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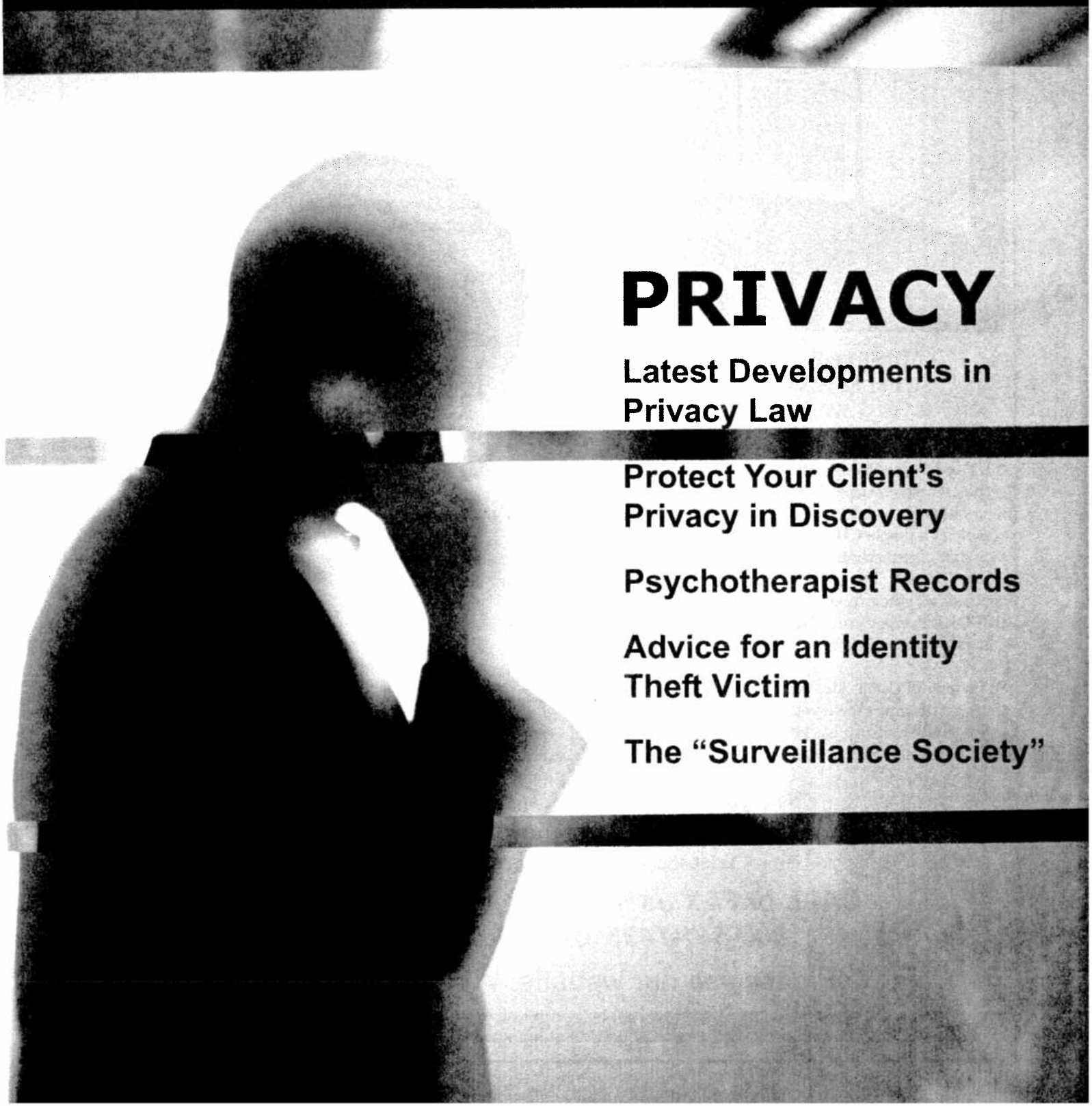

PRIVACY

Latest Developments in Privacy Law

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Defense Attorneys as the Thought Police: Proving Damages While Preserving Your Client's Privacy in Personal Injury Litigation

By Shaana A. Rahman

In George Orwell's novel *Nineteen Eighty-Four*, the Thought Police were secret police tasked with uncovering and punishing *thoughtcrime*, i.e. the mere thought of challenging ruling authority. In order to retain his individuality, and document his private thoughts for the future, the main character, Winston Smith, begins to keep a diary of his thoughts. He did so with the knowledge that while the keeping of a diary was not illegal, "if detected it was reasonably certain that it would be punished by death, or at least by twenty-five years in a forced-labour camp." (Orwell, George, *Nineteen Eighty-Four*, Part 1, Ch. 1.)

