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California Court of Appeal Holds Witness Statements Not Protected by Work-Product Doctrine

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The California Court of Appeal's new decision in *Coito v. Superior Court*, ___ Cal. App. 5th ___ (Cal. Ct. App., 5th Dist., Mar. 4, 2010) opens a can of worms for employers relating to attorney work-product protection over third-party witness statements. After *Coito*, such witness statements may be discoverable in litigation—*even when lawyers conduct the interviews*.

Plaintiffs' lawyers regularly serve discovery requests asking employers to list all witnesses that they have interviewed and to produce copies of any witness statements. Employers have regularly objected to such requests based on *Nacht & Lewis Architects, Inc. v. Superior Court*, 47 Cal. App. 4th 214 (1996). In *Nacht*, the Third Appellate District held that the qualified work-product doctrine protected a request for a list of witnesses interviewed by counsel and that the *absolute* work-product privilege covered witness statements taken by counsel. In *Coito*, a divided panel of the Fifth Appellate District disagreed with *Nacht*'s bright-line approach to witness statements and ordered the production of the third-party witness statements at issue—which had been obtained at the direction of counsel.

In *Coito*, Ms. Coito's teenage son died in a drowning incident in a local lake and six other juveniles were present and witnessed the events. Ms. Coito filed a wrongful death action against the city and state. The government's attorney sent investigators from the California Department of Justice to take recorded statements from four of these third-party witnesses and told the investigators what questions to ask. The investigators submitted audio recordings of the witness statements to the government's attorney as well as a separate memorandum about the interviews.

Shortly thereafter, Ms. Coito served supplemental discovery (including Judicial Council Form Interrogatory No. 12.3), asking for the names of witnesses from whom written or recorded statements had been obtained and for production of any recorded witness statements. (Ms. Coito did *not* seek discovery of the memorandum prepared by the investigator for the government's lawyer.) The government objected, and Ms. Coito filed a motion to compel. The trial court denied Ms. Coito's motion, and she then filed a petition for writ of mandate.

The Court of Appeal posed the issue before it as whether "the statement of a witness, taken in writing or otherwise recorded verbatim, by an attorney or the attorney's representative is entitled to the protection of the California work-product privilege." It held that, in the circumstances of the case before it, the witness statements were not protected and must be disclosed. In doing so, the court distinguished between absolute work-product privilege (which applies to writings that contain an attorney's impressions, conclusions, opinions, or legal research or theories) and the qualified work-product

privilege (which applies to writings created by attorneys for their clients that reflects the attorneys' evaluation or interpretation of the law of the facts involved). According to the court, the verbatim witness statements at issue did not qualify for the absolute privilege and, in the case before it, the government had not carried its burden to prove the applicability of the qualified privilege.

Although the *Coito* decision certainly causes concern, some limitations arise from its context that should mitigate its impact:

- First, the court did *not* hold that witness statements and witness lists could *never* fall within the attorney work product doctrine. In *Coito*, the government had relied entirely on the argument that the witness statements were protected solely because the government's attorney had told the investigators what questions to ask. The government never requested an *in camera* inspection of the witness statements to determine whether they revealed interpretive rather than evidentiary information. The court stated: "[I]f there were something unique about a particular witness interview that revealed interpretive rather than evidentiary information, nothing about [the court's] holding would prevent the attorney resisting discovery from requesting an *in camera* hearing before the superior court and the opportunity to convince the court that the interview or some portion of it should be protected as qualified work product."

- Second, the *Coito* decision addressed only the work-product doctrine, not the attorney-client privilege. The court recognized a distinction between interviews of third-party, "independent" witnesses (which were at issue in *Coito*) and interviews of witnesses "who have a confidential relationship with the attorney—e.g., the client." The witness statements at issue in *Coito* were verbatim, recorded statements of third-party witnesses—not, for example, statements by a defendant employer's employees. Employers can argue that *Coito* does not extend to witness statements made by their own employees or former employees whose statements otherwise would fall within the attorney-client privilege under *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981).

- Third, because *Nacht* is still a valid appellate decision, trial courts can choose to follow it and not *Coito*. Although trial courts in the Fifth Appellate District are more likely to follow *Coito*, even they are not legally bound to do so. *See McCallum v. McCallum*, 190 Cal.App.3d 308, 315 n.4 (1987); 9 WITKIN, CAL. PROC. 5th (2008) Appeal, § 497, p. 558.

Because uncertainty will remain until the California Supreme Court resolves the conflict between *Nacht* and *Coito*, employers (and their counsel) should exercise great care when deciding which third-party witnesses to interview and how and whether such interviews are recorded. The identity of witnesses interviewed and the content of any witness statements obtained may now be discoverable.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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