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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2018 Issue

Company accident reports

A GUIDE TO COMPELLING THEIR PRODUCTION OVER DEFENDANT'S OBJECTIONS

A company's accident report has long held the reputation of a potentially critical piece of evidence that lies just beyond our grasp. This evidence is so alluring because of the potential treasure of information it could contain: witness statements, photographs, descriptions of physical evidence, and most importantly, party admissions from the defendant employee and the defendant company, itself. But case law, and a general belief in the futility of actually obtaining these reports, have created what is commonly misperceived as an insurmountable barrier protecting this evidence from production.

Attempts to get a defendant company to produce its accident report are almost always met with objections of attorney work product and attorney-client communication, among others. Attempts to meet and confer – and then later move to compel – are also almost universally met with a similar resistance and ultimate denials of such motions. But with a careful and thoughtful approach, as described below, there is a way to gain access to an accident report.

Step One: Does an accident report even exist?

While obvious, the first step is determining whether an accident report even exists. Your first request for production should include a specific request for just this type of report; e.g., "Any and all accident investigation or incident reports for the SUBJECT INCIDENT." Try to avoid lumping the accident investigation report request into a broader request like "Any and all reports about the SUBJECT INCIDENT," because the broader request invites the boilerplate "overbroad, vague and ambiguous" objections. With a focused request, your inevitable meet and confer letter should put these boilerplate objections to rest.

You should also include as your last request for production a demand for a privilege log that reads, "A privilege log that complies with California Code of Civil Procedure section 2031.240 in the event YOU withhold any documents or other information based on a claim of privilege, work product, or otherwise."

The purpose of this specific request is three-fold:

First, it is a specific attempt to force a responding defendant to comply with its discovery obligations to produce a privilege log with its response to the RFP.

Second, it is an attempt to force the responding defendant to specifically identify whether an accident report even exists so we can learn whether there is even anything worth fighting about.

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Finally, this is an invitation for a defendant to copy and paste its boilerplate, non-responsive objections and fail to produce anything. Such abusive objections are almost never sustained in a subsequent motion to compel. To the contrary, the objections typically make the defendant look unreasonable: "Your Honor, we're just trying to make defendant comply with the law and produce a privilege log. Defendant cannot cite a single case that excuses it from complying with its discovery obligations like every other litigant who sets foot in this courthouse."

Alternative approach

An alternative to the standard, stand-alone RFP, is to include a request for production of documents with a notice of deposition of the defendant employee and the defendant's person most qualified (PMQ) pursuant to Code of Civil Procedure section 2025.220(a)(4) and/or section 2025.280(a). These options can be a savior for situations where you requested the specific accident report in your initial request for production, but you either failed to timely meet and confer when defendant asserted only objections or you failed to timely file a motion to compel. When pursuing this option, as it relates to the company's PMQ, in addition to the specific request for the report detailed above, include the following as one of the deposition topics: "Any and all accident investigation or incident reports for the SUBJECT INCIDENT, and the purpose(s) of those reports." As discussed later, the purpose of the accident report is critical to determining whether it should be produced, so you want to make sure the defendant company is offering someone purportedly qualified to discuss it.

Do note, however, that if and when defendant asserts the same boilerplate objections to the request that accompanies the deposition notice, any subsequent attempts to meet and confer – and then move to compel – are governed by Code of Civil Procedure section 2025.410 and 2025.450. While Code of Civil Procedure section 2031.310 relating to motions to compel for stand-alone requests for production is similar, there are subtle differences that, if not followed, could result in your Judge denying an otherwise meritorious motion.

Step Two: A report exists; must defendant produce it?

Defendant has finally identified the accident report's existence (through a privilege log or deposition testimony, or both) but of course it remains steadfast in its refusal to produce it, claiming it is protected by the attorney work product doctrine and/or attorney-client privilege. But do these protections even apply? Not surprisingly, the answer is "it depends."

