

ATTORNEY-CLIENT PRIVILEGE

**Confidential
information**

RESTATEMENT §68. ATTORNEY-CLIENT PRIVILEGE

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:

- (1) a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client.

RESTATEMENT §69. PRIVILEGE — “COMMUNICATION”

A communication within the meaning of § 68 is:

any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression.

DISTINCTION BETWEEN CONTENT AND KNOWN FACTS

Privilege protects only the content of the communication between privileged persons, not the knowledge of privileged persons about the facts themselves.

Although a client cannot be required to testify about communications with a lawyer about a subject, the client may be required to testify about what the client knows concerning the same subject.

DISTINCTION BETWEEN CONTENT AND KNOWN FACTS

The client thus may invoke the privilege with respect to the question “Did you tell your lawyer the light was red?” but **not** with respect to the question “Did you see that the light was red?”

Similarly, the privilege does not apply to preexisting documents or other tangible evidence, even if they concern the same subject as a privileged communication.

CLIENT IDENTITY, THE FACT OF CONSULTATION, FEE PAYMENT, ETC

Privilege does not apply to such matters as the following: the identity of a client;

- the fact that the client consulted the lawyer and general subject matter of the consultation;
- identity of nonclient who retained/paid lawyer to represent client;
- details of any retainer agreement;
- amount of the agreed-upon fee;
- client's whereabouts.

CLIENT IDENTITY, THE FACT OF CONSULTATION, FEE PAYMENT, ETC

Testimony about such matters normally does not reveal the content of communications from the client.

BUT privilege **does apply** if the testimony directly or by reasonable inference would reveal the content of a confidential communication.

Privilege does **not** protect clients or lawyers against revealing a lawyer's knowledge about a client solely on the ground that doing so would incriminate the client or otherwise prejudice the client's interests.

RECORD OF A PRIVILEGED COMMUNICATION

Privilege applies both to communications when made and to confidential records of such communications, such as a lawyer's note of the conversation.

Confidential communications by a lawyer to a client are also protected, including a record of a privileged communication such as a memorandum to a confidential file or to another lawyer, etc.

PREEXISTING DOCUMENTS

Clients may communicate information to a lawyer by sending writings or other kinds of documentary or electronic recordings that came into existence prior to the time that the client communicates with the lawyer.

Privilege protects the information that the client so communicated but not the preexisting document or record itself.

A client-authored document that is not a privileged document when originally composed does not become privileged simply because the client has placed it in the lawyer's hands.

§ 70. PRIVILEGE - “PRIVILEGED PERSONS”

Privileged persons within the meaning of § 68 are the **client** (including a prospective client), the **client’s lawyer, agents** of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.

§ 71. PRIVILEGE — “IN CONFIDENCE”

A communication is in confidence if, at the time and in the circumstances of the communication, the communicating person **reasonably believes** that no one will learn the contents of the communication except a privileged person.

§ 72. LEGAL ASSISTANCE AS THE OBJECT OF COMMUNICATION

A communication is made for the purpose of obtaining or providing legal assistance if it is made to or to assist a person:

- (1) who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and
- (2) whom the client or prospective client consults for the purpose of obtaining legal assistance.

§ 73. PRIVILEGE FOR AN ORGANIZATIONAL CLIENT

When a client is a corporation [or other organization], privilege extends to a communication that:

- (1) otherwise qualifies as privileged under §§ 68-72;
- (2) is between an agent of the organization and a privileged person as defined in § 70;
- (3) concerns a legal matter of interest to the organization; and
- (4) is disclosed only to:
 - (a) privileged persons as defined in § 70; and
 - (b) other agents of the organization who reasonably need to know of the communication in order to act for the organization.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

Privilege applies to communications made by a corporation's **employees** to its attorney acting at the direction of corporate superiors to secure legal advice if:

- (1) The info concerned the employee's **corporate duties**;
- (2) the employees were **aware** that information was sought from them to obtain legal advice; and
- (3) the communications were considered **confidential** when made and were thereafter kept confidential by the corporation

***Upjohn Co. v. United States*, 449 U.S. 383 (1981)**

- Upjohn Co. conducted an internal audit and investigation that revealed alleged illegal payments made to foreign officials in exchange for business. As a result, questionnaires were sent to all foreign and area managers inquiring as to information regarding any such payments.
- This procedure of collecting information had been deemed “highly confidential.”
- Upjohn volunteered notice of such actions to the IRS, who issued a summons for the internal questionnaires sent to managerial employees by Upjohn's in-house counsel.
- Upjohn said those documents were protected by privilege and attorney work product.

