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June 12, 2012

# Alternative Litigation Finance and the Work Product Doctrine

Grace M. Giesel



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## Alternative Litigation Finance and the Work Product Doctrine

By Grace M. Giesel\*

### Abstract

*The United States judicial system is in the midst of great and fundamental change with regard to funding litigation. Alternative litigation finance (ALF) entities have begun, with much more frequency and success, to provide funding for small matters such as individual personal injury claims and also larger commercial litigation matters between businesses. Historical obstacles such as the champerty doctrine have faded somewhat from the legal landscape in light of the notion that everyone deserves access to justice regardless of bank account balance. In this quickly developing ALF reality, new utilitarian questions have emerged. Perhaps the most important of these is the effect the involvement of ALF entities has on the attorney-client privilege and the work product doctrine. The desire to preserve privilege and work product protection will likely mold the shape of the day-to-day operations of ALF entities and the ALF market in general.*

*This article considers the work product doctrine in the ALF setting while leaving to a later date a consideration of the application of the attorney-client privilege. Relying on cases involving independent auditors, this article concludes that courts are likely to find that materials evaluating litigation, even if created in the ALF setting, are protected by the work product doctrine. The article further concludes that courts are likely to find that work product doctrine protection is not lost when materials are shared with an ALF entity but only if the entity enters into a binding nondisclosure agreement. Absent such an agreement, sharing materials with an ALF entity may destroy work product protection.*

<b>I. Introduction</b>	<b>3</b>
<b>II. The Alternative Litigation Finance Phenomenon</b>	<b>7</b>
<b>III. The Historical Barriers and the Modern Environment</b>	<b>9</b>

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A. Champerty	9
B. Usury	13
C. Professional Responsibility Issues	15
IV. The Work Product Doctrine	17
A. A Little History	17
B. The <i>Hickman</i> Opinion	18
C. Rationale for the Doctrine	19
D. The Modern Work Product Doctrine	21
1. Parameters of the Doctrine	21
2. Waiver	27
V. The Scant Case Law Regarding the Work Product Doctrine and Alternative Litigation Finance	34
VI. Lessons from Independent Auditor Cases	36
A. Why the Independent Auditor Cases are Helpful	36
B. What is an Independent Auditor?	36
VII. Does the Work Product Doctrine Protect Materials that Evaluate Litigation?	39
A. Materials Created by the Party or an Agent of the Party	39
1. Evaluative Materials Prepared in the Audit Process or in Other Contexts <i>Are or May</i> <i>Be Protected</i>	40

2. Evaluative Materials <i>Are Not</i> Protected	43
B. Materials Created by the Litigation Finance Entity	47
C. Implications for Alternative Litigation Finance	50
VIII. Does Disclosure to Alternative Litigation Finance Entities Waive Work Product Doctrine Protection?	53
A. Disclosure to an Auditor <i>Does Not</i> Waive Protection	54
B. Disclosure to an Auditor <i>May or May Not</i> Waive Protection	59
C. Disclosure to an Auditor <i>Waives</i> Protection	60
D. Implications for Alternative Litigation Finance	62
IX. Conclusion	66

## I. Introduction

The United States judicial system is in the midst of great and fundamental change with regard to funding litigation. Historically, parties financed litigation out of their own literal or figurative pockets or, perhaps with the assistance of some sort of contingent fee representation. Third-party financing of litigation was frowned upon if not specifically forbidden. But now third-party litigation funding entities have begun, with much more frequency and success, to provide funding for small matters such as individual personal injury claims and also larger commercial litigation matters between businesses.<sup>1</sup> The

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<sup>1</sup> See *Third-Party Financing Profitable Endeavor for U.K. Funding Firm*, 28 ABA/BNA LAWYERS' MANUAL OF PROFESSIONAL CONDUCT 229 (April 11, 2012) (Burford, an international entity that finances high-end litigation, in its Annual Report

demand for this alternative litigation finance (ALF)<sup>2</sup> clearly exists<sup>3</sup> and the supply of funding has developed despite historical obstacles.<sup>4</sup> Doctrines such as champerty have faded somewhat<sup>5</sup> from the legal landscape and old fears of having litigation funded and controlled by evil actors equal to the worst villain in any Dickens novel have receded in light of the notion that everyone deserves access to justice regardless of bank account balance.

As historical obstacles to litigation funding have waned, a new reality has emerged in which ALF entities increase access to justice—at least for some. For others, funding from these entities allow litigants who have the means to fund litigation to shift risk.<sup>6</sup> Litigation funding alters the relative power

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states \$15.9 million profit); Binyamin Appelbaum, *Betting on Justice: Lawsuit Loans Add New Risk for the Injured*, NEW YORK TIMES, Jan. 17, 2011, at A1 (discussing loans to individuals). *See also infra* Section II.

<sup>2</sup> The American Bar Association Commission on Ethics 20/20 in its Informational Report to the House of Delegates in February 2012 adopted the term, “alternative litigation finance (“ALF”), to refer to any funding of litigation “by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer.” *See American Bar Association Commission on Ethics 20/20 in its Informational Report to the House of Delegates*, p. 5 (February 2012) [hereinafter *ABA Report*], available at

[http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111212\\_ethics\\_20\\_20\\_alf\\_white\\_paper\\_final\\_hod\\_informational\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf). Steven Garber had earlier used the term. *See* Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns*, RAND INSTITUTE FOR CIVIL JUSTICE LAW, FINANCE, AND CAPITAL MARKETS PROGRAM (2010), available at [http://www.rand.org/pubs/occasional\\_papers/](http://www.rand.org/pubs/occasional_papers/).

<sup>3</sup> The Annual Report released in April of 2012 of Burford, a high-end ALF entity states, “While uncertain economic conditions, rising litigation costs and shrinking corporate budgets have helped generate interest in Burford’s proposition, the fundamental driver of our success to date has simply been a thirst for financial options.” *See Third-Party*, *supra* note 1 (quoting Burford April 2012 Annual Report). Burford, for example, has worked with approximately one half of the top fifty law firms in the United States. *Id.* *See also* William Alden, *Looking to Make a Profit on Lawsuits, Firms Invest in Them*, NEW YORK TIMES B3, May 1, 2012, 2012 WLNR 9115096; and at <http://dealbook.nytimes.com/2012/04/30/looking-to-make-a-profit-on-them/> (ALF is “increasingly gaining backing from some of the country’s top law firms”).

<sup>4</sup> *See* Catherine Ho, *Investment Firms Playing Role in Legal Field*, THE WASHINGTON POST, Dec. 12, 2011, at A14 (discussing the financing activities of Blackrobe, Burford, Juridica, and Credit Suisse). *See also* Melissa Maleske, *Hedging Bets: Third-Party Litigation Funding Gains Steam in the United States*, INSIDE COUNSEL, Dec. 1, 2009, available at <http://www.insidecounsel.com/2009/12/01/hedging-bets> (discussing the increase and historical obstacles). *See generally* Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 (2010).

<sup>5</sup> *See infra* Section III.

<sup>6</sup> *See* Catherine Dunn, *Litigation Financing Becoming a Useful Tool for In-House Counsel*, CORPORATE COUNSEL, Dec. 20, 2011, available at [http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?\\_af=1202535981907](http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?_af=1202535981907) (discussing risk shifting).

of players in the justice system; it provides access to the playing field and also ensures that the teams show up at the field with the same equipment.<sup>7</sup>

In this new and quickly developing ALF reality, new utilitarian questions have emerged. Perhaps the most important of these is the effect the involvement of ALF entities has on the attorney-client privilege and the work product doctrine. The desire to preserve privilege and work product protection will likely mold the shape of the day-to-day operations of litigation finance entities and the ALF market in general.

A body of law has not yet developed dealing with the application of the attorney-client privilege or work product doctrine to the involvement of ALF entities. Only one case has dealt substantively with the applicability of the attorney-client privilege in the litigation finance setting.<sup>8</sup> Case law applying the work product doctrine in the litigation finance setting likewise is scant.<sup>9</sup> This article attempts a complete consideration of the application of the work product doctrine to the ALF situation while leaving to a later date a consideration of the application of the attorney-client privilege.

ALF entities can be involved in a litigation matter in two ways that may call into question the work product doctrine. First, the financing entity must have access to information in order to decide

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<sup>7</sup> See Binyamin Appelbaum, *Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts*, NEW YORK TIMES, Nov. 14, 2010, at A1 (the money “ensures that cases are decided by merit rather than resources;” notes abuses). Christopher Bogart, Burford CEO and former general counsel of Time Warner, has stated, “The reality of litigation is that litigation is so expensive that that fair and impartial process can be influenced by two imbalances.” He notes that one imbalance is “an imbalance of resources” while the other is “an imbalance of risk tolerances.”

<sup>8</sup> See *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010) (disclosure at the investment decision stage; no common interest shared by the party to the litigation and the ALF entity so no attorney-client privilege applied); *Bray & Gillespie Mgmt LLC v. Lexington Ins. Co.*, 2008 WL 5054695 (M.D. Fla. 2008) (ALF entered into confidentiality agreement and materials were shared for investment decision but ALF did not invest; no privilege); *Mondis Tech., Ltd. v. LG Electronics, Inc.*, 2011 WL 1714304 (E.D. Tex. 2011 (issue raised but the court decided the matter on the basis of the work product doctrine).

<sup>9</sup> See *infra* Section V. Commentators have noted the issue but have not provided a thorough analysis. See, e.g., Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 674-75 (2005); *ABA Report*, *supra* note 2, at 32-36 (discussing both the attorney-client privilege and the work product doctrine).

whether to invest in a particular matter.<sup>10</sup> Second, if an ALF entity decides to invest, it may require updates on that matter as a way of monitoring the investment.<sup>11</sup>

In either context, the ALF entity may require two types of disclosure. The entity may require the attorney and client team to supply it with materials already created in pursuit of the litigation matter. In addition, the ALF entity may require the creation of new materials critically evaluating the litigation matter. The entity may require such evaluative information for the investment decision and also after the entity becomes involved in the matter as an investor.

With regard to previously created materials protected by the work product doctrine and shared with the ALF entity, the question that arises is whether the act of sharing waives the protection. With regard to evaluative material specifically created for the ALF entity, the initial question is whether the work product doctrine applies at all. If the materials are protected, the question of whether sharing such information with the ALF entity waives the protection arises as well.

Parties and attorneys will be much less inclined to share materials with ALF entities if in so doing they destroy the protection afforded by the work product doctrine. Similarly, an ALF entity has no desire to lower or completely destroy the value of a litigation matter it is considering for investment or in which the entity is already involved. If the materials available to ALF entities are also available to litigation adversaries, the value of many litigation matters would be reduced greatly.

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<sup>10</sup> See Alden, *supra* note 3 (“Firms have to be selective about the cases they pick, combining a lawyer’s legal sense with an investor’s knowledge of risk. Deals are customized for each case, after a due diligence process that often includes analysis of a case’s facts, witnesses, opposing counsel and potential recoveries.”). For example, in *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 628 (Fla. Ct. App. 2005), the court noted that the plaintiff’s “attorneys also provided U.S. Claims with information about her claim to assist U.S. Claims in deciding whether to advance her funds.” *Id.* at 628. See also Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 391 (2009) (noting that any prudent investor would want access to information as part of “due diligence”).

