

# WORKPLACE INVESTIGATIONS: CONSIDERATIONS REGARDING THE ATTORNEY-CLIENT PRIVILEGE AND THE ATTORNEY WORK PRODUCT DOCTRINE IN USING OUTSIDE COUNSEL TO INVESTIGATE ALLEGED VIOLATIONS OF EMPLOYMENT LAWS IN THE WORKPLACE

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## Introduction

Over the past several years, courts have placed increasing responsibility on employers to conduct investigations of alleged violations of employment laws in the workplace, and an employer's defense in seeking to minimize both liability and damages in these situations often depends on its prompt corrective action.<sup>3</sup> This process begins with a timely and thorough investigation of the matter to support the making of informed decisions.

All employers, large or small, public or private, have the same basic choices in deciding who should conduct its workplace investigation: (1) internal employees, such as human resources personnel, (2) independent contractors, such as outside human resources consultants,

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<sup>3</sup> See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (holding that when an employee has not suffered a tangible employment action, but proves that she has been subject to sexual harassment by an immediate (or successively higher) supervisor, the employer is still liable, but affirmative defenses are available including (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (focusing its inquiry on whether the city exercised reasonable care to prevent and correct promptly any sexually harassing behavior).

(3) licensed private investigators, (4) in-house legal counsel, or (5) outside legal counsel.<sup>4</sup> One of the foremost considerations in selecting outside legal counsel, however, is how that decision impacts the application of both the attorney-client privilege and the attorney work product doctrine. While it may seem logical to have outside employment counsel conduct the investigation, employers must consider the potential ramifications *before* the investigation begins. For instance, if litigation ensues, outside counsel may become a witness in the litigation and then will be conflicted out of representing the employer in the lawsuit. Oftentimes, employers choose outside counsel to do the investigation because they desire to keep the investigation report confidential. The downside to this, however, is that the investigation report and the investigator's testimony may be necessary for the employer to show that it took prompt, corrective action.

For these reasons, employers must think these issues through in deciding how best – and who best – to conduct its investigations into potential violations of employment law in the workplace.

### **Background on the Attorney-Client Privilege and Attorney Work Product Doctrine**

Using an attorney to conduct a workplace investigation is advantageous because he or she should be thoroughly familiar with federal and state anti-discrimination laws. The attorney's involvement with the investigation, however, can bear significantly on the application of the attorney-client privilege and the work product doctrine to the investigation materials.

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<sup>4</sup> Jennifer Brown Shaw, Matthew J. Norfleet, & Shane K. Anderies, *Workplace Investigations: Whom to Call*, THE DAILY RECORDER (May 22, 2008), available at <http://shawvalenza.com/publications.php?id=106> (last accessed on Feb. 2, 2009).

## ***I. The Attorney-Client Privilege***

The attorney-client privilege is the “oldest confidential communications privilege known to the common law.”<sup>5</sup> The privilege protects confidential communications made by clients, including corporate clients,<sup>6</sup> to their attorneys in order to obtain legal assistance or advice.<sup>7</sup> The essence of the privilege, therefore, is a client seeking out legal assistance from an attorney serving in the “capacity of legal advisor.”<sup>8</sup> Despite this longstanding principle, courts have struggled with determining whether an attorney is acting in his or her “legal capacity” when conducting a workplace investigation. For example, in *Harding v. Dana Transport, Inc.*,<sup>9</sup> the court held that outside counsel had acted in his legal capacity when he conducted the workplace investigation and, therefore, the attorney-client privilege attached.<sup>10</sup> In that case, plaintiffs alleged sexual discrimination against their employer and one of its supervisors.<sup>11</sup> In response, the defendant corporation hired outside counsel to conduct an investigation of the alleged claim.<sup>12</sup> The corporation used the materials prepared by outside counsel to prepare a position statement, postulate a defense strategy with regard to the complaints, and formulate a written

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<sup>5</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>6</sup> *Id.* at 394-95.

<sup>7</sup> *See id.* at 389 (“The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”) *See also Fisher v. United States*, 425 U.S. 391, 403 (1976) (“Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.”)

<sup>8</sup> *See Merrily S. Archer, Attorney-Client Privilege and Work Product Protections in an Internal Sexual Harassment Investigation*, 30 COLO. LAW. 141, 141 (Oct. 2001) (“The attorney-client privilege protects confidential communications made by clients, including corporate clients, to their attorney to obtain legal assistance in the attorney’s capacity as legal advisor.”)

