PRESERVING EVIDENCE OF DISASTER

by Joe Teig

INTRODUCTION

The loss of crucial evidence may be devastating to a party's case in litigation or settlement. One survey has concluded that 50% of all litigators found spoliation to be a frequent or regular problem.[1] There has been a recent trend in the courts of punishing spoliators in a strict and unforgiving manner.[2] Such punishment comes in the form of unfavorable jury instructions or exclusion of expert testimony, or more severe sanctions such as a dismissal of a case, monetary fines or allowing a separate cause of action for spoliation of evidence.

The retention of an attorney early in the process of investigating an accident will help a company to avoid sanctions for spoliation of evidence. The attorney-client privilege helps to protect investigative files from disclosure and potential spoliation. Further, there are steps that a company can take following an accident to ensure the preservation of material evidence for future litigation and thereby avoid court sanctions.

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[1] Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793 (1991).

[2] Bart S. Wilhoit, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631 (Dec. 1998); Michael Hoenig, *The 'Spoliator Beware' Trend Continues*, THE NEW YORK LAW JOURNAL, April 14, 1997, at 3.

DISCUSSION

Law of Spoliation

The first 24 hours after a serious accident or emergency greatly influence the final resolution of legal claims which often follow. When evidence is lost or destroyed, a court can instruct the jury that it may infer that the lost evidence was damaging to the party who had control of it. A court may also impose substantial sanctions for the inadvertent destruction of evidence.

A recent New York case is demonstrative of the risks associated with spoliation of evidence in accident cases.[3] In the *Conderman* case, an ice storm caused an electric pole to fall on a road, crashing into a woman's car and causing near-fatal injuries. The plaintiffs alleged that the wood in the poles had become defective and that the defendants were negligent in allowing that to occur. However, the plaintiffs were unable to use the poles as evidence to support their claim because the defendant electric and telephone companies had disposed of the poles within 24 hours of the accident. The court found that because of the emergency situation and the need to clear the road and restore electricity, the destruction of the poles was not intentional.[4] However, since those at the scene were experienced professionals, they should have been aware of the likelihood of possible litigation.[5] Nonetheless, the "risk management team" took no steps to preserve material evidence. Therefore, the court allowed the plaintiffs a *res ipsa loquitor* presumption of negligence jury instruction at trial.[6] This means that the jury was allowed to presume that, absent proof to the contrary, the accident occurrence itself was evidence of negligence.

Spoliation Defined. Spoliation can occur when evidence is moved or inadvertently removed from the scene. Spoliation can also occur if evidence is improperly preserved. Black's Law Dictionary defines "spoliation" as: "[t]he destruction of evidence . . . . The destruction, or the significant and meaningful alteration of a document or instrument."[7] The various courts define spoliation much more broadly, often holding that simply being unable to provide necessary information in a case is enough to cast doubt on that party's credibility.

Preservation Duty. There are three key reasons for preventing spoliation: enhancing truth determination, assuring fairness, and promoting the integrity of the judicial system.[8] Furthermore, courts generally recognize that a party to litigation has a duty to

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[3] *Conderman v. Rochester Gas & Elec. Corp.*, 687 N.Y.S.2d 213 (Sup. Ct. 1998).

[4] *Id.* at 217.

[5] *Id.*

[6] *Id.*

[7] BLACK'S LAW DICTIONARY 1257 (5th ed. 1979).

[8] David P. Leonard, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 2.7 (Supp. 1999).

prepare evidence that is relevant to the case at issue.[9] In fact, even before a lawsuit is filed, a party has a duty to keep evidence that foreseeably may become relevant. In the case of an environmental incident, the available physical remnants of the incident (e.g., the pieces of the pipe that blew) are the most logical forms of evidence that need to be properly recorded and preserved, much like a homicide investigator takes care to preserve the evidence at a crime scene.

What may be less obvious is that electronically-stored information, such as computer programs, e-mail and voice mail, is generally discoverable evidence, and as such, it is subject to the duty to preserve.[10] In fact, the advisory committee note to Federal Rule of Civil Procedure 34 (the rule concerning requests for production of documents) confirms that "documents" include information stored electronically. Thus, in an age where the use of computerized systems is widespread, a company is not safe by merely searching the "visible" physical evidence at the scene of an environmental (or other) incident. Care must also be exercised to ensure that all data systems (computer faxes, communications, and the like) with potentially relevant information be maintained. If, for example, e-mails or computer files are routinely deleted on a weekly or monthly basis, the potential defendant may need to consider whether to disable the auto-delete function for some period of time.

Consequences of Failing to Properly Preserve Evidence.

1. Inference that Evidence Would Have Been Unfavorable.

Generally, intentional spoliation with knowledge that the spoliation will destroy material evidence or access to material evidence raises an inference or rebuttable presumption that the evidence would have been unfavorable.[11] The following is an example of a jury instruction that might be given by a court where a party has failed to properly preserve evidence following a natural gas system disaster:

> If a party in this case has failed to offer evidence within his power to produce, **you may infer that the evidence would be adverse to that party** if you believe each of the following elements: (1) The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence; (2) the evidence was not equally available to an adverse party; and (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence.

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[9] *See Baliotis v. McNeil*, 870 F. Supp. 1285, 1290 (M.D.Pa. 1994), *Fire Ins. Exch. v. Zenith Radio Corp.*, 747 P.2d 911, 914 (Nev. 1987).

[10] *See, e.g., National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257 (E.D. Pa. 1980).

[11] *Equitable Trust Co. v. Gallagher*, 77 A.2d 548 (Del. 1950); *Maszczenski v. Myers*, 129 A.2d 109 (Md. 1957); *Trupiano v. Cully*, 84 N.W.2d 747 (Mich. 1957); *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. Ct. App. 1993).

