REVIEW OF RECENT CASES: ***Coito v. Superior Court***

THE CALIFORNIA SUPREME COURT HOLDS WITNESS INTERVIEWS AND INTERVIEWEES MAY NOT BE DISCOVERABLE

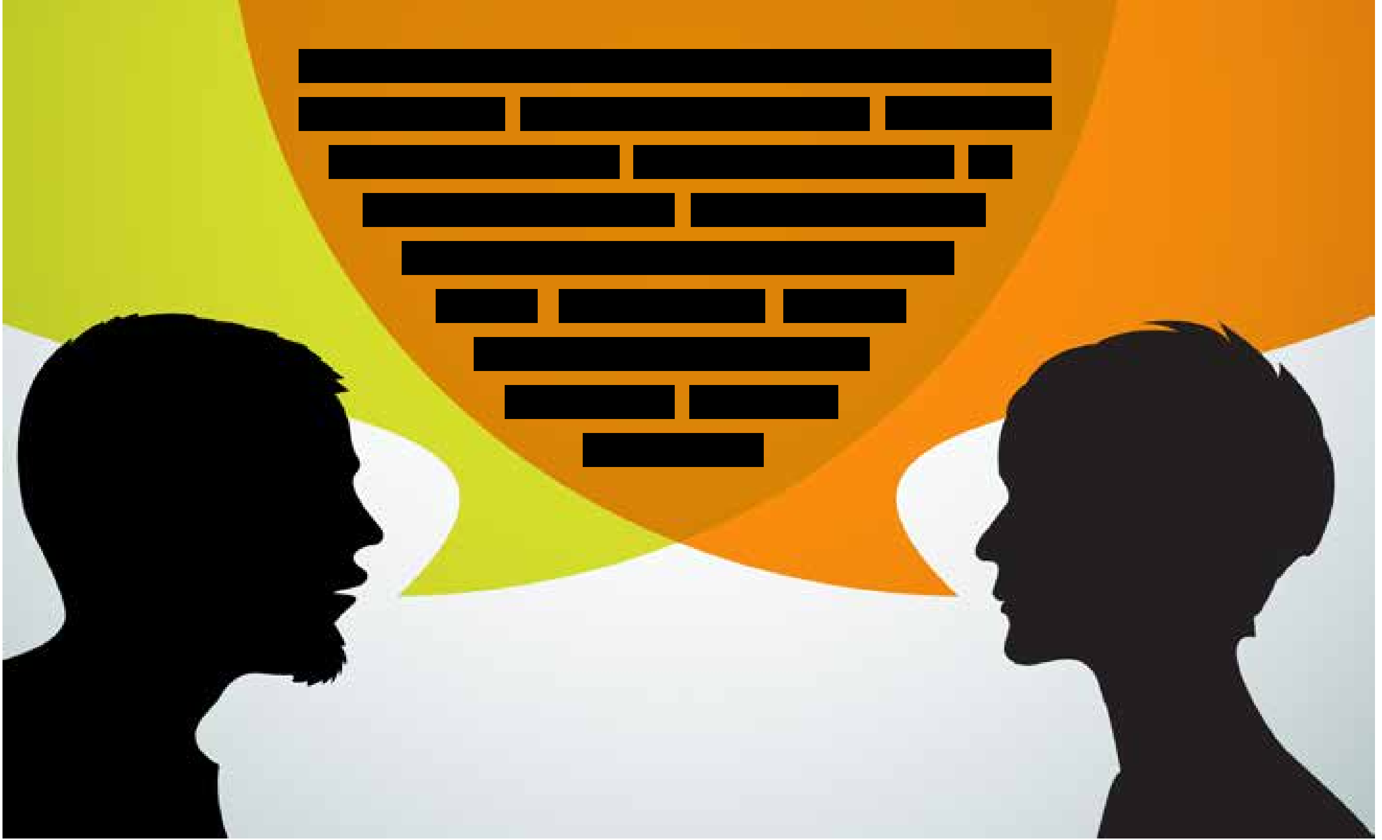
Audra Ibarra

Ideally a trial is the search for the truth. The purpose of pretrial discovery, or forced disclosure between parties of witnesses, exhibits, and other information, is to take the gamesmanship out of trial so that the truth can come out. But the attorney-client privilege protects confidential attorney-client communications from disclosure. And the work product doctrine similarly protects attorney work in preparation for litigation. The purpose of the privilege and doctrine is in part to encourage candid communication between parties and their respective attorneys and to encourage attorneys thoroughly to investigate and prepare their cases for trial. There has always been a tension between pretrial discovery and the attorney-client privilege and work product doctrine. Last year, the California Supreme Court addressed this tension in the area of witness interviews and interviewees in *Coito v. Superior Court*. 54 Cal. 4th 480 (2012).

In *Coito*, a thirteen-year-old boy drowned in the Tuolumne River in Modesto, California. *Id.* at 486. His mother, Debra Coito, filed a complaint for wrongful death against the State of California and other defendants. Six other teenagers saw what happened. The deputy attorney general, handling the case for the state, sent agents to interview four of the teenagers. The agents asked questions posed by the deputy attorney general and audio-recorded the interviews. Coito served the state with interrogatories and document demands that included the names of the witnesses who were interviewed and their statements. The state objected, and Coito filed a motion to compel. The trial court generally denied the motion and found that the information was protected from disclosure by the work product doctrine. A divided Fifth District Court of Appeal reversed. The court held that as a matter of law the names and interviews were not protected. The California Supreme Court reversed and held that attorney-directed interviews are at a minimum covered by qualified work product protection and that the names of interviewees may also be protected in some situations.

