S181712

IN THE

SUPREME COURT OF CALIFORNIA

DEBRA COITO, individually
and as Successor in Interest
to Decedent Jeremy Wilson,

Plaintiff & Petitioner,

vs.

SUPERIOR COURT OF
THE COUNTY OF STANISLAUS,

Respondent,

STATE OF CALIFORNIA,

Defendant & Real Party in Interest.

After a Decision By the Court of Appeal,
Fifth Appellate District,
Case No. F057690

ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

All three Justices of the Fifth District Court of Appeal held in these writ proceedings that there is *no possibility* that the signed or recorded verbatim statement of an independent witness in a civil action could be "absolute attorney work product". Despite that unanimity in their disagreement with the contrary *dicta* in *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214 ("*Nacht & Lewis*"), the Attorney General persists in making that indefensible argument in this Court. No

sound reason in law or public policy supports the Attorney General's position. Accordingly, this Court is urged to overrule *Nacht &Lewis* for the reasons stated in *Coito v. Superior Court* (2010) 182 Cal.App.4th 758. [1]

That leaves the issue of whether the signed or recorded verbatim statements of independent witnesses should be considered "attorney work product" at all. The majority opinion in the Court of Appeal was that it should not; the minority opinion promoted the idea of "qualified" work product because an attorney conceived the questions asked of the witnesses.

The holdings by the *Coito* majority, that parties must answer Form Interrogatory No. 12.3 *completely*, and that signed or recorded verbatim verbatim statements *are not work product at all* and must be produced in discovery, were correct for the reasons given in the opinion, but also for a further reason presented herein that the Court of Appeal did not reach.

First, the majority opinion correctly applied the traditional "derivative versus non-derivative material" test, and held that such statements are non-derivative, and therefore are not work product.

Second, the majority opinion also applied an "evidentiary character" test, and held that such statements are potential *evidence*, and therefore cannot be withheld from discovery. This important distinction allows this

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[1] The Opening Brief used the official reporter citation for *Coito*, and this Answering Brief follows that lead to maintain consistency in references to the Court of Appeal's opinions.

Court to hold that *all* independent witness statements that are potential evidence, i.e., they were written or signed (adopted) by the witnesses, or they are the recorded words of the witnesses, they are *all* discoverable.

Third, an additional, separately dispositive reason that such statements are not work product at all is the fact that there is no reasonable expectation, by either the attorney or the witness, that the witness' words or the attorney's questions once asked, are "confidential". No expectation exists because the lawyer and witness are strangers, between whom there is no pre-existing confidential relationship. The importance of this additional reason is that it allows this Court to establish a "bright line" rule for all statements that are the words of the witness, including signed or recorded verbatim statements. Because there is *never* a confidential relationship between lawyers and independent witnesses, as a matter of law there can never be a reasonable expectation of confidentiality. Absent confidentiality, *no* signed or recorded verbatim witness statements can ever be withheld from discovery. They *never* qualify as "attorney work product".

This Answering Brief also supports another good reason for rejecting this "absolute attorney work product" excuse for not producing conf-confidential, evidentiary witness statements in discovery. That reason is *the rights and interests of the witnesses* themselves. Disclosure will prevent the manipulation of their testimony. Disclosure will prevent the witnesses from

being needlessly humiliated, or worse, exposed to perjury charges. Disclosure is consistent with this Court's finding of good cause in *Beesley v. Superior Court of San Diego County* (1962) 58 Cal.2d 205, for the production of statements because the witnesses could not recall what they had told the procuring investigator.

The reason this Court should not accept the minority opinion's view that such witness statements are "qualified" attorney work product is because it has no principled basis that would allow for predictability of enforcement of this discovery right. If "qualified", their discoverability just depends upon the individual judge's decision, and civil litigants in this State are "back to square one" of being unable to predict which statements are discoverable. In a world where non-confidential independent witness statements are considered "qualified" attorney work product, *what* would inform each jurist's decision? There is no principled basis for treating this category of witness statements (signed or recorded verbatim statements of independent witnesses) as "attorney work product" in the first instance. Absent basic principles, there will be no uniformity in judicial decisions, and there will be no predictability about discovering witness statements. Consistency in the cases will only exist if this Court will affirm the *Coito* majority decision, *and* further utilize all three tests to hold that *every* party

that obtains a signed or recorded verbatim statement from an independent, third-party witness must disclose that evidence in discovery proceedings.

I. The Court of Appeal's Majority Opinion Correctly Followed "The Long Line of Precedent" In California Jurisprudence To Hold That A Signed Or Recorded Verbatim Statement Of An Independent Witnesses Is Not Attorney Work Product, and Therefore Cannot Be Withheld In Civil Discovery Proceedings

The Attorney General's Opening Brief has no answer for the fact that the majority opinion followed "the weight of authority" *under California law* in holding that "the statement of a witness, taken in writing or otherwise recorded verbatim, by an attorney or the attorney's representative," is *not* entitled to the protection of the California work-product privilege and is "therefore available through discovery." (*Coito v. Superior Court* (2010) 182 Cal.App.4th 758, 761, and 769.)

While there is no reason for the undersigned to repeat the majority opinion's decision here, it is important to underscore the fact that the majority undertook a statutory construction of C.C.P. § 2018.030 and related statutes, and held that the "absolute" attorney work product protection in Subdivision (a) of that statute did not apply.

The majority opinion then addressed the "qualified" attorney work

product doctrine set forth in Subdivision (b) of Section 2018.030, noted that there was no statutory definition, and correctly described the applicable judicial test which is applied on a "case-by-case basis" as asking whether the disputed document was "derivative" or "interpretative" material, or "nonderivative" or "evidentiary" material. (*Id.*, at p. 767.) The Attorney General is unable to argue that the Court of Appeal used the "wrong test".

Section II of the majority opinion reviewed the jurisprudence and determined that *California courts* have held that independent witness statements do not have work-product protection. (*Id.*, at pp. 765-767.)

The single contrary precedent of *Nacht & Lewis* is properly found to have contradicted "the long line of contrary precedent" (*id.*, at p. 768), and the Fifth Appellate District refused to follow that solitary *dicta* (see below).

> [W]e choose to follow the weight of authority and hold that written and recorded witness statements, including not only those produced by the witness and turned over to counsel but also those taken by counsel, are not attorney work product. [*Coito*, *supra*, 182 Cal.App.4th at p. 769.]

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II. Both The Majority and Minority Court Of Appeal's Opinions Correctly Held That Signed Or Recorded Verbatim Statements Of Independent Witnesses Are Potential Evidence

A. Signed or recorded verbatim statements are evidence, and hence they are necessarily discoverable.

The Attorney General's Opening Brief completely avoids the fact that signed or recorded witness statements are *evidence*, and can be used in depositions or at trial. This is a critical omission because the entirety of the Attorney General's position must presuppose that verbatim witness statements can be hidden from the parties and the witnesses because the statements are "not evidence". If the Attorney General would just concede the obvious, i.e., that signed and recorded verbatim witness statements "are evidence", then they must be discoverable. "The admissibility of a document bears on its discoverability in the sense that **if the document is admissible, it necessarily is discoverable**. (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1760-1761, 30 Cal.Rptr.2d 217.)" (*Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481, 1490, bold added.) From this logical conundrum, the Attorney General's assertion of "absolute", or even "qualified" attorney work product for verbatim independent witness' statements, cannot escape.

1. The Court of Appeal's majority opinion held that signed or recorded witness statements are classic evidentiary material.

The majority in *Coito v. Superior Court* (2010) 182 Cal.App.4th 758, 768-769, recognized that "witness statements are classic evidentiary material. They can be admitted at trial as prior inconsistent statements (Evid. Code, § 1235), prior consistent statements (*id.*, § 1236), or past recollections recorded (*id.*, § 1237). Yet, if the statements are not subject to discovery, the party denied access to them will have had no opportunity to [p. 769 of text] prepare for their use."

2. The Court of Appeal's concurring and dissenting opinion held that signed or recorded witness statements have the characteristics of evidentiary matter.

