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Claims Management/Cost Reduction Strategies for Corporate Departments

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A CLAIMS MANAGEMENT TOOL: TECHNIQUES TO LIMIT THE IMPACT OF ABUSIVE DISCOVERY TACTICS USED AGAINST CORPORATIONS IN NEGLIGENCE ACTIONS

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I. OVERVIEW:

B Subject of Article:

This paper will discuss the use of techniques to combat abusive discovery in cases brought against corporations based upon allegations of a corporation's employee's negligence. Half of my caseload is taken up by the supervision of the defense of such cases. This paper therefore concentrates on abusive tactics which seek information or document disclosures going well beyond the question of the reasonableness of the employee's actions right before the incident in question, and also seeking information or documents compiled or produced in anticipation of litigation or as part of a company's discipline or practices review process. However, the principles and techniques discussed should also be applicable to many other types of litigation brought against corporations. The problem of abusive discovery tactics by Plaintiffs which request the production or disclosure of voluminous documents or detailed information, going beyond the proper scope of discovery as defined by the pleadings is often present in all types of claims litigated against corporations.

The purpose of this article is to present legitimate techniques for the limitation of such abusive discovery. Use of these techniques should reduce overall litigation costs, while limiting the production of extraneous materials.

B. The Historical Development of Modern Discovery Rules:

During the past 25 to 30 years, parties have litigated lawsuits in most jurisdictions under what have been generally described as "liberal" rules of discovery. Most states have adopted a version of the Federal Rules of Discovery, which were first enacted in 1938. When compared to the old common law rules, modern rules of discovery do allow for comparatively easier discovery of information or documents held by lawsuit adversaries. However, the permissible "scope of discovery" under modern discovery rules is not unlimited, and evidentiary privileges still apply. Plaintiffs suing corporations should be held to the limits provided for under modern discovery rules.

C. The Importance of Enforcing Limits on Discovery:

Processing discovery requests for corporations can be very expensive and time consuming. Much time and effort must be spent on finding voluminous records, compiling information and producing related company witnesses. In addition, the production of some items in discovery often leads to subsequent discovery requests seeking additional information or documents, based upon leads given Plaintiff's counsel in the first round of discovery. If the Plaintiffs are not held to limits as defined under modern discovery rules, Plaintiffs are allowed to engage in unmerited fishing expeditions effectively financed by the company being sued.

If Plaintiff's attorneys are allowed to "fish", they may search for documents or information from which to develop theories for which they originally had no good faith factual basis. In effect, Plaintiffs make the allegations in the hope of finding something in the future to not only substantiate the allegations, but in many instances to find material for presentation out of context to juries for purposes of inflaming the juries. Federal Rule 11 prohibits such tactics. Objections to such discovery requests are well grounded in the Federal Discovery Rules, and similar state code provisions.

Plaintiffs may also seek to access the corporate Defendant's own investigation file on the incident in question, despite the presence of applicable privileges. Although such discovery requests often seek "relevant" information, if these privileges are not enforced, parties suing corporations will get the benefit of accessing the corporation's own internal investigations.

D. The Advocate's Important Role in Educating Judiciary:

The key to limiting the impact of a Plaintiff attorney's attempts "to go fishing" at the company's expense is to make timely legitimate discovery objections, and then to support those objections with well founded legal arguments, if the Plaintiff's attorney seeks an order compelling production of the objectionable documents or information.

In some jurisdictions, however, the process may seem initially like an uphill battle, because trial judges generally do not like to become involved

in discovery disputes. With reluctant judges, it is important for the defense counsel to reinforce what judges once knew, but sometimes seem to have forgotten, that modern discovery rules don't allow for the discovery of anything Plaintiff asks for, but rather for anything relevant to legitimate factual issues which is not privileged. Discovery may only be obtained with regard to relevant, non-privileged information, or information reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26; *Pierson v. United States*, 428 F.Supp. 384 (1977); *Devex Corp. v. General Motors Corp.*, 275 F.Supp. 310 (1967).

The defense attorney must be well versed in the caselaw interpreting the proper scope of discovery and privileges arising under modern discovery and evidence rules.

II. LIMIT DISCOVERY TO ISSUES WHICH ARE PLEADED IN GOOD FAITH

Before the attorney becomes an advocate in front of the trial judge on discovery issues, he or she must first initiate the process by making objections to discovery items. The objections to be made at the start of this process are based on an examination of the pleadings. What legitimate factual issues are posed by the complaint and responsive pleadings? It is the Plaintiff's Burden to show that the discovery sought is legitimate under these pleadings. The party seeking discovery has the burden of showing clearly that the information sought is relevant to the subject matter of the action or would lead to admissible evidence. *National Organization for Women v. Sperry Rand*, 88 F.R.D. 272, 277 (D.Conn. 1980); *McLain v. Mack Trucks, Inc.*, 85 F.R.D. 53 (1979). Accordingly, unless the discovery sought appears reasonably calculated to lead to discovery of admissible evidence, the requests seeking such information are properly subject to objections. *Hooker v. Raytheon Co.*, 31 F.R.D. 12 (1962).