<sup>9</sup> 914 F. Supp. 1084 (D. N.J. 1996).

<sup>10</sup> *Id.* at 1091.

<sup>11</sup> *Id.* at 1087.

<sup>12</sup> *Id.* at 1088.

sexual harassment policy.<sup>13</sup> Nevertheless, plaintiffs argued that defendant's outside counsel was not "acting as an attorney," but instead was acting as a fact-finder or investigator when he conducted the investigation. The court found plaintiffs' argument unpersuasive.<sup>14</sup> Applying U.S. Supreme Court precedent, the court reasoned:

[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.<sup>15</sup>

Accordingly, the court held that outside counsel was acting as an attorney for the purposes of the attorney-client privilege.<sup>16</sup>

Conversely, other courts have seriously questioned or patently dismissed the argument that attorneys act in their "legal capacity" when conducting a workplace investigation. For instance, in *Payton v. New Jersey Turnpike Auth.*,<sup>17</sup> the court, applying state law, rejected the blanket contention that the attorney-client privilege protects the entire investigatory process simply because the defendant corporation hired attorneys to participate in the investigation.<sup>18</sup> That case involved a lawsuit brought by an employee against her employer and two of her supervisors for sexual harassment under state law.<sup>19</sup> In order to gauge the timeliness and thoroughness of defendants' actions, plaintiff sought discovery of materials relating to the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1091.

<sup>15</sup> *Id.* (citations omitted).

<sup>16</sup> *Id.*

<sup>17</sup> 691 A.2d 321 (N.J. 1997).

<sup>18</sup> *Id.* at 334.

<sup>19</sup> *Id.* at 324.

investigation.<sup>20</sup> The employer maintained that the attorney-client privilege protected the entire investigatory process simply because attorneys employed by defendant participated in the investigation.<sup>21</sup> The court, however, rejected this contention and instead held that the record was insufficient to resolve the issue.<sup>22</sup> The court remanded the case to the trial court to determine “the exact role that an attorney played regarding each particular document for which the privilege is asserted.”<sup>23</sup>

Taken together, these cases demonstrate that merely utilizing an attorney to conduct the investigation is not sufficient to bring the investigative materials under the ambit of the attorney-client privilege. Instead, outside counsel must act in his or her “legal capacity” when conducting the investigation, such as preparing the employer for litigation or actually providing legal advice.

## ***II. The Attorney Work Product Doctrine***

The attorney work product doctrine was first articulated by the United States Supreme Court in *Hickman v. Taylor*<sup>24</sup> and was later codified into FED. R. CIV. P. 26(b)(3). Rule 26(b)(3) shields from disclosure attorney work product<sup>25</sup> prepared “in anticipation of litigation,” absent a showing of “substantial need” for the materials and “undue hardship” in obtaining equivalent

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<sup>20</sup> *Id.* at 325.

<sup>21</sup> *Id.* at 334.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 329 U.S. 495 (1947).

<sup>25</sup> Attorney work product is tangible material or its intangible equivalent – in unwritten or oral form – that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress. BLACK’S LAW DICTIONARY 772 (2d Pocket ed. 2001). Thus, it includes written materials, charts, notes of conversations and investigations, and other materials directed toward preparation of a case or other legal representation. The Free Dictionary by Farlex, available at <http://legal-dictionary.thefreedictionary.com/attorney's+work+product> (last accessed Feb. 2, 2009).

materials by other means.<sup>26</sup> The standards articulated in this rule have raised questions about the applicability of the work product doctrine to attorney-prepared materials in workplace investigations.<sup>27</sup>

For example, in sex harassment cases, the Equal Employment Opportunity Commission (EEOC) regulations require employers to promptly investigate the allegations, often long before litigation ensues.<sup>28</sup> In these cases, plaintiffs may be able to successfully argue that the attorney's investigative materials were not prepared "in anticipation of litigation," but merely in response to this regulatory mandate.<sup>29</sup> On the other hand, employers have been able to successfully argue that the investigation was conducted in anticipation of litigation when contact from the employee's attorney triggered the investigation.<sup>30</sup> Even in cases where the work product protection applies, however, courts have reached conflicting conclusions about plaintiffs' ability to satisfy the "substantial need" and "undue hardship" requirements. For example, some courts have held that when the attorney's materials are necessary to rebut the defense that the employer

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<sup>26</sup> FED. R. CIV. P. 26(b)(3) provides: "[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another . . . party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

<sup>27</sup> Archer, *supra* note 8, at 142 (analyzing standards in the context of internal sexual harassment investigations).

