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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF LOS ANGELES – [REDACTED] DISTRICT

11 [REDACTED], an individual, )  
12 )  
13 Plaintiff, )  
14 vs. )  
15 [REDACTED], an individual, )  
16 Defendant. )

Case No. [REDACTED]  
**AMICUS CURIAE BRIEF SUBMITTED  
BY PERCIPIENT WITNESS [REDACTED]  
REGARDING PERMISSIBLE  
PARAMETERS OF TESTIMONY BY  
AN ATTORNEY**  
[REDACTED], 2007 – 8:30 A.M. – Department [REDACTED]

17  
18  
19 [REDACTED] (“[REDACTED] an Attorney at Law having been subpoenaed to testify as a  
20 percipient witness in the within proceedings, hereby submits this *Amicus Curiae* Brief for the purpose of  
21 offering the Court additional guidance regarding the issue of what parameters an attorney’s testimony  
22 may permissibly cover in the within proceeding given that the attorney has in the past represented both  
23 [REDACTED] [REDACTED] and [REDACTED] [REDACTED] [REDACTED]  
24 and [REDACTED] are adversarial parties to one another in the within proceeding, and [REDACTED] has  
25 subpoenaed [REDACTED] to appear as a witness in the within proceeding, presumably to testify regarding the  
26 nature and characteristics of the relationship between [REDACTED] and [REDACTED] during the many years that  
27 [REDACTED] has known and interacted with each of these parties.  
28

1           █ respectfully submits the following guidelines and principles as *amicus curiae* for the  
2 Court's use in whatever manner it sees fit.

3  
4 **1.     The Attorney-Client Privilege Extends Only to “Communications” Made Between the**  
5 **Attorney and the Client; It Does Not Extend to Acts or Conduct of the Client that the**  
6 **Attorney May Have Independently Witnessed.**

7           If an attorney physically watches a client rob a bank, the lawyer's testimony is just as admissible  
8 as would be the testimony of a lay witness. If, on the other hand, the client later consults the attorney  
9 seeking advice about what he should do in connection with the criminal charges resulting from the  
10 robbery, the resulting communications will be subject to a claim of privilege. This is the simple,  
11 common sense explanation of how the confidentiality rule works.

12           One of the leading cases in this area is *Grand Lake Drive In, Inc. v. Superior Court in and for*  
13 *Alameda County* (1960) 179 Cal.App.2d 122, in which the court held that those data which would have  
14 come to the attorney's attention in any event, by mere observation, without any action on the client's  
15 part, as well as those data which become known by such acts as the client would have ordinarily done in  
16 any event, without any purpose of communicating them to the attorney as his adviser, are not subject to  
17 a claim of attorney-client privilege. *Accord*, see *Wilson v. Superior Court of Los Angeles County* (1964)  
18 226 Cal.App.2d 715.

19           Following the general rule that observations of a client's conduct are not privileged, as opposed  
20 to confidential communications, it has been held that an attorney's observations and impressions of his  
21 client's mental condition are not privileged. *Darrow v. Gunn* (1979) 594 F.2d 767, *cert. den.* 444 U.S.  
22 849 (9<sup>th</sup> Cir., applying California law).

23           Conversations between third parties and an attorney that do not involve anything falling within  
24 the parameters of the attorney-client privilege are, of course, not privileged. *Metzler v. U.S.* (1933) 64  
25 F.2d 203 (applying California law).

26           Summarized, the attorney-client privilege only protects against the disclosure of  
27 communications; it does not protect against disclosure of underlying facts upon which communications  
28 are based, and it does not extend to independent witnesses. *Aero-Jet-General Corp. v. Transport Indem.*

1 *Ins.* (1993) 18 Cal.App.4<sup>th</sup> 996. See also, *Triple A Mach. Shop, Inc. v. State* (1989) 213 Cal.App.3d 131,  
2 holding that observations by witnesses that occur outside any attorney-client relationship are not  
3 protected.