A. Discovery Rules Require Good Faith Basis for Discovery Inquiries:

Plaintiffs must demonstrate to the Court how the information is relevant. Plaintiffs often seek to support the discoverability of the items sought with general conclusionary allegations as to relevancy. General allegations of relevancy are not sufficient to overcome an adverse party's specific objection that an item is not discoverable because it is not relevant to the subject matter of the action. *Home Ins. Co. vs. Ballenger Corp.*, 74 F.R.D. 93, 101 (N.D. Ga. 1977).

Under Federal Rules 11 and 26, a Plaintiff must have a good faith basis for opening up a subject area for inquiry. Most states have similar state code provisions.

Federal Rule 11 provides in pertinent part:

> *. . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion upon its own initiative, shall impose . . . an appropriate sanction . . .*

Federal Rule 26(b)(1) provides in pertinent part:

> *The parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .*
>
> *The frequency or extent of use of the discovery methods . . . shall be limited by the court if it determines that:*
>
> *(iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount of controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation . . .*

Federal Rule 26(g) provides in pertinent part:

> *. . . The signature of an attorney or party constitutes a certification that the signer has read the request, response or objection and that to the best of the signer's knowledge, information and belief formed after reasonable inquiry in . . . (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the*

> *case, the amount of controversy, and the importance of the issues in stake in the litigation . . .*

Plaintiff's attorney should be precluded from searching for documents or information merely to "explore" theories for which he or she has no good faith factual basis. Rule 11 requires an attorney to make a reasonable inquiry into the facts and merits of his or her client's case before filing a lawsuit. Rule 11 also prohibits using pleadings for any improper purpose, including "to harass or cause unnecessary delay or needless increase in the cost of litigation."

One must read the above cited rule provisions together in order to determine the duties and responsibilities of the parties in scope of discovery issues under Rule 26(b). The comments to the rules specifically approve of the reading of these provisions together. It is stated in the Rule 26 Comments for the 1983 amendments relating to "Subdivision (g)" as follows:

> *If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response or objection. Motions relating to discovery are governed by Rule 11. However, since a discovery request, response or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).*

The comments to the 1983 Amendments to Rule 11 stress the importance of making a PREFILING INQUIRY into the facts. Litigants do not have the option of making perfunctory allegations of negligent hiring, entrustment or training without some good faith knowledge of facts to back up the allegations. The rules do not provide for a post-filing inquiry into facts making up a good faith basis for the initial pleading of a particular theory of recovery. Lack of a pre-filing good faith knowledge of substantiating facts should close discovery doors on these issues. It is stated in the 1983 Amendment Comments to Rule 11 in pertinent part:

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is reasonableness under the circumstances. . . . This standard is more stringent than the original good-faith formula and thus it

is expected that a greater range of circumstances will trigger its violation . . .

If the pleading allegations supporting a particular theory are made without a good faith factual basis, it is clear from a reading of Rule 11 and 26 that objections to discovery into these pleaded subject areas should be sustained by the court as a proper remedy under both rules. In addition, the court could enter a protective order providing that discovery cease outside the bounds of issues posed by GOOD FAITH pleading assertions.

A Georgia case gives support for the principal that one may not open discovery doors by making unfounded pleading allegations. In *Holman v. Burgess*, 199 Ga.App. 61, 404 S.E.2d 144 (1991) the Georgia Court of Appeals cited a "national trend" by holding that a mere allegation of punitive damages alone would not permit a Plaintiff to discover financial information about a defendant. *See also Gierman v. Toman*, 77 N.J.Super. 18, 185 A.2d 241, 144 (1962); *Rupert v. Sellers*, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975); *Cox v. Theus*, 569 P.2d 447 (Okla.1977); *Leidholt v. Dist. Ct. of Denver*, 619 P.2d 768 (Colo. 1980); *Campen v. Stone*, 635 P.2d 107 (Del.1982); *Larriva v. Montiel*, 143 Ariz. 23, 691 P.2d 735, 738 (1984). The Georgia Court held that a defendant's finances are not discoverable until Plaintiff makes an evidentiary showing (by affidavit, discovery responses or otherwise) that a factual basis existed for a punitive damages claim.