ATTORNEY-DIRECTED INTERVIEWS HAVE WORK PRODUCT PROTECTION

In California, attorney work product is protected by statute. Absolute protection or nondisclosure is allowed for writings that reflect "an attorney's impressions, conclusions, opinions, or legal research or theories." Cal. Civ. Proc. Code § 2018.030(a). All other work is provided qualified protection. In other words, it "is 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." Cal. Civ. Proc. Code § 2018.030(b).

In *Coito*, the California Supreme Court held, on *de novo* review, that "a witness statement obtained through an attorney-directed interview is, as a matter of law, entitled to at least qualified work product protection." 54 Cal. 4th at 497. Writing for a unanimous court, Justice Goodwin Liu explained that a default rule to the contrary, which generally forced disclosure of a witness statement procured by an attorney, would impede the California legislature's intent "to encourage [attorneys] to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of their cases." *Id.* at 496. There would be a chilling effect on case investigation and preparation, which might inhibit the truth from coming out:

> [W]ithout work product protection "no meaningful privacy exists within which an attorney may have sufficient confidence to thoroughly investigate and record potentially *unfavorable* matters." This result would derogate not only from an attorney's duty and prerogative to investigate matters thoroughly, but also from the truth-seeking values that the rules of discovery are intended to promote. *Id.* at 497 (emphasis in original).

The court further held that in some circumstances absolute work product protection might apply. The court found that "[i]t is not difficult to imagine that a recorded witness interview may in some instances, reveal the 'impressions, conclusions, opinions, or legal research and or theories' of the attorney." *Id.* at 495. For example, when a witness's statements are "'inextricably intertwined' with explicit comments or notes by the attorney stating his or her impressions of the witness, the witness's statements, or other issues in the case." *Id.* Or when questions that an attorney has chosen to ask (or not ask) indicate the attorney's theory of the case or evaluation of what issues are important.

The court clarified the procedure for deciding discovery disputes. A party seeking discovery of an attorney-directed interview bears the initial burden of establishing that denial of disclosure will unfairly prejudice the party in preparing its case or will result in an injustice. If the party resisting discovery alleges that the interview, or a portion of it, is absolutely privileged, that party must make a foundational showing that the statement or portion "reflects the attorney's impressions, conclusions, opinions, or legal

research or theories." *Id.* at 499–500. Then, the trial court must make an *in camera* inspection and decide whether absolute work product protection applies to foreclose disclosure of some or all of the statement.

NAMES OF INTERVIEWEES MAY HAVE WORK PRODUCT PROTECTION

The California Supreme Court held, on *de novo* review, that the identity of a witness from whom a party has obtained a statement is not automatically entitled to work product protection. The court found that generally the identity of such a witness does not involve attorney work product. For example, when a witness prepares a statement and gives it to an attorney through no initiative of the attorney; when there are only a few witnesses who are known to both parties; or when it appears that a party has tried to take statements from all witnesses.

The court acknowledged however that there may be some situations in which the identity of an interviewee may be protected by qualified or even absolute privilege. The court found that protection is more likely when an attorney strategically interviews only one or a few of many witnesses:

> [D]isclosing a list of witnesses from whom an attorney has taken recorded statements may, in some instances, reveal the attorney's impressions of the case. Take, for example, a bus accident involving 50 surviving passengers and an allegation that the driver fell asleep at the wheel. If an attorney for one of the passengers took recorded statements from only 10 individuals, disclosure of the list may well indicate the attorney's evaluation or conclusion as to which of the witnesses were in the best position to see the cause of the accident. *Id.* at 501.

The court explained that a party is generally entitled to discovery of witness names but described the procedure for deciding discovery disputes. The party resisting discovery must make a preliminary showing that disclosure would reveal the attorney's tactics, impressions, or evaluation of the case or would result in opposing counsel taking undue advantage of the attorney's industry or efforts. Then, the trial court must decide, by making an *in camera* inspection if necessary, whether absolute or qualified work product protection applies to the names.

SIGNIFICANCE

The California Supreme Court's opinion gives guidance to an attorney seeking to maximize work product protection and foreclose disclosure of an interview or interviewee. An attorney seeking absolute work product protection (as opposed to the qualified protection to which he or she is already entitled) of an interview must show that any disclosure would reveal his or her "impressions, conclusions, opinions, or legal research or theories." *Id.* at 486. A court is more likely to foreclose disclosure if the attorney: (1) participated in the interview by conducting it him- or herself or having an investigator ask questions posed by the attorney; (2) did not solely rely on open-ended questions, but also asked leading questions to focus the witness on specific topics and details that the attorney thought were important to the case; and (3) included his or her comments or notes about the witness, the witness's statements, or other issues in the case throughout the documentation of the interview.

An attorney seeking to protect the identity of a witness who was interviewed must show "that disclosure would reveal the attorney's tactics, impressions or evaluation of the case (absolute privilege) or would result in opposing counsel taking undue advantage of the attorney's industry or efforts (qualified privilege)." *Id.* If there are many witnesses, a court is more likely to foreclose disclosure if an attorney strategically interviews only one or a few of them. On the other hand, if there are few witnesses, a court is more likely to require disclosure if an attorney interviews any of them. In the latter case, the attorney would be better protected if he or she actually interviewed all of the witnesses, because then forced disclosure would reveal almost nothing, least of all which witness the attorney thought most important.

Audra Ibarra is a civil and white-collar appellate attorney. She has a solo practice and is also counsel to California Appellate Law Group. She serves as a commissioner for the Judicial Nominees Evaluation Commission for the California State Bar and judge pro tempore for California Superior Court. She is a former supervising assistant U.S. attorney, deputy district attorney, and litigator at a large national law firm. For more information, please go to www.aiappeals.com and www.calapplaw.com.