communication itself routinely in determining whether a prima facie showing of the illegal-act (crime-fraud) exception has been made. E.g., In re Berkley & Co., 629 F.2d 548, 553 & n.9 (8th Cir.1980); cf. also, e.g., Decora, Inc. v. DW Wallcovering, Inc., 899 F.Supp. 132, rehearing denied, 901 F.Supp. 161 (S.D.N.Y. 1995) (on lawyer-disqualification motion, defending routine use of in camera review, at request of privilege-holder, of both testimony and documents on issue of whether former client provided challenged lawyer with confidential information). Others refuse to permit inspection unless the inquiring party first establishes a prima facie case. E.g., United States v. Shewfelt, 455 F.2d 836, 840 (9th Cir.), cert. denied, 406 U.S. 944, 92 S.Ct. 2042, 32 L.Ed.2d 331 (1972). Still other courts allow in camera inspection, but only after the inquiring party presents some factual foundation for the exception, although perhaps not enough to warrant a finding of a prima facie case. E.g., Whetstone v. Olson, 732 P.2d 159, 161 (Wash.Ct.App.1986).

Comment g. Redaction. Contemporary case law assumes the validity of redaction. E.g., Minskoff v. American Express Co., 1994 WL 649162 (S.D.N.Y.1994); Resolution Trust Corp. v. Bright, 157 F.R.D. 397, 401 (N.D.Tex.1994).

Comment h. The burden of establishing waiver or an exception. See generally 2 D. Louisell & C. Mueller, Federal Evidence § 213, at 583 (1978); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5501, at 493 (1986); id. § 5507. On the burden that rests on the objecting person to establish each element of the privilege, see, e.g., United States v. Zolin, 809 F.2d 1411, 1415 (9th Cir.1987), aff'd in part and rev'd in part on other grounds, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989).

TOPIC 3. THE LAWYER WORK-PRODUCT IMMUNITY

Introductory Note

TITLE A. THE SCOPE OF THE LAWYER WORK-PRODUCT IMMUNITY

Section

87. Lawyer Work-Product Immunity
88. Ordinary Work Product
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TITLE B. PROCEDURAL ADMINISTRATION OF THE LAWYER WORK-PRODUCT IMMUNITY

90. Invoking the Lawyer Work-Product Immunity and Its Exceptions

TITLE C. WAIVERS AND EXCEPTIONS TO THE WORK-PRODUCT IMMUNITY

Introductory Note

Introductory Note: Topic 3 examines the work-product immunity as established in court rule, statutory provisions, and common law. Although work-product rules generally protect lawyers, clients, and other litigation agents, this Topic considers those rules only as they apply to lawyers (see § 87, Comment *a*).

The law governing work product is of consequence primarily in pretrial discovery and, to a much lesser extent, as a rule of evidence. In general, lawyer work-product materials also constitute confidential client information (see § 59). Material that is not work product might nonetheless still be confidential client information and subject to the confidentiality rules.

Work-product immunity is a relatively recent development in American jurisprudence. The Federal Rules of Civil Procedure of 1938, with their expansion of pretrial discovery, gave impetus to the work-product doctrine, first in the Supreme Court's 1947 decision in *Hickman v. Taylor*. The Federal Rules were extensively amended in 1970 to incorporate *Hickman v. Taylor* and related common-law decisions. Every American jurisdiction now provides some protection for trial-preparation materials. Because *Hickman* and the federal discovery rules have been widely emulated in state systems, this Topic focuses primarily on the work-product doctrine articulated for federal courts.

Like the attorney-client privilege, the work-product rule reflects competing policies. On the one hand, it seeks to preserve a zone of privacy in which a lawyer can work free from intrusion by opposing counsel. On the other hand, discovery rules encourage disclosure of relevant information to facilitate a full and fair trial of issues (see § 87, Comment *b*). The rule seeks a balance between those goals.

Work-product immunity applies in civil and criminal litigation, trial-type administrative hearings, and similar settings (see § 87, Comments *c* & *h*). Pretrial discovery, however, is much more common in civil litigation, and the law of work product has evolved primarily in that context.

Work-product immunity augments the protection afforded by other privileges and immunities, such as the attorney-client privilege (see §§ 68–86) and the Fifth Amendment privilege against self-incrimi-

nation. Inapplicability of one of those protections does not foreclose application of another; each must be separately analyzed.

TITLE A. THE SCOPE OF THE LAWYER WORK-PRODUCT IMMUNITY

Section

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§ 87. Lawyer Work-Product Immunity

(1) Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.

(2) Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product.

(3) Except for material which by applicable law is not so protected, work product is immune from discovery or other compelled disclosure to the extent stated in §§ 88 (ordinary work product) and 89 (opinion work product) when the immunity is invoked as described in § 90.

Comment:

a. Scope and cross-references. This Section defines the work-product immunity as it applies to lawyers. Federal and state discovery rules accord work-product protection to others, including personnel who assist a lawyer, and to litigation preparation of a party and the party's representatives. Application of the immunity with respect to such other persons is beyond the scope of this Restatement.

Section 88 sets forth the standard for overcoming ordinary work-product immunity. The broader protection afforded opinion work product is considered in § 89. Procedures for invoking the immunity and its exceptions are considered in Title B. Title C discusses exceptions to that rule.

b. Rationale. The Federal Rules of Civil Procedure in 1938 provided for notice pleading supplemented by expanded discovery. The

Rules sought to eliminate the "sporting" concept of litigation in favor of more accurate factfinding and open truth-seeking. However, the discovery rules presupposed that counsel should be able to work within an area of professional confidentiality, described by the work-product rule. A companion assumption has been that the truth emerges from the adversary presentation of information by opposing sides, in which opposing lawyers competitively develop their own sources of factual and legal information. The work-product doctrine also protects client interests in obtaining diligent assistance from lawyers. A lawyer whose work product would be open to the other side might forgo useful preparatory procedures, for example, note-taking. The immunity also reduces the possibility that a lawyer would have to testify concerning witness statements (compare § 108).

Nonetheless, the work-product immunity is in tension with the purposes of modern discovery by impeding the pretrial exchange of information. The immunity also entails duplication of investigative efforts, perhaps increasing litigation costs. Enforcement of the immunity causes satellite litigation and additional expense.

Protection of lawyer thought processes (see § 89) is at the core of work-product rationale; accordingly, those are accorded the broadest protection. A lawyer's analysis can readily be replicated by an opposing lawyer and, in any event, would usually be inadmissible in evidence. Factual information gathered by a lawyer usually relates directly to controverted issues and generally is discoverable in forms that do not reveal the lawyer's thought processes.

Beyond that, the work-product rules are a set of compromises between openness and secrecy. Thus, under Federal Rule 26(b), the identity of witnesses must be disclosed even if ascertaining their identity has been burdensome or involved confidential consultations with a client. Similarly, under Rule 26(b) statements given by a party to an opposing lawyer are subject to discovery, even though such a statement necessarily reflects the lawyer's thought process in some degree. So also are the opinions of an expert who is expected to testify at trial. A nonparty witness's statement must be produced upon demand by that witness. A party's documents and other records are generally discoverable even if they have been reviewed by counsel. On the other hand, the identity of an expert consulted but who will not testify is protected against discovery, even if that expert's opinion is highly material. So also, the classification systems employed by a lawyer in reviewing a client's documents are not subject to discovery.

c. Applications of the work-product immunity. The work-product immunity operates primarily as a limitation on pretrial discovery, but it can apply to evidence at a trial or hearing. Work-product

immunity is also recognized in criminal and administrative proceedings and is incorporated as a limitation on other types of disclosure, for example in the federal Freedom of Information Act. The scope of those applications of the work-product rule is generally beyond the scope of this Restatement.

d. The relationship of the work-product immunity to the attorney-client privilege. The attorney-client privilege is limited to communications between a client and lawyer and certain of their agents (see § 70); in contrast, work product includes many other kinds of materials (see Comment *f*), even when obtained from sources other than the client. Application of the attorney-client privilege absolutely bars discovery or testimonial use; in contrast, the work-product immunity is a qualified protection that, in various circumstances, can be overcome on a proper showing (see §§ 88 & 89). The attorney-client privilege protects communications between client and lawyer regarding all kinds of legal services (see § 72); in contrast, the work-product immunity is limited to materials prepared for or in anticipation of litigation (see Comments *h-j*).

Work-product immunity is also similar to the rule recognized in some jurisdictions that a self-evaluation study and report is immune from discovery. The self-evaluation immunity is not limited to work performed in anticipation of litigation. The scope of self-evaluation and similar immunities is beyond the scope of this Restatement.

e. The source of the law concerning work-product immunity. In the federal system, work-product immunity is recognized both under Rule 26(b)(3) of the Federal Rules of Civil Procedure and as a common-law rule following the decision in *Hickman v. Taylor*. In a few states work-product immunity is established by common law, but in most states it is defined by statute or court rule. Some state statutes mirror Federal Rule of Civil Procedure 26(b)(3); others codify the principles of *Hickman v. Taylor* more broadly; and others codify pre-*Hickman* rules that were not adopted for the federal courts. State courts, in construing their statutes, often look to federal case law in applying work-product immunity.

f. Types of work-product materials. Work product includes tangible materials and intangible equivalents prepared, collected, or assembled by a lawyer. Tangible materials include documents, photographs, diagrams, sketches, questionnaires and surveys, financial and economic analyses, hand-written notes, and material in electronic and other technologically advanced forms, such as stenographic, mechanical, or electronic recordings or transmissions, computer data bases, tapes, and printouts. Intangible work product is equivalent work product in unwritten, oral or remembered form. For example, intangi-

ble work product can come into question by a discovery request for a lawyer's recollections derived from oral communications.

A compilation or distillation of non-work-product materials can itself be work product. For example, a lawyer's memorandum analyzing publicly available information constitutes work product. The selection or arrangement of documents that are not themselves protected might reflect mental impressions and legal opinions inherent in making a selection or arrangement. Thus, a lawyer's index of a client's preexisting and discoverable business files will itself be work product if prepared in anticipation of litigation. So also, the manner in which a lawyer has selected certain client files, organized them in pretrial work, and plans to present them at trial is work product.

g. The distinction between protected materials and nonprotected underlying facts. Work-product immunity does not apply to underlying facts of the incident or transaction involved in the litigation, even if the same information is contained in work product. For a comparison to the nonprivileged status accorded to facts under the attorney-client privilege, see § 69, Comment *d*.

The distinction between discoverable underlying facts and nondiscoverable work product can be difficult to draw. Relevant are the form of the question or request, the identity of the person who is to respond, and the form of a responsive answer. Immunity does not attach merely because the underlying fact was discovered through a lawyer's effort or is recorded only in otherwise protected work product, for example, in a lawyer's file memorandum. Immunity does not apply to an interrogatory seeking names of witnesses to the occurrence in question or whether a witness recounts a particular version of events, for example that a traffic light was red or green. On the other hand, an interrogatory seeking the substantially verbatim contents of the witness's unrecorded statement would be objectionable.

h. Anticipation of litigation: kinds of proceedings. The limitation of the work-product immunity to litigation activities is best explained by the origin of the rule in the context of litigation. "Litigation" includes civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial. It also includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing. In general, a proceeding is adversarial when evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues. Thus, an adversarial rulemaking proceeding is litigation for purposes of the immunity.

i. Anticipation of litigation: the reasonableness standard. Work-product immunity attaches when litigation is then in progress or there is reasonable anticipation of litigation by the lawyer at the time the material was prepared. On what constitutes litigation, see Comment *h* hereto. The fact that litigation did not actually ensue does not affect the immunity.

In one sense, almost all of a lawyer's work anticipates litigation to some degree, because preparing documents or arranging transactions is aimed at avoiding future litigation or enhancing a client's position should litigation occur. However, the immunity covers only material produced when apprehension of litigation was reasonable in the circumstances. The reasonableness of anticipation is determined objectively by considering the factual context in which materials are prepared, the nature of the materials, and the expected role of the lawyer in ensuing litigation.

