Combatting the "privilege defense" when you represent a lawyer who was fired

Pursuing the rights of attorneys against discrimination and wrongful termination by law firms

By Pieter Bogaards

Representing attorneys in employment actions against their former law firms presents serious potential ethical and discovery pitfalls. Our profession is not immune from illegal employment practices, but any action on behalf of a wronged attorney will likely be met with claims of immunity based on Attorney-Client Privilege (ACP), Attorney Work Product (AWP) and the Litigation Privilege. Anti-SLAPP motions may also be filed on a claim that an employment discrimination action is premised upon a law firm's protected petitioning activity – i.e., your client was terminated for sub-par performance in his/her legal representation of the defendant firm's Non-Party Clients (NON-PTY-CLT).[1]

The gist of the defense is that the defendant law firm would sincerely like to be able to explain the faulty performance of your attorney client which led to his/her termination, but they are lamentably barred by their ethical obligations to the NON-PTY-CLT.[2] The defense would seriously restrict the ability of any attorney from raising the issue of improper discharge where the defense to the claim was purportedly incompetent legal work that involved the use of privileged or confidential information. Such a broad application of the privilege would effectively remove the protection of the wrongful termination statutes from most attorneys who regularly use privileged information.

Unfortunately, there is legal support for the defense position, and courts have held that dismissal of a lawsuit is mandatory where claims – and essential defenses – are based on privileged information. Where a discharged attorney's claims against the employer cannot be established without breaching the attorney-client privilege, "*the suit must be dismissed in the interest of preserving the privilege*."[3]

Therefore there are a number of critical considerations in analyzing, or preparing, a case against a law firm or corporate in-house legal department, on behalf of a former attorney, including:

• Avoid any claim which requires your client to rely on privileged information or documents, unless based upon information or documents for which any NON-PTY-CLT involved has waived ACP.[4] Though there is a balancing test for the court to apply if the defense relies on ACP and AWP for its defenses, there is none if your client relies on such information of documents for his/her claims;

• Prepare to face repeated efforts to dispose of your client's case entirely with the argument that the employer's defense relies on *essential* ACP communications and confidential information related to the firm's NON-PTY-CLT, whose cases your client will be accused of having mishandled in various unspecified ways, which the defense further claims cannot be disclosed due to the obligation to protect the APC and confidences of the same NON-PTY-CLT;

• Prepare to hunker down for a discovery battle, and do not let slide conclusory discovery responses that the basis for termination relates to unidentified privileged matters constituting your client's sub-par performance of legal services on behalf of a NON-PTY-CLT, none of which are explained;

• Be inventive regarding finding alternative non-privileged sources of information and documents related to the purported basis for your client's termination in the public record, filed pleadings, correspondence with opposing counsel, exchanged discovery responses, etc.

***Example*:** Defendant law firm claims that your plaintiff, who was terminated shortly after return from surgery, was allegedly terminated for having failed to file a verified answer to a verified complaint, further obstructing discovery on claim that all relevant and essential documents and information rests in privileged documents which cannot ethically be disclosed. Evidence to refute the pretextual defense may be found in numerous non-privileged sources, including:

• Timing of filed pleadings in Court Docket, which may demonstrate that:

  Non-verified answer was filed by other counsel or before the plaintiff attorney was associated in the case;

  No effort was ever made by defendant law firm to later file an amended verified answer, in the months;

  No Motion to Strike Answer, or to Amend the Complaint, was filed by any party in the action;

• No evidence that the issue was ever raised to attorney plaintiff or to the NON-PTY-CLT, absence of warning or discipline short of termination;

• Never addressed in correspondence with opposing counsel;

• Lack of any injury to firm or NON-PTY-CLT;

• Evidence that other attorneys in firm have been publicly sanctioned for pleading and discovery abuse or sued for malpractice which has actually damaged firm and NON-PTY-CLT, without any adverse employment action. In this regard when a law firm states that the terminated attorney fell below their acceptable standard of practice, it opens up the question of what that standard is, much of which will be evident in the public record, including its more costly and serious errors;
• Prior to the surgery, the attorney client was described by the managing partner of the firm as a "*key player*" on the litigation team. After surgery, he/she is claimed to "*not be a team player*;" and
• Defendant themselves offer declarations which misstate the law, such as supervising partner declaration that a non-verified answer exposed NON-PTY-CLT to immediate judgment [*not without prior motion, for which court would liberally grant leave to file an amended verified answer*], or that a Motion for Judgment on the Pleadings could be sought after trial commenced [*it cannot, the defect is waived if not previously raised pursuant to noticed motion*.]

