Thanks for the report

A guide to using Motion to Compel to secure defendant's incident report; overcoming the common defense claim of privilege

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One of the first things that you want to know in a personal injury case is whether anyone saw your client get hurt – did anyone see what happened?

This search for witnesses and statements often leads us to discover that a defendant in the case created an "incident report" on what happened. As a prosecuting attorney, it really is incumbent upon you to get that report, or at the very least make diligent efforts. The report may hold the keys to the case, such as the identity and statements of first-hand witnesses, photographs and repair records.

The good news is that the law does not allow defendants to simply hide their incident reports without actual justification; the bad news is that you won't always get the report you deserve. Still, you'll score an early goal in the case by filing your motion to compel because the defendant will be required by the court to give you the information (persons to depose and documents to compel) that justify the withholding of the report. So even if you don't get the incident report, that's a win for your client.

The incident report and discovery

So, is the incident report in your case discoverable? That depends on how it was made and for what purpose it was made. Corporate and municipal defendants generate incident reports for different purposes, and often seek to hide them in bad faith. To keep you from discovering the report in litigation, the defendant must put forth facts to show that the *dominant* purpose of the report was for "attorney-eyes-only," and not for employee training, or something else. If the report was not made just for the in-house counselors or the risk management department, it should be yours.

This article discusses how to initiate discovery to obtain the reports, how to combat the fact-free objections you will likely receive, and how to use your crafted discovery to win the motion to compel the reports.

The hypothetical – your client's slip-and-fall at the local electronics store

A would-be client comes to your office regarding a fall that he suffered last Wednesday at the local electronics store. He is quite badly injured, and may likely need a surgery on his knee. Here are the facts:

"Please let us know what happened…" you inquire. He then says, "*I went to the electronics store because I needed some new headphones. I went down the headphones aisle and suddenly slipped. While on the ground, I felt that the floor was wet. After I fell, I saw a yellow "wet-floor" sign at the other end of the headphones aisle, but there was no sign at the end of the aisle that I used. Two store employees told me that they saw me fall, and then I saw them speaking to a guy that looked like a manager or something about mopping. I called my friend who lived around the corner, and he drove me to the ER.*"

Interviewing your client at the intake

If what your prospective client says is true, there is likely some negligence on behalf of the electronics store, and it sounds like the store manager interviewed and took statements from the two employees that saw your client fall. Essentially, this is a case where you basically *know* that there are employee statements, and possibly an incident report on the whole thing. Because mopping and wet-floor signs were involved, there is also a good possibility that the incident report and statements were used for training other employees (and not just for the good people at the risk management department).

These are just *some* of the questions that you should ask your client about what he saw and heard: (1) Whom did you speak with at the scene (employees/witnesses)? (2) What did the people you spoke with tell you about what they saw? (3) Did you see them speaking to anyone who did not speak to you? (4) Did you overhear any conversations between other people? (5) Did anyone take down your information? (6) Did you get any employee names? (7) Did you see any video cameras?

In short, and without bothering the client, get every single piece of information that you can regarding what your client saw and heard at the scene – pre and post fall – and get it as soon as you can before the memories fade. Getting all the information from your client at the beginning will help you craft better discovery.

Using our hypothetical example, for instance, you already know that mopping was done, so you can send a special interrogatory for the names of the persons who mopped on the incident date, and that is one way of getting the

names of the persons who were likely interviewed by the electronics store – take their depositions and ask them what manager spoke to them, and what the manager asked them. You are now getting closer to showing that the incident report (and statements) were not just for "attorney eyes only," *that wasn't the dominant purpose* and those statements and the report are therefore discoverable.

Your first set of discovery – the form, special and document requests to send

Your form interrogatories

Perhaps the most useful arrow that you have in your discovery quiver are the form interrogatories, and the "12 series" in particular. The 12 series form interrogatories, otherwise known as the "Investigation" form interrogatories, ask the other party to identify the following: FROG 12. 1 (who witnessed the incident?), FROG 12.2 (interviewed anyone?), FROG 12.3 (obtained any statements?), FROG 12.4 (have any photographs/videos?), FROG 12.5 (any diagrams?), FROG 12.6 (made any incident reports?), and FROG 12.7 (inspected the scene?).

