SUPREME COURT OF THE STATE OF CALIFORNIA

DEBRA COITO, Petitioner, vs. THE SUPERIOR COURT OF STANISLAUS COUNTY, Respondent	Case No. S181712 Fifth Appellate District Case No. F057690 Stanislaus County Superior Court No. 624500 Honorable William A. Mayhew
STATE OF CALIFORNIA Real Party in Interest	

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES, ET AL. IN SUPPORT OF REAL PARTY IN INTEREST STATE OF CALIFORNIA

DENNIS J. HERRERA, State Bar #139669
City Attorney
DANNY CHOU, State Bar # 180240
Chief of Complex and Special Litigation
Fox Plaza
1390 Market Street, 7th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3807
Facsimile: (415) 554-3985
E-Mail: danny.chou@sfgov.org

Attorneys for *Amici Curiae*
LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to rule 8.500(f) of the California Rules of Court, Amici Curiae California State Association of Counties (CSAC) and the League of California Cities (League) (collectively, Amici) respectfully request permission to file the brief submitted herewith as amici curiae in support of Real Party In Interest State of California.

INTEREST OF AMICI CURIAE

CSAC is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

Altogether, Amici represent over 500 public entities. These entities receive tens of thousands of claims for money or damages each year. To investigate and settle those claims, these entities routinely conduct and record interviews of potential witnesses. They do so because those

recorded interviews are currently and absolutely protected as attorney work product under *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214. Stripping recorded witness interviews of their work product protection would therefore have a dramatic impact on the ability of public entities to defend and settle claims. Thus, Amici have a strong interest in the issues raised in this case.

Amici have reviewed the briefs in this case to date and do not seek to simply duplicate arguments set forth in those briefs. Rather, they seek to assist the Court by further explaining: (1) how the historical conditions that prompted the enactment of the work product statutes, the relevant case law existing at the time of the enactment, and the legislative history confirm that recorded witness interviews are protected attorney work product; (2) how the stated purposes behind the work product statutes establish that recorded witness interviews are privileged; and (3) why a contrary conclusion would dramatically impair the ability of public entities to defend and settle the tens of thousands of claims filed against them each year.

Amici respectfully submit that there is need for additional briefing on these matters and that, based on their experience, they may assist this Court in making a sound decision. Accordingly, Amici respectfully request leave to file the brief submitted herewith.

December 10, 2010

DENNIS J. HERRERA
City Attorney
DANNY CHOU
Chief of Complex and Special Litigation

By: _____
DANNY CHOU
Attorneys for *Amici Curiae*
LEAGUE OF CALIFORNIA CITIES
AND CALIFORNIA STATE
ASSOCIATION OF COUNTIES

AMICUS BRIEF

INTRODUCTION

Each year, public entities in California receive tens of thousands of claims for money or damages. To investigate and settle those claims, attorneys for public entities routinely conduct and record interviews of potential witnesses. Public entities need those recorded witness interviews to prepare their defenses to the claims and to decide whether, when, and how to settle the claims. If, however, those recorded witness interviews are subject to unrestricted discovery, then public entities will likely conduct and record fewer interviews out of fear that those interviews will be used against them during litigation.

Fortunately, the Legislature recognized this conundrum over 40 years ago when it enacted the work product privilege now located in Code of Civil Procedure section 2018.030.[1] As real party in interest the State of California (State) explained, in enacting the work product statute, the Legislature intended to protect recorded witness interviews from discovery. Amici Curiae California State Association of Counties (CSAC) and League of California Cities (League) (collectively, Amici) agree with the State's arguments and do not repeat them here. Instead, Amici expand upon those arguments by explaining how certain extrinsic sources confirm that the Legislature intended to protect recorded witness interviews conducted by an attorney or an attorney's representative as attorney work product.

Specifically, the historical conditions that prompted the enactment of the privilege, the relevant case law existing at the time of the enactment, and the legislative history reveal that the Legislature enacted the privilege,

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

in part, to protect recorded witness interviews. The stated purposes behind the work product privilege reinforce this conclusion. And those purposes further reveal that the admissibility of witness statements as evidence and an interview's lack of confidentiality have no bearing on whether recorded witness interviews are protected work product. Indeed, recorded witness interviews should be absolutely privileged because they necessarily reveal an attorney's "impressions, conclusions, opinions, or legal research or theories." (§ 2018.030, subd. (a).)

