CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Coito v Superior Court 6/25/12

Work Product Doctrine; Absolute and Qualified; Interrogatory 12.3

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' depositions, 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.

The Fifth District Court of Appeals reversed the trial court. It held that because the state failed to show the recorded statements of the four juvenile witnesses

were protected work product, the trial court erred in denying the plaintiff's motions to compel. A writ of mandate 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 making a showing under CCP section 2018.030(b). In his twenty page dissent, he suggested that the California Supreme Court should evaluate this issue to clarify the scope of the work product privilege in this context for legal practitioners.

The Supreme Court accepted the case for review. Associate Justice Liu began the opinion by noting that attorney work-product is codified in the Code of Civil Procedure, section 2018.030, 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. 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…"

Previous cases have discussed the difference between "derivative" or "non-derivative" material, or between "interpretative" and "evidentiary" material. (*Fellows v Superior Court* (1980) 108 Cal.App.3d 55; *Rodriguez v McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626; *Mack v Superior Court* (1968) 259 Cal.App.2d 7) Such cases concluded that only derivative or interpretive material—material created by or derived from an attorney's work reflecting the attorney's evaluation of the law or facts—constitutes work product. Other courts, instead of distinguishing between derivative and non-derivative material have determined the scope of protected work product by relying primarily upon the policies underlying the work product statute and its legislative history. (*Dowden v Superior Court* (1999) 73 Cal.App.4th 126)

Justice Liu then undertook a review of the legislative history of the work product doctrine, beginning with the US Supreme Court case, *Hickman v Taylor* (1947) 329 U.S. 495. At the time of *Hickman*, California law protected work product only through the attorney client privilege. The legislature began the work of amending the privilege thereafter, but work stopped after publication of *Holm v Superior Court* (1954) 42 Cal.2d 500. That case was said to address the problems on "working papers" of the attorney, and the amendment was dropped. Subsequent enactment of the Discovery Act failed to clarify the extent Hickman's interpretation of work product was the law in California.

Shortly thereafter, the case of *Greyhound v Superior Court* (1961) 56 Cal.2d 355 was decided. That case excluded non-party witness statements from the protections of attorney client or work product. The court there found work product protections had not been extended in California. The legislature then undertook the amendment of the Code of Civil Procedure which ultimately led to the present day section 2018.020 and 2018.030, providing for privacy to the attorney in preparing the case, and offering both absolute and qualified protection for such work.

Justice Liu continued by noting the absence of a definition of work product in section 2018.030. The opinion noted that work product has been understood since *Hickman* to include witness statements obtained by interview by the attorney. In *Rico v Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, the high court held that work product protection extends to an attorney's written notes about a witness's statements and that when a witness's statement and the attorney's impressions are inextricably intertwined the entire document receives absolute protection. The statement in that case was a summary, unlike the present case. *Rico* did observe that the existence of the document was completely owing to the lawyer's thought processes. The statement would not exist but for the attorney's initiative, decision, and effort to obtain it.

Recorded witness interviews may or may not reveal the attorney's "impressions, conclusions, opinions, or legal research or theories" and thus be entitled to absolute protection. A particular line of inquiry in the statement, or perhaps the mere decision to interview a certain witness may be revealing of tactical or evaluative information. Still, not all such statements reveal the

attorney's thought processes. Where the investigator asks few if any questions while taking the witness's statement little of the attorney's calculations are disclosed.

For this reason, the Supreme Court holds that witness statements procured by an attorney are not automatically entitled as a matter of law to absolute work product protection. Instead, the applicability of absolute protection must be determined on a case by case basis. An attorney resisting discovery based on absolute discovery must make the preliminary showing disclosure would reveal his or her "impressions, conclusions, opinions, or legal research or theories." With an adequate showing, the trial court should then determine by in camera inspection whether the absolute work product protection applies to all or some of the material.

