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**THE WORK PRODUCT PRIVILEGE –
PROTECTING COUNSEL’S STRATEGIES AND EVALUATIONS**

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With increasing frequency, outside counsel takes an active role in the pre-litigation surety and fidelity claims process. When, as often occurs, litigation ensues, protecting from disclosure counsel’s “work product” – the evaluations made by counsel of any particular claim, and the strategy that counsel and its client may take in response to the claim – is of great importance, both to the surety and the outside attorney. This paper will address the origins of the work product doctrine, its utility in the discovery process, exceptions to its being successfully invoked, and practical issues that a surety and its counsel may confront when dealing with the work product doctrine.

I. The Origins Of The Work Product Doctrine in U.S. Jurisprudence

The doctrine was first recognized in *Hickman v. Taylor*.¹ In *Hickman*, the Supreme Court recognized that:

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways ... Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be

¹ 329 U.S. 495 (1947)

demoralizing. And the interests of the clients and the cause of justice would be poorly served.²

The *Hickman* Court, however, noted that “where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery [of those facts] may properly be had.”³

The work product doctrine recognized in *Hickman* has been codified in Federal

Rule of Civil Procedure 26, which provides in relevant part:

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person’s own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

² *Id.* at 510-511.

³ *Id.* at 511.

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.⁴

II. The Scope of the Work Product Doctrine

1. Generally

The work product privilege is intended to protect the internal thought processes of the attorney developed while preparing the client's case.⁵ Under the standard set forth in the Federal Rules the work product privilege protects only those documents and other tangible items that a party or its representative (including, of course, the party's attorney) has prepared in anticipation of litigation or for trial.⁶ Most circuits have adopted the standard set forth in Wright & Miller's Federal Practice and Procedure⁷ – that the doctrine only applies to documents and materials prepared “because of” litigation.⁸ Even in those circuits that have not explicitly adopted the “because of” standard, district courts have adopted that test.⁹

2. State Specific Twists

A. Deviation from the Federal Rule

⁴ Fed. R. Civ. P. 26(b)(3) (2007).

⁵ See, e.g. *Halbach v. Boyman*, 872 A.2d 120, 124, 377 N.J. Super. 202, 208 (N.J. Sup. Ct. App. Div. 2005) (attorney work product is protected from disclosure, absent undue hardship, even if attorney is acting *pro se*).

⁶ Fed. R. Civ. P. 26(b)(3).

⁷ See, generally, 8 Wright & Miller Federal Practice and Procedure § 2204 (“Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation”).

⁸ See, e.g., *State of Maine v. U.S. Dept. of Interior*, 298 F.3d 60 (1st Cir. 2002); *U.S. v. Adlman*, 134 F.3d 1194 (1st Cir. 1998); *In re Grand Jury Proceedings*, 604 F.2d 798 (3d Cir. 1979); *U.S. v. Roxworthy*, 457 F.3d 590 (6th Cir 2006); *Binks Mfg. Co. v. National Presto Industries, Inc.*, 709 F.2d 1109 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987); *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900 (9th Cir. 2004); *Senate of the Commonwealth of Puerto Rico v. U.S. Dept. of Justice*, 823 F.2d 574 (D.C. Cir. 1987).

⁹ See, e.g., *Adams v. Gateway, Inc.* 2003 WL 23787856 (D. Utah 2003); *Joiner v. Hercules*, 169 F.R.D. 695 (S.D.Ga. 1996); *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467 (N.D. Tex. 2004).

Most states, in protecting work product, simply incorporate the language of the Federal Rules into their own rules of civil procedure.¹⁰ Some states, however, have adopted protections that, while substantially the same in effect, incorporate explicitly absolute protection for attorneys' opinions and legal theories while leaving other trial preparation materials subject to conditional privilege.

New York, for example, has expanded its work product protection to make the protection of "work product" absolute, while the protection afforded to "materials prepared in anticipation of litigation or for trial" is conditional¹¹. New York CPLR § 3101(c) provides absolute protection of "work product" from disclosure:

(c) Attorneys work product. The work product of an attorney shall not be obtainable.¹²

CPLR §3101(d)(2), however mirrors the Federal Rule and provides that materials prepared in anticipation of litigation or trial:

... may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the 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.¹³

Qualifying a document under § 3101(c), however can be difficult. Commentators on New York practice have noted that the absolute privilege is to be construed narrowly¹⁴. For the purposes of classifying materials as subject to § 3101(c)'s unqualified privilege, as opposed to CPLR § 3101(d)(2)'s qualified privilege, New York courts have accepted the materials described in *Hickman*, "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs' conducted, prepared or held by the attorney," as being within the "work product" absolute protection.¹⁵ These materials, under § 3101(c) are completely immune from production.

¹⁰ See, e.g. AL R. RCP 26(b)(3); 16 A.R.S. Rules of Civil Procedure R. 26(b)(3); C.R.C.P. 26(b)(3); Fla. R. Civ. P. Rule 1.280(b)(3), N.J. Court Rules R. 4:10-2 (GANN 2008).

¹¹ Compare N.Y. C.P.L.R. Law §3101(c) (McKinney 2007) and N.Y. C.P.L.R. Law §3101(d)(2) (McKinney 2007).

¹² N.Y. CPLR §3101(c).

¹³ N.Y. CPLR § 3101(d)(2).

¹⁴ Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 3101:28;

¹⁵ *Kenford Co., Inc. v. Erie County*, 55 A.D.2d 466, 471, 390 N.Y.S.2d 715, 718 (N.Y.A.D. 1977) (quoting *Hickman*, *supra*, 329 U.S. at 510.)