A contrary conclusion would significantly impair the ability of public entities to investigate and resolve the tens of thousands of claims filed against them each year. Rather than permit such an anomalous result, this Court should hold that recorded witness interviews conducted by an attorney or an attorney's representative are attorney work product and absolutely privileged under section 2018.030, subd. (a).

DISCUSSION

I.

THE RELEVANT INDICIA OF LEGISLATIVE INTENT ESTABLISH THAT RECORDED WITNESS INTERVIEWS CONDUCTED BY AN ATTORNEY OR AN ATTORNEY'S REPRESENTATIVE ARE PROTECTED BY THE STATUTORY WORK PRODUCT PRIVILEGE.

"The Legislature has protected attorney work product under California Code of Civil Procedure section 2018.030." (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 814 (*Rico*).) Section 2018.030 states:

> (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
>
> (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines the denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

This statute "creates for the attorney a qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney's impressions, conclusions, opinions or legal theories." (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1250 (*BP Alaska*).)

"The statute, however, does not define 'work product.' Thus, the determination of what work product is must be resolved by individual court determinations on a case-by-case basis." (*City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 71 (*City of Long Beach*).) Where, as here, the statutory language is ambiguous, courts must look to "extrinsic sources" to determine whether matters are protected by the work product privilege. (*Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 129 (*Dowden*) [considering extrinsic sources in construing work product statutes].)

Amici agree with the State's analysis of these extrinsic sources and its conclusion that "[t]he recording of the question and answer sessions [conducted by attorneys or their agents] with witnesses" is attorney work product. (State of California's Reply Brief on the Merits (Reply) 1.) Amici do not repeat that analysis here. Instead, Amici further explain how the historical context, including relevant court decisions and legislative history, and the public policies behind the enactment of the work product privilege confirm that recorded witness interviews are protected as work product.

A. The History Behind The Work Product Privilege And The Case Law Existing At The Time Of Its Enactment Reveal That The Legislature Intended To Protect Recorded Witness Interviews As Attorney Work Product.

"It is a fundamental rule that a statute should be construed in light of the history of the times and the conditions which prompted its enactment,

and in the light of relevant court decisions existing at the time of its enactment." (*People v. Fair* (1967) 254 Cal.App.2d 890, 893; see also *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 487 [statutes "are normally construed in light of existing statutory definitions or judicial interpretations in effect at the time of the [statute's] adoption"]; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 170 [statute "must be construed in light of its historical background and evident objective"].) Indeed, "[a]n important consideration in determining the intention of the Legislature in enacting [a statute] is the state of the law as it existed prior to the enactment – a consideration of the criticisms, if any, of alleged deficiency or inequity of existing law." (*In re Estate of Simoni* (1963) 220 Cal.App.2d 339, 341.) Consistent with these principles, courts often look to the "legislative history" in construing a statute. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1153.) Here, the historical conditions that prompted the enactment of the work product privilege, the relevant case law existing at the time of that enactment, and the legislative history establish that recorded witness interviews are protected work product.

"The United States Supreme Court first recognized a privilege for work product in *Hickman v. Taylor* (1947) 329 U.S. 495" (*Hickman*). (*Dowden*, 73 Cal.App.4th at p. 130; see also McCoy, *California Civil Discovery: Work Product of Attorneys* (1966) 18 Stan. L.Rev. 783, 784 ["The phrase 'work product' first saw the light of day . . . in *Hickman*"].) *Hickman* established that the "work" of an attorney should not be disclosed absent "adequate reasons." (*Hickman*, at pp. 510-512.) According to the court, "[t]his work is reflected . . . in *interviews, statements*, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless

other tangible and intangible ways – aptly though roughly termed . . . as 'work product of the lawyer.' " (*Id.* at p. 511, italics added.) Thus, "witnesses' statements . . . compiled by an attorney in the course of preparation for trial, are qualifiedly protected from pretrial discovery absent a special showing of necessity or justification." (Comment, *California Discovery Since Greyhound: Good Cause for Reflection* (1963) 10 UCLA L.Rev. 593, 605.) "Were such materials open to opposing counsel on mere demand . . . [i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." (*Hickman*, at p. 511.)

