

State Water Resources Control Board

January 21, 2016

VIA ELECTRONIC MAIL

To: Enclosed Service List of Participants

Hearing Officer's Partial Ruling on Prosecution Team's December 10 and December 11 Motions for Protective Order or, Alternatively, Motions to Quash; Fahey's Opposition; and Fahey's December 18 Motion to Compel Depositions and Document Disclosures

Background

On December 9, 2015, Scott Fahey and Sugar Pine Spring Water, LP (Fahey) served deposition notices on the Division of Water Rights Prosecution Team (Prosecution Team) witnesses Katherine Mrowka and David LaBrie. The notices call for depositions to commence on December 22, 2015, and include the following requests for certain documents, as defined, "whether or not privileged":

- (1) All DOCUMENTS utilized or relied on to create, formulate or prepare your written testimony, conclusions, reports and/or opinions in this matter.
- (2) All DOCUMENTS constituting or relating to correspondence between YOU and Fahey and/or between YOU and Fahey's agents, employees or representatives.
- (3) All DOCUMENTS constituting or relating correspondence (including, but not limited to, letters and emails) from YOU, and to YOU, relating to Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491).

On December 10, 2015, the Prosecution Team filed a Motion for Protective Order or, Alternatively, Motion to Quash the deposition notices issued to Ms. Mrowka and Mr. LaBrie and the accompanying document requests. The Prosecution Team argued that (1) Fahey cannot demonstrate a need for depositions or document requests, (2) the depositions will place an undue burden on Prosecution Team staff should they have to sit for potentially lengthy depositions regarding matters already covered by witness statements and supporting evidence or through prior disclosures, (3) the Document requests are unreasonably cumulative or duplicative in that they seek documents already disclosed to Fahey, or which would be disclosed on December 16, (4) the Document requests also seek potentially privileged documents and attorney work product, and (5) the December 10 deposition notices and document requests are duplicative, unreasonable and oppressive.

Also on December 10, 2015, Fahey filed an additional notice of deposition on the Person Most Knowledgeable as to certain Curtailment Certification Forms received by the Board and contending a right to continue diversion, certain written correspondence between the Board and water right holders who submitted such Curtailment Certification Forms, and Board rules,

procedures, or policies for responding to such Curtailment Certification Forms. The notices call for deposition to commence on December 23, 2015. The deposition notice for the Person Most Knowledgeable did not include a request for documents, but described certain documents to which the Person Most Knowledgeable would testify, as follows.

On December 11, 2015, the Prosecution Team filed an additional Motion for Protective Order or, Alternatively, Motion to Quash the deposition notice issued to the Person Most Knowledgeable. The Prosecution Team argued that (1) Fahey's request for every curtailment form from throughout the state with the "OTHER" box checked, as well as all of the correspondence associated with those forms is irrelevant to the current proceeding, (2) Fahey's request is also exceedingly burdensome, (3) given the December 16, 2015 deadline to submit exhibits and the January 25, 2016 hearing date, the size, scope, and breadth of Fahey's Deposition Notice is oppressive, burdensome, and harassing, and finally, (4) Fahey will see all of the Prosecution Team's evidence and have an opportunity to respond, consistent with the Hearing Notice.

Also on December 11, 2015, Fahey served an additional notice of deposition on Prosecution Team witness Samuel Cole. The notices call for deposition to commence on December 23, 2015, and include the following requests for certain documents, as defined:

"All DOCUMENTS constituting or relating to correspondence (including, but not limited to, letters and emails) from YOU, and to YOU, relating to Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491)."¹

On December 14, 2015, the Prosecution Team submitted a letter requesting that its pending Motions for Protective Order or, Alternatively, Motions to Quash deposition notices and accompanying document requests be broadened to include to Mr. Cole and all prospective deposition notices and document requests submitted and served by Fahey in connection with these proceedings. The Prosecution Team argued that expanding the motions was necessary because (1) Fahey is using public record requests and the State Water Resources Control Board's (State Water Board or Board) subpoena power for repetitive, unreasonable, burdensome, and oppressive documents requests, and (2) Fahey's discovery requests serve no purpose other than harassment.