CORPORATE CLIENTS

Whistleblowers and disgruntled lower-level employees talking to in-house counsel about a legal issue they've observed in the workplace might NOT be privileged, because this was not done at the behest of the corporate directors.

Same applies to written complaints from lower-level employees not submitted under the purview of directives from management

§ 75. PRIVILEGE FOR CO-CLIENTS

(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is **not** privileged as between the co-clients in a subsequent adverse proceeding between them.

§ 77. DURATION OF PRIVILEGE

Unless waived (see §§ 78-80) or subject to exception (see §§ 81-85), the attorney-client privilege may be invoked as provided in § 86 at any time **during or after termination** of the relationship between client or prospective client and lawyer.

...even after death of client, though this is less clear.

DURATION (DEATH)

There are some public policy exceptions to the application of the attorney-client privilege, which include:

Death of a Client – Traditional rule is that privilege **survives the death of the client**. Modern trend: privilege may be breached upon the death of a testator-client if litigation ensues between the decedent's heirs, legatees or other parties claiming under the deceased client. *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1999)

Fiduciary Duty - An **exception** has been carved out when the corporation's **shareholders** wish to pierce the corporation's attorney-client privilege (against the directors).

§ 78. AGREEMENT, DISCLAIMER, OR FAILURE TO OBJECT

Privilege is waived if the client, the client's lawyer, or another authorized agent of the client:

- (1) agrees to waive the privilege;
- (2) disclaims protection of the privilege 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 a privileged communication.

§ 79. SUBSEQUENT DISCLOSURE

Privilege is **waived** if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a nonprivileged communication.

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§ 79. SUBSEQUENT DISCLOSURE

Unauthorized disclosure by a lawyer not in pursuit of the client's interests **does not constitute waiver.**

For example, disclosure of a client's confidential information to prevent a threat to the life or safety of another or to prevent a client crime or fraud does not constitute waiver within the meaning of this Section, although another basis for finding the privilege inapplicable may apply.

§ 79. SUBSEQUENT DISCLOSURE

A subsequent disclosure that is itself privileged does not result in waiver.

Thus, a client who discloses a communication protected by the attorney-client privilege to a second lawyer does not waive the privilege if the attorney-client privilege or work-product immunity protects the second communication.

So also, showing a confidential letter from the client's lawyer to the client's spouse under circumstances covered by the marital privilege preserves the attorney-client privilege.

§ 79. SUBSEQUENT DISCLOSURE

To constitute waiver, a disclosure must be **voluntary**.

The disclosing person need not be aware that the communication was privileged, nor specifically intend to waive the privilege.

A disclosure in obedience to legal compulsion or as the product of deception does **not** constitute waiver.

§ 79. SUBSEQUENT DISCLOSURE

A subsequent disclosure through a voluntary act constitutes a waiver even though not intended to have that effect. It is important to distinguish between inadvertent waiver and a change of heart after voluntary waiver.

Waiver does **not** result if the client or other disclosing person took precautions **reasonable** in the circumstances to guard against such disclosure.

“**Reasonable**” (relative importance of the communication; efficacy of precautions taken or precautions omitted; time pressures; whether disclosure was by client, lawyer, or 3rd party; degree of disclosure to nonprivileged persons)

PUTTING ASSISTANCE OR A COMMUNICATION IN ISSUE

Privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that:

- 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
- a lawyer's assistance was ineffective, negligent, or otherwise wrongful.

Privilege is waived for a recorded communication if a witness:

- employs the communication to aid the witness while testifying; or
- employed the communication in preparing to testify, and the tribunal finds that disclosure is required in the interests of justice.

§ 82. CLIENT CRIME OR FRAUD (MPRE FAVORITE!)

Privilege does not apply to a communication occurring when a client:

(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or

(b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.

§ 83. LAWYER SELF-PROTECTION

Privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding:

(1) to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer; or

(2) to defend the lawyer or the lawyer's associate or agent against a charge by any person that the lawyer, associate, or agent acted wrongfully during the course of representing a client.