The concurring and dissenting opinion agreed that signed and recorded statements also have the "characteristics of evidentiary matter (i.e., a witness statement may be admissible to refresh recollection, or to impeach a witness, or if the witness becomes unavailable to testify)." (*Coito*, *supra*, 182 Cal.App.4th at p. 778.)

B. The complete withholding, or even delayed production of evidentiary witness statements, are unjustifiable.

While it may be an obvious proposition that the suppression of testimony just because one attorney "got there first" is unacceptable because of the adverse consequences for the truth-seeking function of our adversarial system (*Coito*, p. 769.), it is also significant that delaying production of witness statements at the unilateral election of the opposing counsel is antithetical to all of the purposes of civil discovery.

Discovery should be obtained at the earliest possible stage in the proceedings since it plays a significant role in the preparation for depositions and trial, but also in the resolution of cases. An attorney cannot be allowed to delay production of testimony until either the deposition or trial, by invoking the "shield" of either "absolute" or "qualified" attorney work product earlier in the case and then using the testimony as "a sword" whenever it suits the interests of one party. In this case, the Attorney General has provided no justification for that notion of civil litigation.

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III. The Absence of A Reasonable Expectation of Confidentiality in the Content of An Independent Witness' Signed or Recorded Verbatim Statement Precludes a Finding of Work-Product Protection

The Court of Appeal decided it was unnecessary to discuss an additional reason for holding that independent witness statements are not protected from discovery as the "work product" of the procuring attorney criteria. That reason is the absence of a confidential relationship between the attorney and the witness. That reason is important, however, because it renders wholly unnecessary any debate about the meaning and significance of whether the witness statements are "derivative" or "nonderivative".

The majority opinion emphasized: "'Independent' witnesses are to be distinguished from witnesses who have a confidential relationship with the attorney - e.g., the client." (*Coito, supra,* 182 Cal.App.4th at p. 766, fn. 11.) Because the attorney involved in procuring a witness statement from an *independent* third-party witness *cannot* have a reasonable expectation that the content of the statement, or the circumstances under which the statement was obtained, will remain "confidential", the work-product doctrine does not apply. It is not "work product" in the first instance.

A. The Court of Appeal's majority opinion declined to discuss the significance of the absence of confidentiality between attorneys and independent witnesses, but that issue is also dispositive of whether the witness' statements are "attorney work product" at all.

The majority opinion, having concluded that the State failed to make the required showing that the absolute or qualified work-product doctrine applied to the witness statements in this particular case, elected not to analyze the effect of the absence of an expectation of confidentiality, concluding it was relevant only to the issue of waiver. "[W]e need not and do not consider petitioner's additional argument that, because witness interviews by their very nature are not confidential, the waiver doctrine should apply." (*Id.* at p. 770, n.17.)

The argument Coito advanced, however, is that an expectation of confidentiality is an element of the work-product doctrine that goes to the establishment of the protection, and not just to waiver. As will be demonstrated, California courts have more recently not only acknowledged the requisite for an expectation of confidentiality in context of waiver, but also in the context of establishing the protection in the first place.

B. California courts have recognized that a reasonable expectation of confidentiality is both an element necessary to establish the existence of work-product protection, as well as an issue pertaining to waiver.

In *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240 ("*BP Alaska*"), the Fifth District Court of Appeal considered a question of first impression in California, i.e., whether an attorney's opinion writing retains its work product status upon delivery to the client. (*Id.* at p. 1255.) In so doing, the Fifth District began a judicial trend of expressly acknowledging that an expectation of confidentiality was necessarily an aspect of the work-product doctrine.

The broader issue under consideration, whether the crime-fraud exception to the attorney-client privilege also applies to work product protected information, would have been rendered moot "if the writings containing the attorney's legal opinions and impressions . . . are outside the statutory definition of work-product[.]" (*Id.* at p. 1253.) The Fifth District rejected the idea that this threshold issue, whether the writings met the statutory definition of work-product, was one of waiver.

> **This is not a question of waiver** of the work product rule by the attorney's act of delivering the document to the client (under the cases, such a communication in confidence does not constitute a waiver) but

rather is a question of **whether the document loses its character as work product once it is delivered to the client.**

[*Id.* at pp. 1252-1253, bold added.]

Explicitly recognizing the confidential nature of work-product protected information, the Fifth District concluded that an "attorney's absolute work product protection continues as to the contents of a writing delivered to a client **in confidence**." (*Id.* at p. 1260, bold added.)

> The recognition of an attorney's right to assert a work product protection in the contents of a writing after it is delivered to the client strengthens the attorney-client relationship by enabling the attorney to evaluate his client's case and to communicate his opinions to the client **without fear that his opinions and theories will thereafter be exposed** to the opposing party or to the public in general for criticism or ridicule. [*Id.*, bold added.]

After addressing the *threshold* issue, the Fifth District *then* addressed the issue of "waiver" as the only possible exception to work product protection.

> The sole exception to the literal wording of the statute which the cases have recognized is under the *waiver* doctrine which has been held applicable to the work product rule as well as the attorney-client privilege. (See cases cited in 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 41.2, pp. 1483, 1485-1486.)

[*Id.* at p. 1254, emphasis in original.]

The Court of Appeal's opinion continued:

> Thus, the only **exception to the absolute work product protection** of an attorney's **confidential** opinion letter to a client is where there has been a waiver of the protection by *the attorney's* voluntary disclosure or consent to disclosure of the writing to a person other than the client who has **no interest in maintaining the confidentiality of the contents of the writing**. (2 Jefferson, Cal. Evidence Benchbook, supra, § 41.2, p. 1486.)

[*Id.* at p. 1261, italics in original, bold added.]

Like the Fifth Appellate District in *BP Alaska*, other courts who have discussed the role that an expectation of confidentiality plays in work-product jurisprudence have not reached a consensus on whether confidentiality is an element necessary to establish work-product protection, or the lack of confidentiality is relevant only to the issue of waiver.

In *Armenta v. Superior Court* (2002) 101 Cal.App.4th 525, Division One of the Second Appellate District analyzed whether reports generated by an expert (Maas), hired pursuant to a joint-prosecution agreement, could be considered work-product protected. The issue arose because one party to the joint-prosecution agreement wanted to disseminate the reports (LADWP), while the other party (Armenta) invoked work-product protection to prevent their dissemination. (*Id.* at p. 530.)

The trial court found that the reports were not work-product protected because Armenta had no reasonable expectation of

confidentiality. (*Id.* at p. 532.) Despite the joint-prosecution agreement, the trial court concluded that no reasonable expectation of confidentiality existed because LADWP, a governmental entity, was required to disseminate the reports upon settlement pursuant to the Public Records Act, and had informed Armenta that they would ultimately have to make the reports public. (*Id.* at pp. 531-532.)

The Second District framed the issue consistent with the trial court's conclusion, and asked whether the absence of a reasonable expectation of confidentiality defeats the existence of work-product protection.

> **The question thus becomes whether the reports qualify as work product.** The court found that they did not. In the court's view, in light of LADWP's consistently expressed intent to make the test results public, **Armenta cannot have had any reasonable expectation of confidentiality**. [*Id.* at p. 533, bold added.]

Distinguishing between test results obtained by LADWP independently (i.e. outside the scope of the joint prosecution agreement) and the expert reports prepared by Maas, the Second District held that the Maas reports were qualified work product because, due to the joint prosecution agreement, Armenta had a reasonable expectation of confidentiality.

> LADWP's willingness to make its own independent test results public and counsel's willingness to waive her work product privilege with respect to Maas's work **do not establish that Armenta had no reasonable expectation that Maas's reports would remain**

confidential. Armenta asserts no joint work product interest in LADWP's independent reports. [*Id.* at p. 534, bold added.]

Referencing what has since become known as the "common interest doctrine", the Second District held that "Maas's reports do qualify as work product." (*Id.*) But the Second District also discussed waiver.

The joint prosecution agreement likewise provides full protection to such information. Parties with common interests may share confidential information **without waiving applicable protections.**

[*Id.*, bold added.]

In *Oxy Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, Division 3 of the First District Court of Appeal formally adopted the "common interest doctrine" under California law and confirmed that a reasonable expectation of confidentiality is an indispensable aspect of the work-product doctrine. Because California courts are powerless to expand or contract statutory privileges, the First District discussed the common interest doctrine in terms of "nonwaiver."