On December 16, 2015, Fahey and the Prosecution Team filed their proposed testimony, exhibits, lists of exhibits, witness qualifications, and statement of service. On December 18, 2015, Fahey filed its Opposition to the Prosecution Team's Motions for Protective Orders / To Quash and a new Motion to Compel Depositions and Document Disclosures. Fahey argued that (1) Fahey is entitled to these depositions, and related document discovery, because relevant correspondence to/from State Water Board staff involved in this matter apparently was permanently deleted, (2) Depositions are required to ascertain relevant discussions among State Water Board, and (3) Fahey's deposition notices were both within the discovery cutoff deadline and the proper time to give adequate notice of the depositions ... further explaining that Fahey only served the discovery notices when it became apparent that documents were

¹ Fahey's document request submitted to Mr. Cole excludes the language "whether or not privileged" from the definition of "document," and did not request records relied on by Mr. Cole in forming his opinion as an expert. However, Fahey's Motion to Compel Document Disclosures contends that, because the Prosecution Team identified Ms. Mrowka, Mr. LaBrie, and Mr. Cole as expert witnesses, "privilege is waived to the extent any of the privileged discovery was relied upon or considered." For the purposes of analysis, this ruling discusses a hypothetical document request to Mr. Cole that attempts to compel production of privileged documents. This ruling does not concede that Fahey has actually requested privileged records relied on by Mr. Cole in forming his opinions.

missing for the 2012-September 2015 time period, and when “the Prosecution Team confirmed that State Water Board staff ... likely destroyed relevant emails, even months after the ACL was filed in this matter.”

On December 21, 2015, we issued a partial ruling denying Fahey’s motion to compel the deposition of Ms. Mrowka, Mr. LaBrie, and Mr. Cole, conditionally denying Fahey’s motion to compel deposition of the Person Most Knowledgeable, and granting the Prosecution Team’s motions for protective order against these depositions. We reasoned that Fahey’s opportunity to cross examine Prosecution Team witnesses at the hearing provided an adequate alternative means of discovery and would present unnecessary duplication of discovery. The Prosecution Team designated Ms. Mrowka as the Person Most Knowledgeable by letter filed December 22, 2015, satisfying the conditions of our ruling. Our ruling reserved judgment on the document requests included in Fahey’s deposition notices, the Prosecution Team’s corresponding Motions for Protective Order and Motions to Quash, and Fahey’s corresponding Motion to Compel Document Disclosures.

On December 30, 2016, the Prosecution Team filed its Opposition to Fahey’s Motion to Compel Document Disclosures. The Prosecution Team argued that (1) it had already disclosed or otherwise made the requested documents available except to the extent those documents were privileged attorney-client communications or attorney work product, (2) that the additional discovery sought is duplicative, (3) that the discovery sought is obtainable through less burdensome means, and (4) that the attorney-client communication privilege and attorney work product privileges apply in State Water Board proceedings, have not been waived with respect to the remaining undisclosed documents, and should therefore be honored.

The opposition papers describe previous document disclosures made to Fahey in response to administrative subpoenas and Public Records Act requests, through voluntary disclosures, and by filing the Prosecution Team’s exhibits for its case in chief. Office of Enforcement attorney Kenneth Petruzzelli declared in a supporting declaration, under penalty of perjury, that “[t]o the best of my knowledge and recollection, the only material the Prosecution Team has not disclosed or already made available consists of privileged attorney-client communications and attorney work product.” Andrew Taurainen, co-counsel for the Prosecution Team, filed a December 10, 2015 declaration under penalty of perjury that further details document disclosures to Fahey.

Legal Analysis

This partial ruling is limited to the document requests in Fahey’s deposition notices and to the associated motions described above. The State Water Board conducts adjudicative proceedings in accordance with the provisions and rules of evidence set forth in section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648.5.1.) Pursuant to the Government Code, the Board shall admit evidence “if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov. Code, § 11513, subd. (c).)

Parties to water rights hearings may issue subpoenas and subpoenas duces tecum for attendance at Board proceedings and for production of documents. (See Cal. Code Regs., tit. 23, § 649.6.) Any party to a proceeding before the Board may take the deposition of witnesses in the manner described by title 4 (commencing with section 2016.010) of part 4 of the Code of Civil Procedure. (Wat. Code, § 1100.) However, section 1100 does not address the issue of document production requests that accompany a deposition notice. Because we granted the Prosecution Team’s motion for protective order against depositions in our December 21, 2015

procedural ruling, we are not presented with and need not consider the argument that the document request should be treated as part of a deposition under section 1100 of the Water Code. Therefore, for the purposes of resolving the remaining motions, we will construe Fahey's requests for document production as administrative subpoenas duces tecum filed pursuant to the Board's regulations.