§ 84. FIDUCIARY-LAWYER COMMUNICATIONS

In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise privileged is nonetheless **not privileged** if the communication:

- (a) is relevant to the claimed breach; and
- (b) was between the trustee and a lawyer who was retained to advise the trustee concerning the administration of the trust.

ATTORNEYS' REPRESENTATIVES

Privilege also applies to **representatives** of the client and/or attorney – but only if they facilitate the rendition of legal advice by the attorney

- Clerical/administrative employees (e.g., secretaries, receptionist, file clerks, law clerks, messengers)
- Others (e.g., accountants, translators, experts, consultants)

COMMUNICATIONS WITH THIRD PARTIES

NOTE: The majority of courts find **NO** privilege for communications, even related to legal matters, for accountants, bankers, financial advisers, consultants, PR firms not retained by the lawyer

SUMMARY - NO PRIVILEGE

- ❖ Privilege does not protect **facts** communicated to counsel
- ❖ Privilege does **not cover everyone** in the corporation or everyone working with the corporation
- ❖ **Generally, no privilege:**
 - If the communication had primarily a non-legal objective
 - If the communication was personal musing rather than request for advice
- ❖ **Copying (cc:)** your attorney or general counsel does **not** automatically make a communication privileged
- ❖ Information that is generally available to the public

THIS DOESN'T WORK

All of your outgoing emails contain the following:

“The information contained in this email is privileged. It has been sent for the sole use of the intended recipient(s). If the reader of this message is not an intended recipient, you are hereby notified that any unauthorized review, use, disclosure, dissemination, distribution or copying of this communication, or any of its contents, is strictly prohibited.”

Not automatically privileged. Blanket privilege inscriptions do not help in the privilege analysis; courts are increasingly wary of indiscriminate marking of all communications as privileged.

WAIVER AT TIME OF COMMUNICATION

Waiver typically arises when a communication is witnessed by a third party or where the client does not intend the communication to be confidential.

The mere presence of a third party will likely prevent the creation of attorney-client privilege.

WAIVER AT TIME OF COMMUNICATION

EXAMPLE – Client and her stockbroker meet with Attorney to discuss the suspect sale of stock. Attorney represents Client in connection with the sale, but not the stockbroker. During the course of the meeting, Client discloses sensitive information.

Under this scenario, privilege is likely **waived** and the information conveyed does not have protection from disclosure.

SUBSEQUENT WAIVER

Waiver by failure to assert the privilege at trial

Waiver by voluntary disclosure

Waiver by putting the protected information at issue

Rule 502 waiver (federal proceeding or to a federal office or agency)

WAIVER BY CONDUCT: THE “HALF-OPEN DOOR” RULE

- Revealing parts of the communication in testimony
- Revealing one opinion but asserting privilege on others related to the same topic

Note – new Fed Rule 502 (see below) codified the half-open door rule

BUSINESS DISCUSSIONS NOT COVERED

Communications by a corporation with its attorney, who at the time is acting solely in his capacity as a business advisor, are not privileged, nor are documents sent from one corporate officer to another merely because a copy is also sent to counsel.

Employee manuals and similar routine legal documents prepared by an attorney for a corporate client's regular use are probably not privileged