With respect to the attorney work product doctrine, such protection is only afforded to attorneys or people acting in pro per. (Code Civ. Proc., § 2018.030(a); *Dowden v. Superior Ct.*, (1999) 73 Cal.App.4th 126, 136.) For a writing to receive work-product protection it must "reflect" the *attorney's* impressions, conclusions, research, etc. (Code Civ. Proc., § 2018.030(a).) More often than not, the accident report's author(s) will be a supervisor and/or employee who are non-lawyers. In light of this, the accident report necessarily cannot contain any impression, conclusion or otherwise from any attorney, whatsoever.

That the accident report may have later been sent to the insurance company and/or an attorney does not change the accident report's unprotected character. (*D.I. Chadbourne, Inc. v. Superior Ct.*, (1964) 60 Cal.2d 723, 732 [finding the mere delivery to an attorney of a communication does not automatically render the communication privileged].) Moreover, to the extent the company's accident report contains independently prepared witness statements, the attorney work product doctrine does not apply: "[U]nlike interview notes prepared by counsel, statements written or recorded independently by witnesses neither reflect an attorney's evaluation of the case nor constitute derivative material, and therefore are neither absolute nor qualified work product." (*Nacht & Lewis Architects, Inc. v. Superior Ct.*, (1996) 47 Cal.App.4th 214, 218.) "Defendants cannot shield independently prepared witness statements by having their employees turn such statements over to defendants' attorney during his interviews with the employees." (*Id.*, at n.2.)

With respect to the attorney-client communication privilege, these protections are codified in sections 950 through 962 of the Code of Civil Procedure. The term "confidential communication between client and lawyer" includes "information transmitted between a client and his… lawyer in the course of that relationship and in confidence…." (Code Civ. Proc., § 952.) A "confidential communication between client and lawyer"' is defined as "information transmitted between a client and his or her lawyer" that "discloses the information *to no third persons* other than those who are present to further the interest of the client…." (*Palmer v. Superior Ct.*, (2014) 231 Cal.App.4th 1214, 1225-26, quoting Evid. Code, § 952, emphasis added.)

Under certain circumstances, an employer's accident report may be entitled to the attorney-client protection. The leading case on this issue is *D.I. Chadbourne, Inc. v. Superior Ct.*, (1964) 60 Cal.2d 723. *Chadbourne* and subsequent California cases dealing with this issue (including federal court opinions applying California law in diversity actions) apply a "dominant purpose" test to determine whether company's accident report is a protected communication.

Chadbourne involved the question of whether a written statement obtained by a representative of the defendant corporation's insurance carrier from the corporation's employee and delivered to the corporation's attorney was protected from disclosure as a matter of law by the attorney-client privilege. If an employer requires an employee to give a statement or report concerning the facts of an incident in the ordinary course of business, the employer's dominant purpose for that requirement determines whether the privilege applies. (*Chadbourne*, 60 Cal.2d at pp. 736-38.)

The employer's intent for the requirement controls, so if the employer's dominant purpose for requiring the

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statement or report is for the confidential transmittal to the employer's attorney, then the statement or report may be confidential. On the other hand, if the employer requires the creation of an accident report after every accident, and it is primarily used to counsel the involved employee (and/or other employees) on safety and how to avoid accidents like this in the future, then the statement or report is most likely not confidential and should be produced.

For example, in *Payless Drug Stores, Inc. v. Superior Ct.*, 54 Cal.App.3d 988 (1976), the reviewing court reversed a trial court's order requiring the production of an accident report involving a slip and fall because the *only evidence* of the report's dominant purpose showed the report's sole purpose was for a confidential transmission "intended for the information and assistance of [PayLess's] attorney in defending PayLess and its employees and to provide an attorney." (*Id.* at 990; see also *Scripps Health v. Superior Ct.*, 109 Cal.App.4th 529, 535 (2003) [finding confidential occurrence reports to be privileged because undisputed evidence showed report's primary purpose was use by in-house attorneys for internal risk and claim assessment].) So, as detailed extensively below, your plan going forward is gathering enough testimony to prove the accident report's dominant purpose (or "main," or "most important" or "prominent" purpose) is something other than preparing for litigation.

Step Three: What testimony will help you get access to the accident report?

