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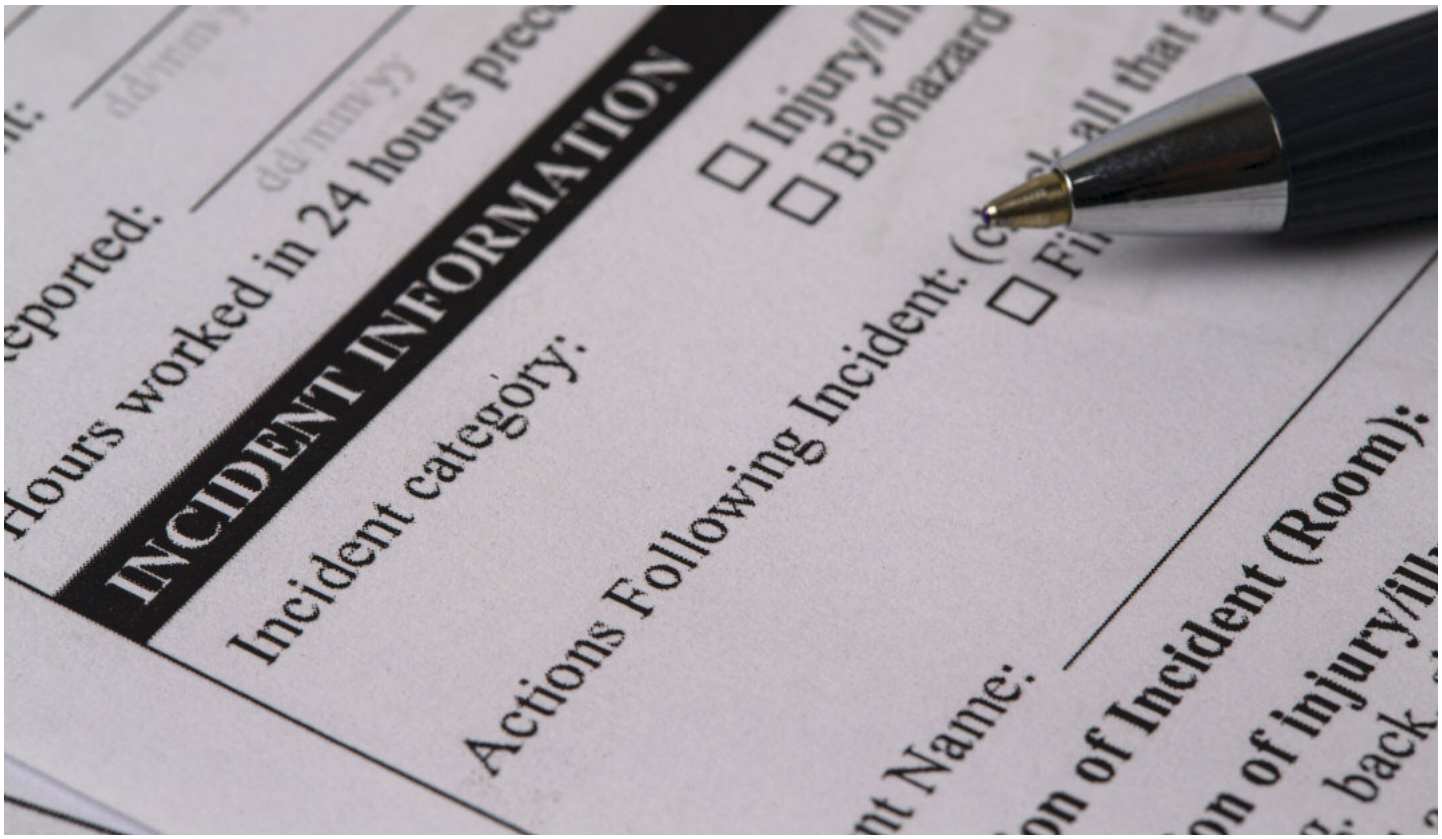

Getting the corporate incident report and witness statements

APPLICATION OF ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES TO CORPORATE INCIDENT REPORTS AND EMPLOYEE-WITNESS STATEMENTS

In any personal-injury action, access to witness statements and reports taken in the immediate or near aftermath of the incident is critical for evaluation and workup of the case. Plaintiffs' lawyers are frequently at a significant disadvantage for conducting contemporaneous investigation because of the passage of time between the injury-causing event and the date they are retained by the client.