<sup>11</sup> See Maleske, *supra* note 4 (Juridica’s CEO Richard Fields stated that he expects “clients to keep [Juridica] informed if some material event happened in the case, and [to provide] quarterly reports”); Nate Raymond, *Top Australian Litigation Finance Company Opens New York Subsidiary*, AM. LAW., Oct. 10, 2011 (BlackRobe Capital Partners and Fulbrooke Management LLC seek active roles; Bentham Capital LLC does not seek control).

In Section II, this article presents an overview of the ALF phenomenon. Section III reviews the current status of the major historical obstacles to ALF. Section IV outlines the history and parameters of the work product doctrine. Section V discusses the existing case law applying the work product doctrine to the ALF context. Section VI addresses the similarity of applying the work product doctrine to situations involving ALF entities and to situations involving independent auditors. Section VII discusses courts' treatment, especially in the independent auditor context, of the question of whether the work product doctrine protects materials that evaluate litigation. Section VIII discusses courts' treatment of the question of whether the sharing, in the independent auditor context, of materials otherwise protected by the doctrine waives the protection.

This article concludes that materials that evaluate litigation, even if created in the ALF setting, are likely protected by the work product doctrine. The article further concludes that materials likely do not lose protection when an attorney and client team shares them with an ALF entity. This is true, however, only if the ALF entity enters into a binding nondisclosure agreement with regard to any shared materials.

## **II. The Alternative Litigation Finance Phenomenon**

The beginning of modern ALF took the form of relatively small lending businesses recognizing the need for litigation funding and seeking to answer that need. These entities loaned money to plaintiffs, usually individuals, in exchange for a share of the recovery-- if there was a recovery.<sup>12</sup> This activity has been called "first-wave litigation funding."<sup>13</sup> While many of these businesses were probably

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<sup>12</sup> See Courtney R. Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 710-16 (2007) (describing the financing arrangement provided to plaintiffs).

<sup>13</sup> Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277 (2011).



completely reputable, some engaged in predatory practices<sup>14</sup> and thus tarnished the general reputation of the entire ALF community.<sup>15</sup> Today hundreds of entities are in the business of making loans related to litigation.<sup>16</sup>

In just a few years the ALF market has expanded to include sophisticated litigation investing. In this “second-wave litigation funding,”<sup>17</sup> funders include sophisticated entities such as banks, investment funds, and insurance companies, as well as specialized entities that are publicly traded.<sup>18</sup> For example, Juridica and Burford, two of the many financing entities investing in litigation in the United States, are traded on the Alternative Investment Market(AIM) which is a part of the London Stock Exchange.<sup>19</sup> Australian veteran funder IMF launched a United States subsidiary in 2011 and many other entities opened for business in recent years.<sup>20</sup> These ALF entities provide funding to plaintiffs and defendants in a variety of settings.<sup>21</sup> For example, the Burford Group, in its Annual Report issued in the spring of 2012, noted that it had committed \$280 million in more than thirty-six investments. These investments

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<sup>14</sup> See, e.g., *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 218 (Ohio 2003)(which involved a loan arrangement with an interest rate of 180 percent); *Kelly, Grossman & Flanagan LLP v. Quick Cash, Inc.*, 2012 WL 1087341 (N.Y. Sup. Ct. Mar. 29, 2012) (forty percent interest on loans to attorneys).

<sup>15</sup> For discussions of the predatory issue, see Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-Rancman Era*, 17 GEO. J. LEGAL ETHICS 795 (2004); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008).

<sup>16</sup> See, e.g., *Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 2012 WL 1087341 (N.Y. Sup. Ct. Mar. 29, 2012) (small-scale litigation finance provided to a law firm); *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 628 (Fla. Ct. App. 2005) (finance provided to an individual).

<sup>17</sup> Steinitz, *supra* note 14, at 1277.

<sup>18</sup> See Lyon, *supra* note 4, at 573 (discussing entities whose sole business is ALF as well as other entities who have other businesses such as banking entities); Ho, *supra* note 4 (discussing various ALF entities such as Blackrobe, Burford, and Juridica, as well as banking entity Credit Suisse).

<sup>19</sup> See Richard Loyd, *The New, New Thing*, AM. LAW. May 17, 2010, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202457711273>. See also Lyon, *supra* note 4, at 573 (discussing Burford and Juridica).

<sup>20</sup> The subsidiary is named Bentham Capital LLC. See Raymond, *supra* note 11. See also Alden, *supra* note 3 (in January of 2012 Credit Suisse’s litigation finance group departed and formed Parabellum Capital); Nate Raymond, *Heavyweight New York Litigator Jumps into the Litigation Finance Ring with New Venture*, AM. LAW., June 21, 2011 (BlackRobe Capital Partners and Fulbrooke Management LLC opened in 2011).

<sup>21</sup> See ABA Report, *supra* note 2, p. 5 (a spectrum of transactions). See also Steinitz *supra* note 14, at 1277 (“corporate defendants, classes (in class action cases), and individual plaintiffs in non-personal injury cases”). Juridica states that it often invests in patent disputes and competition law infringement matters. See Alex Spence, *The £8 Slice of Courtroom Winnings, with More to Come; Juridica to Pay Out Special Dividend Next Month*, THE TIMES (LONDON), p. 39, Jan. 5, 2012.

include contract disputes and other general business matters, real estate matters, intellectual property matters, environmental disputes, and trade secret litigation. Burford reported a \$15.9 million profit.<sup>22</sup> The ALF industry is indeed enjoying much success.<sup>23</sup>

### III. The Historical Barriers and the Modern Environment

#### A. Champerty

Long ago people feared that the powerful among them would “buy up claims and, by means of their exalted and influential positions, overawe the courts, secure unjust and unmerited judgments, and oppress those against whom their anger might be directed.”<sup>24</sup> The litigation often involved land, and, in exchange for funding the litigation, the wealthy and powerful party would obtain a share of the land. The poorer claimholder had little choice; the wealthy and powerful party became wealthier and more powerful by the increase in land ownership.<sup>25</sup>

To control such conduct, England created rules limiting a third party’s involvement in another’s litigation.<sup>26</sup> In particular, rules were created to prohibit maintenance, champerty, and barratry.<sup>27</sup> The

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<sup>22</sup> See *Third-Party*, *supra* note 1.

<sup>23</sup> Juridica, in January of 2012, announced a stock payout as a result of success in seven matters in the patent and antitrust fields. See Spence, *supra* note 21. The United Kingdom and Australia have been ahead of the United States in the establishment and acceptance of ALF. See Lee Aitken, *Before the High Court: ‘Litigation Lending’ After Fostif*, 28 Sydney L. Rev. 171, 177 (2006).

<sup>24</sup> *Casserleigh v. Wood*, 59 P. 1024, 1026 (Colo. Ct. App. 1900).

<sup>25</sup> See GRACE M. GIESEL, 15 CORBIN ON CONTRACTS §83.10 (2003) (discussing the historical motivators to the development of the doctrines of champerty, maintenance, and barratry). See also Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935). As the South Carolina Supreme Court noted in *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269 (S.C. 200), this type of activity was “a resistance of the moneyed class to capitalistic forces that had begun to take root across Europe in the eleventh and twelfth centuries.” *Id.*

<sup>26</sup> For example, a statute enacted in the thirteenth century in the time of Edward I stated: “No officer of the King by themselves, nor by other, shall maintain pleas, suits, or matters hanging in the King’s courts, for land, tenements, or other things, for to have part or profit thereof by covenant made between them, and he that doth, shall be punished at the King’s pleasure.” St. of Realm, i. 33, *quoted in* Percy H. Winfield, *The History of Maintenance and Champerty*, 35 LAW Q. REV. 50, 59 (1919).

<sup>27</sup> See Winfield, *supra* note 26.

Supreme Court, in *In re Primus*<sup>28</sup> provided a very basic definition of each: “maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.”<sup>29</sup> These rules often took the form of criminal provisions, tort causes of action, or contract enforcement defenses.<sup>30</sup>

Perhaps because the need for these rules has faded,<sup>31</sup> courts have expressed displeasure in these ancient doctrines. For example, in *Giambattista v. National Bank*,<sup>32</sup> the court noted, “In no state are these doctrines and the laws relating to them preserved with their original rigor.”<sup>33</sup> Similarly, the Ninth Circuit in *Del Webb Communities, Inc. v. Partington*<sup>34</sup> has stated, “The consistent trend across the country is toward limiting, not expanding, champerty’s reach.”<sup>35</sup> Many states no longer recognize tort causes of action or criminal prohibitions.<sup>36</sup> Some states also have significantly curtailed recognizing the doctrines as a defense to contract enforcement.<sup>37</sup> For example, in *Osprey, Inc. v. Cabana Limited*

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<sup>28</sup> 436 U.S. 412 (1978).

<sup>29</sup> *Id.* at 424 n.15. See also Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011); Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002).

<sup>30</sup> See, e.g., N.Y. JUDICIARY LAW §489 (McKinney) (making champerty a crime). See also Winfield, *supra* note 26, at 59.

<sup>31</sup> Courts have recognized that the justice system has other tools to control any improper use of the system such as abuse of process actions and malicious prosecution actions. See, e.g., *Security Underground Storage, Inc. v. Anderson*, 347 F.2d 964, 969 (10<sup>th</sup> Cir. 1965)(noting that no tort cause of action was recognized but that actions might be maintained for malicious prosecution or abuse of process). In addition, the logic of applying rules related to the champerty doctrine is suspect given that the United States system of justice has long accepted an obvious type of champerty, the contingency fee. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.5 (ethical guidelines re contingency fees). See also Sebok, *supra* note 29, at 99 (“Technically, of course, all fifty-one jurisdictions permit at least one form of maintenance: the contingency fee.”).

<sup>32</sup> 586 P.2d 1180 (Wash. Ct. App. 1978).

<sup>33</sup> *Id.* at 1186.

<sup>34</sup> 652 F.3d 1145 (9<sup>th</sup> Cir. 2011).

<sup>35</sup> *Id.* at 1156. See also *TMJ Hawaii, Inc. v. Nippon Trust Bank*, 153 P.3d 444, 449 (Hawaii 2007) (“this court has repeatedly rejected blind adherence to rules crafted to meet anachronistic societal demands and has expressed skepticism about the continued potency of the doctrines of champerty and maintenance”).

<sup>36</sup> See, e.g., *Del Webb*, at 1157 (“[t]here was no adequate basis, in short, for the federal district court, applying Nevada law, to recognize a tort claim for champerty”); *Hall v. Delaware*, 655 A.2d 827 (Del. 1994) (the court noted there is no champerty crime in Delaware).

<sup>37</sup> See, e.g., *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269 (S.C. 2000) (refusing to recognize champerty as a defense to enforcement of a contract, stating that the contract can be evaluated in light of other doctrines such as unconscionability); *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997)(refusing to recognize champerty as a defense to enforcement of a contract).

