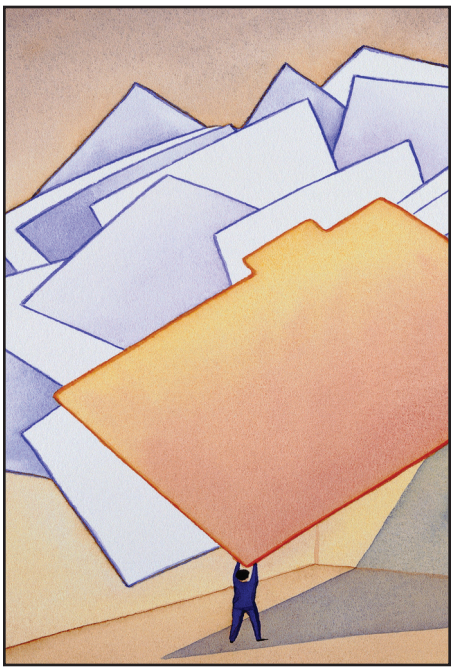

YOUR RAPID RESPONSE TEAM AND DISCOVERY

How to Avoid Producing Your Investigative Team and File

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Imagine a courtroom trial arising out of an intersection collision between a semi-trailer and a sedan. Whether the trucking company and its driver are at fault is hotly disputed.

The plaintiff's attorney presents to the jury "Exhibit A," an incident report created by the safety director of the trucking company just hours after the accident. The report states, "This accident was preventable because the driver should have been paying better attention to the road."

There is something wrong with this scenario. The trucking company's own safety director very well may have created a "smoking gun." Even if the trucking company had refused to disclose the incident report to opposing counsel, the court would have ordered it to do so if the report was created under the company's standard protocols for investigating accidents.

Yet, under certain circumstances, trucking companies can protect its investigative file from disclosure, preventing the courtroom scene described above. This article explores the protection offered by the Work Product Doctrine for investigations conducted when litigation is reasonably expected to arise out of the accident and the company initiates an investigation specifically because of the prospect of suit being filed at some point in the future. Numerous courts have protected the trucking company's investigative file, as well as testimony of the persons who conduct the investigation, when these circumstances are present. It is imperative that the trucking company have at least two separate protocols in place prior to an accident to ensure that its investigative file and investigators stay protected under the Work Product Doctrine.

THE WORK PRODUCT DOCTRINE

During the discovery phase of a lawsuit, the parties exchange information and documents. A party can withhold information or documents that are protected by a privilege, even if they are requested by the opposing party. One basis for withholding documents is the Work Product Doctrine, which protects materials collected or prepared in anticipation of litigation. One of the primary functions of the Work Product Doctrine is to prevent a current or potential adversary in litigation from gaining access to the fruits of an attorney's investigative and analytical effort, and strategies for developing and presenting the client's case. The Work Product Doctrine permits attorneys and their team to investigate the facts of a case and prepare for trial knowing that the file will not be disclosed to the other side. The team is permitted to fully and candidly assess the situation.

The key to receiving protection under the Work Product Doctrine is that the documents were prepared in anticipation of litigation. For the majority of courts, so long as the documents were prepared or obtained "because of" the prospect of litigation, the document is protected from discovery.[1] To meet this standard, the document must be created with the reasonable belief that litigation is a real possibility. Documents prepared in the ordinary course of business, including documents related to accident investigations, are not protected. Documents that would have been prepared in substantially the same manner irrespective of anticipated litigation are not protected. Even where litigation is imminent, there is no work product immunity for documents prepared in the "ordinary course of business" rather than for litigation purposes.

This distinction – anticipated litigation versus ordinary course of business – lies at the heart and soul of the Work Product Doctrine. If a court is not convinced that the document was specifically created with the subjective and reasonable belief that a lawsuit would be filed, the documents will not be protected.

CREATE A SPECIAL PROCESS OR PROTOCOL FOR MORE SERIOUS ACCIDENTS

In light of these principles, trucking companies should create specific investigative protocols to follow when litigation is expected. They must be separate and distinct from measures taken for all other accident investigations. By policy, a special team should be established and directed by an attorney to investigate the crash. The team can include an attorney, a private investigator, company employees and an accident reconstructionist to name a few. Following this special policy, the team undertakes an investigation of the accident with a specific focus on gathering information and documentation related to the defense of a future lawsuit. A separate, "Anticipation of Litigation File" is created to maintain the investigative notes, witness statements, reports from third-party experts, and other related materials.

Several courts have examined the special protocols created by transportation companies and have permitted the company to withhold its entire team's investigative file from production to opposing counsel based on the Work Product Doctrine. An examination of these cases reveals the key ingredients for an anticipated-litigation protocol to ensure its protection from disclosure.

First, the protocol must specifically identify the types of accidents that trigger the special protocols. Generally, only accidents involving death or serious bodily injury, such as a danger of paralysis or a severe head injury, should trigger the special measures.[2] This is because litigation often ensues under these circumstances, regardless of liability.

Certainly, if "special protocols" were followed for each and every trucking accident or incident, the court would likely see the investigation for what it really is: an investigation performed in the ordinary course of business. The investigative files that courts have shown a willingness to protect are for only a small subset of accidents that a trucking company investigates. Yet, these are the larger and more serious accidents, ones in which litigation is likely to, and often does, ensue. By invoking the special protocols for only the more serious accidents, courts are more likely to protect the resulting investigative file.

