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## **COITO v. SUPERIOR COURT** **Is It Heading Back to the Supreme** **Court?**

**By Katherine Gallo**



On August 14, 2012, Judge William A. Mayhew of Stanislaw Superior Court issued his **Notice of Hearing on Issues Re Remand** in the case of *Debra Coito v. State of California*. The order requested that the following issues to be briefed:

1. Does the absolute privilege apply to all or any part of the recorded witness interviews?
2. Does the Plaintiff contend that they can make a sufficient showing of unfair prejudice or injustice under C.C.P. Section 2018.030(b) such as to allow discovery as to any of the interviews that may be found to be not absolutely privileged?
3. As to interrogatory 12.3, does the STATE contend that answering said interrogatory would result in opposing counsel taking undue advantage of the attorney for the STATE's industry of efforts or that answering said interrogatory would reveal the attorney of the STATE's tactics, impressions or evaluation of the case?

**Issue 2** is easy for the plaintiff to respond to, as the prejudice is **TIME**. The death of Timothy Wilson occurred over five years ago on March 9, 2007. Even the best witness is not going to remember all the details and is going to need the statement to refresh his/her memory.

**Issue 3** also is easy to respond to. [Form Interrogatory 12.3](#) reads as follows:

Have **YOU OR ANYONE ACTING 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

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statement;

(c) the date the statement was obtained; and

(d) the name, **ADDRESS**, and telephone number of each **PERSON** who has the original statement or a copy.

How much different is this then providing the information in a privilege log pursuant to [C.C.P. §2031.240 \(pdf\)](#) in which it is expected that for each document withheld on the claim of privilege that the privilege log state (a) the nature of the document (e.g., letter, memorandum, (b) date, (c) author, (d) recipients, (e) the sequential number (or document control number, if any), and (f) the privilege claimed? See California Civil Discovery Practice (CEB 4th Ed. 2012) §3.192 citing [Wells Fargo Bank v. Superior Court \(2000\) 22 C4th 201 \(pdf\)](#) and see §33.201 for a sample of a privilege log. Therefore, the State should respond to the interrogatory.

**Issue 1** is the real problem, as *Coito* never gave directions on how the Judge is going to determine this.

As we have learned in the Supreme Court's Opinion in *Coito v Superior Court*, the work product protection may be either absolute or qualified. [C.C.P. Section 2018.030\(b\) \(pdf\)](#) states that there is an absolute protection against discovery of any writing that reflects an attorney's "**impressions, conclusions, opinions or legal research or theories.**" The protection continues even if the writing is delivered to a client as long as it is delivered in confidence. [BP Alaska Exploration, Inc. v. Superior Court \(1988\) 199 Cal. App. 3d 1240, 1252 \(pdf\)](#). Because such documents are absolutely protected, courts do not engage in any sort of weighing or balancing of competing interests with regard to these documents. California Civil Discovery Practice (CEB 4th Ed. 2012) § 3.53 citing *Fellows v. Superior Court* (1980) 108 CA3d 55.

But not every question asked of a witness shows the attorney's "*impressions, conclusions, opinions or legal research or theories.*" Questions such as "State your name, address and phone number.", "Tell me what happened.", "What did you see?" or "What did he say?" are generic investigative questions and do not show an attorney's "*impressions, conclusions, opinions or legal research or theories.*"

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According to Weil and Brown, Cal. Prac. Guide: Civil Procedure Before Trial (TRG 2012) ¶8:239:

*"Statements made (verbally, in writing or in records) by a witness to interviewing counsel are usually "evidentiary" (non-derivative) in nature, and hence discoverable [See Kadelbach v. Amarai (1973) 31 CA3d 814, 823; 107 CR 720,725*

*However, many witness statements are an "amalgam" of the witness' recorded statements and comments by the interviewing attorney. In such cases, that part of the statement consisting of the attorney's own comments is absolutely protected under CCP §2018.030(a) (as a writing reflecting the attorney's "impressions, conclusions, opinions, etc.) And, where the attorney's comments are inextricably intertwined with the witness' statement, the entire statement is absolutely protected. [Rodriguez v. McDonnell Douglas Corp. (1978) 87 CA3d 626, 647-648; 151 CR 399, 410]"*

There are many ways for Judge Mayhew to handle Issue 1. **First**, the Judge can instruct the State to redact only the questions and/or responses that show an attorney's "*impressions, conclusions, opinions or legal research or theories*" and trust that they will respond in good faith. **Second**, Judge Mayhew can order an in camera hearing and have a more candid discussion with counsel for the State as to what is in the statements. **Finally**, which I believe is the best course, is for Judge Mayhew to advise the State that, unless the State is ready to spend another couple of years at the Court of Appeals and Supreme Court, it is time for them to allow the court to do an in camera inspection of all the witness statements and determine which questions and responses are generic and which ones actually show what the attorneys "*impressions, conclusions, opinions or legal research or theories.*"

Unfortunately, even if the parties figure out how to resolve the witness statements at the trial level; Courts are still going to be in the dark as to what they need to do to determine whether or not a witness statement is protected in whole or part because of the absolute work product privilege until the Appellate Courts addresses the issue.

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