However, a spoliation instruction may not be justified in the absence of evidence showing: (1) the harmful nature of the missing evidence, (2) the absence of other evidence that was cumulative of such proof, and (3) the culpability of the defendants regarding the loss of such data.[12]

2. Other Sanctions.

Courts have a great amount of discretion in fashioning a penalty suitable to the "crime" of spoliation.[13] Monetary sanctions are common, including assessment of attorneys' fees and costs for additional expert analysis. Courts may also enter sanctions in more harsh forms, including striking testimony, defenses, and even entry of judgment against the offending party. For example, experts who have removed or altered evidence may be precluded from testifying as to their observations of, or opinions about, the evidence before it was altered.[14] Also, under the Federal Rules of Evidence, secondary evidence may be excluded where a proponent's bad faith causes an original to be lost or destroyed.[15] Courts may even dismiss a case where a plaintiff fails to preserve evidence.[16]

Courts may even instruct a jury to consider the offending conduct in its deliberations of whether punitive damages are warranted, and how much they should be. Finally, courts have been known to find the party in contempt, which is a criminal charge. Needless to say, spoliation of evidence is a serious matter.

3. Spoliation as a Separate Cause of Action.

In some cases, spoliation of evidence may be viewed as tortious conduct.[17] This occurs primarily when the defendant's conduct has been intentional.[18] However, some

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[12] *Brewer*, 862 S.W.2d at 159-60. Some courts have required bad faith rather than merely negligent behavior for justifying an unfavorable jury instruction. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Nation-Wide Check Corp. v. Forest Hills Distrib., Inc.*, 692 F.2d 214 (1st Cir. 1982). However, other courts have held that bad faith is not necessary for such a jury instruction. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993).

[13] *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988).

[14] *Nally v. Volkswagon of Am., Inc.*, 539 N.E.2d 1017 (Mass. 1989).

[15] FED. R. EVID. 1004(1); *see also Consolidated Coke Co. v. Comm'r*, 25 B.T.A. 345, 358 (1932), *aff'd*, 70 F.2d 446, 448 (3rd Cir. 1934).

[16] *But see Austal-Pac. Fertilizers, Ltd., v. Cooper Indus., Inc.*, Nos. 95-4255/95-4287, 1997 U.S. App. LEXIS 5383.

[17] *David P. Leonard, supra* note 9; s*ee generally,* Terry R. Spencer, *Do Not Fold, Spindle, or Mutilate: The Trend Toward Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37 (1993-1994).

[18] *See* Williams v. California, 664 P.2d 137 (Cal. 1983).

courts have also recognized spoliation as a tort for merely negligent behavior.[19] The policy rationale for recognizing spoliation as a separate tort is to prohibit spoliators from benefiting from their failure to preserve evidence.[20]

California was the first state to explicitly recognize spoliation as an independent tort in *Smith v. Superior Court.*[21] In *Smith*, the plaintiff was injured when the wheel of an oncoming truck became disengaged. After the accident, the truck was towed to a dealer who had previously customized the truck's wheels. The dealer disposed of the wheel, knowing that it was evidence that was material to the plaintiff's case.[22] The court found that spoliation of evidence causing the loss of opportunity of winning a law suit was analogous to the tort of intentional interference with prospective business advantage and held that the plaintiff had a cause of action under the new tort of spoliation.[23]

Generally, the elements of the intentional tort of spoliation are: 1) pending or probable litigation involving plaintiff, 2) knowledge by the defendant that litigation exists or is probable, 3) willful destruction of evidence by the defendant designed to disrupt the plaintiff's case, 4) actual disruption of plaintiff's case, and 5) damages proximately caused by defendant's acts.[24] A number of states have recognized the intentional tort of spoliation, including Florida,[25] Alaska,[26] New Jersey,[27] Ohio,[28] Mississippi,[29] Michigan[30] and Oklahoma.[31]

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[19] *See Velasco v. Commercial Bldg. Maintenance Co.*, 169 Cal. App. 3d 874 (1985).

[20] *Spencer*, *supra* note 18 at 54.

[21] 151 Cal. App. 3d 491 (1984).

[22] *Id.* at 494.

[23] *Id.* at 502.

[24] *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); *see also* Smith, 151 Cal. App. 3d at 502 (but overruled by *Cedars-Sinai Med. Ctr. v. Super. Ct. of Los Angeles County*, 954 P.2d 511, 521 (Cal. 1998)).

[25] *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. Dist. Ct. App. 1984), *review denied*, 484 So. 2d 7 (Fla. 1986).

[26] *Hazen v. Municipality of Anchorage,* 718 P.2d 456 (Alaska 1986).

[27] *Viviano v. CBS, Inc.*, 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 606 A.2d 375 (N.J. 1992).

[28] *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993).

[29] *DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818 (Miss. 1992).

[30] *Jackovich v. General Adjustment Bureau, Inc.*, 326 N.W.2d 458 (Mich. Ct. App. 1982).

[31] *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okla. 1979).

A claim for negligent spoliation requires similar elements except that knowledge of the litigation and willful destruction are not required.[32] Again, California was the first state to establish the tort of negligent spoliation in *Velasco v. Commercial Building Maintenance Co*[33]. In *Velasco,* bottle fragments held by an attorney as evidence in a suit for injuries sustained from bottle's exploding disappeared after the attorney's janitorial service cleaned his office. Relying on *Smith,* the court found that negligent spoliation was analogous to negligent interference with prospective economic advantage and recognized the negligent spoliation tort.[34] A handful of states now also recognize the negligent spoliation tort, including Illinois,[35] Kansas[36] and Florida.[37]

However, other states have explicitly rejected the tort, including Colorado,[38] Maryland,[39] New York,[40] Missouri,[41] Texas,[42] and the District of Columbia.[43] Reasons offered by courts for failing to recognize the tort include: 1) the tort cannot be recognized in the absence of a contractual or special relationship, 2) sanctions should be imposed in lieu of recognizing an independent tort of spoliation, 3) the uncertainty associated with damages precludes recognition of spoliation as a tort, and 4) spoliation should not be recognized when evidence is spoliated by a third party who was not a party to the action in which the evidence was used.[44]

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[32] The elements of negligent spoliation are: 1) existence of a potential civil action, 2) a legal duty to preserve material evidence, 3) destruction of the evidence, 4) significant impairment in the ability to prove the lawsuit, 5) a causal relationship between the destruction and the inability to prove the lawsuit, and 6) damages. *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990).

