CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Coito v Superior Court (3/24/2010)

Work-Product Privilege; Witness Statements

Plaintiff's thirteen year old son drowned in the Tuolumne River, and she later sued various defendants, including the State of California. Six other juveniles were present at the site and witnessed what occurred. Counsel for the state sent two investigators to interview and take recorded statements from four of the juveniles. Counsel for the state provided the investigator with the questions he wanted answered. Statements and a memo were prepared by one of the investigators. Another defendant noticed one of the witnesses' deposition, and counsel for the state used the content of the recorded statement to examine him.

Thereafter, plaintiff served the state with supplemental interrogatories and document demands, seeking names of and information about witnesses from whom statements had been obtained. Plaintiff also sought copies of the statements, but did not seek the memo. The state objected based on the work-product privilege, and plaintiff moved to compel. In its opposition, the state relied primarily on *Nacht & Lewis Architects, Inc. v Superior Court* (1996) 47 Cal.App.4th 214. After a hearing, the superior court denied plaintiff's motion, finding the discovery sought "qualified" work product and "absolute" work product. The court did order production of the statement of the witness whose deposition had been taken, on the basis the work-product protection had been waived by its use at deposition. Plaintiff then filed an application for writ of mandate.

Attorney work-product is defined in the Code of Civil Procedure, section 2018.010, subdivision (a) which provides absolute protection from discovery, any writing, "…*that reflects an attorney's impressions, conclusion, opinions, or legal research or theories*…" Such writings are not discoverable under any

circumstances. A classic example is a memorandum written by an attorney, after taking a statement from a witness, summarizing the attorney's impressions and conclusions. (*People v Boehm* (1969) 270 Cal.App.2d 13)

Subdivision (b) is a catch-all for work-product not falling within the above description. It provides a qualified protection: such work product, "*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…*" Since the Civil Discovery Act lacks a description or definition of what is and is not **qualified** work product, the courts proceed on a case-by-case basis. The focus is on the distinction between "interpretive" (derivative) material on the one hand and "evidentiary" (non-derivative) material on the other. (*Mack v Superior Court* (1968) 259 Cal.App.2d 7; *Fellows v Superior Court* (1980) 108 Cal.App.3d 55) Generally speaking, work product protection extends only to **derivative** material, which is 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. In contrast, **non-derivative** material is that which is only **evidentiary** in character. As such it is not protected even if a lot of attorney "work" may have gone into locating and identifying it. Examples of derivative materials include trial diagrams, audit reports, appraisals and expert opinions, developed as a result of counsel's initiative. Non-derivative or evidentiary materials include the identity and location of physical evidence and the identity and location of witnesses. (*City of Long Beach v Superior Court* (1976) 64 Cal.App.3d 65)

A guiding principle in the analysis is that information regarding events provable at trial, or the identity and location of physical evidence cannot be brought within the work product privilege simply by transmitting it to the attorney. The courts have addressed the question whether witness statements are subject to discovery. Statements prepared by a witness and turned over to an attorney are clearly not work product. (*Wellpoint Health Networks, Inc. v Superior Court* (1997) 59 Cal.App.4th 110) The situation is more difficult when the statement has been taken by the attorney or the attorney's representative. Even though such work is in part the product of the attorney's work, the statement is not protected.

In *Greyhound Corp. v Superior Court* (1961) 56 Cal. 2d 355, the California Supreme Court distinguished written memoranda of impressions received from oral statements and conversations had with independent witnesses and actual

written statements taken from independent witnesses. The trial court's order of production of the written witness statements was upheld. (*Greyhound*, at p. 401) In *Kadelbach v Amaral* (1973) 31 Cal.App.3d 814, appellants argued that written or recorded statements of witnesses made to an attorney were protected by the work product privilege. The court rejected the contention on the basis that witness statements, even those taken by an attorney, are not derivative but are evidentiary in nature.

Notes made by the interviewing attorney or attorney's representative usually are treated as work product, entitled to absolute protection, because they reflect the impressions, conclusions, or opinions of the interviewer. (*Rodriguez v McDonnell Douglas Corp* (1978) 87 Cal.App.3d 626) Even in that case, the court noted production would be ordered were the statements not "inextricably intertwined" with a portion of the interviewer's summary which was absolutely protected work product.

Here, the trial court relied on *Nacht & Lewis*, *supra*, which stated that a list of witnesses interviewed by defendant's counsel, recorded in notes or otherwise, would be qualified work product as it tended to reveal counsel's evaluation of the case by revealing persons from whom counsel deemed it important to obtain statements, and would be absolutely privileged, as revealing counsel's impressions, conclusions, opinions or legal theories. (*Nacht & Lewis*, at p. 217) Here, the Justices in the majority noted the purpose of the work product doctrine is to prevent incompetent counsel from taking unfair advantage of their adversary's efforts in preparation for trial, not to suppress relevant testimony which happened to have been obtained by the opposition. (*Jasper Construction, Inc. v Foothill Junior College Dist.* (1979) 91 Cal.App.3d 1)

The Fifth DCA then chose to follow the weight of authority and hold that written and recorded witness statements, including those produced by the witness and turned over to counsel and those taken by counsel are not attorney work product. Because such statements are not work product, neither is a list of witnesses from whom statements have been obtained.

The state also resisted the motion to compel on the basis the statements are subject to qualified work product protection. The state argued the choice of the witness to interview, and the questions asked, will reflect counsel's impressions, conclusions, or theories about the case. The Justices found this proposition was too broad to be useful. In most cases, nothing would be revealed by the mere choice of witnesses to interview or the questions asked, yet the state's request to

treat all witness statements taken by an attorney or attorney's representative as work product would provide blanket protection. Although an attorney could reveal his or her thoughts through the interview process, competent counsel will be able to tailor the interview to avoid the problem should they choose to do so. Additionally, if there is anything unique about a particular witness interview that reveals interpretive rather than evidentiary information, nothing would prevent the attorney from requesting an ***in camera*** **inspection** by the trial court, in an effort to convince the court the interview or some portion of it should be protected as qualified work product. (*Wells Fargo Bank v Superior Court* (2000) 22 Cal.4th 201) Here, no such hearing was requested, and the state offered nothing to suggest the statements required such protection.

Because the state failed to show the recorded statements of the four juvenile witnesses were protected work product, the majority held the trial court erred in denying the plaintiff's motions to compel. The writ of mandate is issued, directing the trial court to vacate its discovery order denying the motions and to enter an order granting the motions.

In dissent, Justice Kane stated that he found the statements should be protected by qualified work product privileges. He would find that recording what a witness says constitutes qualified work product, subject to a moving party demonstrating need under CCP section 2018.030(b). In his twenty page dissent, he suggests the California Supreme Court should evaluate this issue to clarify the scope of the work product privilege in this context for legal practitioners.

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