Conclusory non-specific responses do not limit defendant's claims

One cannot accept evasive and conclusory discovery responses and then comfortably rest on the theory that the defense has failed to articulate any specific factual basis for the termination, and is therefore essentially without a defense at trial. The core defense is that the defendant law firm employer is barred from presenting any such exculpatory evidence due to the Rules of Professional Conduct, and therefore the case *must* be dismissed. It is incumbent upon the plaintiff attorney to demonstrate that this is not the case.

Court may not review privileged documents or information

Nor can one rely on Court assistance – without the principles noted below. Generally, the court cannot compel disclosure of information claimed to be privileged, even for an in camera review to rule on the claim of attorney-client privilege.[5,6] Similarly absolute AWP may be shielded from Court review.[7]

The Court's *"Equitable Arsenal"* and *"Aggressive Managerial Role"*

But there are also very important tools to demonstrate that ACP and AWP would not be compromised, and/or is not *essential* to the defense, or is not even privileged in the first place. The accurate test is best and most authoritatively stated as follows:

> [A] court may take the extraordinary step of dismissing a plaintiff's claim on the ground that an attorney defendant's due process right to present a defense is compromised by the defendant's inability to present confidential information in support of that defense only in the rarest of cases.

(*Dietz v. Meisenheimer & Herron*, (2009) 177 Cal.App.4th at pp. 794, 771.)

> If dismissal were required whenever a lawyer's ethical duties prevented the lawyer from presenting evidence having *any* relevance to the action, without respect to the materiality of the evidence, the 'drastic action' of dismissal would become commonplace.

(*General Dynamics Corp. v. Superior Court*[8], (1994) 7 Cal.4th at p. 1190.)" (*Dietz, supra,* 177 Cal.App.4th at p. 792,) [*People ex rel. Herrera v. Stender*, 212 Cal.App.4th 614, 646-47, 1ast modified (Jan. 16, 2013)]

It would be grossly improper for the Court to simply dismiss a case based on the claim that privileged information *might* be involved in the defense in some unspecified way. As the Court held in *General Dynamics,* trial judges can minimize the dangers to the legitimate privilege interests such cases may present by taking an "*aggressive managerial role*," (*General Dynamics, supra.*) and it is a collaborative effort of plaintiff counsel and the Court, vigorously opposed by the defense, to assist in the management of discovery in the case.

The *"Balancing Test"* for defense claims of reliance on privileged documents

Before dismissing a case on the ground that defendant law firm's due process right to present a defense would be violated by the defendant's inability to disclose a client's APC and/or confidential information, a court must apply a *balancing test* comprised of at least four factors:
• The evidence at issue must be the client's confidential information, *which the client insists on keeping confidential*;
• The evidence must be "*highly material to the defendants' defenses*";
• The trial court must determine whether it could "effectively use '*ad hoc* measures from [its] equitable arsenal,' including techniques such as redaction, 'sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, *in camera* proceedings,' so as to permit the action to proceed"; and
• The court "should consider whether it would be 'fundamentally unfair' to allow the action to proceed." (*Dietz, supra,* 177 Cal.App.4th at pp. 792-794.) The last of these considerations "is an extension of the principle that, '[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield.'" (*Chevron Corp. v. Pennzoil Co.* (9th Cir. 1992) 974 F.2d 1156, 1162.) [*People ex rel. Herrera v. Stender*, A131625, 2012 WL 6808475 (Cal. Ct. App. Dec. 4, 2012), as modified (Jan. 16, 2013)][9]

The foregoing requires extensive briefing, a strategy which foresees the pitfalls and constant diligence. It is the duty of the plaintiff attorney to press the issue and move for the necessary aggressive judicial management.

Privilege Log, Protective Order and Notice to NON-PTY-CLTs

The recommendations below are drawn from issued court orders which detailed the procedures for discovery, obligations of the defendant to provide

evidence of both privilege and that the NON-PTY-CLT has been fully informed of the issue and actually claimed APC. To that extent the article is more anecdotal illustration than what would have to be a much more lengthy and detailed legal treatise. In most cases, once the discovery battle is fought and the following matters addressed, and the orders for production issued, is when serious and realistic settlement discussions finally commence.