[33] 169 Cal. App. 3d 874 (1985).

[34] *Id.* at 877.

[35] *Rodgers v. St. Mary's Hosp. of Decatur,* 597 N.E.2d 616 (Ill. 1992), *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270 (Ill. 1995) (action for negligent spoliation can be stated under existing negligence law without creating a new tort).

[36] *Foster v. Lawrence Memorial Hosp.*, 809 F. Supp. 831, 834 (D. Kan. 1992).

[37] *Continental Ins. Co.*, 576 So. 2d at 315.

[38] *Moore v. United States,* 864 F. Supp. 163, 164 (D. Colo. 1994).

[39] *Miller v. Montgomery County*, 494 A.2d 761 (Md. Ct. Spec. App. 1985).

[40] *Phar v. Cortese*, 559 N.Y.S.2d 780, 781; *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774, 776 (Sup. Ct. 1993).

[41] *Baugher v. Gates Rubber Co., Inc.* 863 S.W.2d 905, 907 (Mo. Ct. App. 1993).

[42] *Trevino v. Genaro Ortega*, 969 S.W.2d 950, 952 (Tex. 1998).

[43] *Wilder-Mann v. United States*, No. 87-2392 SSH, 1993 U.S. Dist. LEXIS 9166 (D.D.C. June 27, 1993).

[44] *Spencer supra* note 18 at 56-60. *See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363 (9th Cir. 1992) (spoliation as a tort is only applied when a defendant

In *Cedars-Sinai Medical Center v. The Superior Court of Los Angeles County*, the California Supreme Court recently overruled *Smith* and held that there is no recognition in California of a tort of spoliation.[45] The court found that the available non-tort remedies for spoliation were extensive and effective.[46] The court also discussed the uncertainty of harm in spoliation cases in concluding that spoliation does not give rise to an independent tort.[47]

Despite the lack of unanimity among the states, there is generally a trend toward recognizing spoliation of evidence as a separate tort.[48] One commentator has even identified the viability of four potential torts associated with spoliation: 1) intentional spoliation by an adverse party, 2) intentional spoliation by a third party, 3) negligent spoliation by an adverse party and 4) negligent spoliation by a third party.[49]

Case Studies in Disaster.

The following case studies are designed to illustrate ways in which the failure to preserve critical evidence can result in disappointing and literally disastrous outcomes.

A. **Incident**: Wellhead blowout and fire, resulting in serious burn injuries.

Probable Cause: Defective wellhead equipment. Lockdown screws which secure the BOP stack are sheared off.

Query: Adequacy of metallurgical design of equipment with regard to shear resistance and brittleness.

Subsequent Events: Suspect portions of wellhead equipment sent to expert who cuts the evidence into pieces, loses sections which were not yet destroyed and cannot find his own test results. In an incredible act of self-preservation, HE MAKES UP THE RESULTS.

Consequences: Motion for sanctions, including judgment, against the manufacturer of the wellhead equipment and a significant chance of punitive damages award.

Result: Settlement three times expected settlement value.

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or a third party acting for him has spoliated evidence). *See also* Thomas J. Fischer, Annotation, *Intentional Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable,* 70 A.L.R. 4th 984, § 3(d), 3(e) and 4 (1990).

[45] 954 P.2d 511, 521 (Cal. 1998).

[46] *Id.*

[47] *Id.*

[48] *Wilhoit, supra,* note 3; Spencer, *supra,* note 18.

[49] *Wilhoit*, supra note 3.

B. **Incident**: Gas Plant Furnace Explosion - Employee fatality. Maintenance employee attempting to light the furnace pilot. Gas ignited causing explosion and death of employee.

Probable Cause: Malfunctioning auto-ignition system and valve operation.

Query: Were auto-ignition system and valves in good repair and functioning properly at the time of the incident?

Subsequent Events: Eight Sheriff's Department personnel, some on-duty, some not, sift through accident scene moving and displacing evidence, including key evidence.

Local management, anticipating OSHA visit, orders collection of documents which are subsequently "misplaced" and never found.

Consequences: The plaintiff's expert opinion that ignition system malfunctioned was indefensible. Plant operator had no way to prove the position of the valves or the proper operation of the ignition system. Also, records of inspection unavailable.

Result: Settlement twice expected value.

C. **Incident**: Contract employee repairing circuits in gas plant pipe rack falls 45 feet to his death. No eye witnesses.

Probable Cause: H_2S knockdown; lack of adequate tie-off locations/opportunities.

Query: Did H_2S leak occur? What caused the employee to fall?

Subsequent Events: Emergency response and ambulance personnel remove safety belt and H_2S detector from victim. Two years later, when lawsuit is filed by survivors, no witness has any recollection of removing the safety belt or H_2S detector, or where they might have been stored.

Consequences: No evidence to dispute the claim of an H_2S leak and knockdown as cause of fall.

Result: Substantial settlement of a claim that otherwise should have been dismissed. Had the gas producer been able to prove that no gas leak occurred, the contract and the facts confirmed that the deceased's employer, not the gas producer, was solely responsible for the safety of its employees.

