

California Case Law Update – Decision Changes Discovery Rules on Witness Statements

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Fifth District Court of Appeal Rules that Neither Absolute Nor Qualified Attorney Work Product Privilege Applies to Written or Recorded Statements Obtained from a Percipient Witness by an Attorney or the Attorney's Representative

This decision also changes how parties will respond to Judicial Council Form Interrogatory Number 12.3, as the court strongly disagreed with the ruling in Nacht & Lewis, which had previously provided a blanket protection from revealing the list of individuals that the responding party had taken written or recorded statements from.

The California Court of Appeals recent decision in Coito v. The Superior Court of Stanislaus County, 2010 Cal. App. LEXIS 292 (F057690), not only impacts how a party will respond to the standard written discovery regarding their investigation of an accident, but also should inform risk managers, insurance adjusters, in-house counsel and panel counsel as to *how* they should conduct their pre-suit and litigation investigation.

The Coito decision includes at least four significant holdings:

1. A written or recorded statement obtained from a percipient witness is “classic evidentiary material” and is afforded no protection from disclosure by absolute attorney work product privilege.¹ Cal Code Civ. Proc. 2018.030(a)
2. An attorney's choice of which witnesses to interview, and/or the questions asked during the course of an interview, in most cases will not “reflect counsel's impressions, conclusions, and theories about the case,” sufficiently to provide protection from disclosure under the qualified attorney work-product privilege for written or recorded witness statements. Cal Code Civ. Proc. 2018.030(b)
3. A party responding to written discovery can no longer rely solely on the holding in Nacht & Lewis to protect from discovery the list of witnesses interviewed, and/or witness statements obtained by that party's attorney or attorney's representative.
4. To the extent a party wishes to invoke the qualified attorney work-product privilege to prevent from disclosure the list of individuals it has obtained written or recorded statements from or the statements themselves, it should be prepared to make a foundational showing in the trial court, in an in camera hearing, that the privileged material is “derivative” in nature, i.e. it is material created by and derived from an attorney's work and reflects the attorney's evaluation or interpretation of the law or facts involved.

The petitioner in Coito, Debra Coito, filed a complaint for wrongful death against several defendants, including the State of California. Her complaint was based upon the death of her 13-year-old son, Jeremy Wilson, who died in a drowning accident in the Tuolumne River in Modesto, California. At the time of the drowning, there were six other juveniles present. Counsel for the state sent two investigators to interview and

¹ “Independent” witnesses are to be distinguished from witnesses who have a confidential relationship with the attorney – e.g., the client. Coito, 2010 Cal. App. LEXIS 292, p. 13, fn. 11.

take recorded statements from four of the juveniles. Counsel for the state provided the investigators with questions they wanted answered.

After the interviews by the state had taken place, Coito served the state with Judicial Council form interrogatory No. 12.3, seeking the names of and information about witnesses for whom written or recorded statements had been obtained. Coito also served a demand for production of documents, seeking production of the four recorded witness interviews. The state objected on the basis of attorney work-product privilege. Coito filed a motion to compel. In support of her motion, Coito filed declarations from two of the interviewed witnesses in which both declared that they did not intend their recorded statements to the state investigator be confidential. The state opposed the motion to compel, relying on Nacht & Lewis Architects, Inc. v. Superior Court.² Relying on the court's holding in Nacht & Lewis, the superior court denied Coito's motion. Coito filed an application for a writ of mandate compelling answers to interrogatory No. 12.3 and production of the recorded interviews.

The Court of Appeals disagreed with the court's holding in Nacht & Lewis, and "in following the weight of authority" held that witness statements recorded by an attorney or their representative are "classic evidentiary material," as they can be admitted at trial as prior inconsistent statements, prior consistent statements, or past recollections recorded.³ As such, the recorded interviews as well as the list of witnesses from whom statements have been obtained are not attorney work-product. In rejecting the state's argument that such evidence should be subject to qualified work-product protection, the court acknowledged that while an attorney could potentially reveal his or her thoughts about a case by the way in which they conduct a witness interview, counsel should be able to tailor their interviews so as to avoid this problem. Alternatively, an attorney wishing to protect this information from disclosure can request an in camera hearing before the superior court to convince the court that the interview or some portion of it should be protected as qualified work product.

An in camera review was not requested by the state in Coito, and the only evidence offered by the state to support the protected nature of the witness interviews was counsel's vague assertion that he "provided the investigator with questions [he] wanted answered." Without any evidentiary evidence to show that the witness statements were qualified work product, there was no basis to conclude that the witness statements produced either were or included anything other than evidentiary material. The court ordered the trial court to vacate its previous order and enter an order granting Coito's motions to compel both the list of potential witnesses interviewed as well as the four recorded interviews.

² 47 Cal. App. 4th 214 (1996). The Court of Appeals in Natch & Lewis held that lists of potential witnesses interviewed by counsel recorded in notes or otherwise constitute qualified work product because it tends to reveal counsel's evaluation of the case by identifying the persons who claim knowledge of the incident from whom counsel deemed it important to obtain statements. It further held that the recorded witness statements were entitled to absolute work-product protection.

³ Courts have made the distinction between "derivative" and "evidentiary material." "Derivative" material is material "created by or derived from an attorney's work on behalf of a client that reflects the attorney's *evaluation or interpretation* of the law or the facts involved." Non-derivative or "evidentiary" material is categorized as material that is only evidentiary in character, such as the identity and location of physical evidence and the identity and location of witnesses.

Five Rules to Consider Regarding the Discoverability of Witness Statements:

Based on the Court of Appeal's holding in Coito, risk managers, insurance adjusters, in-house counsel and panel counsel should keep in mind the following rules when planning and executing an accident investigation either pre-suit or during litigation:

1. Statements prepared by percipient witnesses and then simply turned over to an attorney are not protected from discovery by the attorney work-product privilege under any circumstance;
2. You should assume that the list of percipient witnesses, including their contact information, that you have spoken to, and/or obtained written or recorded statements from, is always discoverable;
3. You should assume that a claim of qualified work product privilege for a witness statement taken by counsel or his representative, based on the argument that the choice of which witness to interview, or that the questions asked by counsel during the interview will reflect counsel's impressions, conclusions and theories about the case, will **not** be successful;
4. You should assume that even a memorandum or notes prepared by counsel, or his representative, during an interview with a witness will not be protected from discovery by the qualified work product privilege unless it is derivative in nature, i.e., it reflects the attorney's evaluation or interpretation of the law or facts of the case; and
5. A good rule of thumb to use to guide you in determining whether a witness statement taken by counsel, or notes prepared by counsel during a witness interview, are derivative in nature and therefore entitled to qualified protection, is that "information regarding events provable at trial, or the identity of physical evidence, cannot be brought within the work product privilege simply by transmitting it to the attorney."

We hope the above assists you in navigating the complicated issue of whether statements obtained in an investigation may be entitled to protection during the discovery process. Burnham Brown's Retail and Hospitality Group continues to represent its clients in the array of civil litigation and claims that covers the full spectrum of their operations. It is also available to advise and consult with its Retail and Hospitality clients on best practices and training to effectively conduct pre-suit and litigation investigations.

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