4 ██████ testimony during the course of the hearing will adduce the fact that he has attended  
5 numerous social occasions at which both ██████ and ██████ were present and engaged in  
6 conversations. In this regard, it has been held that conversations during social visits with an attorney not  
7 hired by a party at the time of the conversation are not privileged. *Huenergardt v. Huenergardt* (1963)  
8 218 Cal.App.2d 455. In order to be privileged, a communication must have been made to an attorney  
9 acting in his professional capacity toward his or her client. *Solon v. Lichtenstein* (1952) 39 Cal.2d 75.

10 Finally, the Court should take note of the fact that a single conversation with an attorney may be  
11 able to be broken down into two distinctive parts -- one part privileged, and the other part non-  
12 privileged. A client's communication to an attorney of a fact foreign to the object for which the attorney  
13 was retained is not confidential. *Hager v. Shindler* (1865) 29 Cal. 47. Put another way, statements  
14 made to an attorney are not privileged merely because the attorney has, at different times, transacted  
15 business for the party making the statements if the statements are not being made in reference to any  
16 business that the attorney was then transacting on the client's behalf. *Carroll v. Sprague* (1881) 59 Cal.  
17 655. The underlying rationale for this construction is that the attorney-client privilege does not attach to  
18 communications -- such as social chit-chat or merely informal conversations -- that were not intended at  
19 the time to be confidential. *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4<sup>th</sup> 1537.

20 And although communications made directly between the attorney and client regarding  
21 privileged matters cannot be disclosed by the attorney, he or she is required to testify -- just like any  
22 other witness -- to statements made by the client to other persons, or by other persons to the client, or to  
23 each other in his or her presence. *Gallagher v. Williamson* (1863) 23 Cal. 331. Thus, where an attorney  
24 is called for the purpose of witnessing a conversation or a transaction between his or her client and a  
25 third person, he or she may be compelled to testify both as to the conversation and also as to the  
26 transaction to which he was a witness. *McKnew v. Superior Court of City and County of San Francisco*  
27 (1943) 23 Cal.2d 58.

1 **2. Where Two Parties Have Consulted an Attorney Jointly, the Communications Involved in**  
2 **Such Representation Are Not Privileged Within the Context of a Later Dispute Between**  
3 **the Two Parties.**

4 The law is very clear in this area inasmuch as the rule has been specifically codified in the form  
5 of *Evidence Code* § 962, which provides:

6 “962. Where two or more clients have retained or consulted a lawyer  
7 upon a matter of common interest, none of them, nor the successor in  
8 interest of any of them, may claim a privilege under this article as to a  
9 communication made in the course of that relationship when such  
10 communication is offered in a civil proceeding between one of such  
11 clients (or his successor in interest) and another of such clients (or his  
12 successor in interest).”

13 Section 962, which was adopted by Stats.1965, c. 299, § 2, operative January 1, 1967, was  
14 merely a codification of already-existing case law. For cases that upheld exactly the same principle  
15 codified in Section 962, see *Clyne v. Brock* (1947) 82 Cal.App.2d 958, 965; and *Croce v. Superior Court*  
16 (1937) 21 Cal.App.2d 18. See also, *Harris v. Harris* (1902) 136 Cal. 379; and 7 Cal.L.Rev.Comm.  
17 Reports 1 (1965).

18 The section means just what it says: A joint client relationship is an exception to the attorney-  
19 client privilege that would ordinarily attach. *Zador Corp., N.V. v. Kwan* (1995) 31 Cal.App.4<sup>th</sup> 1285,  
20 *reh. den.* More specifically, where two or more persons engage an attorney to represent all of them, the  
21 attorney-client privilege is waived as between the parties, but remains as to strangers. *Nowell v.*  
22 *Superior Court for Los Angeles County* (1963) 223 Cal.App.2d 652; *Cavanaugh Nailing Mach. Co. v.*  
23 *Cavanaugh* (1959) 167 Cal.App.2d 657.

24 The rationale for this rule is that where persons have mutually employed the same attorney and  
25 have freely discussed their problems in the presence of one another and their counsel, each party by such  
26 concerted action has waived the right to place such communications under the shield of the attorney-  
27 client privilege. See, *Clyne v. Brock* (1947) 82 Cal.App.2d 958. In addition to the waiver concept,  
28 another rationale for the rule is that the primary purpose of the attorney-client privilege is to encourage

1 the freest and fullest possible communication between clients and their attorneys, in the hope that such  
2 fulsomeness of communication will maximize the likelihood that legal advice given will be reliable and  
3 that persons generally will understand their legal obligations and honor them. See, *Sky Valley Ltd.*  
4 *Partnership v. ATX Sky Valley, Ltd.* (N.D.Cal. 1993) 150 F.R.D. 648 (applying California law).