Illustrations:

1. Employer's Lawyer writes to Physician, setting out circumstances of an employee's death and asking for Physician's opinion as to the cause, stating that Lawyer is preparing for a "possible claim" by the employee's executor for worker-compensation benefits. Lawyer's letter is protected work product.

2. Informed that agents of the Justice Department are questioning Publisher's customers, Lawyer for Publisher prepared a memorandum analyzing the antitrust implications of Publisher's standard contract form with commercial purchasers. Publisher's employees testify before a grand jury investigating antitrust issues in the publishing industry. Lawyer, reasonably believing there is a risk that the grand jury will indict Publisher, interviews the employees and prepares a debriefing memorandum. Both Lawyer's memorandum analyzing the contract form and Lawyer's debriefing memorandum were prepared in anticipation of litigation. The grand-jury proceeding is itself litigation for this purpose (see Comment *h*).

j. Future litigation. If litigation was reasonably anticipated, the immunity is afforded even if litigation occurs in an unanticipated way. For example, work product prepared during or in anticipation of a lawsuit remains immune in a subsequent suit for indemnification, whether or not the indemnification claim could have been anticipated. Work product prepared in anticipation of litigation remains protected in all future litigation.

REPORTER'S NOTE

Comment a. Scope and cross-references. See generally Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice §§ 26.63–26.64 (2d ed.1994); 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure §§ 2021–28 (2d ed.1994); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760 (1983).

Rule 26(h)(3) of the Federal Rules of Civil Procedure, as amended, provides as follows:

> (3) *Trial preparation: materials.* Subject to the provisions of subdivision (b)(4) of this rule [pertaining to discovery of experts], a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials when the required showing has been made, the court shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

On the history of state work-product rules, see Comment, Basic Survey of Work Product in Federal and State Jurisdictions in Civil and Criminal Proceedings, 35 Tenn. L. Rev. 474 (1968); Comment, The Work Product Doctrine in the State Courts, 62 Mich. L. Rev. 1199 (1964).

Comment b. Rationale. See generally Upjohn Co. v. United States, 449 U.S. 383, 397–400, 101 S.Ct. 677, 686–688, 66 L.Ed.2d 584 (1981); United States v. Nobles, 422 U.S. 225, 236–240, 95 S.Ct. 2160, 2169–2171, 45 L.Ed.2d 141 (1975); Hickman v. Taylor, 329 U.S. 495, 510–513, 67 S.Ct. 385, 393–394, 91 L.Ed. 451 (1947). See generally Thornburg, Rethinking Work Product, 77 Va. L. Rev. 1515 (1991); Allen, Grady, Polsby & Yashko, A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine, 19 J. Legal Stud. 359 (1990); Waits, Work Product Pro-

tection for Witness Statements: Time for Abolition, 1985 Wis. L. Rev. 305, 306–07 (1985); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 784–88 (1983).

The rationale, mentioned in *Hickman v. Taylor*, supra, 329 U.S. at 511, 67 S.Ct. at 393, that immunity is necessary to avoid sharp practices has been controversial. See generally Special Project, supra, at 787. Some early commentators believed sharp practices to be a significant problem. E.g., Cleary, Hickman v. Jencks, Jurisprudence of the Adversary System, 14 Vand. L. Rev. 865, 869 (1961); Gardner, Agency Problems in the Law of Attorney–Client Privilege: Privilege and "Work Product" Under Open Discovery (Part II), 42 U. Det. L.J. 253, 269 (1965). Others have argued that the possibility is highly overstated. See Cooper, Work Product of the Rulesmakers, 53 Minn. L. Rev. 1269, 1276 (1969). The debate on this point continues in the academic literature. See, e.g., Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1349–51 (1978) (work-product immunity should be severely limited because of over-discovery, lawyer stonewalling, and other abuses); Thornburg, supra, 77 Va. L. Rev. at 1550–73 (assessment of costs of doctrine on parties, particularly noninstitutional litigants, and on society); Waits, supra, 1985 Wis. L. Rev. at 307 (work-product immunity relies in part on overstated claims of "parade of horribles"). The only empirical study suggested that some lawyers might not respond fully or candidly to a discovery request for material that was gathered by a lawyer but was not within the immunity. See generally Shapiro, Some Problems of Discovery in an Adversary System, 63 Minn. L. Rev. 1055 (1979); see also Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 789 (results of American Bar Foundation survey of lawyers concerning, among other things, impact of work-product immunity on discovery and trial practices).

On the concern that, in the absence of immunity, a lawyer would be forced to testify against the lawyer's own client, see Hickman v. Taylor, 329 U.S. at 513, 67 S.Ct. at 394. See also Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986); In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 841–42 (8th Cir.1973). But see Special Project, supra, at 787 (characterizing anti-testimony rationale as "make-weight argument"). See generally § 108(4) (limitation against calling opposing lawyer as witness in absence of compelling need for testimony).

On the relationship of work product to general confidentiality doctrine, see, e.g., In re Subpoenas Duces Tecum (Tesoro Petroleum Corp.), 738 F.2d 1367, 1371 (D.C.Cir. 1984); In re Special September 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir.1980); In re Murphy, 560 F.2d 326, 337 (8th Cir.1977).

On the social costs of the immunity, some courts suggest a balancing approach between a lawyer's privacy concerns and other systemic values. See, e.g., Loctite Corp. v. Fel–Pro, Inc., 667 F.2d 577, 582 (7th Cir.1981) (disclosure required where benefit to the resolution of the suit outweighs the potential injury to the party from whom discovery is sought); Xerox Corp. v. International Business Mach., Inc., 64 F.R.D. 367, 381 (S.D.N.Y.1974) (right of privacy balanced against need for facts; critical

factor is availability of information from other sources). But cf., e.g., Carver v. Allstate Ins. Co., 94 F.R.D. 131, 136 (S.D.Ga.1982) (added expense of deposition discovery does not qualify as hardship under Rule 26(b)(3)); United States v. Chatham City Corp., 72 F.R.D. 640, 644 (S.D.Ga.1976) (increased cost does not satisfy hardship requirement). The systemic costs of work-product immunity might be greater in complex litigation. In at least one instance, a court has held that Rule 16 case-management concerns outweighed the policies underlying work-product immunity. See In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007, 1013–21 (1st Cir. 1988).

Academic commentary is generally more critical of the societal implications of the work-product doctrine. See generally, Brazil, supra; Shapiro, supra; Thornburg, supra; Waits, supra.

Comment c. Applications of the work-product immunity. On application of work-product doctrine beyond pretrial discovery in civil cases, see Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (work-product immunity in trial proceeding to enforce IRS administrative subpoena, pursuant to explicit Federal Rule of Civil Procedure adopting discovery procedures for such proceedings); United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (in criminal trial); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (as exemption under Freedom of Information Act). See generally Clermont, Surveying Work Product, 68 Cornell L. Rev. 755 (1983). See also authority cited in Reporter's Note to Comment *h*.

For the general proposition that work-product immunity should not serve as the ground for a trial objection, see 8 C. Wright & A. Miller, Federal Practice and Procedure § 2023, at n.17.1 (Supp.1991) ("The protection for work product in Rule 26(b)(3) is applicable to discovery only. It is not a limitation on the use of evidence at trial"); Special Project, supra, at 884–86. However, apart from Rule 26(b)(3) itself, the common-law concept of *Hickman v. Taylor* serves to make work-product protection available at trial to attempts to subpoena such material or inquire into it by questioning witnesses.

Comment d. The relationship of the work-product immunity to the attorney-client privilege. See generally 24 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5472, at 93–95 (1986); C. Wolfram, Modern Legal Ethics § 6.6.3 (1986); Cohn, The Work Product Doctrine: Protection, Not Privilege, 71 Geo. L.J. 917 (1983); Note, Attorney–Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison, 108 Harv. L. Rev. 1697 (1995). E.g., In re Martin Marietta Corp., 856 F.2d 619, 624 (4th Cir.1988), cert. denied, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989); In re Subpoenas Duces Tecum, 738 F.2d 1367, 1371 (D.C.Cir. 1984); In re Sealed Case, 676 F.2d 793, 808–09 (D.C.Cir.1982).

Comment e. The source of the law concerning work-product immunity. For a survey of the various state approaches to work-product immunity, see 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2022, at n.24 (2d ed. 1994). See also Comment, Basic Survey of Work Product in Federal and State Jurisdictions in Civil and Criminal

Proceedings, 35 Tenn. L. Rev. 474 (1968) (4 state approaches); Comment, The Work Product Doctrine in the State Courts, 62 Mich. L. Rev. 1199 (1964) (Illinois, Texas, California, and Wisconsin).

Comment f. Types of work-product materials. See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[1] (2d ed.1991); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 788–98, 839–43 (1983).

Federal Rule of Civil Procedure 26(b)(3) protects described "documents and tangible things" as work product. See text of the rule at the beginning of this Reporter's Note. Some courts have interpreted that language narrowly to preclude protection for intangible work product. E.g., Baise v. Alewel's, Inc., 99 F.R.D. 95, 96 (W.D.Mo.1983) (interrogatory seeking facts on which refusals to admit were based did not seek work product); Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86, 88 (W.D.Okla.1980). But see, e.g., Hickman v. Taylor, 329 U.S. 495, 512–13, 67 S.Ct. 385, 394, 91 L.Ed. 451 (1947); In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir.1980) ("work product consists of the tangible and intangible material which reflects an attorney's efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions"). The Section and Comment take the latter position, extending the immunity to intangible material. Note, however, that the practical operation of such procedures as pretrial conference and summary judgment might be that a party is required to reveal work product, such as the identity of judicial decisions, statutes, or other legal authority supporting the party's position.

On investigative reports, questionnaires, and memoranda, see, e.g., United States v. Nobles, 422 U.S. 225, 238–39, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975); In re Grand Jury Investigation (Sun), 599 F.2d 1224, 1229 (3d Cir.1979); United States v. Leggett & Platt, Inc., 542 F.2d 655, 660 (6th Cir.1976), cert. denied, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977) (government investigative reports); Janicker v. George Washington Univ., 94 F.R.D. 648 (D.D.C. 1982) (investigative file of insurer and report prepared by university after fire). On photographs, sketches, and diagrams, see cases cited at Special Project, supra, at 797 n.226.

For cases concerning protection of financial or economic analyses, see Exxon Corp. v. Federal Trade Comm'n, 663 F.2d 120, 129 (D.C.Cir. 1980) (economist's report to FTC); In re Int'l Systems & Controls Corp. Sec. Litigation, 91 F.R.D. 552, 556 (S.D.Tex.1981) (materials produced by corporate accountant), vacated on other grounds, 693 F.2d 1235 (5th Cir.1982); In re Grand Jury Proceedings (McCoy), 601 F.2d 162, 171 (5th Cir.1979) (financial analysis prepared by accountant for lawyer). Numerous cases afford protection to intra- and inter-office memoranda. E.g., Delaney, Migdail & Young, Chartered v. Internal Revenue Serv., 826 F.2d 124, 127 (D.C.Cir.1987) (IRS internal memos advising agency of possible types of legal challenges against proposed audit program); In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933, 935–36 (6th Cir. 1980) (law firm's memoranda of interviews); Jack Winter, Inc. v. Koratron

Co., 54 F.R.D. 44, 47 (N.D.Cal.1971) (preliminary drafts of legal documents, license agreements, and assignments).

