There's A Lot Of Confusion About The Use Of Privilege

Insights
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At the end of the May 12th *ASSE-Georgia's Health and Safety Professional's Conference*, we had 30 minutes of spontaneous Q&A about the use of *Attorney Client Privilege* and *Work Product Protection* for safety audits and accident investigations. Even sophisticated employers remain confused about when and how to use the protections afforded by Attorney Client Privilege and the Work Product Doctrine. Employers may believe that simply sending an audit to their counsel will result in the audit being protected. Likewise, some employers believe that if their counsel retains an expert, the expert's work and report will automatically be protected. Other employers believe that their counsel can after the fact treat a document as privileged when the employer sent that document to the attorney after its creation.

Reason For These Protections
Let's review the role of Attorney Client Privilege and Work Product Protection in a broad laymen's fashion. Both of these protections were created to encourage employers to obtain legal counsel and for clients and their counsel to engage in the type of self-critical analysis which benefits the public. Employers would be understandably reluctant to brutally and self-critically examine their accidents if they believed that all of that work product would later be used by plaintiffs to prosecute claims.

Similarly, it benefits everyone if employers freely talk with their counsel and seek their guidance in the context of current or threatened litigation. As former Attorney General Griffin Bell succinctly explained to me, *"no matter how sophisticated the matter, the attorney's role is to keep their client legally straight."* This fine man went on to explain that every person needs three people to keep him *"straight:" "their minister or priest to keep them morally straight; their physician to keep them physically straight; and their attorney to keep them legally straight."*

I explain this process because I want to disabuse people of the notion that employers simply use Attorney Client Privilege and Work Product Protection to hide their evil deeds. Quite the contrary, these protections encourage employers to freely consult with their counsel and to take steps to ensure that they do not harm others or violate the law.
Attorney Client Privilege
Creating *"Attorney Client Privilege"* Protections is more straightforward then the concept of establishing *"Work Product Protection."* As to Attorney Client Privilege," generally" one's consultation with their counsel about current or threatened litigation or efforts to comply with the law and avoid litigation will be privileged communications. Certain things are not usually privileged,

such as communications where the employer is not seeking advice, underlying facts, advice that aids in the commission of a crime, and protected information for which the client inadvertently waives protections.

The matter becomes more complicated when the manager is conferring with in-house counsel because sometimes courts will conclude that in-house counsel are acting more as an executive or in operations than as pure legal counsel providing advice. This can be a problem because good in-house legal counsel involve themselves in business operation so that they can provide practical guidance. There is a possibility that their involvement in the company's business will allow one to claim that they were providing business advice rather than legal counsel.

Work Product Protection Doctrine

We use the *"Work Product Doctrine"* to protect materials prepared by anyone at counsel's direction in anticipation of litigation, and includes work of the employer, consultants, experts, investigators and others.

Safety audits generate much of the confusion. Attorneys do not have a wand which allows them to magically turn a document into a privileged product. Attorneys share stories about receiving cc's of completed audits without explanation because the client assumed that the document magically became privileged when the employer emailed it to the counsel. It is difficult, if not impossible, to make communications in such documents privileged after their creation.

Let's take the example of a safety self-audit. The essence of the Work Product Protection is that the work by the employer or outside experts is being used by the attorney to provide legal counsel, typically in anticipation of litigation. Therefore, where the attorney commissions the audit, works with the auditor to design the process, consults throughout the audit, and incorporates the audit into legal advice, the auditors work is probably protected as Attorney Client Work Product. Most routine internal audits or even those by outside consultants will not fit within this description. The annual insurance company audit with one of their safety engineers is not typically protected by privilege or work product provisions.

You do not want to privilege or protect most of your safety self-audits. Not only do these audits disclose problems, they demonstrate an effective safety program and culture. So long as the employer corrects safety concerns, why would they want to hide this proactive effort from public scrutiny? An outside party may argue that a large number of "near-misses" shows a lack of concern for safety; however, most judges will view a large number of "near-misses" as proof that the employer's safety program works. The employer is catching violations before they result in an injury. Many employers do not even learn of violations unless they result in an OSHA citation or an injury.

Obviously, there are occasions where the employer should protect an audit or inspection. In order to engage in aggressive self-critical analysis, most employers will want to involve counsel in the "root cause analysis" of a fatality or serious incident. Likewise, compliance efforts involving combustible dust and other complex safety issues may require months and even years to complete. If one has multiple locations, they may be forced to prioritize which plant to address first. Moreover,

multiple locations, they may be forced to prioritize which plant to address first. Moreover, combustible dust compliance is challenging because it is difficult to select the best contractors and complete the necessary process hazard analysis (PHA) and corrective actions within a short period of time. An employer may be reluctant to do a corporate wide survey of its combustible dust needs for fear that it will be accused of being on notice of deadly safety concerns while working in good faith to achieve corporate compliance.

There are no easy answers to these questions and the specific facts really do matter. However, employers must be careful to not assume that they can privilege and protect inspections and work product simply by shooting an email to their favorite counsel.

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