Protective Order

Because of the sensitive privilege issues, you should prepare to file a Protective Order at the outset of the case to facilitate the Court's application of the equitable *ad hoc* measures. This places you in the unusual position of seeking a Protective Order for documents largely held by the defense, and the ironic argument of the defense that no Protective Order should apply, except a blanket order barring any discovery of unilaterally claimed privileged information. The proposed Protective Order should provide for notice to subject NON-PTY-CLTs – once the law firm identifies which are related to its defenses – and a form of Privilege Log to meet the requirements of *Dietz, Herrera, Rickley*, etc., and for limited dissemination. It is important to both your client and to protect the interests of the NON-PTY-CLTs – to whom your client also has a continuing post-termination ethical obligation to protect their APC and confidential information.

In one case, based upon plaintiff's motion, the Court ordered a protective order with the conditions listed below:

• Redact client names and identifying information from public disclosure or court filings to preserve their identity, including pleadings or documents attached as exhibits. For the same reason do not include NON-PTY-CLT names or identifying information in your own pleadings. The benefits of redaction dwindle when the names are previously revealed[10];

• Adhere to use of a Client Legend utilizing "Doe" or numerical references in place of NON-PTY-CLT names in any filings or public disclosure which may include confidential information;

• Production of documents which may include work-product should be limited to those portions necessary to understand the supervision and evaluation of your attorney client's work, and any criticisms, or any defenses to such criticisms, of your client's performance;

• Submit documents for which there is a qualified AWP objection – or includes AWP which the defense has placed at issue in the case – to the Court for *in camera* hearing; and

• Establish a procedure for the designation of any information disclosed at a deposition as confidential and for attorney's eyes only in an effort to fully ensure there is no public dissemination of any privileged information.

Privilege Log

The first step in the analysis is for the defense to provide a detailed Privilege Log, which you can anticipate they will adamantly refuse to do. However, without it, the Court will not be able to conduct an evidentiary hearing to determine whether it is able to effectively use *ad hoc* measures from its *equitable arsenal*, including techniques such as redaction to protect privileged information.[11,12,13]

The Court must order the defendant to provide sufficient factual information so that the Court is able to assess any claim of privilege. In doing so, one court in an attorney discharge case ordered the defendant law firm to provide the following information when objecting on the basis of privilege:

1. Identify documents claimed to be privileged and the nature of the privilege (e.g., whether ACP or AWP)[14];
2. Identify who the document is from and/or who created the document;
3. Identify the sender, the recipients and anyone who reviewed the documents, including anyone outside privilege;
4. Identify whether Plaintiff was a recipient of the information or the drafter of any document, or if the information was available for her review while employed by defendant as a licensed attorney, in the course of such employment;
5. Identify the type of protection claimed and whether the protection is claimed on behalf of a party or client (i.e., attorney-client privilege; and/or attorney work product);
6. Identify what case the document is associated with;
7. Identify the general nature of the mistake made by Plaintiff with respect to the document that provided the reason for termination (e.g., missed a relevant issue or overlooked applicable law);
8. If the mistake was the result of Plaintiff omitting information from a document, such as a case analysis, identify what the omission was (e.g., failed to analyze relevant law, failed to recommend appropriate discovery);
9. Explain whether there are any attachments to the allegedly privileged documents. If there are any attachments, explain whether these attachments were used for other purposes which are not privileged (i.e., such as a pleading or a letter from opposing counsel);
10. Explain whether a NON-PTY-CLT has asserted a claim of privilege;
11. Provide NON-PTY-CLT contact information;
12. Identify if case is filed in public record (e.g., pleadings, deeds, etc.);
13. Explain whether defendant is claiming that the document/information is "highly material" or "pertains to the central disputed issues" and the factual basis for such claim[15];
14. Explain the nature of the documents (e.g., Case Evaluation, Letter to Client, Inter-office Memorandum).
15. Identify which individuals were involved in the termination decision, who reviewed the alleged privileged documents.

The California Supreme Court's decisions in this area indicate that the Court is to ascertain whether the assertion of privilege is so central that the protection of privileged information

requires a dismissal of what would otherwise be a perfectly viable lawsuit. The foregoing list would be useful if you find yourself demanding a Privilege Log.

