

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: JOE TRUCE

DATE: September 10, 2004

RE: EXCLUSION OF WITNESSES AT TRIAL FOR FAILURE TO
SERVE WITNESS STATEMENTS

In the case of City of Livingston v. WCAB (Madrid), Court of Appeal, Fifth Appellate District, June 1, 2004,¹ the Court of Appeal has denied review of a WCAB decision excluding defendant's witnesses for a failure to timely serve witness statements.

This case involved a psychiatric claim brought by a police dispatcher for the City of Livingston based on allegations of sexual harassment.

Both before and at the August 5, 2002 Mandatory Settlement Conference, the applicant's attorney requested copies of all statements, films and videos.

Defendant failed to provide any of the items requested.

The primary witness for the defendants was the applicant's Commander.

At Trial, this witness testified that he had given statements to the defendant. After this testimony, the applicant's attorney requested exclusion of testimony of the defense witnesses but the Workers' Compensation Judge gave defendants an additional 20 days to serve all defense witness statements. The witness statements were not served within the requisite 20 days and the Workers' Compensation Judge granted applicant's Motion to Exclude Witnesses.

The decision of the WCJ was affirmed by the Appeals Board and also the Court of Appeal.

Traditionally, defendants have considered witness statements (either written or recorded) as protected by the work product privilege. However, ever since the Appeals Board in Moreno v. City of Los Angeles (1993) 21 CWCR 1108 held that witness statements are discoverable and are not protected by the work product privilege, applicant attorneys have routinely sent form letters to

¹ Cited at 32 CWCR 159.

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requesting service of all witnesses statements, video surveillance films, etc.

In Moreno, the Board held that statements of independent witnesses (such as supervisors or co-employees of the applicant) are discoverable and must be handed over to the applicant's attorney on demand.

The work product privilege can be divided into two parts:

1. **The Absolute Work Product Privilege:** This contemplates that the attorney interviews the witnesses and makes notes of his and/or her impressions as to the witness' testimony. These notes and/or writings are protected by the absolute work product privilege.
2. **Conditional Work Product Privilege:** In this limited work product privilege, the attorney's investigator interviews the witnesses, and does not take statements (either recorded or written) but simply makes notes as to what the witness tells him. The investigator then transcribes these notes in a report to the attorney. The notes and/or impressions of the investigator who reports directly to the defense attorney are protected by the conditional work product privilege.

We must remind all of our clients that if our investigators obtain either written or recorded statements from independent witnesses (including co-employees and supervisors), then these witness statements are discoverable and must be turned over to the applicant's attorney on demand, otherwise the testimony of these witnesses may well be excluded from evidence.

WJT/tmm