Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

Do You Have a Discovery Plan?

By Katherine Gallo

I received a copy of **Petitioner Debra Coito's Answering Brief on the Merits** in the case of ***Coito v. Superior Court of the County of Stanislaus*** which is currently pending in the California Supreme Court. As you many of you are aware, *Coito v. Superior Court* (2010)182 Cal. App. 4th 758 refused to follow the 14-year old case *Nacht & Lewis Architect, Inc. v. Superior Court* (1996) 47 CA4th 214 stating that witness statements are not attorney work product. Below is Petitioner's argument that the Court of Appeal correctly held that signed or recorded verbatim statements of independent witnesses are potential evidence.

Petitioner argues that "**Signed or recorded verbatim statements are evidence, and hence they are necessarily discoverable**."

> "The Attorney General's Opening Brief completely avoids the fact that signed or recorded witness statements are *evidence*, and can be used in depositions or at trial. This is a critical omission because the entirety of the Attorney General's position must presuppose that verbatim witness statements can be hidden from the parties and the witnesses because the statements are "not evidence". If the Attorney General would just concede the obvious, i.e., that signed and recorded verbatim witness statements "are evidence", then they must be discoverable. "The admissibility of a document bears on its discoverability in the sense that **if the document is admissible, it necessarily is discoverable**. (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750), 1760-1761, 30 Cal.Rptr.2d 217)" From this logical conundrum, the Attorney General's assertion of "absolute", or even "qualified" attorney work product for verbatim independent witness' statements, cannot escape."

Petitioner emphasizes that the Court of Appeal's majority opinion held that "**Signed or recorded witness statements are classic evidentiary material**."

> "The majority in *Coito v. Superior Court* (2010) 182 Cal.App.4th 758, 768-769, recognized that "witness statements are classic evidentiary material. They can be admitted at trial as prior inconsistent statements (Evid. Code, § 1235), prior consistent statements (id. § 1236), or past recollections recorded (id., § 1237). Yet, if the statements are not subject to discovery, the party denied access to them will have had no opportunity to [p. 769 of text] prepare for their use.'"

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 klgallo@discoveryreferee.com

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Petitioner also points out that "**The Court of Appeal's concurring and dissenting opinion held that signed or recorded witness statements have the characteristics of evidentiary matter**."

> The concurring and dissenting opinion agreed that signed and recorded statements also have the "characteristics of evidentiary matter (i.e., a witness statement may be admissible to refresh recollection, or to impeach a witness, or if the witness, or if the witness becomes unavailable to testify)." (*Coito,* supra, 182 Cal.App.4th at p. 788)

Finally, Petitioner argues that "**The complete withholding, or even delayed production of evidentiary witness statements are unjustifiable**."

> "While it may be an obvious proposition that the suppression of testimony just because one attorney "got there first" is unacceptable because of the adverse consequences for the truth-seeking function of our adversarial system (*Coito*, p. 769.), it is also significant that delaying production of witness statements at the unilateral election of the opposing counsel is antithetical to all of the purposes of civil discovery.
>
> Discovery should be obtained at the earliest possible state in the proceedings since it plays a significant role in the preparation for depositions and trial, but also in the resolution of cases. An attorney cannot be allowed to delay production of testimony until either the deposition or trial, by invoking the "shield" of either "absolute" or "qualified" attorney work product earlier in the case and then using the testimony as "a sword" whenever it suits the interests of one party. In this case, the Attorney General has provided no justification for that notion of civil litigation."

Does Petitioner's arguments make sense or are her arguments leading the Supreme Court down a slippery slope of the erosion of the attorney work product protection?

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