Both OXY and Calpine describe the joint defense or common interest doctrine as an "extension" of the attorney-client privilege. We reject this characterization to the extent it suggests there is an expanded attorney-client relationship encompassing all parties and counsel who share a common interest. . . . Rather, the common interest doctrine is more appropriately characterized under California law as **a nonwaiver doctrine**, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine.

[*Id.* at p. 889, bold added.]

The First District then applied the waiver analysis in the context of the common interest doctrine and concluded that without a reasonable expectation of confidentiality, there is no work-product protection.

> Applying these waiver principles in the context of communications among parties with common interests, **it is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential**. [*Id.*, bold added.]

More recently, in *Meza v. H. Muehlstein & Co.* (2009) 176 Cal.App.4th 969, Division Three of the Second District Court of Appeal discussed the common interest doctrine in the context of a motion to disqualify plaintiff's counsel for hiring an attorney who had previously represented one of the defendants in the same lawsuit. (*Id.* at p. 973.) Citing *OXY*, the Second District identified the elements of the common interest doctrine, and also confirmed that a reasonable expectation of confidentiality was an indispensable element of the work-product doctrine.

> Under the common interest doctrine, an attorney can disclose work product to an attorney representing a separate client without waiving the attorney work product privilege if (1) the disclosure relates to a common interest of the attorneys' respective clients; (2) **the disclosing attorney has a reasonable expectation that the other attorney will preserve confidentiality**; and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted. (See *OXY, supra,* 115 Cal.App.4th at p. 891, 9 Cal.Rptr.3d 621.) [*Id.* at p. 981, bold added.]

Indeed, one court has described a reasonable expectation of confidentiality as the "**dispositive question**" for determining the existence of work-product protection.

In *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, Division Four of the Second District Court of Appeal dealt with a motion to disqualify opposing counsel for retaining an expert that a litigation adversary had previously consulted with, but not retained. (*Id.* at pp. 1071-1072.) The threshold issue for resolution was whether the expert received confidential information from counsel who initially consulted with, but did not retain, the expert. (*Id.* at p. 1078.)

Upholding the disqualification of counsel who retained the expert, the court determined that confidential information was potentially at issue because, pursuant to the work-product doctrine, "reports prepared by an expert as a consultant are protected until the expert is designated as a witness." (*Id.* at p. 1079.) The Second District then analyzed the application of the work-product doctrine to a situation where the expert is consulted, but not retained.

> We therefore conclude that communications made to a potential expert in a retention interview can be considered confidential and therefore subject to protection from subsequent disclosure even if the expert is not thereafter retained **as long as there was a reasonable expectation of such confidentiality**. [*Id.* at p. 1080, bold added.]

In response to argument of counsel subject to disqualification that there can be no expectation of confidentiality when the expert is not actually retained, the Second District reiterated:

> As we have already concluded, **the dispositive question is whether there was a reasonable expectation that information would remain confidential**; the existence of a formal relationship between the expert and counsel is just one factor to consider in making that determination.[2]
>
> [*Id.* at p. 182, bold added.]

Based upon the foregoing, this Court is requested to join the precedent cited above, and specifically the Second District's opinion in *Shadow Traffic*, and hold that a reasonable expectation of confidentiality is the "dispositive question" for determining the existence of work-product protection. Expressly acknowledging that a reasonable expectation of confidentiality is a threshold issue for the application of the work-product protection will place the burden of producing evidence from which the expectation of confidentiality can be inferred upon the party claiming the protection, where it belongs. "Parties claiming the benefit of the work product rule have the burden to show preliminary facts to support its

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[2] The other factors discussed were the existence of a formal written confidentiality agreement, oral admonitions by counsel that the information discussed was confidential and whether the subject matter of the conversations were "matters traditionally considered confidential." (*Id.* at pp. 1083-1084.)

applicability." (*Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 Cal.App.4th 1558, 1563.)

An express acknowledgment by this Court that without a reasonable expectation of confidentiality there can be no work-product protection will remove any doubt as to how a particular trial court would treat a particular interview or particular statement given by a particular independent witness.

On the need for "a bright-line rule", both the State and Petitioner agree. But the bright-line rule offered by the Attorney General, that all signed or recorded, independent witness statements should be deemed absolutely work-product protected ignores the history of California Courts' acknowledgment that a reasonable expectation of confidentiality is a necessary element of work-product protection, and the fact that *no confidentiality* can be expected between attorneys and their investigators and independent witnesses. Moreover, by analogy to other public proclamations of an attorney's impressions, conclusions, opinions, or legal research or theories, the Attorney General's proposal would lead to absurd results in the everyday practice of law.

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C. Acknowledging that a reasonable expectation of confidentiality is an element of work-product doctrine is necessary to promote the purposes of the Discovery Act and avoid unreasonable, impractical and arbitrary results.

Confidentiality is an express statutory prerequisite for a communication to be considered protected by the attorney-client privilege. (See Evidence Code § 954 creating the protection for "a confidential communication between client and lawyer"; and Evidence Code § 952 specifically defining that term.) While the Legislature has not expressly codified a parallel confidentiality requirement for work-product protection, (see Code of Civil Procedure §§ 218.010 *et seq.*), such a confidentiality requirement has consistently been acknowledged explicitly and implicitly by California courts.

Acknowledging a reasonable expectation of confidentiality as an element of work-product protection is consistent with accepted canons of statutory construction. Courts are required "to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results." (*Commissions on Police Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 290.)

1. Other public proclamations of an attorney's impressions, conclusions, opinions, or legal research or theories are not considered "absolute work product".

Questions asked of a witness, while theoretically linked to an attorney's impressions, conclusions, opinions, or legal research or theories, while they remain within the attorney's private thoughts, but not after the questions are stated to the witness, are placed in the public domain.

The same is true for a deposition transcript, and there can be no good faith claim that a deposition transcript is the examining attorney's protected work-product. A reporter's transcript of jury selection, opening statements, witness examinations, and closing argument contains the attorney's impressions, conclusions, opinions, and legal research and theories, but the transcript is not protected attorney work product.

The Attorney General provides no sound reason for classifying the public proclamations of an attorney's impressions, conclusions, opinions, or legal research or theories in the form of an examination at deposition or trial differently from the public proclamation made to an independent witness while taking a witness statement. Under the Attorney General's statutory construction of section 2018.030 of the Code of Civil Procedure, all of these public proclamations, once reduced to writing, would qualify as

absolute attorney work product. With the exception of *Nacht & Lewis*, no California case has adopted such an interpretation of the doctrine.

Independent witness are, as the majority below pointed out, " to be distinguished from witnesses who have a confidential relationship with the attorney - e.g., the client." (*Coito, supra,* 182 Cal.App.4th at p. 766, fn. 11.) Thus, independent witnesses are members of the public. When the attorney, or in this case an investigator carrying out an attorney's instructions, reveals his questions to the independent witness, the questions become public. Any attorney's impressions, conclusions, opinions, and legal research and theories that went into formulating the question, to the extent that the same can be revealed by disclosing the question, have been publicly revealed. As statements made in the public domain, they simply are not work product. [3]

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[3] The Attorney General's claim of protected work product for publicly-revealed attorney questions could only extend to recorded statements that include the questions. Written statements, whether in the witness' handwriting or in someone else's writing but executed by the witness, never have "questions" included within the document.

2. Judicial mechanisms for preserving an attorney's right to keep work product private would become unmanageable if work-product protection extended to information generated outside of a confidential relationship.

The stated legislative purpose of the work-product doctrine is to:

> "**Preserve the rights of 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 those cases." [C.C.P. § 2018.020(a), bold added.]

Were this Court to hold that information created outside of a confidential relationship can be considered attorney work product, then established judicial mechanisms for preserving an attorney's right to keep work product private would become unmanageable. Because the independent witness involved with an interview or statement would have personal knowledge of the interview or statement, the independent witness would have every right to reveal the very information that the attorney is claiming to be protected. Thus, if the Attorney General is right that such information qualifies as work product, it would become necessary to also consider what methods are available for courts and practitioners to preserve the attorney's right to privacy in that information.