While in the year 2007, our clients do not have to fear the Thought Police, per se, the issue posed by this article is whether our clients' private thoughts, reduced to writing in a personal diary or calendar are within the zone of privacy such that they may be protected from production to defendants. If such items are "private" should they be withheld, and if so, at what cost?

The Overbroad Request

Defense attorneys have been, and will continue to be, increasingly aggressive in their attempts to gather information that they believe will be potentially harmful to plaintiffs, due in part to plaintiffs' attorneys who let defense counsel get a foot in the door of their clients' privacy in an effort to avoid a motion to compel. An example of this aggressive inquiry can be seen in the following requests for production of documents:

> 1) All DOCUMENTS, including but not limited to calendars, diaries, schedules, or photographs, which refer or relate to YOUR schedule of activities from one (1) year before the INCIDENT to the present.
>
> 2) All DOCUMENTS, including but not limited to personal notes, letters, e-mails, calendars, diaries, schedules, or photographs which refer or relate to the injuries YOU claim to have suffered as a result of the INCIDENT.

When propounding such discovery, defendants argue that information regarding prior activities, and documents relating to the subject are discoverable as they are an element of damages and relate directly to the nature and extent of plaintiff's injuries, including any residual injuries. They further contend that in order to evaluate a plaintiff's claims, they are entitled to obtain a "full picture" of plaintiff's life before and after the incident. In amassing this information, defendants also assert that any information, reduced to writing, regarding a plaintiff's injuries is directly relevant to the issue of damages.

Clearly, if diaries or calendars are created at the direction of the plaintiff's attorney during litigation, or in anticipation of litigation, objections can be raised on the grounds of attorney-client privilege or work-product. However, such documents created solely by the plaintiff, prior to retaining a lawyer and/or without contemplation of litigation, fall into a legal grey area that has not been addressed by courts in the personal injury context. It is in this situation that a decision must be made regarding the efficacy of objecting to the discovery request.

The Argument for Privacy

Article 1, section 1 of the California Constitution provides, in relevant part, that "[a]ll people are by nature free and independent and have inalienable rights. Among these are ... pursuing and obtaining safety, happiness, and privacy."

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(Calif. Const. Art. 1, § 1.) The California Supreme Court has held that while the right to privacy is qualified and not absolute,[1] highly relevant, nonprivileged information can be protected from the discovery process if the disclosure of such information would impair an individual's "inalienable right of privacy" as provided by Article 1, section 1. (*Britt v. Sup. Ct.* (1978) 20 Cal.3d 844, 855-856.)

It is important to note that discovery of private information must not be ordered if the information sought is available from other sources or through less intrusive means. (See, *Allen v. Superior Court* (1984) 151 Cal.App.3d 447, 449; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 856 [discovery "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"].)

Several areas of privacy have been identified by various California courts, including, membership in associations, personal finances, medical records, personnel records, faculty selection proceedings, marital relationship, sexual relations, auto accident reports to the CHP, a newsperson's confidential sources, insurance claims files, juvenile court records, arrest records, communications between patient and psychotherapist, statements made in confidence to an ombudsman, and contents of a private investigator's investigation, subject to certain limitations.[2]

While the issue of the privacy interest a plaintiff may have in a diary or calendar has not been addressed in the civil litigation context, courts have peripherally discussed the issue of diaries in the context of criminal cases and 4th Amendment search and seizure issues.[3]

Often, distinctions will be made between a "private" diary or calendar, i.e., a document completed prior to the incident or that is an amalgamation of non-injury related entries and injury-related entries, and a litigation diary or calendar, i.e., documents created for the sole purpose of chronicling the plaintiff's injuries and the impact their injuries have had on their daily activities. Such a distinction should be immaterial to an analysis of privilege as such distinctions allow defendants to assert that a plaintiff waives any right to privacy by placing their injuries at issue in the litigation.

Even if some of the information in a plaintiff's diary or calendar relates to their injuries, the mere fact that such information is relevant does not make it discoverable. As indicated, any discovery order must not unnecessarily invade the plaintiff's right of privacy and must preserve this right of privacy to the greatest extent possible. (See, *Schabel v. Sup. Ct.* (1993) 5 Cal.4th 704, 714.) While defendants may assert that such information is needed to assess the plaintiff's claim for general damages, discovery of diaries and calendars both pre- and post-accident is not the least intrusive means by which to assess a claim for general damages, the test articulated by the court in both *Allen v. Superior Court, supra,* at 449 and *Britt v. Superior Court, supra,* at 856. Defendants can review plaintiff's relevant medical records and wage records, have the plaintiff evaluated by a defense medical examiner, and complete depositions of plaintiff and percipient witnesses. Each of these methods allows the defendant to assess general damages, including issues regarding the nature and extent of the claimed injuries as well as the impact the injuries have had on plaintiff's life.