Of course, spoliation works both ways:

> **Incident**: Explosion aboard a Bayliner boat when the bilge pump was started a half hour after fueling. The owner operator eventually died of his injuries, and his widow sued the manufacturer of the boat, Bayliner.
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> During the investigation of the cause of the accident, plaintiff hired an expert who, with the two sons of the widow, "virtually attacked the boat with a chain saw and sledge hammer. The area which was critical to the theory eventually presented by the expert was literally ripped apart. . . ."
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> **Consequences**: The expert's activity made it impossible for his own theory to be verified or for the defendants to make a full and fair inspection to develop alternative theories based on the evidence.
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> **Result**: Defendants were permitted to include an affirmative defense based on the spoilage of evidence. The district court allowed this issue to go to the jury which handed down a defense verdict. Affirmed on appeal.

Confidentiality Privileges.

Lawsuits arising out of environmental disasters or from incidents at natural gas facilities usually may be brought in either state or federal court and may be subject to state and/or federal law. The applicable law is important because federal and state law regarding confidentiality privileges may differ in important ways. In state court proceedings, state law will govern the applicability of the attorney-client and other privileges and the work product doctrine. In federal court proceedings, the federal common-law privilege rules will apply to the attorney-client privilege, unless state law supplies the rule of decision for an element of a claim or defense, in which case state privilege law will apply.[50] Where a lawsuit brought in federal court involves both state and federal claims, the court may look to federal privilege rules.[51] The work product doctrine, a procedural rule rather than an evidentiary rule, will always be subject to the federal rules in federal court.[52] Because each state may have variations in the application of United States privilege laws, only the federal privileges are discussed here.

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[50] FED. R. EVID. 501.

[51] *See Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458 (N.D. Cal. 1978) (holding that it would be meaningless to apply different privilege rules if one rule would protect confidentiality and the other would require disclosure).

[52] *See* FED. R. CIV. P. 26; *Hickman v. Taylor*, 329 U.S. 495, 509-10 n.7 (1947).

Attorney-Client Privilege under Federal Law. The attorney-client privilege protects from discovery confidential communications between a client and an attorney made to facilitate the rendition of legal services.[53] The essential elements of the privilege are:

1. a communication between a client and an attorney or his agent;

2. the client has retained, or is seeking to retain, an attorney to furnish legal advice;

3. the communication is made in confidence;

4. the communication is not made for the purpose of committing a crime or fraud; and

5. the privilege is not waived.

The privilege "belongs" to the client. Therefore, only the client, or the attorney acting as his agent, may waive the privilege.

With respect to corporate clients, an important question arises as to who constitutes the "client" for purposes of attorney-client confidences. In *Upjohn Company v. United States*,[54] the United States Supreme Court addressed this question in the context of the federal privilege. The Supreme Court held that the privilege extends to statements of lower-level corporate employees when given to the corporation's attorney at the behest of management. Thus, the Court did not limit the privilege to statements and communications made only by management. Instead, the Court reasoned that the attorney-client privilege protects the rendition of professional advice to those who can act on it and the communication of information to the lawyer that enables him to give sound and informed advice.

Since the privilege can be waived if disclosed to third parties, the *Upjohn* expansion of the definition of "client" to include others outside of management created complications for the modern workforce. The increasingly mobile nature of the corporate workforce and the common practice of corporations having overlapping board members create risks of breaching the confidentiality required to maintain the privilege.[55] However, courts have preserved the privilege in cases where adequate efforts were made by the company to preserve the confidentiality of the privileged information or where the secrecy was violated by no fault of the company.[56]

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[53] *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[54] 449 U.S. 383 (1981).

[55] Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 Duke L.J. 853, 876-77 (1998).

[56] *Crabb v. KFC Nat'l Management Co.*, 952 F.2d 403 (6th Cir. 1992), United States ex rel. *Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1246 (D. Md. 1995). *But see*

Since *Upjohn*, a number of courts have departed from the expanded view of "client," instead recognizing that the privilege only covers communications involving members of the corporate control group, defined as decision makers with the authority to obtain or to act on the advice received from counsel.[57] Other courts have adopted the "control group" test but have expanded its definition to include advisors who substantially influence corporate advisors.[58]

The individual to whom the confidential statement is made must be a member of the bar or his or her subordinate, such as a legal assistant or investigator employed by the attorney and acting on his or her behalf. In the corporate environment, the attorney-client privilege applies to both in-house counsel who provide legal assistance on a regular basis and to outside counsel specially retained for a given matter.[59]

There are three important limitations on attorney-client privilege: (1) The privilege can be waived if the communication is intentionally disclosed to someone outside of the privileged relationship;[60] (2) the attorney-client privilege protects only the communication and not the underlying facts that the client may communicate to the attorney; this allows opposing counsel to potentially discover the underlying facts; and (3) such communications

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Radiant Burners, Inc. v. American Gas Ass'n, 207 F.Supp. 771, 775 (N.D.Ill. 1962), *revd on other grounds* (CA7) 320 F.2d 314 (7th Cir. 1963), *cert denied*, 375 U.S. 929, 84 S. Ct. 330 (1963) (privilege denied to corporation communicating matters to board members sitting simultaneously on the board of more than one corporation).

[57] *Leer v. Chicago*, M., S.P. & P.R. Co., 308 N.W.2d 305 (Minn. 1981), *cert. denied*, 455 U.S. 939, 71, 102 S. Ct. 1430 (1982); *Nat'l Tank Co. v. Brotheron*, 851 S.W.2d 193 (Tex. 1993); *Cigna Corp. v. Spears*, 838 S.W.2d 561 (Tex. App. 1992)

[58] *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1992); *CNR Invest., Inc. v. Jefferson Trust & Sav. Bank*, 451 N.E.2d 580 (Ill. App. Ct. 1983); *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515 (N.D. Ill. 1990); *Dietz v. United States*, 989 F.2d 502 (N.D. Ill. 1992); *Favala v. Cumberland Eng'g Co.*, 17 F.3d 987 (7th Cir. 1994).