Simply subjecting the independent witness to a gag order would violate the witness' right to free speech. Section 2 of Article I of the California Constitution makes it clear that only in the rarest of circumstances can speech be prevented.

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.
>
> [Cal. Const., art. I, § 2, subd. (a).]

Indeed, the right to free speech under the California Constitution is so strong that even the important public policies that give rise to evidentiary privileges cannot support a prior restraint on speech. In *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, the Second District considered the constitutionality of a gag order issued by a trial court preventing a party, and his counsel, from identifying, by name or distinguishing features, patients of a cosmetic surgeon who was alleged to have had vile and degrading contact with the patients while they were under anesthesia. (*Id.* at pp. 1235 - 1241.) The trial court issued the gag order because it found that identifying the patients, in the context of information already made public through the lawsuit, would violate the physician-patient privilege rights of the patients established by Evidence Code section 993. (*Id.* at pp. 1238-1239.)

The Second District held that the physician-patient privilege was an insufficient justification for the gag order. (*Id.* at p. 1243.) The Second District found that "while the privilege protects the patient from forced disclosure in the course of litigation, it may not be extended to cover the dissemination of information already made known outside of litigation." (*Id.*) The Second District concluded:

> And indeed, respondent can point to no case where any court in the nation has held a threatened violation of the physician-patient privilege, **or any other privilege**, justifies a prior restraint on speech.
>
> [*Id.*, bold added.]

Thus, judicial methods of protecting evidentiary privileges, which have been extended to the work-product doctrine, fall into one of two categories. First, where someone with knowledge of confidential information *chooses not to disclose* the information, courts can protect that choice through the issuance of a protective order, or by sustaining an objection to its disclosure. Limiting the scope of privileges to the confines of a confidential relationship generally creates a unity of interests between all those with knowledge of the privileged information as to whether or not to disclose the information. This is evidenced by the fact that, for example, under the common interest doctrine, information generated through a joint-defense agreement can be considered work-product protected only where

the is a reasonable expectation of confidentiality and also unity of interest. (*OXY Resources Cal. LLC., supra,* 115 Cal.App.4th at p. 891: "In addition, disclosure of the information must be reasonable necessary for the accomplishment of the purpose for which the lawyer was consulted.")

If, on the other hand, a disclosure of the confidential information is made inadvertently or through illicit means, courts can fashion a remedy that mitigates the prejudice to the holder of the protection from the disclosure. This is typically accomplished through a motion to disqualify opposing counsel. Indeed, this Court has endorsed an ethical standard associated with the inadvertent receipt of opposing counsel's privileged information in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807.

In *Rico*, this Court upheld the disqualification of plaintiffs' counsel and retained experts for making use of opposing counsel's work-product protected documents that were inadvertently disclosed. (*Id.* at pp. 815-819.)

> "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified."

[*Id.* at p. 817, quoting *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657.]

This very same ethical standard has been imposed on attorneys who consult with an expert who had previously consulted with opposing counsel in a particular case. (*Collins v. State* (2004) 121 Cal.App.4th 1112, 1131-1132; see also *Shadow Traffic, supra,* 24 Cal.App.3d at p. 1088, and *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 657.)

Were the signed or recorded statements of independent witnesses cloaked with a work-product protection, then attorneys investigating their case would have to traverse an ethical minefield. What would the ethical practitioner have to do when, in the midst of interviewing a percipient witness, it is learned that the witness had previously been interviewed by, or even given a written or recorded statement to, a representative of another party with an interest in a particular dispute?

Is counsel prevented from inquiring about the previous interview or statement until permission is received from opposing counsel or the court?

Can opposing counsel object and instruct the independent witness not to answer questions at deposition about the interview or statement at deposition?

While these questions appear somewhat absurd given the way in which law is practiced in California -- where it is routine to inquire about

contacts that independent witnesses have had with opposing counsel during investigation and discovery -- they illustrate how the Attorney General's construction of the statutory work-product doctrine would lead to an arbitrary result in sharp conflict with the purpose of the statutes. The State seeks "a bright-line rule" from this Court that any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances. That rule expands attorney work product protection to the point where the policy purposes of Section 2018.030 are contradicted and much greater problems arise.

Coito's proposal of a bright-line rule that statements given by independent witnesses are outside of the work-product protection because there can be no reasonable expectation of confidentiality is necessary to preserve the statutory purpose of the work-product protection. The potential for disqualification, and the concomitant need to obtain opposing counsel's or the court's permission to interview an independent witness who had previously given an interview or statement to opposing counsel, would inhibit the ability "of attorneys to prepare cases for trial with that degree of privacy necessary to prepare their cases thoroughly[.]" (Code of Civil Procedure § 2018.020(a).)

The majority below stopped short of drawing the bright-line rule necessary to allow counsel to investigate their case without fear of

disqualification or the need to contact opposing counsel for permission to investigate. Because the majority did not address the "dispositive question" (*Shadow Traffic, supra*, 24 Cal.App.3d at p. 1082) of whether counsel had a reasonable expectation of confidentiality in information generated from independent witnesses, the majority left open the possibility that the public proclamation of an attorney's impressions, conclusions, opinions, and legal research and theories made to an independent witness could be ruled by individual judges in some cases to constitute protected work product.

> We do acknowledge that **an attorney could reveal his or her thoughts about a case by the way in which the attorney conducts a witness interview**. We are confident, however, that competent counsel will be able to tailor their interviews so as to avoid the problem should they choose to do so.
>
> We also note that, if there were something unique about a particular witness interview that revealed interpretive rather than evidentiary information, **nothing about our holding would prevent the attorney resisting discovery from requesting an in camera hearing before the superior court and the opportunity to convince that court that the interview or some portion of it should be protected as qualified work product**.
>
> [*Coito, supra,* 182 Cal.App.4th at pp. 769-770, bold added.]

Under such a circumstance, however, the Superior Court will have to confront the issue of a reasonable expectation of confidentiality head on. Were an attorney to convince the Superior Court that an interview should be protected because an attorney revealed his or her thoughts about a case

during the interview, would opposing counsel be precluded from asking questions about the interview at deposition? Would opposing counsel be subject to disqualification if the contents of the interview were revealed through investigation? By not addressing the "dispositive question" of whether the attorney claiming work-product protection has a reasonable expectation of confidentiality in the information sought to be protected, the majority opinion left the possibility for a grey area in the law that inevitably requires further analysis and a clearer rule.

IV. Judicial Council Form Interrogatory No. 12.3 Must Be Answered Completely Because It Provides The Necessary Factual Foundation For Judicial Analysis Of The Merits Of The Withholding Of Witness Statements

The Attorney General's Opening Brief also largely ignores the secondary holding made by *both* the majority and minority opinions concerning the propriety of Judicial Council-approved Form Interrogatory No. 12.3. Of course, because of the "absolute attorney work product" position taken, the Attorney General easily argues that there is no need to answer 12.3 *at all*, unless a party has a signed or recorded statement that their attorney had no involvement in obtaining. However, such evasion in the written discovery process has no justification because there is no

possibility that witness statements are "absolute" work product. Moreover, there is no ability of the parties or the courts to evaluate an objection based upon "qualified" work product if the foundational information is not provided.

In this case, the State served incomplete and evasive responses. For ease of reference, the interrogatory and responses are reproduced below from the Plaintiff's Separate Statement in support of the motion to compel further responses:

FORM INTERROGATORY NO. 12.3 (06/11/08):

12.3 Have YOU OR ANYONE ACTION ON YOUR BEHALF obtained a written or recorded statement from any individual concerning the INCIDENT? If so, for each statement state:
(a) the name, ADDRESS, and telephone number of the individual from whom the statement was obtained;
(b) the name, ADDRESS, and telephone number of the individual who obtained the statement;
(c) the date the statement was obtained;
(d) the name, ADDRESS, and telephone number of each PERSON who has the original statement or a copy.

RESPONSE (07/11/08):

Objection. Attorney-Client and attorney work product privilege. (*Knocked* [sic] *& Lewis Architects, Inc., et al. v. Superior Court of Sacramento* (1996) 47 Cal.App.4th 214.) Notwithstanding the foregoing objection and without waiver of that objection, DWR answers as follows: No.