On technological material, see generally E. Kinney, Litigation Support Systems: An Attorney's Guide § 5:17 (1980); Sherman & Kinnard, The Development, Discovery and Use of Computer Support Systems in Achieving Efficiency in Litigation, 79 Colum. L. Rev. 267 (1979); Madden, Information Management in Complex Litigation, 4 Litigation No. 3 at 12 (1978). See also Manual for Complex Litigation, Second § 21.446 (1986) (production of computer data in complex cases is primary alternative, with production of printouts as secondary alternative, subject to any privileges or work-product immunity). E.g., United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1301 (D.C.Cir. 1980) (work product extends to documentation concerning litigation-support database and how information is stored and retrieved on it); In re IBM Peripheral EDP Devices Antitrust Litigation, 5 Computer L. Serv. Rep. 878 (N.D. Cal.1975) (similar); Equal Employment Opportunity Comm'n v. Avco New Idea Div., 1978 WL 72 (N.D. Ohio 1978) (choice and organization of data for computer printouts containing employee data and prepared by defendant's agents were work product).

On compilations of materials or other data, see, e.g., Gould Inc. v. Mitsui Mining & Smelting Co., 825 F.2d 676, 680 (2d Cir.1987); Shelton v. American Motors Corp., 805 F.2d 1323, 1329 (8th Cir.1986); Sporck v. Peil, 759 F.2d 312, 316 (3d Cir.), cert. denied, 474 U.S. 903, 106 S.Ct. 232, 88 L.Ed.2d 230 (1985). But see City Consumer Services, Inc. v. Horne, 100 F.R.D. 740, 747–48 (D.Utah 1983) (selection of significant documents by plaintiffs' lawyers from among 80,000 documents not entitled to work-product protection).

Comment g. The distinction between protected materials and non-protected underlying facts. E.g., In re Six Grand Jury Witnesses, 979 F.2d 939, 945 (2d Cir.1992), cert. denied, 509 U.S. 905, 113 S.Ct. 2997, 125 L.Ed.2d 691 (1993) ("underlying factual information" not protected just because it was developed in anticipation of litigation); Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir.1984) ("where the same document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts"); Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir.1981) (technical information in document is discoverable; legal assistance is immune); Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 734 (5th Cir. 1977) (purely factual statements regarding events at plant), rev'd on other grounds, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). Cf. In re Int'l Systems & Controls Corp. Sec. Litigation, 91 F.R.D. 552, 561 (S.D.Tex.1981) (letters and exhibits assembled from larger group of documents protected; underlying facts contained in documents can be obtained on deposition), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982); Martin v. Office of Special Counsel, 819 F.2d 1181, 1186–87 (D.C.Cir.1987) (work product applies to witness statements and affidavits despite factual content; FOIA exemption (b)(5) protects documents themselves regardless of their status as "factual"). See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[1] (2d ed.1991); 8 C. Wright, A. Miller & R.

Marcus, Federal Practice and Procedure § 2023, at 330–34 (2d ed.1994); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 789–91 (1983).

On the problem of intertwined work product and underlying facts, see Mervin v. Federal Trade Comm'n, 591 F.2d 821, 825–27 (D.C.Cir.1978) (severance of factual material concerning employee dismissal contained in memoranda inappropriate; material might disclose lawyer's appraisal of factual evidence); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1137–38 (4th Cir. 1977) (factual material to be severed from immunized material; in camera inspection ordered if parties cannot agree); Kent Corp. v. NLRB, 530 F.2d 612, 624 (5th Cir.), cert. denied, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976) (documents exempt from disclosure under FOIA because no reasonably separable portions remained after immunized work product redacted).

Lawyers who create protected work product include inside legal counsel. See Shelton v. American Motors Corp., 805 F.2d 1323, 1328 (8th Cir.1986); United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1298 (D.C.Cir.1980) (database documents prepared by corporate counsel); Cohn, supra, at 922. See also Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (without discussion, extending work-product protection to internal investigation by inside legal counsel and outside counsel of corporate wrongdoing). On government lawyers, see Federal Trade Comm'n v. Grolier, Inc., 462 U.S. 19, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983); Martin v. Office of the Special Counsel, 819 F.2d 1181, 1187 (D.C.Cir.1987).

On the rule that transferring otherwise discoverable material to a lawyer does not convert it to work product, see, e.g., Gould Inc. v. Mitsui Mining & Smelting Co., 825 F.2d 676, 679–80 (2d Cir.1987) (work-product immunity not created merely by transferring preexisting documents from client to lawyer); Xerox Corp. v. International Business Mach. Corp., 64 F.R.D. 367, 382 (S.D.N.Y.1974) (work product does not apply simply by imparting information to lawyer "and then attempting to hide behind the work product doctrine after the party fails to remember the information").

Comment h. Anticipation of litigation: kinds of proceedings. On work in anticipation of adversarial administrative and similar proceedings, see, e.g., Natta v. Zletz, 418 F.2d 633, 637–38 (7th Cir.1969) (patent-interference proceeding before administrative agency); In re Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973) (grand-jury proceedings); Union Carbide Corp. v. Dow Chem. Co., 619 F.Supp. 1036 (D.Del.1985) (patent-interference proceeding); United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 628 (D.D.C.1979) (definition of "litigation" includes "a proceeding in a court or administrative tribunal in which the parties have the right to cross-examine witnesses or to subject an opposing party's presentation of proof to equivalent disputation"); cf., e.g., Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (without discussion, extending work-product protection to internal investigation in anticipation of submitting results of investigation to administrative agencies (IRS and SEC) in attempt to bargain for lenient administrative treatment). Compare, e.g., Research

Inst. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Found., 114 F.R.D. 672 (W.D.Wis. 1987) (work-product doctrine inapplicable to patent-application process conducted through ex parte, nonadversarial proceeding), with Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D.Ill. 1974), aff'd, 534 F.2d 330 (7th Cir. 1976) (immunity afforded to opinion letters and background memoranda with respect to scope and validity of patents and patent application).

Comment i. Anticipation of litigation: the reasonableness standard. See generally E. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 311–47 (3d ed.1997); 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[2] (2d ed.1991); 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2024 (2d ed.1994). For cases employing often tautological definitions of anticipation of litigation, see, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir.1979); Carver v. Allstate Ins. Co., 94 F.R.D. 131, 134 (S.D.Ga.1982) (prospect of litigation at point where "probability of litigating claim is substantial and imminent"); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 143 (D.Del.1982) ("litigation must at least be a real possibility at the time of the preparation or, in other words, the document must be prepared with an eye towards some specific litigation"); Janicker v. George Washington Univ., 94 F.R.D. 648, 650 (D.D.C.1982) ("mere contingency that litigation may result is not determinative"; primary motivating purpose behind creation of document or investigative report must be to aid in possible future litigation).

Illustration 1 is based on Sprague v. Office of Workers' Compensation, 688 F.2d 862 (1st Cir.1982); Illustration 2 on Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir.1970), aff'd by equally divided court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971).

The prospect-of-litigation formulation is from 8 C. Wright, A. Miller & R. Marcus, supra, at 343: "Prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced. 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."

The Wright and Miller standard has been widely cited and used by the courts. E.g., In re Sealed Case, 146 F.3d 881, 884 (D.C.Cir.1998); Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d at 1119; In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir.1979); In re Grand Jury Investigation, 599 F.2d at 1229, 1231. On citations in state-court decisions, see cases cited at 8 C. Wright, A. Miller & R. Marcus, supra, § 2024, 343–46 at n.10. The "reasonable anticipation" formulation of Subsection (1) and the Comment derive from the Wright and Miller standard as explicated in Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 659 (S.D.Ind. 1991) (anticipation requirement met only on satisfaction of two components: (1) causation component, requiring demonstration that anticipation of litigation was cause in fact of activities; and (2) reasonableness component, requiring demonstration of substantial and specific threat of litigation making anticipation reasonable in the circumstances).

For cases dealing with whether a specific claim must have been ascertained for there to be a prospect of litigation, see, e.g., Delaney, Migdail & Young v. IRS, 826 F.2d 124, 127 (D.C.Cir.1987) (rejecting standard of whether specific claim has arisen; focuses on function to be performed by the document); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C.Cir.1980) ("at the very least some articulable claim, likely to lead to litigation, must have arisen"); Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.1976), cert. denied, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976) (prospect of litigation was identifiable because specific claims had already arisen; immunity does not turn on whether litigation actually ensued).

According to much authority, work-product immunity does not apply to materials prepared in the ordinary course of business of a client. The limitation, obviously, will not ordinarily apply to lawyers. The basis for the ordinary-course-of-operations concept is the suggestion in the Advisory Committee Note to Rule 26(b)(3) that materials "assembled in the ordinary course of business" or for nonlitigation purposes are not subject to the limited protection of Rule 26(b)(3). See Advisory Committee Note to Rule 26(b)(3), 48 F.R.D. 487, 501 (1970). In the rare case in which the "ordinary course of business" limitation applies to the work of a lawyer, it might also be found that the lawyer's work did not constitute legal services, and thus that the attorney-client privilege also does not apply (see § 72, Comment *c*). E.g., Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655 (S.D.Ind.1991) (where insurer hired outside counsel to investigate suspected arson, work was in ordinary course of claims adjustment and neither work-product immunity nor attorney-client privilege applied in absence of specific evidence that insurer reasonably anticipated litigation). See generally E. Epstoin, The Attorney–Client Privilege and the Work–Product Doctrine 335–38 (3d ed.1997).

Comment j. Future litigation. See generally E. Epstein, The Attorney–Client Privilege and the Work–Product Doctrine 343–47 (3d ed.1997); 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[2] (2d ed.1991); C. Wolfram, Modern Legal Ethics § 6.6.2 at 294 (1986); 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2024 (2d ed.1994).

The Supreme Court afforded immunity in subsequent unrelated litigation in Federal Trade Comm'n v. Grolier, Inc., 462 U.S. 19, 28, 103 S.Ct. 2209, 2214, 76 L.Ed.2d 387 (1983). But cf. Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 860 (1983) (suggesting that *Grolier* might be limited to Freedom of Information Act cases). For decisions affording work-product immunity in subsequent unrelated litigation, see, e.g., In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir.1980); In re Murphy, 560 F.2d 326, 335 (8th Cir.1977); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 484 n.15 (4th Cir.1973); see generally In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir.1994) (reviewing decisions).

For cases adopting the narrowest view that work-product immunity applies only in the litigation for which the materials are prepared, see, e.g., Research Inst. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Found., 114 F.R.D. 672, 680 (W.D.Wis.1987); In re Grand Jury

Proceedings, 73 F.R.D. 647, 653 (M.D.Fla.1977). For cases articulating a "closely related" test for the extension of work-product immunity to subsequent cases, see, e.g., Republic Gear Co. v. Borg–Warner Corp., 381 F.2d 551, 557 (2d Cir.1967); In re Grand Jury Proceedings, 604 F.2d 798, 803–04 (3d Cir.1979); see also, e.g., 4 J. Moore, J. Lucas & G. Grotheer, supra (earlier action and subsequent, related actions).

§ 88. Ordinary Work Product

When work product protection is invoked as described in § 90, ordinary work product (§ 87(2)) is immune from discovery or other compelled disclosure unless either an exception recognized in §§ 91–93 applies or the inquiring party:

(1) has a substantial need for the material in order to prepare for trial; and

(2) is unable without undue hardship to obtain the substantial equivalent of the material by other means.

Comment:

a. Scope and cross-references. This Section states the limited immunity of ordinary work product from involuntary disclosure and the need-and-hardship exception. On the much narrower exception for opinion work product, see § 89.

b. The need-and-hardship exception—in general. The demonstration of need and hardship operates only when it is first established (see § 90, Comment *b*) that the requested material constitutes protected work product (see § 87). The exception does not provide access if other privileges apply, for example, the attorney-client privilege (see §§ 68–86), the privilege against self-incrimination, or a privilege for proprietary information.

Demonstrating the requisite need and hardship requires the inquiring party to show that the material is relevant to the party's claim or defense, and that the inquiring party will likely be prejudiced in the absence of discovery. As a corollary, it must be shown that substantially equivalent material is not available or, if available, only through cost and effort substantially disproportionate to the amount at stake in the litigation and the value of the information to the inquiring party. The necessary showing is more easily made after other discovery has been completed.

