



California Case Law Update – Supreme Court Provides Much Needed Clarification Regarding Work Product Protection of Attorney-Directed Non-Party Witness Interviews

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Supreme Court Rules that Qualified Attorney Work Product Privilege Applies and Absolute Attorney Work Product Privilege May Apply to Written or Recorded Statements Obtained from a Non-Party Percipient Witness by an Attorney or the Attorney's Agent

This decision also changes how parties may respond to Judicial Council Form Interrogatory Number 12.3, as the court clarified the preliminary showing that must be made to assert absolute or qualified protection of lists of individuals from whom the responding party had obtained written or recorded statements from.

The California Supreme Court's recent decision in *Coito v. The Superior Court of Stanislaus County*, 2012 Cal. LEXIS 5823 (S18712) filed on June 25, 2012, 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 two significant holdings:

1. A written or recorded statement obtained from an attorney-directed interview is "entitled to at least qualified work product protection," and may be entitled to absolute protection if a party can show that disclosure would reveal its "attorney's impressions, conclusions, opinions, or legal research or theories." Cal Code Civ. Proc. 2018.030(a)
2. The identity of witnesses from whom defendant's counsel has obtained statements is not automatically protected, but may be absolutely protected upon a showing that disclosure would reveal the attorney's tactics, impressions, or evaluation of the case; or entitled to qualified protection if a showing is made that disclosure would result in opposing counsel taking undue advantage of the attorney's industry or efforts.

For a history of the case law leading up to this decision please see our March 2010 Client Alert available at <http://burnhambrown.com/index.cfm?fuseaction=content.contentDetail&id=9140&lid=0>

Through this decision, the Supreme Court has provided much needed clarification regarding both the criteria that must be met to obtain qualified or absolute protection of witness statements, as well as the procedures to claim or attack such protection.

Absolute Privilege: The court affirmed that non-party witness statements procured by an attorney or an attorney's agent acting at the attorney's behest may be entitled to absolute privilege upon a showing that the recorded witness interview reveals the "impressions, conclusions, opinions, or legal research and or theories" of the attorney. Cal Code Civ. Proc. 2018.030(a). The court noted that this may occur not only when a witness's statements are "inextricably intertwined" with explicit comments or notes by the attorney stating his or her impressions or strategy, but also may occur when the questions that the attorney has chosen to ask (or not to ask) provide a window into the attorney's theory of the case or the attorney's evaluation of what issues are most important. However, where witness statements are obtained with "no particular foresight strategy, selectivity, or planning," absolute protection is not automatically granted. The applicability of absolute protection must be determined on a case by case basis.

To obtain absolute privilege, the attorney resisting discovery of a non-party witness statement must make a preliminary or foundational showing that disclosure would reveal his or her “impressions, conclusions, opinions, or legal research or theories.” Cal Code Civ. Proc. 2018.030(a). Upon an adequate showing, the trial court should then determine, by making an in camera inspection if necessary, whether absolute work product protection applies to some or all of the material.

Qualified Privilege: The most significant impact of the court’s rejection of the prior ruling of the appellate court respects qualified protection for non-party witness statements obtained by an attorney or the attorney’s agent. Here, the court held that such witness statements are entitled as a matter of law to at least qualified work product protection under Cal Code Civ. Proc. 2018.030 (b). The court based this change on two rationales. Initially, the court noted that when an attorney obtains through discovery a witness statement obtained by opposing counsel through his or her own initiative, such discovery undermines the Legislature’s policy to “[p]revent attorneys from taking undue advantage of their adversary’s industry and efforts.” Cal Code Civ. Proc. 2018.020 (b). The court noted that opposing counsel is free to interview the witness to find out what information the witness has that is relevant to the litigation. The court found that 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. The second rationale offered in support of the court’s holding regarding qualified privilege to attorney procured witness statements concerns the Legislature’s intent to “encourage [attorneys] to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases.” Here, the court found that without at least qualified protection, attorneys who are worried about discovery whenever they take a statement from a witness may obtain fewer witness statements and that adverse information may not be memorialized. The court noted that such a result would “derogate not only from an attorney’s duty and prerogative to investigate matters thoroughly, but also from the truth-seeking values that the rules of discovery are intended to promote.”