Following *Hickman*, the State Bar's "Committee on Administration of Justice proposed an amendment to section 1881 . . . to provide that 'an attorney's working papers, including, but without limitation, *witness statements*, . . . made for the attorney in preparation of or in connection with a trial, [cannot] be examined without the consent of the client.' " (McCoy, *supra*, 18 Stan. L.Rev. at pp. 787-788, quoting State Bar Com. on Admin. of Justice, *Report* (1952) 27 State Bar J. 175, 191, italics added.) Two years later, however, the Committee concluded that "*Holm v. Superior Court* [(1954) 42 Cal.2d 500 (*Holm*)] 'removes many of the problems on "working papers" of the attorney; and that legislation is not necessary at this time.' " (McCoy, at p. 788, quoting State Bar Com. on Admin. of Justice, *Report* (1954) 29 State Bar J. 224, 240.)

In *Holm*, this Court held that that photographs and an accident report "forwarded in confidence to the defendants' attorneys for use in possible litigation" were protected by the attorney-client privilege. (42 Cal.2d at pp.

508-509.) As a result, "*statements of independent witnesses*, . . . which *Hickman v. Taylor* had held were not within the attorney-client privilege, had been held in California to be within such privilege if the dominant purpose of obtaining them was to assist an attorney in preparation for trial." (Pruitt, *Lawyers Work Product* (1962) 37 State Bar J. 228, 233-234, italics added; see also *Heffron v. Los Angeles Transit Lines* (1959) 170 Cal.App.2d 709, 717-718 [holding that statement of defendant's employee obtained in anticipation of litigation was privileged].) "The practical effect of *Holm* was to protect certain materials [– i.e., witness statements –] now considered work product as if it were an attorney-client communication." (*Dowden, supra*, 73 Cal.App.4th at p. 130.)

In 1957, the Legislature overhauled discovery by adopting the California Discovery Act. During the passage of the Act, "the question of privilege and the protection of work product was the subject of extended discussion . . . ." (Masterson, *Discovery of Attorney's Work Product Under Section 2031 of the California Code of Civil Procedure* (1963) 10 UCLA L.Rev. 575, 580.) "Concerned that *Hickman*'s lower level of protection for work product would influence California law, the California State Bar proposed and the Legislature adopted an amendment to the Discovery Acts." (*Dowden, supra*, 73 Cal.App.4th at p. 131.) As Samuel J. Pruitt, the chairman of the State Bar's Committee on Administration of Justice, explained, the Legislature adopted this amendment[2]

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[2] The amendment provided that:

> All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference

> (i) to evidence its hearty approval of the broad scope of the attorney-client privilege as set forth in *Holm* . . .; (ii) to provide a positive mandate for the California courts not to permit the discovery of photographs, witnesses' statements, and the like on the authority of dictum in *Hickman v. Taylor* and the numerous opinions of the lower federal courts permitting discovery of such materials in proper cases and upon a showing of adequate reasons justifying discovery; and (iii) to provide that lawyers' work product . . . should be given at least as much protection against discovery as was afforded it in the opinion in *Hickman v. Taylor*." (Pruitt, *supra*, 37 State Bar J. at pp. 235-236; see also Masterson, *supra*, 10 UCLA L.Rev. at p. 581 ["there can be little question but that the intent of the raftsmen was to preserve *Holm v. Superior Court* and other cases setting forth the broad scope of the attorney-client privilege in California as including matters normally protected in the federal courts under the quasi-privilege of work product"].)

Despite this legislative intent, the amendment "did not expressly do so; nor did the new statute use the term 'work product.' " (*Dowden*, *supra*, 73 Cal.App.4th at p. 131.) As a result and to the dismay of the State Bar, this Court "redefined its ruling in *Holm*" in light of the amendment. (*Dowden*, at p. 131.) It first held that written and signed statements of independent witnesses gathered and transmitted to an attorney were not protected by the attorney-client privilege. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 398-399 (*Greyhound*).) It then declined to protect those statements as attorney work product because "the work product privilege does not exist in this state." (*Id.* at p. 401.)

