In the Supreme Court of the State of California

DEBRA COITO,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS COUNTY,

Respondent.

STATE OF CALIFORNIA, Real Party in Interest

Case No. S181712

Fifth Appellate District, Case No. F057690
Honorable Bert Levy, Acting Presiding Justice
Honorable Betty L. Dawson, Justice
Honorable Stephen Kane, Justice
Stanislaus County Superior Court, Case No. 624500
Honorable William A. Mayhew

STATE OF CALIFORNIA'S OPENING BRIEF ON THE MERITS

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Does California's work product statute, enacted to prevent attorneys from taking undue advantage of their adversary's industry and efforts, apply to witness statements recorded verbatim by an attorney or an attorney's representative?

INTRODUCTION

In litigation, it would be valuable indeed to know what an opponent's attorney is thinking. The Legislature adopted the work product privilege to prevent a party from using the discovery process to obtain clues about an opposing attorney's thoughts and to take advantage of the attorney's industry and efforts. The court below, however, held that the work product privilege does not apply to recorded interviews of three witnesses, even though the attorney selected the witnesses, sent an investigator to interview them, and instructed the investigator to ask specific questions.

Recorded statements such as these are classic examples of attorney work product. Every day attorneys investigate the favorable and unfavorable aspects of anticipated and actual legal controversies. Conscientious counsel identify witnesses from whom statements should be taken, and instruct investigators to interview these individuals. Recorded verbatim interviews provide accurate information to counsel, assist counsel in providing sound advice to clients, and have historically been protected as the work product of the attorney. (*Hickman v. Taylor* (1947) 329 U.S. 495, 511, 67 S.Ct. 385, 394.)

California has a robust work product privilege. The California Legislature codified its intent to enact attorney work product protection as follows:

- to "preserve the rights of attorneys to prepare cases . . . with that degree of privacy necessary to encourage them to prepare

their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases" (Code Civ. Proc., § 2018.020, subd. (a);

- to "prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subd. (b).)

The court below erred. California's attorney work product protection, consistent with *Hickman*, was designed to prevent opposing counsel, by a routine discovery request, from gaining a free ride upon an opponent's thought process, thoroughness, and industry. If upheld, the decision below would fundamentally change this equation and the everyday practice of law. An attorney's recorded question and answer session with a witness often would be afforded neither absolute, nor qualified, work product protection in the face of a routine discovery request.

In short, the decision below should be reversed for the following reasons. First, it is inconsistent with California's attorney work product statute, and its loose standard, if adopted here, will burden the courts with more discovery disputes. Second, the court below incorrectly concluded the denial of attorney work product protection was necessary to promote fairness and prevent surprise. Third, it incorrectly relied upon several distinguishable court of appeals decisions.

STATEMENT

1. California's attorney work product statute reflects the Legislature's intent to "prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subd. (b).) Both an absolute and a qualified privilege is recognized in California.

The absolute privilege covers "a writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories. . . ." This

type of attorney work product "[i]s not discoverable under any circumstances." (Code Civ. Proc., § 2018.030, subd. (a).) A "writing" is any form of recorded information, including audio recordings. (Code Civ. Proc., § 2016.020, subd. (c); Evid. Code, §250.)

The qualified privilege states:

> The work product of an attorney, other than a writing described in subdivision (a), 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.

(Code Civ. Proc., § 2018.030, subd. (b).)

2. On November 12, 2008, an investigator employed by the Office of the Attorney General, counsel for state agency defendants, interviewed four witnesses. These witnesses were believed to have information related to the alleged wrongful death of Jeremy Wilson, a thirteen year-old-boy who drowned in the Tuolumne River. (Index of Exhibits (IOE), p. 294.) Plaintiff, in response to discovery requests, previously disclosed the identity of these witnesses as well as several others. (IOE, pp. 294, 299-317.)

