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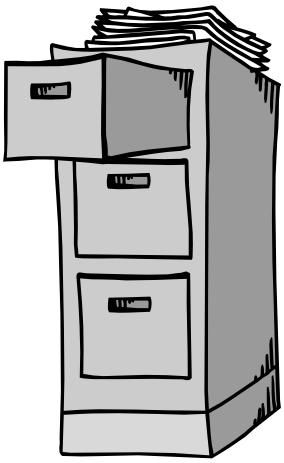

LET THE OTHER GUY DO THE WORK: What Parts of Litigation-Related Investigation Are Not Protected From Disclosure?

By Katherine Gallo and Christopher Cobey

"Request for Inspection No. 47: *All documents, reports, letters, correspondence, notes, computer files on any investigations into the incident which is the subject of this litigation*."

How many of us have received this document request? In fact you probably have a macro on your computer which spits out the following response:

"Objection: vague, ambiguous, overbroad, burdensome, invasive of the attorney-client privilege, protected by work product doctrine and not likely to lead to admissible evidence. No documents will be produced."

Don't think the fight is over once you give this response, because it isn't that simple. California case law has carved out exceptions to the general rule which protects from disclosure a party's documents regarding investigations the party has undertaken.

In a normal case, accident reports are usually not discoverable. Such reports are protected from disclosure in discovery by the attorney-client privilege where the "dominant purpose of the report is to defend against litigation arising out of the accident." *See Payless Drug Store v. Superior Court* (1976) 54 Cal.App.3d 988, 991; *Travelers Insurance Companies v. Superior Court* (1989) 208 Cal.App.3d 424, 427. It is immaterial that no lawsuit has yet been filed. It is enough that litigation is a "threat on the horizon". *Soltani-Rastegar v. Superior Court* (1989) 208 Cal.App.3d 424, 428. The rationale is that the party gathering the information is doing so to protect himself and possibly hand it over to his insurance company and/or his attorney and "[t]o hold otherwise might merely encourage insurance companies to bring in their attorneys at early stages in the claims handling and might discourage early settlement of claims." *Id*.

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However, when the investigation becomes an element of a cause of action or a defense to a cause of action, the documents sought are obviously relevant and discoverable. Two areas of law illustrate this principal -- first party bad faith insurance cases and employment litigation.

In first party insurance cases, an insurance company has a duty to properly investigate plaintiffs' claims. "[I]t is essential that an insurer fully inquire into all possible bases that might support the insured's claim...[A]n insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial" Crosky & Kaufman*, Insurance Litigation*, ' 12.866, citing *Egan v. Mutual of Omaha Insurance Co*. (1979) 24 Cal.3d 809, 819. Therefore, investigation up to the denial of the insurance claim is discoverable in insurance bad faith cases.

In employment cases, the First and Second District Courts of Appeal have recently expanded and clarified the standard for disclosure when a party claims in its defense that it had conducted an adequate investigation, but asserts that evidence concerning the investigation is protected from disclosure by either the attorney-client privilege or the work product doctrine.

In *Wellpoint Health Networks, Inc. v. Superior Court (McCombs)* (1997) 59 Cal.App.4th 110, the employer was faced with a claim of hostile environment sexual harassment by one of its employees. Before any suit was filed, the employer retained a law firm to conduct an investigation of the employee's claims. An attorney from the retained law firm conducted the investigation. After the employee filed her lawsuit, she sought discovery of documents concerning the pre-litigation investigation by the attorney who investigated on behalf of the employer.

Vacating the trial court's ruling, the court of appeal held that if the employer intended to assert as a defense that it conducted a prompt, thorough, and reasonable investigation of the employee's complaints when she raised them, such a defense would operate as an implied waiver of the attorney-client privilege and work product doctrine. "... [T]he employer's injection into the lawsuit of an issue concerning the adequacy of the investigation where the investigation was undertaken by an attorney or law firm must result in waiver of the attorney-client privilege and work product doctrine." *Id.,* 59 Cal.App.4th at 128.

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Wellpoint was clarified in the September 1998 case of *Kaiser Foundation Hospitals v. Superior Court* (1998) __ Cal.App.4th ___, 98 C.D.O.S. 7475, an appeal from the San Mateo Superior Court. In this case, the plaintiff sued Kaiser on theories of sex discrimination and sexual harassment. The facts in *Kaiser* case differed from *Wellpoint* in three significant particulars. First, in *Kaiser*, the investigation was performed by its in house human resources specialist not by a hired outside attorney. Second, the defense in *Kaiser* disclosed to the plaintiff more than 350 pages of documents from its investigation by the in house human resources specialist, withholding all or portions of only 38 pages of documents on the grounds of attorney client privilege or work product doctrine. Third, the plaintiff's and defense counsel entered into a written stipulation that Kaiser's production of the investigative file documents did not constitute a waiver of the attorney-client privilege or the work-product doctrine "as to any other communication with counsel relevant to this litigation." The stipulation was incorporated into a stipulated protective order. On these facts, the First District Court of Appeal found that Kaiser had not waived the protections of the privilege and the doctrine as to the documents not disclosed or redacted. The court went on to say that the investigation notes made by the in-house human resource specialist had been produced and it was only the communications with its counsel that Kaiser had not produced. It appears that the court in *Kaiser* is saying that as long as the attorney is wearing only his "attorney hat" and not the "investigator=s hat" then the protections remain intact. See Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 1998) & 8:217.2 (work product protection may not be available where attorney performs non-legal functions). If the lawyer performs functions that a non-attorney could perform, the investigation will in all likelihood not be shielded from disclosure upon demand.

Prior to initiating investigations, counsel should assess what the goals of the investigation are and whether the investigation and its associated documents may be disclosed in the future, either to further their client's case, or as required under applicable case law. In making this assessment, counsel should also take into consideration that if counsel personally undertakes the investigation, he may find himself in another dilemma--either assert the privileges, thus losing the defense of adequate investigation or disclose the results of the investigation. The latter choice entails the very real consequence that the attorney will almost certainly become a material witness in her or his client's lawsuit. (See Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 1998) & 1:151: "An attorney

may be required to decline or withdraw from representation where the attorney will be called as a witness (by either the client or the opposing party) if the case goes to a jury trial. The risk is that the attorney's credibility as a witness may become an issue, thereby impairing his or her effectiveness as an advocate.")

Like we said – it's not that simple.

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