One year later, this Court further eroded *Holm* and its protections for attorney work product in *Suezaki v. Superior Court* (1962) 58 Cal.2d 166 (*Suezaki*). Implicitly acknowledging that "films taken solely as part of [the attorney's] trial preparation" were work product, the Court nonetheless held

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> any judicial decisions on privilege of any other jurisdiction. (Former § 2016, subd. (b) [Stats.1957, ch. 1904, § 3].)

that the films were "not privileged." (*Id.* at pp. 177.) Instead, the films's status as work product was merely "a factor that the trial court should consider in its discretion . . . in determining whether to deny or grant discovery in whole or in part." (*Id.* at p. 178.)

After *Greyhound* and *Suezaki*, "work product [in California] was not protected under *Hickman*, and its protection was only available where the material sought to be produced fit under the attorney-client privilege umbrella." (*Dowden, supra*, 73 Cal.App.4th at p. 132.) To correct this, "the California State Bar sponsored an amendment to the Discovery Act to create a separate privilege for materials prepared in anticipation of litigation." (*Id.*) The Legislature "adopted the State Bar's amendment almost verbatim."[3] (*Id.* at p. 133.) And the language of that amendment has not substantively changed since 1963:

> The work product of an attorney shall not be discoverable unless the court determines the denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions or legal research or theories shall not be discoverable under any circumstances. (Former § 2016, subd. (b) [Stats.1963, ch. 1744, § 1].)

The State Bar explained that the amendment was, among other things, "needed . . . to fulfill the general intent of the Legislature at the time of enactment [of the California Discovery Act] in 1957" as described by Pruitt in his 1962 article in the State Bar Journal. (Committee Report – Administration of Justice (1962) 37 State Bar J. 585, 586 & fn. 1 (Committee Report).) In fulfilling this intent, the amendment afforded

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[3] "Since the Legislature enacted the State Bar's proposal almost verbatim, the State Bar's report may be used as an interpretative aid." (*Dowden, supra*, 73 Cal.App.4th at p. 133.)

"substantially more protection to 'work product' than now exists under the California rule as explained in the *Greyhound* case." (*Id.* at p. 588.) Specifically, the amendment: (1) restored the broad protections given to witness statements by *Holm* and its progeny (Pruitt, *supra*, 37 State Bar J. at p. 235); (2) prohibited the discovery of *any* "witness statements" (*id.* at pp. 235-236); and (3) provided "lawyers' work product" with "at least as much protection against discovery" as provided in *Hickman* (*id.* at p. 236).

This history behind the enactment of the work product privilege makes clear that recorded witnesses interviews conducted by an attorney or an attorney's representative are privileged. *Greyhound* prompted the enactment of the work product statute because it refused to recognize the work product doctrine and to protect recorded witness statements from discovery despite *Hickman* and *Holm*. (See Committee Report, *supra*, 37 State Bar J. at pp. 587-588.) By enacting the work product statutes, the Legislature intended to restore the absolute protection for witness statements provided by *Holm* (Pruitt, *supra*, 37 State Bar J. at pp. 235-236), and give "attorneys broader protection than the federal courts had given to attorneys under" *Hickman* (*BP Alaska*, *supra*, 199 Cal.App.3d at p. 1254). Thus, the Legislature intended to include recorded witness statements within the definition of attorney work product as held in *Hickman*, *supra*, 329 U.S. at page 511, and as implied in *Holm*, *supra*, 42 Cal.2d at pages 508-509. (See *City of Long Beach*, *supra*, 64 Cal.App.3d at p. 71 [finding *Hickman* "helpful" in determining "what work product is"].) This intent comported with the understanding of California courts at that time – which had "accepted the broad concept of 'the work product of an attorney' as first stated by the court of appeals and thereafter by the Supreme Court in *Hickman v. Taylor*." (McCoy, *supra*, 18 Stan. L.Rev. at p. 797.)

Indeed, to fulfill the true intent behind the Discovery Act (see Committee Report, *supra*, 38 State Bar J. at p. 586), the work product statute must protect "witnesses' statements" (Pruitt, *supra*, 37 State Bar J. at p. 235). This is because work product necessarily " 'includes the results of [the attorney's] own work, and the work of those employed by him or for him by his clients, in investigating both the favorable and unfavorable aspects of the case, the information thus assembled, and the legal theories and plan of strategy developed by the attorney – all as reflected in *interviews*, *statements*, memoranda, correspondence, briefs, and any other writings reflecting the attorney's "impressions, conclusions, opinions, or legal research or theories," and in countless other tangible and intangible ways.' " (*BP Alaska*, *supra*, 199 Cal.App.3d at p. 1253, fn. 4, quoting McCoy, *supra*, 18 Stan. L.Rev. at p. 797, italics added.) This Court should adopt this understanding and hold that recorded witness interviews conducted by an attorney or an attorney's representative are attorney work product protected under section 2018.030.