[59] *See Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).

[60] Therefore, it is important that a company maintain the initial confidentiality. *See Scott Paper Co. v. United States*, 943 F. Supp. 489, 499-500 (E.D. Pa 1996). However, if the disclosure results from an involuntarily compelled disclosure, for example, the response to an erroneous court order, the privilege is not waived. *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986). *But see Olson v. United States*, 872 F.2d 820, 823 (8th Cir. 1989) (disclosure of documents without objection waives the privilege). If the disclosure is voluntary but inadvertent, the court will review the totality of the circumstances to determine whether the disclosure was sufficiently inadvertent to be inconsistent with waiver. *See, e.g., United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987), *aff'd in part, vacated in part*, 491 U.S. 554 (1989). In the corporate context, even though *Upjohn* extended the privilege to certain statements made by lower echelon employees, many courts hold that only members of the control group can waive the privilege. *See supra* notes 58 and 59 and accompanying text.

are generally not privileged unless the investigation forms a basis for the attorney's legal advice to the corporation.[61]

Work Product Doctrine Under Federal Law. The United States Supreme Court created the work product doctrine in *Hickman* to protect interviews, memoranda, briefs and other materials prepared by attorneys "with an eye toward litigation."[62] The Federal Rules of Civil Procedure later codified the *Hickman* work product rule in Rule 26(b), which provides as follows:

> Subject to the provisions of subdivision (b)(4) of this rule, 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 or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) 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 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.[63]

The work product doctrine provides protection separate and apart from the attorney-client privilege.[64] Therefore, even though information may not be privileged under the attorney-client privilege, it may be exempt under the work product doctrine.[65] Also, since the work product privilege is the privilege of the attorney and not of the client, the fact that

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[61] *In re Grand Jury Subpoena* dated Dec. 19, 1978, 599 F.2d 504, 510-11 (2d Cir. 1979). In the *Grand Jury Subpoena* case, the court held that the privilege did not cover documents management had created during an investigation because the investigation was merely an internal investigation. General counsel's involvement did not cloak the documents with the privilege. Nevertheless, when the company later retained outside counsel to investigate further and to advise the company based on the investigation, the court found that the communications with outside counsel were privileged.

[62] *Hickman*, 329 U.S. at 511.

[63] FED. R. CIV. P. 26(b).

[64] *Re Scranton Corp.*, 37 F.R.D. 465 (DC Pa 1965); *Robbins v. Iowa-Illinois Gas & Elec. Co.*, 160 N.W.2d 847 (Iowa 1968).

[65] *Riddle Spring Realty Co. v. State*, 220 A.2d 751 (N.H. 1966).

the client is a corporation does not affects the claim of an attorney to his work product privilege.[66]

Unlike the attorney-client privilege, the work product doctrine's protection is not absolute. The work product doctrine distinguishes between ordinary work product and opinion or "core" work product.[67] Ordinary work product includes factual recitations prepared by an attorney. Ordinary work product is discoverable upon a showing that the party seeking the work product has a substantial need for the materials in preparing its case and is unable to obtain the substantial equivalent of the evidence by other means without undue hardship.[68]

Opinion or core work product encompasses an attorney's mental impressions, conclusions, opinions, and legal theories. Opinion work product is discoverable, if at all, only upon a much higher showing.[69] Because disclosing such opinion information would stifle effective legal assistance, both federal common law, under *Hickman*, and Federal Rule of Civil Procedure 26 prohibit discovery of materials containing the mental impressions, opinions, conclusions, and theories of an opponent's attorney.

The work product doctrine protects only materials prepared "in anticipation of litigation."[70] To determine if the party claiming the privilege anticipated litigation in preparing the materials, federal courts examine the circumstances surrounding their preparation. In general, materials prepared for situations where an adversarial relationship exists, or is reasonably likely to exist, will fall within the doctrine's protection. Thus, for the purpose of applying the "in anticipation of litigation" standard, the federal courts define "litigation" as a proceeding in a court or administrative tribunal in which the parties have a right to cross-examine witnesses or subject an opposing party's proof to an equivalent presentation.[71]

The *Upjohn* decision exemplifies this broad interpretation of the "in anticipation of litigation" requirement. The Court applied the work product privilege even though no proceedings were threatened when the materials were prepared. The Court's approach suggests that the federal work product doctrine should protect materials generated during a company's investigation of possible wrongdoing if the company could realistically have

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[66] *Radiant Burners, Inc. v. American Gas Assoc.*, 207 F. Supp 771 (N.D.Ill. 1962), *rev'd on other grounds* (CA7) 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929, 84 S. Ct. 330 (1963).

[67] *See* FED. R. CIV. P. 26(b)(3); *Hickman*, 329 U.S. at 511-13.

[68] *See* FED. R. CIV. P. 26(b)(3).

[69] *See Upjohn*, 449 U.S. at 399-401, *Hickman*, 329 U.S. at 512-13.

[70] *See* FED. R. CIV. P. 26; *Hickman*, 329 U.S. at 511.

[71] *See, e.g., Kent Corp. v. N.L.R.B.*, 530 F.2d 612, 615 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976).

expected litigation to ensure.[72] Following *Upjohn*, however, the courts of appeals have interpreted this requirement in various ways.[73] Nonetheless, if the materials are prepared in connection with some matter that is not adversarial in nature, a court may not protect them from disclosure. Thus, the work product doctrine may not extend to materials prepared "in the ordinary course of business" or for other reasons unrelated to the prospect of litigation. Accordingly, the work product doctrine will not extend to an investigation conducted by in-house counsel who exercise both "legal" and "business" duties if the in-house counsel conducted the investigation for primarily business reasons.[74]

However, not all material prepared by an attorney for litigation constitutes "work product."[75] "Work product" consists of relevant information an attorney has assembled, his mental impressions, and legal theories, as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, personal beliefs, and other means.[76] The existence or location of information does not constitute "work product," rather only the contents of that information are protected under the privilege.[77] Knowledge gained by an attorney through an expert whom he has employed to investigate matters of a technical or scientific nature is covered by the work product privilege.[78] However, usually actual reports by experts are not sheltered from discovery.[79]

The Role of the Attorney-Client Privilege and Work Product Doctrine in Dealing with Administrative Agencies.

