

**Attorney Work-Product Privilege Does Not Extend to Written and Recorded
Witness Statements, Including Those Taken by Counsel**

by

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In a very recent decision, the Court of Appeal for the Fifth Appellate District has ruled that the statement of a witness either recorded or in writing taken by an attorney or the attorney's representative, is not entitled to the protection of the work-product privilege. Such witness statements, even though they may be taken by counsel, are not protected from disclosure and are therefore "discoverable," if requested. In *Debra Coito v. Superior Court of Stanislaus County (State of California)* (March 4, 2010) DJDAR 3289, the Appellate Court decided to follow the weight of authority, and held that such witness statements, including those taken by counsel, are not protected from disclosure or production.

The Coito case involved the wrongful death of a minor due to a drowning incident. At the time of the drowning, six other juveniles were present and witnessed what occurred. Plaintiff sued the State of California and the City of Modesto. Counsel for the State sent investigators from the California Department of Justice, Bureau of Investigation, to take recorded statements from four of the six juvenile witnesses. Counsel for the State had even provided the State's investigator with specific questions which he wanted answered. The statements of the witnesses were recorded and saved on separate compact discs. During the deposition of one of the juvenile witnesses, counsel for the State used the content of the witness' recorded statement to examine him. Plaintiff then served a supplemental document demand seeking production of the recorded witness statements saved on CDs. The State naturally objected to the production of its witness statements, claiming the attorney work-product privilege. Plaintiff filed a Motion to Compel, which was denied by the trial court. Plaintiff then filed an Application for Writ of Mandate with the Court of Appeal.

The Court's analysis began with a review of the development of the work-product privilege in California. The Court noted that there was a difference between "derivative or interpreted" material on the one hand, and "non-derivative or evidentiary" material on the other, and reiterated that work product protection extends only to derivative material which is created by or derived from an attorney's work on behalf of the client which reflects the attorney's evaluation or interpretation of the law or the facts involved. By contrast, "non-derivative" material is that which is only "evidentiary in character," and is "not protected, even if a lot of attorney work may have gone into locating and identifying it."

The Court then analyzed the history of case law pertaining to whether witness statements are subject to discovery. The Court recognized that a witness statement obtained by an attorney is, in part, the product of the attorney's work. However, this alone does not necessarily mean that it is entitled to work-product protection.

Starting with the 1961 Supreme Court case of *Greyhound Corp. v. Superior Court* (56 Cal.2d 355, 401), in which the Court upheld the trial court's order that the defendant provide

discovery of witness statements, the Coito Court examined decisions following *Greyhound*, which rejected the contention that witness statements, even though taken by an attorney, are not derivative in nature, but are evidentiary in nature and therefore discoverable. In support of this analysis, the Court found that witness statements are “classic evidentiary material,” which can be admitted at trial as prior inconsistent statements, prior consistent statements, or past recollection recorded. As a practical matter, however, if the statements are not subject to discovery, then the party who is denied access to them will have no opportunity to prepare for their use. For these reasons, the Coito Court chose to follow the weight of authority and held, consistently with *Greyhound* and its progeny, that written and recorded witness statements, are not protected by the attorney work-product privilege and are subject to discovery.

This decision is significant because it reiterates and reminds us that under existing case law, statements taken from independent witnesses, including not only those produced by the witness and turned over to counsel, but those actually taken by counsel, are not the attorney’s work-product, and remain subject to discovery - - if a Party requests them.