B. The Purposes Underlying The Work Product Privilege Confirm That Recorded Witness Interviews Are Protected Attorney Work Product.

The statutory work product privilege serves two purposes. First, the privilege seeks to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." (§ 2018.020, subd. (a).) Second, the privilege seeks to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (§ 2018.020, subd. (b).) To accomplish these purposes, the work product privilege must protect all materials

"developed as a result of the initiative of counsel in preparing for trial."[4] (*Mack v. Superior Court* (1968) 259 Cal.App.2d 7, 10.) Such materials are "derivative in character" (*id.*), because they are the fruits of the attorney's trial preparation (see *BP Alaska*, *supra*, 199 Cal.App.3d at p. 1256 [work product privilege safeguards "the fruits of an attorney's trial preparation," internal quotations omitted]).

Recorded witness interviews are not only developed as a result of an attorney's initiative in preparing for trial, they also reflect the attorney's impressions and theories of the case. Protecting recorded witness interviews conducted by an attorney or an attorney's representative from discovery therefore serves both purposes of the work product statute. Stripping those recordings of work product protection because the interviews may contain admissible evidence or because the interviews themselves were not confidential does not. This Court should therefore find that recorded witness interviews are protected attorney work product. (See *Big Creek Lumber*, *supra*, 38 Cal.4th 1139, 1153 [in construing statute, courts look to "the ostensible objects to be achieved," "the evils to be remedied" and "public policy"].)

1. Applying The Work Product Privilege To Recorded Witness Interviews Serves Both Purposes Behind The Privilege.

"In determining whether particular matter is privileged as work product, the reviewing court should be guided by the underlying policies of" section 2018.020. (*Dowden*, *supra*, 73 Cal.App.4th at p. 135.) Those

[4] Materials, however, "cannot be brought within the work product privilege simply by transmitting it to the attorney." (*Mack*, *supra*, 259 Cal.App.2d at p. 10.)

policies confirm that recorded witness interviews should be deemed attorney work product and protected from disclosure.

First, allowing unfettered disclosure of witness interviews discourages attorneys from investigating "not only the favorable but the unfavorable aspects of" their cases. (§ 2018.020, subd. (a).) The list of witnesses chosen to be interviewed is strategic and reflects the attorney's evaluation of the importance of each potential witness. Likewise, the content and order of questions posed to each witness reflects the attorney's "impressions, conclusions, opinions, or legal research or theories." (§ 2018.030, subd. (a).) Thus, recorded witness interviews will likely reveal which witnesses and which legal or factual issues the attorney believes are helpful or harmful to his case. Allowing their disclosure to an adversary will therefore discourage thorough investigations by attorneys.

Indeed, disclosure of those interviews would have a far greater chilling effect on an attorney's "willingness" to investigate than disclosure of a "complete list of trial witnesses" – which is already protected work product. (*City of Long Beach, supra*, 64 Cal.App.3d at p. 73.) "A list of the potential witnesses interviewed by . . . counsel which interviews counsel recorded in notes or otherwise . . . would tend to reveal counsel's evaluation of the case by identifying the persons who claimed knowledge of the incident from whom counsel deemed it important to obtain statements." (*Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217.) Thus, a list of witnesses interviewed by an attorney, like a list of trial witnesses, could reveal where "his case was weakest." (*Id.*) And this risk is even greater for witness interviews than for a list of trial witnesses because the content and order of questions asked

during an interview reveals far more about that the attorney's strategy and thinking than a list of trial witnesses.

Second, allowing unfettered disclosure of witness interviews permits attorneys to take "undue advantage of their adversary's industry and efforts." (§ 2018.020, subd. (b).) If recorded witness interviews are not privileged, then attorneys who wait for their diligent adversaries to identify and interview important witnesses can discover the information painstakingly gathered from those interviews with minimal effort. Allowing "the stupid or lazy practitioner" to "take undue advantage of his adversary's efforts" in this manner contravenes the stated purpose behind the work product privilege. (Pruitt, *supra*, 37 State Bar J. at p. 240, internal quotations omitted; see also § 2018.020, subd. (b).)