Defendant companies will attempt to thwart discovery of highly probative statements and reports taken shortly after the occurrence of the injury-producing event by claiming that they were "obtained in anticipation of litigation" or are otherwise privileged.

The attorney-client privilege and work-product doctrine do afford defendants protection from disclosure of incident (accident) reports and witness statements under certain circumstances, but such protection is not blanket or all-encompassing. Consideration should be given to the intricacies of the statutes and case law, and crafting a discovery plan that increases the chances of defendant producing employee/witness statements and incident reports, or an order compelling same.

Review of attorney-client privilege

The attorney-client privilege is an evidentiary rule that protects confidential communications between a lawyer and client from disclosure to third parties. (Evid. Code, § 954.) Its fundamental purpose is to "safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.)

Communication between a lawyer and client is privileged if it is made in the course of the attorney-client relationship and in confidence. (Evid. Code 952; *United States v. Martin* (9th Cir. 2002) 278 F.3d 988, 999-1000 [the first part of establishing the privilege is demonstrating that legal advice was

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sought]; *In re Spalding Sports Worldwide, Inc.* (Fed. Cir. 2000) 203 F.3d 800, 805 ["the central inquiry is whether the communication is one that made by a client to an attorney for the purpose of obtaining legal advice or services"].) Such communications include legal opinions formed and the advice given in the course of that relationship. (*Id.*; *Calvert v. State Bar* (1991) 54 Cal.3d 765, 779.)

The party claiming the privilege has the burden of establishing preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. (*Costco Wholesale Corp. v. Superior Court* (2009) 27 Cal.4th 725, 733.) Once a *prima facie* claim of privilege is established, the communication is presumed to have been made in confidence, and the burden shifts to the opposing party to demonstrate that the communication was not confidential or is otherwise not entitled to protection. (*In re Spalding Sports Worldwide, Inc.*, 203 F.3d at p. 805.) The privilege only protects disclosure of "communications between the attorney and the client, it does not protect disclosure of underlying facts which may be referenced within a qualifying communication." (*State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625.) Moreover, "documents prepared independently by a party, including witness statements, do not become privileged communications or work product merely because they are turned over to counsel." (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119.) "Transmission alone, even where the parties intend the matter to be confidential, cannot create the privilege if none, in fact, exists." (*Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 176.)

When the privilege may not attach

Attorney-client privilege may not attach where employee is an "independent witness" or where the "dominant purpose" of a report or statement is not intended as a communication to lawyers.

In the context of post-incident fact-finding, a corporate defendant may attempt to prevent disclosure of statements or reports of its employees through wholesale claims of attorney-client privilege, but the California Supreme Court expressly declined to adopt such a broad rule. Indeed, statements of corporate employees to the corporation's attorney are not privileged if the employee speaks as an independent witness, even if the employer requires the employee to make the statement. (*D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 737.)

Analysis of privilege involves determination of the "dominant purpose" underlying the corporate entity's requirement that a report be made or statement be given after the occurrence of an incident. (*Ibid.*) To make a communication privileged, the dominant purpose must be for transmittal to an attorney "in the course of professional employment." (*City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 235.) Where the communication clearly has only a single purpose, there is little difficulty in concluding that the privilege should be applied or withheld. However where it appears a statement is required of a corporate defendant's employee for two or more purposes, one of which would bring it within the attorney-client privilege, such statement will be protected as privileged if that is determined to be the dominant purpose of making the statement in the first instance. (*D.I. Chadbourne, Inc., supra,* 60 Cal.2d at 733.)

Where the employer directs the employee at the request of its insurance carrier to make post-incident statement, it is the intent and "dominant purpose" *of the employer* that controls. If the employer's dominant purpose for requiring the report or statement is for transmission to the employer's attorney, it is likely to be confidential and privileged. However, if reports and statements are prepared after all incidents/accidents and used to improve safety, for training, and/or future accident avoidance, the statement or report is likely not privileged and is discoverable. (*Id.* at 737.)

In *Sierra Vista Hospital v. Superior Court* (1967) 248 Cal.App.2d 359, 364, an incident report was prepared by defendant hospital after an alleged injury. (*Id.* at 363.) The report was typed on a form with the words "CONFIDENTIAL REPORT OF INCIDENT (NOT PART OF MEDICAL RECORD)" appearing at the top. The insurance company for the hospital instructed the administrator to use the form to report all incidents that might result in litigation against the hospital and send the reports to the insurance company for use by the attorney. (*Id.* at 365.)