Your special interrogatories

Certainly, you should send these 12 series interrogatories in your first set of discovery. And in the exact same set, you need to send "special interrogatories" asking the defendant to identify all of the persons and documents that support the responses to each individual 12 series form interrogatory response – i.e., "IDENTIFY all persons named in your response to form interrogatory 12.1," and "IDENTIFY all DOCUMENTS listed in your response to form interrogatory 12.1," and so on.

Your document requests

In your corresponding first set of document requests, you should then, of course, ask for the actual *production* of the documents that were identified in the defendant's responses to the 12 series form interrogatories.

If you follow the above pattern, you will have set up your discovery cleanly so that it is objection-proof and you are all set for your first motion to compel. Unless of course you get an unusually cooperative defendant who gives you all of the discoverable information on your first request (one can always hope).

The fact-free objections that the defendant may throw at you

The meet and confer process – giving the defendant one more chance

In all likelihood, and especially if you are dealing with a large corporate or municipal defendant, you will not get any statements or reports. Instead, you will get a bunch of boilerplate responses to all of your requests that say something like: "*Objection. Attorney client privilege.*" "*Objection. Attorney work product.*" "*Objection. Overbroad, vague and ambiguous*," and so on.

When you get these bad-faith and devoid-of-fact objections, you should send out your meet-and-confer letter pretty much immediately as that will give you more time to prepare your motion to compel when the defendant inevitably fails to hand you statements and the incident report. You have to meet and confer before you file your motion to compel, and this article will give you all the law that you need to get that letter out quickly. And, without any real responses, there isn't much work for you to do in the process.

It also gives the defendant one more chance to produce the statements and incident report after the attorneys see that you are serious about filing a motion to compel. As stated above, the defendant needs to provide you (and all parties in the case) with the information that allows the parties to evaluate whether there is any merit to the privilege claims. If the defendant will not give you any information, you have no choice but to file your motion to compel.

Filing your motion to compel

Using our hypothetical example again, you can refer to the complaint in your statement of facts, which should include the fact that your client was spoken to by the electronic store's employees and that he witnessed them talking to a supervisor about the his fall and their mopping duties.

With those facts in your complaint and motion to compel, the defendant will have to produce the reports and statements themselves, or the defendant will at least have to provide some information that allows the court to consider if the defendant's privilege claims are legitimate or bogus. You are off to a good start, especially if the defendant has given nothing to support the privilege claims before the hearing.

The law that goes into your motion to compel

Remember: The burden is on the defendant

In your motion to compel, the first part of your legal/argument section should be very clear in pointing out that the burden of proof is on the party (the defendant) claiming the application of a privilege, be it the attorney-client or the work-product privilege. (*Alpha Beta Co. v. Superior Court* (1984) 157 Cal.App.3d 818, 825.)

In addition to the case law, the Code of Civil Procedure is also on your side and clear that when a party's "objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." (Code Civ. Proc., § 2031.240.)

The defendant must give you facts

You should remind the court in your papers and at the hearing that the defendant can only discharge the burden by giving *facts and evidence* to show that the claimed privileges are applicable. (*D. I. Chadbourne, Inc. v. Superior Court of City & Cty. of San Francisco* (1964) 60 Cal.2d 723, 737; *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 735.)

Using our hypothetical example again, you can empower the court to ask the defense attorney questions like: "Why

was the manager at the electronics store asking the employees questions about their mopping?" and "What was the real purpose of that conversation between the two employees and the manager?" and "Was the information taken from that conversation just for attorney eyes only?" When you get the judge thinking like that, you have already won (even if you don't ultimately get the full reports), because the defendant has now been forced into giving you information that it did not want to provide. In short, the defendant now has to follow the law and provide the information justifying the privilege claims, which is something it never wanted to do and would never have done if you hadn't filed your motion to compel.

The key question – What was the purpose of the incident report?

Once the defendant has been forced by the court to turn up some information on the statements and the incident report, you now have to convince the court that the *dominant* (or primary) purpose of the report was not for correspondence with attorneys.