Verification of facts in Privilege Log

Any detailed Privilege Log should be verified by knowledgeable attorneys employed with the defendant who were principally responsible for preparing the Privilege Log. An itemized Verification should:

• State that all documents called for in the requests have been produced or, if they were subject to any privilege, they have been listed on the Privilege Log.
• Include a signed certification by attorneys who have reviewed each alleged privileged document that the information on the Privilege Log correctly describes the document by date, author, recipient, description, and other factual information listed on the Privilege Log.

Defendants will argue that there is no obligation to verify a legal determination regarding identification of a legal privilege. However, the foregoing Privilege Log contains extensive factual information, and facts must be verified.[16]

Notice to NON-PTY-CLTs

Once the NON-PTY-CLTs whose APC or confidentiality interests are disclosed in a detailed Privilege Log, you have another means of debunking the defense claims. One means is via a court ordered notice regarding the case to all identified NON-PTY-CLTs whose privileges are invoked by the defense.

Often the NON-PTY-CLTs may like your attorney client, who likely directly represented their interests, better than the defense law firm whose most notable contribution was to send them invoices. To the extent there is APC involved, they may waive the privilege either completely, or in a more select manner related to the specific defense claims. However, you cannot rely on the defense to provide a neutral or informed notice, and you can further expect that they will scream about *ex parte* communications if you directly contact the NON-PTY-CLTs, whether there is continuing representation or not.

Therefore, it may be advisable to include a Notice provision in any draft Protective Order. Propose a focused written notice – to just those whom the defendant identifies as relevant to its defenses. The Court may issue the notice, advising NON-PTY-CLTs of their right to retain or waive the privilege in regards to the documents listed in the revised Privilege Log. The Notice should also provide an explanation of how NON-PTY-CLTs identifying and APC information could be protected. A NON-PTY-CLT may prefer and accept a surgical and limited waiver, or disclosure which protects their identity and APC, to the alternative of the parties tromping through the public record or a less judicially managed procedure.[17]

Alternate sources of non-privileged or confidential documents

A detailed Privilege Log should reveal alternate non-privileged sources to investigate. The bulk of any client file in a law practice is not privileged, and a defendant's claims will likely relate to matters for which the subject NON-PTY-CLT has provided a written release, and/or are based upon court filed documents, correspondence with opposing counsel, and documents which can be redacted, filed under seal, limited to its admissibility, etc. to prevent the public disclosure of privileged or confidential information. Admissible evidence to refute defenses based upon APC or AWP in NON-PTY-CLT cases may be found in:

• The public record, including court filings and dockets related to any claim that your client produced sub-par work;
• Non-privileged correspondence with opposing counsel in the cases your client handled regarding discovery, continuances for filing of Motions for Summary Judgment, etc.
• Propounded discovery and discovery responses related to claims that your client failed to propound discovery, and/or that later propounded discovery provided substantive information resulting in settlement;
• Non-confidential settlement or filed release documents to demonstrate that your client had successfully settled cases for which defendants may now seek to find micro-managed faults;
• Inter-Office management communications, which do not contain any privileged information, confirming that the errors defendants now seek to attribute to your client to justify his/her termination were originally alleged to be errors of other partners and attorneys;
• Evidence of similar – or even more serious – infractions by other attorneys in the defendant law firm for which they were not terminated. As in one case where the managing partner of the defendant firm had been sanctioned heavily for discovery abuse, and been sued for malpractice and the defendant firm lost hundreds of thousands of dollars, without consequence to the attorneys involved.

A defendant's claims may be refuted with non-privileged documents which may be discovered and admitted as evidence. To that end you must diligently pursue discovery seeking further responses and production by the defendant, and anticipate pursuing subpoenas for non-privileged documents from other sources such as opposing counsel in the relevant cases, many of whom may be happy to cooperate.