The most common situation involves a prior statement by a witness who is absent, seriously ill, or deceased and thus now unavailable. See Federal Rule of Evidence 804(a). Another common situation

concerns statements made contemporaneously with an event. Such statements are often the most reliable recording of recollections of that event and in that sense unique. A third situation is where the passage of time has dulled the memory of the witness.

Illustration:

1. Several witnesses testify before a grand jury investigating the publishing industry. Shortly afterward, Lawyer for Publisher debriefs the witnesses and writes memoranda of those interviews in anticipation of the possible indictment of Publisher and later civil suits. Six years later, Plaintiffs, representing a class of consumers, file an antitrust class action against Publisher and seek discovery of the non-opinion work-product portions of Lawyer's debriefing memoranda. Plaintiffs have been diligent in preparing their case and gathering evidence through other means and demonstrate that the witnesses now are unable to recall the events to which they testified. The court may order the memorandum produced. If the memorandum contains both ordinary and opinion work product, see § 89, Comment *c*.

Substantial need also exists when the material consists of tests performed nearly contemporaneously with a litigated event and substantially equivalent testing is no longer possible.

c. Material for impeachment. Need is shown when a requesting party demonstrates that there is likely to be a material discrepancy between a prior statement of a witness reflected in a lawyer's notes and a statement of the same person made later during discovery, such as during a deposition. The discrepancy must be of an impeaching quality. A clear case exists when the witness admits to such a discrepancy. However, the inquiring party may demonstrate a reasonable basis by inference from circumstances. In camera inspection of the statement may be appropriate to determine whether the material should be produced.

d. Witness statements. A statement given to a lawyer by a witness is work product. Being ordinary work product, a witness statement may be obtained by an opposing party only upon an appropriate showing of need and hardship. Under the Federal Rules and the law of many states, the person who gives a substantially verbatim statement has the right to obtain a copy of it.

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Comment b. The need-and-hardship exception—in general. See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[2] (2d ed.1991); 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2025 (2d ed.1994). An element of discretion is entailed in determining the sufficiency of the showing. See J. Moore, J. Lucas & G. Grotheer, supra, at § 26.64[3.–1]; Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 802, 803 (1983).

For cases setting forth general rules with regard to what will not satisfy the burden of demonstrating need and hardship, see, e.g., First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 166 (E.D.Wis. 1980) (factual information in record too scanty); United States v. Chatham City Corp., 72 F.R.D. 640, 643 (S.D.Ga.1976) (surmise or possibility of impeaching material does not justify production); Hodgson v. L.B. Smith, Inc., 1971 WL 733 (M.D. Pa.1971) (ungrounded belief that witness statements were relevant); see also Alltmont v. United States, 177 F.2d 971, 978 (3d Cir.1949), cert. denied, 339 U.S. 967, 70 S.Ct. 999, 94 L.Ed. 1375 (1950) (lawyer's desire to make sure nothing overlooked in trial preparation insufficient; this desire present in all cases).

For cases demonstrating the standard for absence of substantially equivalent information, see, e.g., In re Grand Jury Subpoena Dated December 19, 1978, 599 F.2d 504, 512 (2d Cir.1979) (necessity not shown where opposing party generally cooperative and available); In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 849 (8th Cir.1973) (no discovery because witness available to party seeking discovery of statement); Carver v. Allstate Ins. Co., 94 F.R.D. 131, 136 (S.D.Ga.1982) (added expense of deposition discovery not sufficient hardship); United States v. Chatham City Corp., 72 F.R.D. 640, 644 (S.D.Ga. 1976) (cost or inconvenience of taking deposition not sufficient showing of hardship); but cf. United States v. Amerada Hess Corp., 619 F.2d 980, 988 (3d Cir.1980) (avoidance of time and effort involved in compiling similar list from other sources is sufficient showing when work product is of "minimal substantive content" and discovery presents none of "classic dangers" outlined in *Hickman*).

Courts have held that a requesting party sufficiently demonstrates need and hardship based on the inability to obtain substantially equivalent materials by other means or from alternative sources. See generally J. Moore, J. Lucas & G. Grotbeer, Moore's Federal Practice § 26.64[3.–1] (2d ed.1991); 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2025 (2d ed.1994); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 803–11 (1983).

On absent or deceased witnesses, see, e.g., In re Grand Jury Investigation (Sun), 599 F.2d 1224, 1231 (3d Cir.1979) (interview memoranda with deceased employee); A.F.L. Falck, S.p.A. v. E.A. Karay Co., 131 F.R.D. 46, 49–50 (S.D.N.Y.1990) (witness on key fact absent in Greece; draft affidavit ordered produced, which was work product but which absent witness had refused to sign, thus giving it highly relevant evidentiary value); cf. Hamilton v. Canal Barge Co., 395 F.Supp. 975 (E.D.La.1974) (5 eyewitness statements ordered produced

where injured party no longer alive to give own account). Generally, need and hardship are not shown if a party seeking production of a statement can question or depose the witness, unless the party has made a diligent and unsuccessful effort to question the witness. E.g., In re Grand Jury Investigation (Sun), supra, 599 F.2d at 1232 (production of interview memoranda not ordered where no effort to interview witnesses); United States v. Chatham City Corp., 72 F.R.D. 640, 643–44 (S.D.Ga.1976) (FBI reports not discoverable where no showing of efforts made to investigate independently, and substantial equivalent of reports available through personal interviews, depositions, or interrogatories).

The courts have not articulated a clear standard for witness unavailability. On the suggestion that unavailability ought to be determined by the requirements of Fed. R. Evid. 804(a), see Special Project, supra, at 806–07. See also, e.g., Wilson v. David, 21 F.R.D. 217, 220–21 (W.D.Mich.1957). For criticism of this notion of unavailability and the *Wilson* decision, see 8 C. Wright, A. Miller & R. Marcus, supra, at 379–80.

On the need-and-hardship requirement with respect to a contemporaneous statement, see, e.g., Stout v. Norfolk & W. Ry., 90 F.R.D. 160, 161–62 (S.D.Ohio 1981); Hamilton v. Canal Barge Co., 395 F. Supp. at 978; Southern Ry. v. Lanham, 403 F.2d 119, 127–28 (5th Cir.1968). Support for the proposition that contemporaneous statoments have no substantial equivalent is found in psychological studies that show rapidly diminishing recall of events one or two days after an occurrence. See generally 4 J. Moore, J. Lucas & G. Grotheer, supra, at § 26.64[3.–1]; 8 C. Wright & A. Miller, supra, at 223–24; Special Project, supra, at 804–06. Many courts will not order disclosure unless the witness is presently unavailable; this requirement is said to encourage lawyer diligence in interviewing witnesses, but it can also give frequent, institutional litigants an advantage in pretrial preparation. See generally 4 J. Moore, J. Lucas & G. Grotheer, supra, at n.13; 8 C. Wright & A. Miller, supra, at nn.83–84; Special Project, supra, at 809.

On the dulling of memory, see, e.g., Xerox Corp. v. International Business Mach. Corp., 64 F.R.D. 367, 381–82 (S.D.N.Y.1974) (notes of interviews with 23 employees unable to recall information at subsequent depositions); cf. In re International Sys. & Controls Corp. Sec. Litigation, 693 F.2d 1235, 1240 (5th Cir.1982) (unsubstantiated assertions of faulty memory insufficient); Almaguer v. Chicago, R.I. & Pac. R.R., 55 F.R.D. 147, 150 (D.Neb.1972) (lapse of time alone not persuasive).

Illustration 1 is based on Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir.), aff'd by equally divided court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971).

On material information solely in an opposing party's possession, see generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[3.–1], at n.5 (2d ed.1991), and cases cited therein. E.g., Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir.1981) (test results of defendant's product discoverable; documents established essential elements of plaintiff's patent infringement claim); Xerox Corp. v. International Business Mach. Corp., 64 F.R.D. 367, 382 (S.D.N.Y.1974) (discovery of lawyer's notes in trade-secret case where information solely in defendant corpo-

ration's possession). On hostile or reluctant witnesses, see generally J. Moore, J. Lucas & G. Grotheer, supra, at n.11; 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2025, at n.24 (2d ed.1994); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 807–808 (1983).

Comment c. Material for impeachment. See generally J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[3.–1], at n.12 (2d ed.1991); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2025, at nn.91–92 (1970); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 808–09 (1983).

Use for impeachment is grounded in Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385, 393, 91 L.Ed. 451 (1947) (may discover documents that "might be useful for purposes of impeachment or corroboration"). On showing material discrepancy, see, e.g., Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir.), aff'd by equally divided court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971); Goosman v. A. Duie Pyle, Inc., 320 F.2d 45, 51–52 (4th Cir. 1963). However, mere surmise about impeachment material in a witness statement is insufficient. E.g., United States v. Chatham City Corp., 72 F.R.D. 640, 643 (S.D.Ga.1976), and cases cited therein.

Comment d. Witness statements. On the provisions of Federal Rule 26(b)(3), see § 87, Reporter's Note to Comment *a*. See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 24.64[3.–1], at 26–369 (2d ed.1991); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024 (1970); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 793–95 (1983); Gay v. P. K. Lindsay Co., 666 F.2d 710 (1st Cir.1981), cert. denied, 456 U.S. 975, 102 S.Ct. 2240, 72 L.Ed.2d 849 (1982). Treating witness statements as ordinary work product provides protection in the least deserving settings. Typically, a party can obtain the statement of a friendly witness (indirectly but surely, through the witness's invocation of his or her right to obtain a copy), but not the statement of one who is hostile and thus most likely to give testimony that is both damaging and distorted. Providing immunity to nonverbatim statements of friendly witnesses gives protection only to less formal and thus less trustworthy forms of such statements. See Waits, Work Product Protection for Witness Statements: Time for Abolition, 1985 Wis. L. Rev. 305, 310 (1985) ("witness statement protection is the most indefensible component of the work product doctrine"). See also 8 C. Wright & A. Miller, Federal Practice & Procedure § 2028, at 240 (1970) ("A powerful argument can be made that all statements of witnesses should be routinely discoverable. A provision to this effect would put an end to most of the controversy about work product that has beset the federal courts"); but cf. 8 C. Wright, A. Miller & R. Marcus, id. at 415 (softening argument).

§ 89. Opinion Work Product

When work product protection is invoked as described in § 90, opinion work product (§ 87(2)) is immune from discovery or other compelled disclosure unless either the immunity is waived or an exception applies (§§ 91–93) or extraordinary circumstances justify disclosure.

Comment:

a. Scope and cross-references. Opinion work product of a lawyer is defined in § 87(2). Ordinary work product is subject to a general exception for need and hardship (see § 88).

b. Rationale. Mental impressions, opinions, conclusions, and legal theories form the core of work product. As impressions formed after the event or transaction in issue, they are also not of the same evidentiary value as percipient witness observation or contemporaneous recording of the event. Disclosure of ordinary work product in cases of need and hardship facilitates trial preparation, but no comparable utility ordinarily attends discovery of a lawyer's theories, conclusions, and other opinions. Strict protection for opinion work product effectuates functioning of the adversary system (see § 87, Comment *b*). Moreover, analysis expressed in opinion work product can be carried out by the requesting party's lawyer.

The protection for opinion work product is qualified by discovery rules requiring disclosure of legal contentions on which a party intends to rely (see Federal Rules of Civil Procedure 33(b) and 36(a); cf. id., Rule 16 (pretrial conference)). Also, an advocate is required under certain circumstances to inform a tribunal of adverse legal authority (see § 111).

c. Material combining opinion and ordinary work product. The material sought might contain both ordinary and opinion work product, for example, notes of an interview containing both the recollections of the witness and the thoughts of the lawyer who made the notes. If the tribunal finds that the ordinary work-product material should be produced, it may order production of the notes in redacted form. The tribunal may conduct an in camera inspection to determine whether redaction is appropriate and feasible. If opinion work product is so intertwined in the material that it cannot be redacted without destroying the value of the ordinary work product, the tribunal must balance the need for disclosure against the need for privacy.

d. The extraordinary-circumstances exception. The concept of "extraordinary circumstances" has never been intelligibly defined (see Reporter's Note). It apparently signifies unwillingness on the part of tribunals to put the work-product immunity on quite the same footing as the attorney-client privilege.

