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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTRODUCTION

Regardless of whether the recorded witness interviews at issue are absolutely privileged, or subject to a qualified privilege, the decision below must be reversed. The recording of the question and answer sessions with witnesses in this case are absolutely privileged because they reflect counsel's "impressions, conclusions, opinions, or legal research, or theories." (Code Civ. Proc., § 2018.030, subd. (a).) But even if the statements recorded in this case did not reflect counsel's impressions, conclusions, and opinions, they are still entitled to qualified protection. (Code Civ. Proc., § 2018.030, subd. (b).) Any other holding would be contrary to the text and legislative intent of the relevant statutes, and would have immediate, negative consequences for the investigation and orderly prosecution of civil cases.

Though 59 pages in length, petitioner's answering brief all but ignores the explicit intent of the Legislature to preserve the privacy necessary to encourage thorough preparation and investigation, and "to prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subds. (a) & (b).)

Significantly, the answering brief does not contend the requirements for disclosure of material subject to a qualified privilege were ever met. Rather than argue compliance with the requirements of section 2018.030 as drafted, the answering brief invites this Court to rewrite the statute by creating a confidentiality requirement. This Court should reject this invitation and reverse the decision below.

ARGUMENT

I. THE COURT SHOULD HOLD THAT THE RECORDED WITNESS INTERVIEWS ARE PROTECTED BY AN ABSOLUTE PRIVILEGE.

In 1963, the California Legislature adopted a policy in favor of robust work product protection. Because the Legislature placed an important value on the right of the legal profession to protect its "impressions, conclusion, opinions, or legal research" it created an absolute protection. (Code Civ. Proc., § 2018.030, subd. (a).) But mindful of the need to allow counsel to obtain the work of an adversary "when the denial of discovery will result in unfair prejudice" it created a qualified privilege for all other attorney work product. (Code Civ. Proc., § 2018.030, subd. (b).) Contrary to the views expressed by the answering brief and the court below, the witness interviews in this case fit comfortably within the plain wording of the absolute work product protection for the following reasons.

First, the record on appeal supports the application of the absolute protection. Defense counsel in this case made the decision to interview a small subset of witnesses disclosed during discovery. (IOE at pp. 293-294, 299-371.) The known witnesses included lay witnesses who observed the decedent's behavior before he drowned, and rescue and recovery witnesses. (IOE at p. 299-317.) Counsel selected the identity of the witnesses to be interviewed and provided his investigator with the questions he wanted answered. (*Id.*) According to counsel's specifications, a question and answer session with witnesses was recorded by counsel's investigator. (IOE, at pp. 294, 400.)

In this case, the choice of which witnesses to interview, the choice of which questions to ask those witnesses, and the choice of follow-up questions reflect the evaluations of, and tactical choices made by, counsel. This information provides a roadmap to counsel's thought process because these choices were necessarily made based upon counsel's assessment of

the strengths and weaknesses of the case and the litigation goals for the client. Such information fits comfortably within the absolute protection category because it reflects counsel's "impressions, conclusions, opinions, or legal research, or theories."

Second, the first sentence of the answering brief misconstrues the analysis of the court below. Petitioner makes the following critical misstatement: "[a]ll three Justices of the Fifth District Court of Appeal held in these writ proceedings that there is *no possibility* that the [recorded verbatim witness statements] could be 'absolute attorney work product.'" (Answering brief, at p.1, italics in original.) This statement is incorrect because Justice Kane's dissenting opinion expressed a compelling contrary view.

The dissenting opinion found the recorded statements in this case "are at least qualified work product." (*Coito v. Superior Court* (2010) 182 Cal.App.4th 758, 784 (dis. opn. of Kane, J.).) With respect to the application of absolute work product protection, Justice Kane only rejected a *per se* rule of absolute work product protection "whenever an attorney records in writing the substance of a witness's statement."[1] (*Id.* at 779.) He concluded: "It is therefore possible that some or all of a witness statement prepared or recorded by an attorney (or an attorney's agent) will remain outside the scope of the *absolute* work product protection." (*Id.* at 779-780, italics in original.) In other words, consistent with the work product statute, a witness statement recorded by counsel may or may not reveal an attorneys impressions, conclusions, opinions or legal research. If it does not, it is still protected by the qualified work product privilege.