Counsel representing the state defendants selected the witnesses to interview and provided his investigator with questions he wanted answered. (IOE, pp. 293-294.) The investigator asked questions of the witnesses, at counsel's direction, and recorded the interviews. (*Id.*) The witnesses did not independently create their recorded statements and simply turn them over to the investigator. (IOE, p. 294.) Each taped statement was saved on a separate compact disk. (IOE, pp. 294, 320.)

Plaintiff propounded Judicial Council Form Interrogatory 12.3, which asks: "Have you or anyone acting on your behalf obtained a written or recorded statement from any individual concerning the incident?" If the

answer is yes, the interrogatory requests the name, address and phone number of the interviewee, interviewer, and person in possession of the statement, and the date of the statement.

In response to this interrogatory, the Office of the Attorney General disclosed that "defense counsel, through his investigator, interviewed witnesses on November 12, 2008" (IOE, p. 325); objected to both the discovery of the names of the interviewees and to the content of the interviews, citing Code of Civil Procedure section 2018.030, subdivisions (a) and (b), and *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214 (*id.*); and provided a detailed privilege log which asserted the attorney work product protection for the recorded interviews. (IOE, p, 320.)

In the case cited by the Office of the Attorney General, *Nacht & Lewis,* the Third Appellate District applied sections 2018.020 and 2018.030, and adopted a bright line rule:

> The Respondent court should compel further responses to interrogatory No. 12.3 only to the extent the court determines defendants' counsel obtained an independently written or recorded statement from one or more of the employees interviewed by counsel.

(*Id.* at p. 218.)

Nacht & Lewis distinguished between unprotected statements collected which "the [witnesses] had previously written or recorded themselves" and statements recorded by counsel "in notes or otherwise." It held any notes or recorded statements taken by counsel would be protected by the absolute work product privilege. (*Id.* at p. 217.)

The Office of the Attorney General relied on *Nacht & Lewis* when it responded to discovery requests in this case. Its investigators did not obtain independently written or recorded statements from witnesses, and never secured any other material independently created by the witnesses. (IOE,

p. 294.) Objections on behalf of the state defendants were made to protect the thought process of counsel and the work product of his investigator.

Plaintiff filed a motion to compel discovery of the recorded interviews. No showing was made, as required by section 2018.030(b), that a denial of access to counsel's recorded question and answer session with witnesses would result in unfair prejudice or injustice to the party seeking discovery. There was no claim the witnesses had left the jurisdiction, were gravely ill, deceased or otherwise unavailable to be interviewed. (IOE, pp. 179-185, 419-426.)

The trial court denied plaintiff's motion to compel. The court held that the list of witnesses selected to be interviewed by defense counsel constituted qualified work product, and the recorded witness statements were entitled to absolute attorney work product protection. (IOE, pp. 429-430.) The court relied upon *Nacht & Lewis*. (*Id.*)

3. On March 4, 2010, in a published opinion, the Fifth Appellate District issued a peremptory writ of mandate ordering the trial court to: a) vacate its order denying the motions to compel; and b) enter an order granting the motions to compel. The Fifth Appellate District rejected the Third Appellate District's analysis in *Nacht & Lewis Architects, Inc. v. Superior Court.* Relying upon *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, and the characterization of witness statements recorded by counsel as evidentiary, nonderivative material, the court held that the recorded statements are simply unprotected by California's attorney work product statute.

Justice Kane authored a 20-page concurring and dissenting opinion. He concluded that statements recorded by defense counsel in this case "are *at least* qualified work product." (*Coito v. Superior Court* (2010) 182 Cal. App.4th 758, 784, original italics (dis. opn. of Kane, J.).) Justice Kane's dissent criticized the majority's reliance on *Greyhound* because that case

"expressly determined that the work product privilege did not then exist under California law." (*Id.* at p.780, n. 12.) He also disagreed with the majority's decision to characterize a witness statement recorded by counsel as "nonderivative and wholly evidentiary." Justice Kane explained that this distinction ignores the legislative intent of the work product statute, and the terms are too broad and overlapping to provide meaningful guidance. (*Id.* at p.781.)