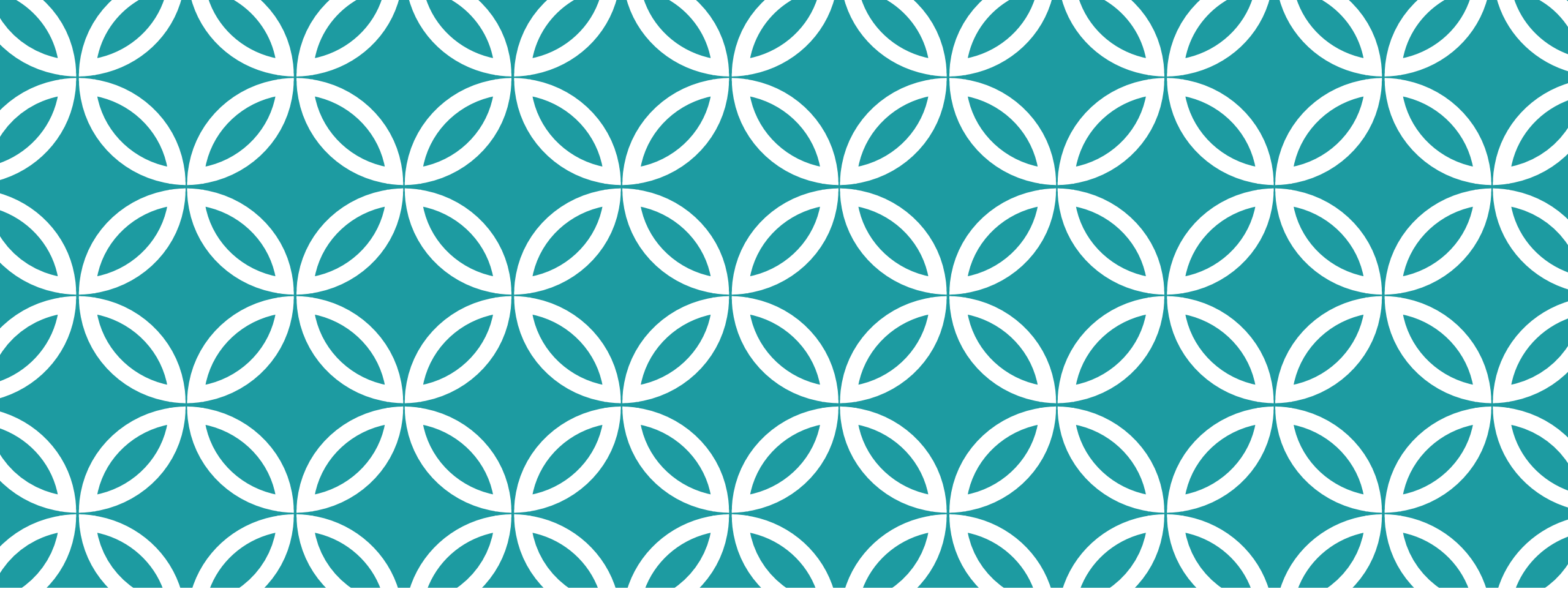
BUSINESS DISCUSSIONS NOT COVERED

Medallion Transport & Logistics, LLC v. AIG Claims, Inc., 2018 WL 3608568 (E.D. Tex. June 23, 2018)

Court concludes the documents in dispute are not “made for the purpose of facilitating the rendition of professional legal services,” and thus are not privileged communications under Texas law.

The documents pertained to general claims reporting procedures, such as to whom bad-faith claims should be reported, assigning counsel, closing files, who has settlement authority, who pays defense costs, records management, and the like.

“These policies, although they may have been drafted by lawyers, are made for the purpose of facilitating the rendition of competent claims handling rather than professional legal services.”



WORK PRODUCT DOCTRINE

Client confidences

WORK PRODUCT – ILLUSTRATION

Lawyer for Employer (defendant) writes to Physician, setting out circumstances of an employee's death and asking for Physician's opinion as to the cause. Explains that Lawyer is preparing for a “possible claim” by the employee's executor for worker-compensation benefits.

Lawyer's letter is **protected work product** but not A-C privileged.

WHICH IS BROADER? - AUG 2018 CASES

Aug 1: “...[W]ork product doctrine is **broader** than the attorney-client privilege.” *In re National Prescription Opiate Litigation*, 2018 U.S. Dist. LEXIS 142270, at *61 (N.D. Ohio Aug. 1, 2018)

Aug 8: “The work-product doctrine is **narrower** than the attorney-client privilege.” *Wolff v. Biosense Webster, Inc.*, 2018 U.S. Dist. LEXIS 133742, at *5 (W.D. **Tex.** Aug. 8, 2018).

Aug 10: work product doctrine is “**broader** than the attorney-client privilege.” *Burrow v. Forjas Taurus S.A.*, 2018 U.S. Dist. LEXIS 134897, at *3 (S.D. Fla. Aug. 10, 2018).

WORK PRODUCT DOCTRINE IS BOTH **BROADER AND NARROWER** THAN A-C PRIVILEGE

It is **broader**, because:

- (1) **anyone** (not just lawyers or clients) can create protected work product, if motivated by anticipated litigation;
- (2) work product includes **more items** - documents, accident scene pictures, translations, collections of newspaper articles, etc.; and
- (3) work product doctrine is **more robust** than the privilege - **disclosing** work product to non-adverse third parties normally **does not waive** that protection.

WORK PRODUCT DOCTRINE IS BOTH **BROADER AND NARROWER** THAN A-C PRIVILEGE

On the other hand, work product is **narrower** than attorney-client privilege, because:

- (1) it applies **only** in **anticipation of litigation**;
- (2) easily overcome - if adversary establishes substantial **need** for the withheld work product and inability to obtain equivalent evidence without undue **hardship**.