First step – RPC Rule 3-500D and *Chubb*

An attorney client is entitled to retain documents

In some cases we must struggle to protect – or face surrender of – documents presented by a client which were acquired in the course of, and related to, the client's employment. However, the rules differ in cases of attorneys who retain *copies* of NON-PTY-CLT documents for whom they provided legal services. Trial courts have held that the general

rule that client papers must be promptly returned to the client is not intended to prohibit a member from making and retaining *copies* of the papers released to the client following termination of the member's services[18]. There are a variety of important reasons to permit a former attorney to retain a copy of client documents, such as needing to justify client fees when disputed, or defending a malpractice suit or explaining why an attorney has acted appropriately. It is critical that the attorney clients have access to these documents to refute claims by the defendant law firm that his/her performance was inadequate and/or might constitute malpractice. Plaintiff has every right to retain these documents and use them – within the strictures of the ethical rules and Court direction – to counter such defense claims.

Entitled to share documents with counsel

Moreover, thanks to the hard work of the firm of Levy, Vinick, Burrell & Hyams, an appellate court has recently confirmed the threshold question of whether the attorney client and his/her own counsel may review such client's NON-PTY-CLT documents without facing disqualification, or worse. In the case of *Chubb & Son v. Superior Court* (2014) 228 Cal.App.4th 1094, 1106 the court held that the disclosures to the attorney client's own counsel:

• Would not be a *public* disclosure, but a disclosure solely to the attorneys representing the parties in the wrongful termination case and that these attorneys would be precluded from further disclosure by the rules requiring attorneys to maintain confidences of their own client;

• Would be limited to information each party reasonably believes is necessary for the attorney's preparation and representation in the case. (*Fox Searchlight, supra,* 89 Cal.App.4th at pp. 310-311.)

• Fundamental fairness requires that the plaintiff attorney be allowed to make a limited disclosure to his/her attorneys to the extent necessary to prepare his/her claims. (*Fox Searchlight, supra,* 89 Cal.App.4th at p. 311), and

• Disclosure of the alleged privileged communications and confidences to the parties' respective attorneys ultimately helps to *protect* the privilege and, thus, its holder, by allowing counsel to make judgments about what is disclosable and what is not (*Fox Searchlight, supra,* 89 Cal.App.4th) and equip the court with the factual and legal arguments needed to evaluate any claimed privilege. (*Chubb & Son v. Superior Court v. Paladino* (2014) 228 Cal.App.4th 1094, 1108-09.)

Though you may review the documents, if they indeed are APC or confidential, you will still be prohibited from admitting or using them, directly. However, as noted above, they may indicate alternate means of discovering admissible evidence, securing NON-PTY-CLT waiver, or undermining the defense claim of how "essential" they actually are.

Conclusion

Representing attorney clients is vastly rewarding. Correcting bad behavior within our profession is important and necessary. But one must acknowledge that these are not cases of formulaic checkers. It is three-dimensional chess. The foregoing is more anecdotal and illustrative than an exhaustive legal analysis. For each position taken or recommendation made, anticipate that the defense will provide equally persuasive counter argument and authority. But it is a place to start, and to plan, when doing the important work of representing our colleagues who have been wrongfully terminated, harassed, faced retaliation and been discriminated against. Even an attorney needs good counsel now and again.

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As a law student he had the privilege to clerk for Prudence Kay Poppinck, author of the Poppinck Act. He received his J.D. from the University of San Francisco School of Law 1982. Prior to law school, he received a Master's in Rehabilitation Counseling, working with the Independent Living Project, an agency devoted to enhancing access and "habilitation" for the disabled.


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Endnotes

[1] The panoply of defenses and privilege issues cannot be fully addressed herein, but there are several practical steps which should be appreciated when evaluating or initiating a claim, and planning discovery, in a case filed on behalf of an attorney against a law firm or corporate in-house legal department.

[2] Contrary to the notion that attorneys are difficult or overbearing clients, they are generally knowledgeable, helpful and engaged. Their professional experience better prepares them for the struggles and digressions of litigation and discovery. Unfortunately, their former defense firm and corporate employers have proven far less understanding and cooperative.