*Partnership*,<sup>38</sup> the South Carolina Supreme Court refused to recognize champerty as a defense to enforcement of a contract, stating that a court can evaluate a suspect contract in light of other doctrines such as unconscionability, duress, and good faith.<sup>39</sup> At least twenty-eight United States jurisdictions expressly allow champerty with varying degrees of limitation.<sup>40</sup>

In addition to this general negative view of champerty, some decisions in recent years in situations specifically involving ALF show that at least some courts have not been receptive to champerty claims.<sup>41</sup> For example, in *Odell v. Legal Bucks, LLC*,<sup>42</sup> the North Carolina Court of Appeals rejected a claim that an ALF arrangement was champertous, stating:

[O]ur Courts have held for at least a century that an outsider's involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery. Rather, "a contract or agreement will not be held within the condemnation of the principle[s] ... unless the interference is clearly officious and for the purpose of stirring up 'strife and continuing litigation.'"<sup>43</sup>

The court saw nothing champertous about the arrangement before it.<sup>44</sup>

The ABA's Commission on Ethics 20/20 addressed the ALF phenomenon in its Informational Report to the House of Delegates in early 2012. The Commission concluded that champerty is not an

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<sup>38</sup> 532 S.E.2d 269 (S.C. 2000).

<sup>39</sup> *Id.* at 277 ("the doctrines of unconscionability, duress, and good faith establish standards of fair dealing between opposing parties").

<sup>40</sup> See Sebok, *supra* note 29, at 98 (2011). See also Bond, *supra* note 29, appendix at 1333-4. A few states have approved of some traditional forms of champerty by statute. See, e.g., ME. REV. STAT. ANN. tit. 9-A, §§12-101 to 107 (2012); OHIO REV. CODE ANN. §1349.55 (2012).

<sup>41</sup> See, e.g., *Echeverria v. Estate of Linder*, 7 Misc. 3d 1019, 801 N.Y.S.2d 233(table), 2005 WL 1083704(text) (N.Y. Sup. Ct. 2005)(no impermissible champerty); *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. Ct. App. 2008)(no impermissible champerty). See also *Core Funding Group, LP v. McIntire*, 2011 WL 1795242 (E.D. La. 2011) (a loan to attorneys to fund litigation was not champertous because it was not a loan to a party and not contingent solely on the outcome of the underlying litigation).

<sup>42</sup> 665 S.E.2d 767 (N.C. Ct. App. 2008).

<sup>43</sup> *Id.* at 775 (quoting *Smith v. Hartsell*, 63 S.E. 150 N.C. 172, 174 (N.C. 1908)(citation omitted)).

<sup>44</sup> *Id.* at 775.

obstacle to ALF in many states. Specifically, the Commission noted that if a state allows champerty in some form, an arrangement would not likely be contrary to the champerty restrictions if the funder is not encouraging frivolous litigation, if the funder is not motivated by an improper motive also referred to as “malice champerty,” and if the funder does not involve itself with the conduct of the litigation such as exercising control over strategic decisions.<sup>45</sup>

When measuring ALF arrangements against these limits, courts should not generally find such arrangements to be champertous. ALF entities certainly do not seek to create or further baseless claims. ALF business models require investment in strong claims with substantial merit.<sup>46</sup> ALF entities have no malicious motive. Rather, they are motivated by a singular desire to maximize recovery on the investment.<sup>47</sup> In addition, ALF entities are aware of the lines they cannot cross in terms of exercise of control over the litigation matter in which the entities invest.<sup>48</sup> ALF arrangements, therefore, are not likely to encounter difficulty in many jurisdictions on the basis of champerty or related doctrines. This is especially so since some parts of society do not view litigation as evil but rather a means to vindicate rights and pursue social change.<sup>49</sup>

Even so, the champerty doctrine is alive and well in many jurisdictions so adverse judgments are possible. For example, in *Johnson v. Wright*,<sup>50</sup> an ALF entity sought to enforce an arrangement in which

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<sup>45</sup> See ABA Report, *supra* note 2, at p. 11. See also Sebok, *supra* note 29 (discussing the various forms of champerty permitted by the various jurisdictions).

<sup>46</sup> See Alden, *supra* note 3 (alternative finance entities “insist they only invest in cases that they believe have merit”).

<sup>47</sup> *Id.* See also Third-Party, *supra* note 1 (discussing Burford’s profit-seeking success).

<sup>48</sup> Burford has stated about itself that Burford “is simply a provider of investment capital and ... the litigant retains control of its case.” Third-Party, *supra* note 1.

<sup>49</sup> See Stephen C. Yeazell, Brown, *The Civil Rights Movement and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 2000 (2004) (discussing “civil litigation as an instrument of social change”).

<sup>50</sup> 682 N.W.2d 671 (Minn. Ct. App. 2004).

the entity financed the litigation in exchange for a piece of any recovery. The court found the arrangement champertous.<sup>51</sup> Such decisions create uncertain terrain for ALF arrangements.

## **B. Usury**

Courts also have viewed ALF arrangements suspiciously in light of laws prohibiting usury. Modern laws prohibit excessive interest charges. Jurisdictions have a variety of statutes that outlaw a variety of interest rates for a variety of arrangements.<sup>52</sup> The modern rationale for these statutes is protection of debtors who have weak bargaining strength and little sophistication from more sophisticated and stronger creditors.<sup>53</sup>

ALF arrangements often involve a relatively high interest rate<sup>54</sup> so challengers to ALF arrangements sometimes argue that such arrangements are usurious.<sup>55</sup> Yet, usury laws generally apply only when the interest is charged for the use of the money and the borrower unconditionally promises to repay the principal and the interest. This is the classic loan situation.<sup>56</sup> ALF arrangements usually do not involve an unconditional promise to repay the principal and interest.<sup>57</sup> Rather, the typical ALF

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<sup>51</sup> *Id.* at 678-79.

<sup>52</sup> See Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 90 (2002)(discussing some of the variations in usury statutes).

<sup>53</sup> See, e.g., *Agapitov v. Lerner*, 133 Cal. Rptr. 2d 837, 843 (Cal. Ct. App. 2003) (“The usury laws protect against the oppression of debtors through excessive rates of interest charged by lenders. Usury laws ‘protect the public from sharp operators who would take advantage of “unwary and necessitous borrowers”’ (citation omitted)).

<sup>54</sup> See, e.g., *Kelly, Grossman & Flanagan LLP v. Quick Cash, Inc.*, 2012 WL 1087341 (N.Y. Sup. Ct. Mar. 29, 2012) (40% interest on loan to attorneys).

<sup>55</sup> See, e.g., *Dopp v. Yari*, 927 F. Supp. 814 (D.N.J. 1996); *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. Ct. App. 2008).

<sup>56</sup> See *Lloyd v. Scott*, 29 U.S. 205, 206 (1830) (“Where a loan is made, to be returned at a fixed day, with more than the legal rate of interest, depending on casualty, which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury.”). See also Martin, *supra* note 52, at 90.

<sup>57</sup> See *Richmond*, *supra* note 9, at 665-666; Martin, *supra* note 52, at 102 (“declaring the advances of funds to be loans subject to usury laws is unrealistic”).

arrangement provides that the funder will be paid only if the litigation is successful. The situation is a classic investment, not a loan.<sup>58</sup>

A typical reception for a challenge to an ALF arrangement on the basis of usury is that in *Anglo-Dutch Petroleum International, Inc. v. Haskell*.<sup>59</sup> Anglo-Dutch entered into an ALF arrangement so that it could pursue what it believed to be meritorious litigation but also could avoid bankruptcy.<sup>60</sup> The finance group provided \$560,000 and was to receive recompense and a return above that amount only if the litigation was successful.<sup>61</sup> The court stated that Anglo-Dutch had “no obligation to reimburse [the funding group] for the principal amount invested, much less pay [the funders] any return on their investment” and so “as a matter of law, the agreements cannot be usurious.”<sup>62</sup> Other courts have reached the same conclusion—that ALF arrangements are not usurious.<sup>63</sup>

Some courts, have reached a contrary result.<sup>64</sup> For example, the court in *Echeverria v. Estate of Lindner*<sup>65</sup> concluded that the probable success for the claim in a strict liability labor law case was a “sure thing.”<sup>66</sup> Thus, in the court’s view, there was no realistic possibility that the funder would not receive

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<sup>58</sup> See, e.g., *Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 2012 WL 1087341 (N.Y. Sup. Ct. Mar. 29, 2012). The *Kelly* court faced a typical, small-scale ALF arrangement and stated, “In fact, the Defendants were always at risk of no recourse whenever one of the underling cases went to trial and resulted in no recovery. Such circumstances simply cannot be stated to constitute a “loan”. *Id.* at \*5.

<sup>59</sup> 193 S.W.3d 87 (Tex.App.—Houston [1 Dist.] 2006).

<sup>60</sup> *Id.* at 90.

<sup>61</sup> *Id.* at 91.

<sup>62</sup> *Id.* at 96.

<sup>63</sup> See, e.g., *Kelly*, 2012 WL at \*6 (“The concept of usury applies to loans, which are typically paid at a fixed or variable rate over a term. The instant transaction, by contrast, is an ownership interest in proceeds for a claim, contingent on the actual existence of any proceeds. Had respondents been unsuccessful in negotiating a settlement or winning a judgment, petitioner would have no contractual right to payment. Thus, usury does not apply to the instant case.”). See also *Dopp v. Yari*, 927 F. Supp. 814 (D.N.J. 1996); *Kraft v. Mason*, 668 So. 2d 679 (Fla. Dist. Ct. App. 1996).

<sup>64</sup> See, e.g., *Echeverria v. Estate of Lindner*, 7 Misc. 3d 1019, 801 N.Y.S.2d 233(table), 2005 WL 1083704(text), at \*9 (N.Y. Sup. Ct. 2005)(because success on the claim was a “sure thing” the funding arrangement was usurious since the funder was sure to be repaid); *Lawsuit Fin., LLC v. Curry*, 683 N.W.2d 233 (Mich. Ct. App. 2004) (because the funding arrangement was entered into after the jury verdict, the funding recovery was fairly certain and thus usurious). See also *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008).

<sup>65</sup> 7 Misc. 3d 1019, 801 N.Y.S.2d 233(table), 2005 WL 1083704(text) (N.Y. Sup. Ct. 2005).

<sup>66</sup> *Id.* at \*9.

repayment. Finding the arrangement usurious, the court stated, “it is ludicrous to consider this transaction anything else but a loan unless the court was to consider it legalized gambling.”<sup>67</sup> Similarly, the court in *Lawsuit Financial, LLC v. Curry*<sup>68</sup> found a usurious arrangement when the funding arrangement was entered into after the jury had rendered its verdict in favor of the party seeking funding.<sup>69</sup> Both of these cases present out of the ordinary facts that gave the respective courts reason to stretch to find usurious arrangements.<sup>70</sup> While these sorts of results are possible, they are unlikely in a typical ALF situation.<sup>71</sup>

### C. Professional Responsibility Issues

Even if ALF arrangements are not champertous or usurious, they create professional responsibility dilemmas that hinder their use. Numerous ethics opinions have addressed various ethical issues raised as objections to ALF arrangements. Generally, the ethics opinions conclude that no professional responsibility issue makes these arrangements impossible,<sup>72</sup> though the potential for problems argues for caution.

It is possible that an ALF entity could improperly interfere with the attorney’s exercise of judgment in representing the client. This could occur if the entity attempted to take control of the conduct of the litigation, including strategy. Several of the ABA’s Model Rules of Professional Conduct

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<sup>67</sup> *Id.*

<sup>68</sup> 683 N.W.2d 233 (Mich. Ct. App. 2004).