With regard to the qualified privilege, Justice Liu quoted Justice Jackson in *Hickman*, in which he stated it may be that the rules of discovery "were to do away with the old situation where a law suit developed into a battle of wits between counsel. But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." (*Hickman*, at p. 516) An attorney is free to interview the witness for himself or herself to find out what information the witness has that is relevant to the litigation. Absent a showing that a witness is no longer available or accessible, or some other showing of unfair prejudice or injustice, the Legislature's declared policy is to prevent an attorney from "free-riding" on the industry and efforts of opposing counsel.

If attorneys must worry about discovery whenever they take a statement from a witness, it is reasonably foreseeable that fewer witness statements will be recorded and that adverse information will not be memorialized. Without work product protection, no meaningful privacy exists within which an attorney may have sufficient confidence to thoroughly investigate and record potentially unfavorable matters. Accordingly, a witness statement obtained through an attorney-directed interview is, as a matter of law, entitled to at least qualified work product protection.

Justice Liu continued his opinion by noting that section 2018.030(b) afforded the same protection provided by the Court in *Hickman*, placing the burden on the party seeking discovery to establish adequate reasons to justify production. The Court of Appeal in this case followed *Greyhound* when it concluded witness statements are not protected by work product. The Supreme Court now concludes that *Greyhound* is not authority for denying work product protection here. The witness statements in *Greyhound* were made to employees of the defendant, not to defendant's counsel or agents of defendant's counsel. The case did not involve a witness statement procured by an attorney through his or her own initiative.

The Court of Appeal also cited several cases suggesting that witness statements made to an attorney do not constitute work product, including *Fellows*, *Rodriguez* , *People v Williams* (1979) 93 Cal.App.3d 40, and *Kadelbach v Amaral* (1973) 31 Cal.App.3d 814. Underlying these cases is the notion that witness statements are non-derivative or non-interpretative material that is wholly evidentiary in nature. Yet the Appellate justices agreed that a witness statement taken by an attorney possesses both derivative characteristics (attorney effort, planning and thought) and non-derivative elements. Because the lower court ruling would promote inefficiency, unfairness and sharp practices, and potentially demoralize the legal profession, and for other reasons, the Supreme Court holds that to the extent the older cases suggest a witness statement taken by an attorney does not, as a matter of law constitute work product, *Fellows*, *Rodriguez* , *Williams* and *Kadelbach* are disapproved. Additionally, *Greyhound* should not be read as supporting that conclusion.

Instead, the opinion holds that a witness statement obtained through an attorney-directed interview is entitled as a matter of law to at least qualified work product protection. A party seeking disclosure has the burden of establishing that denial of disclosure will unfairly prejudice the party in preparing its claim or defense or will result in an injustice. If the party resisting discovery alleges that a witness statement or portion thereof is absolutely protected because it reflects at attorney's impressions, conclusions, opinions, or legal research or theories, that party must make a preliminary or foundational showing in support of its claim. The trial court should then make an in camera

inspection to determine whether absolute work product protection applies to some or all of the material.

Finally, the case addresses form interrogatory 12.3 which asks the responding party to identify all witnesses from whom statements have been obtained. Since the identity of the witnesses may reveal an attorney's thought processes or strategy, the information may be subject to absolute protection. At the same time, there are times when the identity of witnesses from whom statements are taken reveals nothing. The statement may be in an attorney's file simply because the witness was available.

Accordingly, the Supreme Court holds that information responsive to form interrogatory 12.3 is not automatically entitled as a matter of law to absolute or qualified work product privilege. Instead, the interrogatory must usually be answered. However, an objecting party may be entitled to protection if it can make a preliminary or foundational showing that answering the interrogatory 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. Upon such a showing the trial court should then determine, by making an in camera inspection if necessary, whether absolute or qualified work product protection applies to the material in dispute. The trial court may also have to consider non-party witnesses' privacy interests.

The Court of Appeal's decision is reversed and the matter is remanded for further proceedings, to determine whether the disputed materials should be produced.