<sup>28</sup> 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.") See also Archer, *supra* note 8, at 142.

<sup>29</sup> See Payton, *supra* note 17, at 336 (asserting that investigatory documents created months before plaintiff initiated the litigation were not protected by the work product doctrine because they were not prepared in anticipation of litigation); *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D. D.C. 1982) ("If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is produceable in civil pre-trial discovery.")

<sup>30</sup> *Ryall v. Appleton Elec. Co.*, 153 F.R.D. 660, 662 (D. Colo. 1994) (holding that the investigative materials fall under the work product protection when defendant's workplace investigation began in response to contact from plaintiff's attorney indicating litigation was imminent). See also Archer, *supra* note 8, at 142.

promptly investigated and took remedial action, then plaintiffs will have a substantial need for the evidence.<sup>31</sup> However, the availability of other information about the investigation, apart from the attorney's work product, may render the substantial need and undue hardship showings more difficult to achieve.<sup>32</sup>

### **Waiver of the Attorney-Client Privilege and Attorney Work Product Doctrine**

If an employer utilizes outside counsel to conduct its workplace investigation and assuming *arguendo* that the investigative materials are privileged, then employers run the risk of waiving those privileges in two common scenarios. First, in employment discrimination cases, employers may waive the privilege if it asserts its prompt remedial action as an affirmative defense to the plaintiff's claim. Second, in liability cases involving the tripartite relationship between the defense attorney (i.e., outside counsel), the insured (i.e., the defendant corporation), and the insurer (i.e., the insurance company), some states hold that employers waive certain rights by making required disclosures to its insurance company in connection with the litigation.

#### ***I. Employment Discrimination Cases***

Typically, in employment discrimination cases, employers who invest the time and expense of an attorney-conducted workplace investigation will want to use their investigative efforts as a defense in the case.<sup>33</sup> However, the employer may waive the attorney-client privilege and work product protections in employment discrimination cases by asserting that it either took reasonable measures to prevent and correct the situation or that the employee

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<sup>31</sup> See discussion *infra* on Waiver of the Privileges. See also Archer, *supra* note 8, at 142.

<sup>32</sup> See discussion *infra* on Strategic Alternatives to Protect the Privileges. See also Archer, *supra* note 8, at 142.

<sup>33</sup> Archer, *supra* note 8, at 142.

unreasonably failed to take advantage of these measures.<sup>34</sup> The case of *Brownwell v. Roadway Package Sys., Inc.*<sup>35</sup> is illustrative of this point.

This case concerned a sexual harassment suit filed by a plaintiff against her former employer.<sup>36</sup> In connection with that claim, the employer conducted an internal investigation which resulted in plaintiff's termination.<sup>37</sup> Plaintiff subsequently filed suit and requested discovery of statements made to the employer's counsel in connection with the investigation.<sup>38</sup> The employer denied the charges against it and argued, *inter alia*, that plaintiff's claims were barred because it fully and fairly investigated her allegations and took prompt and appropriate action consistent with the results of the investigation.<sup>39</sup>

Although it found the statements to counsel were privileged, the court held that the employer waived its right to invoke the privilege by asserting adequacy of its investigation as a defense to plaintiff's claims of sexual harassment.<sup>40</sup> First, by arguing that it fully and fairly investigated plaintiff's allegations while objecting to the production of statements obtained in the course thereof, the court found that the employer was attempting to use the privilege as both a sword and shield and "this it may not do."<sup>41</sup> Rather, the court believed that equity required that plaintiff be permitted to explore the parameters of the investigation in order to rebut this

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<sup>34</sup> See *supra* note 3.

<sup>35</sup> 185 F.R.D. 19 (N.D. N.Y. 1999).

<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.*

<sup>38</sup> Plaintiff sought copies of five written statements that RPS employees provided to Attorney Spelfogel on March 10, 1997, and one statement made by an RPS employee to Attorney Spelfogel on April 15, 1997. *Id.* at 22.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 25.