SUPPLEMENTAL INTERROGATORY NO. 25 (02/05/09):

Pursuant to Code of Civil Procedure Section 2030.070, Plaintiff requests that the Defendant review all interrogatories previously propounded to it, as well as the answers thereto, and to supply any subsequently acquired information bearing on the answers previously made.

RESPONSE (02/17/09):

DWR has no later acquired information bearing on answers to

previously propounded interrogatories, except with respect to interrogatory Nos. 12.2 and 12.3. As to interrogatory Nos. 12.2 and 12.3, responding party has obtained information protected by the attorney-client privilege and work product privilege. Defense counsel, through his investigator, interviewed witnesses on November 12, 2008. No statements independently written by witnesses or independently recorded by witnesses were obtained. (See, *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 218.) The choice of which witnesses to interview, and the questions asked through defense counsel's investigator, reflects counsel's impressions, conclusions or theories and is absolutely privileged under Code of Civil Procedure section 2018.030 (a). To the extent counsel's investigator's work is not absolutely privileged, it is entitled to a qualified privilege under Code of Civil Procedure section 2018.030 (b). Responding party objects to disclosure of such information.

[IOE, pp. 191:7 - 192:13.]

The State's repeated assertion of the "attorney-client privilege" for unrelated, nonconfidential independent witness statements was frivolous. However, it demonstrates how the absence of "a confidentiality test" for the work product objection allows counsel to avoid providing substantive responses to the subpart questions in Form Interrogatory No. 12.3.

Unfortunately, because of the *dicta* in *Nacht & Lewis*, such evasive and incomplete answers are provided every day in civil discovery. But having the foundational factual information is essential to the evaluation of the nature of the statements. Indeed, in the decisional law, all too often that precise factual information is not available or reported. If this Court will expressly approve of Form Interrogatory No. 12.3, and require full

compliance by responding parties, then litigants will have a much better opportunity to obtain the discovery to which they are entitled.

V. Obtaining The Necessary Foundational Information With Complete Answers to Form Interrogatory No. 12.3, and Applying All Three Tests (derivative vs. non-derivative, evidentiary vs. non-evidence, and confidentiality) To The Jurisprudence Shows Far Greater Potential For Uniform Enforcement of Discovery Rights Concerning Signed or Recorded Verbatim Witness Statements

The key in this case is that we know there are four *recorded* statements of minors who witnessed the terrible drowning of another minor. We may not know the names of the 4 minors who gave the recorded statements but who are otherwise known to have witnessed the accident, because the Attorney General refuses to divulge their names in response to Interrogatory No. 12.3, but it is at least known there are audio recordings.

Hence, the application of all three tests discussed above yields only one conclusion: those recorded statements are not the Attorney General's "work product", which can be withheld from discovery by the parties and the witnesses until such time counsel chooses to use it against the adversary parties and/or witnesses. The witnesses have no confidential relationship

with the State's attorney. Because they are the recorded words of the witnesses, the recordings are evidence. And, the recordings are non-derivative of the State's attorney's private work product.

If we apply the 3 tests to the case law cited in the majority opinion, it will be seen that a comprehensive approach will reveal consistent results.

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

This is the only case in the list where it was known the witness statements had been *recorded*. That is a critical distinction, because all of the other cases discussed below either do not specify the nature of the "statement", or they are the *notes* of the attorney. Whatever their precise form, "attorney notes" is not this case. Coito vs. State involves the *verbatim* words of the witnesses, in an audio-recording format.

Also, *Kadelbach* is not a pre-trial discovery case. The issue was the propriety of the trial judge's order during trial requiring counsel for the defendants, who obtained recorded statements from independent witnesses through an investigator, to provide copies of the recorded statements to plaintiff's counsel before examining the witnesses who gave the statements at trial, if the contents of the recorded statements were to be referenced during the examination. (*Kadelbach, supra,* 31 Cal.App.3d at pp. 819-820.) On appeal before the Third District, the defendants claimed that the threat

of having to disclose the recorded statements to opposing counsel prejudiced the presentation of evidence at trial. (*Id.* at p. 819.)

In support of the claim that the trial court's order was erroneous, defendants "urge[d] that, *as a matter of law*, written or recorded statements of a witness *made to an attorney* are protected against discovery by section 2016, subdivision (b), of the Code of Civil Procedure as work product." (*Id.* at p. 822, italics in original.) The defendants cited *Southern Pac. Co. v. Superior Court* (1969) 3 Cal.App.3d 195, another Third Appellate District case, for the proposition that the recorded statements were work product. (*Kadelbach, supra,* 31 Cal.App.3d. at p. 822.) This caused the Third District to issue a *mea culpa*, and **disapprove** of its holding in *Southern Pac.* Referring to *Southern Pac.*, the Court of Appeal noted:

> However, in our opinion the following statement appears (at p. 198): "The interrogatories did not seek *derivative* Material in the attorney's possession *such as statements of witnesses*, ..." (Italics added.)
>
> [*Id.* at pp. 822-823, italics by the *Kadelbach* Court.]
>
> To clear up this contradiction, we hereby **disapprove** our holding in *Southern Pac. Co. v. Superior Court, supra,* **that statements of witnesses come within the definition of protected derivative material**.
>
> [*Id.* at p. 823, bold added.]

Thus, in *Kadelbach* the Third District utilized the analytical framework of derivative vs. nonderivative and held that the trial judge had

made the correct documents production ruling. Had the Court also found that there was no reasonable expectation of privacy, and that the recording was evidence about to be used in trial against either the witness or another party, the same result (a production order) would have been reached.

B. *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807

The Attorney General's Opening Brief attempts to rely upon this Court's relatively recent decision in *Rico*, but it supports Coito's position.

As discussed above, *Rico* involved a motion to disqualify plaintiff's counsel and their experts for making use of defendant's work-product protected information that was inadvertently disclosed. (*Rico, supra,* 42 Cal.4th at p. 810.) The work product at issue was a printed copy of compiled and annotated notes (created by a paralegal and annotated by an attorney) summarizing a meeting between attorneys, clients and experts regarding a defense strategy to a pending litigation. (*Id.* at p. 811.) The trial court concluded that the document at issue was absolute work product.

On appeal, the plaintiff claimed that the document at issue was not protected work product, arguing that it reflected the statements of disclosed experts. (*Id.* at p. 815.) This Court disagreed. Critically, this Court found that "[t]he document is **not a transcript** of the August 28, 2002 strategy session, **nor is it a verbatim record of the experts' own statements.**"

(*Id.*, bold added.)

> Although the notes were written in dialogue format and contain information attributed to Mitsubishi's experts, the document does not qualify as an *expert's* report, writing, declaration, or testimony. The notes reflect the *paralegal's* summary along with *counsel's* thoughts and impressions about the case. [*Id.*, italics in original.]

Importantly, this Court literally could read the contents of the disputed document, and therefore it was known what the format of the document was. The same consideration applies in this case, and shows the critical need for complete answers to Form Interrogatory No. 12.3. As a *signed* statement, or a *recorded* statement, the document *is* the words of the witness. It *is* "verbatim". It *is* a "transcript". Once that information is known, then the three tests can be applied, and the result would be the same. In *Rico*, it was not the expert's words. Hence, it was not evidence, and was purely derivative of the attorney's thoughts about the case.

Moreover, the focus of this Court in *Rico* was not on a pre-trial discovery dispute. The reason this Court expressed for granting review in *Rico* was not to consider the application of the work-product doctrine, but to "consider what action is required of an attorney who receives privileged documents through inadvertence and whether the remedy of disqualification is appropriate." (*Id.* at p. 810.) Thus, while this Court recited the facts upon which it sustained the finding that the document qualified as absolute

work product, this Court did not address the analytical framework.

However, had the "confidentiality test" espoused herein been applied, and the existence of a reasonable expectation of confidentiality treated as the "dispositive question" (*Shadow Traffic, supra*, 24 Cal.App.3d at p. 1082), this Court's factual recitation would have established that the defendant's counsel had such a reasonable expectation that the document would remain confidential.