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Comment b. Rationale. See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[3.-2] (2d ed.1991); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2026 (1970); Wolf-

son, Opinion Work Product—Solving the Dilemma of Compelled Disclosure, 64 Neb. L. Rev. 248, 264–67 (1985); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 830–31 (1983).

The protection afforded opinion work product applies equally to parties, their lawyers, and nonlawyer assistants. See Advisory Committee Note to Fed. R. Civ. P. 26(b)(3), 48 F.R.D. 487, 502 (1970) ("the courts have steadfastly safeguarded against disclosure of lawyer's mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents"); e.g., Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1219 (4th Cir.1976); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 736 (4th Cir.1974), cert. denied, 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975). Opinion work-product immunity does not protect the mental impressions of witnesses who are not parties or representatives of parties. E.g., Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 403 (E.D.Va.1975).

On other ways of obtaining an opposing lawyer's opinion work product, see, e.g., Fed. R. Civ. P. 33(b) ("An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact"); Fed. R. Civ. P. 36(a) ("A party may serve upon another party a written request for the admission, for the purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements of opinions of fact or the application of law to fact including the genuineness of any documents described in the request."). See generally 8 C. Wright & A. Miller, Federal Practice and Procedure § 2026, at 232 (1970); Cooper, Work Product of the Rulesmakers, 53 Minn. L. Rev. 1269, 1286–87 (1969); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 837–39 (1983).

For descriptions of three standards—absolute protection, balancing, and strict protection—applied by courts with regard to opinion work product, see generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[.–2] (2d ed.1991); Wolfson, supra, at 264–67; Special Project, supra, at 821–31. For cases applying an absolute-immunity standard, see, e.g., Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d at 734; In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 848 (8th Cir.1973). Some decisions employ a balancing approach, seeking on a case-by-case basis to weigh such things as the systemic interests in liberal discovery against the needs for privacy of lawyers and their representatives. The test is limited by the difficulties inherent in all case-by-case balancing. For cases, see, e.g., Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir.), aff'd by equally divided court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971); Xerox Corp. v. International Business Mach. Corp., 64 F.R.D. 367, 377–82 (S.D.N.Y.1974). See also Wolfson, supra, at 266–77 (proposed formulation).

Comment c. Material combining opinion and ordinary work product. On the problem of intertwined ordinary and opinion work product, see, e.g., Bogosian v. Gulf Oil Corp., 738 F.2d 587, 592–96 (3d Cir.1984) (neces-

sary to redact documents combining facts and thought processes); Mervin v. Federal Trade Comm'n, 591 F.2d 821 (D.C.Cir.1978) (severance of factual material in agency memoranda inappropriate where it nonetheless might disclose lawyer's appraisal of factual evidence).

Federal Rule of Civil Procedure 26(b)(3) does not in terms provide for in camera inspection to excise protected opinion work product, but the Advisory Committee Note suggests this procedure in appropriate cases. See Advisory Committee Note to Fed. R. Civ. P. 26(b)(3), 48 F.R.D. 487, 502 (1970). See also Bogosian v. Gulf Oil Corp., supra, 738 F.2d at 595–96; Mervin v. Federal Trade Comm'n, supra, 591 F.2d at 826.

Comment d. The extraordinary-circumstances exception. Most courts applying a strict-protection standard for opinion work product suggest that an "extraordinary circumstances" exception might exist but refuse to hold that it applies on the facts presented and do little to elucidate the circumstances in which the exception might apply. E.g., Upjohn Co. v. United States, 449 U.S. 383, 401–02, 101 S.Ct. 677, 686, 66 L.Ed.2d 584 (1981) ("far stronger showing of necessity and unavailability" required before court may order production of opinion work product); Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1984); In re Sealed Case, 676 F.2d 793, 809–10 (D.C.Cir.1982).

Commentators have suggested that an extraordinary circumstance exists when opinion work product is itself evidence of a substantial element of a party's claim. See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[3.–2], at 385 (2d ed.1991) ("Cases indicate that when the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are 'work product.' "). E.g., In re Int'l Systems & Controls Corp. Securities Litigation, 693 F.2d 1235 (5th Cir.1982) (work product inapplicable where "the claim ... relates to the opposite party's knowledge that can only be shown by the documents themselves").

The cases arguably applying such a broad exception are few, most (but not all) arising in the context of a bad-faith claim against an insurer. For some, there are possible alternative explanations of the decision, not mentioned in the opinion, such as the crime-fraud exception (see § 93), the exception for suits against a fiduciary (see § 84), and, in insurer-insured litigation, application of a requirement of insurer cooperation with the insured. The put-in-issue exception (see § 92) is irrelevant, because the person claiming work-product immunity in these cases is defending against, not asserting, the issue as to which the work product is assertedly relevant. E.g., Holmgren v. State Farm Mut. Automobile Ins. Co., 976 F.2d 573 (9th Cir.1992) (insurance adjuster's notes estimating range of probable recovery by plaintiff discoverable in plaintiff's subsequent suit against insurance company for bad-faith defense); Charlotte Motor Speedway, Inc. v. International Ins. Co., 125 F.R.D. 127 (M.D.N.C.1989); Bio–Rad Laboratories, Inc. v. Pharmacia, Inc., 130 F.R.D. 116 (N.D.Cal.1990); In re Sunrise Securities Litigation, 130 F.R.D. 560, 566–69 (E.D.Pa.1989); APL Corp. v. Aetna Casualty & Sur. Co., 91 F.R.D. 10, 14 (D.Md.1980). See also, e.g., Donovan v. Fitzsimmons, 90 F.R.D. 583, 588 (N.D.Ill.

1981) (memoranda and correspondence between pension-fund trustees and counsel discoverable by plaintiff in action for breach of fiduciary duty; material concerned issue of trustees' factual basis for investments); Handgards, Inc. v. Johnson & Johnson, 413 F.Supp. 926, 931 (N.D.Cal.1976) (plaintiff alleged bad-faith prosecution of previous patent infringement lawsuits; production of defense lawyer's factual work product in bringing those suits required); Bird v. Penn Central Co., 61 F.R.D. 43, 46 (E.D.Pa.1973) (assertion of defendant that plaintiffs are barred from rescission action for ignoring known rights requires discovery of work product in hands of plaintiffs or their agents). The court in Bartlett v. John Hancock Mut. Life Ins. Co., 538 A.2d 997 (R.I.1988), suggested an appropriate limitation—holding that discovery of work product relating to a bad-faith claim against an insurer should not proceed until the contract rights of the insured to claim under the policy had been established.

TITLE B. PROCEDURAL ADMINISTRATION OF THE LAWYER WORK-PRODUCT IMMUNITY

Section

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§ 90. Invoking the Lawyer Work-Product Immunity and Its Exceptions

(1) Work-product immunity may he invoked by or for a person on whose behalf the work product was prepared.

(2) Tbe person invoking work-product immunity must object and, if the objection is contested, demonstrate each element of the immunity.

(3) Once a claim of work product has been adequately supported, a person entitled to invoke a waiver or exception must assert it and, if the assertion is contested, demonstrate each element of the waiver or exception.

Comment:

a. Scope and cross-references. The client, the client's lawyer, or another representative of the client may assert the immunity. Applicable procedure commonly requires that the assertion be specific and made with reasonable promptness. On the elements of the basic immunity, see § 87. The need-and-hardship qualification is described in § 88. On waivers and exceptions, see §§ 91–93; on the effect of disclosures of work product, see § 91. A lawyer has the duty to assert the work-product objection when appropriate to protect the client's

interests, but the lawyer need not push the objection to the point of contempt in order to obtain immediate appellate review (see § 63, Comment *b*). On the analogous rules of standing, specificity, timeliness, and duty with respect to the attorney-client privilege, see § 86.

b. Invoking and resisting a claim of immunity. In general, the procedural requirements for invoking work-product immunity or asserting waiver or exception parallel the procedures set out in § 86 for the attorney-client privilege, with suitable allowance for the setting of discovery in which most work-product issues will arise.

c. Objection by a lawyer. A lawyer has implied authority to invoke the immunity. So long as doing so is not inconsistent with the interests of the client, a lawyer may invoke immunity on the basis of the lawyer's independent interest in privacy. When lawyer and client have conflicting wishes or interests with respect to work-product material, the lawyer must follow instruction of the client (see § 21).

Where a lawyer has taken action that waives the immunity, the client is bound (cf. § 86(1) (effect of lawyer waiver of attorney-client privilege)).

REPORTER'S NOTE

Comment b. Invoking and resisting a claim of immunity. See generally Fed. R. Civ. P. 30(c)(1) (deposition); id. Rule 33(a) (interrogatory); id. Rule 34(b) (production of documents); id. Rule 36(a) (request for admissions); id. Rule 37(b) and (d) (sanctions for failure to comply with discovery orders or failure to answer discovery requests with either responses or objections); 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[2], at 360–61 (2d ed.1991); Wolfson, Opinion Work Product—Solving the Dilemma of Compelled Disclosure, 64 Neb. L. Rev. 248, 253 (1985); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 870–71 (1983).

On the burden of proof necessary to establish the immunity or to overcome it, see generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[2]-[3] (2d ed.1991); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2023, at 196 (1970). See, e.g., Lott v. Seaboard Sys. R.R., 109 F.R.D. 554, 557 (S.D.Ga.1985) (burden on requesting party to show need and hardship to overcome ordinary work-product immunity); Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86, 88–89 (W.D.Okla.1980) (required showing of requisite need as a burden of proof).

Comment c. Objection by a lawyer. On the general problem presented when the interests of the lawyer and the client conflict, see Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 873–77 (1983), relying on In re Kaleidoscope Inc., 15 Bankr. 232 (Bankr.N.D.Ga.1981), rev'd on other grounds, 25 Bankr. 729 (N.D.Ga.1982). In SEC v. National Student Marketing Corp., 1974 WL 415 (D.D.C.1974), lawyers who were co-defendants with their clients un-

successfully attempted to invoke separate work-product protection after the clients waived work-product protection in a consent-decree settlement. The court held that the clients' waiver precluded the lawyers from invoking the immunity. That position is followed in the Comment.

On the client's right of access to the lawyer's work product, see § 46, Comment *d*, and Reporter's Note thereto. See also, e.g., Spivey v. Zant, 683 F.2d 881, 885 (5th Cir. Unit B, 1982) (Rule 26(b)(3) and work-product doctrine do not apply to situations where client seeks access to documents or tangible things amassed by lawyer during representation). In California, a statutory version of the work-product doctrine has been construed to permit a lawyer to withhold work product, even against a client trustee. See Lasky, Haas, Cohler & Munter v. Superior Court, 218 Cal. Rptr. 205 (Cal.Ct.App.1985).

Some courts have stated generally, apparently contrary to the position of the Section and Comment, that the work-product immunity may be invoked only by the lawyer. E.g., Panter v. Marshall Field & Co., 80 F.R.D. 718, 725 n.7 (N.D.Ill.1978), citing Hercules, Inc. v. Exxon Corp., 434 F.Supp. 136, 156 (D.Del.1977) (dicta) ("subject matter" waiver more narrowly applied for work product because "work product immunity may be invoked only by an attorney").

TITLE C. WAIVERS AND EXCEPTIONS TO THE WORK-PRODUCT IMMUNITY

Introductory Note: The rules governing waiver and exception applicable to work-product material generally parallel those for the attorney-client privilege (see §§ 78–85).

As stated in § 89, Comment *b*, opinion work product is given greater protection than ordinary work product (see § 88). Accordingly, waiver or exception with respect to opinion work product requires a correspondingly clearer showing.

