BEWARE THE PITFALLS OF PRE-LITIGATION INVESTIGATION AND RELIANCE ON THE ATTORNEY-WORK PRODUCT DOCTRINE

Although it is increasingly becoming the custom of clients and their insurance carriers to engage consultants to obtain facts, assess potential liability, and develop defense theories before or after a lawsuit has been filed, these reports and assessments may be susceptible to discovery in civil litigation. Understanding what is protected by the attorney work product doctrine and what is discoverable is key to structuring pre-litigation investigations. The following hypotheticals illustrate how the attorney work product privilege comes into play.

The first scenario involves an employer and its attorneys who are threatened with a sexual harassment lawsuit based on a hostile work environment theory. The employer and its attorneys conduct a preliminary investigation; the employer takes detailed notes of the interviews with the other employees, reciting verbatim statements made. The former employee then initiates a lawsuit and plaintiff demands production of the investigative file which includes the statements of its employees. Opposing counsel then sends interrogatory requests, asking for all written information relating to the plaintiff. Whether an employer's counsel invokes the work product privilege when refusing to hand over the employee statements depends on the jurisdiction you are in and what the interview notes contain.

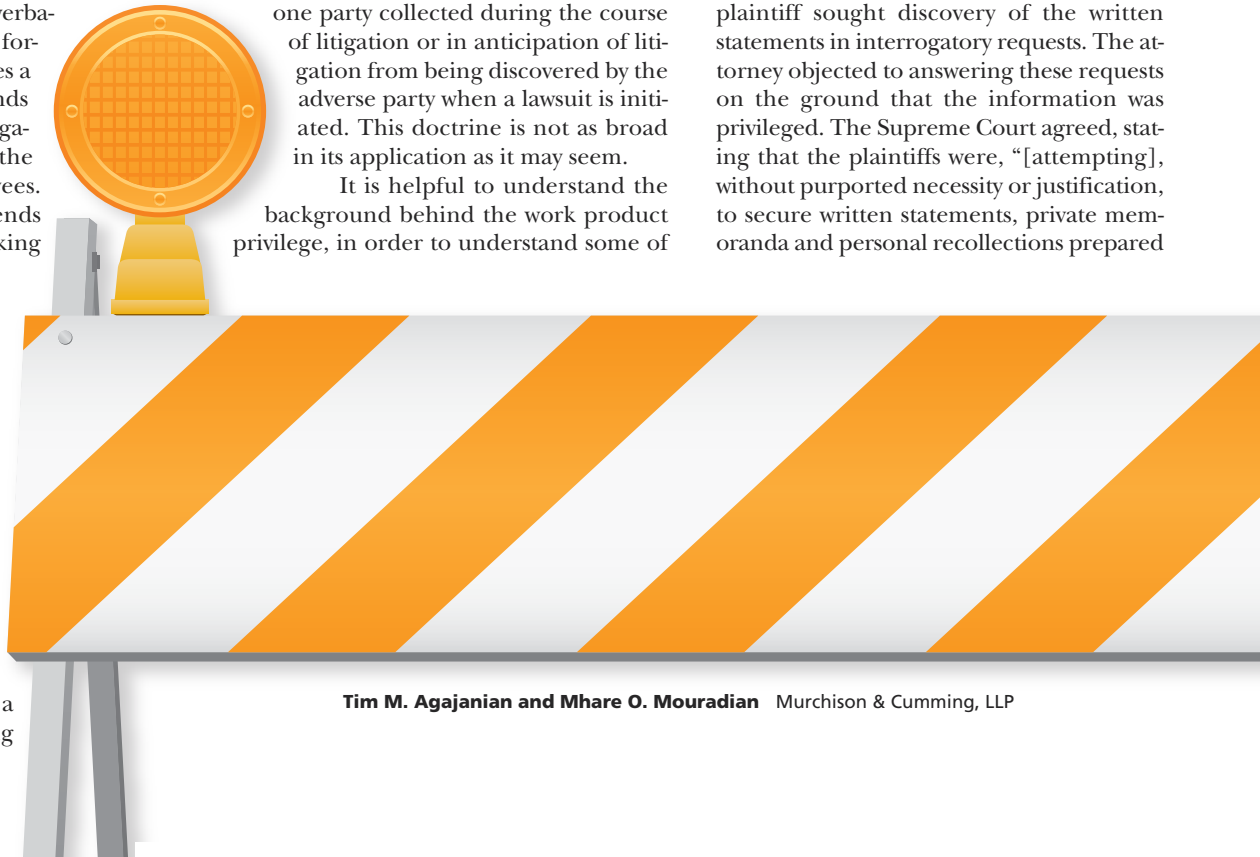
The second scenario involves a situation where an insured submits a claim to its insurer to recover for the loss of its building which was destroyed by a fire. Before deciding whether to accept or reject the claim, the insurer hires consultants to investigate the cause and origin of the fire to ascertain whether the insured is covered under the insurance policy. Detailed reports are written, theories of liability are discussed, and ultimately the documents are handed over to the insurer to put into its claim file and decide the appropriate action. If litigation subsequently arises, defense counsel may be required to hand over the claim file when requested by plaintiff's counsel. This will depend on the jurisdiction and other factors.