<sup>69</sup> *Id.* at 239.

<sup>70</sup> See Richmond, *supra* note 9, at 667-68 (discussing *Curry* and arguing that the case “must be limited to its unusual facts”).

<sup>71</sup> But see Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008) (the court found no loan but an advance and concluded that the advance was usurious).

<sup>72</sup> See e.g., Del. State Bar Ass’n Comm. on Prof’l Ethics Op. 2006-2 (2006) (“the Attorney may comply with such an arrangement under the proper circumstances”); MI Eth. Op. RI 332 (2003) (“The various State Bar Ethics Opinions have concluded that litigation-financing arrangements similar to those described above are permissible, provided the attorney remains obligated on the loan and there is full disclosure to the client.”). See also ABA Report, *supra* note 1, at 39 (concluding that lawyers must abide by the rules of professional responsibility in dealing with a representation involving ALF); Richmond, *supra* note 9, 669-81 (discussing the various ethics issues raised by ALF).



prohibit improper interference.<sup>73</sup> Yet, ethics opinions do not forbid ALF entity involvement but rather warn lawyers to guard against such interference.<sup>74</sup>

In addition, ethics opinions warn lawyers dealing with ALF entities to be wary of conflicts of interest that might arise from the tripartite relationship.<sup>75</sup> These ethics opinions have stated that these rules require lawyers to render competent representation to the client about whether to engage an ALF entity and the various issues surrounding the funder's involvement such as whether disclosure of information to the funder might waive privilege or work product protection.<sup>76</sup>

Also, ethics opinions caution lawyers not to disclose confidential client information but rather to abide by the lawyer's duty of confidentiality.<sup>77</sup> Model Rule 1.6 requires lawyers to protect information relating to the representation unless the client consents to disclosure or a few very specific exceptions

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<sup>73</sup> See, for example Rule 2.1 which states that "a lawyer shall exercise independent professional judgment and render candid advice." MODEL RULES OF PROF'L CONDUCT R. 2.1. *See also* MODEL RULES OF PROF'L CONDUCT R. 5.4(c)(do not allow interference); MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (a third party can pay only if there is no improper interference).

<sup>74</sup> *See, e.g.*, New York City Bar Ass'n 2011-02 ("[w]hile a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit, absent client consent, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation, including the decisions of whether to settle or the amount to accept in any settlement"); Kentucky Bar Ass'n Ethics Op. E-432 (2011)("The lawyer shall not allow the lender to control the representation or interfere with the lawyer's independent professional judgment.").

<sup>75</sup> *See, e.g.*, New York City Bar Ass'n Formal Op. 2011-02 (cautioning about conflicts of interest); Maine Prof'l Ethics Comm'n Op. 191 (2006)(wary of conflicts of interest). Model Rule 1.7 prohibits, absent informed consent, a representation if there is a "significant risk" that the lawyer's representation of the client will be "materially limited" by the lawyer's relationship with another such as the ALF entity. *See* MODEL RULE OF PROF'L CONDUCT R. 1.7. *See also* ABA Report, *supra* note 1, at 15-18 (discussing the conflict issue).

<sup>76</sup> *See, e.g.*, New York City Bar Ass'n Formal Op. 2011-02 (lawyer should provide candid advice and should discuss the potential for waiver of the attorney-client privilege); Maine Prof'l Ethics Comm'n Op. 191 (2006) (client must be advised of potential waiver of privilege). *See also* MODEL RULES OF PROF'L CONDUCT R. 2.1 ("a lawyer shall ... render candid advice"); MODEL RULES OF PROF'L CONDUCT R. 1.1 ("a lawyer shall provide competent representation").

<sup>77</sup> *See, e.g.*, New York City Bar Ass'n Formal Op. 2011-02 (client consent is necessary before disclosure); Maine Prof'l Ethics Comm'n Op. 191 (2006)(client consent is necessary before disclosure); Delaware State Bar Ass'n Comm. on Prof'l Ethics Op. 2006-2 (2006)(disclosure allowed only with client consent). *See also* ABA Report, *supra* note 1, at 31-32.

apply.<sup>78</sup> Generally, in an ALF setting none of the specific disclosure exceptions apply, so a lawyer must obtain informed client consent for disclosures to funders at any stage of the relationship.<sup>79</sup>

At this point in the life of ALF, in many jurisdictions the champerty doctrine is no longer a significant constraint. Usury laws are likewise not a likely regulator of ALF. Lawyer professional responsibility rules provide limits on the form of ALF arrangements but do not prohibit such arrangements. Thus, the question of the effect the presence of ALF entities has on the work product doctrine looms large.

#### **IV. The Work Product Doctrine**

##### **A. A Little History**

The work product doctrine developed in response to an increase in civil discovery made possible by the new Federal Rules of Civil Procedure, which came into effect in the late 1930s.<sup>80</sup> The expanded discovery framework of the new rules permitted attorneys to discover much of the opposition's trial preparation because these rules permitted liberal use of depositions and interrogatories and requests for production of documents.<sup>81</sup> In 1947 the Supreme Court decided *Hickman v. Taylor*<sup>82</sup> and thus established a federal common law work product doctrine.

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<sup>78</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6. Model Rule 1.6 allows disclosure absent informed consent only if the disclosure is impliedly authorized or the lawyer believes disclosure is necessary "to prevent reasonably certain death or substantial bodily harm," to prevent or rectify harm to another in certain circumstances, to obtain legal ethics advice, or to comply with other law or an order of a court. *Id.*

<sup>79</sup> See New York City Bar Ass'n Formal Op. 2011-02 (client consent is necessary before disclosure); Delaware State Bar Ass'n Comm. on Prof'l Ethics Op. 2006-2 (2006)(disclosure allowed only with client consent).

<sup>80</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Topic 3. The Lawyer Work-Product Immunity, Introductory Note (2000) ("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*."). See also Jeff A. Anderson et al, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 765 (1983); Michele DeStefano Beardslee, *Taking the Business Out of Work Product*, 79 FORDHAM L. REV. 1869, 1891 (2011)

<sup>81</sup> See Anderson, *supra* note 80, at 767 n. 46.

<sup>82</sup> 329 U.S. 495 (1947).

## B. The *Hickman* Opinion

The Supreme Court, in *Hickman v. Taylor*,<sup>83</sup> faced the question of the discoverability of interviews of witnesses to a tugboat accident that killed five crew members.<sup>84</sup> The attorney for the tugboat owners interviewed witnesses and these interviews resulted in signed, written statements from some witnesses, notes of the attorney regarding interviews with other witnesses, and the attorney's thoughts and impressions formed as a result of the interviews but which had not been preserved in tangible form.<sup>85</sup> In the resulting litigation, opposing counsel sought access to these materials.<sup>86</sup> Though the materials were arguably within the parameters of allowable discovery provided for in the federal rules, the Supreme Court determined that the materials need not be produced.<sup>87</sup> In so doing, the Court recognized a qualified immunity from discovery for the work product of attorneys. The Court stated that "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases"<sup>88</sup> absent a showing that a denial of production "would unduly prejudice" the plaintiff or cause "hardship or injustice."<sup>89</sup> With such a showing of necessity, discovery of work product in the form of signed written statements from witnesses might be appropriate.<sup>90</sup> The Court indicated that statements of witnesses not yet memorialized in any way should receive additional protection from discovery since any production would, of necessity, be tangled with

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 498.

<sup>85</sup> *Id.* See also Anderson, *supra* note 80, at 773.

<sup>86</sup> *Hickman*, 329 U.S. at 498-99.

<sup>87</sup> *Id.* at 510 ("[I]t falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.").

<sup>88</sup> *Id.* at 511.

<sup>89</sup> *Id.* at 508.

<sup>90</sup> *Id.* at 511.

the attorney's mental impressions.<sup>91</sup> The Court stated, "we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production."<sup>92</sup>

### **C. Rationale for the Doctrine**

The Supreme Court's policy basis for its creation of the work product concept in *Hickman* was that attorneys should have an assurance of privacy so that they can investigate matters and prepare cases. The *Hickman* Court stated:

[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in the interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly though roughly-termed ... as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession

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<sup>91</sup> *Id.* at 512.

<sup>92</sup> *Id.* at 512-13.

would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.<sup>93</sup>

Since the *Hickman* decision, courts and commentators have agreed that the goal of the doctrine is protecting the “privacy of preparation that is essential to the attorney’s adversary role.”<sup>94</sup> The system is a competitive one; each side has the responsibility to develop a case, including investigating the matter, researching the law, and preparing the matter for presentation at trial. The working assumption is that “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.”<sup>95</sup> The work product doctrine eliminates an unfair short-cut to preparation for attorneys who would rather not do the work themselves. It also prevents the system from disincentivizing investigation and preparation by the other attorney.<sup>96</sup> In *United States v. American Telephone & Telegraph Co.*,<sup>97</sup> the court captured this focus on encouraging investigation and preparation by attorneys on both sides of a matter, stating:

The work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safe-guarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent. The purpose of the work product doctrine is to protect information against opposing parties, rather than against

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<sup>93</sup> *Id.* at 510. Justice Jackson, in his concurring opinion, stated, “Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.” *Id.* at 516. See generally CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §5:37 (3d ed., updated June 2011)(discussing *Hickman* and the underlying policy).

<sup>94</sup> Anderson, *supra* note 80, at 784-85. See also *Beloit Liquidating Trust v. Century Indem. Co.*, 2003 WL 355743, \*11 (N.D. Ill. 2003)(“The purpose of the work product doctrine is to protect the ‘adversarial process by providing an environment of privacy in which a litigator may creatively develop strategies, legal theories, and mental impressions outside the ordinary liberal realm of federal discovery provisions, thereby insuring that the litigator’s opponent is unable to ride on the litigator’s wits.” (quoting *Certain Underwriters at Lloyds v. The Fid. & Cas. Co. of New York*, 1997 WL 769467, at \*3 (N.D. Ill. Dec. 9, 1997)).

<sup>95</sup> RESTATEMENT, *supra* note 110, §87 cmt b.

<sup>96</sup> See *Center Partners, Ltd. v. Growth Head GP, LLC*, 957 N.E.2d 496, 503 (Ill. Ct. App. 2011) (“The work-product doctrine is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former’s efforts.”).

<sup>97</sup> 642 F.2d 1285 (D.C. Cir. 1980).

all others outside a particular confidential relationship, in order to encourage effective trial preparation.<sup>98</sup>

With regard to the justifying rationale for protecting materials that reveal an attorney's thoughts about a matter, the court in *United States v. Adlman*,<sup>99</sup> stated, "Special treatment for opinion work product is justified because, '[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.'"<sup>100</sup>

## **D. The Modern Work Product Doctrine**

### **1. Parameters of the Doctrine**

In 1970, the work product doctrine became a part of the Federal Rules of Civil Procedure in Rule 26(b)(3).<sup>101</sup> Today's work product doctrine is a product of Rule 26(b)(3) as well as the common law that has developed in the wake of *Hickman*.<sup>102</sup>

The doctrine provides qualified protection for materials from disclosure in discovery and at trial.<sup>103</sup> Even if a court determines that the work product doctrine protects material, that material can be

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<sup>98</sup> *Id.* at 1299. The work product rationale contrasts with the accepted rationale of the attorney-client privilege: to protect and encourage the confidential communications between an attorney and that attorney's client. The theory behind the attorney-client privilege is that protecting the communications will increase the flow of information to the attorney and the attorney can render the best possible legal advice to the client. *See* *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). *See also* Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475, 492(2011-12).