§ 91. Voluntary Acts

Work-product immunity is waived if the client, the client's lawyer, or another authorized agent of the client:

(1) agrees to waive the immunity;

(2) disclaims protection of the immunity and:

(a) another person reasonably relies on the disclaimer to that person's detriment; or

(b) reasons of judicial administration require that the client not be permitted to revoke the disclaimer; or

(3) in a proceeding before a tribunal, fails to object properly to an attempt by another person to give or exact testimony or other evidence of work product; or

(4) discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.

Comment:

a. Scope and cross-references. Section 90 discusses the procedure whereby claims of waiver or exception are invoked and resolved. The exceptions and waivers addressed in this Section correspond to those governing the attorney-client privilege (see §§ 78–79).

b. Waiver of the work-product immunity by voluntary disclosure. Work-product protection is waived by disclosure to third parties if it occurs in circumstances in which there is a significant likelihood that an adversary in litigation will obtain the materials. For analogous waiver of the attorney-client privilege by subsequent disclosure, see § 79. Cf. also § 92(2) (waiver of work-product immunity by use of materials in preparing nonparty witness to testify). Indifference to such a consequence indicates that protection of the immunity was not important to the person claiming the protection. However, the privacy requirement for work-product material is in some situations less exacting than the corresponding requirement for the attorney-client privilege. Effective trial preparation often entails disclosing work product to coparties and nonparties. Work product, including opinion work product, may generally be disclosed to the client, the client's business advisers or agents, the client's lawyer or other representative, associated lawyers and other professionals working for the client, or persons similarly aligned on a matter of common interest (compare § 76). On disclosure to a client's liability insurer, see § 134, Comment *f*. Disclosure permitted by a protective order or made subject to the parties' confidential agreement does not destroy the immunity.

Illustration:

1. Government brings an antitrust suit against Corporation B. Corporation A independently sues Corporation B, alleging essentially the same facts as alleged by Government and seeking parallel relief. Lawyer for Corporation A shows to Government documents that constitute part of Lawyer's work product in Corporation A's action. Corporation A and Government agree that documents will be used by Government only in litigation against Corporation B. In the Government's action, Corporation B seeks discovery of the Corporation A work product. Both Corporation A and Government may properly assert Corporation A's work-product immunity (see § 90).

c. Waiver of the work-product immunity by partial disclosure. The concepts of inadvertent disclosure, partial waiver, and "subject-matter waiver" applicable to attorney-client privileged material apply similarly to work-product material, with appropriate necessary modifications because of the particular character of the material sought (see § 79, Comment *h*).

d. Privileged disclosure. A disclosure of work-product material in a communication that is itself subject to a privilege does not waive the immunity, as in the case of communications protected under the attorney-client privilege (see § 79, Comment *d*).

REPORTER'S NOTE

Comment a. Scope and cross-references. On consent, see, e.g., In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982) (where lawyer alone was complicit in crime, waiver resulted because client explicitly consented to disclosure of documents relating to offense); SEC v. National Student Marketing Corp., 1974 WL 415 (D.D.C.1974) (lawyers, co defendants with their clients, unsuccessfully attempted to invoke work-product protection after clients waived work-product protection in a consent-decree settlement). Most decided cases of waiver involve actions of the attorney or client that are voluntary but not explicitly consensual. Nonetheless, instances of explicit consent to waiver of work-product protection are found in stipulations, settlement agreements, and the like, and the Comment affirms that such agreements are effective. See C. Wolfram, Modern Legal Ethics § 6.6.2, at 294 (1986).

No reported decisions deal with disclaimer in the circumstances of Subsection (2)(b) and the Comment. Employing reasoning that is arguably analogous, a number of cases have suggested a "fairness" rationale for requiring full disclosure of related materials where an attorney or client partially and selectively discloses work product. That doctrine is accepted only to the extent indicated in

the Section. See Subsection (2). E.g., In re Subpoenas Duces Tecum (Tesoro Petroleum Corp.), 738 F.2d 1367, 1375 (D.C. Cir.1984); Hercules, Inc. v. Exxon Corp., 434 F.Supp. 136, 156 (D.Del.1977).

A work-product objection must be raised in lieu of answering a discovery request seeking work product. See § 90, Comment *b*, and Reporter's Note thereto. On the extent to which work-product immunity is relevant outside of discovery, see § 87, Comment *c*, and Reporter's Note thereto. Cf. United States v. Nobles, 422 U.S. 225, 239, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975); In re Sealed Case, 676 F.2d 793, 817–18 (D.C.Cir. 1982).

Comment b. Waiver of the work-product immunity by voluntary disclosure. See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[4], at 390–92 (2d ed.1991); Cohn, The Work Product Doctrine: Protection, Not Privilege, 71 Geo. L.J. 917, 936–38 (1983); Note, Waiver of the Work Product Immunity, 1981 U. Ill. L. Rev. 953, 963–68 (1981); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 886–93 (1983).

The "common interest" test utilized by the courts is adopted from 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 210 (1970). See, e.g., In re Doe, 662 F.2d 1073, 1081 (4th Cir.1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982) (voluntary disclosure of otherwise protected work product to client, who at time of disclosure was person with interests adverse to lawyer, waives immunity); United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1298–1300 (D.C.Cir.1980) (common interest not narrowly limited to co-parties; immunity exists so long as transferor and transferee anticipate litigation against common adversary on same issue or issues and have strong common interest in sharing fruits of trial preparation); In re Sunrise Securities Litigation, 130 F.R.D. 560, 564 (E.D.Pa.1989) (disclosure to regulatory agency, an adversary and not a person with a common interest, waives work-product protection); Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84, 89 (E.D.N.Y.1981) (no per se rule; immunity waived if disclosure of work product substantially increases possibility that opposing person could obtain information). On application of the doctrine to opinion work product, see In re Martin Marietta Corp., 856 F.2d 619, 626 (4th Cir.1988), cert. denied, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989) ("certainly actual disclosure of pure mental impressions may be deemed waiver").

Older cases applied a rule that disclosure to any person constituted automatic waiver of the immunity by forfeiture. E.g., B & C Trucking Co. v. Holmes & Narver, Inc., 39 F.R.D. 317, 319 (D.Haw.1966); D'Ippolito v. Cities Serv. Co., 39 F.R.D. 610 (S.D.N.Y.1965); United States v. Kelsey–Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D.Mich.1954) (documents lose cloak of privacy by voluntary disclosure when circulated among corporate officials by party to lawsuit). For commentary criticizing that view, see 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 209–10 (1970); Note, supra, 1981 U. Ill. L. Rev. at 964–66; Special Project, supra, at 886–93. That view criticized is not followed in this Restatement.

Illustration 1 is based on United States v. American Tel. & Tel. Co., 642 F.2d 1285 (D.C.Cir.1980). See also, e.g., In re Chrysler Motors

Corp. Overnight Evaluation Program Litigation, 860 F.2d 844, 846 (8th Cir. 1988) (disclosure to adversary in course of settlement negotiations); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D.Cal.1985) (inadvertent disclosure of work product to adversary) (citing authorities); 1 S. Stone & R. Taylor, Testimonial Privileges § 2.12 (2d ed.1994).

Comment c. Waiver of the work-product immunity by partial disclosure. See generally § 79, Comment *f*, and Reporter's Note thereto ("subject-matter" waiver for privileged communications). Some decisions limit waiver of the work-product immunity to ordinary work product (see § 88), holding that the immunity for opinion work product (see § 89) will not be waived as readily. E.g., In re Martin Marietta Corp., 856 F.2d 619, 625–26 (4th Cir.1988), cert. denied, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989). Some decisions have held that waiver of the attorney-client privilege does not necessarily waive work-product immunity with respect to related materials. E.g., Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1428 (3d Cir.1991); Nye v. Sage Prod., Inc., 98 F.R.D. 452, 453–54 (N.D.Ill.1982) (opinion work product); Hercules Inc. v. Exxon Corp., 434 F.Supp. 136, 156–57 (D.Del.1977).

As with some decisions applying the privilege, both lines of decisions are concerned to limit application of the broad "subject-matter waiver" or "implied waiver" concept with respect to either ordinary or opinion work product. Under that concept, if the subject matter of otherwise protected (and undisclosed) materials is related to that of waived materials, then protection is waived for all the material, including material not disclosed. E.g., In re Martin Marietta Corp., 856 F.2d at 625; In re Sealed Case, 676 F.2d 793, 818 (D.C.Cir.1982). The asserted basis for the broad subject-matter-waiver doctrine is a "fairness" argument derived by analogy from the "fairness" doctrine in general evidence law. E.g., 8 J. Wigmore, Evidence § 2327, at 636 (J. McNaughton rev.1961) (in dealing with attorney-client privilege, "regard must be had ... in every waiver ... [to] the element of fairness and consistency"). E.g., In re Sealed Case, 676 F.2d at 818.

However, fairness concepts relevant to evidence submitted to a fact-finder are irrelevant to voluntary, out-of-court disclosures of work product. See 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[4], at 391–92 (2d ed.1991) ("[A]t least in the case of inadvertent waiver, the broad subject matter waiver concept of the attorney-client privilege, requiring the wholesale production of all related privileged material where there has been any waiver at all, is inapplicable in the work product context."); Special Project, supra, at 890–91. In accord with the latter view, several decisions have recognized that the so-called "subject-matter-waiver" doctrine is properly confined mainly to instances of testimonial use of either privileged material or material protected by the work-product doctrine. E.g., Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1223 (4th Cir.1976) (subject-matter waiver does not extend to instance of partial or inadvertent disclosure "in which no testimonial use has been made of the work product"); In re Sunrise Securities Litigation, 130 F.R.D. 560, 566 n.19 (E.D.Pa. 1989); 8 C. Wright & A. Miller, Fed-

eral Practice and Procedure § 2024, at 209 (1970).

As indicated in the Comment, waiver of work-product immunity by disclosure out of court follows only where disclosure is inconsistent with the objectives of the immunity. Partial disclosure indicates little about a concern for the privacy of other materials. Accordingly, this Restatement does not recognize the subject-matter-waiver doctrine as a rule generally applicable outside of testimonial use of assertedly immune or privileged material, although it does recognize instances of waiver of the privilege and the immunity through actions that are inconsistent with their continuation. Compare § 79, Comment *f*.

On inadvertent disclosure, compare, e.g., Duplan Corp. v. Deering Milliken Inc., 540 F.2d 1215, 1222–23 (4th Cir.1976) (no waiver of immunity where only inadvertent or partial disclosure in response to specific inquiries), with, e.g., Hercules, Inc. v. Ex xon Corp., 434 F.Supp. 136, 156 (D.Del.1977) ("Even if certain facts or documents were disclosed inadvertently, the protection may be waived"). See § 79, Comment *h*, which provides the qualification that waiver does not result if the measures taken to protect confidentiality of the material were reasonable in the circumstances (even if they failed) and if reasonably prompt efforts to recover inadvertently disclosed material are taken.

Comment d. Privileged disclosure. E.g., Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 458 (N.D.Ill.1974) (bargaining negotiations), aff'd, 534 F.2d 330 (7th Cir. 1976); American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 431 (D.Mass.1972) (settlement negotiations); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 892–93 (1983). But see, e.g., Chrysler Motors Corp. Overnight Evaluation Program Litigation, 860 F.2d 844, 846–47 (8th Cir.1988) (disclosure of work product—computer tape containing counsel's selection of information—waived by disclosure to class-action plaintiffs as part of due diligence phase of settlement of class action); Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84, 90 (E.D.N.Y.1981) (disclosure to an adversary in settlement waives work-product protection as to items actually disclosed); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 46 (D.Md. 1974) (same).