B. A Simple Negligence Pleading Should Not Open Up All of the Company's Employment, Training, and Incident History Files for Discovery Fishing Expeditions

A case which is pleaded as a simple negligence case, or where the company admits the employment or agency status of the employee, should not subject the company to discovery fishing expeditions on such subjects as hiring, training and retention practices, and personnel records. Nevertheless, Plaintiffs often seek such information as the employee's personnel file, his or her training, and the procedures used in hiring. The only possible relevance of such items would be to support a claim based upon negligent hiring/supervision/retention/training/entrustment. If the Defendant corporation admits the employee's agency, and the fact that the employee was acting within the scope of his or her agency/employment at the time of the incident which is the subject of the action, such issues should be moot.

Given such a scope of employment admission, not only are the negligent hiring/supervision/retention/training/entrustment theories moot, but Plaintiff should be barred from pursuing them. The majority rule provides that a negligent hiring chain is improper when an employer admits that a respondeat superior situation is involved.[i1]

Most states, if not all, provide for vicarious liability under common law for the acts of agents or employees made within the scope of agency or employment. It should also be noted that for employee vehicular accident cases most states have enacted code provisions making owners of vehicles liable and responsible for deaths or injuries resulting from negligent or wrongful acts in the operation of the vehicle in the business of the owner, or by any person using or operating the same with the permission of the owner. 74 ALR 3d 739; 13 ALR 2d 378. (See also California Vehicle Code Section 17150, and similar code provisions of other states.)

If an employee was acting within the course and scope of his or her employment, the employer is responsible for the damages sustained by the Plaintiff as the result of the employee's negligence, if any. When an employer stipulates that it is liable for the negligence, if any, of its agent/employee under the doctrine of respondeat superior, other theories for imposing liability are unnecessary and superfluous.

It is pointed out in the cases constituting the majority view[1] that negligent hiring claims are based on the similar conduct giving rise to vicarious liability through respondeat superior, and this subjects the employer to no extra liability. *See Clooney vs. Geeting*, 352 So.2d 1216, 1220 (Fla. Ct. App.2d 1977); *Willis v. Hill*, 159 S.E.2d 145, 158 (Ga. Ct. App. 1967). Since negligent hiring imposes no additional liability, courts have found that the pursuit of negligent hiring deflects the jury's attention from the contested issue of the employee's negligence, confuses the issue of the employer's negligence, and incites prejudice against the employer. *Wise vs. Fiberglass Systems, Inc.*, 718 P.2d 1178, 1182 (Idaho 1986); *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995). Vicarious liability or imputed negligence has been recognized under numerous theories, including agency, negligent entrustment of a chattel to an incompetent, conspiracy, and ownership liability statutes. If imputation of any proven negligence is admitted, proof supporting all these theories serves no legitimate purpose in a lawsuit. In making their rulings, many courts have cited the highly prejudicial nature of the proposed evidence, stating that such evidence is ordinarily not allowed to be admitted absent allegations of negligent entrustment. As noted in *Houlihan v. McCall*, 78 A.2d 661, 666 (Md. 1951):

> *Where (an employee's) known incompetence is in issue, the exclusionary rule must yield, no doubt, to the necessity of permitting proof of previous misconduct. But where agency is admitted it can serve no purpose except to inflame the jury.*

The *Houlihan* court went on to hold that admission of prior misconduct evidence was sufficiently prejudicial to require reversal and a new trial, even though the evidence actually admitted showed only one minor incident which took place four years before the incident in question. Admission of such evidence, even of this relatively trivial nature, has a natural tendency to exaggerate the importance of the offenses.

The Court in *Willis*, *supra*, held that once an employer admits its liability under respondeat superior for the negligence, if any, of the defendant driver on occasion, the Plaintiff is precluded from proceeding with a negligent entrustment theory because it would not result in a greater recovery if proven. The court in *Willis* explained that the Plaintiff should not be allowed to pursue a negligent entrustment theory if the respondeat superior issue is conceded, because the link to the employer is already established, rendering proof of the purported negligent entrustment unnecessary, irrelevant, and inflammatory. Therefore the very same reasons for excluding the evidence of the employee's prior record, as to him or her, apply with equal force to the employer.

