

In *Doe 1 v. Baylor University*, 2020 WL 2850232 (W.D. Tex. June 2, 2020), Magistrate Judge Andrew W. Austin of the Western District of Texas held that defendant placed a law firm's investigation materials "at issue" in the litigation by relying on the fact of the investigation to demonstrate that it was not deliberately indifferent, resulting in waiver of the work product protection.

In this Title IX litigation, plaintiffs sued their former university alleging that it maintained discriminatory practices in handling student reports of sexual assault and mishandled their reports of sexual assaults based on gender. *Id.* at \* 9. Plaintiffs sought discovery of all materials related to an investigation undertaken by a law firm at the direction of defendant. *Id.* at \*1. Defendant had retained the law firm "to conduct an independent and external review of Baylor University's institutional responses to Title IX and related compliance issues through the lenses of specific cases." *Id.* (citation omitted). The investigation culminated in two presentations of the attorney's findings and recommendations made to the defendant's board of regents. Afterward, the defendant published two documents "summarizing [the law firm's] investigative findings and recommendations." *Id.* at \* 2.

In the instant order, Magistrate Judge Austin considered whether the defendant could rely on the work-product protection to withhold the investigation materials. *Id.* at \*1. The district judge overseeing the case had previously concluded that defendant waived the attorney-client privilege over the investigation materials "by making repeated public disclosures regarding the [law firm's] investigation" and when defendant published an external report regarding the investigation. *Id.* at \*3. Waiver of the attorney-client privilege did not automatically waive protection of work product, however, because the work-product protection is broader and distinct from the attorney-client privilege. *Id.* at \*6. Magistrate Judge Austin articulated three general grounds for waiver of the work-product protection: "disclosure to a third party, placing the material 'at issue,' and 'substantial need' " under Fed. R. Civ. P. 26(b)(3)." *Id.* at \*7. The question in the instant order was whether the defendant had placed the investigation materials "at issue."

Magistrate Judge Austin stated that determining whether a party has placed work product at issue is a fact-intensive analysis. It is not enough that the work product be "relevant" to the litigation to be "at issue." *Id.* at \*8. Rather, "[t]o place work product at issue in litigation, a party must 'rely on' the work product 'to prove its claims in the case.' " *Id.* (quoting *Windsor Securities, LLC v. Arent Fox LLP*, 273 F. Supp. 3d 512, 518-19 (S.D.N.Y. 2017)). The prototypical manner in which work product is placed "at issue" is by an "advice of counsel" defense. Here, however, defendant "affirmatively disclaim[ed] any advice of counsel defense." Even where a party disclaims any "advice of counsel" defense, work product can still be "at issue" when a party "asserts a claim or defense that relies on work product to prove its intent, knowledge of the law, or the reasonableness of its conduct." Magistrate Judge Austin noted that district courts in the Fifth Circuit had "found that when a party cites to an investigation 'to show that it exercised reasonable care to promptly correct any harassing behavior,' the party waives work product 'with respect to the investigative report and any underlying documents.' " *Id.* (quoting *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, 315 F.R.D. 460, 470-71 (N.D. Tex. 2016)).

Defendant placed the investigational work product at issue by relying on the fact of the investigation as part of its defense. *Id.* at \*13. Plaintiffs had to prove, among other things, that defendant acted intentionally by "remaining deliberately indifferent to acts of ... harassment of

which it had actual knowledge.” *Id.* at \*9 (citation omitted). Defendant intended to rely on the fact that there was an investigation and that it had implemented reforms to “demonstrate that [it] was not deliberately indifferent.” *Id.* at \*11-\*12. To avoid any “advice of counsel” defense, defendant proposed omitting the identity of the investigators. Magistrate Judge Austin held that omitting reference to attorney involvement, however, was not enough to avoid waiver. The investigation and reform efforts were central to defendant’s defense. The mere fact that defendant and witness would not mention the fact of attorney involvement would not erase the reliance on the investigational work product. As Magistrate Judge Austin explained, “the knowledge and policy decisions of the Regents could provide evidence that [defendant] adopted sincere and comprehensive reforms, or that any mismanagement of a reported sexual assault was an isolated misstep.” *Id.* at \*10. Thus, defendant’s “proposed defensive case explicitly relie[d] on [the law firm’s] work product.” *Id.* at \*12.

Magistrate Judge Austin explained that the scope of the waiver extended beyond just factual work product. *Id.* at \*16. “The scope of an ‘at issue’ waiver extends also to the material on that subject matter necessary to litigate the issue fairly.” *Id.* at \*17. Defendant’s waiver means the “documents setting out the factual basis for [the law firm’s] conclusions and recommendations are discoverable.” Additionally, the search terms used by defendant’s attorneys to determine which documents to review were also discoverable. “Plaintiffs are entitled to know the search terms [the law firm] used and to have access to the smaller universe of factual data that [the law firm] actually based its investigation and recommendations on.” *Id.* at \*18. Some materials, however, could still be withheld: “materials that were not considered by [the law firm] in its investigation or reform work, internal emails or communications between [the law firm’s] attorneys (not copied to any Baylor representative), legal research, materials [the law firm’s] attorneys prepared to aid in conducting witness interviews (witness binders, chronologies, etc.), and notes taken by attorneys during interviews.” *Id.* at \*19.