<sup>99</sup> 134 F.3d 1194 (2d Cir. 1998).

<sup>100</sup> *Id.* at 1196 (quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975)).

<sup>101</sup> *See* FED. R. CIV. P. 26, advisory committee's note, 48 F.R.D. 487, 499-500 (1970). *See also* RESTATEMENT, *supra* note 80, Ch. 5, Topic 3, Introductory Note ("The Federal Rules were extensively amended in 1970 to incorporate *Hickman v. Taylor* and related common-law decisions.").

<sup>102</sup> In *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010), the court noted, "The government mistakenly assumes that Rule 26(b)(3) provides an exhaustive definition of what constitutes work product. On the contrary, Rule 26(b)(3) only partially codifies the work-product doctrine announced in *Hickman*." *See also* RESTATEMENT, *supra* note 80, §87.

<sup>103</sup> *See* *United States v. Nobles*, 422 U.S. 225, 239 (1975) (work product protection does "not disappear once trial has begun").

discovered upon a showing of “substantial need” and “undue hardship” in gaining the “substantial equivalent of the materials by other means.”<sup>104</sup>

Federal Rule of Civil Procedure 26(b)(3) protects “documents and tangible things” that are “prepared in the anticipation of litigation or for trial.”<sup>105</sup> Though litigation need not be in progress,<sup>106</sup> it must be, as some courts state, “fairly foreseeable.”<sup>107</sup> As one court has stated, “For a document to meet this standard, the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.”<sup>108</sup> The *Restatement (Third) of the Law Governing Lawyers* in section 87 states that, to enjoy protection, the material must be prepared “for litigation then in progress or in reasonable anticipation of future litigation.”<sup>109</sup> Courts have interpreted litigation to include, of course, judicial proceedings and also negotiations, governmental investigations, grand jury subpoenas, and arbitrations.<sup>110</sup>

As for the causal relationship of the materials and the litigation, the “in the anticipation of”<sup>111</sup> requirement, the vast majority of federal courts apply a “because of” test.<sup>112</sup> A minority of federal courts applies a “primary motivating purpose” test.<sup>113</sup>

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<sup>104</sup> FED. R. CIV. P. 26(b)(3). *See also In re Seagate Tech., LLC*, 497 F.3d 1360, 1375 (Fed. Cir. 2007) (“Unlike the attorney-client privilege, which provides absolute protection from disclosure, work product protection is qualified and may be overcome by need and undue hardship.”).

<sup>105</sup> FED. R. CIV. P. 26(b)(3).

<sup>106</sup> *See In re Vioxx Prods. Liab. Litig.*, 2007 WL 854251, \*3 (E.D. La. Mar. 6, 2007) (“the existence of litigation is not a prerequisite”).

<sup>107</sup> *See, e.g., Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 754 (E.D. Pa. 1983); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980).

<sup>108</sup> *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).

<sup>109</sup> RESTATEMENT, *supra* note 180, §87(1).

<sup>110</sup> *See Charles M. Yablon & Steven S. Sparling, United States v. Adlman: Protections for Corporate Word Product?*, 64 BROOKLYN L. REV. 627, 636 (1998).

<sup>111</sup> FED. R. CIV. P. 26(b)(3).

<sup>112</sup> *See, e.g., United States v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010) (“[L]ike most circuits, we apply the ‘because of’ test”); *United States v. Roxworthy*, 457 F.3d 590, 593 (6<sup>th</sup> Cir. 2006) (“Today, we join our sister circuits and adopt the ‘because of’ test as the standard for determining whether documents were prepared ‘in anticipation of litigation.’”); *In re Grand Jury Subpoena (Mark Torf/ Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9<sup>th</sup> Cir. 2004) (“[W]e join a growing number of our sister circuits in employing the formulation of the ‘because of’ standard.”). *See also*

With the “primary motivating purpose” test, the litigation must be the “primary motivating purpose” of the existence of the material in question.<sup>114</sup> As the Fifth Circuit Court of Appeals stated in *United States v. Davis*,<sup>115</sup> “litigation need not necessarily be imminent, ... as long the primary motivating purpose behind the creation of the document was to aid in possible future litigation.”<sup>116</sup>

Courts applying the “because of” test ask whether the materials “can fairly be said to have been prepared or obtained because of the prospect of litigation.”<sup>117</sup> Some courts, in determining whether the materials were created in anticipation of litigation also consider whether the materials were created in the ordinary course of business.<sup>118</sup> The courts are not uniform in the value that courts give the ordinary course of business factor. Some courts apply work product protection even if the materials would have been created in the ordinary course of business unless the materials would have been created “in essentially similar form irrespective of the litigation.”<sup>119</sup>

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*Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d 612, 622 (7th Cir. 2010); *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002); *Maine v. U.S. Dep’t of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979). *See generally* Beardslee, *supra* note 80, at 1903 (discussing the courts’ reception of the tests).

<sup>113</sup> *See, e.g.*, *United States v. El Paso Co.*, 682 F.2d 530,542 (5th Cir. 1982) (work product doctrine applied only if the “primary motivating purpose behind the creation of the document was to aid in possible future litigation” (quoting *U.S. v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981))).

<sup>114</sup> *See, e.g.*, *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985) (“If the primary motivating purpose behind the creation of the document is not to assist in pending or impending litigation, then a finding that the document enjoys work product immunity is not mandated.”).

<sup>115</sup> 636 F.2d 1028 (5th Cir. 1982).

<sup>116</sup> *Id.* at 1040. *See also* *Murphy v. Gorman*, 271 F.R.D. 296, 311 (D.N.M. 2010) (“Litigation need not necessarily be imminent as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.”).

<sup>117</sup> This language originates in Wright and Miller’s federal practice treatise. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* §2024 (Updated April 2012). For a sampling of cases using this language, see *United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011); *Bickler v. Senior Lifestyle Corp.*, 266 F.R.D. 379, 383 (D. Ariz. 2010).

<sup>118</sup> *See, e.g.*, *Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d 612, 622 (7th Cir. 2010) (distinction between documents created in the ordinary course of business for a remote chance of litigation and documents prepared because a claim has arisen; only the latter are protected); *Sullivan v. Warminster Twp.*, 274 F.R.D. 147, 152 (E.D. Pa. 2011) (“documents prepared in the regular course of business rather than for purposes of the litigation are not eligible for work-product protection, even if the prospect of litigation exists”).

<sup>119</sup> *See, e.g.*, *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (“the ‘because of’ formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that



For example, in *United States v. Adlman*,<sup>120</sup> the court stated: “Where 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 Rule 26(b)(3).”<sup>121</sup> The *Adlman* court clarified its stance by stating that “the fact that a document’s purpose is business-related appears irrelevant to the question whether it should be protected under Rule 26(b)(3).”<sup>122</sup> Similarly, the court in *United States v. Deloitte LLP*,<sup>123</sup> noted that “material generated in anticipation of litigation may also be used for ordinary business purposes without losing its protected status.”<sup>124</sup> The *Deloitte* court clarified, “In short, a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation.”<sup>125</sup> Courts following this approach thus apply work product protection if *one* of the motivations for the creation of the material is in the anticipation of litigation.<sup>126</sup>

Some courts use the ordinary business concept as a disqualifier of work product protection. These courts take the stance that even if materials were created in part in the anticipation of litigation, those materials are not protected if they, in addition, were created in the ordinary course of business.<sup>127</sup>

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would have been created in essentially similar form irrespective of the litigation”). *See also* Beardslee, *supra* note 80, at 1905; Thomas Wilson, Note, *The Work Product Doctrine: Why Have an Ordinary Course of Business Exception?*, 1988 COLUM. BUS. L. REV. 587, 604.

<sup>120</sup> 134 F.3d 1194, 1202 (2d Cir. 1998).

<sup>121</sup> *Id.* at 1195. *See also* *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010) (quoting *Adlman*); *In re Grand Jury Subpoena* (Mark Torf/ Torf Envtl. Mgmt.), 357 F.3d 900, 908 (9th Cir. 2004)(quoting *Adlman*); *Marciano v. Atlantic Med. Specialties, Inc.*, 2011 WL 294487, \*2 (W.D.N.Y. Jan. 27, 2011) (quoting *Adlman*).

<sup>122</sup> *Adlman*, 134 F.3d at 1200.

<sup>123</sup> 610 F.3d 129 (D.C. Cir. 2010).

<sup>124</sup> *Id.* at 138.

<sup>125</sup> *Id.*

<sup>126</sup> *See, e.g.*, *United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011) (applied the “because of” test and looked to whether the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation” (quoting *In re Grand Jury Subpoena* (Mark Torf/ Torf Envtl. Mgmt.), 357 F.3d 900, 908 (9th Cir. 2004)(quoting *Adlman*, 134 F.3d at 1195)).

<sup>127</sup> *See, e.g.*, *Sullivan v. Warminster Twp.*, 274 F.R.D. 147, 152(E.D. Pa. 2011) (“documents prepared in the regular course of business rather than for purposes of the litigation are not eligible for work-product protection, even if the prospect of litigation exists”).

This position has received criticism for adding an exception to the rule that is not contained in the rule's own language.<sup>128</sup>

Some courts state that they are applying the "because of" standard but do so in a more exacting manner. For example, in *In re Grand Jury Subpoena*,<sup>129</sup> the court applied the "because of" test and noted that the materials' creation need not be "primarily" motivated by the possibility of litigation.<sup>130</sup> The court continued by stating, however, that litigation must be an important motivating factor.<sup>131</sup> Similarly, in *United States v. Textron Inc.*,<sup>132</sup> the First Circuit Court of Appeals seemed to create a modified "because of" test. The *Textron* court seemed to require that the materials be "prepared for use in possible litigation."<sup>133</sup> Requiring that, for application of work product doctrine protection, the materials must be prepared for use in litigation is a "much more exacting standard"<sup>134</sup> than if the material must be prepared "because of" litigation.<sup>135</sup>

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<sup>128</sup> See Anderson, *supra* note 80, at 852 (discussing the exception and concluding that "the exception upsets the effective operation of rule 26(b)(3)"). See also Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 92 (E.D. Mo. 1980) (the exception "twists the language of the Rule"). This more-limited focus on the ordinary course of business may have originated in a comment by the Advisory Committee when the 1970 version of Rule 26 of the Federal Rules of Civil Procedure was in consideration. The comment was that "materials assembled in the ordinary course of business ... are not under the qualified immunity provided by" the rule. See FED. R. CIV. PRO. 26 Advisory Committee Note, 48 F.R.D. 487, 501 (1970).

<sup>129</sup> 220 F.R.D. 130 (D. Mass. 2004).

<sup>130</sup> *Id.* at 146.

<sup>131</sup> *Id.* at 162.

<sup>132</sup> 577 F.3d 21 (1<sup>st</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010).

<sup>133</sup> *Id.* at 27.