ARGUMENT

I. THE RECORDED STATEMENTS ARE PROTECTED UNDER CALIFORNIA'S ATTORNEY WORK PRODUCT STATUTE.

A. California's Attorney Work Product Statute Is Broad In Scope.

California's attorney work product protection reflects the Legislature's intent to encourage thorough preparation and investigation of all aspects of a case and to "prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subds. (a), (b).) Both an absolute and a qualified attorney work product protection are recognized in California. The absolute attorney work product protection covers "a writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories . . . ." This type of attorney work product "[i]s not discoverable under any circumstances." (Code Civ. Proc., § 2018.030, subd. (a).)

The qualified work product protection is outlined as follows:

> The work product of an attorney, other than a writing described in subdivision (a), 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.

(Code Civ. Proc., § 2018.030(b), emphasis added.) The court of appeal has summarized work product as:

> the product of [the attorney's] effort, research, and thought in the preparation of his client's case. It includes the results of his own work, and the work of those employed by him or for him by his client, in investigating both the favorable and unfavorable aspects of the case, the information thus assembled, and the legal theories and plan of strategy developed by the attorney-all as reflected in interviews, statements, memoranda, correspondence, briefs, and any other writings reflecting the attorney's impressions, conclusions, opinions, or legal research or theories....

(*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1253-1254, fn. 4, citing McCoy, *California Civil Discovery: Work Product of Attorneys* (1966) 18 Stan.L.Rev.783, 797.)

Notably, the court below failed to recognize that the work product statute reflects a policy decision by the Legislature to protect attorney work product despite its potential relevance and value to a particular case. The statute was enacted, in part, to overturn the decision by this Court in *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 401. In *Greyhound*, this Court refused to acknowledge the existence of a work product privilege in California. *Greyhound* affirmed the order of a trial court to disclose written witness statements to opposing counsel because "[p]etitioner has not only failed to convince us that 'work product' is equated with privilege in California, it has failed to indicate the reasons underlying that doctrine would be applicable to this proceeding." (*Id.* at p. 401; see also *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 177 ["simply because the subject matter sought to be discovered is the 'work product' of the attorney it is not privileged."].) The court below adopted the view, expressed in *Greyhound,* that "the Civil Discovery Act 'must be construed liberally in favor of disclosure unless the request is clearly improper by virtue of well-established causes for denial...." (*Coito v. Superior Court, supra*, 182 Cal.App.4th at p. 765.)

The lower court's reliance on *Greyhound* and its attempt to balance these policies overlooks the fact that the Legislature rejected *Greyhound* on this point, and the Legislature balanced the competing policies when it enacted the work product statute. In response to *Greyhound*, the California State Bar sponsored an amendment to the Discovery Act to create a separate privilege for materials prepared in anticipation of litigation.

The State Bar's proposed amendment provided: "[I]t is the policy of this state (i) to preserve the rights of parties and their attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to so limit discovery that one party or his attorney may not take undue advantage of this [sic] adversary's industry or efforts. Accordingly, the following shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice: (1) The work product of an attorney. . . ." (Committee Report-Administration of Justice, IOE, 336-337.) The Committee Report noted that the proposed amendments, if enacted, "will afford substantially more protection to 'work product' than now exists under the California rule as explained in the *Greyhound* case." (Committee Report-Administration of Justice , IOE, p. 338.) In 1963, the Legislature adopted the State Bar's amendment almost verbatim.

Thus, the terms and legislative purposes of the work product statute govern its application. If a writing falls within the absolute privilege, it is "not discoverable under any circumstances." (Code Civ. Proc. § 2018.030; see *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 820 [noting that the content and value of a writing are irrelevant if the writing is absolutely privileged; it is "off limits."].) If a writing falls within the conditional privilege, the Legislature has settled the requirements for discovery: the

writing 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." (Code of Civ. Proc., § 2018.030, subd. (b); see *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 78-79.)

