Litigation Alert

NEW CHALLENGES TO PROTECTING INVESTIGATIVE MATERIALS IN LARGE SCALE DISASTER LITIGATION

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In today's complex world, large-scale disasters are becoming more common-place. Whether it is a drilling rig disaster, or a nuclear power plant, large scale losses are on the rise. These large scale disasters present unique and complicated challenges for lawyers, particularly in the investigative phase prior to litigation, and then in the discovery stage after litigation has been filed.

After disasters of the types mentioned, it is not uncommon for a formal request for an "exhaustive" internal investigation to be completed to collect evidence related to the incident, and to prepare a report of investigative findings, including causes and future recommendations.

Ensuing litigation is increasingly headed toward a battle over the discoverability of investigative communications. Industry typically views these communications as privileged and the law has been somewhat settled for a number of years. However, if, as some believe, the plaintiff's bar will seek disclosure of communications related to the initiation and conduct of post-accident investigations, the corporate defendants may have an opportunity to shape the discussion before the courts in a way that provides some additional, and appropriate, protections. In addition, it may be appropriate to address the concerns of the business community through legislation.

Historically, business has used work product and the attorney client communications privileges to protect underlying communications of this nature from disclosure. There is a well-established body of law that governs these privileges.

For example, in Texas, the work product privilege protects from discovery: 1) material prepared or mental impressions developed in anticipation of litigation or trial by or for a party or a party's representatives; and 2) communications made in anticipation of litigation or for trial between a party and a party's representatives. See Tex. R. Civ. P. 192.5(a).[1] The "anticipation of litigation" test is satisfied “whenever the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation” and “if the party invoking the privilege believes in good faith that there is a substantial chance that litigation will ensue.”[2]

The rule identifies two types of work product: core work product and non-core work product. Core work product is the work product of an attorney or an attorney's representative that contains the attorney's or attorney's

representative mental impressions. Generally, core work product is not discoverable. See, e.g., Tex. R. Civ. P. 192.5(b)(1). Non-core work product is discoverable upon a showing of substantial need and that the party is unable to obtain a substantial equivalent without undue hardship. See, e.g., Tex. R. Civ. P. 192(b)(2).

The attorney-client privilege permits a client to refuse to disclose and to prevent others from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. See Tex. R. Evid. 503(b)(1). In order for the attorney-client privilege to apply the purpose of the communication must be for the rendition of legal services not for merely business advice.[3] For example, communications regarding individual case reserves would likely be considered related to legal services, and thus, privileged. While communications regarding aggregate case reserves would not be protected from discovery because it is more like business advice than legal services.[4]

It has been accordingly important to distinguish, and to organize the ability to prove the difference, between communications related to anticipated litigation and that related to advice in the ordinary course of business. Some suggestions for doing this include:

- § develop and prepare confidentiality notations for use in documents to be protected;
- § commission a confidential and privileged legal review of the investigative processes and reporting formats;
- § institute single-point attorney oversight for investigative processes, to determine where the work product and attorney-client privileges might be applied and try to develop a method for segregating and identifying that work in advance, in case of discovery battles;
- § develop a comprehensive, organic set of discovery objections for use in potentially encroaching discovery, with the oversight attorney reviewing and making final recommendations or decisions on answers, to ensure uniformity; and
- § provide basic in-person classroom training for the managers involved in investigative processes.

At the end of the day, the criteria for determining whether protections should apply are fairly clear and the ultimate decision is fact-specific.

In preparing for onslaughts like the ones discussed herein a helpful strategy may include using directives from chief executives to general counsel to suspend ordinary investigation processes in favor of "special investigations" in order to add a layer of protection to the inquiry in case of catastrophic events. This may be helpful but it opens up the question of whether the courts will view this as an ordinary process instituted for certain extraordinary circumstances.

For guidance in what is likely to occur, we examined the self-critical privilege, which may provide a defense to discovery when the information sought is confidential self-analysis and self-criticism.[5] However, the application of the self-critical privilege has been limited and “[c]ourts have been reluctant to apply the privilege and it is only applied in extraordinary circumstances.”[6] The courts have evaluated the chilling effect that disclosure of investigative information is likely to have on companies' efforts to investigate and remediate operational problems and historically have decided that the importance of disclosure outweighs the potential for deterring the investigative process; the courts take the position that companies have other reasons to continue investigating and remediating their operational deficiencies even if the process is subject to discovery.

However, all of the federal circuits and all states have not developed their own stare decisis on this topic and it may be beneficial to bring the issue before additional courts for decision under the right circumstances. One

situation in which it may be appropriate to develop this area of law is where a potentially serious accident results in minimal damage. Policy considerations would seem to encourage a full self-critical analysis of such an event without the fear of public disclosure. Another situation is where the entity is subject to self-reporting obligations under various federal statutes or regulations.

It also may be beneficial to engage in discussion at the legislative level to craft some relief for organizations that face the fearsome problem of how to investigate internally without facing years of protracted litigation because an operations employee uses terminology that can be twisted or taken out of context by an enterprising plaintiff attorney.

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[2] National Tank Co. v. Brotherton, 851 S.W.2d 193, 204-07 (Tex.1993).

[3] See e.g., In Re Pfizer, No. 90 Civ. 1260 (SS), 1993 U.S. Dist. LEXIS 18215 (S.D.N.Y., Dec. 23, 1993)

[4] Id. at *17 – 18.

[5] See Wealton v. Werner Enterprises, Inc., Civil Action No. 99C-02-246-JOH, 2000 Del. Super. LEXIS 385 (Del. Super. Ct, Nov. 2, 2000).

[6] Id. at *3