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Reasonable Expectation of Confidentiality is the "Dispositive Question" for Determining the Existence of Work-Product Protection

By Katherine Gallo

The absence of a reasonable expectation of confidentiality in the content of an independent witness' signed or recorded verbatim statement precludes a finding of work-product protection**.** That is what Petitioner Debra Coito's Answering Brief on the Merits states in the case of ***Coito v. Superior Court*** (2010)182 Cal. App. 4th 758 which is currently pending in the California Supreme Court.

Petitioner demonstrates that California Courts have acknowledged that an expectation of confidentiality is an essential element of the work product doctrine not only in the context of waiver, but also in the context of establishing the protection in the first place. She cites the following cases to substantiate her argument:

> ***BP Alaska Exploration, Inc. v. Superior Court*** *(1988) 199 Cal. App. 3d 1240.* The Fifth District Court of Appeal stated that "[t]he only exception to the absolute work product protection of an attorney's confidential opinion letter to a client is where there has been a waiver of the protection by the attorney's voluntary disclosure or consent to disclosure of the writing to a person other than the client who has ***no interest in maintaining the confidentiality*** of the contents of the writing. (2 Jefferson, Cal. Evidence Benchbook, supra, §41.2 p.1486)" [Id at 1261]
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> ***Armenta v. Superior Court*** *(2002) 101 Cal. App. 4th 525.* The Second Appellate District determined that a report generated by an expert, hired pursuant to a joint-prosecution agreement could not be considered work-product protected because there was ***no reasonable expectation of confidentiality*** since one of the parties was a governmental entity and was required to disseminate the reports upon settlement pursuant to the Public Records Act, and had informed the other party that they would ultimately have to make the reports public. [Id. at 531-532]
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> ***Oxy Resources California LLC v. Superior Court*** (2004) 115 Cal. App. 4th 874. The First District Court of Appeal formally adopted the "common interest doctrine" under California law and confirmed that a ***reasonable expectation of confidentiality*** is an indispensable aspect of the work-product doctrine.

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> ***Meza v. H. Muehestein & Co***. (2009) 176 Cal. App. 4th 969. The Second District Court of Appeal discussed the common interest doctrine citing ***Oxy*** stating that "[u]nder the common interest doctrine, an attorney can disclose work product to an attorney representing a separate client without waiving the attorney work product privilege if (1) the disclosure relates to a common interest of the attorney's respective clients; (2) the disclosing attorney has a ***reasonable expectation that the other attorney will preserve confidentiality***, and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted " (See ***Oxy*** at 891) [Id at 91] [Emphasis added]
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> ***Shadow Traffic Network v. Superior Court*** (1994) 24 Cal. App. 4th 1067. The court concluded "that communications made to a potential expert in a retention interview can be considered confidential and therefore is subject to protection from subsequent disclosure even if the expert is not thereafter retained as long ***as there was a reasonable expectation of such confidentiality***." [Emphasis added]

Petitioner concludes that because the attorney involved in procuring a witness statement from an *independent* third-party witness *cannot* have a reasonable expectation that the content of the statement or the circumstances under which the statement was obtained will remain "confidential", the statement is not "*work-product*" thus making the statement discoverable.

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