Work Product Doctrine: Protected Information

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A Practice Note analyzing the key issues courts consider in determining whether documents and tangible things may be protected from disclosure under the work product doctrine. This Note addresses the difference between fact work product and opinion work product, matters that the work product doctrine does not protect, work product created through wrongful means, and the crime-fraud exception to the work product doctrine.

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In the US, the **work product doctrine** protects from disclosure to third parties documents and tangible things that are prepared in anticipation of litigation by or for another party or its representative (Federal Rule of Civil Procedure (FRCP) 26(b)(3)(A)). Unlike the **attorney-client privilege**, which only protects communications that relate to a request for legal advice, the work product doctrine generally does not focus on the substance of the materials a litigant seeks to protect. The more important issue is the context in which the materials were created (that is, whether they were created in anticipation of litigation), although there are several instances in which the substance of a particular document or other tangible thing is relevant to whether it deserves work product protection.

Fact Work Product

US law recognizes two types of work product:

- Fact work product.
- Opinion work product.

Whether a document qualifies as fact work product depends primarily on the context in which it was created, rather than on its actual content. Fact work product can be almost anything prepared by (or for) a party or its representative in anticipation of litigation or for trial. Examples of the types of documents that may deserve fact work product protection include:

- A lawyer's time slips and billing records.
- A litigant's list of confidential witnesses.
- Pictures of a pertinent place.
- A company's **litigation hold** notice.
- Documents containing logistical information, such as **deposition** dates.
- General factual chronologies.

Taken to the extreme, fact work product protection could even extend to a lunch order for witnesses preparing for trial because the lunch order would not exist but for the upcoming trial.

Opinion Work Product

Opinion work product may include a party's attorney's or other representative's:

- Mental impressions.
- Conclusions.
- Opinions.
- Legal theories.

(FRCP 26(b)(3)(B).)

In contrast to fact work product, opinion work product protection depends more on the actual content of a particular document. Even if a litigant can show a substantial need for documents or other tangible things that qualify for fact work product protection, a court still must protect opinion work product from disclosure. However, courts disagree about the exact level of higher protection available for opinion work product (see

Practice Note, Work Product Doctrine: Overcoming the Work Product Protection: Overcoming Opinion Work Product Protection).

Documents Containing a Lawyer's Opinions

Typically, documents that the opinion work product doctrine protects include a lawyer's:

- Memorandum reflecting her legal opinion, strategy, or analysis.
- Audit opinion letter.
- Memorandum containing opinions about a witness interview.
- Correspondence to the client about litigation.

Documents Reflecting a Lawyer's Opinions

The more complicated application of opinion work product protection relates to intangible work product, or documents reflecting (but not containing) a lawyer's opinion. Examples of documents reflecting, but not necessarily containing, a lawyer's opinion may include:

- Draft press releases that a lawyer prepares.
- A lawyer's draft settlement agreement.
- A lawyer's list of documents that his client selected for copying from the opposing side's production.
- Charts reflecting compilations of information created in defense of litigation.
- Draft pleadings and other court documents.

The opinion work product doctrine may also protect a lawyer's recollection of a witness interview even if he did not memorialize his opinions in writing (see Under Seal 1 v. United States (In re Grand Jury Subpoena), 870 F.3d 312, 317 (4th Cir. 2017); but see Smyth v. Williamson, 2014 WL 1912062, at *3 (D.S.C. May 12, 2014)).

Participants Whose Opinions Can Be Protected

The opinion work product doctrine can protect the opinions of a client's lawyer or other representative (FRCP 26(b)(3)(A); see, for example, *Hobart Corp. v. Dayton Power & Light Co.*, 2017 WL 3668848, at *2-3 (S.D. Ohio Aug. 24, 2017) (extending protection to paralegal's witness interview notes); *Serrano*

v. Chesapeake Appalachia, LLC, 298 F.R.D. 271, 283 (W.D. Pa. 2014); *In re Katrina Canal Breaches Consol. Litig.,* 2010 WL 2522968, at *2 (E.D. La. June 14, 2010); *SEC v. Brady*, 238 F.R.D. 429, 442 (N.D. Tex. 2006); but see *Beltran v. InterExchange, Inc.*, 2018 WL 839927, at *7-8 (D. Colo. Feb. 12, 2018)).