The Administrative Procedure Act authorizes the presiding officer in an adjudicative proceeding to issue an order that is appropriate to protect the parties or witnesses from unreasonable or oppressive demands pursuant to a subpoena or subpoena duces tecum, including violations of the right to privacy. (Gov. Code, § 11450.30, subd. (b); see also Cal. Code Regs., tit. 23, § 649.6.) The scope of discovery shall be limited if the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood of discovering admissible evidence. (Cf. Cal. Code Civ. Proc., § 2017.020.)² A method of discovery shall be restricted if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. (See *id.*, § 2019.030, subd. (a)(2).) Rules of privilege are effective in Board hearings to the extent that statute otherwise requires the State Water Board to recognize them in a hearing. (Gov. Code, § 11513, subd. (c).)

1. Relevancy of the requested documents

Fahey has requested documents used by Ms. Mrowka and Mr. LaBrie to prepare their testimony, opinions, and reports, and has also requested their documents constituting or relating to conversation with Fahey and his representatives. Fahey has requested all documents constituting correspondence from or to Ms. Mrowka, Mr. LaBrie, and Mr. Cole relating to Fahey's water rights. "Document" is broadly defined to mean "all written, recorded, or graphic material, however produced or reproduced, pertaining in any way to the subject matter of this action." For Ms. Mrowka and Mr. LaBrie, "document" is further defined to include such materials "whether or not privileged."

Clearly, such documents could lead to facts that support a defense to unlawful diversion pursuant to section 1052 of the Water Code or establish relevant circumstances meriting a reduction in administrative civil liability under section 1055.3. Therefore, the Hearing Officers find that the requested documents are relevant, generally speaking, to these proceedings. This finding does not preclude any party from making appropriate objections to disclosure of specific documents. (See generally Gov. Code, § 11513.)

2. Burden, expense, or intrusiveness of production vs. likelihood of discovering admissible evidence

In the absence of prior disclosure, Fahey's document requests issued to Ms. Mrowka, Mr. LaBrie, and Mr. Cole would be calculated to lead to the discovery of admissible evidence. To the extent that the Prosecution Team has already disclosed or made available specific documents or portions of specific documents to Fahey, however, requiring re-disclosure of the same documents or portions of documents is not warranted. Because repeating disclosure

² The State Water Board is not required by statute or regulation to apply the Civil Discovery Act when determining the scope of discovery in adjudicative proceedings before the Board. However, the Hearing Officers have broad power to issue an order that is appropriate to protect the parties or witnesses from unreasonable or oppressive demands pursuant to a subpoena duces tecum. (Gov. Code, § 11450.30.) For the purposes of this ruling, the Hearing Officers find that sections 2017.020 and 2019.030 of the Code of Civil Procedure are persuasive as to the appropriate standard to determine the scope of discovery.

cannot lead to the discovery of any *new* admissible evidence, imposing the burden and expense of re-reviewing, re-evaluating, re-redacting, or re-disclosing the same documents is not warranted.

To the extent that the Prosecution Team has not yet disclosed or made available specific documents or portions of specific documents, we find that Fahey's document requests are calculated to lead to the discovery of admissible evidence. This clearly outweighs the Prosecution Team's burden and expense of reviewing, evaluating, redacting, and disclosing additional documents. However, the Prosecution Team has asserted that the remaining undisclosed documents are subject to the attorney-client communication or attorney work product privileges. Therefore, compelling production of these documents is highly intrusive to the extent that those privileges apply and have not been waived. We address privilege issues separately, below.

3. Cumulativeness, duplication, and adequacy of other methods of discovery

Water rights hearings before the State Water Board differ from civil litigation in important respects. Cross examination of either party's witnesses is not limited to the scope of direct testimony. (Cal Code Regs., tit. 23, § 648.5.1; Gov. Code, § 11513, subd. (b).) Each party has the right to cross-examine opposing witnesses on any matter relevant to the issues. (Gov. Code, § 11513, subd. (b).) Fahey will have the opportunity to question Ms. Mrowka, Mr. LaBrie, and Mr. Cole as to the basis for their opinions and conclusions during cross-examination. This includes questions concerning the process through which the Prosecution Team witnesses formed their opinions, questions regarding the kinds of documents that they consulted, and questions as to the specific content of those documents.