Accordingly, this Court should follow the stated purposes behind the work product statutes and hold that recorded witnesses interviews are protected attorney work product.

2. In light of the purposes of the work product statute, neither the admissibility or confidentiality of witnesses interviews have any bearing on whether the recordings are privileged.

Plaintiff Debra Coito contends recorded witness interviews are not attorney work product because: (1) the witness's statements may otherwise be admissible evidence (Answering Brief on the Merits 7-9); and (2) there was "no reasonable expectation, by either the attorney or the witness," that the interview was "confidential" (*Id.* 3). These contentions, however, make no sense in light of the purpose of privileges in general or the particular purposes behind the work product privilege.

First, as a matter of commonsense, the admissibility of statements found in materials should have no bearing on whether the materials are privileged. Privileges, by definition, prohibit disclosure of materials that may otherwise contain admissible evidence in order to serve public purposes that the Legislature has deemed more important. In creating a work product privilege, the Legislature decided that the policies of encouraging thorough investigations and preventing attorneys from unfairly profiting from their adversary's industry trump the policy favoring discovery. (See §§ 2018.020 & 2018.030.) As explained above, affording recorded witness interviews work product protection serves both policies behind the work product privilege. (See *ante*, at pp. 11-13.) Thus, the fact that materials may contain statements that may otherwise be admissible has no bearing on whether those materials are privileged. Indeed, by Coito's logic, client statements to an attorney would not be privileged because those statements are otherwise admissible as party admissions.

Second, an interview's lack of confidentiality does not strip a recording of that interview of its work product status. "[T]he work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent." (*BP Alaska, supra*, 199 Cal.App.3d at p. 1256, quoting *U.S. v. American Tel. & Tel. Co.* (D.C.Cir. 1980) 642 F.2d 1285, 1299, internal quotations and italics omitted.) Its purpose "is to protect information against opposing parties, rather than against all others outside a particular confidential relationship." (*Id.*, internal quotations omitted.) Thus, "voluntary disclosure to a third party . . . should not suffice in itself for waiver of the work product privilege." (*Id.*, internal quotations and italics omitted.) "To

the contrary, because disclosure to third parties will often strengthen a client's case, it supports the policy of protecting the vitality of the adversary system by allowing an attorney to prepare thoroughly without fear of discovery by an adversary." (Anderson, et al., *The Work Product Doctrine* (1983) 68 Cornell L.Rev. 760, 883.)

Cases holding that the work product privilege may be waived do not suggest otherwise. Those cases recognize that "work product protection 'is not waived except by a disclosure *wholly inconsistent with the purpose of the privilege*, which is to safeguard the attorney's work product and trial preparation.' " (*OXY Resources California, LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 891 (*OXY Resources*), quoting *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 689, italics added.) As explained above, protecting recorded witness interviews serves the purposes behind the privilege. (See *ante*, at pp. 11-13.)

In any event, there has been *no* disclosure to any third party of the physical recordings of the witness interviews – the *actual* fruit of the attorney's trial preparation that Coito seeks here. Thus, the State has not waived any work product protection for those recordings. (See *OXY Resources, supra*, 115 Cal.App.4th at p. 89.)

Accordingly, recordings of witness interviews that have never been disclosed to a third party remain protected attorney work product.

II.

RECORDED WITNESS INTERVIEWS ARE ABSOLUTELY PRIVILEGED BECAUSE THEY REVEAL THE WITNESSES CHOSEN TO BE INTERVIEWED AND BECAUSE THE CONTENTS OF THOSE INTERVIEWS ARE INEXTRICABLY INTERTWINED WITH THE ATTORNEY'S IMPRESSIONS.

Section 2018.030 identifies two categories of attorney work product and affords different protections to each category. "A writing that reflects

an attorney's impressions, conclusions, opinions, or legal research or theories is *not discoverable under any circumstances.*" (§ 2018.030, subd. (a), italics added.) All other work product is not discoverable "unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will results in an injustice." (§ 2018.030, subd. (b).) Recorded witness interviews fall within the first category and are absolutely privileged for two reasons.