The work product rule does not typically extend opinion work product protection to the client's own opinion (FRCP 26(b)(3)(B); see, for example, *In re Gulf States Long Term Acute Care of Covington, L.L.C.*, 2014 WL 1761622, at *5 (Bankr. E.D. La. May 1, 2014)). However, in the case of corporate clients, courts have protected the opinions of corporate employees, who presumably count as a corporate client's representatives (see, for example, *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1037 (N.D. Ill. 2009); *Bd. of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 528, 531 (C.D. Cal. 2008); *Massachusetts Eye And Ear Infirmary v. QLT Phototherapeutics, Inc.*, 2001 WL 1180694, at *2 (D. Mass. Sept. 25, 2001)).

A Lawyer's Communications with Third Parties

The opinion work product doctrine can protect a lawyer's questions or statements to a third-party witness because they may reveal the lawyer's opinions about important facts or issues in the case and their disclosure could undermine the adversary process (see, for example, *Carolina Power & Light Co. v. 3M Co.,* 278 F.R.D. 156, 160 (E.D.N.C. 2011); *Gerber v. Down E. Cmty. Hosp.,* 266 F.R.D. 29, 34 (D. Me. 2010)). Although the adversary can interview or depose the third-party witness, she must ask her own set of questions rather than seeking to learn what the other side's lawyer asked.

Compilations of Non-Protected Documents or Facts Reflecting Opinion (*Sporck* Doctrine)

Most courts recognize that a lawyer's (or other client representative's) compilation of specific information out of a larger universe of information may deserve opinion work product protection because the selection process reflects the lawyer's opinions or impressions. This approach is called the *Sporck* doctrine (see *Sporck v. Peil,* 759 F.2d 312, 316 (3d Cir. 1985)).

Reflection of a Lawyer's Opinion

The *Sporck* doctrine applies only if the compilation of facts, documents, witnesses, or other information reflects the lawyer's opinion. A real, non-speculative danger of revealing the lawyer's thoughts must exist for the doctrine to apply (see, for example, *Am. Mgmt. Servs., LLC v. Dep't of the Army,* 842 F. Supp. 2d 859, 881-82 (E.D. Va. 2012) aff'd, 703 F.3d 724 (4th Cir. 2013) cert. denied, 2013 WL 1499158 (Oct. 7, 2013); *SEC v. Brady,* 238 F.R.D. at 442).

The smaller the number of documents, and the larger the universe from which they are selected, the more likely the *Sporck* doctrine applies (see, for example, *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 385 & n.2 (2d Cir. 2003); *Shapiro v. US Dep't of Justice*, 969 F. Supp. 2d 18, 32-34 (D.D.C. 2013)).

Even where a lawyer's selection of documents does not reveal her theory of the case (due to the large number of documents selected), the selection of documents still may deserve fact work product protection (see, for example, *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 144 (D.D.C. 2007)).

Application of the *Sporck* Doctrine

Courts have extended opinion work product protection under the *Sporck* doctrine in a variety of settings, including:

- A lawyer's selection of important documents in litigation or anticipated litigation (see, for example, *Sentry Ins. v. Brand Mgmt. Inc.*, 2012 WL 3288178, at *9 (E.D.N.Y. Aug. 10, 2012) (refusing to require plaintiff to disclose certain documents in advance of a deposition)).

- The identity of specific documents that a lawyer has asked a deponent to review before testimony (see, for example, *Briese Lichttechnik Vertriebs GmbH v. Langton*, 272 F.R.D. 369, 376 (S.D.N.Y. 2011)).

- The identity of witnesses that a lawyer interviews (see, for example, *Didonna v. Vill. Farms Iga, LLC,* 2012 WL 3879149, at *1 (E.D.N.Y. Sept. 6, 2012)).

- The identity of specific documents that a lawyer provides to attorneys representing the same client in related lawsuits (see, for example, *Boston Scientific Corp. v. Edwards Lifesciences Corp.*, 2016 WL 7440473, at *2 (D. Del. Dec. 27, 2016)).

Generally, courts are reluctant to broadly apply the opinion work product doctrine to compilations unless the compilation clearly reflects a lawyer's opinions or impressions (see, for example, *Progressive Cas. Ins. Co. v. F.D.I.C.,* 49 F. Supp. 3d 545, 552-53 (N.D. Iowa 2014); *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 411 (S.D.N.Y. 2009) (compilations that did not reflect counsel's mental impressions, conclusions, opinions, or legal theories were not entitled to work product protection)).