A company that has experienced an accident must confront the prospects of an administrative investigation and proceeding, as well as private litigation. Federal agencies,

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[72] *See In re International Sys. & Controls Group SEC Litig.*, 693 F.2d 1235, 1239 n.4 (5th Cir. 1982).

[73] *See, e.g., In re Special Sept. 1978 Grand Jury*, 640 F.2d 49, 61-62 (7th Cir. 1980) (considering whether litigation was imminent); *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981) (examining the party's motivation in creating the materials at issue), *cert. denied*, 454 U.S. 862 (1981).

[74] Richard H. Porter, *Voluntary Disclosures to Federal Agencies—Their Impact on the Ability of Corporations to Protect from Discovery Materials Developed During the Course of Internal Investigations,* 39 CATH. U.L. REV. 1007, 1013 (1990).

[75] *Zimmerman v. Supererior Court of Maricopa*, 402 P.2d 212 (Ariz. 1965); *Robbins v. Iowa-Illinois Gas & Elec. Co.*, 160 N.W.2d 847 (1968, Iowa).

[76] *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 150 N.W.2d 387 (Wis. 1967).

[77] *McCall v. Overseas Tankship Corp.*, 16 F.R.D. 467 (D.N.Y. 1954); *Smith v. Ins. Co. of N. Am.*, 30 F.R.D 534 (D. Tenn. 1962); *Butler v. United States*, 226 F. Supp 341 (D. Mo. 1964).

[78] *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55 (D. Ohio 1953).

[79] *Security Industries, Inc. v. Fickus*, 439 P2.d 172 (Alaska 1968); *State ex rel. State Highway Com. v. Steinkraus*, P2.d 431 (N.M. 1966).

such as OSHA, the EPA, the Department of Transportation, and the National Transportation Safety Board, have authority to bring a civil action against a company after an accident. Thus, the rules of privilege in the administrative context should also guide counsel in conducting post-accident investigations.

Federal administrative agencies have broad investigative powers.[80] To gather information, agencies can require reports to be made, make inspections, conduct field studies, hold informal hearings, utilize compulsory process, and order persons to appear, give testimony, and produce documents.[81] Structuring a post-accident investigation in accordance with privilege rules maximizes the protection afforded by the privileges. Counsel should consider whether to make a voluntary disclosure to an agency to avoid or limit any administrative investigation.[82]

Moreover, administrative tribunals, like federal and state courts, have the power to enforce their orders. For example, if a party refuses to produce subpoenaed documents or to testify regarding certain matters, the agency can bring a contempt action in federal district court even if the party asserts that the materials or testimony are privileged.[83] Rather than risking contempt penalties, the party asserting a privilege should appeal the tribunal's order. Note that disclosing privileged materials in response to an erroneous court order will not waive the privilege.[84]

The Federal Rules of Evidence and the Federal Rules of Civil Procedure that govern the attorney-client privilege and the work product doctrine in federal court may not apply in administrative proceedings. Instead, each agency has its own body of rules governing methods of inquiry and procedure.[85] Fortunately, despite their broad investigative powers, agencies respect most privileges recognized by state and federal law in formulating their own rules.[86] For example, attorney work product is protected in the administrative setting.[87]

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[80] *See, e.g., United States v. Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977).

[81] Stein, Mitchell, Mezines, 4 Administrative Law § 23.02[1] (1994).

[82] *See Porter*, *supra*, at 1018-32 (discussing the advantages and disadvantages of making voluntary disclosures to administrative agencies).

[83] *See generally*, 3 Stein, Mitchell & Mezines § 20.

[84] *See Hollins*, 773 F.2d at 196.

[85] *See F.C.C. v. Schreiber*, 381 U.S. 279 (1968).

[86] *See Kenneth C. Davis*, 3 Administrative Law Treatise § 16.10 (1980).

[87] *See, e.g.*, Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252 (3d Cir. 1993) (holding that the work product doctrine will apply in an OSHA proceeding so long as the party claiming it can show the material was made in the unilateral belief that litigation would result and that such belief was objectively reasonable); Natta, 418 F.2d at 635 (considering administrative proceedings to be litigation).

Agencies themselves can also claim attorney-client and work product privileges.[88] Another protection afforded parties made to appear before an agency is the right to be "accompanied, represented, and advised by counsel. . . ."[89] With counsel present, disclosure of privileged materials is less likely to occur.

Protecting an Accident Investigation with the Confidentiality Privileges.

1. Retaining Outside Counsel. Retaining outside counsel can be a key component in conducting an internal investigation of the accident as well as in representing the company's interests in any ensuing regulatory investigations or litigation. Internal investigations conducted by the company's management may present several problems. First, management may be unable to appear sufficiently objective or independent in conducting the investigation so as to present a credible report on the accident's cause or appropriate remedial measures. Second, management often lacks sufficient legal expertise to appreciate all of the consequences of its findings. Finally, the various privileges discussed do not protect an investigative file compiled by management.

Therefore, the company should retain outside counsel promptly after an accident. First, the company should send outside counsel a retention letter stating that the company is hiring outside counsel to oversee and conduct an accident investigation to provide the company with legal advice.[90] This letter should also indicate that the company foresees litigation as a result of the accident (if litigation is foreseeable).[91] Senior officers of the corporation who are capable of making decisions on behalf of the corporation should specifically request counsel provide legal rather than business advice. The company should prepare a similar memorandum for its in-house counsel.

