Witness Statements: What to Do Now

Less than a week after the 5th District Court of Appeal decided *Coito v. Superior Court*, my law firm heard from a major client: "Have you heard about this case? What does it mean? What do we do?"

This is my answer:

The way we deal with written and recorded independent witness statements in California must now change. The absolute work-product privilege protection for such statements discussed in *Nacht & Lewis Architects Inc. v. Superior Court*, 47 Cal.App.4th 214 (1996), almost 14 years ago has been meaningfully challenged.

There is now a new, and perhaps bigger, kid on the block. In *Coito*, the majority held that, in most cases, witness statements obtained by or for an attorney are not protected by the absolute work-product privilege or even by the qualified privilege.

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Until the California Supreme Court finally decides whether such statements are discoverable, I think that the following should be done.

As a preliminary matter, I would point out that, for those who wish to assert that such statements remain protected by the absolute work-product privilege, *Nacht* is bruised but not dead. The *Coito* court has the power to criticize the reasoning in *Nacht*, but not to overrule it. As it stands now, we have two Courts of Appeal decisions with completely different holdings. Pursuant to *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450 (1962), a litigant may choose to rely on either decision regardless of the district in which the matter is pending. If a party wishes to protect a witness statement from production to the opposing counsel, such a party still has the option to rely on *Nacht* as authority for that position.

In addition, it should be noted that neither *Nacht* nor *Coito* affect the separate protection afforded statements obtained from clients and client employees provided by the attorney-client privilege.

Since 1996, parties to all manner of litigation have obtained written and recorded statements from independent witnesses with little risk that those statements would be turned over to opposing counsel. Now that *Coito* exists and may be relied upon by trial courts, I think that counsel, investigators and claims personnel should rethink their decision-making process regarding when written and recorded statements are taken and by whom. Instead of a blanket practice to obtain statements from all witnesses, a conscious decision needs to be made about which witness statements, if any, should be recorded or written down verbatim.

Importantly, the *Coito* decision deals only with witness statements, not witness interviews. Consequently, counsel who wish to preserve the work-product protection of their investigation should take two distinct steps regarding recorded or written witness statements. First, the witnesses should simply be interviewed, without making any effort to take verbatim notes. Second, and only at that point, counsel should decide whether to obtain written or recorded statements from any of the witnesses interviewed. If the questioner chooses not to have a written or recorded statement prepared after any particular interview is conducted, then the non-verbatim notes of the interview itself are still privileged, even under the majority holding in *Coito*.

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A decision should also be made about who should conduct the interview. In making this decision, it should be noted that although the majority in *Coito* holds that no privilege exists for the written or recorded statements, Justice Stephen Kane's concurring and dissenting opinion states that a qualified work-product privilege should attach to the statements.

As it stands now, with a trial court able to rely on the ruling in *Nacht* or the rationale of the opinions set out in *Coito*, I believe that there is a decent chance that a trial court will take the middle ground – that is, it will find that such statements are governed by qualified work-product rules. Therefore, even though the statements taken by investigators or claims personnel at the direction of counsel could be covered by the privilege, I believe it is more likely a judge would find a particular statement or portion of a statement to be privileged if the statement were taken directly by counsel, rather than his or her agent.

Questions posed directly by the attorney will arguably reveal more about the attorney's impressions, conclusions or opinions, which are issues to be considered by the trial court when performing a qualified-privilege analysis. Therefore, if there is a particularly sensitive witness from whom a statement is to be obtained, a counsel may choose to have that statement procured directly by counsel, thus increasing the chance that the court will find a qualified privilege. Of course, it is rarely a good idea for the actual trial counsel to be the person to obtain the statement because of the chance of that this counsel could be called as a witness to describe the circumstances surrounding the statement or to provide foundation for it.

In order to increase the likelihood of a finding of a qualified privilege, I suspect that some counsel will specifically tailor their questions or comments during a recorded statement to maximize the chance of such finding. Even the majority in *Coito* acknowledges that an in camera inspection of a statement could occur to address whether a qualified work-product privilege exists. Although I don't necessarily condone such conduct, I would not be surprised if certain counsel made a conscious effort to ask questions in a way that exposes the attorney's thought process.

This could happen subtly, or a counsel could simply choose to make the process overt. For example, in an auto case involving an accident at an intersection, a counsel thinking about a later in camera hearing may simply say something like, "I'm now going to get into an area dealing with various theories about why the accident happened. I went to the intersection and looked at the light phasing. I'm wondering what your thoughts are about..." Such a tactic may not result in the protection of the entire statement, but if the tactic were used regarding some issue that is truly central to the counsel's theory of the case, then a judge could decide to protect that portion of the statement.

In his opinion in *Coito*, Justice Kane succinctly pointed out, "To date, our Supreme Court has not weighed in on this subject. It should do so." Until it does so, practitioners on each side of this issue are left with case law supporting their position. Pending a Supreme Court decision, attorneys not wanting to have adverse witnesses statements provided to opposing counsel should err on the side of instructing their investigators and claim representatives to not take statements in the first place. Before any recording is made, interviews of the independent witnesses can be conducted to shed light on whether a written or recorded statement is warranted.

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