Bench Book*, 3d Ed., Vol. 2, Section 41.20, p. 948).

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## Work Product Privilege and Protection (Continued)

- Public entity use of the work product privilege:
  - Have litigation adjusters and investigators obtain the necessary statements (whether recorded or not)
  - Conduct investigations and obtain information at the direction of legal counsel
  - Sensitive matters can and should include legal interpretations and theories on the materials
  - Have clear policy that the investigation is pursuant to litigation plan

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## California Public Records Act (CPRA) (continued)

- CPRA applies to every state and local agency and office in California, including political subdivisions (Govt. Code Section 6252(b)(d)).
- Non-profit auxiliary corporations established by law are not "state agencies," such as public university booster clubs (Govt. Code Section 6252(a); *California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 829-830).

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## California Public Records Act (CPRA) (continued)

- CPRA protections apply to requests for documents made at any time, whether there is litigation pending or not (Govt. Code Section 6250, et seq., and as applies to pending litigation, see, *Board of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889, 899; *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414).

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## California Public Records Act (CPRA) (continued)

- Exemptions to CPRA requests (which can also be used during litigation):
  - Litigation records: Any records "pertaining to pending litigation to which the public agency is a party" are exempt until the litigation is finally adjudicated or otherwise settled" (Govt. Code Section 6254(b)).
    - This exemption applies only to documents specifically prepared for use in the litigation and does not apply to documents which are otherwise available to the public, such as deposition transcripts (*Fairley v. Superior Court* (City of Long Beach) (1998) 66 Cal.App.4<sup>th</sup> 1414, 1420-1422; *Board of Trustees of California State University v. Superior Court* (Copley Press, Inc.), (2005) 132 Cal.App.4<sup>th</sup> 889, 898-901).

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## California Public Records Act (CPRA) (continued)

- Personnel records are exempt from production under CPRA (Govt. Code Section 6254(c)).
- Personnel, medical and "similar files" are exempt from production under the CPRA (Govt. Code Section 6254(c)).

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## California Public Records Act (CPRA) (continued)

- The CPRA exempts from production any other document whose production is prohibited by federal laws or state laws under Government Code Section 6254(k).
- Such other state or federal laws prohibiting production would include the attorney/client privilege, the work product privilege and protection, medical peer reviews, spousal privileges, Brown Act protections under Government Code Section 54950 and student and pupil records under Education Code Section 49076.

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## Model for Use of Privileges and Protections

- Personal injury claim is made informally to the public entity.
  - Risk manager immediately requires, as part of the regular process of addressing potential claims, that a confidential/attorney/client privilege statement is made by public entity witnesses (attorney/client privilege)

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## Model for Use of Privileges and Protections (continued)

- Under the direction for the legal plan for investigating potential claims, a litigation adjuster takes statements of other potential witnesses, either recorded or not recorded (attorney/client privilege and work product protection)
- Photographs of the areas of the injury, and the potential mechanism of the injury, are taken and provided to the risk manager (work product privilege, potentially discoverable later)

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## Model for Use of Privileges and Protections (continued)

- A diagram is handcrafted by the litigation adjuster, depicting where he believes people were located and what he believes they did in the occurrence of the injury (work product privilege)
- A report is drafted under the plan for responding to claims and potential liability, summarizing the impressions, conclusions and likely exposures of the matter, for presentation to and use by legal counsel (attorney client and work product privilege)

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## Model for Use of Privileges and Protections (continued)

- Some documentation describing involvement in the event are placed in employee files for public entity employees (CPRA exemption and employment/personnel file privileges, not necessarily absolute)
- Risk manager and liability adjusters communicate with legal counsel, in writing, about their impressions of the case, and receive correspondence back from legal counsel regarding the same (attorney client privilege, absolute)

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## Model for Use of Privileges and Protections (continued)

- In determining liability, counsel provides information to an expert engineer who reviews the matter and advises counsel on his opinions (work product privilege and attorney client privilege, preserved unless the expert is later put forth for use at trial).
- Plaintiff requests all of these documents from defense in discovery and defense attorney objects to all categories as privileged/protected (including non-employee witness statements, protected by the "good cause" requirement).
  - Counsel may choose to turn over photographs if they are helpful to the defense case.

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## Model for Use of Privileges and Protections (continued)

- Counsel does disclose the names and addresses of witnesses so that plaintiff can set those depositions himself in order to obtain his own information, but counsel and the public entity do not turn over their own statements and investigative materials.
- If plaintiff proceeds with the case and does not use his or her own investigative materials to both find the witnesses and evidence, and ask the appropriate questions to gain information from the witnesses and evidence, then plaintiff may never learn what the public entity already knows through its own industry.

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# Questions ?

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# Thank You

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