The courts which have prohibited Plaintiffs from asserting negligent hiring, retention, or supervision, where the employer has conceded the respondeat superior issue, have done so with the following reasoning:

> *In cases where A is sought to be held liable for an injury caused by B, the "breach of duty" by A is nothing more than a theory under which responsibility for B's conduct is tacked onto A. The result is the same whether A's "duty" is to be called primary or vicarious. If then, the only purpose and relevance of evidence showing the employee's incompetence and the employer's knowledge thereof is to show a liability link from the employee to the employer, and this link is admitted to exist, the evidence should be excluded under the general rule regarding undisputed matters, leaving as the only question the only disputed issue--whether the employee's negligence caused the injury.*

Wise, 110 Idaho at 743-44, 718 P.2d at 1181-82 (citing *Willis*, 116 Ga. App. 848, 159 S.E. 2d at 150). If agency is admitted, it is only necessary to prove negligence on the part of the employee involved in the injurious accident. *See Houlihan v. McCall*, 197 Md. 130, 78 A.2d 661, 664-65 (1951).

C. Pleading of Entitlement to Punitive Damages Should Not Open Up Discovery Flood Gates

Once evidence of "negligent entrustment" is rendered irrelevant for purposes of liability for compensatory damages, the pleading of entitlement to punitive damages based upon general allegations of "negligent entrustment" does not necessarily make such evidence once again relevant. Courts which have referred to the punitive damages exception as allowing the claim for "negligent" entrustment have done so by referring, in fact, to conduct which is actually willful or wanton in character. Punitive damages are generally not allowed for mere negligence. Instead, courts have referred to conduct which is willful, outrageous, grossly fraudulent, or aggravated by evil motive. *See, Hackett v. Washington Metro, Area Transit Auth.*, 736 F.Supp. 8 (D.D.C. 1990)(allegations of failure to investigate background and training held insufficient to plead gross negligence). In the majority of instances, courts have referred to the type of allegations and conduct required to admit the evidence as "willful" or "reckless." *Elrod v. G & R Const. Co.*, 628 S.W.2d 17, 19 (Ark. 1982); *Bartja v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 218 Ga. App. 815, 463 S.E.2d 358 (1995). Courts have been willing to render summary judgments in favor of employers on claims of willful and wanton entrustment for which punitive damages are sought.[ii2]

D. Evidence Rules Are Applied In Order To Determine Discoverability

1. Relevancy to Incident is the Primary Issue

Plaintiffs often accompany allegations of simple negligence by the employee on the occasion at issue with unfounded independent claims against the corporation for negligent hiring, retention or entrustment. Federal Rule of Civil Procedure 26(b) provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . .". Depending on the nature of the action it can be argued that the goal of limiting the burdensome nature of discovery

requires that discovery items be relevant to Plaintiff's claims of **negligence at or near the time of the incident only**. See Fed.R.Civ.Proc. 26(b)(1). Rule 401 of the Federal Rules of Evidence provides:

> *"Relevant evidence" means evidence having any tendency to show the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.*

If agency is admitted, and Plaintiff has all information or documents relevant to the issue of the negligence of the employee at the time of the incident, discovery of miscellaneous other extraneous information is unduly burdensome. The burden of discovery rises for the corporation as Plaintiff seeks information or documents from us that are irrelevant to claims of negligence at the time of the incident.

2. Relevancy vs. Materiality

Some courts have referred to evidence of negligent entrustment as "irrelevant," but it may be more accurate to say that such evidence, once agency is admitted, is "immaterial." Some courts have ordered *dismissal* of these claims upon admission of agency by the defendant. If dismissal takes place, there is no question that no issue of negligent entrustment or hiring is then made out by the pleadings. This renders any evidence tending to show such negligence "immaterial." This could be a crucial distinction in resolving related discovery disputes. *See, Armenta v. Churchill*, 52 Cal. 2d 448, 267 P.2d 303, 309 (1954).

3. Admissibility Is A Factor:

Often Plaintiffs argue to courts that it doesn't matter if the information or documents sought are admissible, because Rule 26 allows for the discovery of information which might lead to the discovery of admissible evidence. However, the issue of admissibility is important, because it places on Plaintiff the burden of showing in discovery disputes that the discovery sought will lead to the discovery of admissible evidence. A good discussion of this issue is found in *Shipes v. BIC Corporation*, 154 F.R.D. 301 (M.D. Ga., 1994). There the issue was the discoverability of

settlement documents the corporate defendant had entered into in past products liability claims. It is stated with regard to Plaintiff's burden at 154 F.R.D. 309:

> *BIC seeks a protective order concerning the fact, amount, or negotiations of prior settlements in claims against BIC lighters.*
> *Federal Rule of Evidence 408 makes evidence of compromise or settlement of disputed claims inadmissible to show liability or invalidity of the settlement amount. While Rule 408 deals only with admissibility at trial and not the scope of discovery, the rule makes it unlikely that information about prior settlements will lead to the discovery of admissible evidence. Rule 26(b)(1).* ***Other courts have required that one make a "particularized showing" that settlement information is likely to lead to admissible evidence before it can be discovered.*** *Morse/Diesel, Inc. v. Trinity Industries, Inc., 142 F.R.D. 80, 84 (S.D.N.Y.1992); Bottaro v. Hatton Assoc., 96 F.R.D. 158, 160 (E.DN.Y. 1982) (better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of settlement terms). This position encourages settlements and protects their confidentiality while still allowing discovery if the information is truly relevant. This court, then, will require Plaintiff to make a particularized showing in order to obtain discovery of settlement information.*