5 Once this waiver has taken place, either client can compel the lawyer to testify against the other  
6 client as to all matters that were discussed in the presence of the attorney. *De Olazabal v. Mix* (1937) 24  
7 Cal.App.2d 258.

8 In the action at bar, [REDACTED] has on many occasions been present contemporaneously with both  
9 [REDACTED] and [REDACTED] while he was acting in the capacity as attorney for both parties. His testimony  
10 at the hearing will so adduce. In accordance with *Evidence Code* § 962 and both its predecessor as well  
11 as successor cases, his testimony may properly be received both as against as well as on behalf of either  
12 of these parties. He may, moreover, actually be compelled by either party to testify as to matters that are  
13 within his personal knowledge.

14  
15 **3. The Attorney-Client Privilege is Waived if a Client Makes Disclosure of the Otherwise**  
16 **Privileged Communication(s) to Any Third Party(ies).**

17 *Evidence Code* § 912(a) provides, in pertinent part:

18 “Except as otherwise provided in this section, the right of any person to  
19 claim a privilege provided by Section 954 (lawyer-client privilege)...is  
20 waived with respect to a communication protected by such privilege if any  
21 holder of the privilege, without coercion, has disclosed a significant part  
22 of the communication or has consented to such disclosure made by  
23 anyone. Consent to disclosure is manifested by any statement or other  
24 conduct of the holder of the privilege indicating consent to the disclosure,  
25 including failure to claim the privilege in any proceeding in which the  
26 holder has the legal standing and opportunity to claim the privilege.”

27 Section 912, adopted by Stats.1965, c. 299, § 2, operative January 1, 1967, and amended by  
28 Stats.1980, c. 917, p. 2915, § 1, is also a codification of what was already existing case law. See, *City &*

1 *County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 233; and *Lissak v. Crocker Estate Co.*  
2 (1897) 119 Cal. 442.

3 As in the case of Section 962, Section 912 means just what it says on its face. The attorney-  
4 client privilege is waived when the holder of the privilege, without coercion, and in a non-confidential  
5 context, discloses a significant part of the communication or consents to such disclosure by anyone and  
6 when there is a failure to claim the privilege in any proceeding in which the holder has the legal standing  
7 and opportunity to do so. *Motown Record Corp. v. Superior Court* (1984) 155 Cal.App.3d 482. It has  
8 also been said that “Once the privilege of a communication is waived, it is gone for good.” *Markwell v.*  
9 *Sykes* (1959) 173 Cal.App.2d 642.

10 The existence of a mere intent to disclose does not operate as a waiver of the attorney-client  
11 privilege; the waiver comes into being only after the disclosure has actually been made. *Lohman v.*  
12 *Superior Court in and for Alameda County* (1978) 81 Cal.App.3d 90.

13  
14 **4. Summary and Conclusion.**

15 ■■■■ if called to testify on behalf of either party to the within proceeding, can be compelled to  
16 testify, notwithstanding any claim of attorney-client privilege, if:

- 17 • The matter as to which testimony is sought relates to conduct or other circumstances that are not  
18 in and of themselves protected communications as between an attorney and his client.
- 19 • The privileged communication took place between two clients who were being jointly  
20 represented by ■■■■ at the time of the communication, and one of those clients seeks to elicit  
21 testimony regarding the substance of the communication.
- 22 • Either of the clients has either disclosed to a third party, or authorized the disclosure to a third  
23 party, of the substance of the otherwise-privileged communication with ■■■■

24 It is hoped that this *Amicus Curiae* Brief has been of some assistance to the Court in connection  
25 with its consideration of any evidentiary objections or issues that may arise concerning the permissible  
26 scope of ■■■■ testimony regarding the relationship between ■■■■ and ■■■■