Generally speaking, the opinions and conclusions of expert witnesses on factual issues should be supported by documents that are marked as exhibits in the record, analyze and evaluate such documents, or otherwise relate to such documents. To the extent that the Prosecution Team's witnesses' testimony is not supported by evidence in the record, Fahey may object as to lack of foundation. If any party responds to an objection by declining to identify supporting documents on the basis of privilege, the Hearing Officers may conclude that the witness is not credible as to particular issues or in general. (Cf. *People v. Tallman* (1945) 27 Cal.2d 209, 214 [wide latitude is permitted in cross-examination of an expert witness in all matters tending to test her credibility so that jury may determine weight to be given testimony].) Citing a particular document as the sole basis for an opinion but refusing to disclose the document will often provide sufficient grounds to sustain an objection for lack of foundation.

Accordingly, we find that the opportunity for cross examination provides an adequate alternative means of discovery for determining the basis of expert witnesses opinions and conclusions. To the extent that Fahey seeks to compel the disclosure of documents or portions of documents that have already been disclosed or otherwise made available, we find that doing so would be duplicative. Disclosure of previously undisclosed documents or portions of documents would not be duplicative.

4. Privilege issues

a. Introduction

The rules of privilege are effective in State Water Board adjudicative hearings "to the extent that they are otherwise required by statute to be recognized at the hearing." (Gov. Code, § 11513,

subd. (e); Cal. Code. Regs., tit. 23, § 648, subd. (b).) The attorney client privilege and attorney work product privilege are required by statute to be recognized. (See Evid. Code, § 954; Code Civ. Proc., § 2018.030; see also generally Evid. Code, §§ 901, 950 et. seq.; Code Civ. Proc., § 2018.010 et seq.) Both privileges are subject to the possibility of waiver by disclosure of privileged material. (Evid. Code, § 912; *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1129, 1238-1239.)

Fahey argues that he has a right to discovery of material relied upon by Ms. Mrowka, Mr. LaBrie, or Mr. Cole in forming their opinions, whether or not such material is subject to the attorney-client communications privilege or the attorney work product privilege. The Prosecution Team designated these witnesses as expert witnesses on its notice of intent to appear (NOI), argues Fahey, thereby waiving both privileges with respect to materials relied upon or considered by the witnesses when forming their opinions. In support of this proposition, Fahey cites section 721, subdivision (b)(1) of the Evidence Code and *People v. Combs* (2004) 34 Cal. 4th 821, 862 [hereinafter *Combs*]. Fahey also contends that disclosure is necessary to protect his rights, an apparent reference to his other arguments concerning the destruction of emails found elsewhere in Fahey's Motion to Compel Document Disclosure.

The Prosecution Team objects that section 721 of the Evidence Code does not apply to adjudicative hearings before the Board and therefore that reliance on *Combs* would be inapt. *Combs* is also distinguishable, they argue, because in *Combs* the party asserting privilege had already waived it by disclosing the contested report before the expert reviewed or relied on it. "The prosecutor could cross-examine the defense expert about the report not just because the expert considered the report in forming his expert opinion, but also because the defense counsel waived the report's confidentiality by failing to assert the report was privileged when he disclosed it." Lastly, the Prosecution Team argues that applying *Combs* would lead to an untenable result. Board staff could typically be established as experts on cross examination, according to the Prosecution Team, and applying a privilege waiver per *Combs* would "eviscerate the ability of the Office of Enforcement to provide effective assistance of counsel and destroy the State Water Board's ability to conduct enforcement."

b. Scope of Document Requests

Fahey requested all documents from Ms. Mrowka and Mr. LaBrie constituting certain communications and all documents that they "utilized or relied on to create, formulate or prepare your written testimony, conclusions, reports and/or opinions in this matter." Concerning Mr. Cole, Fahey's document request was limited to communications. However, Fahey's Motion to Compel Document Disclosures contends that, pursuant *Combs* and section 721, subdivision (b)(1) of the Evidence Code, Fahey is entitled to receive "any privileged discovery relied upon or considered" by Ms. Mrowka, Mr. LaBrie, and Mr. Cole "when forming their opinion." This ruling will consider the general legal issue raised by Fahey without conceding whether Fahey has properly filed requests for documents considered by any particular Prosecution Team witness.³

