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California Supreme Court Expands Work Product Protection for Witness Statements in *Coito v. Superior Court*

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In a ruling sure to increase the number of discovery disputes reaching the courts, the California Supreme Court recently clarified the reach of the attorney work product doctrine in *Coito v. Superior Court*, 2012 Cal. LEXIS 5823 (June 25, 2012). The Supreme Court rejected several long-standing appellate decisions and reversed the Court of Appeal to hold that while certain witness statements obtained through an attorney-directed interview may be entitled to absolute protection, almost all are at least subject to qualified work product protection as a matter of law. Therefore, even if witness interviews do not reveal an attorney's impressions or opinions to merit absolute protection, such material ordinarily will not be discoverable unless a court determines that denial of disclosure will unfairly prejudice the party seeking discovery or result in an injustice. This decision provides important guidance to attorneys who wish to protect witness interviews from discovery, and will make it harder to obtain discovery of even the most basic witness statement.

At the same time, the Court declined to find that the work product protection applies as a matter of law to information sought under Form Interrogatory No. 12.3, relating to the identity of witnesses from whom statements have been obtained. Under certain circumstances, such information may be protected work product. To obtain such protection, the withholding party must persuade the trial court that disclosure is subject to either (1) absolute privilege because the information would reveal the attorney's impressions, conclusions, or legal research or theories; or (2) qualified privilege such that disclosure would result in undue advantage to the opposing side.

Case Background and Road to the California Supreme Court

The *Coito* case concerned the drowning of a 13-year-old, whose mother filed a complaint for wrongful death against the State of California, among other parties. Counsel for the state sent two investigators from the Department of Justice to conduct audio-recorded interviews of four of the six witnesses to the accident. Plaintiff then sought responses from the State to Form Interrogatory 12.3, which seeks the names, addresses, and telephone numbers of individuals from whom written or recorded statements have been obtained. Plaintiff also demanded production of the audio recordings. The state asserted the work product privilege, relying on the Third District's ruling in *Nacht & Lewis Architects, Inc. v. Superior Court*, 47 Cal.App.4th 214 (1996), which held that the absolute work privilege applies to witness statements recorded by an attorney, while the qualified privilege applies to information

sought by Form Interrogatory No. 12.3. The trial court relied on *Nacht* and largely denied the motion to compel. The Court of Appeal, criticizing *Nacht*, concluded that neither recorded witness statements nor the information sought by Form Interrogatory No. 12.3 were entitled to work product protection as a matter of law.

The Supreme Court's Decision: Potentially Entitled to Absolute Protection, Witness Statements or Interviews Are at Least Subject to Qualified Privilege As a Matter of Law

Influenced heavily by the legislative history and policy underlying the work product privilege, the Supreme Court struck a balance between the trial court and the Court of Appeal and resolved a split in the lower courts. “In light of the origins and development of the work product privilege in California, we conclude that witness statements obtained as a result of an interview conducted by an attorney, or by an attorney’s agent at the attorney’s behest, constitute work product protected by section 2018.030.” 2012 Cal. LEXIS at *22. The Court held that where witness statements reveal an attorney’s impressions, conclusions, opinions, or legal research, the statement is entitled to absolute protection. The Court went on to hold that even witness statements obtained by an attorney that do not reveal the attorney’s thought process are entitled as a matter of law to qualified work product protection, since production of these would undermine the legislative policy of preventing an attorney from taking advantage of an adversary’s efforts.¹

Under *Coito*, a party objecting to producing recorded statements on the grounds they are entitled to absolute protection must make a preliminary or foundational showing that disclosure would reveal the attorney’s “impressions, conclusions, opinions, or legal research or theories.” Upon adequate showing, the trial court would then determine (including through an *in camera* inspection if necessary) whether and to what extent the absolute privilege applies, thereby potentially shielding all or portions of recorded interviews from discovery.