Another key ingredient for protection of the team's investigative file is the involve-

ment of outside counsel. Where outside counsel is retained within hours after an accident to direct the investigation and provide legal advice regarding the accident, courts will likely protect the team's investigative file.[3] This is because trucking companies generally do not hire outside counsel to participate in the investigation of a routine accident. By hiring outside counsel to direct the team's investigation, the company acts in a way that is markedly different than during an ordinary-course-of-business investigation.[4] Moreover, it acts as a signal that a lawsuit requiring defense by outside counsel is expected at some point in the future.

Note that it is not enough that outside counsel be *retained*. Rather, outside counsel must *direct* all aspects of the investigation. In one case, the company retained defense counsel as soon as the seriousness of the accident had became known. However, the counsel did not direct the company's claims representative to perform his accident investigation and the representative performed the same investigation that it normally performed for accidents. The court ordered the company to produce to opposing counsel the investigative file prepared by the claims representative, finding that it was not protected by the Work Product Doctrine.[5]

This is a cautionary tale that reinforces the lesson that the trucking company must be able to demonstrate that it took separate and distinct measures in investigating an accident that it believed would eventually lead to a lawsuit. A trucking company seeking to protect its investigation must ensure that its outside counsel is overseeing and coordinating all aspects of the investigation. Because the Work Product Doctrine protects an *attorney's* mental impressions and strategies, the work performed by the investigative team must be at the attorney's behest.

There is an extraordinary advantage to having outside counsel direct the investigation as well. When outside counsel hires the third party experts and investigators, and they report directly to outside counsel rather than to the company, the entire team's investigative file will likely be protected.[6] With outside counsel at the helm, courts can plainly see that such an investigation is independent of any routine investigation ordinarily conducted by the company and that a file is being assembled with the expectation that a lawsuit will be forthcoming.

Another important element in protecting the investigative file is the assembly of a special investigative team. If an anticipated-litigation investigation is carried out by the same people that perform all other accident investigations, the court may not consider the investigation worthy of protection. However, if a *different* group of people carries out the different set of protocols, a court is more likely to find that litigation was anticipated. Again, the more distinct and separate the two protocols, the better. Commissioning a different team to perform anticipation-of-litigation investigations is simply another way a trucking company can further distinguish these investigations from routine investigations so that the resulting file may be protected from discovery to the opposing party.

PROTECTING THE INVESTIGATORS FROM TESTIFYING ABOUT THE INVESTIGATION

If the plaintiff learns of the legal investigation and/or requests a copy of that file during the discovery phase of a lawsuit, he or she will probably also request the deposition of the persons on the team. The reasoning is that, if the plaintiff cannot obtain the investigative file, he or she hopes to at least discuss the investigation with the people who conducted it. Some plaintiffs will argue that, because the Work Product Doctrine only protects "documents and tangible things," it does not protect deposition testimony. This is inaccurate.

It is true that an investigator cannot withhold the facts that he or she has learned, the persons from whom he or she has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may be protected from discovery. However, the Work Product Doctrine does apply to testimony concerning the company's strategies and legal theories, as well as the subjective evaluations of the investigator.[7] If the company anticipated litigation at the time it conducted the investigation, and the investigation occurred because of anticipated litigation, the opposing party cannot depose team members and gain access to the fruits of the investigative and analytical effort to defend the expected lawsuit.

When trucking companies prepare and implement special protocols for serious accidents that are separate and distinct from investigations of routine accidents, the entire team will be protected. The company can withhold the investigative file from discovery to opposing counsel and can refuse to permit its investigators from testifying under oath regarding the investigation. The plaintiff will have to find another "Exhibit A."

1 *See e.g. United States v. Adlman (Adlman II)*, 134 F.3d 1194, 1202 (2d Cir. 1998); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *U.S. v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983); *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002); *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 908 (9th Cir.); *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).

2 *See Gruenbaum v. Werner Enterprises, Inc.*, 270 F.R.D. 298, 305 (S.D. Ohio 2010) ("the Court finds that Werner had a subjective fear of litigation because of, *inter alia*, the serious nature of this particular collision, including decedent' death and in-house counsel's invocation of the extraordinary CAT Loss protocol."); *Lagace v. New England Cent. Railroad*, 2007 WL 2889465 at *3 (D. Conn Sept. 28., 2007) (court concludes that the defendant anticipated litigation immediately in this case in part because the plaintiff was seriously injured).

3 *Laney ex rel. Laney v. Schneider Nat. Carriers, Inc.*, 259 F.R.D. 562, 567 (N.D. Okla. 2009); *Carnes v. Crete Carrier Corp.*, 244 F.R.D. 694, 698 (N.D. Ga. 2007); *Lagace*, 2007 WL 2889465 at *3 (litigation was anticipated in part because "counsel was retained immediately").

4 *Laney*, 259 F.R.D. at 567 ("Schneider does not ordinarily retain outside counsel to investigate collisions involving its trucks and drivers, and Schneider's counsel in this matter has been retained only a few times in the last several years.").

5 *Skrovig v. BNSF Ry. Co.*, 2011 WL 2263789 at *4 (D.S.D. Jun. 7, 2011); *see also Fulmore v. Howell*, 189 N.C.App. 93, 102 (N.C.App. 2008) (where company hired outside counsel in anticipation of litigation, but investigation had already been initiated by company safety director, the investigative file not protected by the Work Product Doctrine).

6 *Laney*, 259 F.R.D. at 567 (court protects the team's investigative file in part because "Schneider did not direct the investigation that is at issue here and was not involved in that investigation").

7 *Gruenbaum*, 270 F.R.D. at 305; *Carnes*, 244 F.R.D. at 699; *Basinger v. Glacier Carriers, Inc.*, 107 F.R.D. 771, 775 (M.D. Penn. Oct. 22, 1985).

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