Beyond the scope of the Restatement is the question whether a privilege exists for submission of work-product (or privileged) material to an administrative agency as part of a so-called voluntary-compliance program. See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir.1991); In re Subpoenas Duces Tecum (Tesoro Petroleum Corp.), 738 F.2d 1367 (D.C. Cir.1984); In re Subpoenas Duces Tecum (Fulbright & Jaworski), 738 F.2d 1367, 1372 (D.C. Cir.1984) (voluntary disclosure to SEC as part of that agency's voluntary-disclosure program waives work-product protection for materials disclosed when subsequently sought by Justice Department in independent investigation); Information Resources, Inc. v. Dun & Bradstreet Corp., 999 F.Supp. 591 (S.D.N.Y.1998); cf. In re Sealed Case, 676 F.2d 793, 817 (D.C.Cir.1982) (waiver of work-product immunity for all related work product by voluntary, but corruptly partial, submission of reports and underlying work product to SEC). An undertaking by the

agency to extend confidentiality to materials may protect disclosed work product against attempts by others to obtain it. Cf. In re Subpoenas Duces Tecum (Tesoro Petroleum Corp.), 738 F.2d at 1373–74 (agency undertaking as one factor); Permian Corp. v. United States, 665 F.2d 1214, 1218–19 (D.C.Cir.1981) (documents first produced in private-party litigation pursuant to confidentiality agreement and protective order stating that inadvertent disclosure would not constitute waiver, and then produced to SEC pursuant to special agreement on continuing confidentiality, still subject to work-product immunity in subsequent litigation). Disclosure to an agency by force of law is not voluntary and does not result in waiver. Cf. GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 52 (S.D.N.Y.1979) (disclosure of plaintiff's work product in response to government's civil investigative demand would not constitute waiver of plaintiff's work-product immunity; statute specifically imposes confidentiality on response); In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672, 675 (D.C.Cir.) (dicta), cert. denied, 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979) (suggestion of similar rule under attorney-client privilege).

§ 92. Use of Lawyer Work Product in Litigation

(1) Work-product immunity is waived for any relevant material if the client asserts as to a material issue in a proceeding that:

(a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct; or

(b) a lawyer's assistance was ineffective, negligent, or otherwise wrongful.

(2) The work-product immunity is waived for recorded material if a witness

(a) employs the material to aid the witness while testifying, or

(b) employed the material in preparing to testify, and the tribunal finds that disclosure is required in the interests of justice.

Comment:

a. Scope and cross-references. This Section parallels the analogous rules governing waiver of the attorney-client privilege by putting legal assistance or privileged communications into issue (see § 80(1)) or using work-product material or privileged communications to assist a witness (see § 80(2)).

b. Putting work product into issue. A party waives work-product protection by putting the protected material into issue, including

claims of reliance on counsel and of good faith evidenced by consultation with counsel, or where determining the truth of the party's allegation requires examination of work product. Such waivers, like the analogous waivers of the attorney-client privilege, are based on considerations of fairness (see § 80, Comment *b*). The immunity is not lost if the proceeding in which the claim or defense is asserted, for example in a pleading, ends without other disclosure of the work product (see Comment *f* hereto).

Although discovery of opinion work product is more restricted (see § 89), when the advice or other service of counsel is directly in issue and is evidenced by the lawyer's opinion work product, the balance is struck in favor of disclosure.

c. A client's attack on a lawyer's services. A party who asserts that a lawyer's assistance was defective may not invoke work-product immunity to prevent an opposing party's access to information concerning the claim. See § 80, Comment *c* (analogous waiver of attorney-client privilege). Where the interests of the lawyer and the client conflict (see § 83 & § 90, Comment *c*), the lawyer may not use the work-product protection to deny the client access to relevant work-product materials (see § 90, Comment *c*).

d. Use of work product at a hearing. When a witness has relied on work-product material in testimony, the rules of evidence afford an opposing party the opportunity to examine the relevant portions of the work product. Portions not relevant to the witness's direct examination may be ordered to be redacted.

Illustration:

1. Lawyer, retained to defend a person accused of bank robbery, interviews Teller, who was a witness to the robbery. Lawyer notes the conversation in a written memorandum that qualifies as work product (see § 87). At trial, Teller testifies for the prosecution, and Lawyer cross-examines by quoting from Teller's prior statement as recorded in Lawyer's memorandum. Teller denies making the purported statements. Because Lawyer elected to ask Teller questions with direct reference to Lawyer's memorandum, the work-product immunity for the portion of the memorandum discussing Teller's story has been waived. Waiver extends to other portions of the memorandum if necessary to place all Teller's testimony fairly into context.

e. Use of work product in witness preparation. When work product has been provided to a witness preparing for testimony, the

tribunal generally has discretion to order disclosure of the work product to the opposing party (Subsection (2)). A witness who is a party or a party's agent typically will examine work product in working with the lawyer in the matter. Whether such examination results in waiver depends on whether the examination was primarily for preparing testimony, rather than for generally facilitating preparation of the case.

f. Effects of waiver. Waiver required under this Section aims to assure fairness in the proceeding, not to make the material generally available. For example, if work product was shown to a witness but was not subsequently produced in open court, for example because the witness did not testify, waiver based on that use does not occur. Waiver does not apply to material produced subject to a protective order or only in camera. However, when material is produced under waiver and becomes part of a public record, it may thereafter be used for any purpose consistent with the rules of evidence.

Whether related work product should also be disclosed is governed by the principle of evidence law that a fair and balanced presentation be made to the factfinder (see § 79, Comment *f*).

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Comment b. Putting work product into issue. See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[3.-2], at 26–385 (2d ed.1991); Wolfson, Opinion Work Product—Solving the Dilemma of Compelled Disclosure, 64 Neb. L. Rev. 248, 265–66 (1985); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 831–33, 873–75 (1983).

On opinion work product, the leading case is Handgards, Inc. v. Johnson & Johnson, 413 F.Supp. 926, 931–33 (N.D.Cal.1976) (party cannot affirmatively assert reliance upon a lawyer's advice and then refuse to disclose such advice). See also, e.g., Bio-Rad Laboratories, Inc. v. Pharmacia, Inc., 130 F.R.D. 116 (N.D.Cal.1990) (despite fact that, in process of consulting as nontestifying expert, percipient witness became exposed to present trial counsel's opinion work product concerning same issue involving patent-application process and percipient's role in process, percipient witness could be required to testify in present patent-infringement and patent-validity litigation); Bird v. Penn Cent. Co., 61 F.R.D. 43, 47 (E.D.Pa. 1973) (where defense concerns knowledge, legal theories, and conclusions of lawyers, such "advice of counsel" evidenced in documents is discoverable when directly relevant to asserted defense).

On asserting reliance on advice of counsel, see, e.g., Panter v. Marshall, Field & Co., 80 F.R.D. 718, 725 (N.D.Ill.1978) (reliance on lawyer's advice in defense of shareholder's derivative suit); American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706, 709 (W.D.Mo.1978) (time and manner of lawyer's discovery of facts relevant to statute of limitations); Handgards, Inc. v. Johnson & Johnson, 413

F.Supp. 926, 931–33 (N.D.Cal.1976) (defendant's reliance on lawyer's advice with regard to former patent-infringement actions).

Comment c. A client's attack on a lawyer's services. The propositions stated in this Comment are derived from the analogous provisions for waiver of attorney-client privilege. See § 80, Comment c, and Reporter's Note thereto. Those principles also stem from the rationale underlying the work-product doctrine. See § 87, Comment *b*. Also relevant is the client's general control over the immunity (see § 90, Comment *c*) and the doctrine (see § 89, Reporter's Note to Comment *d*) removing work-product immunity when a lawyer's work product is directly in issue. Surprisingly, no authority has been found for the proposition that a convicted person's claim of ineffective assistance of counsel constitutes waiver of work-product immunity. The point seems well-settled in practice. Cf. also, e.g., United States v. Dupas, 14 M.J. 28 (C.M.A.1982) (in case of first impression, trial counsel who resisted attempt by former client to gain access to case file in order to support claim of ineffective assistance ordered to provide access).

Comment d. Use of work product at a hearing. The general statement of the rule and Illustration 1 are based on United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). See generally Cohn, The Work Product Doctrine: Protection, Not Privilege, 71 Geo. L.J. 917, 938 (1983). The *Nobles* opinion indicates that putting the report into issue by cross-examining the witnesses based on what they assertedly had told the investigator and then calling the investigator to the stand were the critical elements. Had no earlier reference been made by the defense to the investigator's report, there would have been no basis for waiver of the immunity. See, e.g., In re Martin Marietta Corp., 856 F.2d 619, 624 (4th Cir.1988); United States v. Salsedo, 607 F.2d 318, 320–21 (9th Cir. 1979) (defense forfeited work-product immunity for materials used to cross-examine witness); In re Murphy, 560 F.2d 326, 339 n.24 (8th Cir.1977) (forfeiture limited to situations where party seeking to preserve work-product protection makes testimonial use of materials). On the general question whether the work-product immunity applies to limit testimony or other evidence offered at trial, see § 87, Comment *c*.

Comment e. Use of work product in witness preparation. See generally E. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 218–20 (3d ed.1997); Noto, Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules, 88 Yale L.J. 404–06 (1978). On waiver by examination while testifying, see, e.g., Chavis v. North Carolina, 637 F.2d 213, 223–24 (4th Cir.1980) (witness referred to and sought to bolster credibility by relying at trial on material party sought to protect as work product); S. & A. Painting Co. v. O.W.B. Corp., 103 F.R.D. 407, 409–10 (W.D.Pa.1984) (waiver where, during deposition, witness examined and referred to portion of handwritten notes of lawyer).

On pretestimonial examination of work-product materials by a witness, see, e.g., Spivey v. Zant, 683 F.2d 881, 885 n.5 (5th Cir.1982) (under Fed. R. Evid. 612, plaintiff entitled to inspect and use work-product files employed for witness's preparation); Derderian v. Polaroid Corp., 121

F.R.D. 13 (D.Mass.1988) (trial court has discretion to order disclosure of work product so used); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144–146 (D.Del.1982) (lawyer's ring binders used for preparation of witness within scope of Rule 612(2) and should be disclosed); Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616–17 (S.D.N.Y.1977) (trial notebooks prepared by lawyer and shown to expert witness during preparation for deposition). As Evidence Rule 612 is discretionary, a court occasionally will refuse to order production of opinion work product so used. E.g., Parry v. Highlight Indus., Inc., 125 F.R.D. 449 (W.D.Mich.1989) (refusing to order disclosure of lawyer opinion-work-product documents examined by witness prior to deposition testimony and evidently influencing witness's peculiar verbal formulations in testifying); Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co., 92 F.R.D. 779, 780–81 (S.D.N.Y.1982) (notes consisting largely of opinion work product, examined by witness prior to deposition testimony). In practice, the evidence rule often is applied by judges so that a lawyer who has shown either ordinary or opinion work product to a witness prior to the witness's testimony, either at trial or deposition, has the practical, forensic burden of justifying its continued secrecy.

Some courts might be reluctant to order production of work product shown to expert witnesses during the course of preparing them to testify, in view of the limited scope of expert testimony, the limited discovery allowed of experts under Federal Rule of Civil Procedure 26(b)(4), and the frequently perceived identification between experts and the lawyers retaining them. Compare, e.g., Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 n.3 (3d Cir.1984) (rejecting production of opinion-work-product materials examined by expert witness that were of "marginal value" in intended cross-examination); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 108 F.R.D. 283, 286 (M.D.N.C.1985) (similar), with, e.g., Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D.Cal.1991) (absent extraordinary showing of unfairness, written and oral communications from lawyer to expert related to matters on which expert will testify are discoverable, even if opinion work product); Emergency Care Dynamics, Ltd. v. Superior Court, 932 P.2d 297 (Ariz.Ct.App.1997) (rejecting balancing position of Restatement in favor of per se rule of waiver in case of testifying experts). See generally Note, Discovery of Attorney Work Product Reviewed by an Expert Witness, 85 Colum. L. Rev. 812 (1985); Note, Discovery under the Federal Rules of Civil Procedure of Attorney Opinion Work Product Provided to an Expert Witness, 53 Fordham L. Rev. 1159 (1985).