THE WORK-PRODUCT DOCTRINE

(Restatement § 87)

(1) **Work product** is tangible material or its **intangible equivalent**, 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**.

Normally, work product is immune from discovery or other compelled disclosure . . . when the immunity is invoked . . .

NEED AND HARDSHIP EXCEPTION

NO PROTECTION if the other party:

(1) has a substantial **need** for the material in order to prepare for trial (i.e., it's relevant/prejudicial); and

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

“Need and hardship” does **not** matter if other privileges apply: attorney-client privilege, privilege against self-incrimination, etc.

DEFINING “HARDSHIP”

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.

Easier to show **after** other discovery has been completed.

Most common situation: prior statement by a witness who is now unavailable.

ANTICIPATION OF LITIGATION

The work-product doctrine **only** protects materials prepared “**in anticipation of litigation.**” Fed. R. Civ. P. 26(b)(3) (unlike privilege)

Does NOT mean imminent – W-P applies as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.

Does **not** cover materials assembled in the **ordinary course of business**, created pursuant to public requirements, or would create regardless of any anticipated litigation.

REASONABLE ANTICIPATION

Three ways to trigger **objectively** and **subjectively reasonable** anticipation of litigation:

- (1) an outside event certain to generate litigation;
- (2) the adversary's explicit threat of lawsuit
- (3) in **rare** situations, the party's own internal actions (i.e., preparing to bring a novel claim)

MATERIALS CONSIDERED WORK PRODUCT

Tangible materials: documents, photographs, diagrams, sketches, questionnaires/surveys, financial analyses, handwritten notes, digital material.

Intangible work product is equivalent work product in unwritten, oral or **remembered** form.

Example: discovery request for a **lawyer's recollections** derived from **oral conversations**.

WORK PRODUCT: COMPILATIONS/SUMMARIES

Compilations or summaries of **non-work-product** materials can be work product. **Example:** lawyer's memorandum analyzing **publicly available** information is work product.

Selection/arrangement of documents **not otherwise protected** in **trial prep** can reflect mental impressions and legal opinions.

Lawyer's index of a client's **preexisting and discoverable** business files is work product if prepared in anticipation of litigation.

UNDERLYING FACTS NOT PROTECTED

Distinction is often unclear – W-P does **not** apply 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.

- W-P does **not** apply to **names of witnesses** or **whether a witness recounts a particular version of events**, for example that a traffic light was red or green, if other party requests this
- On the other hand, interrogatories seeking the **verbatim contents** of the witness's unrecorded statement **would** be protected.

INVOKING PROTECTION OR EXCEPTION

- Party invoking work-product **must object** and, if contested, **demonstrate each element** of the immunity.
- Opposing party must assert **need & hardship** or **waiver** to negate W-P claim; must demonstrate each element of the waiver or exception. (**shifting burden**)

PRIVILEGE OR WORK PRODUCT?

NO PRIVILEGE: *United States v. Tirado*, 890 F.3d 36, 38 (1st Cir. 2018) - defendant and his lawyer spoke on the courthouse lawn in the company of his relatives and friends.

The presence of third parties meant **no privilege** attached to the conversation

(Defendant then disappeared during recess; judge compelled atty to disclose whether he said he was fleeing)

<https://www.mcguirewoods.com/Client-Resources/Privilege-Ethics/Privilege-Points/2018/7/Does-Third-Party-Presence-Destroy-Attorney-Client-Privilege.aspx>

PRIVILEGE OR WORK PRODUCT

Work product protected (One day later): *Firefighters' Retirement System v. Citco Group Limited*, 2018 U.S. Dist. LEXIS 79034 (M.D. La. May 10, 2018), defendant sought to discover communications at a meeting attended by bankruptcy liquidation committee members, interested creditors, accountant, etc.