B. The Court Should Adopt A Bright Line Rule For Recorded Statements.

Nacht & Lewis, *supra*, 47 Cal.App.4th 214, provides a rule that tracks the statutory terms and purposes. The Court of Appeal in *Nacht & Lewis* distinguished statements that a witness has independently written or recorded, which are discoverable, from statements recorded by counsel in notes or otherwise, which are privileged. (*Id.* at pp. 217-218.) This is a straightforward application of California's work product statute.

A statement that is independently recorded by a witness does not reflect an attorney's impressions, conclusions, opinions, or legal research or theories because the attorney had nothing to do with it. Statements produced by an attorney, on the other hand, such as a recorded interview with a witness, inherently reflect the attorney's impressions, conclusions, opinions, or theories, not only because the attorney's ideas are the creative force which led to the recorded statement from that particular witness, but also, of course, the questions (and omitted questions) reflect the attorney's thought process. (See *id.*; see also *Well Point Health Networks Inc. v. Superior Court* (1997) 59 Cal. App. 4th 110, 119, fn. 4 [holding that attorney work product does not extend to memoranda and statements separately prepared by the interviewees].) This Court cited *Nacht* for this distinction in *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 814.

The bright line rule of *Nacht & Lewis* has practical advantages. Generally, to ensure that a rule is predictable and reduces burdens on courts

and parties, "crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards." (See *Bittinger v Tecumseh Products Co.* (6th Cir. 1997) 123 F.3d 877, 881.) With a bright line rule, attorneys would know in advance whether recorded statements are discoverable. By contrast, the rule adopted by the court below invites uncertainty and disputes. For example, the court suggested that if "there were something unique about a particular witness interviewed that revealed interpretive rather than evidentiary information" nothing would "prevent the attorney resisting discovery from requesting an in camera hearing before the superior court and the opportunity to convince the court that the interview or some portion of it should be protected . . . ." (*Coito v. Superior Court* (2010) 182 Cal.App.4th 758,770.) Given this invitation, an unintended consequence of the decision below will be increased court involvement in resolving discovery disputes.

As a practical matter attorneys do reveal their thought process when engaging in recorded question and answer sessions with witnesses. And, as a practical matter, industrious attorneys who take the time to do so, would justifiably take up the *Coito* decision's invitation to engage the trial court as the arbiter to protect their thought process from routine discovery requests. As Justice Kane pointed out, to characterize a statement recorded by an attorney "as nonderivative is a blatant misnomer." (*Coito v. Superior Court* (2010) 182 Cal.App.4th 758, 781 (dis. opn. of Kane, J.).) Due to the overlapping meanings of "nonderivative", "interpretive" and "evidentiary", it is reasonable to expect an increase in resort to the courts for resolution of such disputes.

Bright line rules, like the one articulated in *Nacht & Lewis* promote clarity and uniformity in the practice of law. The decision below invites confusion, will trigger increased discovery litigation, and invites inconsistent results.

C. The Recorded Witness Statements Comfortably Fit Within the Statutory Description of Materials that Are Absolutely Privileged.

The recorded statements in this case are absolutely privileged because the recorded question and answer sessions fit within the categories for absolute privilege under section 2018.030, subd. (a). Each is a writing that reveals counsel's thought process and evaluation of the case. Counsel selected the witnesses for the investigator; thus the list of witnesses indicates the attorney's impression of which witnesses are sufficiently important to obtain a recorded statement. Counsel instructed the investigator to ask specific questions; thus the questions provide insights into the attorney's conclusions, opinions, and theories. (*Id.*)

In some cases, the identity of the witnesses may present a different question than the content of witness interviews, but at least should be protected under the qualified privilege.[1] (*Nacht, supra*, 47 Cal.App.4th at p. 217; see also *People v. Coddington*[2] (2000) 23 Cal.4th 529, 606.) When