<sup>134</sup> Deloitte, 610 F.3d at 138. The *Deloitte* court discusses the difference between the traditional "because of" test and the test applied in *Textron*. *Id.*

<sup>135</sup> Judge Tortuella, in his dissent in *Textron*, states:

The majority purports to follow ... [the "because of" test, but never cites it. Rather, in its place, the majority imposes a "prepared for" test, asking if the documents were "prepared for use in possible litigation." .... This test is an even narrower variant of the widely rejected "primary motivating purpose" test used in the Fifth Circuit and specifically repudiated by this court. In adopting its test, the majority ignores a tome of precedents from the circuit courts and contravenes much of the principles underlying the work-product doctrine. It also brushes aside the actual text of Rule 26(b)(3), which "nowhere ... state[s] that a document must have been prepared to aid in the conduct of litigation in order to constitute work product." Adlman, 134 F.3d at 1198. Further, the majority misrepresents and ignores the findings of the district court. All while purporting to do just the opposite of what it actually does.

*Textron*, 577 F.3d at 32.

According to Rule 26(b)(3) of the Federal Rules of Civil Procedure, materials are protected if they are prepared by or for a party or a “representative” of a party.<sup>136</sup> “Representative” includes an “attorney, consultant, surety, indemnitor, insurer, or agent.”<sup>137</sup> Courts apply the doctrine even if a nonlawyer created the materials while working independently.<sup>138</sup>

Courts have taken special care to protect opinion work product.<sup>139</sup> Rule 26(b)(3)(B) states: “If the court orders discovery of [work product] materials, it must protect against disclosure of the mental impressions, conclusions, opinion, or legal theories of a party’s attorney or other representative concerning the litigation.”<sup>140</sup> Some courts, therefore, have required a more substantial showing of need and hardship to overcome the work product doctrine protection for this type of work product.<sup>141</sup> Other courts may not require disclosure regardless of the showing of need.<sup>142</sup>

Opinion and ordinary work product can be found in tangible or intangible form. Rule 26(b)(3) states that work product protection applies to “documents and tangible things”<sup>143</sup> but courts recognize

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<sup>136</sup> FED. R. CIV. PRO. 26(b)(3).

<sup>137</sup> *Id.* See also MUELLER & KIRKPATRICK, *supra* note 93, §5:37.

<sup>138</sup> See, e.g., *Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 195 F.R.D. 610, 615 (N.D. Ill. 2000) (“materials prepared in anticipation of litigation by any representative of the client are protected, regardless of whether the representative is acting for the lawyer”).

<sup>139</sup> Opinion work product is the “ideas, impressions, legal theories, trial strategy, and other mental processes of the attorney.” RESTATEMENT, *supra* note 80, §87 cmt a. See also MUELLER & KIRKPATRICK, *supra* note 93, §5:38; *In re Doe*, 662 F.2d 1073, 1076 n.2 (4<sup>th</sup> Cir. 1981) (ordinary work product is “those documents prepared by the attorney which do not contain the mental impressions, conclusions, or opinions of the attorney”; “[o]pinion work product” is work product that contains those fruits of the attorney’s mental processes”).

<sup>140</sup> FED. R. CIV. PRO. 26(b)(3)(B).

<sup>141</sup> See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981) (attorney notes not protected but “far stronger showing of necessity and unavailability” required to obtain disclosure); *In re Seagate Tech., LLC*, 497 F.3d 1360, 1375 (Fed. Cir. 2007) (“Whereas factual work product can be discovered solely upon a showing of substantial need and undue hardship, mental process work product is afforded even greater, nearly absolute, protection.”).

The *Restatement (Third) of the Law Governing Lawyers* states that opinion work product is immune from disclosure unless “extraordinary circumstances justify disclosure.” RESTATEMENT, *supra* note 80, §89.

<sup>142</sup> See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6<sup>th</sup> Cir. 2002) (“absent waiver, a party may not obtain the ‘opinion’ work product of his adversary”); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4<sup>th</sup> Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (“In our view, no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney’s mental impressions, conclusions, opinions or legal theories.”).

<sup>143</sup> FED. R. CIV. PRO. 26(b)(3).

that the work product doctrine also protects intangibles such as “the memory of the attorney (or agents of the attorney or the client) as to oral statements by eyewitnesses that were not transcribed or recorded and the attorney’s ‘mental impressions’ and thoughts about the case and the underlying legal principles and issues.”<sup>144</sup>

## 2. Waiver

Sharing work product with third parties does not generally waive the doctrine’s protection because the doctrine does not, unlike the attorney-client privilege, demand confidentiality.<sup>145</sup> The attorney-client privilege demands confidentiality because the privilege exists to encourage communications between attorney and client that would not occur absent confidentiality.<sup>146</sup> If a party discloses a communication, otherwise privileged, to an outsider to the attorney-client relationship, then that party has indicated that confidentiality is not a motivator for that communication and so no

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<sup>144</sup> MUELLER & KIRKPATRICK, *supra* note 93, §5:37. The *Hickman* opinion itself dealt with this kind of work product. See discussion of *Hickman* *supra* Section IV.B. See also *In re Cendant Corp. Secs. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) (“It is clear from *Hickman* that work product protection extends to both tangible and intangible work product.”); *In re Grand Jury Subpoena Dated November 8, 1979*, 622 F.2d 933, 935 (6<sup>th</sup> Cir. 1980)(the doctrine applies to “tangible and intangible material which reflects an attorney’s efforts at investigating and preparing a case”). The *Restatement* includes intangible material in the definition of work product. *RESTATEMENT*, *supra* note 110, §87(1) (work product is “tangible material or its intangible equivalent in unwritten or oral form”).

<sup>145</sup> See *United States v. Deloitte LLP*, 610 F.3d 129, 139 (D.C. Cir. 2010) (“While voluntary disclosure waives the attorney-client privilege, it does not necessarily waive work-product protection.”); *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 687 (1<sup>st</sup> Cir. 1997)(“Nonetheless, the cases approach uniformity in implying that work-product protection is not as easily waived as the attorney-client privilege. The privilege, it is said, is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege; by contrast, work product protection is provided against “adversaries,” so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.”).

<sup>146</sup> See *Upjohn v. United States*, 449 U.S. 383, 389 (1981) “[The] purpose [of the privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”).

privilege is necessary.<sup>147</sup> Likewise, the attorney-client privilege does not apply in the first instance if an outsider to the attorney-client relationship is present when the communication occurs.<sup>148</sup>

The rationale of the work product doctrine is quite different and so the standard for waiver is quite different as well. As the First Circuit Court of Appeals stated in *United States v. Massachusetts Institute of Technology*<sup>149</sup> when comparing the waiver standard of the attorney-client privilege and the waiver standard of the work product doctrine, “[t]he attorney client privilege is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege; by contrast, work product protection is provided against ‘adversaries,’ so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.”<sup>150</sup>

Disclosure can waive work product protection if the client or lawyer or a representative of either discloses the materials voluntarily to the adversary or discloses the materials in a way that “substantially increase[s] the opportunities for potential adversaries to obtain the information.”<sup>151</sup> The *Restatement* states that waiver occurs if the lawyer or client or a representative of either “discloses the material to

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<sup>147</sup> For a discussion of the confidentiality requirement for the attorney-client privilege, see Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853 (1998); Paul R. Rice, *A Bad Idea Dying Hard: A Reply to Professor Leslie’s Defense of the Indefensible*, 2001 WIS. L. REV. 187 (2001); Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of the Privilege*, 2000 WIS. L. REV. 31 (2000).

<sup>148</sup> See *In re Chevron Corp.*, 650 F.3d 276, 289 (3d Cir. 2011) (“[I]f persons other than the client, its attorney, or their agents are present, the communication is not made in confidence, and the privilege does not attach.” .... Here, the communications captured on film clearly were not made ‘in confidence’ due to the presence of the filmmakers at the time of the communications, and so the protections of the attorney-client privilege never attached to those communications.” (quoting *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 359 (3d Cir.2007))).

<sup>149</sup> 129 F.3d 681 (1<sup>st</sup> Cir. 1997).

<sup>150</sup> *Id.* at 687. See also *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) (“As we have explained, the attorney-client privilege promotes the attorney-client relationship, and, indirectly, the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys. In contrast, the work-product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. Protecting attorneys’ work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients.”).

<sup>151</sup> WRIGHT & MILLER, *supra* note 117, §2024. See *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011) (“it is only in cases in which the material is disclosed in a manner inconsistent with keeping it from an adversary that the work-product doctrine is waived”); *U.S. v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (“[a] disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege”).

third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.”<sup>152</sup>

In determining whether a disclosure constitutes a waiver, courts have taken a variety of paths.<sup>153</sup> A common approach is for a court to ask whether the party disclosed the materials under circumstances “inconsistent with the maintenance of secrecy from the disclosing party’s adversary.”<sup>154</sup> If the disclosure is “inconsistent with the maintenance of secrecy,” the disclosure waives work product protection.<sup>155</sup>

In *United States v. Deloitte LLP*,<sup>156</sup> the court explained that this “‘maintenance of secrecy’ standard” requires that materials not be disclosed to any adversary or potential adversary or a conduit to an adversary.<sup>157</sup> If “the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential,” the *Deloitte* court stated that the recipient was not to a conduit to an adversary.<sup>158</sup>

The *Deloitte* court explained that such a reasonable expectation of confidentiality can be present in two situations. First, a reasonable expectation of confidentiality can be present when the discloser and person to whom the materials are disclosed share “common litigation interests.”<sup>159</sup> The

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<sup>152</sup> RESTATEMENT, *supra* note 80, §91(4).

<sup>153</sup> See Dale G. Wills, Comment, *Waiver of the Work Product Immunity*, 1981 U. ILL. L. REV. 953 (1981) (noting various approaches used).

<sup>154</sup> *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D. C. Cir. 1980).

<sup>155</sup> *Id.* (“A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.”). See also *Monarch Fire Prot. Dist. of St. Louis County v. Freedom Consulting & Auditing Servs.*, 2009 WL 2155158, \*2 (E.D. Mo. 2009) (“The work product doctrine will protect opinion work product that has been disclosed to third parties ‘unless disclosure is inconsistent with maintaining secrecy from possible adversaries.’” (quoting *Stix Prods. Inc. v. United Merchs. & Mfrs.*, 47 F.R.D. 334, 338 (S.D.N.Y. 1969))).

<sup>156</sup> 610 F.3d 129 (D.C. Cir. 2010).

<sup>157</sup> *Id.* at 141. The court was careful to note that the test is not whether a party might be a potential adversary in any litigation but whether the party might be an adversary with respect to the materials disclosed. *Id.* at 140.

<sup>158</sup> *Id.* at 141.

<sup>159</sup> *Id.* See also *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984) (noting common interest might be basis for expectation of confidentiality).

logical presumption is that parties who share “common litigation interests” are not likely to make disclosures to adversaries.<sup>160</sup>

The *Deloitte* court continued that the second way a discloser might have a reasonable expectation of confidentiality is if the discloser and the person to whom the materials are disclosed have a relatively unqualified confidentiality agreement or a similar arrangement.<sup>161</sup> While the situation before the *Deloitte* court did not present a confidentiality agreement, the court found a reasonable expectation of confidentiality because the audited entity disclosed materials protected by the work product doctrine to independent auditors who had an ethical “obligation to refrain from disclosing client information” in the form of a provision of the Code of Professional Conduct of the American Institute of Certified Public Accountants.<sup>162</sup>

The court in *Schanfield v. Sojitz Corp.*<sup>163</sup> undertook a similar analysis. In *Schanfield*, a party disclosed material protected by the work product doctrine to employees of the adversary. The adversary had also employed the disclosing party.<sup>164</sup> The court noted that “[i]t is simply common sense, ... that such material will reach others within the corporation.”<sup>165</sup> The court found no common interest, having defined common interest as it has been defined in the attorney-client privilege jurisprudence by

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<sup>160</sup> See *Deloitte*, 610 F.3d at 141 (“As we explained in *AT&T*, ‘[t]he existence of common interest between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege.’ ... This is true because when common litigation interests are present, ‘the transferee is not at all likely to disclose the work product material to the adversary.’” (quoting *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D. C. Cir. 1980))).