II ABUSIVE DISCOVERY CAN BE EFFECTIVELY LIMITED BY ASSERTING PRIVILEGES

Federal Rules generally reference common law privileges rules which may apply to prevent discovery of information or documents Plaintiffs seek in discovery from corporate defendants. State evidentiary codes provide more specificity as to the privileges that are available in each jurisdiction. In any event, the privilege rules available in every jurisdiction effectively limit discovery of items or documents prepared in anticipation of litigation. Attorney/Client Privilege and Work Product Doctrine are the

most commonly invoked privileges. Some jurisdictions allow for a privilege applicable to self-critical internal investigations designed to serve an important public policy.

A. Work Product Doctrine:

At some point the investigation of a injurious incident involving a corporation may become anticipatory to litigation. This is particularly true of corporations which are looked upon by the Plaintiffs' bar as "target defendants". That is why the Work Product Doctrine is so important to these types of cases. If the incident investigation was conducted under the supervision of in-house counsel or outside defense counsel, a solid case can be made for protection of much of the material in that file from disclosure in discovery. There is also caselaw support for application of this doctrine to the work of independent investigators or adjusters, even if they don't report directly to an attorney.

The Work Product Doctrine provided for in Federal Rules (and similar state law codifications) is essentially a codification of the United States Supreme Court holding in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L.Ed. 451 (1947). This doctrine was specifically applied to in-house counsel in *Upjohn Co. vs. United States*, 449 U.S. 383, 101 S.Ct. 677, 55 L. Ed.2d 584 (1981). The work product privilege of Fed.R.Civ.P. 26(b)(3) protects from discovery "materials prepared by or for any litigation or trial so long as it was prepared by or for a party to the subsequent litigation." *FTC v. Grolier, Inc.*, 462 U.S. 19, 103 S.Ct. 2209, 2213, 76 L.Ed2d 387 (1988) (*citing, C. Wright & A. Miller, Federal Practice and Procedure*, § 202, p.201 (1970). The Work Product Doctrine was codified in Fed.R.Civ.P. 26(b)(3) as follows:

> ***Trial Preparation Materials.*** *Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents 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 party's attorney, consultant, surety, indemnitor, 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.*

It has been held that material prepared by or for another under this rule includes an attorney, surety, indemnitor, insurer or agent. *Ennis By and Through McMillan v. Anderson Trucking,* 141 F.R.D. 258, 259 (E.D.N.C. 1991). One court held that "[a] statement by insured parties to their insurer or its representative, in the course of an investigation by the insurer of an event giving rise to potential liability falls squarely within the protection" of the work product doctrine. *Menton v. Lattimore*, 667 S.W.2d 335 (Tex. App. 1984).

Rule 26(b)(3) protects from discovery documents and tangible things prepared in anticipation of litigation or trial, except upon a showing that the party seeking discovery has substantial need of the materials and that party is unable without undue hardship to obtain the equivalent by other means. *Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507, 509 (E.D. Pa. 1987). Thus, under Rule 26(b)(3), if a party demonstrates that materials in its possession that would otherwise be discoverable were prepared in anticipation of litigation, the materials are considered work product and become subject to a qualified privilege from discovery. *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir. 1996).

In *Logan*, the court held that the claims documents sought by the Plaintiff were created in anticipation of litigation. It was found that Commercial Union had shown that all the documents for which it had claimed the privilege were written after Plaintiff's claim had been processed, investigated and denied. These documents generally concerned how Commercial Union intended to defend against Plaintiff's action and therefore were created in anticipation of litigation. *See also, Hickman v. Taylor, supra* at 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *United States v. Rockwell International*, 897 F.2d 1255, 1266 (3d Cir. 1990).