> [Defense counsel] Yukevich printed only one copy of the notes, which he later edited and annotated. **Yukevich never intentionally showed the notes to anyone**, and the court determined that the sole purpose of the document was to help Yukevich defend the case.
>
> [*Id.* at p. 811, bold added.]

C. *Rodriguez v. McDonnell Douglas Corp.* (1979) 87 Cal.App.3d 626

The Second Appellate District's opinion in *Rodriguez* also addressed a trial procedural issue, and not a pre-trial discovery issue. It also concerned a private investigator's *notes* of a witness interview.

Rodriguez was a personal-injury action based upon a construction-site accident. (*Supra*, 87 Cal.App.3d at p. 641.) The engineering company involved in the construction, Norman, sought to impeach a witness, Higgins, whose testimony implicated Norman's employees as responsible

for the accident. (*Id.* at pp. 645-646, fn. 8.) Norman subpoenaed to trial an investigator named Miller, retained by counsel for cross-defendant Bethlehem. (*Id.* at p. 646.) Miller had previously interviewed Higgins and taken notes of that interview. (*Id.*) Bethlehem objected based upon hearsay and the work-product privilege, but the trial judge allowed Miller's notes to be introduced as evidence for the non-hearsay purpose of impeaching Higgins. (*Id.* at pp. 646-647.) On appeal, Bethlehem asserted prejudicial error. (*Id.* at p. 647.)

The Second District first concluded that Higgins' statements, as reflected in investigator Miller's notes, were *not* inconsistent with witness Higgins' trial testimony, and it was clear error to admit them for the non-hearsay purpose of impeachment. (*Id.*)

The Second District then discussed at length the application of the work-product protection to investigator Miller's notes. The Court began its discussion noting the nature of the evidence at issue; "**notes** [which] were **an amalgam of the recorded statements of a witness and comments of Miller, as agent for an attorney**." (*Id.*, bold added.) The Court distinguished that portion of Miller's notes that recorded the statements made by witness Higgins - which the Court described as "nonderivative or noninterpretative" - from that portion of Miller's notes which consisted of investigator Miller's comments, which the Court described as "protected

absolutely from disclosure by the attorney's work-product privilege." (*Id.* at pp. 647-648, italics in original.)

Because the *Rodriguez* Court found that "Miller's comments were **so intertwined** with Higgins' recorded statements that all portions of the notes should be held protected", the Court found error with the trial court's failure to sustain Bethlehem's timely objection based upon the work-product protection. (*Id.*, at pp. 648-649, bold added.)

The Second Appellate District used the traditional analytical framework to arrive at its distinction between the work-product protected and non-protected portions of Miller's notes. A bright line rule that a reasonable expectation of confidentiality is a necessary element of establishing work-product protection would have achieved the same results. That portion of Miller's notes that reflects information generated **outside** of a confidential relationship (the statements made by Higgins) was found to be outside of the work-product protection. That portion of Miller's notes that reflects information generated **within** the confidential relationship between counsel for Bethlehem and its investigator Miller (Miller's own comments) was found to be work-product protected.

D. *People v. Boehm* (1969) 270 Cal.App.2d 13

Boehm is obviously a criminal case, decided by the First Appellate

District, but it was cited by the *Coito* majority. It concerns a prosecutor's *notes*, but is also consistent with the comprehensive analytical framework.

The defendant, Boehm, was convicted for conspiracy to bring narcotics into a county jail. (*Boehm, supra,* 270 Cal.App.2d. at p. 17.) Prior to trial, a co-conspirator was granted immunity to testify against Boehm. (*Id.* at p. 19.) One of several issues on appeal from Boehm's conviction, was the following claim of error by the trial judge:

> It is also contended that the court erred in refusing to allow inspection of "*notes made by the district attorney*" relating to "notes, memoranda, or records pertaining to the interviews, dates, persons present between the district attorney's office" and the immunized witness. The court ruled that the desired information was the district attorney's "work product," **but allowed inspection of any statements or writings made by the witness himself**. And as previously stated, the court allowed a thorough cross-examination of the witness as to his "interviews" with the district attorney. [*Id.* at p. 21, italics in original, bold added.]

The First District concluded that the trial court had not committed error, and stressed the subject of the disallowed inspection were notes made by the district attorney.

> We think that the court did not err in holding the requested "**notes made by the district attorney**" to be his work product and not discoverable. [*Id.* at p. 22, bold added.]

Boehm appears to mark the genesis of the observation that "statements or writings made by the witness himself" are outside the scope of the work-product protection. (*Id.* at p. 21.) The First District does not

elaborate on the specific analytical framework that it used to arrive at its conclusion that while "notes made by the district attorney" are work-product protected, "any statements or writings made by the witness himself" are not. However, the conclusion is consistent with both the "evidentiary matter" test, and the "confidential relationship" test advanced herein.

E. *People v. Williams* (1976) 93 Cal.App.3d 40

Williams involved the same issue as *Boehm*, i.e., whether a prosecutor's notes taken during a pre-trial interview with a witness constituted protected work product. (*Williams, supra,* 93 Cal.App.3d at p. 63.) But the Second District Court of Appeal in *Williams* reached the opposite conclusion as the First District in *Boehm*, by holding that the trial court erred in denying the defendant's motion for discovery. (*Id.*) The Second District's discussion of the issue is brief, and is reproduced below in its entirety.

> We hold that the trial judge erred in denying defendant's motion for discovery. The erroneous ruling was made on the ground that the prosecutor's notes regarding his interview with Rebecca, the victim, were immune from discovery because of the privilege for an attorney's work product. **We have reviewed the notes. They are simply the prosecutor's summary of statements of Rebecca, the victim.**
>
> It is well-settled that there is no attorney's work-product privilege for statements of witnesses since such statements constitute material of a nonderivative or noninterpretative nature. (*Craig v. Superior Court* (1976) 54 Cal.App.3d 416 [126 Cal.Rptr. 565]; see Jefferson, Cal.

Evidence Benchbook (1972) Attorney's Work-Product Privilege, §§ 41.1-41.2, pp. 701-712, (1978 supp., pp. 475-483).)

[*Id.* at pp. 63-64, bold added.]

The brevity of the reported opinion on this topic again shows the importance of understanding the exact nature of the witness' "statements". It appears that the Second District examined the prosecutor's notes and determined that the notes were more of a verbatim transcript of the interview than a compilation of the prosecutor's thoughts and impressions of the information received during the interview. Thus, the Second District utilized the analytical framework of derivative vs. nonderivative to reach the same conclusion that would have been reached under both the "evidentiary material" test and the "reasonable expectation of confidentiality" test.

F. *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214

The Third Appellate District's opinion in *Nacht & Lewis* was well-discussed by both the majority and minority opinions in *Coito*, and the holding of "absolute attorney work product" for independent witness statements was rejected by both opinions.

The opinion in *Nacht & Lewis* actually supports the need for a full

factual record with complete answers to Form Interrogatory No. 12.3, but lawyers have used the "absolute" protection notion to *not* provide complete answers to No. 12.3. In practice, parties only disclose witness statements literally created by the witness that end up in the possession of attorneys. The practical effect has been the evisceration of Interrogatory No. 12.3, rendering it a completely useless discovery tool.

Unfortunately, this all happened because the *Nacht & Lewis* opinion ventured into the topic of "absolute work product protection" without *any* facts about whether *any* signed or recorded statements even existed in that case. Although the Attorney General relies upon the opinion, it is clear that the opinion on this topic is *dicta*, and should not allow the discovery practice of withholding the testimonial evidence of independent, non-confidential witnesses.

In *Nacht & Lewis*, the plaintiff filed a civil complaint based upon claims arising out of her former employment with Nacht & Lewis Architects, Inc. (*Nacht & Lewis*, *supra*, 47 Cal.App4th at p. 216.) A dispute arose when plaintiff served form interrogatories 12.2 (seeking information concerning witnesses interviewed) and 12.3 (seeking information concerning written or recorded witness statements obtained, the same form interrogatory herein at issue). (*Id.*) The defendants responded to both form interrogatories identically as follows:

"Counsel for the Defendants **has conducted interviews** of employees of Nacht & Lewis Architects. The information collected from the interviews is protected by the attorney-client privilege and work product doctrine." [*Id.* at pp. 216 - 217, bold added.]

