

California Supreme Court Addresses Attorney Work Product Privilege for Witness Statements and Identities

In *Coito v. Superior Court of Stanislaus County* (June 25, 2012) __ Cal.4th __ (2012 WL 2369186), the California Supreme Court reviewed the attorney work product privilege in the context of (1) recordings of witness interviews conducted by investigators employed by counsel, and (2) information concerning the identity of witnesses from whom counsel had obtained statements. The Court determined that recorded witness statements are entitled as a matter of law to at least qualified work product protection and may also be afforded absolute privilege if they reveal the attorney's tactics, impressions, or evaluation of the case. In contrast, the identity of witnesses who have provided statements is not automatically entitled to either a qualified or absolute privilege and generally must be disclosed.

After a thorough analysis of the legislative history underlying the statutes governing the work product privilege in California, Code of Civil Procedure sections 2018.030 et seq., the Supreme Court found that witness statements obtained as a result of an interview conducted by an attorney, or by an attorney's agent at the attorney's direction, constitute protected work product. Based on the fact that witness statements obtained through an attorney-directed interview would not exist but for the attorney's initiative, decision, and effort to obtain them, the Court held that these types of statements are always entitled to at least qualified work product protection. In instances where the witness statements are "inextricably intertwined" with explicit comments or notes by the attorney, and therefore reveal the attorney's thought process, the statements will be protected by an absolute privilege.

The Court then found that disclosing a list of witnesses from whom an attorney has taken recorded statements may sometimes, but not always, reveal the attorney's impressions of the case. Witness identities are absolutely privileged only if disclosure would reveal the attorney's tactics, impressions, or evaluation of the case, and qualifiedly privileged only if disclosure would result in opposing counsel taking undue advantage of the attorney's industry or efforts. Therefore, information identifying witnesses from whom the attorney has obtained statements is not automatically entitled as a matter of law to absolute or qualified work product privilege. Instead, the information usually must be provided.

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This decision supports the guiding principles that attorneys work with a certain degree of privacy and should be prohibited from free-riding on the efforts of opposing counsel. In light of the Supreme Court's ruling, and in order to protect their investigative efforts, employers should give serious consideration to having witness interviews conducted by their counsel or at their counsel's direction.

If you have any questions regarding the attorney work product doctrine, this decision, or how it impacts any pending litigation, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#) or follow Lozano Smith on [Facebook](#).

Written by:

[Mark K. Kitabayashi](#)

Shareholder and Litigation Practice Group Chair

Los Angeles Office

mkitabayashi@lozanosmith.com

[Anne L. Collins](#)

Associate

Sacramento Office

acollins@lozanosmith.com



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