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What a Witness Tells an Attorney, May Well Stay With the Attorney

An appellate court shocked California litigators two years ago when it ruled that attorneys generally have to share their interviews of witnesses with their litigation opponents.

Previously, lawyers and judges understood that the interviews were protected by the attorney work-product privilege, but the appellate panel said in its March 2010 opinion (described in The Rodolff Law Firm newsletter here) that the privilege didn't cover simple witness statements. The change in the law worried lawyers so much that Barry Rodolff wrote an article in a leading legal newspaper offering advice about how to cope with the decision. Click on this link to see Barry Rodolff's article from then.

Now, the California Supreme Court has eased litigators' concerns. In a unanimous decision in June called *Coito v. Superior Court*, the court stuck a middle position, holding that "a witness statement obtained through an attorney-directed interview is entitled as a matter of law to at least qualified work product protection."

That means that if an attorney or his investigator records or writes down a witness's verbatim answers to questions, that statement does not have to be disclosed — except to prevent "unfair prejudice or injustice" to the other side.

The case involved statements from six witnesses to a boy's drowning. The boy's mother demanded the witnesses' names and copies of their statements, but the defendant, the state of California, resisted.

Writing for the unanimous court, new Justice Goodwin Liu traced the concept of keeping secret the work attorneys do for their clients to a 1947 U.S. Supreme Court decision. That decision held that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel" in order to gather information, sift facts and "prepare his legal theories and plan his strategy without undue and needless interference."

Liu said that decision ultimately influenced California's own work-product statute, Code of Civil Procedure section 2018.030, in the 1950s and '60s. Although the code section doesn't define the privilege

in detail, “from the very inception of judicial recognition of the concept, attorney work product has been understood to include witness statements obtained through an interview conducted by an attorney,” he wrote. The U.S. Supreme Court mentioned them specifically.

The next question is whether the statements merit absolute or qualified privilege. Work product is absolutely protected if turning it over would expose an attorney’s “impressions, conclusions, opinions, or legal research and or theories.”

Sometimes, the very fact that an attorney wanted a particular witness questioned “may disclose important tactical or evaluative information,” Liu said. In that situation, the statement should be absolutely privileged.

But more often, the mere existence of a witness statement reveals nothing about the attorney’s strategy, and absolute privilege should not apply to it. Attorneys may seek court approval for absolute protection on a case-by-case basis, he said.

On the other hand, a witness statement “would not exist but for the attorney’s initiative, decision, and effort to obtain it,” and it deserves at least qualified privilege.

There are two reasons. First, the Legislature sought to prevent attorneys “from free-riding on the industry and efforts of opposing counsel.”

Second, attorneys should be encouraged to investigate their cases thoroughly, including the weaknesses. They might not do that if they believed what they find out could be discovered by the other side.

“This result would derogate not only from an attorney’s duty and prerogative to investigate matters thoroughly, but also from the truth-seeking values that the rules of discovery are intended to promote,” Liu noted.

On a separate question, the court held that the identities of witnesses interviewed should not be protected as work-product unless the attorney can show discovery “would reveal the attorney’s tactics, impressions, or evaluation of the case, or would result in opposing counsel taking undue advantage of the attorney’s industry or efforts.”

Because the “unfair prejudice or injustice” exception exists as to statements protected by the qualified privilege, perhaps the safest approach for an attorney or claim office would be to make the decision as to whether to take a recorded statement of an independent witness based on the assumption that the statement will ultimately be produced to the other side.

Finally, it should be noted that the *Coito* decision does not affect the attorney-client privileged nature of an attorney-directed recorded statement of a client witness. Such statements remain absolutely privileged.

No License, No Problem for Auto Policy’s Permissive User

Almost 16 years ago, California voters declared in Proposition 213 that before a driver injured in a traffic accident could collect damages for his pain and suffering, he had to have auto insurance.

What the injured driver does not need, however, is a driver’s license, according to a recent appellate decision.

Even though someone without a license might not be able to purchase auto insurance in the first place, if he has permission to drive someone else’s car, he is covered under that person’s insurance policy, the appellate panel held in *Landeros v. Torres*.

“[T]here is no basis for concluding that an unlicensed permissive user is excluded from coverage,” the court said.

The injured driver in this case was a 16-year-old girl whose parents had just bought her a car. Even though she didn’t have a license yet, her father allowed her to take the car for a spin, with her 25-year-old sister riding along.

Both daughters were seriously injured when a drunken driver blew through a stop sign and crashed into them. That driver went to prison, but the 16-year-old suffered severe brain injuries and spent weeks in a coma.

Asked to decide only damages, a jury awarded the girl $31 million, which included $21 million in noneconomic damages. Her attorney had requested more than 10 times that amount.

Upholding the trial judge, the appellate court ruled the girl did have insurance as a permissive user under her father's policy on the new car. The court noted the policy did cover permissive users, but did not specify those users had to be driving legally.

Further, "it is the public policy of our state to broaden 'insurance coverage to protect the public when the automobile to which the policy relates is operated by one other than the insured owner,'" the appellate panel noted.

The defense argued that because the girl was unlicensed, she could not get insurance and therefore should be barred from noneconomic damages by the ballot measure, codified now in Civil Code Section 3333.4.

"This argument, in reality, is a request that we add a new exclusion to section 3333.4, one based on whether the injured driver properly was licensed," the court said.

But the statute makes no mention of unlicensed drivers. "The question is the existence of insurance, not whether the injured driver was licensed," the panel said. Whether the law should be amended is up to the Legislature.

Policy set by the courts and by Sacramento require auto insurance to cover permissive users, even unlicensed ones. "To exclude unlicensed drivers from permissive user coverage, or to prevent unlicensed drivers from recovering noneconomic damages, would require an examination and weighing of the policies of each law, a task for which the Legislature is better suited than this court," the appellate panel declared.

Barry L. Rodolff

The founder and president of The Rodolff Law Firm, APC, Barry L. Rodolff, is a highly experienced lawyer who has been assisting clients faced with civil litigation for more than two decades. Mr. Rodolff developed his skills with two well-respected defense firms, Schell & Delamer, and Haight, Brown & Bonesteel. He also worked in-house at Travelers Insurance Company, representing a variety of insured companies in many types of litigation. His clients have ranged from small businesses to multinational corporations. Mr. Rodolff brings extensive experience and knowledge in the defense of litigation involving premises liability, business, product liability, personal injury, employment, construction defect, and intentional torts.