

Certain Witness Statements Protected by Attorney Work Product Privilege, California High Court Rules

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Recordings of witness interviews conducted by investigators employed by counsel and the identity of witnesses from whom counsel obtained statements are subject to at least a qualified work product protection, the California Supreme Court has ruled. *Coito v. Superior Court*, No. S181712 (Cal. Jun. 25, 2012). In addition, the Court held such statements and information could be subject to absolute privilege if disclosure would reveal an attorney's tactics, impressions, or evaluation of the case. The Court reversed an order compelling discovery and returned the case to the trial court.

Background

On March 9, 2007, 13-year-old Jeremy Wilson drowned in the Tuolumne River in Modesto, California. Jeremy Wilson's mother, Debra Coito, filed a wrongful death action against the State of California. Six other juveniles witnessed the drowning. Before their depositions, investigators for the State's counsel interviewed four of them, asking questions provided by the State's counsel. Each interview was audio-recorded and saved on a compact disc.

Coito requested production of the witnesses' statements and demanded the State identify witnesses from whom it obtained statements. The State objected, asserting the attorney work product privilege protected the statements and identities from discovery. The trial court sustained the objection, concluding as a matter of law that the recorded witness interviews were entitled to absolute work product protection and that the other information sought was work product entitled to qualified protection. The appellate court reversed and directed the trial court to grant the motion to compel discovery. The State appealed.

Applicable Law

Section 2018.030(a) of the California Code of Civil Procedure prohibits discovery of any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" as absolutely privileged. "Writing" includes any form of recorded information, including audio recordings.

The law provides qualified protection for all other attorney work product. Such material "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." Courts have resolved whether particular materials constitute work product on a case-by-case basis.

Witness Statements and Identity Protected

The California Supreme Court concluded the recorded witness statements requested in this case were entitled to at least qualified work product protection because such statements would not exist "but for the attorney's initiative, decision, and effort." Whether witness statements are subject to an absolute or qualified privilege depends on whether they reveal an attorney's "impressions, conclusions, opinions, or legal research and or theories." The Court noted that this analysis must be applied on a case-by-case basis; it overruled a line of cases holding that witness statements taken by an attorney do not constitute work product. On the other hand, it disapproved of any blanket finding that such statements would be absolutely privileged.

Absolute Privilege

Absolute privilege may apply where a witness's statements are "inextricably intertwined" with the attorney's comments or notes stating his or her impressions of the witness, the witness's statements, or other issues in the case. It may apply when the attorney's questions provide a "window into the

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attorney's theory of the case" or reveal the attorney's evaluation of significant issues. In some cases, the fact that the attorney has chosen to interview a particular witness may disclose important tactical or evaluative information (especially perhaps in cases involving a multitude of witnesses).

To invoke the absolute privilege, the Supreme Court instructed, an attorney must make a preliminary showing that disclosure would reveal his or her "impressions, conclusions, opinions, or legal research or theories." The trial court then should determine, by private inspection if necessary, whether absolute work product protection applies to some or all of the material.

Qualified Privilege

Even if witness statements would not reveal an attorney's thought process, the Court concluded such statements would be entitled to qualified protection for two policy reasons. First, the work product privilege helps to prevent an attorney from taking undue advantage of his or her adversary's industry and efforts. Second, the work product privilege encourages attorneys to prepare their cases thoroughly and to investigate both the favorable and unfavorable aspects. Accordingly, the Court said, a party may obtain discovery of such statements only if that party can show denial of discovery would unfairly prejudice him or her in preparing the case or would result in an injustice.

With respect to the identity of witnesses, the Court applied a similar analysis. Such information is not entitled to an absolute or qualified privilege automatically, the Court said. Rather, the party invoking the privilege must establish that disclosure would reveal the attorney's tactics, impressions, or evaluation of the case or would result in opposing counsel taking undue advantage of the attorney's industry or efforts.

The Court reversed the order compelling discovery and returned the case to the trial court for it to determine whether the requested discovery should be produced.

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In many employment cases, and particularly in class actions, the employer's counsel obtains witness statements. Plaintiffs' attorneys routinely seek to obtain these statements through discovery. Based on *Coito*, however, such statements are entitled to at least qualified work product protection and plaintiffs' counsel may find it more difficult to obtain the fruits of employers' counsel's hard work. Of course, whether and to what extent the work product privilege applies will rest in the sound discretion of the trial court. Jackson Lewis attorneys are available to answer inquiries regarding this and other legal developments.

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