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[1] A list of witnesses interviewed by counsel may be entitled to absolute protection. For example, the list may reflect counsel's impression that a witness is unstable or has a poor memory. The decision to interview witnesses to particular events, or certain types of witnesses, may reflect counsel's theory of the case or trial strategy. In a commercial dispute, an attorney's decision only to record statements from a company's accountants might reveal that the attorney plans to rely heavily on the accountants' advise as a defense. In short, whether a list of witnesses selected to be interviewed by counsel falls under the absolute or qualified privilege depends on whether, in the context of a case, the list falls within the categories for absolute privilege. (Code Civ. Proc. § 2018.030, subd. (a).)

[2] *Coddington,* overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, n.13, cites *Nacht & Lewis* with approval. It held a prosecutor violated the work product rule by eliciting that other defense experts who examined defendant were not called to testify.

there are many witnesses, an attorney's decision to obtain a recorded statement from some of them "would tend to reveal counsel's evaluation of the case" by identifying those "from whom counsel deemed it important to obtain statements." (*Nacht, supra*, 47 Cal.App.4th at p. 217.) Opposing counsel is free to seek through discovery a list of all percipient witnesses and conduct their own interviews. And Judicial Council form interrogatory 12.1 is commonly used for this purpose. But counsel should not be permitted to gain insights into the other side's strategy by discovering its attorney's lists of recorded statements. (See Code Civ. Proc., § 2018.020.)

D. The Court Below Incorrectly Characterized Witness Statements Recorded By Counsel As Nonderivative And Unprotected.

The decision below held that witness statements recorded by counsel are unprotected by the work product statute because "work product protection extends only to 'derivative' material, which is material '*created by or derived from* an attorney's work on behalf of a client that reflects the *attorney's evaluation or interpretation* of the law or the facts involved.'" (*Coito v. Superior Court, supra,* 182 Cal.App.4th at p. 764, citing 2 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶8:235, original italics.) According to the court below, "'nonderivative' material is that which is 'only evidentiary in character.'" (*Id.*)

Our approach is more straightforward, but even under the lower court's reasoning, the result cannot be reconciled with California's work product statute. As Justice Kane aptly pointed out in his dissenting and concurring opinion, "[a]ll witness statements, diagrams, audit reports, photos, etc. are potentially evidentiary. If all that was necessary to disqualify an item from work product privilege protection was to characterize it as potential evidence, then nothing would be protected."

(*Coito v. Superior Court* (2010) 182 Cal.App.4th 758. 781(dis. opn. of Kane, J.).)

Hypothetically, a recorded witness statement taken by an attorney may simply record a narrative response to the question "what happened?" In such a case, the content of the interview would not constitute absolute attorney work product because it would not reveal the attorney's thought process involved in forming questions and following up on specific answers. Yet the recorded statement would still be protected as qualified work product. (Code Civ. Proc., §2018.030(b); See *Coito v. Superior Court* (2010) 182 Cal.App.4th 758, 781 (dis. opn. of Kane, J.).)

Qualified work product protection is set forth in Code Civil Procedure section 2018.030, subdivision (b) as follows:

> The work product of an attorney, other than a writing described in subdivision (a), 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.

Assuming for the sake of argument that the recorded witness statements in this case do not reveal the thought process of counsel, these recorded statements are still not discoverable without a showing that denial of disclosure will unfairly prejudice the party seeking discovery or will result in an injustice. Unfair prejudice results where the party seeking discovery establishes that there exists no adequate substitute for that which is sought by discovery. (*Armenta v. Superior Court* (2002)101 Cal.App.4th 525, 535 citing, *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 654, fn. 4.)