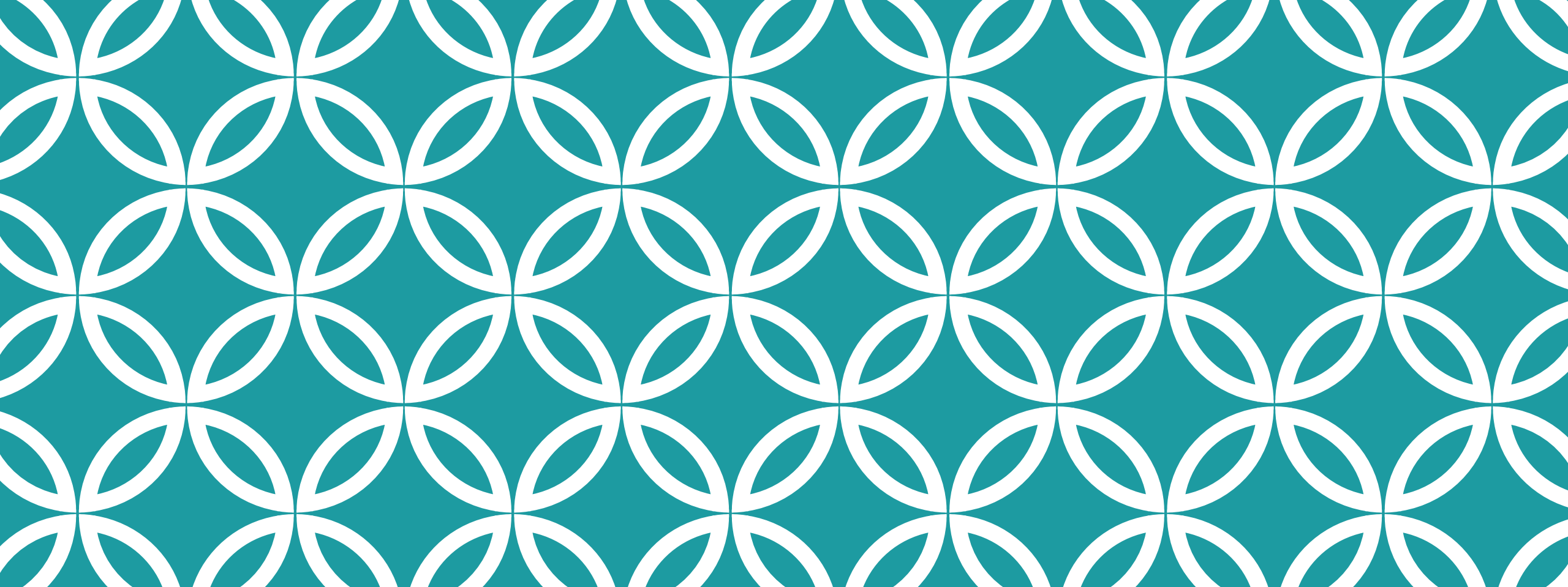
Held: those friendly third parties' presence did **not** negate the communications' work product protection

REVIEW: WORK PRODUCT vs. A-C PRIVILEGE

- A-C privilege protects communications regarding **all kinds** of legal services; in contrast, work product applied only if prepared in anticipation of litigation
- A-C privilege applies only to communications between a **client and lawyer** and their direct agents; in contrast, work product includes **many** other kinds of materials, even when obtained from **sources other than the client**.

REVIEW: WORK PRODUCT vs. A-C PRIVILEGE

- Privilege does not have the same “**need and hardship**” exception as W-P
- **Work product can survive contemporaneous or later disclosure** that would **waive** attorney-client privilege, i.e., disclosures to the party’s consultants, auditors, public relations firms, etc.



PRIVILEGE - FEDERAL RULES

***U.S. v. Jicarilla Apache Nation*, 564 U.S. 162 (2011)**

Court held that, even if it were to recognize the common law “fiduciary” exception to attorney-client privilege (which prevents a trustee from withholding from trust beneficiaries attorney-client communications relating to administration of trust), this exception did **not** extend to federal government in its capacity as “trustee” of Indian funds.

PRIVILEGE APPLIES TO GOVERNMENTAL CLIENTS

Unless applicable law provides otherwise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys.

Governmental agencies and employees enjoy the same privilege as nongovernmental counterparts

FED. R. EVID. 501 — STATE LAW OFTEN CONTROLS

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, **state law governs privilege** regarding a claim or defense for which state law supplies the rule of decision.

FED. R. EVID. 502 — LIMITS ON WAIVER

Rule 502. Attorney-client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

* * *

FED. R. EVID. 502(A) — HALF-OPEN DOOR

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

FED. R. EVID. 502(B)

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

FED. R. CIV. P. 26(B)(5)(B)

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.