Fahey appears to agree that, even if *Combs* and section 721 of the Evidence Code apply to State Water Board adjudicative proceedings, their applicability would be limited to documents actually considered by expert witnesses when preparing their conclusions and opinions. The communication records sought by Fahey would not be disclosable under *Combs*, except to the extent that expert witnesses considered a particular communication when preparing their

³ See also *infra*, fn. 1.

conclusions and opinions. Accordingly, the applicability of the privilege section of this ruling is limited to Fahey's requests for such documents.

c. Discussion: *People v. Combs*

Combs resolved numerous evidentiary objections, criminal law objections, and other objections raised on appeal from a first degree murder conviction and death sentence. (*Combs*, 34 Cal.4th at 827.) Relevant to this proceeding, defendant objected that the trial court violated his attorney-client privilege and attorney work product privilege by allowing the prosecution to call a certain Dr. Oshrin, a psychiatrist, as a rebuttal witness during the penalty phase of the trial.⁴ (*Id.* at 863.) The trial court had appointed Dr. Oshrin as a confidential mental health expert to advise defense counsel on possible mental defenses. (*Id.*, at 863.) Dr. Oshrin performed a psychiatric evaluation of the defendant, prepared a report, and provided the report to defense counsel. (*Id.*, at 861.) The defense called two other witnesses, Dr. Crinella and Dr. Fischer, as expert witnesses during the penalty phase of the trial. (*Id.* at 863.)

Both doctors testified that they had read and considered Dr. Oshrin's full report and relied on portions of it in forming their opinions, and Dr. Crinella discussed and disclosed significant portions of Dr. Oshrin's report during his testimony. (*Combs*, 34 Cal.4th at 863.) The defense marked Dr. Oshrin's report as an exhibit for identification and provided the jury with copies of two paragraphs from the report during Dr. Crinella's direct examination. (*Ibid.*) Defense counsel voluntarily provided a copy of Dr. Oshrin's full report to the prosecution during the recess between direct and cross-examination of Dr. Crinella. (*Id.* at 862.) Without objection, the prosecution used Dr. Oshrin's full report to cross-examine Dr. Crinella. (*Ibid.*)

Over defendant's objection, the trial court then permitted the prosecution to call Dr. Oshrin as a rebuttal witness. (*Combs*, 34 Cal.4th at 863.) Although *Combs* does not describe the scope of Dr. Oshrin's rebuttal testimony, it appears to have addressed disagreements with defense witnesses' conclusions as to whether defendant was in fact mentally ill and, if so, as to the correct diagnosis. Dr. Oshrin report "did not find that defendant suffered from any organic problems, but instead concluded that he probably had an antisocial personality disorder." (*Id.*, at 862; see also *id.*, at 836 ["Dr. Oshrin concluded that defendant was not suffering from an organic brain disorder, psychosis, or any specific or identifiable mental illness."]; *ibid.* ["Dr. Oshrin did not believe that the psychological tests the defense experts used had any place in forensic psychiatry."]) Dr. Crinella "had concluded that defendant showed signs of brain damage, schizophrenia, and borderline personality disorder," but conceded under cross-examination that defendant's history was consistent with the antisocial personality disorder diagnosed by Dr. Oshrin. (*Ibid.*)

Defendant specifically objected that allowing Dr. Oshrin to testify at the penalty phase of the trial violated his psychotherapist-patient privilege. (*Combs*, 34 Cal.4th at 863.) The trial court overruled this objection, concluding that defendant waived the psychotherapist-patient privilege by placing his mental health at issue during the trial and by allowing Dr. Crinella and Dr. Fischer to rely on Dr. Oshrin's report. (*Id.*, 863-864.) Defendant did not raise the attorney-client privilege or the attorney work product privilege at trial. (*Combs*, 34 Cal.4th at 863.) On appeal, defendant argued that the trial court violated his attorney-client and attorney work product privileges by allowing the prosecutor to call Dr. Oshrin as a rebuttal witness. (*Id.*, at 863.) According to defendant, the substantive content of Dr. Oshrin's report was privileged information that could