First, recordings of witness interviews necessarily reveal the list of potential witnesses *chosen* to be interviewed by the attorney. This list is absolutely privileged because it reflects the attorney's "evaluation of the case by revealing which witnesses or persons who claimed knowledge of the incident" the attorney "deemed important enough to interview." (*Nacht & Lewis, supra,* 47 Cal.App.4th at p. 217.) This is clear from this case where the State's counsel "made the decision to interview a small subset of witnesses disclosed during discovery." (Reply 2.) The selection of those particular witnesses was a strategic decision that reflected counsel's evaluation of the case. Because the recordings cannot be disclosed without revealing the list of witnesses chosen to be interviewed by the attorney, those recordings must be absolutely privileged. (See *Rico, supra,* 42 Cal.4th at p. 814.)

Second, even if the recordings are not absolutely privileged for that reason, they may still be absolutely privileged if the witness statements contained in the recordings are inextricably intertwined with the questions asked by the attorney. A witness's statements, by themselves, do not reflect an attorney's "impressions, conclusions, opinions or legal research or theories." (§ 2018.030, subd. (a).) But "[w]hen a witness's statements and the attorney's impressions are inextricably intertwined, the work product

doctrine provides that absolute protection is afforded to all of the attorney's notes." (*Rico, supra*, 42 Cal.4th at p. 814.)

The questions asked by an attorney may reflect an attorney's evaluation of the case by revealing which legal and factual issues the attorney deemed important enough to ask about. To the extent that the questions do so, their content and order are absolutely privileged and not discoverable. (See § 2018.030, subd. (a).) As a practical matter, those questions cannot be separated from the witness's answers. Even with the questions redacted, the contents and order of the witness's answers will likely reveal the gist – if not the actual content – and order of the questions asked; thereby, revealing the attorney's impressions and theories of the case. In that situation, this Court should also find that recordings of witness interviews conducted by an attorney or an attorney's representative are absolutely privileged.[5] (See *Rico, supra*, 42 Cal.4th at p. 814.)

Indeed, the legislative history compels such a finding. The Legislature enacted the work product statutes to fulfill its original intent in adopting the Discovery Act. (Committee Report, *supra*, 37 State Bar J. at p. 586 & fn. 1.) That included an intent "to provide a positive mandate for the California courts *not to permit discovery of . . . witnesses' statements . . .* on the authority of" *Hickman* and other federal decisions "permitting discovery of such materials in proper cases and upon a showing of adequate reasons justifying discovery." (Pruitt, *supra*, 37 State Bar J. at pp. 125-236.) This confirms that the Legislature intended to make recorded witness

[5] An "in camera inspection is the proper procedure to evaluate the applicability of the work product doctrine to specific documents, and categorize whether each document should be given qualified or absolute protection." (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 121.)

interviews conducted by an attorney or an attorney's representative absolutely privileged. This Court should follow that intent here.

III.

COMPELLED DISCLOSURE OF RECORDED WITNESS INTERVIEWS WILL SIGNIFICANTLY IMPAIR THE ABILITY OF PUBLIC ENTITIES TO INVESTIGATE AND RESOLVE CLAIMS FILED AGAINST THEM.

As the State explained, depriving recorded witness interviews of work product protection "could impede or frustrate the civil investigations of the Attorney General." (Reply 5.) The same is true for cities and counties, which often pursue litigation to protect "consumer[s], investor[s] and worker[s]" – i.e., actions to enforce building, health, and safety codes. (*Id.* 6.) Compelled disclosure of recorded witness interviews would also hamper the ability of cities and counties to pursue such litigation.

But stripping recorded witness interviews of work product protection would affect public entities on an even more fundamental level by hindering their ability to investigate claims filed against them. Public entities have tens of thousands of claims for money or damages filed against them every year. For example, the City and County of San Francisco alone has received an average of 3,700 claims for money or damages per year over the last decade. To investigate those claims, attorneys for public entities or their representatives routinely conduct and record interviews with potential witnesses. In so doing, they rely on the protections afforded by the work product privilege to insure that these recorded interviews are not disclosed to their adversaries. Absent those protections, public entities will conduct and record fewer interviews out of fear that their adversaries may use those interviews against them. As a

result, the ability of public entities to defend against claims or to resolve claims expeditiously will be impaired.

