Prompt Remedial Action and Waiver of Privilege

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Workplace Harassment

In order to avoid liability for workplace harassment, an employer must show that it exercised reasonable care to prevent and correct any harassing behavior. This is commonly referred to as the defense of "prompt remedial action." The United States Supreme Court's June 26, 1998 rulings in *Faragher v. City of Boca Raton*, __ U.S. __, 118 S.Ct. 2275 (1998) and *Burlington Industries v. Ellerth*, __ U.S. __, 118 S.Ct. 2257 (1998), clarified that prompt remedial action is part of an affirmative defense to both liability and damages in sexual harassment hostile work environment claims. Lower courts applying the *Faragher* and *Ellerth* decisions have expanded their application to claims involving harassment based on race, national origin, disability and other protected categories.

Given that proof of remedial action may allow an employer to avoid liability and damages, employers have a strong incentive to place their remedial activities into evidence when litigation commences. On the other hand, plaintiff employees will strive to show that their employer's actions, when it became aware of harassing behavior, did not amount to the exercise of reasonable care to promptly correct the situation. Accordingly, all aspects of an employer's reaction to notification of harassing behavior may be placed squarely at issue in responding to agency charges, as well as during discovery, motion practice and trial of a harassment claim. Although Arizona courts have not addressed the issue, courts in other jurisdictions have held that even if the attorney-client or work product privileges attach to an internal harassment investigation, an employer may waive the privilege by asserting that the investigation was part of the employer's prompt remedial action.

The Attorney-Client Privilege and Work Product Doctrine

Attorney-Client Privilege in Arizona Courts

The Arizona Supreme Court and the Arizona Legislature have disagreed about the application of the privilege to communications between an attorney for a corporation and a corporate employee. In November 1993, the Arizona Supreme Court issued its decision in *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 826 P.2d 870 (1993), a medical malpractice case involving the discoverability of notes taken by a nurse paralegal during interviews with employee witnesses at the direction of the defendant hospital's attorney. The hospital contended that the notes were protected by the attorney-client privilege under the rule adopted by the United States Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677 (1981). In *Upjohn*, the Court had rejected a "control group" test, and instead held that the privilege applied to

communications concerning matters within the scope of an employee's duties, where the purpose of the communication was to allow the corporation's counsel to provide legal advice to the corporation.[1] The trial court in *Samaritan* had treated the nurse paralegal's notes as protected not by the attorney-client privilege, but by the work product doctrine.[2] The Arizona Court of Appeals rejected the *Upjohn* analysis, and instead applied the "control group" rule under which the privilege applied to communications by "persons in a position to control or take a substantial part in a decision about action a corporation may take upon advice of counsel."[3] The Court of Appeals also created a lesser, qualified privilege for non-control-group employees.[4]

The Arizona Supreme Court rejected the control group and qualified privilege crafted by the Court of Appeals, and instead adopted a rule based upon a narrow reading of *Upjohn*. The Court focused on the nature of the communications, rather than on the nature of the corporate employee, and held that the privilege applies to: (1) all communications initiated by an employee and made in confidence to counsel, in which the communicating employee is directly seeking legal advice; and (2) communications from corporate employees to corporate counsel, when an investigation is initiated by the corporation, only if the communications concern the employee's own conduct within the scope of his or her employment and are made to assist counsel in assessing or responding to the legal consequences of that conduct for the corporate client.[5] Under this test, the Court found that the paralegal's notes were not privileged, because the communication, initiated by the corporation, did not concern actions by the interviewed employees that subjected the corporation to potential liability.[6] Instead, the employees were "mere witnesses."[7]

Reaction to *Samaritan* was not entirely favorable.[8] The Arizona Legislature responded in its next session with House Bill 2161, enacted as A.R.S. § 12-2234(B), which provides[9]:

> B. For purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:
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> 1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
>
> 2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

Under the statute, then, the outcome of *Samaritan* would have been different, because the nurse paralegal's interviews were conducted with employees "for the purpose of obtaining information in order to provide legal advice to the employer." Likewise, under the statute, the privilege would apply to all communications between an attorney and corporate employees during the course of an investigation of harassment, whether the employees are witnesses, alleged harassers or alleged victims.[10]

The Work Product Doctrine in Arizona Courts

The work product analysis in Arizona is guided by Ariz. R. Civ. P. 26(b)(3), which provides that a party may obtain discovery of documents prepared in anticipation of litigation by another party, or by or for that other party's attorney, only upon a showing that the party seeking discovery has substantial need for the materials and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Even if the party is able to make the required showing, the court must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney concerning the litigation.