⁴ Defendant also objected that allowing the prosecution to call Dr. Oshrin violated his 5th Amendment right against self-incrimination.

only be waived if the defense called Dr. Oshrin as a witness. (*Ibid.*) At most, the prosecution could cross-examine Dr. Crinella only on the parts of Dr. Oshrin's report on which Dr. Crinella relied in forming his opinions, and with which he presumably agreed. (*Ibid.*)

The California Supreme Court explicitly stated two rationale's for rejecting defendant's arguments and also discussed a third basis for rejection. First, the court elsewhere observed that "by voluntarily turning over the report and failing to object to the prosecutor's using it during cross-examination, defendant waived any claim that the production and use of the report violated the attorney work product doctrine, the attorney-client and psychotherapist-patient privileges." (*Combs*, 34 Cal.4th at 862.)⁵ Subsequently, defendant did not object when the prosecution used the full report to cross-examine certain expert witnesses. (*Id.*, at 863.) Although not explicitly cited as such, these facts alone would provide an adequate basis for rejecting defendant's privilege objections. Second, the court explicitly found that "[d]efendant ha[d] forfeited his appellate [privilege] claim because he asserted only his psychotherapist-patient privilege at trial." (*Id.*, 34 Cal.4th at 863.) Lastly, the court cited case law and sections 721 and 912 of the Evidence Code to support the proposition that "[d]efendant waived any protections that the attorney-client privilege, the attorney work-product doctrine, and the privilege against self-incrimination afforded him regarding all matters that Drs. Crinella and Fischer considered or on which they relied, including Dr. Oshrin's report." (*Id.*, at 864.)

d. Analysis

As an initial matter, we observe uncertainty as to whether *Combs*' discussion of a privilege waiver under section 721 of the Evidence Code is properly part of California Supreme Court's holding in that case. In *Combs*, the defense counsel waived attorney-client privilege and attorney work product privilege by voluntarily providing Dr. Oshrin's report to the prosecution, (*Combs*, 34 Cal.4th at 862), and defendant waived these privilege objections on appeal by failing to raise them at the trial, (*id.*, at 863). There is a fair argument that the language Fahey cites in *Combs* does not apply in State Water Board adjudicative proceedings for the simple reason that that portion of *Combs* is non-binding dictum. (But see *Combs*, 34 Cal.4th at 862 ["We presume that defense counsel provided Dr. Oshrin's report because he knew that the prosecutor was entitled to cross-examine Dr. Crinella about its contents. [citations]"]; *id.*, at 864; *People v. Ledesma*, 39 Cal.4th 641, 695-96 [citing *Combs* for proposition that an opposing party "is entitled to cross-examine an expert concerning an otherwise privileged report considered by the expert in formulating his or her opinion."].)

Even if the disputed section of *Combs* is precedent, the facts of *Combs* are easily distinguished from administrative adjudications before the State Water Board. *Combs* upheld the trial court's decision allowing the prosecution to call Dr. Oshrin, the defense's non-testifying mental health expert, as a rebuttal witness. Dr. Oshrin's report apparently described his expert opinion and conclusions of fact, for example that the defendant "did not ... suffer[] from any organic problems" and that the defendant "probably had an antisocial personality disorder." (*Id.*, at 862.) Dr. Oshrin presumably testified to these or other factual matters. Thus, although Dr. Oshrin was defendant's attorney's agent, (*id.*, at 863), and although his report would normally be protected as attorney work product, (Code Civ. Proc., § 2018.030; *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911), the California Supreme Court reasoned that defendant waived his privilege, per section 721 of the Evidence Code, when his other experts relied on Dr.

⁵ This language appears in preceding discussion of a separate issue, whether the trial court erred by issuing an improperly broad discovery order that defendant alleged, on appeal, to compel production of Dr. Oshrin's report. (See *Combs*, 34 Cal.4th at 862; see generally *id.*, at 861-862.)

Oshrin's report as a basis for forming their opinions. Likewise, although confidential communications among defendant, his attorney, and his attorney's agents during the course of the attorney-client relationship are normally subject to the attorney-client privilege, (Evid. Code, §§ 951, 952, 954; *City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 236), the court reasoned that defendant had waived this privilege when his other experts relied on the copy of Dr. Oshrin's report provided.

