

# Case Highlights How to Protect Investigative Work Product from Disclosure

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One of the most important topics for a company to consider when conducting an internal investigation is how to protect (or leave open the option to protect) material prepared during the investigation from disclosure in subsequent litigation. A recent case in the U.S. District Court for the District of New Jersey provides an illustrative road map for one way to protect such material by planning ahead and assessing potential testimony and written evidence at the outset of the investigation.

In *General Motors, LLC v. Ashton*, the court denied a request for production of documents made by the defendant, former United Auto Worker's Vice President Joseph Ashton, for General Motors' documents and communications related to internal investigations led by its consulting expert investigators. According to letters submitted to the court by GM, the investigators worked with GM's attorneys and at their direction to conduct two investigations that showed Ashton had maintained offshore bank accounts that held substantial funds used to accept and retain bribes from Fiat Chrysler as part of a scheme to harm GM.<sup>[1]</sup> During discovery, Ashton sought the identities of GM's investigators, as well as documents and communications relating to the investigations. GM asserted that the materials and communications were protected from disclosure by the attorney work-product privilege. The court agreed and denied Ashton's requests, finding that: (1) GM had not waived work product protection over communications with its investigators; and, (2) Ashton had failed to show exceptional circumstances or substantial need warranted production of the investigators' opinion work product or fact work product. Finally, the court held that because the investigators did not possess any relevant, discoverable information, their identities were not discoverable.

GM's success in maintaining the confidentiality of its internal investigations was primarily due to its decision, made very early on, to use the investigators as non-testifying consulting experts only. This decision ultimately shielded their work product from disclosure in two ways. First, as consulting experts retained in anticipation of litigation who were not expected to testify at trial, the materials they prepared and their communications with GM's counsel were subject to protection under the work product doctrine. Here, GM and Ashton agreed that the investigators qualified as consulting experts, in large part because GM made the decision to not use them as testifying experts. However, opposing parties typically will not agree on that point. Therefore, companies looking to utilize this strategy should take concrete and documented steps, as GM did here, to establish the experts as consulting experts to ensure the privilege will apply to materials they prepare during the investigation. One critical step is to silo information by separating what is learned during the investigation and what is already known by company personnel. The best way to achieve this is to do what GM did: engage and retain outside counsel or other experts to conduct the internal investigations at the direction of counsel. Doing so creates silos of

information. Therefore, if a court determines the internal investigations are subject to privilege or the work-product doctrine, the individuals who conducted the investigation do not have *any* information that is discoverable and that could subject them to any document requests or depositions. This is much harder to accomplish if the individuals who conducted the investigation are company employees, as they are likely to have other relevant information.

The second critical step that GM took to protect the internal investigation materials was to not put the investigator's work product at issue in the litigation. GM did this by deciding early on that it would not rely on the testimony of the investigators as evidence against Ashton. Rather, GM decided that while it would *allege* the facts against Ashton that the investigators uncovered, it would only *prove* those facts through other evidence adduced during discovery (rather than the internal investigations). This was critical for GM, because it avoided waiving the protections of the work-product privilege and putting the investigator's work product at issue. While having to make decisions like this regarding which witnesses will testify and what evidence will be used early in a case may give one pause, the risks are likely to be low, especially when compared to the danger of potential unwanted disclosure of the material prepared during an internal investigation.

GM took one more step to inoculate itself from having to turn over the requested information in discovery. GM made the clever decision to provide Ashton with the names and locations of the overseas banks at which it alleged he maintained the relevant off-shore accounts. The court found that Ashton had the information he needed to determine whether the accounts were in his name at those banks. The court also noted that "whether [Ashton] has overseas bank accounts is uniquely within his knowledge or control." Because GM had provided Ashton with the account information, the court concluded that Ashton could not establish "substantial need" for the investigators' fact work product. Companies should consider whether they are in a position to disclose some low-hanging information as a compromise. As GM demonstrated here, strategically providing certain information can reap major rewards by negating a litigant's ability to satisfy the necessary standards to vitiate privilege.

*General Motors, LLC v. Ashton* provides a great example of how a company can prevent the disclosure documents and communications related to internal investigations. By designating its investigator as non-testifying and providing the defendant with some information in compromise, GM was able to maintain the privilege over its investigations and avoid providing additional information in discovery. Of course, companies have many ways to protect their investigations. This decision illustrates how courts analyze this issue, and provides insight into how one company was able to leverage its decision to engage outside investigators to ultimately protect what they learned from discovery.

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[1] Ashton has been convicted of conspiring with other UAW officials to engage in honest services wire fraud by taking \$250,000 in bribes and kickbacks from a UAW vendor and for conspiring to launder the proceeds of the scheme, and is serving 30 months in prison.

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