Many would argue that under both these illustrations, the insurer and employer could invoke the work product doctrine to prevent their adversaries from discovering these potentially damaging documents. The work product doctrine protects the written materials, charts, and investigations of one party collected during the course of litigation or in anticipation of litigation from being discovered by the adverse party when a lawsuit is initiated. This doctrine is not as broad in its application as it may seem.

It is helpful to understand the background behind the work product privilege, in order to understand some of the common pitfalls involved in seeking protection from this doctrine, depending on which jurisdiction governs the matter.

FOUNDATION OF WORK PRODUCT PRIVILEGE

The leading case involves the Supreme Court decision of *Hickman v. Taylor*, when tracing the roots of the attorney work product privilege doctrine.[1] It was decided in 1947, two decades before the doctrine was codified in the Federal Rule of Civil Procedure 26(b)(3).[2] In Hickman, a tugboat sank, resulting in the deaths of five crewmembers. The owners of the boat and its underwriters hired a law firm days later to defend against potential suits. One of the attorneys privately interviewed the survivors "with an eye toward the anticipated litigation." A lawsuit was later initiated and the plaintiff sought discovery of the written statements in interrogatory requests. The attorney objected to answering these requests on the ground that the information was privileged. The Supreme Court agreed, stating that the plaintiffs were, "[attempting], without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared



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or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."

The Supreme Court emphasized the need for an attorney to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." The Court recognized that without this privilege, much of what is now put into writing would remain unwritten. The Court did not want for "[i]nefficiency, unfairness and sharp practices" to develop when attorneys gave their clients legal advice. Yet, the Court recognized that where "relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had."

In 1970, Rule 26 of the Federal Rules of Civil Procedure was changed to govern the duty of parties to disclose during discovery. Under the section limiting the scope of the duty, subsection (b)(3) reads "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." This limitation can be overcome where the documents sought are otherwise discoverable and the requesting party demonstrates a substantial need for the information since they would not otherwise be able to obtain the information without undue hardship.

The notes of the advisory committee which discussed the amendments to Rule 26 in 1970 state that materials assembled in the ordinary course of business or pursuant to public requirements unrelated to litigation are not under the qualified immunity provided for in subsection (b)(3). *Hickman* left open the issue of whether the work product doctrine extends only to the preparatory work of lawyers, versus any other agents of the party involved in the litigation. The committee decided to extend the protection of materials prepared in anticipation for litigation by any representative acting on a party's behalf, on just the attorney.

THE ISSUE: DIFFERENT APPLICATIONS BETWEEN STATE AND FEDERAL COURTS

The biggest obstacle in understanding the reach and scope of the work product doctrine is the lack of uniformity in its application in state and federal courts. Even though *Hickman* was the guiding principal for most states in adopting their own version of the work product privilege, each state interprets the doctrine differently and has its own application.

Who May Investigate

The discrepancies between state and federal applications are demonstrated when comparing the language of California's work product doctrine with the language of the Federal Rules. California has an absolute privilege, which states, "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." It also has a qualified privilege which reads, "[t]he work product of an attorney, other than a writing described in subdivision (a), 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 result in an injustice." In contrast, the Federal Rules do not put the limiting term "attorney" in its work product doctrine and instead has the broad phrase "by or for another party or its representative."

Whereas California makes it clear that only work done under the direction of an attorney can qualify for protection under the privilege, the federal courts acknowledge that statements taken by an insurance or claim adjuster in anticipation of litigation qualify for protection under the doctrine, even where an attorney has not yet been hired.[3]

"Anticipation of Litigation"

The phrase "in anticipation of litigation" is an oft litigated issue. Just about any document can arguably be compiled in anticipation of litigation somewhere down the line; the question becomes how far remote in the future qualifies.

The circuit courts are split between two different approaches: (1) documents prepared "because of" litigation and (2) documents prepared "primarily to assist in" litigation. The former arguably gives broader protection to different types of documents since it would protect a memorandum analyzing anticipated or threatened litigation but prepared to assist in a business decision rather than to assist in the conduct of legislation.

In describing the "because of" litigation formula, the Second Circuit Court in *United States v. Adlman* explained that where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under the formulation merely because it is created in order to assist with a business decision.[4] However, the Court cautioned that protection under the work product doctrine is withheld for documents that are prepared in the ordinary course of business or that would have been created in essentially similar form regardless of potential litigation.

CONCLUSION

Whether the employer or insurer could use the work product doctrine to shield their preliminary investigations depends on how carefully you prepare the investigative reports and which jurisdiction would cover the case. If you are in federal court, it is more likely that statements taken by an insurance or claim adjuster in anticipation of litigation qualify for protection under the doctrine, even where an attorney has not yet been hired. However, some state courts only protect work done under the direction of an attorney.

This article could not be written without the research and assistance of Kelsey C. Starn, Law Clerk at Murchison & Cumming, LLP.

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1 *Hickman v. Taylor*, 329 U.S. 495 (1947).
2 Federal Rules of Civil Procedure § 26(b)(3).
3 *See generally, Hamilton v. Canal Barge Co.*, 395 F.Supp.975 (1975) (Eyewitness statements, taken day of accident by defendant's insurance adjuster, although taken by insurance adjuster, fell within Rule 26(b)(3) category of material prepared in anticipation of litigation.)
4 *United States v. Adlman*, 134 F.3d 1194 (2nd Cir. 1998).