Arizona courts have held that summaries of witness interviews gathered during an internal corporate investigation concerning an event that creates a substantial risk of legal exposure qualify as work product.[11] While the Arizona Supreme Court has stated that "ordinarily" this type of work product will not be discoverable if the same witnesses are available and can be interviewed by the opposing party, "substantial need" and "undue hardship" exist if the statements are sought to impeach or determine the credibility of a witness, if the witness is unavailable, if the witness is hostile, if the witness has problems with recollection, or if the statements contain admissions or are unique because they were taken soon after the event.[12] Under this rationale, where the harassment claim at issue creates a substantial risk of litigation, such that the ensuing investigation is in anticipation of litigation, materials generated during the investigation qualify as work product. In today's litigious society, it is difficult to imagine that an employer responding to an allegation of harassment does not anticipate litigation. To ensure that the work product doctrine attaches to an investigation, an employer should make a record at the beginning of the investigation that it anticipates that litigation may ensue.

A Word About Proceeding in Federal Court

Oddly enough, the scope of the attorney-client privilege varies depending on whether the litigation is commenced in state or federal court. In diversity cases, the federal court will apply state privilege law.[13] In cases involving a federal question (such as Title VII cases), with or without pendent state law claims, the federal common law of privilege controls.[14] Thus, counsel should turn to the guidance provided in *Upjohn* to determine whether the attorney-client privilege attaches. The federal work product doctrine, originating in *Hickman v. Taylor* and codified in Fed. R. Civ. P. 26(b)(3), is substantially identical to the Arizona doctrine.

Waiver of Privilege Under Arizona Law

Even if communications or documents are protected under the umbrella of attorney-client or work product privilege, the privilege may be waived. For example, A.R.S. § 12-2236 provides that a person who offers himself as a witness and voluntarily testifies with reference to attorney-client communications consents to the examination of such attorney.

Arizona courts have also adopted the common law doctrine of implied waiver of privileges. For example, the Arizona Supreme Court has held that where the holder of a physician-patient or psychologist-patient privilege places a particular medical condition at issue by means of a claim or affirmative defense, the privilege will be deemed waived with respect to that particular medical condition.[15] This is because placing a privileged communication at issue is viewed by courts as conduct inconsistent with observance of the privilege.[16] Similar decisions have been reached with respect to attorney-client or work-product privileges.[17]

Asserting the Defense of Prompt Remedial Action

Recently, courts outside of Arizona have applied the implied waiver doctrine to require production of information gathered by counsel during an internal harassment investigation, when the defendant employer asserts the affirmative defense of prompt remedial action. For example, in *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D.N.J. 1996), two female employees first filed complaints with the New Jersey Division on Civil Rights, and later an action in federal court, alleging that their supervisor had sexually harassed them, and that their employer had failed to prevent,

address or take corrective measures.[18] After the first plaintiff filed her complaint with the Civil Rights Division, the employer retained outside counsel to defend the action.[19] Counsel conducted an internal investigation, during which he had "conferences" with the company's president, controller and company managers in order to determine whether there was a factual basis for the claim.[20] The company later asserted that the purpose of the investigation was also "to assess the strengths, if any, and weaknesses of [plaintiff's] charges and to recommend, if appropriate, remedial measures and a legal defense strategy/settlement posture based upon his findings."[21] Part of the employer's defense strategy included reliance upon the reasonableness of the employer's actions in response to the plaintiffs' charges.[22]

During a deposition of the employer's controller by plaintiff's counsel, the controller refused to answer the questions about the substance of defense counsel's investigation[23] on the basis of the attorney-client privilege.[24] Plaintiff's counsel then noticed the deposition of the attorney who had conducted the interviews, along with a request for production of a wide range of documents, including: (1) memos, handwritten notes, and tapes relating to the investigation; (2) the attorney's billing records reflecting the actual time spent by the attorney on the investigation; and (3) all correspondence between the attorney and his client, the employer, pertaining to the investigation (excluding, by redaction, legal opinion and legal advice).[25] The issue before the court was whether discovery of this material, and the deposition of defense counsel, were protected by the attorney-client privilege and work-product doctrines.

The court held that while the communications at issue would otherwise be protected by the attorney-client privilege and work-product doctrine, the defendant had waived these immunities by placing these communications "at issue" through the affirmative defense of prompt remedial action.[26] The court reasoned that without evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder at trial would be able to discern the adequacy of the investigation.[27] The court ordered the defense attorney to submit to a deposition, and to produce all of the requested documents, subject to some limited redaction.[28] The court observed that employers "may easily avoid this result in the future either by separating the role of investigator from that of litigator, or by refraining from defending themselves on the basis of reasonable investigation."[29] Numerous other federal courts, and one state court, have embraced this reasoning, and have required similar disclosures from defendant employers and their attorneys.[30] However, these courts are split on whether disclosure of the mental impressions, conclusions, opinions or legal theories of the attorneys involved is required under this waiver doctrine.

