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## Ghostwriting To Keep Documents Privileged Is Ghostbusted

By Aaron J. Graf

In a recent case out of the Northern District of California, a federal court held that an internal investigation memorandum "essentially ghostwritten" by in-house counsel was not protected by the attorney-client privilege. The holding by the court, and the implications, serve as an excellent opportunity for companies to review internal procedures to ensure that investigation materials remain protected by the attorney-client privilege. After all, one would not want to end up slimed like Dr. Venkman when the seemingly privileged memorandum must be turned over to the opposing party.

In [\*Thompson v. C&H Sugar Company, Inc.\*](#), 2014 WL 595911 (February 14, 2014), a group of thirteen employees filed suit alleging race discrimination based on a denial of training and promotion opportunities. During discovery, the plaintiffs sought information concerning a 2010 internal investigation into complaints filed through the company's complaint hotline alleging the plaintiffs' supervisor had engaged in race discrimination. The company refused to turn over emails, memoranda, and interview notes related to the internal investigation into the complaints.

What makes this particular discovery dispute worthy of note is the court's treatment of the internal investigation memoranda in analyzing the plaintiffs' motion to compel. In-house counsel for the company had submitted a declaration in which he established that he directed the investigation and gave legal advice as to how the

investigation should be conducted. Further, the in-house counsel stated that when it came time to draft the memorandum concerning the investigation, he "essentially ghostwrote" the summary and conclusions for the human resources manager. The company asserted that the memorandum and its draft versions were protected by both the attorney-client privilege and the attorney work product doctrine.

The court, sensing something was strange in the neighborhood, quickly dispensed of the attorney-client privilege theory. The court noted that the purpose of the privilege is to encourage open and frank communications between attorney and client and that subjecting an internal memorandum, portions of which were ghostwritten by counsel, did not further that purpose. In fact, one could argue that it runs directly contrary to this purpose because when something is ghostwritten by an attorney, the attorney's communications are intentionally veiled and hidden, not open and frank.

The plaintiffs also objected to the company's application of the work-product doctrine to the materials. However, the court did not find that applying the work product doctrine to the memorandum was likely to lead to dogs and cats living together and mass hysteria. The declaration from in-house counsel, while not establishing that he wrote the memorandum, clearly established that he had directed and supervised the investigation in anticipation of potential litigation. The court applied the work-product doctrine to the memorandum because the doctrine applies to materials prepared by representatives for the attorney as well as material prepared by the attorney directly. That being said, the court found that the plaintiffs adequately demonstrated they had a substantial need for the memorandum and could not procure its information from another source. Thus, the court ordered the company to provide the memorandum for an *in-camera* review by the court to redact any information that revealed the mental processes of the attorney before it was produced to plaintiffs.

Often, a company desires its internal investigation materials to be kept privileged, to the fullest extent possible, so as to avoid providing ammunition for any future potential plaintiffs. And while in-house counsel can provide legal advice during investigations and be involved in the analysis of facts gathered during the investigation and in drafting internal memoranda opining on liability, exposure, and the like, the decision in *Thompson* is a reminder that mere involvement of in-house counsel does not guarantee that everything in-house counsel touches during the investigation will be privileged.

And, if you haven't laughed in a while, take our non-legal advice and watch *Ghostbusters* again in the honor of the late, great Harold Ramis.

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