Under certain circumstances it may be possible to redact a witness statement and thereby protect the work product. 2012 Cal. LEXIS at *25. In other instances, redactions will not offer sufficient protection and the statement will be protected from disclosure. *Id.* To the extent the absolute privilege does not apply, however, the court’s holding that the statement is entitled to qualified privilege means that parties seeking production of recorded witness statements or interviews will have the burden on a motion to compel of showing that “denial of disclosure will unfairly prejudice the party in preparing its claims or will result in an injustice.” *Id.*

¹ In reaching its decision, the Court specifically disapproved of five cases decided between 1961 and 1980 to the extent they held that a witness statement taken by an attorney would not, as a matter of law, constitute work product. The cases expressly disapproved by the *Coito* court are *Fellows v. Superior Court*, 108 Cal.App.3d 55 (1980); *People v. Williams*, 93 Cal.App.3d 40 (1979); *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal.App.3d 626 (1978); *Kadelbach v. Amaral*, 31 Cal.App.3d 814 (1973); and *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355 (1961).

Guidance for Practitioners

Under *Coito*, certain factors, if present, will increase the likelihood that witness interviews and statements will be entitled to absolute work product protection:

- Inclusion of explicit comments or notes by the attorney stating his or her impressions of the witness or other case issues.
- Questions that provide insight into the attorney's theory of the case or evaluation of what issues are most important.
- Follow-up questions that potentially reveal the attorney's strategy or concerns. "Lines of inquiry that an attorney chooses to pursue through follow-up questions may be especially revealing." *Coito* at *25.
- Selectively determining the specific witnesses to be interviewed from among the total available.

Now that the Court in *Coito* has made clear that the qualified privilege applies to witness statements and interviews as a matter of law, it will be much harder for counsel to obtain such materials in discovery. It is certainly the case that any party seeking recorded witness statements or interviews should anticipate filing a motion to compel and be prepared to show that denial of disclosure will unfairly prejudice the party in preparing its claim or defense or will result in an injustice.

On a Case-by-Case Basis, the Absolute or Qualified Privilege May Apply to Information Requested by Form Interrogatory 12.3

Form Interrogatory No. 12.3 asks whether the party or his agent has obtained any recorded statement from an individual. The Interrogatory also requests information regarding the identity of the witness from whom a statement was obtained. The Court of Appeal, disagreeing with *Nacht v. Lewis*, held that the defendant in *Coito* could not refuse to answer. The Supreme Court held that the identities of witnesses from whom a lawyer had obtained statements could in certain circumstances constitute work product, but refused to extend the work product doctrine to information sought under Form Interrogatory No. 12.3 as a matter of law.

The court observed that identities of witnesses where the attorney interviews only a selective few of many known witnesses may reveal the attorney's conclusions as to which individuals may provide the most information. The identity of these culled witnesses may therefore receive absolute protection. Significant work may go into the selection of such witnesses, such that producing these identities would unfairly allow the discovering attorney to "free-rid[e]" onto the work of the other counsel. *Coito* at *28. By contrast, where an attorney interviews all or most of the known witnesses to an incident, the information requested by interrogatory No. 12.3 would not reveal an attorney's impressions or legal theories, and should therefore be provided. The court concluded that in all or most cases, the information

sought under interrogatory No. 12.3 does not unequivocally implicate the policy considerations represented by the work product privilege and consequently held that interrogatory No. 12.3 “usually must be answered.” The court also suggested that in the instant case, the facts supported disclosure because the investigators interviewed most (four) of the known (six) witnesses to the drowning.

Conclusion

Coito provides increased work product protection for witness interviews and statements. Counsel must carefully conduct and/or manage the interviews to ensure absolute work product protection. Otherwise, the statements are entitled to qualified protection, and may be produced if parties seeking their production can show that denying such discovery will result in unfair prejudice or hardship.

How We Can Assist

If you have any questions about this subject, please contact Merri Baldwin (mbaldwin@rjo.com) or Suhani Kamdar (skamdar@rjo.com), or another member of the Complex Commercial Litigation Practice Group (all of whom are listed at <http://www.rjo.com/complexcommercial.html>). RJO’s Complex Commercial Litigation Practice Group regularly represents and counsels a wide variety of clients. The Complex Commercial Litigation Practice Group’s articles are available on our web site, at http://www.rjo.com/pub_complexcommercial.html. Please visit our web site now and in the future as we continue to track and analyze developments in the law governing commercial litigation.

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