It may be argued that if the plaintiff will testify at deposition or trial substantively consistently with the contents of any diary or calendar, it is wise to produce such documents in discovery to allow plaintiff to use them to refresh their recollection during testimony. There are several reasons why this strategy is disadvantageous for a plaintiff. First, it allows the defendants to push the envelope of privacy in litigation further and further, eroding all the strides in this area that have been made thus far. Second, while a sophisticated plaintiff may be able to maintain a comprehensive diary which clearly articulates and chronicles the progression of injuries and pain, many cannot. The end result is a diary replete with entries such as "feel much better today" which, to a defense attorney or insurance adjuster, reads as "plaintiff is fully resolved." Moreover, once a diary is produced, it is incumbent on the plaintiff and the attorney to ensure that the plaintiff does not give testimony inconsistent with the diary, for fear of being impeached with their own diary. It is difficult, even for the most sophisticated clients, to recount the same experience, in the same way, multiple times. Thus, even if the contents of the diary itself seem to aid in the presentation of a plaintiff's damages, any deviation from the diary will allow the defense attorney to seize on the inconsistency, to the detriment of the plaintiff.

Another issue raised is the therapeutic value to an injured plaintiff that keeping a diary may have. Such a diary can provide an injured person with a means to freely discuss their injuries and the impact their injuries have on them, in a way they are unwilling to do verbally as people, by and large, do not want to be pitied or typed as "complainers" or a burden to others, a frequent worry to those who are seriously injured and who must rely on others to care for them. In such situations, a diary is their one outlet of privacy; when you are injured, the process of convalescing may be very public because you are hospitalized or confined to your home and require the help of others for completing basic tasks.

Finally, while we may all evaluate the benefit of producing such documents on a case-by-case basis, this is precisely what the defendants expect. Therefore, when you produce a diary in one case but not another, the assumption is that you will only produce documents otherwise protected by privacy when they aid your case and withhold them when they do not. Using the shield of privacy to gain a tactical advantage is problematic as it devalues the rights articulated by our Constitution and undermines the legitimacy of raising such a claim for other plaintiffs.

Raising a Privacy Objection

When asserting the right to privacy on behalf of your client you may object to the request, thereby shifting the burden on the opposing party to file a motion to compel the response, or in the alternative, you may seek a protective order.

If discovery responses are not timely served, arguably the waiver provisions of the Discovery Act may be invoked. (Cal. Code of Civ. Proc. § 2030.290; *Scottsdale Insurance Company* (1997) 59 Cal.App.4th 263.) However, as privacy rights are constitutional in nature, it has been held that such rights cannot be waived by a "technical shortfall." (*Boler v. Sup. Ct.* (1987) 201 Cal.App.3d 467, 472.) Additionally, if the responding party timely objects on other grounds, a privacy objection can be raised later as "[w]aivers of constitutional rights are not lightly found." (*Heda v. Superior Court* (1990) 225 Cal.App.3d 525, at 530.) As such, the fact that a party does not object on the grounds of privacy in the initial response to discovery does *not* bar that party from raising the privacy objection at a later time. (*Heda v. Superior Court,* 225 Cal.App.3d at 529.)

If applicable, it is good practice to also pose objections based on the attorney-client privilege and attorney work product doctrines.

The attorney-client privilege allows the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code § 954.) For the attorney-client privilege to apply, the client must have intended the communication to be confidential. (*City & County of San Francisco v. Superior Court In and For City and County of San Francisco* (1951) 37 Cal.2d 227, 234-235.) The attorney-client privilege covers all forms of communication, including the transmission of specific documents. (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600.) Once a party claims the attorney-client privilege, the communication sought to be suppressed is presumed confidential and the party opposing the privilege has the burden of proof to show the communication is one not made in confidence. (See, Evid.

Code § 917; *Alpha Beta Co. v. Superior Court* (1984) 157 Cal.App.3d 818, 824-825.) Such an objection may be relevant where an attorney directs the client to keep a diary or calendar to keep the attorney apprised of the client's progress.