Corporate legal departments must track nationwide litigation involving the company. In today's world, there is a good chance that the information gathered will end up in a database. The court in *Shipes v. BIC Corporation*, 154 F.R.D. 301 (M.D. Ga., 1994) held that BIC's legal department database on litigated cases was protected from disclosure in discovery under the work product doctrine. The court stated at 154 F.R.D. 309:

> *BIC's in-house legal department maintains a computer database to manage claims. The computer database undoubtedly contains a substantial amount of work product which would be impossible to separate from non-work product. In fact, the entire system arguably constitutes work products as it was created in anticipation of litigation. The database should not be any more vulnerable to discovery than were it maintained by outside counsel. Accordingly, the computer database is not subject to discovery, although information which can be obtained from an alternate source does not become immune from discovery simply because it is also found on the database.*

In most cases, the information and documents sought by the Plaintiffs relate to claim reports and other investigative materials that were prepared in anticipation of litigation. These documents usually contain insights as to how the corporation planned to defend the particular claim. Plaintiffs usually cannot show a substantial need for such information in the preparation of their case; nor that they are unable, without undue hardship, to obtain the substantial equivalent of these materials by other means. *Granger*, 116 F.R.D. at 510. This information should be protected from discovery pursuant to Rule 26(b)(3).

B. Self-Critical Analysis Privilege

1. Evidence Code Background

Courts are beginning to recognize a new privilege protecting in-house investigative/analytical material from disclosure in discovery. This is the "Self-Critical Analysis Privilege." It has been recognized most often under Federal Evidence Rules. In actions based on federal law, Rule 501 is liberal in allowing recognition of privileges arising under common law.[iii][3] In state law based claims, it is a bit more restrictive.

The "critical self-analysis doctrine" protects certain information from discovery, primarily where public policy outweighs the needs of the litigants in the judicial system for access to information relevant to the litigation. Courts have held that the doctrine is designed to encourage confidential self-analysis and self-criticism. *Webb v. Westinghouse Electric Corp.*, 81 F.R.D. 430 (E.D. Pa.

1978); *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980); *see also, Granger*, 116 F.R.D. at 508. This societal interest to encourage confidential self analysis and self criticism is present as corporations review incidents by taking statements of employees, and taking other investigatory steps and then deciding what actions may be necessary with regard to discipline or remedial training.

The corporation's liability for the employee's actions may be decided under state law and in state courts. Therefore, interpretation of state evidence code provisions will often be necessary to determine the viability of this privilege in a particular state. If the pertinent state evidence code section is wide open like Federal Rule 501, a convincing argument can be made of the existence of the self-critical analysis privilege under applicable common law. It is not one that has been codified in most jurisdictions.

2. Existence of the Privilege in Federal Discrimination Cases

The privilege has been successfully invoked most often in the past in discrimination cases based on Federal law. As a matter of federal common law, employers may invoke a self-critical analysis privilege to limit the disclosure of studies undertaken to comply with federal antidiscrimination laws. Employers' self-generated candid critiques of their affirmative action policies and practices are protected from discovery by a Plaintiff in an employment discrimination suit under a self-critical analysis privilege. *Cloud vs. Superior Court* (Western Atlas Inc.), Cal. App.2d, No. B100927, 11/21/96.

In a New York case it was held that Plaintiffs have the ability to discovery factual material contained in an internal, confidential company report, but the report's narrative, evaluative, and analytical portions are shielded from disclosure by a self-critical analysis privilege. *Troupin vs. Metropolitan Life Insurance Co.*, DC SNY, No. 95 Civ. 7329 (RWS), 12/5/96.

3. Recognition Outside Context of Discrimination Cases

Given the recognition of the doctrine primarily in discrimination cases, the ultimate question is whether this privilege can be successfully invoked in other types of claims litigation.

A corporation should be permitted to engage in self-critical analysis of its policies, procedures and operations without the threat of compelled production of related documents during litigation. Business entities that prepare reports of incidents in which they have been involved often do so to determine whether there are preventative measures that can be employed to prevent similar incidents in the future. This type of self-critical analysis should serve important public policy goals.[iv4]

Many jurisdictions have held that commercial entities are not required to produce evaluative portions of traffic incident reports and internal investigations concerning incidents involving their commercial vehicles. For example, the Fifth Circuit Court of Appeals has found that disclosure of the opinions and recommendations contained in such reports in the possession of a railroad company would be a disadvantage to the company, because the fear of potential discovery might deter it from seeking full and candid evaluations of the cause of incidents, and hinder the proper disposition of claims. "[M]uch of what is now put in writing would remain unwritten, and amicable statements made more difficult." *Southern R. Co. v. Lanham*, 403 F.2d 119, 131 (13th Cir. 1968), *rh'g denied on other grounds*, 408 F.2d 348 (Mar. 4, 1969) (quoting *Guilford Nat'l Bank v. Southern R. Co.*, 24 F.R.D. 493, 500 (D.N.C. 1960), *reversed on other grounds*, 297 F.2d 921 (4th Cir. 1962)).