Relying on a presumption in favor of disclosure attributed to *Greyhound,* and the characterization of recorded witness statements as "evidentiary" rather than "derivative", the court below mistakenly

concluded it need not apply the work product statute. (*Coito v. Superior Court, supra,* 182 Cal.App.4th at pp. 765-768.) Yet it acknowledged the following: "A more difficult problem is presented where the witness's statement has been taken by the attorney or by the attorney's representative. In such situations, it can surely be said that the witness statement is in part the product of the attorney's work." (*Id.* at pp. 765-766.) We agree. Here, of course, the witnesses' statements were indeed taken by the attorney's representative. Had the court followed the statute, the statements would have been found to be privileged.

II. THE DECISION BELOW CONFLICTS WITH THE SEMINAL FEDERAL CASE *HICKMAN V. TAYLOR.*

In 1963, the Legislature significantly changed California's work product statute in order to codify a federally created privilege. (IOE at p. 337.) Yet the decision below conflicts with the seminal federal case on attorney work product, *Hickman v. Taylor* (1947) 329 U.S. 495, 67 S.Ct. 385.

In *Hickman*, an attorney, in anticipation of litigation arising from a tugboat sinking, privately interviewed and took statements from tugboat survivors. The survivors signed these statements. (*Id.* at p. 498.) He also interviewed other persons believed to have some information relating to the accident, and in some cases made memoranda of what they told him. (*Id.*) After representatives of a deceased crew member brought suit, the tug boat owners were served with a discovery request seeking "exact copies" of all statements taken from crew members if in writing, "and if oral, set forth in detail the exact provisions of any such oral statements or reports." (*Id.* at pp. 498-499.) The identities of the witnesses were well known and their availability was unimpaired. (*Id.* at p. 508.)

With respect to the signed written witness statements, the Supreme Court held that the trial court should have sustained the tug owner's refusal

to produce because "no attempt was made to establish any reason why [the attorney] should be forced to produce the written statements." (*Id.* at p. 512.) With respect to the oral statements made by witnesses to the attorney, whether in the form of mental impressions or memoranda, the Court stated: "we do not believe any showing of necessity can be made under the circumstances of this case to justify production." (*Ibid.*)

In setting forth the foundation for both qualified and almost absolute privilege, the Supreme Court noted that "[p]roper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." (*Id.* at pp. 511-512.) The Supreme Court noted that were such materials open to discovery "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal system would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." (*Ibid.*)

Written witness statements obtained by or prepared by an adverse party's counsel in the course of preparation for possible litigation, according to *Hickman*, are not discoverable without a showing of necessity. (*Id.* at p. 510.) If the party seeking the recorded statement can obtain the desired information elsewhere, it has not met the burden of showing special circumstances. (8 Charles A. Wright, Arthur R. Miller, Federal Practice and Procedure, § 2028, p. 485.)

In this case, the holding of the court below that recorded witness statements are simply not accorded attorney work product protection, and can be discovered by a routine discovery request, conflicts with the holding in *Hickman*. It also undermines the public policy supporting California's statutory work product protections. This policy, as Justice Kane pointed

out in his dissenting and concurring opinion, includes preventing opposing counsel, by a routine discovery request, from gaining a free ride upon an opponent's thought process and industry. (*Coito v. Superior Court, supra,* 182 Cal.App.4th at pp.774-775 (dis. opn. of Kane, J.).)

III. THE COURT BELOW INCORRECTLY CONCLUDED THE DENIAL OF ATTORNEY WORK PRODUCT PROTECTION WAS NECESSARY TO PROMOTE FAIRNESS AND PREVENT SURPRISE.

Denying work product protection to witness statements recorded by counsel is not necessary to promote fairness or prevent surprise for two reasons. First, trial courts already have the discretion to require the production of witness statements when counsel intends to use them. Second, routine discovery allows counsel to obtain the identity of all percipient witnesses far in advance of trial.

First, the goal of ascertaining the truth, safeguarding against surprise, and preventing delay, *Greyhound* factors cited by the court below, is accomplished not by refusing to enforce California's attorney work product statute, but by enforcing Evidence Code section 769, and engaging in the "firm control which courts have traditionally exercised over the examination and cross-examination of witnesses." (*Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814, 822.)

