

## The Work Product Privilege

The last issue of *LegalWatch* featured a discussion of the attorney-client privilege, especially in the context of an institutional client such as the University. The attorney-client privilege traces its origins to the ancient common law. Of more recent origin is the related “attorney work product” doctrine, which was created by the U.S. Supreme Court in the case of *Hickman v. Taylor*, 329 U.S. 495 (1947) to protect materials prepared by attorneys “with an eye toward litigation.” *Hickman*, 329 U.S. at 511. The doctrine was later memorialized in the federal rules of civil procedure, and most states, including Alabama, adopted a similar rule.

The work product doctrine protects documents and tangible things prepared in anticipation of litigation by a party’s attorney or representative. This might include, for example, witness statements secured by an attorney, investigative reports, drafts of pleadings, etc., all of which are considered “ordinary work product.” The mental impressions, conclusions, opinions, and legal theories of an attorney, classified as “opinion or core work product,” receive heightened protection. The application of the doctrine typically arises in the context of an ongoing lawsuit when one party seeks to obtain materials from the other party through the discovery device of a request for production of documents, either in connection with a deposition or separately. The party receiving the request may oppose it on the ground that some or all of the materials fall within the work product doctrine. Because the doctrine, where applicable, bars disclosure, it is sometimes referred to as the “work product immunity.”

The doctrine is not, however, absolute. If the requesting party can show that he/she has a need for the materials and cannot, without substantial hardship, obtain the materials or a substantial equivalent thereof by other means, the protection is defeated and discovery is allowed.

The Alabama work product doctrine is set forth in Rule 26(b)(4) of the Alabama Rules of Civil Procedure. This rule states as follows:

*Trial Preparation: Materials.* [A] party may obtain discovery of documents and tangible things . . . 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 discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The first question usually encountered when the work product doctrine is invoked is whether or not a particular document was prepared “in anticipation of litigation.” Alabama is one of a minority of states that takes a lenient view of what will satisfy this essential element of

the doctrine. Under Alabama law, it is not necessary that impending litigation be the sole motivation for the creation of the materials. The test is whether or not it was reasonable to assume, at the time the materials were prepared, that litigation could be expected, taking into account all the circumstances. If so, the materials are protected. *Ex parte Flowers*, 991 So. 2d 218 (Ala 2008). The doctrine may also apply even though an attorney was not involved in the creation of the documents, since Rule 26 makes it clear that protection is extended to documents prepared a party's "representative" and lists several kinds of representatives, including, in addition to an attorney, a consultant or agent. *Ex parte Norfolk Southern Railway Co.*, 897 So.2d 290 (Ala. 2004). See generally Teresa G. Minor and Patrick H. Strong, *Ex Parte Flowers: The Alabama Supreme Court's Most Recent Decision Shaping the Work-Product Doctrine*, 69 Ala. Law. 332 (2008).

The next question is typically raised when the party requesting the documents claims the benefit of the exception to the work product rule. The issue here is whether or not such party can demonstrate, first, "substantial need" for the work product material and, secondly, if such need exists, that obtaining the material or its substantial equivalent from other sources is not possible without "undue hardship." On the issue of "need," the party generally must show that the material is relevant to the party's claim or defense and that prejudice will result if discovery is not permitted. The second requirement for the exception is usually approached as a fact-intensive matter to be resolved based on the totality of the circumstances in a particular case. For example, an insurance adjuster who takes a statement from an accident witness will usually not have to produce the statement in the face of a work product objection, if the identity of the witness is known to the requesting party and the witness is available for deposition. On the other hand, if the witness is deceased or otherwise unavailable, then the witness' statement may well have to be produced even in the face of a work product objection, since the other party cannot otherwise obtain the witness' statement. As noted above, the "opinion work product" protection is much more difficult to penetrate, and it is nearly impossible for a requesting party to show "substantial need" for the opposing attorney's mental impressions, conclusions, etc.

Finally, the matter of waiver in the work product context bears some similarities to waiver of the attorney-client privilege. Though there is little Alabama law on the subject, the general rule is that work product waiver may occur by *voluntary* act where the attorney, the client, or an authorized agent of the client either agrees to waive the immunity protection, disclaims the protection, or fails to properly object to an attempt to obtain disclosure of protected material. *Restatement of the Law Governing Lawyers*, American Law Institute, §91. Disclosure to others from whom it is likely that an adversary in actual or potential litigation will obtain it may also result in waiver. *Id.* There is some authority in other jurisdictions, however, narrowing the scope of this "third party disclosure" waiver. The last issue of *LegalWatch* discussed the federal court procedural rules regarding waiver by *inadvertent* disclosure of protected communications under the attorney-client privilege, particularly in terms of whether that waiver then extends to other undisclosed communications pertaining to the same subject matter. Those rules also apply to waiver of work product materials.

The work product rule provides another, though limited, means of protecting certain documents prepared by the University or its authorized officials because of the reasonable

likelihood of litigation. As noted, however, the rule provides only a qualified immunity, and materials assembled by University officials in preparation for anticipated litigation could possibly end up on the hands of other parties in that litigation.