As mentioned previously, your first step is to ask for the accident report in a request for production and/or in a request for production that accompanies a deposition. Your next step is locking down critical deposition testimony necessary for your motion to compel. While depositions are costly and sometimes difficult to schedule with recalcitrant defense counsel, they are a much better discovery tool than anything written. Depositions typically provide access to unfiltered testimony while interrogatories provide little more than sanitized non-responses from defendant's counsel.

Presuming you decide to move ahead with your deposition before attempting to meet and confer and/or move to compel (which you should), your next step is to address the specific request for production for the accident report on the record, during the deposition.

First, confirm with the witness that an accident report actually exists. Then, ask whether the defendant employee or defendant PMQ reviewed the accident report in order to prepare for their deposition. If they say, "yes," make sure to follow up by asking whether reviewing the accident report helped refresh their memory about the subject accident. Pursuant to Evidence Code section 771, a "yes" to both of these questions should ensure production of the accident report. Evidence Code section 771(a) provides in part that "if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party…."

"Evidence Code section 771 requires the production of documents used to refresh Power's memory with respect to any matter about which he testifies, no more and no less." (*Int' l Ins. Co. v. Montrose Chem. Corp.*, (1991) 231 Cal.App.3d 1367, 1372-73.) With this testimony locked down, you should then meet and confer on the record with defense counsel, citing this particular Evidence Code, the witness's answers, and ask whether in light of same, the accident report will be produced. The typical response is "no," however, defendant has no valid legal basis to refuse its production in response to a motion to compel.

But let us assume the defendant witness said "no" to your questions about reviewing the accident report in order to prepare for the deposition. Your next step is to ask the critical foundational questions about the report's creation and its "dominant purpose."

With respect to the report's creation, you should be asking questions addressing these topics:

1. Was it written at the request of another company employee or at the request of an attorney and/or insurance claims adjuster?
2. Who wrote it? As discussed, if a non-attorney wrote it (which is most likely the case) then the attorney work product doctrine cannot apply. Indeed, oftentimes these company accident reports have sections where the employee is required to handwrite a narrative about the accident, which could contain devastating admissions and/or impeachment material.
3. Who interviewed the employee for the accident report? An attorney or just another employee of the company?
4. Is the accident report's creation standard for all company accidents regardless of whether it could result in a lawsuit? Put another way, was the report's creation mandated by the company or by the company's insurer? If a company's accident report is a standard report an employee fills out after every accident, regardless of whether litigation is possible, then that is another fact bolstering your claim that the report's dominant purpose was for something other than litigation.
5. Is there a standard company form for the accident report versus a form provided by an insurance company? Does the report state on it that it is "CONFIDENTIAL" or "FOR INSURANCE REPORTING PURPOSES ONLY" (or words to similar effect)? If the report is on the company's own form, and does not have any confidential-type warnings, this is yet another fact demonstrating the report's primary purpose is something other than litigation preparation or investigation.
6. What was done with the accident report after its creation? Was it merely kept in the company's files and/or the employee's personnel file? Was it automatically sent to the company's insurance company? Was it sent only after the insurance company requested it? If the report is just part of the company's ordinary filing system, this is another fact that goes to establishing the report's

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main purpose is something other than reporting it to the insurance company and/or counsel.

With respect to the report's dominant purpose, this area of questioning is more nuanced and requires a thoughtful laying of foundation before you get to the most critical questions. In formulating your questions, it is best to work in reverse from what your ultimate goal is or, rather, what you want the employee and company PMQ to admit: the most important purpose of the accident report is addressing company safety and employee safety. With that in mind, your questioning can begin with simple safety questions that should only elicit a "yes" from any employee or PMQ who does not want their employer to look like a modern-day Triangle Shirtwaist Company:

• Safety is a concern of Defendant Company;
• In fact, safety is one of the most important things at Defendant Company;
And the reason safety is so important at Defendant Company is because without safety, accidents can occur and people can get injured;
• So knowing that safety is of utmost importance, Defendant Company has specific safety policies and procedures it requires its employees to follow when they are working;
• And Defendant Company makes sure that all of its employees are trained on the Company's safety policies and procedures;
• When an accident happens involving a Defendant Company employee, the Company certainly attempts to find out what happened and what caused the accident;
• And part of the process when Defendant Company investigates an accident includes writing some type of accident report (refer to the foundational questions 1-6 above);
• And then with that accident report, Defendant Company is able to counsel and train the employee involved in the accident so that it hopefully does not happen again;
• And also with that accident report, Defendant Company is able to train all other employees so that they also may be prepared and aware of how to avoid similar incidents; and
• So, in light of all of this, and the fact that safety is Defendant Company's most important concern, you would agree the accident report's most important (or dominant) purpose is addressing Company safety and making sure employees are following Company policy.