In *Kadelbach*, a catastrophic personal injury case, statements from two witnesses were recorded by defense counsel. Defendants opposed a motion to compel the discovery of the recorded statements based upon attorney work product. The trial court denied the motion to compel with the caveat that if either witness was called to testify by plaintiff, the defense must be make the tapes available before cross-examination if defense counsel "is going to use the tape." (*Id.* at pp. 819-820.)

The court in *Kadelbach* enforced Evidence Code Section 769. This section states:

> In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.

The court stressed that section 769 applies "only to *witnesses*, not lawyers." (*Id.* at p. 821, original italics.) The court explained: "There are compelling reasons why opposing counsel should be permitted, during trial, to examine the contents of a written or recorded statement prior to and during its use in the cross-examination of a witness." (*Id.* at p. 821.) The court also noted that work product loses its statutory protection when used as an offensive weapon for cross-examination or to refresh the recollection of a witness. (*Id.* at pp. 821-822, citing *Bolles v. Superior Court* (1971) 15 Cal.App.3d 962.)

Second, asking for the identity (name, address, and telephone number) of each individual who witnessed a relevant event is a common discovery request, routinely propounded in the early stages of discovery. (See Judicial Council Form Interrogatory 12.1.) Such a request does not seek information protected by the attorney work product privilege, and is fundamental to trial preparation. (*City of Long Beach v. Superior Court* (1976) 225 Cal.App.3d 65, 72-73.) Barring unavailability issues, each counsel is free to use his or her own resources to interview any listed witness. In this case, the discovery process was used to disclose the identity of all percipient witnesses. (IOE, pp. 294, 299-317.) The identity of all witnesses were well known to all parties. If any counsel wanted to obtain recorded statements in order to investigate the strengths and weaknesses of their case and prepare for trial, they were free to do so.

IV. THE DECISION BELOW INCORRECTLY RELIED UPON THE *KADELBACH*, *WILLIAMS*, AND *FELLOWS* DECISIONS.

The *Kadelbach*, *Williams* and *Fellows* decisions, relied upon by the court below, are not on point. To the extent that these decisions can be interpreted as lending support for the decision below, they should be disapproved.

A. *Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814.

The court below relied on that part of the *Kadelbach* decision which is, at best, dicta. The Court in *Kadelbach* never opined on the admissibility of taped witness statements because they had "not been made a part of the record on appeal" and it had "no means of ascertaining whether the whole or any part of the tape was entitled to protection as work product . . . ." (*Kadelbach, supra*, 31 Cal.App.3d at p. 823.) Instead, it affirmed the trial court's denial of a motion to compel recorded statements because "the trial court exercised wide discretion vested in it" over the examination of witnesses. (*Id.* at pp. 823-824.)

The court in *Kadelbach* did "disapprove" of its earlier holding in *Southern Pacific Co. v. Superior Court* (1969) 3 Cal.App.3d 195 that "statements of witnesses come within the definition of protected derivative material." (*Kadelbach*, *supra*, at p. 823.) But *Southern Pacific* addressed a motion to compel answers to interrogatories requesting facts known to counsel, not a request to produce specific witness interviews prepared by counsel. (*Southern Pacific Co. v. Superior Court, supra,* 3 Cal.App.3d at p. 199.) As the court in *Southern Pacific* noted: "The facts sought, those presently relied upon by plaintiffs to prove their case, are discoverable no matter how they came into the attorney's possession. [citation omitted]. Plaintiffs will ultimately disclose these facts at the trial." (*Id.*)

Certainly, facts relied upon by counsel in support of a claim or defense are discoverable no matter how they came into counsel's

possession. (*Kadelbach, supra*, at p. 823.) It is counsel's recorded question and answer session with a witness, the process by which those facts are learned, which is afforded work product protection. Accordingly, with respect to the application of an attorney work product protection to recorded witness statements neither the rationale nor the holding of *Kadelbach* is on point.