Such a result not only contravenes the purposes behind the work product privilege, it also contravenes the purpose behind the Government Claims Act. Under the Act, " 'no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with . . . [Government Code section 910] . . . until a written claim has been presented to the public entity and has been acted upon by the [public entity's] board, or has been deemed to have been rejected by the board. . . .' " (*Stockett v. Association. of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 445.) The purpose of this claim requirement is "to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." (*Id.* at p. 446, internal quotations omitted.) Because stripping recorded witness interviews of work product protection flouts this purpose, this Court should reverse.

CONCLUSION

When the Legislature enacted the work product statutes, it viewed recorded witness interviews as protected attorney work product. This is clear from both the history of the statutes and their stated purposes. Indeed, the contents of a recorded witness interview cannot be disclosed without revealing an attorney's impressions, conclusions, opinions, or legal research or theories. Relying on this legislative intent, public entities routinely conduct and record witness interviews in order to defend against claims and to settle claims whenever possible and advisable. This Court should not disrupt this practice by stripping recorded witness interviews of their work

product protection. Instead, it should adhere to the Legislature's intent and find that those recordings are absolutely privileged.

December 10, 2010

DENNIS J. HERRERA
City Attorney
DANNY CHOU
Chief of Complex and Special Litigation

By: _____
DANNY CHOU
Attorneys for *Amici Curiae*
LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 5,691 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 10, 2010.

DENNIS J. HERRERA
City Attorney
DANNY CHOU
Chief of Complex and Special Litigation

By: 
DANNY CHOU
Attorneys for *Amici Curiae*
LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

PROOF OF SERVICE

I, MARTINA HASSETT, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On December 10, 2010, I served the following document(s):

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES, ET AL. IN SUPPORT OF REAL PARTY IN INTEREST STATE OF CALIFORNIA

on the following persons at the locations specified:

Joseph W. Carcione, Jr., Esq.
Gary W. Dolinski, Esq.
Neal A. Markowitz, Esq.
LAW OFFICES OF CARCIONE, CATTERMOLE,
DOLINSKI, ET AL.
601 Brewster Ave., 2nd Flr
P. O. Box 3389
Redwood City, CA 94064

Attorneys for Debra Coito, Petitioner

Clerk to the
Honorable William A. Mayhew
STANISLAUS COUNTY SUPERIOR COURT
801 10th Street, Sixth Floor
Dept. 21
Modesto, CA 95354

Edmund G. Brown Jr.
Attorney General of California
David S. Chaney
Chief Assistant Attorney General
Peter A. Meshot
Deputy Attorney General
Gordon Burns
Deputy Solicitor General
James M. Schiavenza
Senior Assistant Attorney General
Steven M. Gevercer
Supervising Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-7487
Facsimile: (916) 322-8288
Email: Steven.Gevercer @doj.ca.gov

Attorneys for Real Party in Interest

Clerk to the
Honorable Bert Levy
Acting Presiding Justice
Honorable Betty I. Dawson, Justice
Honorable Stephen Kane, Justice
COURT OF APPEAL, FIFTH APPELLATE DISTRICT
2424 Ventura Street
Fresno, CA 93721

Dale H. Thayer, Esq.
Paul R. Scheele, Esq.
CURTIS & ARATA
1300 K Street, 2nd Floor
Modesto, CA 95354

Attorneys for City of Ceres

Richard S. Linkert, Esq.
MATHENY SEARS LINKERT & JAIME
3638 American Rivert Drive
P.O. Box 13711
Sacramento, CA 95853-4711

Attorneys for City of Modesto

Don H. Hguyen
DALEY & HEFT, LLP
462 Stevens Avenue, Suite 201
Solana Beach, CA 92075

Attorneys for Tuolomne River Reg. Park Joint Powers Authority

Lawrence T. Niermeyer, Esq.
1301 K Street, Suite H
Modesto, CA 95354

Co-Counsel for Plaintiff

Daniel Farrar, Esq.
P.O. Box 3382
Turlock, CA 95381

Attorneys for County of Stanislaus

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed December 10, 2010, at San Francisco, California.

Martina Hassett

Martina Hassett