Courts generally require the party asserting the privilege to show that the material to be protected satisfies at least three criteria:

1. The information sought must result from a critical self analysis by the party asserting the privilege;

2. There must be a strong public interest in preserving the free flow of the type of information sought; and

3. The information must be of the type whose flow would be curtailed if a Court permitted discovery.

Dowling v. American Hawaii Cruises Inc., 971 F.2d 423 (9th Cir. 1992). Some courts have required a fourth element that there was an expectation that the document would be kept confidential. *Roberts v. Carrier Corporation*, 107 F.R.D. 678 (N.D.Ind. 1985). These elements should be satisfied when a corporation investigates incidents in which it has been involved.

IV. CONCLUSION

Grounds for resistance to burdensome discovery directed at corporations by Plaintiffs are well grounded in modern discovery rules. Legitimate use of techniques for objecting to proffered discovery serves the purpose of reducing the company's burden to respond to discovery, while denying Plaintiffs the illegitimate opportunity to engage in unfounded fishing expeditions. In addition, the corporation is set free to develop attorney work product and internal investigations without fear of disclosure.

[i1] *Cole vs. Alton*, 567 F.Supp. 1084, 1086 (N.D. Miss. 1983); *Wise vs. Fiberglass Systems, Inc.*, 718 P.2d 1178, 1182 (Idaho 1986); *Elrod vs. G & R Const. Co.*, 628 S.W.2d 17, 19 (Ark. 1982); *McHaffe vs. Bunch*, 891 S.W.2d 822 (Mo. App. 1995); *Clooney vs. Geeting*, 352 So.2d 1216, 1220 (Fla. Ct. App. 1978); *Shipley vs. City of South Bend, Indiana*, 372 N.E.2d 490, 493 (Ind. Ct. App. 1978); *Willis v. Hill*, 159 S.E. 145, 158 (Ga. Ct. App. 1967) rev'd on other grounds 161 S.E.2d 281 (1968); *Houlihan vs. McCall*, 78 A.2d 661., 664-65 (Md. Ct. App. 1951); *Armanta vs. Churchill*, 42 Cal. 2d 448, 267 P.2d 303 (1954); *Prosser vs. Richman*, 133 Conn. 253, 50 A.2d 85 (1946); *Clooney vs. Geeting*, 352 So.2d 1216 (Fla. App. 2d 1977); *Hood vs. Dealers Transport Co.*, 459 F.Supp. 684 (N.D. Miss. 1978); *Nehi Bottling Co. vs. Jefferson*, 226 Miss. 586, 84 So.2d 684 (1956); *Heath vs. Kirman*, 240 N.C. 303, 82 S.E.2d 104 (1954); *Plummer vs. Henry*, 7 N.C. App. 84, 171 S.E.2d 330 (1969); *Patterson vs. East Texas Motor Freight Lines*, 349 S.W.2d 634 (Tex. Civ. App. 9th Dist., 1961); *Livual vs. Henke & Pillot*, 366 S.W.2d 831 (Tex. Civ. App. 1st Dist., 1963); *Frasier v. Pierce*, 398 S.W.2d 955 (Tex. Civ. App. 7th Dist., 1965); *Rodgers vs. McFarland*, 402 S.W.2d 208 (Tex. Civ. App., 8th Dist. 1966). 30 A.L.R. 4th 838; 7 A Am Jur.2d Automobiles and Highway Traffic 643 (1980). (See also, *Jordan vs. Cates*, 68 Okla. Bar Jrn. 485, _____ P.2d _____ (1997) wherein the Oklahoma Supreme Court held that an employer's admission of respondeat superior precluded Plaintiff from pursuing a negligent hiring theory in an intentional tort case).

[ii2] In *Elrod v. G & R Const. Co.*, 628 S.W.2d 17 (Ark. 1982), the Plaintiff offered evidence that the driver had been involved in six motor vehicle incidents in the previous four years (two of which resulted in personal injury), and had received additional unrelated citations in that same time period for failure to yield and unsafe operation of a vehicle. The court ruled that this was insufficient, as a matter of law, to sustain a claim for punitive damages since there was nothing in the record that put the employer on notice that the driver might commit a willful and wanton act. *See also Bartja v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 218 Ga. App. 815, 463 S.E.2d 358 (1995) (compliance with federal regulations in hiring truck driver, and absence of anything in the record which indicated that employer knew or should have known that driver had a tendency to fall asleep at the wheel); *Ledesma v. Cannonball, Inc.*, 182 Ill. App. 3d