[3] *General Dynamics Corp. v. Sup.Ct. (Rose)*, supra, 7 C4th at 1190-1191, 32 CR2d at 18; see Cal. State Bar Form.Opn. 2012-183 "*attorney may not disclose employer/law firm's confidential client information in pursuing wrongful termination claim against employer/law firm*"

[4] Since in the Tri-partite relationship the carrier will claim it is also a holder of the privilege, and is unlikely to waive its claim of APC in an action against its own counsel, this is risky, even if the insured is on your client's side and has waived the privilege. Case law provides that both holders of the privilege must waive, and no one holder can do so unilaterally,

[5] Evid Code, § 915(a); *Southern Calif. Gas Co. v. Public Util. Comm'n* (1990) 50 C3d 31, 45, 265 CR 801, 809, fn. 19; see also *Costco Wholesale Corp. v. Sup.Ct. (Randall)* (2009) 47 C4th 725, 736-737, 103 CA3d 758, 767; *Zimmerman v. Sup.Ct. (People)* (2013) 220 CA4th 389, 402, 163 CR3d 135, 144-145.

[6] A disclosure order is no less intrusive because it only requires in camera inspection of attorney-client privileged documents. No statutory or other provision allows such inspection. [*Southern Calif. Gas Co. v. Public Util. Comm'n*, supra, 50 C3d at 45, 265 CR at 809, fn. 19; *Bank of America, N.A. v. Sup. Ct. (Pacific City Bank)* (2013) 212 CA4th 1076, 1100, 151 CR3d 526, 544 — documents on privilege log (see CCP § 2031.240(c)) not subject to disclosure for in camera inspection]

[7] Attorney work product protection is separate and distinct from the attorney-client privilege. [*People ex rel. Lockyer v. Sup.Ct. (Pfingst)* (2000) 83 CA4th 387, 397, 99 CR2d 646, 653-654 (disapproved on other grounds in *People v. Sup.Ct. (Laff)* (2001) 25 C4th 703, 718, 107 CR2d 323, 335, fn. 5)] CCP § 2018.030 does not confer a discovery "privilege." Indeed, unlike privilege, work product protection is not necessarily "absolute". Another distinction is that the *attorney* who created the work product – usually your client - is the exclusive "holder" of work product protection, and not the NON-PTY-CLT. [See, *Fellows v. Sup.Ct.* (*Allstate Ins. Co.*) (1980) 108 CA3d 55, 63, 166 CR 274, 279-280; Ev.C. § 953. Cases directly analyze the issue in the context of third-party adversaries attempting to obtain discovery of the attorney's work-product. There has never been a case which holds that an attorney may be barred from discovery of that attorneys *own work product* on the basis of a work product doctrine. Moreover, AWP generally is subject to the same waiver principles

applied to the APC. [*Regents of Univ. of Calif. v. Sup.Ct. (Aquila Merchant Services, Inc.)* (2008) 165 CA4th 672, 678–679, 81 CR3d 186, 190–191] Attorneys may be found to have waived (or be estopped from claiming) absolute *work product* protection for their opinions, conclusions, by tendering certain issues, as where they proffer your client's purportedly sub-par work product as a defense to your client's claims, thereby placing the AWP at issue. [See, *DeLuca v. State Fish Co., Inc.* (App. 2 Dist. 2013) 158 Cal.Rptr.3d 761, 217 Cal.App.4th 671; *Harding v. Dana Transport, Inc.* (D NJ 1996) 914 F.Supp. 1084, 1099]. In an employment discrimination action, the employer's injection of an issue concerning the adequacy of investigation undertaken by its attorney into allegations of hostile work environment results in a waiver of both the attorney-client and attorney work product privileges regarding investigation. [*Wellpoint Health Networks, Inc. v. Superior Court* (App. 2 Dist. 1997) 68 Cal.Rptr.2d 844, 59 Cal.App.4th 110.] If in your case the defendants places the quality of your client's work product at the center of its defense to his/her claims of discrimination and wrongful termination, the AWP has arguably been waived. Defendants cannot both assert the importance of your client's work product as the gravamen of their defense, and then assert the work product protection to bar your client from being able to receive the same work product. At minimum your client's own work product should be submitted for *in camera* review, whether it is absolute or qualified, with redaction of any APC which cannot be reviewed by the Court.