<sup>161</sup> See *Deloitte*, 610 F.3d at 141 (“Alternately, a reasonable expectation of confidentiality may be rooted in a confidentiality agreement or similar arrangement between the disclosing party and the recipient. Nevertheless, a confidentiality agreement must be relatively strong and sufficiently unqualified to avoid waiver.”).

<sup>162</sup> See *Deloitte*, 610 F.3d at 142. Rule 301.01 of the American Institute of Certified Public Accountants Code of Professional Conduct states: “A member in public practice shall not disclose any confidential client information without the specific consent of the client.” See also *Secs. & Exch. Comm’n v. Vitesse Semiconductor Corp.*, 711 F. Supp. 2d 310, 313 (S.D.N.Y. 2011) (the court noted that a finding of a common interest or the finding of a non-waiver agreement may stymy any claim of waiver).

<sup>163</sup> 258 F.R.D. 211 (S.D.N.Y. 2009).

<sup>164</sup> *Id.* at 215.

<sup>165</sup> *Id.*

some courts as a “demonstrated cooperation in formulating a common legal strategy.”<sup>166</sup> In addition, the court observed that the party disclosed the materials to employees who were not bound by confidentiality agreements.<sup>167</sup> While the discloser may have thought the employees would not disclose to the employer, the adversary, the court concluded that the discloser had not provided proof that he reasonably expected the materials to remain confidential.<sup>168</sup>

The disclosing party in *Schanfield* also shared materials protected by the work product doctrine with three family members.<sup>169</sup> The court found no waiver from these disclosures, stating that the disclosures “did not significantly increase the likelihood that [the employer adversary] would obtain private information by sharing.”<sup>170</sup> With regard to the relatives, the court did not note a common interest as the court had defined it and did not note an actual confidentiality agreement. The court did not apply a formalistic analysis but rather looked to the ultimate question of whether the likelihood that the adversary would access the materials had been “significantly increase[d].”<sup>171</sup> Evidently, the court concluded that the disclosure to relatives had not substantially increased the likelihood that the adversary would access the information. Disclosure to a relative was the equivalent to disclosing to someone who was bound by a confidentiality agreement.

Some courts, in determining whether a party’s disclosure has waived the work product doctrine, go no farther than the common interest analysis.<sup>172</sup> This is perfectly logical; these courts have no need to go farther in the analysis because once a court finds a common interest, the court concludes that there

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<sup>166</sup> *Id.* at 216 (quoting *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995)).

<sup>167</sup> *Id.* at 216.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See, e.g.,* *Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567, 572 (E.D. Cal. 2002) (an insured and an insurer share a common interest so there is no waiver of the attorney-client privilege or the work product doctrine). *Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 15 (D.D.C. 2010)(common adversary so common interest; “Disclosure to a person who shares a common interest with the party claiming the privilege cannot therefore work a forfeiture.”).



has been no waiver. As the *Deloitte* and *Schanfield* courts have recognized, however, *lack* of a common interest does not make the recipient of materials an adversary or one likely to pass materials to an adversary.<sup>173</sup>

A problematic aspect of any focus on a common interest is that there is no useful definition of that term for purposes of the work product doctrine. Just as the *Schanfield* court did, other courts dealing with the question of waiver of the work product doctrine have looked to the definition of a common interest as that concept has been developed in attorney-client privilege jurisprudence.<sup>174</sup> Unfortunately, courts have struggled with defining and applying the concept in determining waiver in the attorney-client privilege context<sup>175</sup> so its usefulness in the work product context is questionable.

In the attorney-client privilege context, the courts are not in agreement about many aspects of the doctrine but especially do not agree as to what, exactly, is a common interest. For example, some courts require “an identical legal interest with respect to the subject matter of a communication.”<sup>176</sup> One court requires “a common legal interest, not merely a common commercial interest” and further defines that interest to be present “where ‘the parties have been, or may potentially become, co-parties

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<sup>173</sup> See *Deloitte*, 610 F.3d at 141; *Schanfield*, 258 F.R.D. at 216. See also *Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 14-15 (D.D.C. 2010) (“The disclosure instead must be to a party who is an adversary or does not have a common interest with the party claiming the privilege.”).

<sup>174</sup> See, e.g., *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 705 (10<sup>th</sup> Cir. 1998)(expressing doubt as to whether the common interest doctrine applied but finding that under the standard of common interest applicable to the attorney-client privilege no shared interest existed); *Pulse Eng’g, Inc. v. Mascon, Inc.*, 2009 WL 3234177, \*3 (S.D. Cal. 2009) (applying the common interest concept applicable to the attorney-client privilege to work product doctrine).

<sup>175</sup> See *Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 15 (D.D.C. 2010)(“There is no clear uniformity in the case law ‘as to when parties share a common interest and how that interest is to be defined.’” (quoting *Miller v. Holzmann*, 240 F.R.D. 20,22-23 (D.D.C. 2007))). Katherine Taylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT’L L.J. 49 (2005) (discussing the doctrine generally).

<sup>176</sup> See, e.g., *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) (“A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice. ... the key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.”).

to a litigation ... or have formed a coordinated legal strategy.”<sup>177</sup> Another court requires only a common interest about a legal matter.<sup>178</sup> As the court in *Miller v. Holzman*<sup>179</sup> noted, “it is impossible to conclude that the common law, as interpreted in this and other jurisdictions, provides a clear explanation of what a common interest is.”<sup>180</sup>

The common interest concept in work product jurisprudence should simply be a shortcut to determining whether the disclosure “substantially increased the opportunities for potential adversaries to obtain the information,”<sup>181</sup> or was “not inconsistent with maintaining secrecy against opponents”<sup>182</sup> or whether “the disclosing party had a reasonable basis for believing that the recipient” of the materials “would keep the disclosed material confidential.”<sup>183</sup> Narrow definitions of common interest developed by courts when determining whether the attorney-client privilege applies to communications between parties and their separate attorneys<sup>184</sup> are of questionable usefulness.

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<sup>177</sup> See *Fox News Network, LLC v. U.S. Dep’t of the Treasury*, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010) (quoting *In re Subpoena Duces Tecum Served on N.Y. Marine & Gen. Ins. Co.*, No. M 8-85 (MHD), 1997 WL 599399, \*4 (S.D.N.Y. 1997)).

<sup>178</sup> See *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989) (parties must share a common interest about a legal matter).

<sup>179</sup> 240 F.R.D. 20 (D. D.C. 2007).

<sup>180</sup> *Id.* at 22. See also George S. Mahaffey, Jr., *Taking Aim at the Hydra: Why the “Allied Party Doctrine” Should not Apply in Qui Tam Cases When the Government Declines to Intervene*, 23 REV. LITIG. 629 (2004); Schaffzin, *supra* note 175.

<sup>181</sup> WRIGHT & MILLER, *supra* note 117, §2024.

<sup>182</sup> *American Tel. & Tel. Co.*, 642 F.2d at 1299.

<sup>183</sup> *Deloitte*, 610 F.3d at 141.

<sup>184</sup> In the attorney-client privilege context, the common interest concept has been used by modern courts as a way of determining whether to apply privilege protection to communications in situations involving parties not represented by the same attorney but who claim that they should be treated as if they shared an attorney. This expanded application of the privilege was first used by the Virginia Supreme Court in *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822, 1871 WL 4931 (1871). The court did not find a waiver of the privilege when communications were shared with attorneys who represented other defendants but not the defendant who was a party to the communication.

Modern courts often find a communication occurring or shared outside an attorney-client relationship, a communication that historically would waive the privilege or would not be privileged in the first instance, is privileged and retains that status if the disclosure involves parties or attorneys of parties who share a common interest. See, e.g., *United States v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012) (privilege may apply to communications between defendants and their attorneys); *Hunton & Williams v. U.S. Dep’t of Justice*, 590 F.3d 272 (4th Cir. 2010) (privilege applied to communications between parties and attorneys). See also *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (discussing the doctrine in general). See generally Giesel, *supra* note 98 (discussing

## V. The Scant Case Law Regarding the Work Product Doctrine and Alternative Litigation Finance

To date, only one reported court decision has addressed the application of the work product doctrine to an ALF scenario. In *Mondis Technology, Ltd. v. LG Electronics, Inc.*,<sup>185</sup> after a group of potential investors agreed to keep any disclosed information confidential, a company provided the investors with slide presentations and other documents which disclosed litigation strategies and estimates of litigation costs and recoveries. The company sought to interest investors in the endeavor of the company and fund the company's efforts to "license and litigate its various patent programs."<sup>186</sup> In later litigation involving a subsidiary of the company, the litigation adversary sought access to all information shared with the investors. The subsidiary claimed work product protection and attorney-client privilege.<sup>187</sup>

In finding that the work product doctrine protected the shared materials, the United States District Court for the Eastern District of Texas stated: "[T]he documents were at a minimum created for possible future litigation. ... All of the documents were prepared, ..., with the intention of coordinating

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the doctrine in the attorney-client privilege context). This context and the use of the common interest in this context is conceptually far away from the work product waiver analysis.

This setting of attorney-client privilege application has many names: common interest doctrine, joint defense privilege, community of interest doctrine, allied party doctrine, and others. *See, e.g.*, *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 273 (4th Cir. 2010) (common interest doctrine); *United States v. Austin*, 416 F.3d 1016, 1018 (9th Cir. 2005) (joint defense privilege); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 856 (2011) (community of interest doctrine); *Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 225 (1st Cir. 2005) (common interest exception). *See also* *Lugosch v. Congel*, 219 F.R.D. 220, 223 (N.D.N.Y. 2003) ("The joint defense privilege has many monikers such as the common interest doctrine, common interest arrangement doctrine, or pooled information doctrine.").

Historically, the attorney-client privilege has always been recognized as applying to communications among a group comprised of joint clients of one attorney. By definition, those parties have a common interest that is evident from the fact that the parties chose to be represented by the same counsel and counsel agrees to represent the parties jointly. The communications to which the privilege applies are truly communications among attorney and clients. *See, e.g.*, *Whiting v. Barney*, 38 Barb. 393 (N.Y. Gen. Term 1862) (joint clients' communications with counsel were privileged).

<sup>185</sup> 2011 WL 1714304 (E.D. Tex. May 4, 2011).

<sup>186</sup> *Id.* at \*2.

<sup>187</sup> *Id.*

potential investors to aid in future possible litigation.”<sup>188</sup> The *Mondis* court concluded that the materials were created “in anticipation of litigation” even though the court applied the more stringent minority test that “the primary motivating purpose” for the creation must be “to aid in possible future litigation.”<sup>189</sup> In finding that the disclosure of the documents did not waive that work product protection, the court stated that the documents “were disclosed subject to nondisclosure agreements and thus did not substantially increase the likelihood that an adversary would come into possession of the materials.”<sup>190</sup> Other courts facing the same question in a similar ALF context should reach similar results.