The court’s holding that a non-party percipient witness statement obtained through an attorney-directed interview is entitled as a matter of law to at least qualified work product protection raises important issues with respect to both how a party will respond to the standard written discovery regarding their investigation of an accident, and how pre-suit and litigation investigation should be conducted. As non-party percipient witness statements will rarely qualify for absolute protection, qualified protection will in practice be the far more common scenario. Litigants can now confidently take statements of non-party percipient witnesses without fear that such statements will automatically be disclosed to opposing parties. By disclosing the existence of such statements, litigants may eliminate any claim of prejudice, while retaining qualified privilege over the non-party percipient witness statement itself.

Disclosure of the Identity of Non-Party Percipient Witness Statements: The court’s second primary holding also provides guidance for the development of best practices for responding to standard written discovery and pre-suit and litigation investigation. Here, the court held that the identity of witnesses from whom defendant’s counsel has obtained statements is not automatically protected, but may be absolutely protected upon a showing that disclosure would reveal the attorney’s tactics, impressions, or evaluation of the case; or entitled to qualified protection if a showing is made that disclosure would result in opposing counsel taking undue advantage of the attorney’s industry or efforts. Here, the court noted that parties in litigation typically know the full universe of witnesses, as form interrogatory No. 12.1 requires parties to provide a list of all known witnesses. Thus, form interrogatory No. 12.3 specifically aims to reveal which witnesses an attorney for one party saw fit to ask for a recorded statement.

The court was cognizant that disclosing a list of witnesses from whom an attorney has taken recorded statements may, in some instances, reveal the attorneys’ impressions of the case. The court noted this may occur for example where an attorney chooses to obtain recorded statements from only some of the universe of witnesses. It found that absolute privilege may apply if disclosure of the list indicates the attorney’s evaluation or conclusion as to which witnesses were in the best position to see the cause of an accident. The court further found that qualified privilege may apply to the extent the list of witnesses from whom an attorney has taken recorded statements reflects the attorney’s industry and effort in selecting which witnesses to ask for a recorded statement.

The court qualified this holding however, noting that it will rarely be the case that a witness list responsive to form interrogatory No. 12.3 reflects counsel's premeditated and carefully considered selectivity in choosing which witnesses from whom to obtain recorded statements. The court noted that when recorded statements are obtained from all or almost all of the known witnesses to the incident, compelling a response to form interrogatory No. 12.3 is unlikely to violate the work product privilege, as it does not reveal the attorney's evaluations, strategy or tactics. Thus the court found that because it is not clear that form interrogatory No. 12.3 implicates the policies underlying the work product privilege in all or even most cases, information responsive to form interrogatory No. 12.3 is not automatically entitled as a matter of law to absolute or qualified work product privilege. However, the court found that an objecting party may be entitled to protection based on a preliminary 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. The trial court may then determine, by making an in camera inspection if necessary, whether absolute or qualified work product protection applies to the material in dispute.

Rules to Consider Regarding the Discoverability of Witness Statements and Lists of Witnesses from Whom Recorded Statements Have Been Obtained:

Based on the Supreme Court'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, whether pre-suit or during litigation:

1. Whenever litigation is anticipated, all non-party percipient witness statements should be obtained by legal counsel, or by legal counsel's agent acting at the attorney's request;
2. Statements prepared by non-party percipient witnesses and then simply turned over to an attorney are not protected from discovery by the attorney work-product privilege under any circumstance;
3. As most non-party percipient witness statements do not qualify for absolute privilege, our recommendation is generally to disclose non-party percipient witness statements in response to form interrogatory No. 12.3. Doing so generally eliminates the validity of any claim of prejudice from the opposing party, and by eliminating any claim of prejudice, maximizes the ability to protect the content of the statement under the qualified privilege standard.
4. Know your burden. If you are seeking disclosure of recorded non-party percipient witness statements, you have the burden of establishing that denial of disclosure will unfairly prejudice you in preparing your claim or defense or will result in an injustice.
5. When witnesses are available, obtaining your own recorded statement from the relevant non-party percipient witnesses may be more beneficial to evaluating your case (and less expensive) than winning a discovery battle to obtain the statement obtained by opposing counsel.

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 cover 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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