ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE WORK PRODUCT PRIVILEGE FALLACY

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits I was really looking forward to a relaxing evening at the lobby bar at the Hyatt.

Visions of being served my cocktail of choice, a Beefeater's martini straight up with two olives, by Kim, the Hyatt's breathtakingly beautiful cocktail waitress, danced in my head.

Unfortunately my dream evening went out the window when I arrived at the lobby bar and saw a beaming Ron Summers, George the Bartender's workers' compensation attorney.

A beaming Ron can only mean one thing: bad news for the defense.

I knew if I did not ask the source of Ron's happiness I would be told anyway. Therefore, after downing my first Beefeater's martini and taking one last longing look at Kim, I joined Ron at the bar to ask about his apparent latest triumph.

Ron confided in me that today a case went to trial which he always regarded as a 14 carat loser! His client, after being fired for cause from his employer, had filed for a specific injury claiming a back injury shortly before his dismissal.

Although Ron's client swore up and down that the injury actually did happen Ron knew that pursuant to Labor Code §3600 the employer had an ironclad defense of a post termination claim unless Ron's client had given notice of the injury to his employer before the termination or had sought medical treatment.

Ron told me in confidence that although the applicant had not obtained treatment before his dismissal his client insisted that he had given prompt notice to his supervisor. Ron went on to tell me that the defense attorney told him that the applicant's supervisor denied receiving notice of the injury from the applicant, creating an issue of fact

Ron then said that despite his client's "version" of events Ron was uncomfortable with his client's credibility. Ron had known that the applicant's supervisor had a good chance of being deemed more credible by the Workers' Compensation Judge (WCJ) thereby ensuring a "take nothing" award.

I was still trying to figure out the source of Ron's elation as he smiled and proudly proclaimed that his devastating cross examination had saved the day for his client. On cross examination it came out that the applicant's supervisor had given a recorded statement to the insurance company's investigators shortly after the claim form was filed and the recorded statement had never been turned over to Ron.

Ron then produced his "representation letter" which was sent to the defendant and contained the stock phrase demanding that all investigation reports, statements of witness, etc. be disclosed and turned over to the applicant's attorney.

After setting the foundation Ron made his motion that the direct testimony of the applicant's supervisor be excluded from evidence.

Before ruling on Ron's motion the WCJ wanted to hear arguments from the defense attorney in Ron's case.

Defense counsel argued that the recorded statement of the applicant's supervisor was protected by the well known doctrine of "work product privilege."

In granting Ron's motion and excluding the applicant's supervisor's testimony from evidence the WCJ relied on the recent Court of Appeal decision in *Debra Coito v The Superior Court of Stanislaus County*, 182 Cal App 4th 758, 75 Cal Comp Cases 240. In *Coito* the Court of Appeal went over the history of the so-called **"**work product privilege" and held that recorded or written statements of witnesses obtained by investigators and turned over to the handling attorneys are not covered under "work product privilege" and are discoverable.

The Court made a distinction between matters that are privileged under the "work product" exception and actual written and/or recorded statements of witnesses.

The Court pointed out that actual witness statements could be used as "evidence" at trial to impeach a witness for making prior inconsistent statements and, therefore, should be discoverable.

The "work product privilege" only covers the work product of the attorney as to the attorney's notes, impressions and ideas.

In other words, if the attorney interviews a witness and makes notes as to his opinion and/or perception of what the witness tells him then those notes are protected by what is refered to as the absolute "work product privilege."

However, if the attorney or his investigator obtains an actual recorded statement or written statement from the witness then those statements are discoverable and are not protected.

Ron indicated that since the judge threw out the testimony of the applicant's supervisor there was no rebuttal to the applicant's sworn testimony as to giving notice to the supervisor and, therefore, Ron was confident that he would prevail.

Many in our business misunderstand the concept of "privilege," especially when applicant attorneys make a form demand for the production of witness statements.

We invariably try to resist said discovery by claiming either "attorney client privilege" or "work product privilege."

However, neither privilege attaches. "Attorney client privilege" is limited to communications, written or oral, between the client and attorney. "Work product privilege" is limited to just that, i.e., the work product of the attorney, i.e, the attorney's impressions, notes, strategies, etc.

Without even looking at most files I know that the assigned investigators, with recorder in hand, interviewed and recorded the statements of all relevant witnesses.

In my opinion this is an absolute major blunder. Since these witness statements are discoverable by the applicant's attorney it is the same thing as just inviting the applicant's attorney to accompany the investigator.

The best practice is as follows:

1. Our assigned investigator, in conjunction with the claims administrator, should first determine whether or not it is necessary to take an actual written and/or recorded statement from a witness.

   For example, it did not make sense for the investigator, in my hypothetical case, to take a recorded or written statement of the applicant's supervisor.

3. In some cases there is a reason for taking a statement from a witness so as to preserve the testimony of the witness or to make sure that the witness does not change his or her mind.

   However, in the case of Ron's supervisor it would have made more sense for the testimony of the supervisor to be protected by the "work product privilege" in which the investigator simply interviews and makes notes of the interview which are then transmitted to the defense attorney.

5. Conditional work product privilege: A conditional work product privilege would be a situation in which an attorney (not the claims administrator) assigns the investigator to interview (not take a statement) from the witness and the investigator would then report back to the attorney as to his impressions as to the testimony of the witness. In this case there would be no statements to be turned over and the only information that might be

discoverable would be the notes of the investigator as to the witness interview. These could be subpoenaed but under the conditional work product privilege there would have to be an in camera review by the WCJ to make a determination as to whether or not the parties seeking the notes would be substantially prejudiced by not obtaining the investigator's notes.

6. Absolute work product privilege: In many cases I like to identify the witnesses myself with the help of the claims administrator and then interview (again, not take a statement) the witnesses either by phone conference or in person. My notes as to my conversation with the witness are protected by absolute work product privilege and may not be discovered.

DISCLAIMER:

With the exception of George, Kim and I all characters of the lobby bar are, of course, fictional and are products of my warped imagination. Sadly, the storyline is all too true. On May 25, 2010 the Appeals Board issued a panel decision in *Cynthia Armando*[1] in which it addressed this very issue and set forth an excellent discussion of the history of the so called Work Product Privilege in California.

We have recently had more and more cases in which credible defense witnesses are not allowed to testify because a defendant erroneously believed that witness statements are protected by either the work product or attorney client privileges.

In one case in which the investigators for a major carrier obtained multiple statements I even offered to personally go out to the investigation company and burn all of their recording devices.

Every time this happens we get another patron drinking heavily at the lobby bar.

Make mine a double, George.

-Joe Truce

[1] Anyone wishing a copy of the *Cynthia Armando* case, please request via e-mail.