The report was protected by the attorney-client privilege because these factors indicated that the hospital intended it to be a confidential communication to its attorney through its insurance company. (*Id.* at 368; see also *Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529 [attorney client privilege protects reports "primarily created for the purpose of attorney review whether or not litigation is actually threatened at the time a report is made"].) It does not matter that the reports may contain "observational information" rather than "opinion information." (See *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 601.)

A discovery plan aimed at demonstrating that the "dominant purpose" of requiring the preparation of incident reports and employee statements is something besides litigation defense and attorney review is critical. Interrogatories and deposition questions can establish that the "absolute privilege" claimed by the defendant does not, in fact, attach to the incident report or witness statement: Who requested that the report be prepared? Was an interview conducted to obtain a statement and if so, who conducted it? Was a standard form used by the defendant company and what does the form say? Who received a copy of the report or statement?

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Once facts and circumstances that undermine a claim of attorney-client privilege have been established, it is important to also analyze the existence of work-product protection that may further impede disclosure of incident reports and employee-witness statements.

Review of the work-product doctrine

The purpose underlying the work-product doctrine is to allow 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 their cases and to prevent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subds. (a)-(b); *Hickman v. Taylor* (1947) 329 U.S. 495.) Any writing that "reflects an attorney's impressions, conclusions, opinions, or legal research or theories" is afforded absolute protection and not discoverable. (Code Civ. Proc., § 2018.030, subd. (a).)

Work product that does not fall into this category is given qualified protection and is not discoverable "unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim." (Code Civ. Proc., § 2018.030, subd. (b).) Determination of good cause contemplates a balancing of the need for disclosure against the purpose served by the work-product doctrine. (*National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 490.)

Neither subdivision of section 2018.030, nor any other provision of the Civil Discovery Act, provides a description or definition of what is or is not qualified work product. In interpreting the statute, California courts have focused on the distinction between "derivative" material on the one hand and "evidentiary" material on the other. (*Mack v. Superior Court* (1968) 259 Cal.App.2d 7, 8-10.) Generally speaking, work-product protection extends only to "derivative" material, which is material "created by or derived from an attorney's work on behalf of a client that reflects the attorney's evaluation or interpretation of the law or the facts involved." (2 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶8:235.)

In contrast, "nonderivative" material is that which is "only *evidentiary* in character." (*Mack*, *supra*, 259 Cal.App.2d at 8-10.) As such, it is "not protected even if a lot of attorney 'work' may have gone into locating and identifying [it]." (*Id.* at 10.) Examples of derivative materials include "diagrams prepared for trial, audit reports, appraisals, and other expert opinions, developed as a result of the initiative of counsel in preparing for trial." (*Mack,* at p. 10.) Examples of nonderivative or evidentiary materials include the identity and location of physical evidence, and the identity and location of witnesses. (*City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 73.) A guiding principle in this analysis is that "[i]nformation regarding events provable at trial, or the identity and location of physical evidence, cannot be brought within the work-product privilege simply by transmitting it to the attorney." (*Mack, supra,* 259 Cal.App.2d at 10.)

In order to accomplish the purpose underlying the work-product doctrine, the Civil Discovery Act "must be construed liberally in favor of disclosure unless the request is clearly improper by virtue of well-established causes for denial. . . 'Only strong public policies weigh against disclosure.'" (*Greyhound, supra,* 56 Cal.2d at 377, quoting *Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, 572.)

Incident reports and witness statements

Incident reports and witness statements are not work-product protected where they are not prepared by lawyers, regardless of subsequent transmission to attorney.

The courts have several times, and in differing contexts, addressed the question of whether witness statements are subject to discovery. They have clearly held that statements prepared by a witness and then turned over to an attorney are not the attorney's work product. (See, e.g., *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119.) Importantly, many witness statements and incident reports are not authored by an attorney, but by the involved employee and/or their supervisor/manager (i.e., non-lawyers), and by definition, cannot qualify as attorney work product. (*Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 136 [work-product protection only available to attorneys or pro per plaintiffs].) Unlike interview notes prepared by counsel, statements written or recorded independently by witnesses neither reflect an attorney's evaluation of the case nor constitute derivative material, and therefore are neither absolute nor qualified work product. (*Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 218.) Transmission of an otherwise unprivileged incident report to defendant company's attorney or insurance carrier does not make privileged that which was not privileged in the first place. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 397; *D.I. Chadbourne, Inc. v. Superior Court* 60 Cal.2d at 734 ["a litigant may not silence a witness by having him reveal his knowledge to the litigant's attorney…"].)