[8] The *General Dynamics Corp*. opinion focused primarily on the attorney-client privilege. As a practical matter, however, the same result would follow from the obligations inherent in a lawyer's duty of confidentiality. [See *Chubb & Son v. Sup.Ct. (Lemmon)* (2014) 228 CA4th 1094, 1104, 176 CR3d 389, 397 - client confidences "*may or may not be subject to the attorney-client privilege, but must nonetheless be kept confidential by the attorney so as not to cause the client or former client embarrassment or harm*"]

[9] S*ee also Chubb & Son v. Superior Court,* 228 Cal.App.4th 1094, 1105–06 (2014); *Preston v. City of Oakland*, No. 14-CV-02022 NC, 2015 WL 577427, at 4 (N.D. Cal. Feb. 11, 2015)

[10] **Redaction:** In order to protect the identity of NON-PTY-CLTs, and avoid inadvertent disclosures, courts have ordered that the parties prepare — and include as part of the Privilege Log — a chart utilizing numbers and/or letters to indicate the case and NON-PTY-CLT name, so that the name of the case and client name do not appear on the Privilege Log. There must be a clear identification of what each number and letter means which is then supplied to the Court in a sealed envelope. Specifically, a list should be prepared which includes:
Name of the case;
Court in which the case was filed;
Case number, and the names of clients in the case;
Generic description of each case without a reference to where it was filed or the client name utilizing whatever numerical or other designation is selected
State whether the case is pending or not pending, and if the case was resolved, when the case was resolved or dismissed;
Generic description of NON-PTY-CLTs. For example, "Case PI" might be described as an attorney malpractice case involving claims of failing to comply with statute of limitations where the defendant law firm represents the attorney and malpractice insurer.

The cases can be designated in numerical order from, e.g. "C 1 - C13." The clients can be designated "NON-PTY-CLT I-NON-PTY-CLT 13" or more. This procedure will further shield the identity of the NON-PTY-CLT from direct disclosure in the Privilege Log and allow for discussion and reference in any filed pleadings. [See, *People ex rel. Herrera v. Stender*, 212 Cal.App.4th 614, 650, 152 Cal.Rptr. 3d 16, 47 (2012), as modified (Jan. 16, 2013), review denied (Mar. 20, 2013).] (Emphasis added.)]

Where an otherwise admissible document contains inadmissible hearsay or information that is privileged or invades the privacy rights of another, the Court may order the inadmissible portions cut out ("redacted") or thoroughly concealed before it is received in evidence. [See *People v. Fairchild* (1967) 254 CA2d 831, 839, 62 CR 535, 540—photograph used for identification had inadmissible information written on the back; photo admitted only after inadmissible writing concealed.

[11] See, *Dietz v. Meisenheimer & Herron* 2009) 177 Cal.App.4th 771, 793, 99 Cal.Rptr.3d 464; see *id.* at pp. 781–784, 99 Cal.Rptr.3d 464 [discussing evidentiary hearing; *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th at p. 1190, 32 Cal.Rptr.2d 1, 876 P.2d 487; *Rickley v. Goodfriend*, 212 Cal. App. 4th 1136, 1165-66, 151 Cal. Rptr. 3d 683, 708-09 (2013), review denied (Apr. 10, 2013), reh'g denied (Feb. 5, 2013); and *People ex rel. Herrera v. Stender*, 212 Cal.App.4th 614, 619, 152 Cal. Rptr. 3d 16 (2012), as modified (Jan. 16, 2013), review denied (Mar. 20, 2013)] The identity of an attorney's client is not considered within the protection of the attorney-client privilege. [*People v. Chapman* (1984) 36 Cal.3d 98, 110, 201 Cal.Rptr. 628, 679 P.2d 62; *Hays v. Wood* (1979) 25 Cal.3d 772, 785, 160 Cal.Rptr. 102, 603 P.2d 19.]

[12] Common sense requires that a privilege log be prepared so that the court may have the facts to determine whether the privilege claim has merit. *Best Products, Inc. v. Superior Court* (2004) 119 Cal.App.4th 1181, See also, *D.I. Chadbourne, Inc.,* at p. 729, 36 Cal.Rptr. 468, 388 P.2d 700; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123, 68 Cal.Rptr.2d 844.

[13] Evidence Code section 915 also does not prevent a court from reviewing the facts asserted as the basis for the privilege to determine, for example, whether the attorney-client relationship existed at the time the communication was made, whether the client intended the communication to be confidential, whether the communication emanated from the client, or whether the APC has been waived or disclosed to parties outside of the privilege. (*Cornish,* at p. 480, 257 Cal.Rptr. 383.) [*Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 737, 219 P.3d 736, 744 (2009)]. The Court must have the opportunity to review, and the plaintiff to challenge, any self-serving defense claims of privilege.

