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Witness Statements: Attorney Work Product?

A recent California Court of Appeals case, *Coito v. Superior Court of Stanislaus County*, __ Cal. App. 4th __ (March 4, 2010), highlights an important discrepancy between state and federal protection of attorney work product as it applies to witness statements. While the federal rules and case law support a qualified privilege with regard to such statements (requiring a showing of substantial need to permit discovery), the law applicable in state courts may differ. The court in *Coito*, as further discussed below, followed a line of California cases that place witness statements outside of the attorney work product doctrine.

A. Witness Statements

A witness statement, or "previous statement" under Federal Rule of Civil Procedure 26(b)(3)(C), is either:

> (i) a written statement that the person has signed or otherwise adopted or approved; or
>
> (ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

Taking a witness statement, in the context of an investigation or preparation for litigation, can serve a number of important uses. It allows for an informal and potentially "off-the-record" atmosphere for collecting facts about the case, without formal notice to an opponent. If recorded, the statement could later be used at deposition or at trial as a recorded recollection, to refresh a witness' memory, or to impeach the witness based on a prior inconsistent statement.

Unlike interviews taken with an attorney's own client, however, the statements of percipient witnesses (not the attorney's client) will not be protected by the attorney-client privilege. Instead, such statements are afforded protection under the attorney work product doctrine.

B. <u>Attorney Work Product Protection of Witness Statements Under Federal Law</u>

The attorney work product doctrine, and its application to witness statements, was first recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947). The decision revolved around a sinking tugboat and the statements of four surviving crew members. An attorney hired by the defendant tugboat owners took the statements of the four witnesses, which the plaintiff then sought through discovery. Although the district court granted a motion to compel, this was reversed by the Third Circuit, and the Supreme Court sided with the defendants. The Supreme Court held that such matters were not discoverable without a showing by the requesting party of "necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case." *Id*. at 509.

The current basis for work product protection is set forth in Federal Rule of Civil Procedure 26(b)(3):

> 3) Trial Preparation: Materials.
>
> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Under the Federal Rules, the federal courts have allowed this qualified or limited privilege to protect the disclosure of witness statements in discovery absent a showing of "substantial need" and lack of ability to obtain "substantial equivalent[s] by other means." An important caveat to this requirement is that Rule 26(b)(3)(C) permits any person to request, without a showing of "substantial need," the person's *own* previous statement.

C. <u>Attorney Work Product Protection of Witness Statements Under California Law</u>

However, as a recent California case illustrates, the treatment of witness statements as attorney work product in state courts may differ. In *Coito v. Superior Court of Stanislaus County*, __ Cal.

App. 4th __ (March 4, 2010), a 2-1 split decision by California Court of Appeals, the Court held that recorded witness statements were not protected by the attorney work product doctrine.

In response to decisions of the California courts (*see, e.g.*, *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355 (1962) (deciding that the work product doctrine did not apply as a privilege under California law)), California amended its Civil Discovery Act in 1963 for the purposes of protecting attorney work product. As stated in California's Code of Civil Procedure, Section 2018.020, it is the policy of California to do both of the following:

> (a) Preserve 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.
>
> (b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.

California's attorney work product doctrine, codified in Section 2018.030, sets forth both an *absolute* and a *qualified* privilege:

> (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
>
> (b) The work product of an attorney, other than a writing described in subdivision (a), 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.

Whether, and if so where, witness statements fall into this scheme has been a topic over which the California courts have reached somewhat mixed conclusions, and the California Supreme Court has not weighed in on the matter. While an attorney's impressions and theories, as reflected in a written summary of a witness interview, fits squarely within the absolute privilege, the treatment of the factual portions of the interview and summary—or more to the point, a verbatim transcription or recording of the interview—is less clear.

One line of cases holds that written or recorded statements of percipient witnesses are not protected as qualified work product even when prepared or recorded by the attorney or the attorney's agent. These cases hold that the statements are only evidentiary in character, not "derivative" or "interpretive." *See, e.g.*, *Kadelbach v. Amaral*, 31 Cal. App. 3d 814, 822-23 (1973) (tape recorded statements made by witnesses to attorney were presumed to be evidentiary and nonderivative in character).

At the other end of the spectrum is *Nacht & Lewis Architects, Inc. v. Superior Court*, 47 Cal. App. 4th 214 (1996), where a California Court of Appeal indicated that *whenever* an attorney records in writing the substance of a witness' statement, **all** of the written notes or recorded statements are protected by the absolute work product privilege. The rationale of *Nacht & Lewis* is that whom an attorney chooses to interview, and what was asked, are invariably affected by the attorney's impressions and theories.

In *Coito v. Superior Court of Stanislaus County*, __ Cal. App. 4th __ (March 4, 2010), a California Court of Appeals again attempted to pick apart the attorney work product doctrine as it applies to witness statements. In its 2-1 decision, the Court sided with the authority that recorded statements of percipient witnesses were discoverable and **not** privileged, either absolutely or qualifiedly.

The dissenting opinion, which goes to such lengths as to urge the California Supreme Court to address the subject, espouses a framework that would more closely follow that of the federal courts:

> First, the *absolute* work product privilege is not applicable to a recorded witness statement *merely because* it was recorded by an attorney or his agent. Rather, the absolute privilege applies, if at all, to the attorney's "impressions, conclusions, opinions, or legal research or theories" (Code Civ. Proc., § 2018.030, subd. (a)), and matters inextricably intertwined therewith.
>
> Second, where any attorney (or the attorney's agent), in the course of preparing or investigating a client's case, interviews a percipient witness therein and records what that witness said, the recording constitutes *qualified* work product of the attorney. While such recording is protected by the qualified privilege, it is still potentially discoverable depending on a moving party's showing of need under section 2018.030, subdivision (b).

Dissenting and concurring opinion, slip op. p. 1.

D. <u>Conclusion</u>

While the federal rules quite clearly attach a qualified privilege to recorded witness statements, the same protections may not apply in state courts, such as in California. Practitioners should be aware of both standards to the extent they might apply when developing any investigation or litigation strategy. If *Coito* endures, it could be critically important, in California at least, to know the forum in which you may end up litigating well before the litigation commences. For now at least, the privilege hangs on the answer to that question.

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