In other words, the contested passage of *Combs* finds that section 721 of the Evidence Code effects a waiver of the attorney-client and attorney work product privileges for reports memorializing the opinion of a party's non-testifying, consulting expert when the party's testifying experts rely on that opinion. Fahey's request appears too broad to be consistent with the narrow conclusion discussed by the Supreme Court in *Combs*. Fahey has requested "all written, recorded, or graphic materials ... pertaining in any way to the subject matter of this action" that were used by Ms. Mrowka, Mr. LaBrie, and Mr. Cole,⁶ as the basis of forming their opinions. Fahey has requested such documents "whether or not privileged." Fahey's requests are not limited to the opinions and conclusions of Prosecution Team experts. Fahey's request appears to include the work product of the Prosecution Team's attorneys and documents memorializing communications among Ms. Mrowka, Mr. LaBrie, and Mr. Cole, and the prosecution team's attorneys.

This overbroad request is not supported by *Combs* and is not supported by applicable law. Under the attorney work product privilege, "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (Code Civ. Proc., § 2018.030, subd. (a); but see *id.*, § 2018.040 [statute only intended to restate existing law].) This protection preserves the rights of attorneys to prepare their cases thoroughly and prevents other attorneys from taking undue advantage of opposing counsel's efforts. (*Kizer v. Sulnick* (1988) 202 Cal.App.3d 431, 441.) The attorney-client privilege protects confidential communications among attorneys, their clients, and their agents. It safeguards "the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740; Evid. Code, §§ 951, 952, 954.) This policy "has been a hallmark of Anglo-American jurisprudence for almost 400 years." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.)

Combs addressed a non-testifying expert's work product for an attorney, not the work product of an attorney. (*People v. Ledesma*, 39 Cal.4th 641, 695-96 ["In [*Combs*] we recognized that the prosecution is entitled to cross-examine an expert concerning an otherwise privileged *report* considered by the expert in formulating his or her opinion."] (italics added); see also Code Civ. Proc., § 2018.030; cf. *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 639 [the attorney-client privilege only protects disclosure of communications between the attorney and the client; it does not protect disclosure of underlying facts which may be referenced within a qualifying communication].) This is consistent with the distinction, under subdivisions (a) and (b) of section 2018.030 of the Code of Civil Procedure, wherein the writings that reflect an attorney's impressions, conclusions, opinions, and legal research or theories enjoy an absolute privilege but other attorney work product is subject to a qualified privilege. (Compare Code Civ. Proc., § 2018.030, subd. (a), with *id.*, subd. (b); see also, e.g., *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834 [Opinion of consulting expert developed as a result of the initiative of counsel in preparing for trial constitutes attorney work product.]).

⁶ See *infra*, fn. 1.

Fahey has not provided authority in support of extending *Combs* to compel disclosure of the Prosecution Team attorneys' work product or documents constituting or memorializing their communications with Prosecution Team staff. We have not identified any precedent that would support extending *Combs* or Evidence Code section 721 to writings "that reflect[] an attorney's impressions, conclusions, opinions, or legal research or theories." (See Code Civ. Proc., § 2018.030, subd. (a).) Thus, we decline to extend *Combs* to the work product and client communications of attorneys themselves.⁷

Conclusion

The Prosecution Team's motion is granted with respect to documents and portions of documents already disclosed or otherwise made available to Fahey. Fahey's Motion to Compel Document Disclosures is denied as it applies to those documents.

The Prosecution Team's motion is also granted for those documents to which the attorney-client communications privilege or the attorney work product privilege actually applies and has not been waived. Merely listing a witness as an "expert" on a notice of intent to appear does not constitute a waiver of either privilege as to documents or portions of documents that "reflect[] an attorney's impressions, conclusions, opinions, or legal research or theories," (Code Civ. Proc., § 2018.030, subd. (a)), for the reasons discussed above. Fahey's corresponding Motion to Compel Document Disclosures is denied for those documents. The Prosecution Team may continue to withhold any documents that reflect an attorney's impressions, conclusions, opinions, or legal research or theories, provided that the attorney-client privilege and attorney work product privilege have not otherwise been waived.