The plaintiff successfully moved the trial court to compel a further response. (*Id.* at p. 217.) The Third District found that the trial court erred as to form interrogatory 12.2, because a further response "would necessarily reflect counsel's evaluation of the case by revealing which witnesses or persons who claimed knowledge of the incident . . . counsel deemed important enough to interview." (*Id.*) But the Third District also found that the "issue is more subtle as to interrogatory 12.3." (*Id.*)

The Third District speculated that defendants' counsel may have either 1) "[taken] notes or otherwise recorded his interviews with employees of Nacht & Lewis" *or* 2) "collected from the employees statements the employees had previously written or recorded themselves." (*Id.*) The Third District cites to *Rodriguez, Kadelbach* and *Boehm* as authority, but did not use the analytical framework used in those decisions.

A list of the potential witnesses interviewed by defendants' counsel which interviews counsel recorded in notes or otherwise would constitute qualified work product because it would tend to reveal counsel's evaluation of the case by identifying the persons who claimed knowledge of the incident from whom counsel deemed it important to obtain statements. Moreover, **any such notes or recorded statements** taken by defendants' counsel would be protected by the **absolute work product privilege** because **they would reveal counsel's "impressions, conclusions, opinions, or legal research or theories"** within the

meaning of Code of Civil Procedure section 2018, subdivision (c). [*Id.*, bold added.]

Because the record was bereft of any facts that would inform the Third District of the nature of, or even the existence of, any notes or recorded statements that might have been obtained, the Court discussed the issue as a speculative hypothetical. (*Id.* ["defendants did not state that their attorney took notes or otherwise recorded his interviews[.]]") Thus, the Third District's discussion was pure dictum. [4]

By focusing on who obtained the evidence rather than who supplied the evidence, the Third District's opinion in *Nacht & Lewis* stands alone as an aberration from the long line of precedents discussed above. The error of the Third District's construction of the work-product statute, which ignores the analytical framework adopted by the very precedents the opinion cited, becomes obvious by analogy.

Just as sure as a script of an attorney's summation at trial is absolutely protected prior to its delivery in open court, once spoken in court,

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[4] See *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985: "A decision is authority only for the point **actually passed on** by the court and directly involved in the case. General expressions in opinions that go **beyond the facts of the case** will not necessarily control the outcome in a subsequent suit involving different facts." (Bold added.) See also *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn.2: "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."

however, the reporter's transcript is absolutely *not* protected. This is true even though the transcript "would tend to reveal counsel's evaluation of the case." Work-product in the public sphere is not protected. Hence, it can be seen that the omission of the attorney's / witness' reasonable expectation of confidentiality in a signed or recorded verbatim independent witness statement is fatal to the *Nacht & Lewis* opinion's reasoning.

VI. Consideration of The Interests of Third-Party Witnesses in Obtaining Copies of Their Signed or Recorded Verbatim Statements, Prior to Testifying Under Oath In Deposition or Trial, Exposes the Unjust, Adverse Consequences For Innocent Non-Parties of Expanding the Attorney Work-Product Doctrine Beyond Confidential Relationships

The Attorney General's Opening Brief is bereft of any mention of the rights and interests of the innocent witnesses who cooperate with a party's attorney in providing signed or recorded statements. Basically, the Attorney General argues that just because a party's attorney crafted questions for these strangers, the attorney coopts the words of the stranger for himself/herself to the point of denying access to evidence by not only adverse parties *but also the witnesses themselves*. No support for that position exists in the jurisprudence.

Worse, under the Attorney General's view, once the statement is given, the cooperative, innocent stranger is now exposed to the oppressions associated with having to testify under oath in a deposition or trial in which they have no stake. The independent witnesses may be cross-examined (humiliated by impeachment) at a minimum, but they may also be indicted for perjury based upon the previously undisclosed witness statements.

Contrary to the Attorney General's approach, when the interests of the third-party witness statement-giving individuals are given their due consideration, the absence of any expectation of confidentiality by either the attorney or witness cannot justify expansion of the work-product doctrine to the needless detriment of the witness.

A. This Court held in *Beesley v. Superior Court* that witnesses cannot be refused copies of their signed or recorded statements before testifying under oath in deposition or in trial.

In *Beesley v. Superior Court of San Diego County* (1962) 58 Cal.2d 205 ("*Beesley*"), it was held that when *the witness asks* (or a party asks on a witness' behalf), a copy of their signed statement must be produced.

Because the parties did not argue the statement was "attorney work product", the *Beesley* opinion proceeded on the assumption that a good

cause showing by the plaintiff was required to obtain an inspection order for two independent witness statements. (*Id.* at p. 207.) The earlier decision in *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, was relied upon for that proposition. Hence, with the good cause requirement assumed, there was no discussion of any particular "privilege" or the basis for its application.

The underlying facts are similar to those at hand.

> The facts shown by the record are relatively simple. Petitioner, a minor, 4 years old on the date of her accident (and now proceeding through her guardian *ad litem*) is the plaintiff, and Jack Talashek (the real party in interest) is the defendant in an action for damages for personal injuries alleged to have been sustained when the minor was struck by defendant's automobile. Shortly after the accident, an adjuster representing defendant's insurance carrier, obtained written statements from two eyewitnesses to the accident. Subsequently, plaintiff's attorney interviewed the same witnesses. Each of them gave him an oral statement of the events of the accident as then recalled by her, and each advised him of the fact of her previous written statement given to defendant's adjuster. Each stated that she had given the adjuster an oral statement which the latter reduced to writing, and which the witness had then signed. Neither had been given a copy of such statement, and each denied, according to petitioner's attorney, recollection of what was contained in their respective statements. [Footnote 1 omitted.]
>
> [*Beesley*, *supra*, 58 Cal.2d at p. 207.]

This Court held that "good cause" was shown by the inability of the witnesses to recollect what was written in the signed statements. (*Beesley*, *supra*, 58 Cal.2d at p. 208.)

Critically, "prevention of perjury" was identified as one reason for

compelling production of the statements. "It was pointed out in *Greyhound*, that the legislative purposes in enacting the discovery statutes are not to be subverted under the guise of an exercise of discretion. Elimination of surprise, preparation [p. 209 of text] for examination and cross-examination, prevention of perjury, and ascertainment of the truth (all present here) are among such legislative purposes." (*Beesley*, *supra*, 58 Cal.2d at pp. 208-209.)

Since *Beesley*, one Court of Appeal has granted the same relief requiring production of witness statements, in *Christy v. Superior Court of Kern County* (1967) 252 Cal.App.2d 69, and this Court has only cited *Beesley* in one subsequent case, *Associated Brewers Distributing Co. v. Superior Court of Los Angeles County* (1967) 65 Cal.2d 583, 587, which did not involve production of witness statements.

The danger to witnesses of the litigation tactic of obtaining a signed (even sworn) or recorded statement but then refusing to produce a copy to the witness all the while insisting on taking the sworn deposition testimony of the witness, is self-evident. Since this is *evidence*, perjury is a potential consequence.

///

B. No justification, other than litigation gamesmanship, exists for delaying production of a signed or recorded statement until after the witness testifies under oath.

The practice of taking unfair advantage of independent witnesses should be decried. Independent witnesses are generally not represented by counsel. Hence, the witnesses can be manipulated in many ways. The contents of the witness' "testimony" in his/her signed or recorded statement can be "structured" by obtaining it under circumstances of subtle or direct pressure, or even to the extent of duress. The statement can include or exclude certain content which may provide context or explanation, and thereby present incomplete or even misleading testimony. The witness' rights and interests cannot be directly safeguarded during that process. But, the law's requirement of discovery disclosure of the statement will either stop manipulating counsel from creating witness statements that are evidence, or will mitigate the manipulations because procuring counsel knows that adversarial counsel (or even later-retained lawyers for the witnesses) must be given the statement in advance of depositions or trial.