<sup>41</sup> *Id.*

affirmative defense.<sup>42</sup> Second, by asserting the adequacy of its investigation as a defense to plaintiff's allegations, the court held that the employer had "implicitly waived the attorney-client privilege by placing the investigation 'in issue.'"<sup>43</sup> Thus, the adequacy of the employer's investigation became critical to the issue of liability.<sup>44</sup> "The only way that Plaintiff, or the finder of fact, can determine the reasonableness of Defendant's investigation is through full disclosure of the contents thereof."<sup>45</sup> Accordingly, the court concluded that the statements are discoverable and must be produced to plaintiff.<sup>46</sup>

Employers also run the risk of waiving the protective nature of its investigative materials in liability cases involving insurance contracts.

## ***II. Liability Cases Involving Insurance Contracts***

There is no insured-insurer privilege protecting communications between an insured and its liability or indemnity insurer.<sup>47</sup> The only privilege normally protective of such communications is the attorney-client privilege.<sup>48</sup> There are two views as to the application of the privilege to communications between an insured and its insurer: the broad view and the narrow view.<sup>49</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 21, 26.

<sup>47</sup> John P. Ludington, *Insured-Insurer Communications as Privileged*, 55 A.L.R.4TH 336, § 2 (1987).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Under the broad view, an insured's communication to its liability or indemnity insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the attorney-client privilege.<sup>50</sup> The usual rationale for this view is that such communications are made for the dominant purpose of transmission to an insurer-assigned attorney for defense of the claim.<sup>51</sup>

By contrast, under the narrow view, there is no per se attorney-client privilege in insured-insurer communications.<sup>52</sup> Rather, these jurisdictions believe that the attorney's sole loyalty and duty is owed to the client (i.e., the insured), not the insurer.<sup>53</sup> Since communications between an insured and its insurer are not protected by the attorney-client privilege in these jurisdictions, the question becomes whether the liability insurer can claim any other privilege to prevent subsequent disclosure of the information. The Michigan Court of Appeals squarely addressed this issue in *Koster v. June's Trucking, Inc.*<sup>54</sup>

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<sup>50</sup> *Id.* § 4 (listing jurisdictions, such as Colorado, Delaware, Florida, Illinois, Kentucky, Missouri, Nebraska, New York, Ohio, Texas, and Washington, which have found such communications to be privileged). *See also, e.g., Royal Indemn. Co. v. Terra Firma, Inc.*, No. X04CV054005063S, 2007 WL 610783, at \*1 (Conn. Super. Ct. Feb. 1, 2007) ("There is indeed a common interest among the insured, the attorney and the insurer, and ordinarily the insured's privilege is not waived because of disclosure to the insurer, at least with respect to disclosures made before a coverage dispute arises"); *Richey v. Chappell*, 594 N.E.2d 443, 447 (Ind. 1992) ("Therefore, we hold that where the policy of insurance requires the insurer to defend claims against the insured, statements from the insured to the insurer concerning an occurrence which may be made the basis of a claim by a third party are protected from disclosure.")

<sup>51</sup> A store general manager's accident report concerning a customer's fall on the store premises, sent to the store's liability insurer for investigation by the insurer of the fall pursuant to the insurer's fulfillment of its obligation to defend the store, was held privileged in *Grand Union Co. v. Patrick*, 247 So.2d 474 (Fla. Dist. Ct. App. 1971). The court stated that the principle under which such reports by an insured to its insurer are privileged is that they are considered relevant to the defense of the action and in effect are communications between attorney and client, being information which is to benefit the defense of the cause by counsel, passing through the insurer to defense counsel. *Id.* at 475.

<sup>52</sup> *Ludington, supra* note 47, at § 2.

<sup>53</sup> *See, e.g., Kirschner v. Process Design Associates, Inc.*, 592 N.W.2d 707,711 (Mich. 1992).

<sup>54</sup> 625 N.W.2d 82 (Mich. Ct. App. 2000).

