

# Legal Briefing

## Witness Interviews Revealed to Other Side

By Daniel T. Rudderow, Esq.

When an accident or some other unfortunate event occurs in life that results in the filing of a lawsuit, a common dilemma confronting litigants and their attorneys is whether or not to interview witnesses to the incident. Often times, interviews yield helpful information to advance the client's case. However, clients and their attorneys need to remember that the questions asked by the attorney and the answers given by



the witness during the interview may be fully "discoverable" or in other words, turned over to the opposing side.

In the case of *Coito v. Superior Court*, the Fifth Appellate District Court of Appeal recently confronted the issue of whether information collected from witness interviews was discoverable.

The case involved a wrongful death lawsuit brought against state and local officials by Debra Coito, the mother of a 13-year old boy who drowned on the Tuolumne River in Modesto, California. After the lawsuit was filed, an attorney with the California Department of Water Resources sent an investigator to interview four teenage boys who were with the victim at the time. The investigator conducted and recorded the interview of each of the four witnesses. When Coito's

attorney learned of the recorded witness statements, he filed a motion asking that the recorded statements be immediately turned over. The trial court refused, believing the interviews were the product of the attorney and the investigator's work on the case, and therefore subject to the so-called "attorney work product" privilege.

However, the appellate court reversed the trial court's decision, reaching the opposite conclusion that the recorded witness statements were not privileged and therefore should be turned over to Coito's side. The Court of Appeal noted that, on the one hand, the attorneys' own work product in making evaluations of their client's case is generally considered protected from disclosure, while, on the other hand, statements given by a witness and then turned over to an attorney are not deemed the attorney's protected work product.

In *Coito*, however, the appellate court was confronted with the question whether the witnesses' statements, taken by the investigator with the California Department of Water Resources, were privileged since the witness statements could be construed, at least in part, as being the product of the attorney's work. The court in *Coito* held that the witnesses' statements – although a product of the attorney's work – were not protected under the work product privilege. The court reasoned that the statements were simply evidence of what the witnesses stated, and did not constitute the impressions of the lawyer so as to make the privilege applicable.

In *Coito*, the Department's attorneys argued that revealing the statements would intrude upon the privilege because the recorded interview revealed the lawyer's questions and thus the thought process as to what was critical in the case. The court rejected the argument, however, noting that competent counsel will be able to tailor their interviews so as to avoid this problem.

The lesson to be learned for anyone involved in litigation is to remember that witness interviews, although often times useful, will most likely need to be turned over to the opposing side in a lawsuit. As a result, clients and their attorneys should give careful consideration as to how such interviews should be conducted, and consider such factors as who will conduct the questioning, who will prepare the questions to be asked, and whether the answers to the questions will be recorded. By carefully considering these factors before the interview, the client and attorney may be able to obtain information critical to the client's case, while at the same time minimizing the risk involved in having to later turn over the information to the other side.

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# Investment Adviser, Financial Adviser, Broker/Dealer - What is the Difference?

By Richard P. Gerber, Esq.

Many of us entrust our money to an investment adviser, a financial adviser and/or a broker/dealer to make financial decisions. The difference between these financial professionals is significant in terms of the duties they owe to their clients.

## Investment Adviser

An Investment Adviser is any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. Investment Advisers are fiduciaries by operation of law under the Advisers Act. As fiduciaries, Investment Advisers owe their clients the highest duty of loyalty and care. The standard of care is analogous to the standards of agents or trustees.

The Investment Adviser fiduciary duty of care includes the following:

- An obligation to provide only suitable investment advice by obtaining information regarding the client's financial situation, investment experience, and investment objectives.
- An obligation to disclose to clients all material facts about the advisory relationship. Information is material if there is a substantial likelihood that a reasonable client would attach importance to it.
- To act solely in the best interests of their clients, which require that they place the interest of the client above their own if a conflict arises. The Investment Advisor must disclose any conflict and obtain the client's consent to the arrangement.

- Treat each client fairly and ensure that they do not benefit one client to the disadvantage of another.

## Financial Adviser

A Financial Adviser may or may not be a fiduciary depending on the facts and circumstances, therefore, the obligations of a Financial Adviser to their clients are distinguishable from those of an Investment Adviser. A Financial Adviser, who is not an Investment Adviser, will be liable under securities law only for matters that are in connection with the purchase or sale of securities.

## Broker/Dealer

A Broker is defined as "a person engaged in the business of effecting transactions in securities for the account of others." A dealer is defined as "a person engaged in the business of buying and selling securities for his own account."

Most Brokers/Dealers must register with the U.S. Securities and Exchange Commission (SEC) and join a self-regulatory organization. A Broker/Dealer making a representation to a client must have grounds for believing that the recommendation is suitable with respect to the client's portfolio, financial situation and needs. Before making a recommendation, the Broker/Dealer must make reasonable efforts to discover the client's financial and tax status, investment objectives and other pertinent information. The SEC treats suitability as a fundamental duty of Brokers and enforces those duties under securities laws.

## Dispute Resolution

Disputes arise when these financial professionals violate their duties and responsibilities to their clients. The disputes that cannot be informally resolved typically wind up in arbitration

before the Financial Industry Regulatory Authority (FINRA). FINRA operates the largest securities dispute resolution forum in the world, annually administering arbitrations and mediations through its network of five offices located throughout the United States.

If you have a dispute with an investment professional and need more information, please call Attorney Richard Gerber at 714-432-8700 or via email at [rgerber@hkclaw.com](mailto:rgerber@hkclaw.com).

## General Counsel Seminar Series - June 2, 2010 7:30am - 9:00am

### What Every General Counsel Needs to Know About Marketing and the Law

Hart, King & Coldren is continuing their seminar series specifically designed for in-house General Counsel. The next seminar will be presented on Wednesday, June 2, 2010, from 7:30 a.m. to 9:00 a.m. at our office.

Partners David Baker and John Pentecost will share their insights on how to avoid common legal problems that companies often encounter with their marketing efforts, as well as what steps to take when a competitor's marketing campaign infringes on their rights. From trademarks, copyrights, domain names, keywords, to false advertising issues and more, learn how to protect your company from liability while positioning yourself to enforce your company's rights when necessary.

The seminar is complimentary and one hour of general MCLE credit will be given. A continental breakfast will be provided. To register, please call or email Karen Koenes at 714-432-8700 or [kkoenes@hkclaw.com](mailto:kkoenes@hkclaw.com).

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