Equal Access by Adversary

The *Sporck* doctrine applies only if the adversary has equal access to the same universe of documents from which a lawyer made a compilation of the documents he thinks are the most important (see, for example, *Briese Lichttechnik*, 272 F.R.D. at 376). If the adversary does not have access to the documents, withholding them under the *Sporck* doctrine would deprive the adversary of responsive evidence.

Timing of Disclosure

Protection under the *Sporck* doctrine lasts only for a limited time to allow the party claiming work product protection to prepare for the litigation without having to prematurely disclose her theory of the case. Eventually, a litigant must disclose the information that she intends to use at trial, such as trial exhibits and the identities of witnesses she intends to call at trial, even if that information is protected from disclosure earlier in the litigation (see, for example, *Kartman v. State Farm Mut. Auto. Ins. Co.*, 247 F.R.D. 561, 565-66 (S.D. Ind. 2007)).

The Client's Selection of Documents

Few courts have addressed whether the client's (as opposed to a lawyer's) selection of documents, facts, or witnesses constitutes work product. Although the work product doctrine on its face protects only the opinions of a client's lawyer or representative, at least one court has held that the work product doctrine protects emails that a client forwarded to a lawyer, as long as the client produced the underlying emails elsewhere in the document production (see, for example, *Lang v. Intrado, Inc.*, 2007 WL 4570558, at *2 (D. Colo. Dec. 26, 2007)). In contrast, the attorney-client privilege normally does not protect documents selected by the client (see Practice Note: Attorney-Client Privilege: Scope of Protection: Historical Documents Sent by a Client to a Lawyer).

Matters That the Work Product Doctrine Does Not Protect

Information that the work product doctrine typically does not protect includes:

- Underlying (historical) facts and documents obtained from or given to clients (see Historical Facts and Documents Obtained from or Given to Clients).
- Historical facts and documents obtained from or given to third parties (see Historical Facts and Documents Obtained from or Given to Third Parties).
- Facts about the creation of work product (see Facts About the Creation of Work Product).

Historical Facts and Documents Obtained from or Given to Clients

As with the attorney-client privilege, the work product doctrine clearly does not protect historical or underlying facts from **discovery** (see, for example, *California Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 644 (E.D. Cal. 2014); *First Fin. Bank, N.A. v. Bauknecht*, 71 F.Supp.3d 819, 827 (C.D. Ill. 2014); *Graff v. Haverhill N. Coke Co.*, 2012 WL 5495514, at *50-51 (S.D. Ohio Nov. 13, 2012); *Oklahoma v. Tyson Foods, Inc.*, 262 F.R.D. 617, 628 (N.D. Okla. 2009)).

Moreover, a client cannot refuse to disclose facts within his knowledge merely because he learned them from his attorney or because he communicated those facts to counsel (see, for example, *FTC v. Boehringer Ingelheim Pharm., Inc.*, 180 F. Supp. 3d 1, 16 (D.D.C. 2016); *EEOC v. Bill Heard Chevrolet Corp.*, 2009 WL 2489282, at *5 (D. Nev. Aug. 12, 2009); and see Practice Note, Attorney-Client Privilege: Scope of Protection: Underlying Facts and Facts Provided by Lawyers to Their Clients)).

However, this does not mean that a party must produce otherwise protected documents containing discoverable factual information. Instead, the adversary must discover those facts through other non-privileged or non-protected discovery means, such as by deposing a party or serving **interrogatories** (*Graff*, 2012 WL 5495514, at *51; *Mack v. GlobalSantafe Drilling Co.*, 2006 WL 980746, at *4 (E.D. La. Apr. 11, 2006); *EEOC v. Caesars Entm't, Inc.*, 237 F.R.D. 428, 433, 434 (D. Nev. 2006)).

Historical Facts and Documents Obtained from or Given to Third Parties

Generally, the work product doctrine does not protect facts within counsel's possession that are obtained from third parties. Nor does the work product doctrine normally shield from disclosure documents obtained from third parties (see, for example, *Kriss v. Bayrocl Grp., LLC*, 2015 WL 1305772, at *16 (S.D.N.Y. Mar. 23, 2015); *Hunter's Ridge Golf Co., Inc. v. Georgia-Pacific Corp.*, 233 F.R.D. 678, 681 (M.D. Fla. 2006)).

