Your company had been embroiled in litigation over injuries from its automatic bagel-slicer. The company is now in the final design stages of its new, improved model. The legal department has been asked by product safety and risk management for any "input." A bright young in-house litigator pipes up: "I will analyze how the plaintiffs' bar will bring cases based on the new model and then we will remedy as many problems as practical before going to market." Hmmm . . . you are concerned about the discoverability of his study in the event that litigation does ensue; would it be protected by the work-product doctrine? The young lawyer answers "Sure, it's in anticipation of litigation." Is he right?

Preventive Medicine—A Bitter Pill?

By John K. Villa
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Good catch! Sophisticated business planning does require a frank and informed assessment of the potential legal risks of a company's proposed course of action, whether it is the marketing of a new product, a corporate reorganization, a major transaction, or tax planning. And every general counsel's office strives to add value at the front end of business decisions, not just defend lawsuits arising from them. But you don't want your insightful assessment to haunt you later by falling into your opponent's hands. In the circumstances posited here, there is no guarantee that you can prevent that from occurring by invoking the work-product protection.

Knowing What Privilege Is

First, who cares whether work-product protection exists—isn't the attorney-client privilege always available to protect against disclosure? The short answer is "no."[1]

The attorney-client privilege only protects confidential *communications* between counsel and *client* for the purpose of securing legal advice.[2] The "client" for purposes of the corporate attorney-client privilege is generally limited to managerial employees who are authorized to act on behalf of the corporation.[3] If counsel directed a nonmanagerial employee to prepare a document in anticipation of litigation, that document may not be protected by the attorney-client privilege. Likewise, an employee-recipient of legal communications may not fall within the definition of "client," thereby precluding application of the privilege. Work-product often extends to notes or memos to the file, or importantly, communications with and work from experts; depending on the facts, these may not be a communication between counsel and client entitled to protection under the attorney-client privilege. Finally, there is a different threshold for a finding of a waiver of the attorney-client privilege: Deliberate disclosures of protected material to a third party may not result in a waiver of work-product protection, unless the disclosure is likely to lead to disclosure to an adversary,[4] but such a disclosure will generally result in a waiver of the attorney-client privilege, unless a common legal interest exists between the parties.[5]

Bottom line: you need to know work-product.

Let's review the general rules.

Traditional Work Product

The work-product doctrine, famously announced by the Supreme Court in *Hickman v. Taylor*,[6] and now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries."[7] The rule protects from discovery documents prepared "in anticipation of litigation or for trial," absent a showing of substantial need or undue hardship. Where the documents reflect the "mental impressions, conclusions, opinions, or legal theories," of an attorney or party, the rule provides nearly absolute protection.[8]

As recognized by the *Restatement*, most lawyers' work is at least to some extent in anticipation of litigation "because preparing documents or arranging transactions is aimed at avoiding future litigation or enhancing a client's position should litigation occur."[9] Thus, in order to provide some limit to the concept of work-product, many courts seek to deter-

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mine whether "the document[s] can fairly be said to have been prepared or obtained because of the prospect of litigation."[10] Making this determination involves a two-prong inquiry: (1) was there a reasonable apprehension of litigation when the document was created, and (2) was the apprehension of litigation the motivation for the document's creation?[11]

"In Anticipation of Litigation"

With respect to the first element, "reasonable apprehension" has been variously construed to mean more than a "remote prospect," a "likely chance," or an "inchoate possibility" of litigation.[12] While it is generally recognized that litigation need not have commenced at the time of the document's creation,[13] courts applying the strictest standards require a specific claim to have arisen.[14] One virtue of this approach is simplicity of application.

Other courts reject the necessity of a specific claim[15] and adopt a more flexible and subtle approach that focuses on whether a document was created "with an eye toward litigation."[16] This standard is met where the prospect of litigation is identifiable because of the facts of the particular situation.[17] Illustratively, where counsel has a reasonable belief, based on her experience, that an event may likely result in litigation, such as a proposed, large-scale reduction in the company's workforce, documents prepared to assess the implications of that event may be protected as having been prepared in anticipation of litigation.[18] A classic example under this approach involves documents prepared after the discovery of a product defect, which outline the results of product safety studies and discuss potential defense strategies—these documents can be work product in subsequent litigation involving the defective product.[19] But, remember, not all courts are so generous.