Under the work-product doctrine, any writing that reflects an attorney's impressions, conclusions, opinion, or legal research or theories is not discoverable under any circumstances. (Cal. Civ. Proc. § 2018.030(a).) Any other form of attorney work product is not discoverable unless the court determines that denial of discovery will unfairly prejudice the other party or result in an injustice. (Cal. Civ. Proc. § 2018.030(b).) As the California Legislature has indicated, the work product doctrine is intended to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (Cal. Civ. Proc § 2018.020(b).) To this end, the doctrine seeks to "[p]reserve 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." (Cal. Civ. Proc § 2018.020(a).)

While traditionally the work product doctrine was thought of as applying to lawyers only, this is no longer the case as its scope has been expanded to include, among others, an attorney's employees, agents, and consultants. (See, *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647–648; *Scotsman Mfg. v. Superior Court* (1966) 242 Cal.App.2d 527, 530.) In determining, then, whether certain material should be accorded work-product protection, "the reviewing court should be guided by the underlying policies of section 2018."[4] (*Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 135.)

At issue in *Dowden v. Superior Court, supra,* was whether the petitioner, a litigant acting in propria persona, could claim work product protection as to a diary which he prepared in anticipation of litigation. In determining whether the policies of the work product doctrine would be served by according work product protection in the case, the court initially noted that the work product privilege is intended for the protection of not just attorneys, but also litigants generally. (*Id.*, at 134.) The court went on to conclude that in light of the underlying policies behind the work product doctrine, namely "the policy of promoting diligence in preparing one's own case, rather than depending on an adversary's efforts" the diary of the unrepresented plaintiff was entitled to work product protection.[5] (*Id.* at 135.) Thus, in the event your client creates a diary prior to retaining counsel, *Dowden* may provide a basis for analogy.

Conclusion

As members of the plaintiffs' bar we are all zealous advocates for our clients, by right. Part of our advocacy is to preserve justice as well as the integrity of the civil justice system. Our clients' privacy rights are integral to this pursuit. Our clients are not just litigants but are citizens who are entitled to maintain human dignity and the basic rights afforded to all citizens. None of us wants to see Orwell's fiction become reality. To guard against this, we must seek to preserve our clients' privacy, even if doing so is inconvenient or cumbersome. ■

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[1] In determining whether information falls under the veil of privacy and is non-discoverable, the court must carefully balance the right of privacy against the need for discovery. For further discussion of the balancing test, see Jeremy Pasternak's article "Your Client's Privacy Is Not a Myth: How to Protect Your Client's Privacy – and Your Case – in Discovery" in this edition.

[2] See, *Britt v. Sup. Ct. San Diego Unified Port Dist.* (1978) 20 Cal.3d 844, 852 [constitutional right to freedom of association requires protection of a person's membership in associations]; *Cobb v. Sup. Ct.* (1979) 99 Cal.App.3d 543, 550 [a right of privacy exists as to a party's confidential financial matters, even when relevant to the litigation]; *Board of Med. Quality Assurance v. Gheradini* (1979) 93 Cal.App.3d 669, 679 [privacy applies to a party's medical history]; *Board of Trustees v. Sup. Ct.* (1981) 119 Cal.App.3d 516, 528-530 [employment personnel files are within the zone of privacy]; *Tylo v. Sup.Ct.* (1997) 55 Cal.App.4th 1379, 1388 [a marital relationship can be the basis for assertion of the right to privacy]; *Barrenda L. v. Sup. Ct.* (1998) 65 Cal.App.4th 794, 800 [an individual's sexual practices are protected by the California Constitution]; *Dalitz v. Penthouse Int'l, Ltd.* (1985)168 Cal.App.3d 468, 482 [there is a reasonable expectation of privacy by new reporter's confidential sources upon disclosure of information to reporter]; Ins. Code § 791.01 et seq. [an insured or claimant's insurance company files constitute private information]; Welf. & Inst. Code § 827 [juvenile court records are confidential, requiring a court order for release to third persons].

[3] Diaries, by their nature, are both personal and private. (See, *People v. Miller* (1976) 60 Cal.App.3d 849, 854 ["A diary represents a collection of entries made in expectation of privacy."]) "Indeed, it would be difficult to imagine what ... should be more entitled to privacy than one's personal diary." (*People v. Frank* (1985) 38 Cal.3d 711, 743, citing *People v. Williams* (1976) 192 Colo. 249, 254.)

[4] California Code of Civil Procedure § 2018, codifying the work product doctrine, was repealed in 2004 to facilitate non-substantive reorganization of the rules governing civil discovery. The content of former § 2018(a) is now contained in § 2018.020 without substantive change; the content of former § 2018(b) is now contained in § 2018.030(b) without substantive change; and the content of former § 2018(c) is now contained in § 2018.030(a) without substantive change.

[5] The Court in *Dowden* was not presented with the issue of whether or not a litigant's diary is protected by the right of privacy.