With affirmative responses to these or similar questions, you should be in a prime position to have the accident report produced.

But what if the company employee and/or company PMQ testifies the accident report has multiple purposes; that not only is it for company safety, but also for reporting the incident to the insurance carrier? Do not abandon hope. You can still get the witness to testify that even if there are many purposes to the report, the most important purpose is still company and employee safety.

Here is an exchange from a company's PMQ deposition where I addressed a similar situation.

Q. And at some point in time I think you said you had Defendant Employee fill out an accident report?
A. Yes, I think so.
Q. And what is an accident report?
A. It' s just a little piece of paper that says what happened.

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Q. All right. And so this accident report as – in your position as the safety manager of Defendant Company, would you review these accident reports that an employee would fill out? Was that part of your job?
A. Yes.
Q. Okay. And in reviewing these accident reports, would you discuss and review these accident reports with the employee who was involved?
A. Frequently, yes.
Q. Okay.
A. Not necessarily every time, but –
Q. Understood. And so then one of the purposes of these accident reports is to just go over what happened, find out what happened, do some fact gathering, and then possibly counsel that employee about what happened?
A. Yes.
Q. Okay. All right. Is that the primary purpose, the most important purpose for these accident reports, is what I just described to you?
DEFENSE COUNSEL: Objection. Speculation. Go ahead.
A: THE WITNESS: I've also – I have to communicate with the insurance company, and they're going to ask questions; and without that piece of paper there, I don't know what happened.
Q. All right. As the safety manager of Defense Company, the purposes that you just described, is there any one that's more important than the other?
DEFENSE ATTORNEY: Objection. Vague.
THE WITNESS: I really didn't understand the question a whole lot.
Q. Okay. So – and I know you described what you do with the accident reports is from time to time you give them to the insurance company; is that correct?
A. Correct.
Q. All right. With respect to the other purpose that we talked about, using it to gather facts about what happened and counseling the driver, making sure they're being as safe as possible, is that the most important purpose for these accident reports?
DEFENSE ATTORNEY: Objection. Vague.
Q. (PLAINTIFF COUNSEL) You can answer.
A. *The most important part would be to make sure it doesn't happen again, that what my drivers are doing would be corrected*.
Q. Okay. *So counseling the* 13 *drivers on always being safe, that is the most important purpose?*
DEFENSE ATTORNEY: Objection. Vague.
Q. Yes?
A. *Yes*.

Armed with this testimony, I met and conferred on the record and later moved to compel. Citing the exact testimony detailed above, the court found "[e]mployee accident reports can fall within the attorney-client privilege where compiled for purposes of litigation.

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However, when such a report is not made solely for that purpose, then the inquiry is its dominant purpose. (*Scripps Health v. Superior Ct.* (2003) 109 Cal.App.4th 529, 534.) If the dominant purpose for the report is unrelated to potential litigation, then the report is not privileged. [Defendant PMQ's] testimony forecloses [Defendant Employer's] argument that Accident Report is privileged." The court ordered defendant to produce the accident report within five days. On the fifth day, the case settled for an amount in excess of its policy limits.

Company accident reports can contain facts, admissions, and other information so damaging that a court order mandating its production can change the entire dynamic of your case as it relates to liability and value. This is why defendant companies almost universally refuse to produce them without motion practice. Now you have a roadmap to this powerful piece of evidence.

Andrew Owen is an attorney with Panish Shea & Boyle LLP. *He focuses his practice on litigating and trying catastrophic personal injury and wrongful death cases involving trucks, commercial vehicles, pedestrians, industrial or construction accidents, as well as dangerous conditions of public and private property. He also devotes a portion of his practice to consumer class actions against businesses that engage in unfair and illegal business practices.*