Memo To: Doble & Doble LLP, Daniel Diamond
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Jurisdiction: California, United States of America
Date: February 9, 2021
Regarding: Privilege & Diversity Jurisdiction

Issue

Should a federal court located in California, sitting in diversity jurisdiction, apply California law or federal law to determine whether attorney work product is privileged?

Facts

In-house counsel for a large corporation incorporated in Delaware and headquartered in New York investigated allegations of misconduct and prepared a legal opinion for corporate officers about whether the corporation had cause to terminate an employee located in California. The corporation subsequently terminated the employee and the employee brought a wrongful termination lawsuit. The employee is seeking production of the opinion letter. It is accepted that the case is properly before the federal court under diversity jurisdiction. The parties disagree on whether the opinion letter was prepared in anticipation of litigation.

Conclusion

Federal courts sitting in diversity jurisdiction should apply the substantive law of the forum state and the procedural law of the federal courts. The substantive law to be applied is the law of the state as declared by the highest state court or the state legislature. (28 U.S. Code § 1652; *Erie Railroad v. Tompkins*)

Privilege claims in civil actions before the federal courts under diversity jurisdiction are governed by state law. (Federal Rules of Evidence)

However, the work product doctrine is a procedural immunity, not an evidentiary privilege. Whether attorney-client privilege applies is a question of state substantive law, while federal law governs assertions of work product protection. (*United Coal Companies v. Powell Construction Co.*; *Federal Deposit Insurance v. Fidelity & Deposit Co.*)

Attorney-Client Privilege

In California, attorney-client privilege is codified at Cal. Ev. Code § 950-962. The privilege protects confidential communications between client and lawyer, including legal opinions formed by the lawyer during the course of the relationship.

In *Wellpoint Health Networks, Inc. v. Superior Court*, the California Court of Appeal was asked to resolve whether a law firm's prelitigation investigation into the circumstances surrounding the claims of an employee who may have suffered discriminatory treatment was protected by attorney-client privilege. The investigation culminated in a letter discussing the law firm's findings and concluding that the employee's allegations of discrimination were unfounded. In the employee's discrimination lawsuit, he sought to depose the lawyer who wrote the letter and also sought the production of all documents pertaining to the investigation. The employer refused to produce the documents, citing attorney-client privilege. The Court of Appeal held that the fact the attorney was hired to conduct an investigation of the charges of discrimination was enough to support a prima facie claim of lawyer-client privilege. However, the employer may have waived the protection of the privilege by raising the investigation in its defense.

Work Product

Fed. R. Civ. P. 26(b)(3)(A) specifically limits protection for documents prepared by an attorney to documents prepared in anticipation of litigation. Documents prepared in anticipation of litigation may be discoverable if the opposing party has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. However, discovery of such documents must protect against disclosure of the attorney's mental impressions, opinions, etc. (*Admiral Insurance v. United States District Court for the*

District of Arizona)

A two-part test for determining whether a document was prepared "in anticipation of litigation" was identified. First, the court should determine whether the party invoking work product protection has shown that the prospect of litigation was a substantial factor in the mix of considerations that led to the preparation of the document. If the answer to that question is yes, the court must assess whether denying protection would harm the policy objectives of the work product doctrine. If denying protection would frustrate or interfere with the promotion of the doctrine's principal objects, the document should be protected. (*JumpSport, Inc. v. Jumpking, Inc.*)

In *Walker v. County of Contra Costa*, the plaintiff filed a discrimination claim with the California Department of Fair Employment and Housing after he was denied a promotion within the Contra Costa County Fire Protection District. After the charge was filed, the Contra Costa Deputy County Counsel engaged an outside attorney to investigate the charge and report on the merits of the plaintiff's claim. The outside attorney prepared a report on her findings and the defendant had already turned over portions of her report as well as certain documents on which the attorney relied in drafting the report. However, the plaintiff sought production of the unredacted report after commencing a civil action. The defendant argued that the redacted portions of the report were subject to the work product doctrine because they contained the attorney's legal research, analysis, and her evaluation of the merits of the case. Judge Larson of the Northern California District Court held that the report may have been protected by the work product doctrine because it was prepared in anticipation of litigation by an attorney for one of the parties to the action before the court. Though work product protection is not absolute, the redacted portions of the report belonged to the most protected class of work product because they reflected on the attorney's mental impressions. However, the defendant had asserted as an affirmative defense the adequacy of their pre-litigation investigation into the employee's discrimination claim. As a result, the defendant had waived both the attorney-client privilege and the work product doctrine with respect to documents reflecting that investigation. The attorney's legal analysis, however, was not relevant to the defendant's affirmative defense, and therefore did not fall within the scope of the waiver.