However, the identity of documents that lawyers select from a group of documents received from third parties may be protected by the work product doctrine if that selection reflects the lawyer's mental impressions and theory of the case and opposing counsel also has access to the same group of documents (see, for example, *McClurg v. Mallinckrodt, Inc.*, 2016 WL 880388, at *2 (E.D. Mo. Mar. 8, 2016); *Disability Rights Council*, 242 F.R.D. at 142-43; *Hunter's Ridge Golf Co.*, 233 F.R.D. at 682-83; *Wollam v. Wright Med. Grp., Inc.*, 2011 WL 4375016, at *2 (D. Colo. Sept. 20, 2011)).

Many courts do not extend work product protection to compilations of material that a lawyer in one case obtains from lawyers who prepared the compilations for another case, finding that those documents were not prepared "because of" the litigation at issue, although some courts do protect these types of collections (see, for example, *Kartman*, 247 F.R.D. at 564; *Miller v. Ford Motor Co.*, 184 F.R.D. 581, 583 (S.D. W. Va. 1999); compare with *McDaniel v. Freightliner Corp.*, 2000 WL 303293, at *7 (S.D.N.Y. Mar. 23, 2000); and see Practice Note, Work Product Doctrine: Work Product Must be Created in Anticipation of Litigation: Motivational Element).

Facts About the Creation of Work Product

As with the attorney-client privilege, facts about the creation of work product, such as the fact that a document was created or that an interview occurred, generally are not protected. It often can be difficult to draw the line between permissible and impermissible areas of inquiry in this context. For example, it should be permissible to ask whether a party's accident reconstruction expert performed an analysis of an accident scene, but inquiries about where the expert took measurements at the accident scene should not be allowed (as even this basic information would provide hints about the investigator's theories or conclusions).

Some courts have taken an extremely broad view of the work product doctrine, extending the doctrine's protections to:

- Email headers containing information about the sender, recipients, time stamp, and subject line (*Schuler v. Invensys Bldg. Sys. Inc.*, 2009 WL 425923, at *2-3 (N.D. Ill. Feb. 20, 2009)).
- The date that a party first considered filing a certain pleading (*3V, Inc. v. CIBA Specialty Chems. Corp.*, 587 F. Supp. 2d 641, 647 (D. Del. 2008)).
- Non-substantive details about an attorney-client communication, such as:
    - when it occurred relative to other critical events;
    - how long it lasted; and

- where the attorney and client were when they communicated.

(*Turkmen v. Ashcroft*, 2006 WL 1517743, at *5 (E.D.N.Y. May 30, 2006)).

- Acknowledgement of whether certain documents exist (*Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986)).

Work Product Created Through Wrongful Means

Some courts have held that materials prepared through client or lawyer wrongdoing (such as wiretapping) do not deserve work product protection (see, for example, *Anderson v. Hale*, 202 F.R.D. 548, 559 (N.D. Ill. 2001)).

Crime-Fraud Exception

Courts generally do not extend work product protection to work product generated in furtherance of a fraud or a crime. However, unlike in the attorney-client privilege context (in which a lawyer's intent is irrelevant to determining whether the crime-fraud exception applies), courts may consider a lawyer's intent and whether the lawyer was complicit in a client's crime or fraud before deciding whether the crime-fraud exception precludes work product protection.

(See, for example, *In re Green Grand Jury Proceedings*, 492 F.3d 976, 980-81 (8th Cir. 2007); *In re Grand Jury Subpoenas*, 454 F.3d 511, 520 (6th Cir. 2006); *In re Grand Jury Proceedings #5*, 401 F.3d 247, 256 (4th Cir. 2005); *Chevron Corp. v. Donziger*, 2013 WL 1087236, at *25 (S.D.N.Y. Mar. 15, 2013); and see *In re Grand Jury*, 705 F.3d 133, 158 (3d Cir. 2012), *cert. denied*, 2013 WL 1625137 (Oct. 7, 2013).)

An innocent client also may successfully assert work product protection over materials that an unscrupulous lawyer prepared (see, for example, *Moreno v. Autozone, Inc.*, 2008 WL 906510, at *4-5 (N.D. Cal. Apr. 1, 2008); *Moody v. IRS*, 654 F.2d 795, 801 (D.C. Cir. 1981)).

For a detailed discussion of the crime fraud exception to the attorney-client privilege, see Practice Note, Attorney-Client Privilege: Scope of Protection: Crime-Fraud Exception.