The Prosecution Team may also withhold documents containing the opinions of non-testifying experts developed as a result of the initiative of counsel in preparing for the hearing and not relied upon by testifying experts to form their opinions and conclusions. However, the Prosecution Team is advised that it withholds those documents at its peril. We will carefully consider evidentiary objections as to lack of foundation by testifying experts and resolve those objections as appropriate to prevent unfairness.

The Prosecution Team's motion is denied, and Fahey's motion is granted, for any document that meets all five of the following criteria:

- a. The document is within the scope of Fahey's document requests;
- b. The document was not previously disclosed to Fahey;
- c. The document was not otherwise made available to Fahey;
- d. The document is not subject to any privilege, or, alternatively, the document is a report or similar document relied on by an expert witness in reaching his or her opinions; and
- e. The document does not "reflect[] an attorney's impressions, conclusions, opinions, or legal research or theories," (Code Civ. Proc., § 2018.030, subd. (a)), or that information is isolated within the document and can be redacted.

The Prosecution Team shall produce any such documents to Fahey by 5:00PM, Pacific Time,

⁷ The Prosecution Team also contends that section 721 of the Evidence Code does not apply to State Water Board administrative proceedings pursuant to title 23, section 648 of the California Code of Regulations and section 11513 of the Government Code. Because we decline to extend *Combs* to the work product and client communications of attorneys themselves, it is unnecessary to reach this argument.

on Friday, January 22, 2016. If no such documents exist, the Prosecution Team may satisfy this requirement by submitting a letter to this effect signed by an appropriate members of the Prosecution Team. This letter shall be served upon the list of hearing participants, and a copy shall be provided to the Hearing Team.

The Prosecution Team may request the Hearing Officers' permission to file additional exhibits. To be considered, the request shall include a short description of the document sought to be introduced, an explanation of why the exhibit was not previously introduced, and a showing of good cause why leave should be granted to admit the late exhibit. The Prosecution Team shall serve the request upon the hearing list for this proceeding. Any other party may object to specific requests by the Prosecution Team to introduce new exhibits.

Any party may petition the Board for appropriate relief if the Prosecution Team fails to comply with the terms of this ruling. This ruling is made without prejudice to any party filing a subsequent motion based on information not previously offered.

Sincerely,



Frances Spivy-Weber, Vice-Chair



Dorene D'Adamo, Board Member

Enclosure: Service List

**SERVICE LIST OF PARTICIPANTS
G. Scott Fahey and Sugar Pine Spring Water, LP
Administrative Civil Liability Complaint and Cease and Desist Order
(November 13, 2015; Revised 11/30/15; 01/05/16)**

Parties	
THE FOLLOWING MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
<p>DIVISION OF WATER RIGHTS SWRCB Office of Enforcement Prosecution Team Kenneth P. Petruzzelli 1001 I Street, 16th Floor Sacramento, CA 95814 kenneth.petruzzelli@waterboards.ca.gov</p> <p>Andrew Tauriainen, Attorney III 1001 I Street, 16th Floor Sacramento, CA 95814 Andrew.Tauriainen@waterboards.ca.gov</p> <p>(revised: 11/30/15)</p>	<p>G.SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP Diane G. Kindermann Glen C. Hansen Abbott & Kindermann, LLP 2100 21ST Street Sacramento, CA 95818 dkindermann@aklandlaw.com ghansen@aklandlaw.com</p> <p>Bart Barringer Law Offices of Mayol & Barringer P.O. Box 3049 Modesto, CA 95353 bbarringer@mblaw.com</p> <p>(revised 11/30/15)</p>
<p>TURLOCK IRRIGATION DISTRICT Arthur F. Godwin Mason, Robbins, Browning & Godwin, LLP 700 Loughborough Driver, Suite D Merced, CA 95348 agodwin@mrgb.org</p>	<p>MODESTO IRRIGATION DISTRICT William C. Paris, III O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 bparis@olaughlinparis.com anna.brathwaite@mid.org lwood@olaughlinparis.com</p>
<p>CITY AND COUNTY OF SAN FRANCISCO Robert E. Donlan Ellison, Schneider & Harris L.L.P. Attorneys at Law 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 red@eslawfirm.com</p> <p>Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p> <p>(revised 01/05/16)</p>	