One federal court has refused to find implied waiver of the work product immunity prior to trial when the plaintiff already possesses a significant amount of information about the investigation. In *Ryall v. Appleton Electric Co.*, 153 F.R.D. 660 (D. Colo. 1994), the defendant employer refused to disclose interview notes taken by in-house counsel during a sexual harassment investigation.[31] The magistrate judge ruled that the employer had waived any privilege by raising the affirmative defense of good faith investigation, and that upholding the privilege would unfairly deny the plaintiff her only means to challenge the sufficiency of the employer's defense.[32] The district court reversed, noting (1) that the doctrine of implied waiver has traditionally applied to the attorney-client privilege, not the work-product doctrine, and (2) that the plaintiff already possessed a significant amount of information pertaining to the investigation, and would be able to further construct, through discovery, a "fairly complete" picture of the investigation.[33] The court concluded that the better option was to preclude the defendant from introducing the contents of the privileged interviews or resulting

notes or statements at trial to establish its defense, with the proviso that if the defendant did use this information at trial, then the work product immunity or attorney-client privilege would be waived.[34]

The Ninth Circuit has not addressed the issue of waiver of the attorney-client privilege through assertion of the defense of prompt remedial action in a harassment case. However, in a closely analogous situation, the Ninth Circuit ruled that an employer waived the qualified privilege for self-critical materials when it attempted to use evidence of its equal employment opportunity efforts to disprove a claim of gender discrimination.[35]

Practical Tips

When counseling a client who has received an allegation of harassment, Arizona attorneys should be mindful that the employer's investigation may become the centerpiece of a prompt remedial action defense, and may become subject to scrutiny by an agency, opposing counsel or a jury. Given the importance of the defense, the attorney should advise the client to conduct its investigation in a timely, fair, thorough, consistent, accurate and confidential manner. The notes, written reports and other documents related to the investigation should be prepared with an eye toward using such documents to establish "prompt remedial action."

On the other hand, as the facts develop, the employer may not need to establish prompt remedial action, and will instead wish to keep all aspects of the investigation shielded by the attorney-client or work-product privileges. Accordingly, the attorney should advise the client on steps to take to preserve the privilege. Even though the client may later decide to waive the privilege, it will not have the luxury of making that choice if the privilege does not attach in the first instance. Varying actions and levels of attorney involvement may be utilized in order to bring the investigation within the protections of the privilege. For example, the attorney's role could range from personally conducting all aspects of the investigation to merely guiding the human resources personnel on actions to be taken as the investigation proceeds. Counsel should aid the client in creating a record of its intent to have the privilege attach and its concern over anticipated potential litigation by sending a written communication confirming the attorneys' role at the beginning of the investigation. Of course, documents should be marked as "privileged and confidential," "attorney-client communications" or "work product," as may be appropriate.

Given the possibility that a client may need to place all or parts of the entire investigation at issue, the attorney should advise the client at the beginning of an investigation that there is a risk that the privilege may need to be waived at some point in the future. Upon such a waiver, the following items might be subject to disclosure: notes prepared by an attorney investigator, reports prepared by an attorney investigator, communications between the client representatives and the attorney during the course of the investigation, and communications between client representatives and the attorney discussing what remedial action to take as a result of the investigation. The level of waiver and required disclosure will likely vary on a case-by-case basis, and counsel should carefully distinguish various steps in the investigation and remedial action process as the matter proceeds. For example, while interview notes may need to be disclosed, letters of advice may continue to be protected. Likewise, in some cases, the investigation itself will remain entirely protected, and only the remedial actions wil be discoverable.

The attorney should also advise the client of the risk that the investigating attorney may be subject to a deposition or forced to testify at trial. This could result in the unpleasant consequence of forcing the client to incur additional expense by hiring a new attorney to act as trial counsel. Ethical Rule 3.7 would prohibit an investigating attorney from acting as an advocate in a trial in which he or she is likely to be a

necessary witness.

Although Arizona courts have not yet ruled on waiver of the attorney-client privilege and work product protections when the employer asserts a defense of prompt remedial action, the decisions from other jurisdictions provide guidelines for attorneys to use when advising clients at the initial stages of an investigation. Likewise, plaintiff employees should not automatically assume that the privilege will preclude them from obtaining information about the underlying investigation. If an employer places the investigation at issue, a waiver of the privilege is likely to occur.