[14] Where both the ACP and AWP are claimed, each assertion of privilege must be followed by an explanation for the grounds being asserted. (E.g., (i) if APC is asserted, defendants must provide factual non-privileged information sufficient for the Court to determine the validity of the claim of privilege, (ii) if AWP is asserted, defendants must provide factual non-privileged information sufficient for the Court to determine the validity of the claim of privilege). Where both privileges are being asserted for a specific document, there should be a clear factual explanation for why such privilege is asserted. For example, if the document is a communication between two attorneys at the defense law firm it might be subject to the AWP. In claiming the privilege, this should be explicitly stated as the reason for the claim of privilege. If the communications between the attorneys at the defense law firm also involve ACP communications with or about confidential client information, there would be a basis for assertions of both AWP and ACP. If this is the case, this should also be explicitly explained to provide grounds for the claimed privilege.

[15] Defendant's Privilege Log must also contain a substantive evaluation of how important each requested document is to the case (i.e., does the document contain evidence that plaintiff was somehow derelict in his/her professional capacity? Does the document contain an appraisal of plaintiff's professional performance, either positive or negative?). Ideally, the evaluation should contain factual non-privileged information and an evaluation should contain a five-tiered numeric system which will allow the Court to determine how "*essential*" to the defense each document may be:
HIGHLY CRITICAL
VERY CRITICAL
IMPORTANT BUT NOT CRITICAL
BACKGROUND
INCIDENTAL

[16] See, *Herrera, supra*, which held that: It has long been the accepted practice that when an attorney includes time sheets or invoices as exhibits to supporting declarations, an attorney will *redact* all privileged attorney-client information. [See Ev.C. §§ 952, 954; and detailed discussion of "confidential communications"] Courts have held that " '(C)ourts should impose partial limitations rather than outright denial of discovery,' " when by doing so otherwise affected constitutional rights may be preserved. (*Valley Bank of Nevada v. Superior Court*, 15 Cal.3d 652, 658, 125 Cal.Rptr. 553, 542 P.2d 977; See also, *Dept. of Air Force v. Rose*, 425 U.S. 352, 375, 96 S.Ct. at 1592, 1605, 48 L.Ed.2d 11; *City & County of S. F. v. Superior Court*, 38 Cal.2d 156, 162-163, 238 P.2d 531; *Bristol-Myers Company v. F. T. C*. (D.C. Cir.) 424 F.2d 935, 938-939; This principle of appropriate deletion has obtained statutory recognition in California for Constitutionally protected privacy information. (Civ.Code, s 1798.1, subd. (c) - Information Practices Act of 1977states that if information was received: "*This may be done by providing a copy of the text of such material with only such deletions as are necessary to protect the identity of the source or by providing a comprehensive summary of the substance of the material*...." (Civ.Code, s 1798.38; emphasis added.)

[17] In your application inform the Court that you are concerned that the NON-PTY-CLTs have not received impartial advice and in some cases may have received incorrect advice relating to the privilege, i.e., advice that your client was improperly withholding privileged documents. A defendant law firm in advising NON-PTY-CLTs of whether to continue to assert the privilege has different interests than it did when it was simply representing those NON-PTY-CLTs. Specifically, if all critical documents to the defense are held to be privileged and no ameliorating measures may be taken by way of redaction or other prophylactic measures, the defendant may be entitled to have your client's case dismissed irrespective of its merits. Accordingly, it is critical that a notification be prepared that sets forth the situation in neutral terms as to the issue of privilege, and narrows the scope of any waiver of APC to just matters relevant to the defendant law firm's defensive claims. This will provide the NON-PTY-CLTs an objective statement on which they can reach a reasonable decision as to whether to continue to assert the privilege, or to only waive the privilege in certain respects, for example, by consenting to the Court only reviewing the privileged documents or to more narrowly waiving the privilege in order to expedite the resolution of the pending litigation. Many may prefer to have their identifying information shielded as a "Roe" or "NON-PTY-CLT #1" and waive APC on that basis, than risk having their information placed in the public record when admissible evidence is discovered. It will allow the NON-PTY-CLT to control what information enters the record.

[18] *See* Rules of Professional Conduct 3-700(D)(1) and Discussion: "Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client; Rules of Professional Conduct 1-100(B)(2) defines "member" as a member of the state bar of California.