B. *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55.

The protection of recorded statements taken by counsel was not specifically at issue in *Fellows*. Instead, the court addressed whether the work product privilege regarding the contents of a closed file of counsel remains viable in subsequent litigation. *Fellows* held that the work product privilege is not terminated simply because a case has come to an end. (*Id.* at p. 62.) The court remanded the matter with directions to conduct an in camera procedure to adjudicate each particular claim of attorney work product privilege. (*Id.* at p. 70.)

Fellows opined generally that recorded statements of prospective witnesses is a category of "non derivative evidentiary material excluded from the concept of an attorneys work product." (*Id.* at p. 68, citing Jefferson, Cal. Evidence Benchbook (1972) Meaning of "WorkProduct" for Attorney's Work product privilege, §41.2.) But the exact nature of the statement or statements contained in the closed file of counsel at issue in *Fellows* is unknown. (*Id.* at pp. 60, 67-68.) The closed file consisted of 64 documents including "statements and diagrams." (*Id.* at p. 60.) The nature of the "statements" are not described by the court.

It is unknown whether the statements contained in the closed file at issue in *Fellows* contained verbatim statements recorded by counsel, counsel's notes or summaries of witness statements, or recorded statements prepared by witnesses and provided to counsel. Given the view expressed in *Fellows* that a "writing that reflects an attorney's impressions,

conclusions, opinions or legal research or theories" shall not be discoverable under any circumstances (*Fellows*, *supra*, at p. 68), it is doubtful the court intended to express an opinion that an attorney's recorded question and answer session with a witness is outside the scope of the attorney work product privilege.

C. *People v. Williams* (1979) 93 Cal.App.3d 40.

The *Williams* case is not on point because it addressed a discovery issue unique to the practice of criminal law - the disclosure to the defense of a prosecutor's notes regarding his interview with a rape victim. (See, *Brady v. Maryland* (1963) 373 U.S. 83, 87, 83 S.Ct. 1194 [due process requires prosecutors to avoid an unfair trial by making available upon request evidence favorable to an accused where the evidence is material either to guilt or to punishment]; *United States v. Agurs* (1976), 427 U.S. 97, 112-113, 96 S.Ct. 2392 [defense request unnecessary]; *In Re Miranda* (2008) 43 Cal.4th 541, 575 [evidence is favorable if it helps the defendant or hurts the prosecution].) *Williams* held that a trial court erred in denying a criminal defendant's motion to obtain the witness' statement.

While *Williams* cited the derivative versus evidentiary test, the decision rested on the principle that in "a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution...." (*Williams*, *supra*, at p. 64, citing *Murgia v, Municipal Court* (1975) 15 Cal.3d 286, 293). *Williams* also opined that there is no attorney work product privilege for statements of witnesses because they are nonderivative or noninterpretive in nature. (*Id.* at 63-64.) But the decision upon which it relied, *Craig v. Superior Court* (1976) 54 Cal.App.3d 416, never used, or even mentioned, this approach to limiting attorney work product.

CONCLUSION

The Court should reverse the decision below because it fails to follow California's attorney work product statute and undermines public policy in favor of robust attorney work product protection.

Dated: August 6, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached State of California's Opening Brief on the Merits uses a 13 point Times New Roman font and contains 5,716 words.

Dated: August 6, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Debra Coito v Superior Court of Stanislaus County (State of California, Real Party in Interest)**

Case No. **S181712**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **August 6, 2010**, I served the attached:

STATE OF CALIFORNIA'S OPENING BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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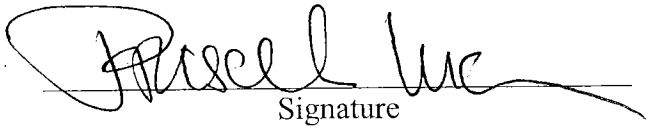
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 6, 2010, at Sacramento, California.

Priscilla Lucas
Declarant



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