Law

Pursuant to the "*Erie* Doctrine", as enunciated by Justice Brandeis for the United States Supreme Court in *Erie Railroad v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), federal courts sitting in diversity jurisdiction should apply the substantive law of the forum state and the procedural law of the federal courts. The substantive law to be applied is the law of the state as declared by the highest state court or the state legislature:

> *Third.* Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

The *Erie* Doctrine is codified in 28 U.S. Code § 1652, which provides that state laws shall be regarded as the rules of decision in civil actions before the federal courts unless the Constitution, treaties, or statutes of the federal government require otherwise:

> 28 U.S. Code § 1652. State laws as rules of decision
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> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.
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> (June 25, 1948, ch. 646, 62 Stat. 944.)

Rule 501 of the Federal Rules of Evidence further provides that privilege claims in civil actions before the federal courts under diversity jurisdiction are governed by state law:

> Rule 501. Privilege in General

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
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> - the United States Constitution;
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> - a federal statute; or
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> - rules prescribed by the Supreme Court.
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> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

However, the work product doctrine is a procedural immunity, not an evidentiary privilege. As explained by Judge Whelan of the United States District Court for the Southern District of California in *Federal Deposit Insurance v. Fidelity & Deposit Co.*, 196 F.R.D. 375 (S.D. Cal. 2000) at 381, whether attorney-client privilege applies is a question of state substantive law, while federal law governs assertions of work product protection:

> While the attorney-client privilege serves to promote communication between attorney and client, the work-product doctrine serves to balance an attorney's ability to prepare in representing its client against society's interest in revealing all true and material facts relevant to the resolution of a dispute. *Hickman v. Taylor,* 329 U.S. 495, 509-12, 67 S.Ct. 385, 392-94, 91 L.Ed. 451 (1947). Unlike the attorney-client privilege, the work-product doctrine is a procedural immunity and *not an evidentiary privilege. Connolly Data Systems, Inc. v. Victor Technologies, Inc.,* 114 F.R.D. 89, 95 n. 4 (S.D.Cal.1987). Federal law, not state law, provides the governing law on the scope and extent of the attorney work-product doctrine. *Id.* at 95; *United Coal Cos. v. Powell Constr. Co.,* 839 F.2d 958, 966 (3d Cir.1988) ("Unlike the attorney client privilege, the work-product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed.R.Civ.P. 26(b)(3)... "); *Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators (U.S.A.) Inc.,* 97 F.R.D. 37, 40 (E.D.N.Y.1983) (same).

The Court of Appeal for the Third Circuit came to the same conclusion in *United Coal Companies v. Powell Construction Co.*, 839 F.2d 958 (3d Cir. 1988) at 965-966:

> In this diversity case Fed.R.Evid. 501 refers the district court, on questions of privilege, to state law. The reference, in the first instance, is to the law of the forum state. *Samuelson v. Susen,* 576 F.2d 546, 549 (3d Cir.1978). ...
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> [...]
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> Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed.R.Civ.P. 26(b)(3), which provides:
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> > *Trial Preparation: Materials.* 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 parly's attorney, consultant, surety, indem-nitor, 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 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.

Attorney-Client Privilege

In California, attorney-client privilege is codified at Cal. Ev. Code § 950-962. The privilege protects confidential communications between client and lawyer, including legal opinions formed by the lawyer during the course of the relationship:

950. As used in this article, “lawyer” means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

951. As used in this article, “client” means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

952. As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

953. As used in this article, “holder of the privilege” means:

(a) The client, if the client has no guardian or conservator.

(b) (1) A guardian or conservator of the client, if the client has a guardian or conservator, except as provided in paragraph (2).

(2) If the guardian or conservator has an actual or apparent conflict of interest with the client, then the guardian or conservator does not hold the privilege.

(c) The personal representative of the client if the client is dead, including a personal representative appointed pursuant to Section 12252 of the Probate Code.

(d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public

entity that is no longer in existence.

954. Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

In *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110 (Cal. Ct. App. 1997), the California Court of Appeal was asked to resolve whether a law firm's prelitigation investigation into the circumstances surrounding the claims of an employee who may have suffered discriminatory treatment was protected by attorney-client privilege or the work product doctrine. The investigation culminated in a letter discussing the law firm's findings and concluding that the employee's allegations of discrimination were unfounded. In the employee's discrimination lawsuit, he sought to depose the lawyer who wrote the letter and also sought the production of all documents pertaining to the investigation. The employer refused to produce the documents, citing attorney-client privilege and the work product doctrine. The trial court had

adopted a referee's recommendation that all of the documents be produced, with the attorney's impressions, conclusions, and thought processes redacted. The trial judge concluded that attorney-client privilege did not apply because the lawyer was acting in a nonattorney capacity when he conducted the investigation. The Court of Appeal concluded that this distinction was misplaced. Instead, the decision should be based on the subject matter of each document (at 122):

> Reliance on these cases to support a blanket rule excluding attorney investigations of employer discrimination from attorney-client and work product protection is misplaced. Both cases involved analyses of individual documents containing attorney-client communications or purported work product to determine whether the dominant purpose behind each was or was not the furtherance of the attorney-client relationship. The courts in both cases recognized that even though an attorney is hired to conduct business affairs, he or she may be called on to give legal advice during the course of the representation, and documents related to those communications should be protected notwithstanding the original purpose of employing the attorney. The trial court should not have given McCombs carte blanche access to Lafayette's investigative file, but should have based its ruling on the subject matter of each document.

The attorney was hired to conduct an investigation of the charges of discrimination. This alone was enough to support a prima facie claim of lawyer-client privilege. As a result, the burden passed to the employee to make a prima facie showing that an exception applied (at 123-124):

> McCombs suggests that it was petitioners' burden to establish that Lafayette's investigation involved functions primarily legal in nature. While it is true that the burden of showing preliminary facts necessary to support the privilege lies with the party claiming it *(State Farm Fire & Casualty Co.* v. *Superior Court, supra,* 54 Cal.App.4th at p. 639), there was never a dispute concerning the underlying facts. McCombs conceded in his memorandum in support of the motion to compel that Lafayette was an attorney hired by his employer to conduct an investigation of the charges of discrimination. This concession established the facts necessary to support a prima facie claim of privilege, i.e., communication in the course of the lawyer-client relationship (see *State Farm Fire & Casualty Co.* v. *Superior Court,*

supra, at p. 639), and passed the burden to McCombs to make a prima facie showing that an exception applied. *(Ibid.;* see *BP Alaska, supra,* 199 Cal.App.3d at p. 1252 [holding that party claiming privilege could not be "faulted for failing to make an adequate evidentiary showing when there was no apparent need to do so" because opposing party did not challenge the conclusion that the documents at issue contained attorney impressions, opinions, and legal *124theories].) "The party opposing the privilege must bear the burden of showing that the claimed privilege does not apply or that an exception exists or that there has been an expressed or implied waiver. [Citation.]" *(Lipton* v. *Superior Court, supra,* 48 Cal.App.4th at p. 1619.) McCombs could not meet this burden by simply asserting in a supplemental memorandum of points and authorities that Lafayette was engaged in a fact-finding mission. At a minimum, he needed to present evidence concerning his employer's normal method of dealing with internal employment discrimination complaints and whether they were routinely assigned to outside counsel to investigate and deal with. It might then have been urged that Lafayette was engaged in routine fact-finding on behalf of the company's personnel department rather than legal work. (But see *Aetna Casualty & Surety Co.* v. *Superior Court* (1984) 153 Cal.App.3d 467, 475-476 [200 Cal.Rptr. 471] [holding that an insurer's hiring of an attorney to investigate the insured's claim and make a coverage determination under the policy represents "a classic example of a client seeking legal advice from an attorney," and that inapplicability of the privilege must be decided on a document by document basis].) In the absence of any evidence on this point, the trial court could not make a factual finding.

The Court accepted that the investigation documents were protected by attorney-client privilege. However, the employer may have waived the protection of the privilege by raising the investigation in its defense (at 128-129):

> If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both

ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived.

This leads to the question of whether a waiver has occurred herein. The trial court did not reach this question because of its ruling that Gary *129Lafayette was not acting in a predominantly legal role. We believe that the question could not be properly answered at the point when the trial court issued its order compelling production of the file. Demurrer to the second amended complaint had been sustained. There was no complaint on file and no indication of defense strategy. In his third amended complaint, McCombs might have chosen to focus on claims of discrimination and retaliation through adverse employment actions rather than on hostile work environment. Employer knowledge and failure to take appropriate corrective action is not an element of an ordinary discrimination claim. (See *Meritor Savings Bank* v. *Vinson, supra, 477* U.S. at pp. 70-71 [106 S.Ct. at p. 2407] ["[T]he courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions. *E.g., Anderson* v. *Methodist Evangelical Hospital, Inc.,* 464 F.2d 723, 725 (CA6 1972)."].) Even if a claim for hostile work environment were to be asserted, defendants might not raise the defense of investigation and remedial action as they did in the earlier answer to the first amended complaint. They might instead choose to defend by denying the alleged incidents occurred or by denying they were racially motivated.