2. Conducting the Investigation. Once involved, outside counsel must have the primary responsibility for ensuring confidentiality and documenting the investigative process. Outside counsel should centralize the management of the investigation of the accident and any related regulatory investigation or litigation. An investigation team should be formed to oversee the internal investigation and to deal with regulatory agencies and third parties. If litigation ensues, a non-lawyer employee who is not connected with the accident should be appointed from the investigation team to interface with outside attorneys, for example, to deal with any requests for documents.

Ideally, outside counsel should direct all investigative work and all factual investigators, including insurers, private investigators, consultants, testifying experts, and in-house technical personnel. Investigators should report to outside counsel. When outside counsel communicates with the other team members, the written communications should state that the investigators are acting pursuant to the instructions of outside counsel. Such

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[88] *See, e.g., N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

[89] 5 U.S.C. § 555(b).

[90] *See* Porter, *supra*, at 1014-15, 1017.

[91] *See id.* at 1016.

information will help show that the investigators are acting as outside counsel's representatives for the purpose of the attorney-client privilege. Outside counsel should also require all non-attorneys assisting in the investigation to sign confidentiality agreements and instruct them and others involved in the investigation on the importance of confidentiality.[92] When outside counsel interview company employees, outside counsel should advise each person interviewed that the purpose of the investigation is to help the attorney render legal advice to the company's management.[93]

In directing the investigation, outside counsel should prevent the waiver of any privilege by limiting dissemination within the corporation. For example, outside counsel should receive the reports from non-lawyers directly and maintain investigative files apart from the general corporate files. Moreover, all documents generated that fall within these privileges should be labeled "Privileged and Confidential," "Material Prepared in Anticipation of Litigation: Attorney Work Product," or some other applicable heading. All memoranda or notes of interviews should list those present. Such labels are intended to demonstrate that the company anticipates litigation in conducting its investigation and is seeking to maintain confidentiality.

During the investigation, outside counsel should secure all information from the highest possible source. By obtaining information from the highest possible source, counsel better ensures attorney-client protection under both the more lenient *Upjohn* standard and the state rules that have adopted a "control group" test. Counsel should always be mindful of the potential differences between state and federal law. Whenever possible, counsel should conduct the investigation so as to satisfy the stricter standard.

Tips for Preserving Evidence

Security of the Accident Site. Site security is one of the first major challenges you will face following an incident. Not only must you worry about your own personnel and those responding to the emergency, but the amazing assortment of agency investigators, claims adjusters, union officials, "interested" parties and even souvenir hunters which will appear as if by magic. The "curious" will photograph, video and remove evidence. A bit of preplanning and the designation of a "manager" for both physical and documentary evidence is crucial and will help you avoid many of the common pitfalls.

- Secure all relevant areas from access, including locations which may contain documentary or physical evidence which is not in the immediate area of the incident. (Examples: roads leading to the accident site, record retention areas, control rooms, and employee lockers and offices).

[92] *See id.* at 1015, 1018.

[93] *See id.* at 1015.

- Arrange for 24-hour security by a law enforcement agency, private security company or neutral company personnel. Do not guard accident sites with individuals who may be familiar with, friends of, or related to anyone who has been hurt in the accident. Restrict access by all personnel pending the initiation of a formal investigation.

- If possible, block affected areas from outside view with tarps, fences, vehicles, etc.

- Take whatever steps are necessary to protect accident sites from weather or other external forces which could destroy evidence.

- Immediately advise all personnel on site to cease work, maintain radio silence, and report directly to immediate supervisors. Supervisors should send uninvolved employees home. Advise all employees that an "all-employee" meeting will be held within 24 hours.

Preservation and Collection of Physical Evidence. Immediately after the site is secured, it is imperative to assess the state of the physical evidence and determine the best manner in which to protect and preserve that evidence. This task can range from relatively simple to Herculean, depending on the nature of the accident.

- Prohibit any site access pending the arrival of regulatory agencies unless advance approval is obtained from the agencies to initiate a site investigation. Confirm their arrival.

- Record the original position and location of each and every piece of potential evidence in the secured area.

- Create a site map and plot plan showing the exact location, dimensions and measurements of all debris, evidence, information or other markers in the vicinity of the accident.

- Do not touch any materials or other evidence until permission to do so has been obtained from the appropriate regulatory agencies.

- Once the site map and plot plan have been completed and the site thoroughly photographed, tag each piece of evidence, secure the evidence in bags or other appropriate storage materials, and place the evidence under lock and key.

- Make an effort to specifically record all equipment or other materials which are moved by emergency response personnel during any medical emergency. Equipment moved during extraction, fire fighting, etc., should be carefully documented.

- If equipment or machinery must be repaired and put back into service, retain all parts removed and log, tag and secure with other physical evidence.

If the accident occurs on public property or that of a third party, your control over the evidence often depends entirely on the cooperation of the property owner. It is extremely important to establish the cooperation of the owner and proceed with site security, preservation of evidence and identification of witnesses to the extent the owner will allow. If the owner refuses to cooperate, document your efforts and the refusal.

Preservation of Documents. Location and preservation of documents as soon as possible after an incident or accident is critical, and careful management of this task will save both time and money during any investigation or subsequent legal proceedings.

- Take time to think of all possible documents which should be collected, including shift and process logs, instrument data, production reports, time cards, maintenance records, parts lists and specifications, process specifications and procedures, shift schedules, personnel and medical files, training and certification records, training policies and course materials, computer data, printouts, disks, design drawings, site maps, contracts, insurance policies, employee day-timers or calendars, piping and instrument drawings, process safety management plans and procedures, safety audits and HAZOPS, regulatory agency files and citation records.

