

KD Alert: "First Thing We Do is Kill All the Lawyers": The Importance of Retaining Counsel to Secure Work Product Protection of Witness Statements and Witness Identities in California

Co-Authored by Pamela E. Woodside

On June 25, 2012, the California Supreme Court clarified the work product protection to include recorded witness statements and the identities of witnesses interviewed by, or at the request of counsel. In *Coito v. Superior Court* (Sup. Ct., June 25, 2012), the Supreme Court held: (i) recorded witness statements are entitled to qualified work product protection; (ii) witness identities may be entitled to qualified work product protection if an attorney establishes that disclosing the identities would permit her adversary to obtain an “undue advantage” of her industry and efforts; and (iii) witness statements and witness identities may be entitled to absolute work product protection where an attorney can show disclosing such information would reveal her “impressions, conclusions, opinions, legal research or theories.”

The case arose out of the drowning death of a 13-year old boy, in Modesto, CA. The victim’s mother filed a wrongful death complaint against several defendants, including the State of California and the City of Modesto. The City of Modesto noticed the depositions of six teenagers who were present when the boy drowned. Prior to the depositions, the State’s counsel had an investigator interview four of the six witnesses with questions the attorney had prepared. The investigator recorded each of the interviews.

Plaintiff served the state with California Judicial Council Form Interrogatory General No. 12.3, which seeks the names, addresses and telephone numbers of individuals from whom a party obtains a written or recorded statement. Plaintiff also asked the state to produce copies of the audio recordings of the interviews. State counsel refused to provide the requested information on the grounds that the identities of the witnesses and the audio-taped recordings were entitled to absolute work product protection. Plaintiff moved to compel.

The trial court denied Plaintiff’s motion. Ultimately, the case made its way to the Supreme Court, which recognized “the questions that the attorney has chosen to ask (or not ask) provide a window into the attorney’s theory of the case or the attorney’s evaluation of what issues are most important. Lines of inquiry that an attorney chooses to pursue through follow-up questions may be especially revealing.” The Court distinguished witness statements in which the witness made a statement without significant questioning by the interviewer, since those statements would not reveal the attorney’s thought process.

This decision may have significance for insurance carriers to the extent it impacts the manner in which investigations of claims and potential claims are conducted. The *Coito* opinion strongly suggests that carriers should involve legal counsel (either outside or in-house) to draft interview questions and/or interview witnesses. Without the appropriate precautions, carriers face the likelihood that the written and recorded statements as well as the identities of the witnesses interviewed, will have to be produced if the matter proceeds to litigation.