Using our hypothetical example once again, you can argue that the facts show that the manager at the electronics store would have no reason to discuss mopping duties with the employees other than for training and perhaps disciplinary purposes – "Did you both follow your training here?" and "So that we can tell others what should be done differently, what things did you both do incorrectly this time?" The defendant's attorneys will have some explaining to do at the motion to compel hearing if they want to show that the dominant purpose of the report and taking of statements was for communication with lawyers.

Below are some case law examples of what was a satisfactory showing (and not so satisfactory showings) regarding the "dominant" purpose of incident reports that you can use to your advantage.

Case law that will help you get the incident report

In *Scripps Health v. Superior Court*, our state's highest court ruled that the incident reports at issue in that matter were not discoverable because the Scripps Institute presented "uncontroverted evidence" that the reports were "kept confidential, with access provided only to the risk managers, in-house or outside counsel and third-party litigation claim administrators." (*Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529, 536.)

The Court held that the reports were not discoverable because the defendant presented uncontroverted *evidence* on the primary purpose of the reports. Thus, provide the judge with this case and force the defendant to come up with some evidence instead of just the boilerplate nothingness they gave you before the hearing.

In *Payless Drug Stores, Inc. v. Superior Court*, the appellate court held that incident reports by managers and management level employees are often privileged. (*Payless Drug Stores, Inc. v. Superior Court* (1976) 54 Cal.App.3d 988.)

However, if the defendant in your case wants to use *Payless* as a vehicle to hide its statements and incident report, it will have to *show* that managers were involved, and that only allows you with more opportunities for discovery. Statements prepared by a witness and then turned over to an attorney are not the attorney's work product. (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119.) Incident reports and statements are not written by attorneys, but by the involved employees/supervisors, and, thus, by definition cannot qualify as attorney work product. (*Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 136.) Moreover, transmission of an otherwise unprivileged incident report to defendant company's attorney or insurance carrier does not make privileged that which was not privileged in the first place. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 397; *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d at 734 ["a litigant may not silence a witness by having him reveal his knowledge to the litigant's attorney…"].)

Using our hypothetical example once again, the defendant's claim of manager involvement now means that you can send special interrogatories in your second set of discovery asking for the names, job titles, duties, hours, etc., of those persons that the defendant has claimed were involved in the incident investigation in managerial roles. Again, you have already won even if you don't have the reports yet, and you may well get them after you have deposed these managers, as the questioning may show that the statements were not taken with any consideration for, or sending to, in-house attorneys or risk management.

The case of *D.I. Chadbourne* works well in cases like our hypothetical example when it seems rather clear that the employer (through the manager) has obtained employee statements and created an incident report for the purpose of training other employees on why the incident happened.

The *Chadbourne* case is clear: the incident reports and statements are discoverable and not protected by the attorney-client privilege when the reports and statements are prepared after all incidents/accidents and in turn are used to improve safety, for training, and/or future accident avoidance. (*D.I. Chadbourne,* 60 Cal.2d at 737.)

Even if you do not "win" the hearing and get the statements and reports that you know your client is entitled to receive, the court will almost certainly agree that you are entitled to a privilege log pursuant to Code of Civil Procedure section 2031.240, subdivision (c)(1).

Conclusion

As shown herein, fighting for the incident report that the defendant is refusing to produce is something that you must do. The law is largely on your side. Even if you don't get the report, you will demonstrate your willingness to fight and your knowledge of the law. In the process, you *will* get information that the defendant does not want to give you – report or not. Additionally, the judge may

be a touch more skeptical of the defendant when your *second* motion to compel (probably to compel something else) hits the hearing calendar. Simply put, the party resisting production must provide the opposing side (and the court) enough facts to evaluate the merits of the privilege claimed, which is a victory for your client.

When a report is kept confidential with access provided only to the risk managers, in-house or outside counsel and third-party litigation claim administrators, it may be protected from disclosure in your case. However, when an incident report or statement is prepared after all incidents and used to improve safety, for training and to prevent future accidents, you should be able to discover the report and statement(s).

Without filing a motion to compel, you may never know…

So, use the above-law, file your motion to compel, and get absolutely everything to which your client is entitled.

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