- Send two people to gather the appropriate documents. Gather originals. Do not alter or change in any fashion the manner in which the originals were located, and immediately place them under lock and key. If records are needed for the continuation of business, make copies of originals for use, and return the originals to a secured site.

- Never alter, hide or destroy any documents following an accident. This includes removing or altering information contained on any storage medium such as computer hard drive, tapes, floppy disks or CD/DVD-ROMS.

- Never “catch up” on backlogged paperwork or otherwise attempt to round out the files after an accident. No matter

how innocently or accurately done, post-accident preparation of paperwork will be viewed by investigators or jurors as an attempt to manufacture evidence.

- Inform company personnel that they should not make any decisions concerning relevance or importance of any document. All documents which may relate in any way to the incident should be secured.

- Help company personnel to understand that, whatever the motive, hiding, altering or destroying documents or evidence is always a bad idea. Such actions not only compromise the investigation, but could have criminal consequences.

Photography and Videotape. Both the intricate photographs taken as part of the evidence collection process and general photographs of the accident site are an important part of preserving physical evidence. But remember, every photograph and video of the scene is likely to be discoverable, and every photograph and video may become a trial exhibit.

- Photograph the accident site and all physical evidence. Create a written log of each photograph. Number all photographs and preserve negatives under lock and key.

- Avoid "dead body" photos, photos of blood or other gore. This material is rarely, if ever, relevant to analysis of the accident and can unnecessarily inflame the passions of jurors. If it is necessary to photograph an accident victim, cover the body with a sheet first.

- Videotape the site if competent videographers are unavailable. However, avoid all comments on the video and maintain silence during the taping. Make certain background conversations carried out by others on site are not recorded on the video. These comments and conversations will likely be discoverable.

- Videotape the removal of any destroyed or disabled equipment or machinery. The repair of machinery that must be put back into service should also be videotaped as it is dismantled and reassembled, so that experts can accurately assess the condition of the equipment or machinery after the accident and the condition of the internal parts.

Witnesses. Obtaining the names of all persons on site and identifying witnesses also of critical importance. Learning the facts, attitudes and roles of witnesses becomes an integral part of the investigation decision-making process and should be undertaken with the involvement of counsel, if possible, and with great care and attention.

- Appoint a key person to identify witnesses and gather information on how to contact them.

- Involve counsel as early as possible to assist in the supervision of the witness identification and subsequent interviewing.

- Secure a list of all employees, by position, who are assigned to the general workplace where the accident occurred, all individuals who were on duty at the time of the accident, and all management or supervisory personnel.

- Secure a list of all contract employees, supervisors and management.

- Emergency response personnel and government officials should also be identified, including fire, rescue and police officers, occupational safety and health investigators, EPA officials or their state equivalents, and any insurance claims adjusters or investigators present.

Be aware that you can and should assist in protecting the attorney-client and work product privileges afforded by involving counsel immediately. You can protect privilege by following a few simple guidelines.

- Arrange for witnesses to meet with counsel for an initial interview to assess the importance of each witness, their attitude, and collect the primary facts regarding the accident. THESE INTERVIEWS SHOULD BE CONDUCTED WITHOUT MANAGEMENT PRESENT.

- Do not request written statements from witnesses at this time.

- Do not interview witnesses or employees together. Interviewing witnesses in groups can taint their individual recollections and impair the truth-finding process. Do not ask for conclusions, guesses, speculations or opinions.

- If you do become involved in an interview, do not take notes. Allow counsel to prepare a memorandum of the interview to protect the privilege.

Regulatory Agencies. The key to dealing with the onslaught of agency personnel is to establish cooperation and confirm your willingness to fully investigate the incident and share information with them. You can establish a good relationship with these agencies without compromising your company's position and it is generally to your advantage to do so. Ideally, your personnel are well trained to deal with the regulators specific to their business operations. However, there are a few key things to consider before the agencies arrive.

Make Sure Investigators are Accompanied by a Company Representative During Any Site Inspection. Designate the "walk-around team" and assign responsibilities:

- Who will head the team and be the principal spokesperson for management?
- Who will represent the affected departments?
- Who will represent the safety department and provide technical information?
- Who will be the principal liaison with counsel?
- Who will have the authority to demand a warrant or to let the agency inspect without one?
- Who will monitor the document control system?
- Who will take pictures and monitor agency sampling?
- Who will be the liaison with contractors, subcontractors and the union during inspection?
- Who will equip the team with cameras, notebooks, document production log, sampling equipment, copy of agency standards, agency field operations manual, and confidential document stamps concerning trade secrets and privileged communications?
- Any subpoenas demanding company documents or appearances should be given to the head of the "walk-around team" immediately. Answer no subpoenas without informing management and consulting counsel.
- Do not volunteer information, documents or evidence.
- Train the team on the basics of agency regulations and on management, employee and union rights, and obligations during inspections.

CONCLUSION AND RESULTS

Both federal and state laws protect confidential communications between clients and their attorneys and the work product of attorneys when prepared in anticipation of litigation. Some states also protect other communications made in anticipation of litigation. The applicability of these privileges may determine whether a company's confidential communications are discoverable during regulatory or judicial proceedings. Accordingly, an awareness of the federal and state privilege rules should guide a company's post-accident conduct. Outside counsel can assist with this assessment.

Outside counsel are usually more familiar with the privilege rules than the company and can organize the company's accident investigation to prevent waiver of these privileges to the extent possible. If management alone conducts the investigation, the confidentiality privileges may not apply or may be waived. While regulatory bodies and private litigants may be able to discover the facts underlying the accident, outside counsel better protects the company's findings and internal communications. Consequently, after an accident a company should retain outside counsel to oversee the investigation of the accident as well as to defend the company in any ensuing administrative or judicial proceedings.

Armed with good investigative practices and a lawyer to help protect the company's rights and privileges, the corporate defendant is well positioned to avoid spoliation of evidence problems.