By contrast, the “litigation materials” covered by § 3101(d)(2) have only a conditional privilege, protecting them from disclosure only to the extent that the requesting party does not have a substantial need for those materials.

This differentiation, however, is not unique to New York. Most states recognize the difference between “core work product” and other work product. Texas, for instance, defines core work product as “the work product of an attorney or an attorney’s representative that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions or legal theories...”¹⁶ Like New York’s definition of “work product”, “core work product” is absolutely protected under Texas law.¹⁷

III. Materials Prepared in “Anticipation of Litigation”

By its terms, the “work product doctrine” applies only to those materials and things prepared by an attorney in preparation for litigation or trial.¹⁸ Documents, such as invoices and bills, that are prepared as part of the ordinary course of business are not considered to be under the doctrine’s protection¹⁹. Anticipation of litigation, using the “because of” standard adopted by nearly every circuit, requires that the party producing the material “have had a subjective belief that litigation was a real possibility and that belief must have been objectively reasonable.”²⁰

IV. Who May Assert the Privilege

The work product privilege is not solely that of the client, unlike the attorney-client privilege. The work product privilege’s purpose is not to protect a client’s confidences (unlike the attorney-client privilege), but rather to protect the adversary system and allow *the attorney* a zone of privacy in which to work.²¹ Some courts have said that only an attorney may invoke the doctrine, since it is his/her zone of privacy that is being invaded.²² The client, however, retains an interest in the work product, since the client is, of course, the person ultimately paying for that product.²³ In In re Grand Jury

¹⁶ Tex. R. Civ. P. 192.5(b)(1).

¹⁷ *Id.*

¹⁸ See, e.g., Fed. R. Civ. P 26(b)(3).

¹⁹ *U.S. v. Naegele*, 468 F.Supp.2d 165, 173 (D.D.C. 2007).

²⁰ *U.S. v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006).

²¹ *Hickman v. Taylor*, at 508-13.

²² *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 152 (D.Del. 1977).

²³ *In re Grand Jury Proceedings*, 604 F.2d 798, 801-802 (3d Cir. 1979).

Proceeding, the United States Court of Appeals for the Third Circuit held that a client may assert the work product privilege for just those reasons. The Court, however, recognized that *waiver* of the protection could not merely be done on the client's sole initiative.²⁴ The Court recognized the attorney's equally important need for intra-firm and preparatory privacy in order to properly prepare a case.²⁵

V. Waiver

A. Materials "At Issue"

One of the ways in which insurers and entities in related industries, such as surety, can lose the protection of the work product privilege is to place the subject documents at issue in the litigation. This can occur, in the surety context, where the surety seeks attorneys fees by reason of the indemnity agreement. In *Mid-State Aftermarket Body Parts, Inc. v. Truck Ins. Exchange*²⁶, both the insured and the insurer sought attorneys fees as a measure of damages. When the insurer sought unredacted versions of the insured's attorney's bills, the insured objected on the grounds of both the attorney-client privilege and the work product privilege.²⁷ The court granted the insurer's motion because, in seeking attorney's fees, the insured had placed the invoices at issue in the litigation and thus the protections of both the work product doctrine and attorney-client privilege were waived.²⁸

B. Disclosure of Work Product

The work product protection may also be waived by disclosure, though not as easily as waiving the attorney-client privilege. The purpose the work product doctrine's protection is to prevent an adversary from obtaining the benefit of an attorney's hard work to aid his own case.²⁹ Disclosure of work product, however, only waives the privilege when that disclosure "substantially increases the opportunity for potential adversaries to obtain the information."³⁰ This waiver may even extend beyond the litigation or adversary proceeding where the disclosure took place. In *Westinghouse*

²⁴ Id. at 801 n.1.

²⁵ Id.

²⁶ 2006 WL 2079940 (E.D.Ark.2006)

²⁷ Id. at *1.

²⁸ Id.

²⁹ *Cite.*

³⁰ *In re Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982*, 561 F.Supp. 1247, 1257 (E.D.N.Y. 1982) (*citing*, *Transamerica Computer Company, Inc. v. IBM*, 573 F.2d 646, 647 n.1 (9th Cir. 1978)).

*Elec. Corp. v. Republic of Philippines*³¹, the Court of Appeals for the Third Circuit held that disclosure by the Plaintiff of otherwise protected work product to the Department of Justice and the Securities and Exchange Commission in a related matter waived the protection as against the defendant.³² The Court held that the doctrine was waived because the disclosure was made in order to forestall prosecution or obtain lenient treatment, not to allow for better preparation of the case.³³

C. Experts

Federal Rule of Civil Procedure 26 provides that a testifying expert may be required to disclose anything consulted in preparation for his report and/or testimony.³⁴ While an attorney's or his agent or representative's work product may otherwise be protected under the work product doctrine, this presents a large loophole through which an adversary may obtain discovery of those theories and opinions. Most courts have held that disclosure of otherwise protected work product to a testifying expert waives the protection.³⁵

D. Other Third Parties

The role of accountants and other consultants will not work a waiver of the work product privilege, unless such a disclosure would allow adversaries access to the disclosed materials.³⁶

³¹ 951 F.2d 1414 (3d Cir. 1991).

³² *Id.* at 1429.

³³ *Id.* at 1429-1430.

³⁴ Fed. R. Civ. P. 26.

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³⁶ *In re Raytheon Securities Litigation*, 218 F.R.D. 354, 360 (D.Mass. 2003).