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[1] This view is consistent with the position taken in the State's Opening Brief at p. 13.

Here, no per se rule need apply. There is a sufficient record to demonstrate the manner in which the recorded statements were taken. Justice Kane's dissenting opinion cuts to the heart of the issue presented here. It displays fidelity to legislative intent "so as to effectuate the purpose of the law." (See *Dyna-Med. Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379,1386.) On the other hand, both the answering brief, and the majority opinion it attempts to defend, do not.

II. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THAT THE RECORDED WITNESS STATEMENTS ARE PROTECTED BY A QUALIFIED PRIVILEGE.

This is not a case in which the witnesses have died or moved out of the jurisdiction. The answering brief all but concedes a failure to establish the showing necessary to obtain qualified work product. (Code Civ. Proc., § 2018.030, subd. (b).)

The record on appeal demonstrates petitioner did not explain to the trial court why denial of discovery of the recorded witness statements would result in unfair prejudice. (IOE, at pp. 202-204.) No showing was ever made why petitioner's counsel could not use its own resources to interview the known percipient witnesses. And no argument was ever made that the percipient witnesses were no longer available or would no longer cooperate. (*Id.* at pp. 418-426.)

Routine discovery in this case identified lay and law enforcement witnesses. (*Id.* at pp. 294, 299-317.) All parties were aware of the identity of the witnesses and all parties had an opportunity to interview them. Yet, petitioner never established unfair prejudice required by section 2018.030, subdivision (b).

For this reason alone, the trial court's ruling was correct and the court below should not have issued its peremptory writ of mandate.

III. THE COURT SHOULD REJECT THE ARGUMENT THAT RECORDED WITNESS STATEMENTS ARE NOT ENTITLED TO ATTORNEY WORK PRODUCT PROTECTION.

A. Petitioner's Reliance on *Greyhound* Is Misplaced.

The answering brief, like the majority opinion below, mistakenly relies on *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, a case effectively overruled by the Legislature. *Greyhound* declined to acknowledge the existence of a work product privilege in California. (*Id.* at 401; see *Coito v. Superior Court, supra.*, 82 Cal.App.4th at 780, fn.12 (dis. opn. of Kane, J.).) That is why the Legislature in 1963 enacted a separate privilege for materials prepared in anticipation of litigation. (*Dowden v. Superior Court* (1999) 73 Cal. App.4th 126, 132-133; see IOE, at pp. 336-338.)

B. The Answering Brief's Policy Criticisms Lack Support.

No data support the problems the answering brief attributes to the *Nacht & Lewis* decision. The trial and appellate courts have now had 15 years of experience enforcing the work product statute since *Nacht & Lewis* was decided. Yet, with the exception of the majority opinion below, that decision has never been criticized by any subsequent appellate decision, law review article or legal treatise. It remains persuasive authority which effectuates the text and intent of the work product statute, and provides practical guidance to the everyday practice of law.

On the other hand, the deprivation of attorney work product protection, as suggested by the answering brief, would have predictable negative consequences on the practice of law. Significantly, it could impede or frustrate the civil investigations of the Attorney General. The Office of the Attorney General relies on recorded witness statements in order to prepare for possible litigation in cases involving consumer,

investor and worker protection. If recorded witness statements are discoverable merely because a routine discovery request has been made, witnesses will be reticent to provide valuable information relevant to the protection of the public.[2]

With respect to the assertion that witnesses are entitled to their own recorded statements (answering brief, at p. 49), petitioner is wrong. Evidence Code section 769 insures the fair administration of justice when protected work product is sought to be used in the examination of witnesses. Section 769 instructs that "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." This section prevents disclosure "only to *witnesses*, not lawyers" and allows the trial courts to engage 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, 821-822.)

