

## Investigation Documents Not Necessarily Protected by the Attorney-Client Privilege

The Massachusetts Superior Court recently held that documents generated during the course of an independent investigation at the Massachusetts Institute of Technology (“MIT”) were not protected from disclosure by the attorney-client privilege in a subsequent action brought against MIT. *Timothy J. Carpenter, Administrator v. Massachusetts Institute of Technology*, Suffolk Superior Court Civil Action No. 03-2660 (Amended Memorandum and Order May 19, 2005).

In *Carpenter*, a student’s estate brought an action against MIT and others following the student’s suicide while at MIT. During the course of this action, MIT asserted the attorney-client privilege with respect to certain documents generated during its internal investigation into the student’s suicide. The Superior Court held that these documents were not protected by the attorney-client privilege, even though the investigation was undertaken at the direction of MIT’s lawyers.

First, MIT had given its investigator, a Dean from Duke University, complete autonomy to conduct her investigation and prepare her report in the manner she saw fit. Thus, the Superior Court reasoned that the investigator was not an agent of MIT, and that any communications between her and MIT’s lawyers were not covered by the attorney-client privilege. Second, the communications between MIT’s lawyers and the investigator consisted of suggested grammatical and stylistic edits to her report, and, therefore, according to the Court, did not amount to legal advice. Third, for reasons of fairness, the Superior Court concluded that MIT had waived the attorney-client privilege because the student’s parents had reasonably relied on MIT’s and the investigator’s representation to them that the investigation was wholly independent of MIT, and the parents had agreed to speak with the investigator on that basis.

The Court’s decision in *Carpenter* serves as a useful reminder that great care must be taken when conducting an internal investigation in order to protect the process of such investigation from being discoverable during subsequent litigation. Clients are advised that communications between their lawyers and an outside individual retained by the client to conduct an independent investigation will likely not be protected from disclosure by the attorney-client privilege if the client does not retain control over that individual and over the course of the investigation. In addition, clients should be cautious about making representations to those cooperating with an investigation about the investigation process and/or the independent status of their investigator. Finally, clients and lawyers should remember that not all communications to and from a lawyer are protected by the attorney-client privilege, and that the privilege applies only when legal advice is being sought from a professional legal adviser acting in that capacity.

To optimize the prospects for the results of an internal investigation being accorded the protections of the attorney-client privilege, the following steps are recommended:

- Memorialize in writing the fact that an internal investigation is being performed to obtain information for legal counsel so that such counsel can offer legal advice to the client.
- To the extent that a non-lawyer is involved in conducting the investigation, document in writing the fact that this individual’s actions are subject to the control of the lawyer and that the individual is working to assist legal counsel in obtaining information so that the lawyer can offer legal advice to the client.
- Mark all substantive communications and documents regarding an internal investigation as “Privileged and Confidential: Attorney-Client/Work Product.”

- Draft interview notes in terms that reflect mental impressions and potential legal theories; avoid verbatim transcripts of interviews.
- Limit access to investigative reports and material on a strict need-to-know basis in order to avoid waiving the attorney-client privilege.
- Draft investigative documents and reports with some circumspection, bearing in mind that their confidentiality under the attorney-client privilege can never be totally assured.
- Limit access to investigative reports and material on a strict need-to-know basis in order to avoid waiving the attorney-client privilege.
- Draft investigative documents and reports with some circumspection, bearing in mind that their confidentiality under the attorney-client privilege can never be totally assured.

### Contact Information

For questions about this issue, or any other labor and employment concerns, please contact any member of Ropes & Gray's Labor & Employment Group.