Put simply, prior to any finding on the question of waiver, McCombs must file an acceptable complaint. Only then, and only if defendants' answer or discovery responses indicate the possibility of a defense based on thorough investigation and appropriate corrective response, can a finding of waiver be made. The order requiring petitioners to turn over the investigative file must be reversed without prejudice to McCombs's ability to reassert a right to obtain discovery of the file at a later time if defendants interject a defense based on the investigation.

Work Product

Fed. R. Civ. P. 26(b)(3)(A) specifically limits protection for documents prepared by an attorney to documents prepared in anticipation of litigation. Documents prepared in anticipation of litigation may be discoverable if the opposing party has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. Discovery of such documents must protect against disclosure of the attorney's mental impressions, opinions, etc.:

> (b) Discovery Scope and Limits.
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> [...]
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> (3) *Trial Preparation: Materials.*
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> (A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
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> > (i) they are otherwise discoverable under Rule 26(b)(1); and
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> > (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
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> (B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

The work product doctrine affords special protections for work product that reveals the attorney's mental impressions, per the Ninth Circuit Court of Appeal in *Admiral Insurance v. United States District Court for the District of Arizona*, 881 F.2d 1486 (9th Cir. 1989) at 1494:

> In ordering production of a privileged statement on the facts of plaintiffs' assertion

> that they could not otherwise obtain the information contained in the statement, the district court confused the attorney-client privilege with the work-product rule. The work-product rule is not a privilege but a qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation. Fed. R.Civ.P. 26(b)(3). Although the rule affords special protections for work-product that reveals an attorney's mental impressions and opinions, other work-product materials nonetheless may be ordered produced upon an adverse party's demonstration of substantial need or inability to obtain the equivalent without undue hardship. *See Upjohn,* 449 U.S. at 401, 101 S.Ct. at 688.
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> The conditional protections afforded by the work-product rule prevent exploitation of a party's efforts in preparing for litigation. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb, Inc.,* 116 F.R.D. 533, 538 (N.D.Ca.1987) (principal function of work-product rule is to force each side to do its own work). *See also* 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2021 (1970). The effort of a party or his representative in generating information needed for trial generally does not create information that will not be available to others willing to invest similar effort in discovery. Accordingly, when a party makes a substantial showing that he is unable through his efforts to obtain needed information, the balance of equities shifts in favor of disclosure of trial preparation materials.

In *JumpSport, Inc. v. Jumpking, Inc.*, 213 F.R.D. 329 (2003) at 330-331, Judge Brazil of the United States District Court for Northern California set out a two-part test for determining whether a document was prepared "in anticipation of litigation". First, the court should determine whether the party invoking work product protection has shown that the prospect of litigation was a substantial factor in the mix of considerations that led to the preparation of the document. If the answer to that question is yes, the court must assess whether denying protection would harm the policy objectives of the work product doctrine. If denying protection would frustrate or interfere with the promotion of the doctrine's principle objects, the document should be protected:

> For reasons set forth in detail below, we have concluded that when a court is trying to decide whether a document was "prepared in anticipation of litigation" it should apply a two-stage test. In the first stage, the court should determine whether the

> party trying to invoke work product protection has shown that the prospect of litigation was *331a substantial factor in the mix of considerations, purposes, or forces that led to the preparation of the document. If, but only if, the party trying to invoke the protection makes this showing, the court proceeds to the second stage of the analysis. In this second stage, the court focuses on the policy objectives that the work product doctrine has been developed to promote — then determines whether (and to what extent) denying Rule 26(b)(3)'s protections to the document would harm those objectives (or, the extent to which conferring that protection would advance the policy purposes that inform the work product doctrine.) The court would conclude that the document comes within the ambit of the Rule (was "prepared in anticipation of litigation") on a showing that a contrary conclusion would likely frustrate or interfere (more than minimally) with the promotion of the principal objectives this doctrine is designed to serve.