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[2] Petitioner's claim that "the State's attorneys sent the Special Agents on November 12, 2008, to record the statements despite a then pending Motion for Protective Order" (Answering Brief at pp. 54-55) is groundless. According to the deposition testimony of the investigator who conducted the witness interviews, she was assigned this case by her supervisor, Mr. Bowen, about two weeks prior to taking the statements. (IOE, at pp. 395, 398.) The recorded interviews took place on November 12, 2008. (IOE, at p. 293-294.) The proof of mail service for plaintiff's Motion for Protective Order was November 11, 2008. (IOE, at p. 141.)

C. The Court Should Reject the Answering Brief's Ill-Conceived Confidentiality Requirement.

Petitioner asks this Court to rewrite the work product statute by imposing a confidentiality requirement. This change would unravel California's work product statute and abandon the well-established rationale in support of work product protection first articulated in *Hickman v. Taylor* (1947) 329 U.S. 495, 67 S.Ct. 385.) This Court should reject petitioner's proposal for the following reasons.

First, when there is no ambiguity in the statute, this Court must presume the Legislature meant what it said. (*Hunt v. Superior* (1999) 21 Cal.4th 984, 1000.) That is the case here. The imposition of a confidentiality requirement would require inserting words into the statute that the Legislature itself chose not to. The wisdom of such a dramatic policy change is for the Legislature to decide, not this Court. (See *California Teachers Assn. v. Governing Board of Rialto Unified School Dist.* (1977) 14 Cal.4th 627, 632-633.)

Second, no authority supports a confidentiality requirement. For example, petitioner cites *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240 for the proposition that a trend exists of "expressly acknowledging that an expectation of confidentiality was necessarily an aspect of the work-product doctrine." (Answering brief, at p. 12.) *BP Alaska* does not express this view. To the contrary, *BP Alaska* relied upon the Court of Appeals for the District of Columbia for the following diametrically opposite point of view:

> the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent . . . . We conclude, then, that while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-

> client privilege, it should not suffice in itself for waiver of the work product privilege.

(*Id.* at p. 1256, quoting *United States v. American Tel. Co.* (D.C.Cir.1980) 642 F.2d 1285, 1299.)

BP Alaska addressed the possibility of an attorney's voluntary waiver of absolute work product protection, not the imposition of a confidentiality requirement to the formation of protected work product. (*Id.* at p. 1260.) *BP Alaska* concluded that an "attorney's absolute work product protection continues as to the contents of a writing delivered to a client in confidence" because the "fact that the client does not object to disclosure of the contents of the writing [to a third party] does not lessen the attorney's need for privacy." (*Id.*)

Likewise, the remainder of the authority cited by respondent (*Armenta, Oxy Resources, Meza or Shadow Traffic*[3]) fails to support the proposition that a confidentiality requirement should be imposed on California's work product protection.

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[3] *Armenta v. Superior Court* (2002) 101 Cal.App.4th 525 [Where parties had executed joint prosecution agreement, all holders of privilege must consent to waiver; no showing of unfair prejudice warranted disclosure of materials protected by qualified privilege]; *Oxy Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874 [joint defense agreement cannot be used to shield non-privileged documents from disclosure]; *Meza v. H. Muelstein & Co.* (2009) 176 Cal App. 4th 969 [the common interest doctrine is a nonwaiver doctrine, analyzed under standard waiver principles]; *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067 [affirmed disqualification of law firm because it had retained an expert known to have previously been interviewed by opposing counsel.]

CERTIFICATE OF COMPLIANCE

I certify that the attached **State of California's Reply Brief on the Merits** uses a 13 point Times New Roman font and contains 2,003 words.

Dated: November 8, 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 **November 9, 2010**, I served the attached:

STATE OF CALIFORNIA'S REPLY 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:

SEE ATTACHED LIST

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 **November 9, 2010**, at Sacramento, California.

Priscilla Lucas
Declarant

Signature

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