The case arose from an accident wherein a truck driven by defendant and owned by defendants crossed the median on the freeway and hit a vehicle in which plaintiffs rode, killing them.<sup>55</sup> Defendants had an insurance policy with Michigan Mutual, and pursuant to the policy, Michigan Mutual retained a law firm to represent defendants in the wrongful death suits filed on behalf of plaintiffs.<sup>56</sup> After judgment, Michigan Mutual paid benefits to the extent of defendants' liability policy, leaving a balance of the judgment unpaid.<sup>57</sup>

Plaintiffs then filed writs of garnishment naming several insurers as garnishee defendants.<sup>58</sup> During the course of the garnishment proceedings, plaintiffs subpoenaed Michigan Mutual for its complete claims file concerning the accident.<sup>59</sup> The appellate court, applying state law, held that "documents and tangible things prepared in anticipation of litigation by or for an insurer of a party are not discoverable absent a showing that the party seeking discovery has a substantial need for the materials and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>60</sup> As such, the documents may be protected under the work product doctrine, but without an in-camera review, the court could not conclude that the documents were so protected.<sup>61</sup> However, if, after the in-camera review, the court concluded that the documents were protected from discovery by the work product doctrine, then plaintiffs would

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<sup>55</sup> *Id.* at 83.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 83-84.

<sup>58</sup> *Id.* at 84.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 87.

<sup>61</sup> *Id.*

have the burden to show “substantial need” and “undue hardship.”<sup>62</sup> If plaintiffs could meet this burden, the court noted that any order must “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of the defendant’s attorney.”<sup>63</sup>

This Michigan case explains that even in those jurisdictions where communications between the insurer and the insured do not fall under the attorney-client privilege, disclosure of those communications may be prohibited under the work product doctrine. However, the protection afforded by the work product doctrine is limited in that it can be overcome by a showing of “substantial need” and “undue hardship.”

Because employers run the risk of waiving the privileged nature of its attorney-prepared investigative materials in both employment discrimination and liability cases involving insurance contracts, if outside counsel (or even in-house legal counsel) is going to be used to conduct investigations in these contexts, then employers must consider some strategic alternatives to safeguard their counsel’s materials from subsequent disclosure.

### **Strategic Alternatives Used to Protect the Attorney-Client Privilege and Attorney Work Product Doctrine**

Outside counsel must appreciate the potential discovery issues inherent in attorney-prepared investigative materials and use strategic alternatives to safeguard the nature of those materials. One strategy that outside counsel can use is to underscore the legal nature of the investigative efforts in attempt to reduce the likelihood of disclosure. Another strategy that counsel can use is to bifurcate the investigation process and utilize company employees in the

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

investigative efforts so that there will be other information, apart from the attorney's work product, available to plaintiffs.

### ***I. Underscoring the Legal Nature of the Investigation***

Attorneys who conduct workplace investigations should deliberately indicate that investigative documents were prepared or reviewed in the attorney's capacity as legal advisor. Measures to preserve the attorney-client privilege in the context of a workplace investigation include: (1) marking all documents as "attorney-client privilege and attorney work product," (2) limiting disclosure of the materials and treating it as confidential, (3) specifically identifying existing circumstances to support anticipation of litigation, and (4) including legal analyses in any documented collection of facts.<sup>64</sup> By implementing these strategies, outside counsel is underscoring the legal nature of the investigation. The importance of such action is illustrated in *Scurto v. Commonwealth Edison*.<sup>65</sup>

In this case, the company had a policy which required its corporate counsel to investigate claims of discrimination in the workplace.<sup>66</sup> In connection with her Title VII lawsuit, plaintiff requested documents prepared by the attorney in the investigation.<sup>67</sup> To support disclosure of those documents, plaintiff asserted that none of the documents were privileged because the attorney was merely carrying out the corporate policy to investigate claims of discrimination.<sup>68</sup> The court, however, rejected this argument and held that the attorney was, indeed, acting in her

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<sup>64</sup> Mark J. Flynn, *Detect and Deter – Performing Investigations on Behalf of Employer-Clients*, 34 COLO. LAW. 67, 73 (Feb. 2005).

<sup>65</sup> No. 97C7508, 1999 WL 35311 (N.D. Ill. Jan. 11, 1999).

<sup>66</sup> *Id.* at \*3.

<sup>67</sup> *Id.* at \*1.