718, 538 N.E.2d 655 (1989) (no punitive damages or willful and wanton claim where employer checked to make sure that driver had a valid license and was insured, driver had no moving violations while in employ, and no duty to investigate past driving record); *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. banc 1995) (not a punitive damages case, but important because it refused to allow a negligent entrustment claim despite allegations of improper experience, training, testing, medical evaluations, and lack of proper log books). On the other side of the ledger, *See*, *Plummer v. Henry*, 7 N.C. App. 84, 171 S.E.2d 330 (1969)(allegations of full knowledge of son's driving habits and entrustment of a "souped-up" car sufficient to allege willful and wanton conduct); *Holben v. Midwest Emery Freight System, Inc.*, 525 F. Supp. 1224 (W.D. Pa. 1981) (evidence of awareness of several prior incidents, traffic violations, and discharge by prior employer due to incident record sufficient to create question of fact as to whether employer exhibited conscious indifference).

iii[3] Rule 501 provides in pertinent part:
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

iv[4] The privilege should be recognized when "an intrusion into the self evaluative analysis of an institution would have an adverse effect on the [evaluation] process with a net detriment to a cognizable public interest." *Flynn v. Goldman, Sachs & Co.*, 1993 WL 362380 at 1 (S.D.N.Y. 1993). The purpose of the privilege is "to protect certain information from discovery, particularly in instances where public policy outweighs the needs of litigants and the judicial system for access to information relevant to the litigation. *Granger vs. National R.R. Passenger Corp.*, 116 F.R.D. 507, 508 (E.D. Pa. 1987) In *Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249 (D.D.C. 1970, aff'd. 479 F.2d 920 (D.C. Cir. 1973) the court recognized the effective existence of the privilege of critical self analysis for hospitals staff meeting notes sought correction with discovery in medical malpractice case, finding that:

"Confidentiality is essential to effective functions of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients . . . to subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations."

50 F.R.D. 250. The privilege should be recognized where disclosure of in-house deliberations would thwart an important social policy. *Troupin vs. Metropolitan Life Insurance Co.*, 169 F.R.D. 546 (S.D.N.Y. 1996). Public safety is enhanced by the full investigation of and the frank deliberation over a company's incidents. Recognition of this privilege in the context of self critical corporation incident deliberations can be justified based upon the strong public interest "in preserving the free flow of the type of information sought," and the information is a type "whose flow would be curtailed if discovery were allowed." *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d at 426.

The New Jersey Superior Court held that self-critical analysis is an important company function. In *Wylie v. Mills,* 478 A.2d 1273 (1984), an employee of an electric and gas company was involved in an automobile incident. The company prepared an incident report after conducting an internal investigation of the incident for purposes of determining whether it should alter its policies to avoid injuries to employees in the future. The court determined that the information was protected from disclosure by the privilege of self-critical analysis, stating that safety in the workplace would be stifled if such internal analysis was subject to disclosure. *Wylie*, 478 A.2d at 1277.

ACCA ANNUAL MEETING PRESENTATION:

CLAIMS MANAGEMENT/COST REDUCTION STRATEGIES FOR CORPORATE LAW DEPARTMENTS

Presentation Outline

Friday, November 5, 1999
from 10:15 to 11:15 A.M.

I. PANEL PRESENTATION INTRODUCTION BY WALT METZ

A. The Subject: Claims Management/Cost Reduction Strategies for Corporate Law Departments

B. What Will Be Presented:

1. We will present time- and battle-tested methods for achieving superior results in resolving claims, while at the same time reducing defense costs.

2. The program will be informal and audience participation will be encouraged to ensure your ability to walk away with ideas to implement back home.

C. The Panelists

1. Walter R. Metz, Jr. (your overall moderator)
   Senior Counsel
   Werner Enterprises, Inc.

2. Randy L. Decker
   Vice President - Senior Counsel
   ITT Financial Services

3. Richard S. Mannella
   Major Claims Management
   ACE U.S.A.

D. The Format

1. The subject moderator will raise issues which arise in litigation from its earliest stages to trial and beyond.

2. All members of the panel will comment on these issues.

3. We invite questions and comments as we proceed.

4. There will also be a question and answer session at the end, if time permits.

II. SETTING GOALS

A. Subject Moderator Introduction By Randy Decker

B. The Importance of Setting Goals

C. Goals to be Achieved Generally in Claims Management:

1. Objective Determines if Superior Results are Obtained
2. Limit Attorney Fees
3. Limit Other Costs of Litigation
4. Early Resolution
5. Low Settlement
6. Low Verdict
7. Reduction of Publicity
8. Discouragement of Similar Claims

III. METHODS TO ACHIEVE GOALS

A. Subject Moderator Introduction By Rich Mannella

B. Outside Counsel Selection Process

C. Discovery as a Means of Cost Reduction

D. Reducing Attorney Fees Cost

1. Recapture of In-House Fees
2. Containing Outside Fees