"Because of the Anticipated Litigation"

The second element of the work-product inquiry is that the reasonable apprehension of litigation must be the motivation for the creation of the documents—i.e., the documents must have been prepared because of that litigation and not because of some business or other nonlitigation purpose.[20] Some courts require that the primary or exclusive purpose for the documents' creation is to assist in pending or threatened litigation.[21] Under this more traditional reading, even though litigation may be a motivating factor in preparing certain documents, the work-product rule will not apply if a business purpose also constituted an underlying reason for the documents' creation.[22] In short, the doctrinaire reading of work-product is essentially to protect the litigator.

Adlman and Other Heresy

There is hope for our hapless GC. In *United States v. Adlman*,[23] the Second Circuit applied the work-product doctrine to a memorandum drafted by an outside accounting firm at the request of the company's tax counsel for the purpose of assessing a *proposed* corporate restructuring that was expected to result in litigation. Note that at the time the memorandum was prepared, the transaction had not yet occurred! The court of appeals rejected the traditional view that documents must be created primarily or exclusively to assist in litigation, finding that such a requirement was not supported by either the language of, or the policies underlying the rule.[24] As explained by the court, to deny work-product protection to a document created to assist in making a business decision with anticipated legal consequences

> *[would] impose[s] an untenable choice upon a company . . . . If the company declines to make such analysis or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself . . . to ill-informed decisionmaking. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.*[25]

In order to determine the applicability of the work-product protection under these circumstances, the Second Circuit adopted a "but for" test: "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within [the rule]."[26]

The *Adlman* approach is gaining traction.[27] Even under *Adlman*, however, there would be no protection if the study was prepared in the ordinary course of business or was created in substantially the same form regardless of the impending litigation.[28] The fact that a study also contains legal analysis and strategy, however, favors finding work-product protection.[29]

So what of our bagel-cutter company? Even under a generous reading of the work-product doctrine, the facts here look like the purpose was more business (improving the product) than legal (defending claims), but who knows? Maybe the case will end up in the Second Circuit where both the work-product doctrine and bagels are well received.

What can a lawyer do to maximize work-product protection?

- Identify in the analysis itself, with as much specificity as possible, the potential legal claims that have arisen or that you expect to arise that prompted the analysis. If they have not yet arisen, explain briefly why you expect them to arise.

- Include in the memorandum all the pertinent legal (i.e., case law) analysis you have performed and exclude any gratuitous discussion of business, engineering, safety, financial, or nonlegal risk factors.
- Make specific analyses and recommendations about future litigation, expressing your ideas in the form of legal judgment.
- Do not provide the legal analysis to purely business personnel who have no responsibility for, contact with, or role in litigation.