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ENDNOTES:

1. *Samaritan*, 176 Ariz. at 500, 862 P.2d at 873.
2. *Id.*
3. *Id.* at 500-01, 862 P.2d at 873-74.
4. *Id.* at 501, 826 P.2d at 874.
5. *Id.* at 499-500, 862 P.2d at 872-73.
6. *Id.* at 507, 862 P.2d at 880.
7. *Id.* at 501, 862 P.2d at 874.
8. *See, e.g.*, David G. Campbell, "*Good or Bad Samaritan?*", *Arizona Attorney* (Feb. 1994); W. Todd Coleman, Note, *Arizona's Attorney-Client Communication Privilege for Corporations*, 27 Ariz. St. L. J. 335, 339-340 (1995).
9. Only the communication itself is privileged—the underlying facts do not become privileged merely because they have been communicated to an attorney. A.R.S. § 12-2234(C).
10. Despite the broad definition in the statute, Arizona attorneys conducting or directing internal investigations or seeking to discover documents relating to such investigations should be aware of the possibility that the statute might be challenged on constitutional grounds. One commentator has already predicted that the Arizona Supreme Court may strike down portions of A.R.S. § 12-2234 for violating the separation of powers doctrine. See *Coleman*, *supra* note 8 at 352. An analysis of the propriety of A.R.S. § 12-2234 under the Arizona Constitution is beyond the scope of this article, however.
11. *See Longs Drug Stores v. Howe*, 134 Ariz. 424, 429, 657 P.2d 412, 417 (1983).
12. *Id.*
13. *See* Fed. R. Evid. 501, Advisory Committee's Note.
14. *See Religious Technology Center v. Wollersheim*, 971 F.2d 364, 367, n.10 (9th Cir. 1992).
15. *See Bain v. Superior Court*, 148 Ariz. 331, 333-334, 714 P.2d 824, 826-827 (1986).
16. *Id.* at 334, 714 P.2d at 827; *see also Blazek v. Superior Court*, 177 Ariz. 535, 541, 869 P.2d 509, 515 (App. 1994). The Ninth Circuit has also adopted an implied waiver doctrine. *See e.g., United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 141 (1997).
17. *State v. Cuffle*, 171 Ariz. 49, 51-52, 828 P.2d 773, 775-76 (1992) (criminal defendant waived attorney-client privilege by asserting that he did not understand the nature of the no contest plea he had made while represented by counsel); *Ulibarri v. Superior Court*, 184 Ariz. 382, 385, 909 P.2d 449, 452 (Ct. App. 1995) (waiver of attorney-client privilege occurred where client disclosed communications to a third party); *Samaritan Health Serv. Inc. v. Superior Court*, 142 Ariz. 435, 438, 690 P.2d 154, 157 (Ct. App. 1984) (privilege was waived where attorney used privileged interview summaries to refresh witnesses' recollection for deposition).
18. *Harding*, 914 F. Supp. at 1087.
19. *Id.* at 1088.
20. *Id.*

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1088-89.
26. *Id.* at 1099.
27. *Id.* at 1096.
28. *Id.* at 1103.
29. *Id.* at 1099.
30. *See Worthington v. Endee*, 177 F.R.D. 113 (N.D.N.Y 1998) (requiring production of investigative notes and report prepared by attorney, including portions of report containing the attorney's opinion, and submission by attorney to deposition); *Sealy v. Gruntal & Co*, No. 94Civ.7948, 1998 WL 698257 (S.D.N.Y. Oct. 7, 1998) (requiring production of "all documents" prepared by in-house attorney reflecting communications made during the course of the internal investigation); *Pray v. New York City Ballet Co.*, No. 96Civ.5723, 1997 WL 266980 (S.D.N.Y. May 19, 1997) (requiring outside attorneys who conducted investigation to submit to depositions regarding the advice they gave to their client on corrective, remedial action after the close of the investigation, insofar as that advice would not reveal a confidential client communication, and requiring production of documents related to the investigation that would not reveal a confidential client communication); *Peterson v. Wallace Computer Servs.*, 984 F. Supp. 821 (D. Vt. 1997) (requiring production of notes of witness interviews and corresponding memoranda prepared by Director of Human Resources and plant manager at direction of in-house attorney and outside attorney, but only insofar as these notes did not reveal the mental impressions, conclusions, opinions, or legal theories of the attorneys involved); *Payton v. N.J. Turnpike Auth.*, 691 A.2d 321 (N.J. 1997) (holding that it would be "truly inequitable" for a party to assert a defense and then refuse to provide the information underlying that defense on the basis of privilege).
31. *See Ryall*, 153 F.R.D. at 662.
32. *Id.*
33. *Id.* at 662-63.
34. *Id.* at 663.
35. *See E.E.O.C. v. Gen. Tel. Co. of Northwest*, 885 F.2d 575, 578 (9th Cir. 1989) (holding that when an employer voluntarily uses evidence of its EEO efforts to prove nondiscrimination, it opens the door and waives whatever qualified privilege may have existed to prevent the admission of self-critical materials).