Discovery disclosure of the statement before the witness testifies under oath in deposition or trial will ameliorate any past unfairness in the obtaining of the statement because other counsel will be prepared to prevent careless or deliberate misquotation of the witness' statement during the

proceedings. Moreover, having the entire statement will allow both the witness and adversarial counsel to ensure that selective quotations from the statement will not result in misleading or simply wrong testimony. Fairness in the examination of witnesses will be promoted by the disclosure of these types of statements.

C. The juvenile witnesses in this case were denied copies of their recorded statements, and thereby were exposed to potential perjury charges.

The foregoing discussion of the practical consequences for independent witnesses of "the law" advocated by the Attorneys General is not born of the creative (or perhaps somewhat jaded) thinking of the undersigned; it is the daily reality for witnesses exposed to the creative unfairness of lawyers in their efforts to "win". It happened in this case.

First, in the statement-creation process in this case, the State's lead attorney defending the liability case manipulated minors into giving recorded statements under circumstances that suggest undue influence.

The eyewitnesses to 14 year old Jeremy Wilson's death included four minors. They were interviewed by two California Department of Justice Special Agents without the minors' parents being present.

The majority opinion by the Court of Appeal noted that "counsel for

the state sent two investigators, both special agents from the California Department of Justice, Bureau of Investigation, to interview and take recorded statements from four of the juveniles.FN1 (FN1. Petitioner's counsel points out that, at the time of the interviews, the juveniles' parents were not present, the agents were armed and wore badges, and the agents did not explain to the juveniles that the statements were being taken for a civil action, not a criminal matter.)" (*Coito*, *supra*, 182 Cal.App.4th at p. 762; also see Coito Petition For Writ of Mandate, Item Nos. 11 - 16, pp. 7-8, and cited pages therein to IOE.)

Second, in the State's attorney's witness statement creation process, he expedited the process to avoid the possibility that the witnesses might have court-appointed counsel by the time the State's Special Agents got to the witnesses.

The State's attorneys sent the Special Agents on November 12, 2008, to record the statements despite a then pending Plaintiff "Motion For Protective Order Barring Defendant City of Modesto From Proceeding With The Depositions Of Juvenile Witnesses Until They Have Legal Counsel Appointed." (See Coito Index of Exhibits (IOE) for Petition For Writ of Mandate (05/22/09), pp. 141-142.) Before that motion was filed, the State's attorney (all counsel in the case) had been placed on written notice on October 31, 2008, that the motion would be brought. (IOE, pp. 131-135.)

Hence, counsel pursued a particular strategy to obtain the witness statements *in the form of evidence* for later use against the witnesses in their deposition testimony, and obviously also for prejudicial use of the statements against the Plaintiff in her wrongful death action.

Third, in the deposition of one of the minors, the same State's attorney then used the recorded witness statements in his cross-examination during the deposition. (IOE, pp. 221-227.) He did not do so by producing the statements to any other counsel, or to the witness. He did not reveal the existence of the statements before the deposition. Instead, he waited to cross-examine the minor during his deposition testimony under oath.

The deposition questioning reveals strategies designed to manipulate and prejudice the witness, including exposing him to potential perjury charges.

Q Do you remember speaking to an investigator that came to your house in November of last year after school?
MR. CARCIONE: Asked and answered.
THE WITNESS: Yeah.
MR. GEVERCER: Q And do you remember talking to the investigator at your house?
A Yeah.
Q And was this a woman?
A No.
Q "No"?
A It was a man.
Q It was a man. Okay. And it was -- you remember it being November of last year, correct?

A Yeah.

Q And do you remember telling him --
MR. CARCIONE: Well --
MR. GEVERCER: Excuse me?
MR. CARCIONE: The last question is leading. I don't know if he remembers exactly.
MR. GEVERCER: Q Okay. Do you remember telling that person the truth?
A Yeah.
Q Do you remember saying that -- or being asked if anyone was telling Jeremy to get into the raft and you said, "Yeah, a couple of people"?
MR. LINKERT: "To get into the raft"?
MR. GEVERCER: Yeah.
Q That everyone was telling Jeremy not to get into the raft?
MR. CARCIONE: Objection, asked and answered. Badgering.
THE WITNESS: No.
MR. GEVERCER: Q Okay. Do you remember telling the investigator that Jeremy had some cans of spray paint in his hoodie?
A No.

[IOE, pp. 224-225.]

The questioning caused the witness to misremember the gender of the interviewer.

The questioning forced the witness to adopt a statement he has not seen.

Critically, the questioning exposed the witness to perjury by his adoption of the statement, with the question: "Do you remember telling that person the truth?"

(We now know the recorded statement is not under penalty of perjury, but the State's attorney induced a minor to adopt the recorded statement as being under penalty of perjury ... without ever allowing the minor to hear or see the statement's contents.)

The questioning then caused the witness to contradict his recorded statement.

These unfair manipulations of a witness have no "work product protection", and they should never have happened in the first place. It should not happen to *any* witness. The tactic serves no legitimate purpose.

The majority opinion noted that: "The [trial] court did order production of the statement of the witness whose deposition had been taken, on the basis that the state had waived work-product protection by using the content of the statement to examine the witness at his deposition." (*Coito v. Superior Court* (2010) 182 Cal.App.4th 758, 763.)

Unfortunately, *for the witness*, it is now too late that the State's attorney could ostensibly use "the absolute attorney work product doctrine" to obtain a recorded statement under undue influence, withhold it from discovery, not produce it to the witness, and then induce an unrepresented minor into adopting the recorded statement as if it were given under penalty of perjury, all for the purpose of later using it at trial. And, because *the opposing party's attorney* did not know of the statement's existence, and

hence had no idea what the contents were, *the party's* ability to effectively ascertain the truth from this witness was blocked.

This case presents the all too common scenario of witness manipulation, which is at odds with our adversarial civil justice system's goal of revealing the truth.

The juvenile witnesses in this case were unfairly manipulated by the State's Special Agents, and *Nacht & Lewis* was used by the State's attorneys to justify hiding the direct and indirect pressures placed on the witnesses, which are relevant to the truthfulness and credibility of their testimony. A bright-line rule holding that the attorney work product doctrine does not include the signed or recorded verbatim statements of unrelated witnesses is the only method of ensuring that all witnesses receives copies of their statements, without delay, before those witnesses are compelled under the authority of the State to provide sworn testimony. It is easily understood that an independent witness has a superior right to obtain a copy of his own signed or recorded statement.

CONCLUSION

A sound theoretical basis exists for establishing a "bright line" rule applicable to the signed or recorded verbatim statements of independent witnesses. Such statements can *never* be "attorney work product" *in the*

first instance because there is no confidential relationship between the attorney (or investigatory) and the witness, and therefore there is no reasonable expectation that confidentiality should be applied to the witness' words. When the interviewing attorney elects to have the witness sign the written statement, or record the witness, potentially *admissible evidence* has been created, and no right of secrecy or non-disclosure can possibly exist.

If the Court will apply the approach supported in this Brief, it will end the morass and multiplicity of litigation on this issue, entailing inconsistent, unpredictable and unjust results for civil litigants in this State. Fourteen years of *Nacht & Lewis* and its expansion of work product "protections" beyond any sound principles have been long enough for litigants and courts to have to cope with. We appreciate this highest Court taking the time to address the problem, and correct it once and for all.

DATE: OCTOBER 21, 2010

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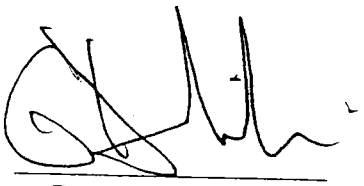
CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(b), (c))

The text of this brief consists of 12,533 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief. The text, excluding headings, quotations and footnotes, is at least a space and a half. The type size throughout is 13 point. The type style throughout is Times New Roman.

Dated: October 21, 2010

By: 

Gary W. Dolinski

Coito v. State of California, et al.
[Stanislaus County Superior Court No. 624500]
[Fifth Appellate District Court of Appeal No. F057690]
[Supreme Court of California No. S181712]

PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of San Mateo, State of California. I am over the age of eighteen and not a party to this action. My business address is 601 Brewster Avenue, Redwood City, California 94063.

On October 21, 2010, I served the attached document(s):

ANSWERING BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the above date at Redwood City, California.