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Notes

1. *See United States v. Adlman*, 134 F.3d 1194, 1200 at n. 4 (responding to dissent's argument that work product protection is unnecessary since protection exists under the attorney-client privilege, and noting that the attorney-client privilege may not always be available to protect attorney work product).
2. *See In re Grand Jury Investigation*, 842 F.2d 1223, 1224 (11th Cir. 1987); *see generally* John Villa, *Corporate Counsel Guidelines* § 1:1 (Thomson/West 2005).
3. *See* Villa, *supra n. 2,* at § 1:3.
4. *See In re Sealed Case,* 676 F.2d 793, 809 (D.C. Cir. 1982); *see also* Villa, *supra,* at § 2:11.
5. *See* Villa, *supra n. 2*, at § 1:24.
6. 329 U.S. 495 (1947).
7. *Adlman*, 134 F.3d at 1196 (quoting, in part, from *Hickman v. Taylor*, 329 U.S. at 510-511).
8. *Fed. R. Civ. P.* 26(b)(3).
9. *Restatement (Third) of the Law Governing Lawyers* § 87, cmt. i.
10. 8 Alan Wright, Arthur R. Miller, and Richard L. Marcus, *Federal Practice & Procedure,* § 2024, at 343 (2d ed. 1994); *see In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004) (noting that a growing number of federal circuits now employ this test in determining a document's eligibility for work-product protection); *see also Restatement*, *supra*, n. 9 ("[A]pprehension of litigation [must have been] reasonable in the circumstances . . . . [which] is determined objectively by considering the factual context in which materials are prepared, the nature of the material, and the expected role of the lawyer in ensuing litigation.").
11. *See In re Gabapentin Patent Litig.*, 214 F.R.D. 178, 183 (D. N.J. 2003); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 659 (S.D. Ind. 1991); *see generally* Villa, *supra note 2,* at §§ 2:5–2:6.
12. *Harper*, 138 F.R.D. at 660.
13. *In re Grand Jury Proceedings,* 73 F.R.D. 647, 653 (M.D. Fla. 1977); *see also Restatement*, *supra,* n. 9 ("The fact that litigation did not actually ensue does not affect the immunity.").
14. *See id.* (at the very least, an "articulable claim," or an "identifiable specific claim," likely to lead to litigation, must have arisen in order for the protection to apply).
15. *Leibel v. General Motors Corp.*, 250 Mich. App. 229, 646 N.W.2d 179, 188 (2002). As explained by one court, "[i]t is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur. . . . If lawyers had to wait for specific claims to arise before their writings could enjoy work-product protection, they would not likely risk taking notes about such matters or communicating in writing with colleagues, thus severely limiting their ability to advise clients effectively." *In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998).
16. *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381, 389–390 (D. Minn. 1992).
17. *Leibel*, 646 N.W.2d at 188.
18. *Maloney v. Sisters of Charity Hosp. of Buffalo, N.Y.,* 165 F.R.D. 26, 30 (W.D.N.Y. 1995); *see also In re Sealed Case*, 146 F.3d at 884 ("[T]he lawyer must at least have a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.")
19. *In re Ford Motor Co.*, 110 F.3d 964, 967 (3d Cir. 1997).
20. *Fed. R. Civ. P.* 26, Advisory Committee's Note, 48 F.R.D. 487, 501 (providing that "materials assembled in the ordinary course of business or . . . for other non-litigation purposes" are not protected by the work product immunity of Rule 26(b)(3)); *see Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992).
21. *See United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Emer. Ct. App. 1985); *Maertin v. Armstrong World Industries, Inc.*, 172 F.R.D. 143, 148-149 (D. N.J. 1997); *Harper*, 138 F.R.D. at 660.
22. *See, e.g., Prater v. Consolidated Rail Corp.,* 272 F. Supp. 2d 706 (D. Ohio 2003) (even though study of frequency of repetitive stress complaints was commissioned by counsel in response to actual and threatened lawsuits, study was business, not legal, in nature, and not covered by the work product rule).
23. 134 F.3d 1194 (2d Cir. 1998).
24. *Id.* at 1198–1199.
25. *Id.* at 1200.
26. *Id.* at 1195.
27. *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002); *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.,* 690 N.W.2d 38, 47–48 (Iowa 2004); *see also In re Grand Jury Subpoena*, 357 F.3d 900, 909–910 (9th Cir. 2004) (applying *Adlman*, and holding that report of environmental consultant hired by counsel both to assist in preparing defense for anticipated litigation arising out of government investigation and to consult on clean-up efforts, was protected by work product doctrine "because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discreetly separated from the factual nexus as a whole.").
28. *See Adlman*, 134 F.3d at 1202.
29. *See id.* at 1200; *cf. JumpSport, Inc. v. Jumpking, Inc.*, 213 F.R.D. 329 (N.D. Cal. 2003) (denying work product protection: even though the prospect of litigation was a substantial factor underlying preparation of financial assessment draft report that was to be included in application for patent enforcement insurance, there was no legal analysis or legal strategy concerning such litigation).