

When Are Witness Statements Protected As Attorney Work Product?

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One of the first things an attorney does when representing a client in a particular matter is interview witnesses to learn the facts of the case, or have an investigator do such on their behalf. The attorney will almost always document the witness interviews by creating written records of such, or preserve them in another form, such as recordings. When doing so, the attorney may include his/her own comments and thoughts.

What happens when an opposing party in litigation seeks to discover such statements? Are they protected from disclosure by the attorney work product privilege? Or may an opposing party obtain such, by order of the court if necessary?

The answer is not as simple as it may seem.

It is true that attorney work product is protected by statute. [Code Civil Procedure, § 2018.010 et seq.] But the statute distinguishes between “an attorney’s

impressions, conclusions, opinions, or legal research or theories”, on the one hand, and all other work product. The former receive absolute protection. The latter receive only qualified protection and are “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 or will result in an injustice.”

These issues were addressed recently by the California Supreme Court in [Coito v. State of California](#) (6/25/12), a case which is now on remand to the Superior Court. The Supreme Court held in *Coito* that witness statements may be entitled to absolute protection, depending on whether or not they contained “attorney’s impressions, conclusions, opinions, or legal research or theories.”

However, the Supreme Court did not instruct the Superior Court Judge how to determine this. One [commentator](#) proposes several alternatives:

1. The Judge can instruct the State to redact questions and answers that show “an attorney’s impressions, conclusions, opinions, or legal research or theories”;
2. An in camera hearing for further discussion about the contents of the witness statements;
3. The Court inspects the witness statements in camera and decides what to redact.

Hopefully, future appellate decisions will provide further guidance on the process and procedure to be used in handling these issues at trial.

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