In *Walker v. County of Contra Costa*, 227 F.R.D. 529 (N.D. Cal. 2005), the plaintiff filed a discrimination claim with the California Department of Fair Employment and Housing after he was denied a promotion within the Contra Costa County Fire Protection District. After the charge was filed, the Contra Costa Deputy County Counsel engaged an outside attorney to investigate the charge and report on the merit of the plaintiff's claim. The outside attorney prepared a report on her findings and the defendant had already turned over portions of her report as well as certain documents on which the attorney relied in drafting the report. However, the plaintiff sought production of the unredacted report after commencing a civil action. The defendant argued that the redacted portions of the report were subject to attorney-client privilege and work product protection because they contained the attorney's legal research, analysis, and her evaluation of the merits of the case. Judge Larson of the Northern California District Court held that the report may have been protected by the work product doctrine (in addition to attorney-client privilege) because it was prepared in anticipation of litigation by an attorney for one of the parties to the action before the court. Though work product protection is not absolute, the redacted portions of the report belonged to the most protected class of work product because they reflected on the attorney's mental impressions (at 534):

> The Tripoli Report may also be protected by the work product doctrine because it was prepared in anticipation of litigation by an attorney for one of the parties to the

> action now before the Court. *Hickman v. Taylor,* 329 U.S. 495, 510, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Although work product protection is not absolute the portions of the report withheld belong to the most protected class of work product because they reflect the mental impressions and legal opinions of Ms. Tripoli.

However, the defendant had asserted as an affirmative defense the adequacy of their pre-litigation investigation into the employee's discrimination claim. As a result, the defendant had waived both the attorney-client privilege and the work product doctrine with respect to documents reflecting that investigation (at 535):

> If Defendants assert as an affirmative defense the adequacy of their pre-litigation investigation into Walker's claims of discrimination, then they waive the attorney-client privilege and the work product doctrine with respect to documents reflecting that investigation. Where a party puts the adequacy of its pre-litigation investigation at issue by asserting the investigation as a defense, the party must turn over documents related to that investigation, even if they would ordinarily be privileged. *Harding v. Dana Transport, Inc. supra.; Wellpoint Health Networks, Inc., supra.*
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> Defendants do not address the waiver issue in the January 27 Joint Discovery Dispute Statement. As mentioned above, Defendants merely assert that: "Plaintiff offers no basis for an order requiring disclosure of such matters."
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> Despite Defendants' bland assertion, they pled as their twelfth affirmative defense that "[P]laintiffs claims are barred because CCCFPD took and had taken reasonable steps to prevent and promptly correct any discrimination and/or harassment in the workplace, and plaintiff unreasonably failed to take advantage of the preventative and corrective opportunities provided by the CCCFPD or avoid harm otherwise."
>
> This language indicates that Defendants intend to rely on Ms. Tripoli's investigation as a defense in this action. For that reason Defendants must turn over Ms. Tripoli's report as it pertains to the pre-litigation investigation into Walker's claim of discrimination.

The attorney's legal analysis, however, was not relevant to the defendant's affirmative defense, and therefore did not fall within the scope of the waiver (at 535):

> However, Ms. Tripoli's legal analysis of the adequacy of Defendants' investigation does not fall within the scope of Defendants' waiver. Defendants' pre-litigation investigation is relevant to their affirmative defense, but the attorney's intra-litigation analysis of that investigation is not. *See Wellpoint,* 59 Cal.App.4th at 127-128, 68 Cal.Rptr.2d 844, citing *Harding.* Their affirmative defense says nothing about any intra-litigation investigation, only the pre-litigation investigation. Consequently, there is no waiver of the work product doctrine with respect to Tripoli's Findings and Conclusions at the end of the report. These finding are in fact the most protected form of work product: the attorney's legal analysis and opinions. They may reflect her advice to Defendants within this litigation and are therefore shielded from discovery. Accordingly, this Court orders Defendants to disclose to Walker all of the Tripoli Report, with the exception of the Findings and Conclusions.

Authorities

Erie Railroad v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)

28 U.S. Code § 1652, 28 U.S. Code § 1652

Federal Rules of Evidence, Rule 501

Federal Deposit Insurance v. Fidelity & Deposit Co., 196 F.R.D. 375 (S.D. Cal. 2000)

United Coal Companies v. Powell Construction Co., 839 F.2d 958 (3d Cir. 1988)

California Evidence Code, Cal. Ev. Code § 950-962

Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal. App. 4th 110 (Cal. Ct. App. 1997)

Rule 26(b)(3)(A), Fed. R. Civ. P. 26(b)(3)(A)

Admiral Insurance v. United States District Court for the District of Arizona, 881 F.2d 1486 (9th Cir. 1989)

JumpSport, Inc. v. Jumpking, Inc., 213 F.R.D. 329 (2003)

Walker v. County of Contra Costa, 227 F.R.D. 529 (N.D. Cal. 2005)