<sup>68</sup> *Id.* at \*3.

legal capacity because the language of the corporate policy stated, “[the attorney] is responsible for the *legal aspects* of the policy and the program.”<sup>69</sup> Therefore, according to the court, even if the attorney was acting pursuant to the corporate policy, she was acting in a legal capacity and the attorney-client privilege and the work product doctrine applied.<sup>70</sup>

Still, however, outside counsel can utilize another strategy to protect the attorney-prepared materials.

## ***II. Utilizing Company Employees in the Investigation***

One way to safeguard the protections afforded to attorney-client communications and work product immunity in workplace investigations is to ensure that investigative materials, apart from the attorney’s work product, are available to plaintiffs. This objective can be achieved by bifurcating the investigation and utilizing company employees in the investigative efforts.

For example, in *Ryall v. Appleton Elec. Co.*,<sup>71</sup> the plaintiff brought an action under federal and state civil rights laws alleging sexual harassment in the workplace.<sup>72</sup> As an affirmative defense, the employer maintained that it was not liable on plaintiff’s claims because it conducted a good faith investigation of her complaints of harassment and took appropriate corrective action.<sup>73</sup> The employer used two company officials to conduct its investigation: its director of industrial relations and its chief employment counsel.<sup>74</sup> The director of industrial

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<sup>69</sup> *Id.* at \*4 (emphasis in original).

<sup>70</sup> *Id.*

<sup>71</sup> 153 F.R.D. 660 (D. Colo. 1994). *See also supra* note 30.

<sup>72</sup> *Id.* at 661.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 662.

relations interviewed four witnesses and prepared written statements summarizing the information he obtained in the interviews.<sup>75</sup> The chief employment counsel also interviewed two witnesses, including plaintiff, and prepared notes.<sup>76</sup> Plaintiff then sought discovery of “all notes and statements made during the investigation.”<sup>77</sup> The employer complied in part by turning over the written statements prepared by its director of industrial relations.<sup>78</sup> It refused, however, the production of written notes that its chief employment counsel took during his interviews on the grounds that disclosure is prohibited under the attorney-client privilege and work product doctrine.<sup>79</sup>

The court held that even if the employer had waived its privileges with respect to those documents by asserting its prompt remedial action as a defense to liability, the plaintiff “already possesses a significant amount of information pertaining to the investigation.”<sup>80</sup> That is, the employer had identified who conducted the investigation and everyone it interviewed.<sup>81</sup> It also provided all of the witness statements that its director of industrial operations prepared.<sup>82</sup> Therefore, “[plaintiff] can now construct a fairly complete picture of the actions [the employer] took to investigate her claim.”<sup>83</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 662-63.

<sup>81</sup> *Id.* at 663.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

This case demonstrates that even if an employer waives the privileges associated with its attorney-conducted investigative materials, subsequent disclosure of those materials can be prohibited by utilizing internal company employees to conduct its own investigation along side the attorney. This strategy is advantageous in two aspects. First, the strategy allows other information, apart from the attorney's work product, to be available to the plaintiff. Accordingly, a plaintiff will have difficulty making the necessary showings of "substantial need" and "undue hardship" required to obtain access to the attorney's work product. Second, this strategy, which permits the availability of other information, substantially reduces the likelihood that the attorney will be called as a fact witness on an important issue. As a result, the attorney will not be prohibited from representing the company in a later lawsuit.

Perhaps an even better approach, however, would have been to have both the industrial relations director (or other human resources personnel) and the in-house or outside counsel, participate in all interviews together. Counsel could take notes for the purpose of providing legal advice as to how to proceed with the investigation, make recommendations for settlement, etc. The industrial relations or human resources personnel could take notes that would be used to prepare the investigative report, all of which would be discoverable. Of course, the actual questions that were asked, even if asked by counsel and even if asked of management individuals, would not be privileged, but the counsel's notes of answers provided would and should be protected.

### **Conclusion**

The decision as to who should investigate a workplace complaint is, often times, critical to an employer's defense in an employment discrimination case. For this reason, the investigator should be familiar with the employer's policies and procedures regarding investigations, as well

as be familiar with federal and state anti-discrimination laws. Although an employer has many options for who may conduct the investigation, utilizing outside counsel is often advantageous for a variety of reasons. Particular care must be taken, however, to think through in advance how issues relating to the implications of the attorney-client privilege and the attorney work product doctrine will be applied both to the investigation itself and to the investigative materials.