It is therefore important to ask early in the course of discovery whether any incident reports exist and who authored them, and to timely meet and confer and/or move to compel complete responses to such discovery to ensure that this foundational information is provided by the corporate defendant as it can serve as a basis to overcome a blanket claim of work-product privilege by the defense.

Attorney-directed investigation

Attorney-directed investigation is entitled to absolute or qualified work-product protection. "[W]itness statements obtained as a result of an interview conducted by an attorney, or by an attorney's agent at the attorney's behest, constitute work product."

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(*Coito v. Superior Court* (2012) 54 Cal.4th 480, 494.) Where a witness statement reveals an attorney's impressions, conclusions, opinions or legal research, the statement is entitled to absolute protection.

A witness statement taken by an attorney possesses both derivative characteristics and non-derivative characteristics. (*Id.* at 498.) Where witness statements obtained by an attorney do not reveal the attorney's thought processes, they are nevertheless entitled as a matter of law to qualified work-product protection because their production would undermine the policy of preventing an attorney from taking advantage of an adversary's efforts.

A party objecting to producing witness statements or incident reports on the grounds that they are protected by absolute work-product privilege must make a *prima facie* showing that disclosure would reveal the attorney's "impressions, conclusions, opinions, legal research or theories." The trial court then must determine whether and to what extent absolute work-product protection applies, potentially shielding all or some portions of the witness interview from discovery.

To the extent it is possible to redact a witness statement to protect absolute work product, the non-privileged portion is then properly disclosed in discovery. (*Id.* at 493.) Where the absolute privilege does not apply, parties seeking production of recorded witness statements or interviews bear the burden on a motion to compel of demonstrating that "denial of disclosure will unfairly prejudice the party in preparing its claims or will result in an injustice." (54 Cal.4th at 500.)

When it appears that absolute or qualified work-product protection will be claimed by a corporate defendant in order to shield witness statements from disclosure, a discovery plan that seeks to uncover the facts and circumstances under which witness interviews were conducted is extremely useful. If it can be shown that the attorney's impressions and thoughts are not necessarily intertwined (i.e., the attorney recorded an interview which was transcribed), the qualified protection is susceptible to being lifted where a showing can be made that the plaintiff will be prejudiced or injustice will result if he or she does not get access to the interview.

Evidence Code 771

If it appears that disclosure of a witness statement or incident report appears unlikely after analysis of the applicability of the attorney-client and work-product privileges, Evidence Code section 771 may provide an alternate avenue to obtaining such materials. Section 771 provides: "(a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of the adverse party and, unless the writing is so produced, the testimony of the witness concerning the matter shall be stricken…"

In *Kerns Construction Co. v. Superior Court* (1968) 266 Cal.App.2d 405, the plaintiffs sued for personal injuries sustained in a gas explosion. During the deposition of one of the defendant's employees, the employee stated he had no recollection of relevant events or matters independent of the investigation and accident reports he had prepared. The reports were provided to him by counsel for the defendant gas company. In order to give his testimony, the employee-witness had to read and reference the reports before and throughout his deposition. When plaintiffs' counsel sought to attach the reports to the transcript, defendant objected to the production of the reports, claiming they constituted work product.

The court concluded that there was a waiver of any privilege that may have existed. (*Id.* at 410.) "Once having testified from the reports, premised exclusively on the information contained in the papers and documents, the Gas Co. cannot now claim privilege or work product to prevent the inspection." (*Id.* at 410-411.)

Importantly, the court determined that the reports would have been given absolute protection under the attorney-client privilege, but that this privilege too was waived. The gas company was a party and had a right to attend the deposition, and it was their employee who testified. The gas company was under no obligation to show the witness the report, but did so anyway. "It would be unconscionable to allow a rule of evidence that a witness can testify to material contained in a report, though not verbatim, and then prevent a disclosure of the reports. As is stated in 8 Wigmore, Evidence, section 2327 (McNaughton rev. 1961), 'There is always also the objective consideration that when his [holder of privilege] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final.'" (*Id.* at 414; but see, *Sullivan v. Superior Court* (1972) 29 Cal.App.3d 65 [*Kerns* not precedent where the witness refreshed her memory before the deposition and raised the privilege when demand was made that she produce transcription of audio recorded discussion with her lawyer].)

With some preparation in written discovery and at deposition, privileges claimed by corporate defendants as complete shields to the disclosure of highly probative evidence are susceptible to legitimate challenges. The important thing is to plan ahead and lay a sufficient foundation for motions to compel, as motion practice will likely be necessary to secure the release of internal incident reports and witness statements.

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