Comment f. Effects of waiver. Compare, e.g., Shields v. Sturm, Ruger & Co., 864 F.2d 379 (5th Cir.1989) (no waiver based on earlier disclosure of material in state-court action with another party under compulsion of court order, but under protective order that resulted in only partial disclosure); Wrisco Indus., Inc. v. Hinely, 733 F.Supp. 106 (N.D.Ga.1990) (lawyer's testimony before grand jury's secret session), with, e.g., United States v. Rosenthal, 142 F.R.D. 389 (S.D.N.Y.1992) (fact that submission of report to agency entitled agency to require additional submission of background work-product ma-

terial suffices for waiver, notwithstanding that agency never requested material). Cf. In re Chrysler Motors Corp. Overnight Evaluation Program Litigation, 860 F.2d 844 (8th Cir. 1988) (waiver of immunity where disclosure actually made was pursuant to confidentiality agreement which, however, contemplated introduction of work product into evidence at subsequent hearing). Cf. generally Industrial Clearinghouse, Inc. v. Browning Mfg. Div., 953 F.2d 1004 (5th Cir.1992) (under attorney-client privilege, any waiver of privilege with respect to client-lawyer communications resulting from client's filing of legal-malpractice complaint, without further disclosure, does not permit third party in separate litigation to gain access to materials).

§ 93. Client Crime or Fraud

Work-product immunity does not apply to materials prepared when a client consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or to aid a third person to do so or uses the materials for such a purpose.

Comment:

a. Scope and cross-references. For the crime-fraud exception to be relevant, the requested materials must qualify as work product under § 87. The crime-fraud exception overcomes protection for both ordinary (see § 88) and opinion (see § 89) work product. The party seeking production need not show need or hardship (compare § 88). On invoking the crime-fraud exception, see § 90, Comment *b*.

For the analogous crime-fraud exception to the attorney-client privilege, see § 82, including the element of accomplishment of the wrongful objective (see § 82, Comment *c*). On the limited circumstances in which a lawyer may disclose a client's intended crime or fraud, see §§ 66–67. On a lawyer's responsibilities with respect to counseling a client concerning illegal acts, see § 94. On a lawyer's responsibilities with respect to false evidence, see § 120.

b. Rationale. Like the crime-fraud exception to the attorney-client privilege (see § 82, Comment *b*), the crime-fraud exception for work-product immunity recognizes that crime and fraud do not warrant such protection. The exception applies to ongoing or future crimes or frauds but not to work product prepared in a representation concerning completed client acts. Whether work product relates to past acts or future or ongoing acts requires close analysis (see § 82, Comment *e*).

c. The intents of the client and the lawyer. To overcome the immunity by use of the crime-fraud exception, the inquiring party must make a sufficient showing that the client's ongoing or future

conduct was criminal or fraudulent. The particulars of that showing are the same as for the corresponding exception to the attorney-client privilege (see § 82).

If the client alone has the requisite criminal or fraudulent intent, work-product immunity is lost despite the innocence of the lawyer (see § 82, Comment *c*). The public interest in deterring wrongful acts outweighs the innocent lawyer's interest in privacy. The rule also prevents a client from advancing an illegal scheme through a noncomplicit lawyer. Once the required showing is made, opinion work product of an innocent lawyer is subject to disclosure along with opinion work product of the client and ordinary work product of both client and lawyer. Conversely, the exception does not apply when a lawyer representing an innocent client commits or is complicit in another's crime or fraud (see § 82, Comment *c*, Illustration 3).

d. Invoking the crime-fraud exception. The crime-fraud exception applies only after a client or lawyer establishes the elements of work-product immunity, as provided in § 90, Comment *b*. The party seeking access to the work product then has the burden of establishing that it falls within the exception (id.; see also § 82, Comment *f*).

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At one time, the question of the application of the crime-fraud exception to work product was a matter of doubt. E.g., In re Murphy, 560 F.2d 326, 337–38 (8th Cir.1977); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1220 (4th Cir.1976). Its application is now well-accepted. See generally 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice § 26.64[4], at 392–93 (2d ed.1991); Comment, The Potential for Discovery of Opinion Work Product Under Rule 26(b)(3), 64 Iowa L. Rev. 103, 106–08, 118–20 (1978); Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 760, 833–37 (1983).

Comment b. Rationale. On the similarity between the crime-fraud exception of the attorney-client privilege and that of the work-product doctrine, see, e.g., In re Burlington N., Inc., 822 F.2d 518, 525 (5th Cir. 1987), cert. denied, 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988); In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir.1986); In re Sealed Case, 676 F.2d 793, 812 (D.C.Cir. 1982); In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 802–03 (3d Cir.1979). On the rationale that the work-product protection exists to serve only the "rightful interests" of the client, see, e.g., Hickman v. Taylor, 329 U.S. 495, 510–12, 67 S.Ct. 385, 392–394, 91 L.Ed. 451 (1947); In re Burlington N., Inc., supra, 822 F.2d at 524; In re Special September 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir.1980). On striking a balance between the interests of the individual lawyer in privacy and the systemic value in disclosing the truth, see, e.g., In re Sealed Case, supra, 676 F 2d at 818; In re Special 1978 Grand Jury (II), supra, 640 F.2d at 63. Occasionally, a court will employ case-by-case balancing. E.g., Moody v. IRS, 654

F.2d 795, 801 (D.C.Cir.1981) (where lawyer, perhaps without knowledge of client, violated lawyer-code rule against ex parte communication with judge, hearing required to determine whether, weighing interests of client in confidentiality of information against numerous other factors, work-product objection should be set aside in FOIA-inquiry case). On the deterrent value of the crime-fraud exception, see In re John Doe Corp., 675 F.2d 482, 492 (2d Cir.1982) ("where so-called work-product is in aid of a criminal scheme, fear of disclosure may serve a useful detorrent purpose and be the kind of rare occasion on which an attorney's mental processes are not immune"); Special Project, supra, at 837.

On the requirement that the client's objective be accomplished, see In re Sealed Case, 107 F.3d 46, 51 n.7 (D.C.Cir.1997) (critiquing earlier version of Section that then omitted requirement of client accomplishment of crime-fraud objective for waiver).

On past, ongoing, and future crimes or frauds, see, e.g., In re John Doe Corp., 675 F.2d 482, 492 (2d Cir.1982) (ongoing criminal scheme not protected); In re Special September, 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir.1980) (ongoing fraud); In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 802 (3d Cir. 1979) (continuing or future criminal activity).

Comment c. The intents of the client and the lawyer. On the absence of a requirement of showing the client's specific intent, see In re Sealed Case, 676 F.2d 793, 815 (D.C.Cir.1982) (citing to In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 803 (3d Cir.1979)); In re Murphy, 560 F.2d 326, 338–39 (8th Cir.1977). Cf. § 82, Comment *c*. Compare In re Int'l Systems & Controls Corp. Securities Litigation, 693 F.2d 1235, 1243 (5th Cir.1982) (where corporate directors and officers used counsel to investigate alleged unlawful practices of corporate employees, crime-fraud exception would not apply to resulting work-product material in absence of showing that directors and officers had specific intent to further crime or fraud by consultation with lawyer or lawyer's preparation of document).

The weight of authority agrees that waiver of the immunity occurs when either both client and lawyer or only the client has the requisite criminal or fraudulent intont. E.g., In re Doe, 662 F.2d 1073, 1079 (4th Cir.1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982) (complicit lawyer, innocent client); In re John Doe Corp., 675 F.2d 482, 491–92 (2d Cir.1982) (innocent lawyer, complicit client). A middle position, not accepted in the Section and Comment, is to provide that in cases where the client alone is guilty waiver of the immunity for ordinary work product results from the client's complicity, but opinion work product of the innocent lawyer remains immune. E.g., In re Special September 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir.1980) (work-product immunity forfeited by client fraud even when asserted by the lawyer, except that it can be asserted to protect innocent lawyer's mental impressions, conclusions, opinions, and legal theories about the case); cf. In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir.1986) ("an unknowing attorney may successfully assert the [opinion work-product] privilege even in the face of a client's fraud or crime"). However, forced disclosure of opinion work product in such cases will not significantly impair the objec-

tives of providing protection to opinion work product. See § 89, Comment *b*.

Where the lawyer, but not the client, is implicated in the crime or fraud, most decisions agree with the position in the Comment that the client may continue to assert the immunity. E.g., Moody v. IRS, 654 F.2d 795, 801 (D.C.Cir.1981) (in FOIA inquiry, the "client's interest in preventing disclosures about his case may survive the misfortune of his representation by an unscrupulous attorney"; on remand, trial court to determine whether facts indicated stronger case for disclosure or denial of access to documents); In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 801–02 (3d Cir.1979) (because client has interest, independent of lawyer's interest, in protecting documents in grand-jury criminal investigation, client accorded standing to appeal trial court's order to lawyer to produce work-product material); cf. In re Doe, 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982) (only lawyer complicit, but client consented to disclosure). But see, e.g., In re Impounded Case (Law Firm), 879 F.2d 1211, 1214 (3d Cir.1989) (crime-fraud exception applies to work-product material where lawyer, rather than client, is object of criminal investigation; exception, however, only applies to materials pertinent to charge of criminal activity by lawyer alone).

Comment d. Invoking the crime-fraud exception. Cf. generally United States v. Zolin, 491 U.S. 554, 562–75, 109 S.Ct. 2619, 2635–2632, 105 L.Ed.2d 469 (1989) (administration of crime-fraud exception to attorney-client privilege). Courts describe somewhat differently the burden of proof that must be met by the party asserting the crime-fraud exception, although most of the authority agrees that only a "prima facie" case need be established. See, e.g., In re Grand Jury Proceedings (Doe), 867 F.2d 539, 541 (9th Cir.1989) ("a prima facie case of the existence of the crime-fraud exception must be established"); In re Antitrust Grand Jury, 805 F.2d 155, 165–66 (6th Cir.1986) (adopting Second Circuit's standard that "a prudent person have a reasonable basis to suspect the perpetration of a crime or fraud"; rejecting burden of showing direct or compelling circumstantial evidence); In re Sealed Case, 676 F.2d 793, 814–15 (D.C.Cir. 1982) (prima facie showing of some foundation in fact of crime or fraud; must proffer evidence establishing elements of some violation ongoing or about to be committed when work product was prepared). The Court in *Zolin*, supra, discussed the quantum-of-proof issue but did not decide it. See 491 U.S. at 563–64, 109 S.Ct. at 2626–2627. The Court did, however, adopt the "reasonable basis" test for determining when a court may review the assertedly privileged material in camera to determine whether the crime-fraud exception removed the immunity. 491 U.S. at 572, 109 S.Ct. at 2630.

For the varying standards required to meet the "relatedness" part of the crime-fraud exception, see, e.g., In re Burlington N., Inc., 822 F.2d 518, 525 n.5 (5th Cir.1987) (work-product material must reasonably relate to the fraudulent activity); In re Murphy, supra, 560 F.2d at 338 (documents must bear "close relationship" to client's existing or future scheme to commit crime or fraud); In re September 1975 Grand Jury Term (Thompson), 532 F.2d 734, 738 (10th Cir.1976) (applying "potential rela-

tionship" standard in context of grand-jury investigation).

On in camera inspection, cf. United States v. Zolin, supra, 491 U.S. at 565–72, 109 S.Ct. at 2627–31 (in attorney-client privilege case, in camera review permissible in trial court's discretion after requesting party shows basis for reasonable belief that crime or fraud occurred). See also, e.g., In re Antitrust Grand Jury, supra, 805 F.2d at 168 (district court should have conducted in camera inspection before ordering documents produced to assist in determining whether necessary showing of violation had been made); In re Sealed Case, supra, 676 F.2d at 815 (to avoid extensive in camera inspection of work product, crime-fraud standard of relatedness not too precise or rigorous).