The issue of the application of the work product doctrine to an ALF setting also was present in *Bray & Gillespie Management LLC v. Lexington Insurance Co.*<sup>191</sup> In that case, Bray and Gillespie (B & G) shared materials with Juridica, an ALF entity, in an attempt to interest Juridica in investing in a litigation matter.<sup>192</sup> Juridica entered into a confidentiality agreement with B & G but, ultimately, passed on the investment opportunity.<sup>193</sup> The opposing party in the litigation sought disclosure of the materials shared with Juridica.<sup>194</sup> The court overruled any instructions or objections based on the work product doctrine because the party seeking the protection of the doctrine did not follow the court’s proper procedure for asserting protection by the doctrine.<sup>195</sup> The opinion’s lack of substantive analysis means that the opinion is of little help in analyzing the application of the work product doctrine to the litigation finance context,

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<sup>188</sup> *Id.* at \*3.

<sup>189</sup> *Id.* at \*2 (quoting *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5<sup>th</sup> Cir. 2000)).

<sup>190</sup> *Id.* at \*3. The court, having resolved the disclosure issue with the work product doctrine, declined to discuss the application of the attorney-client privilege. *Id.*

<sup>191</sup> 2008 WL 5054695 (M.D. Fla. 2008).

<sup>192</sup> *Id.* at \*1.

<sup>193</sup> *Id.* at \*2.

<sup>194</sup> *Id.* at \*1.

<sup>195</sup> *Id.* at \*4. The court’s required procedure, contained in a Standing Order of the court, required the facts supporting the assertion of protection to be stated on the record at the time of the objection or instruction to the witness. The court was of the opinion that the party asserting work product doctrine protection had failed to follow this mandatory procedure. *Id.*

though the facts of the case provide a real life example of how the questions of work product protection and waiver can arise with the involvement of ALF entities.

## **VI. Lessons from Independent Auditor Cases**

### **A. Why the Independent Auditor Cases are Helpful**

While case law dealing with the work product doctrine in the ALF context is meager, a substantial body of case law dealing with the work product doctrine in the independent audit setting exists. The independent auditor cases provide an excellent basis for determining the proper application of the work product doctrine to the ALF situation because similar issues arise with regard to application of the doctrine in each context. In both settings, the attorney and client team may be asked to create materials that evaluate a litigation matter. In addition, in both contexts the attorney and client team may be asked to share evaluative or other materials created for other reasons relating to a litigation matter. In both contexts, such materials might be prepared by the party, by the party's lawyer or other agent, or by the third party in the form of the auditor or the ALF entity. In both contexts, one must determine whether the work product doctrine protects such materials as an initial matter. In both contexts, one must determine whether sharing materials protected by the doctrine with the third party auditor or ALF entity waives the protection. The courts' treatment of these issues when the third party is an independent auditor is, therefore, extremely instructive of the treatment courts might give the same issues when the third party is an ALF entity.

### **B. What is an Independent Auditor?**

The law applicable to publicly-traded companies requires that financial information relating to litigation and other actual or potential liabilities be reviewed by auditors who are completely independent of the audited companies. This information must then be reported to the Securities and

Exchange Commission (SEC).<sup>196</sup> A rule of the entity overseeing the audit process states that the auditing “public accounting firm and its associated person must be independent of the firm’s audit client throughout the audit and professional engagement period.”<sup>197</sup> In addition, the American Institute of Certified Public Accountants emphasizes the requirement of independence by stating that “a member should maintain objectivity and be free of conflicts of interest in discharging professional responsibilities. A member in public practice should be independent in fact and appearance when providing auditing and other attestation services.”<sup>198</sup>

In performing an audit in accord with all relevant standards and principles, an independent auditor must have access to information about current and potential liabilities that could have an impact on the company’s financial situation. For example, in the tax realm, Generally Accepted Accounting

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<sup>196</sup> Publicly-traded companies must file their annual financial statements with the Securities and Exchange Commission. See 15 U.S.C. § 781(b)(1)(J) (audited financial statements must be filed with the SEC before a company can be listed on an exchange); 15 U.S.C. § 781(m)(requiring periodic reports to be filed with the SEC). These financial statements must be audited in accordance with Generally Accepted Auditing Standards. See 17 C.F.R. § 210.1-02(d) (financial statements must be audited “in accordance with generally accepted auditing standards”). The Generally Accepted Auditing Standards require auditors, who must be Certified Public Accountants (CPAs), to review the company’s financial and related information to ensure that the financial statements filed with the SEC are prepared in conformity with Generally Accepted Accounting Principles. See AICPA Statement of Auditing Standards § 110.01 (conformity with Generally Accepted Accounting Principles required). See Aaron J. Rigby, *The Attorney-Auditor Relationship: Responding to Audit Inquiries, the Disclosure of Loss Contingencies and the Work-Product Privilege*, 35 No. 3 SEC. REG. L.J. 1 (2007) (discussing the auditor’s task).

The Generally Accepted Accounting Principles have been the financial accounting principles that govern the preparation of financial statements since 1973. See Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards, Accounting Series Release No. 150, 28 Fed. Reg. 2261 (Dec. 20, 1973).

<sup>197</sup> Professional Standards Rule 3520 (Pub. Co. Accounting Oversight Board 2007) at [http://www.pcaob.com/Rules/Rules\\_of\\_the\\_Board/Section\\_3.pdf](http://www.pcaob.com/Rules/Rules_of_the_Board/Section_3.pdf). The Sarbanes-Oxley Act emphasized the importance of the independence of the auditors in this process by establishing the Public Company Accounting Oversight Board to provide better oversight of public accounting firms performing audits. See 15 U.S.C. § 7211.

<sup>198</sup> AICPA Code of Conduct, § 55, Art. IV. In *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), the Supreme Court stated that a company’s auditors and accountants “assume a public responsibility transcending any employment relationship with the client.” *Id.* at 817. The law requires that the audit committee of a company oversee the work of the public accountants but the auditors “owe[] ultimate allegiance to the corporation’s creditors and stockholders, as well as the investing public ... [and] [t]his ‘public watchdog’ function demands that the accountant maintain total independence from the client and all times and requires complete fidelity to the public trust.” *Id.* The independent auditor’s goal is to issue an unqualified opinion “finding that the company’s financial statements fairly present the financial position of the company, the results of its operations, and the changes in its financial position for the period under audit, in conformity with consistently applied generally accepted accounting principles.” *Id.* at 819.

Principles mandate that a company record adequate liabilities in situations in which the company is espousing an uncertain tax position.<sup>199</sup> The company must note questionable positions, set a liability prediction, and then record a tax reserve on the company's financial statements based upon the liability prediction.<sup>200</sup> The calculations, assumptions, and conclusions regarding the tax positions are usually contained in tax accrual workpapers and related documents.<sup>201</sup> Such documents may be prepared by accountants and, perhaps, attorneys in the company or external to the company and are shared with the auditor. Some materials may be prepared to further elucidate the tax positions in the course of the audit. These materials may be prepared by the company or its representatives or by the auditor.

Another type of information auditors must review relates to accounting for potential adversities in litigation of all sorts. Accounting standards requires certain disclosures and statements of potential losses regarding pending or potential litigation.<sup>202</sup> The auditor must review any evidence about the uncertainty of the occurrence of potential litigation-related loss or its amount.<sup>203</sup> Auditors obtain this information from the company but also rely on attorneys representing the company to provide the appropriate factual and evaluative information about pending litigation as well as as-yet unasserted but probable claims.<sup>204</sup> In particular, the auditor asks attorneys representing the company to "describe and

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<sup>199</sup> See Accounting for Uncertainty in Income Taxes, Interpretation No. 48 (Fin. Accounting Standards Board 2006) (codified at FASB Codification § 740-10-25-16 (FASB 2009).

<sup>200</sup> *Id.* The company must determine that it is more likely than not that the tax position will prevail. If so, the company must set aside a reserve related to the possibility of success. *Id.* See also Tracy Hamilton, *Work Product Privilege: the Future of Tax Accrual Work Paper Discovery in the Eleventh Circuit After Textron*, 27 GA. ST. U.L. REV. 729, 732(2011).

<sup>201</sup> See, e.g., *United States v. Textron Inc.*, 577 F.3d 21 (1<sup>st</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010). See also Hamilton, *supra* note 200, at 729.

<sup>202</sup> A company must accrue potential losses from pending litigation. See Accounting for Contingencies, Statement of Financial Accounting Standards No. 5 (Financial Accounting Standards Board 1975), at 4-6. See also W.R. Koprowski, Steven J. Arsenault, Michael Cipriano, *Financial Statement Reporting of Pending Litigation: Attorneys, Auditors, and Differences of Opinions*, 15 FORDHAM J. OF CORP. & FIN. LAW 439, 442 (2010)(discussing pending litigation reporting).

<sup>203</sup> See Inquiry of a Client's Lawyer Concerning Litigation, Claims and Assessments, Statement of Auditing Standards No. 12 (1976). The relevant part of the Statement is codified as AICPA Professional Standard AU Section 337.

<sup>204</sup> *Id.* The auditors must ask the company to send its attorneys a "letter of audit inquiry." This letter "is the primary means of obtaining corroborating evidence of information furnished by management concerning litigation." See

evaluate pending or threatened litigation, ... [the] progress of the case to date ... an evaluation of the likelihood of an unfavorable outcome and estimate, if one can be made, of the amount or range of the potential loss.”<sup>205</sup>

This regulatory framework results in the independent auditor being in a similar situation to that of an ALF entity. An independent auditor is the recipient of evaluative and other materials that the work product doctrine otherwise protects as well as, perhaps, materials specifically created in the audit. An ALF can be the recipient of evaluative and other materials that the work product doctrine otherwise protects as well as, perhaps, materials specifically created in the ALF setting.

## **VII. Does the Work Product Doctrine Protect Materials that Evaluate Litigation?**

### **A. Materials Created by the Party or an Agent of the Party**

In either the initial investment investigation stage or in the later monitoring stage, the ALF entity may require the attorney and client team to create materials that critically evaluate the matter and assess the risk. In addition, the funder may ask the party and attorney team to supply it with materials, created in another context, which evaluate the matter.

In the audit context, most courts in recent years have determined that the work product doctrine protects materials that critically evaluate litigation whether or not the materials were prepared

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Inquiry, *supra* note 203. The relevant part of the Statement is codified as AICPA Professional Standard AU Section 337.08.

<sup>205</sup> See Inquiry, *supra* note 203. The relevant part of the Statement is codified as AICPA Professional Standard AU Section 337.09(d)(1)-(2).

The American Bar Association, since 1975, has had a Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information. See ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, 31 BUS. LAW. 1709 (1976). The focus of this aspirational but not mandatory Statement of Policy is on limiting disclosure to auditors so as not to eliminate attorney-client privilege and work product doctrine protections. The tension between the auditor’s need to have access to evaluative information from the attorneys and the attorneys’ desire to limit disclosure that might harm their clients, has perhaps increased in recent years in the wake of the passing of the Sarbanes-Oxley Act. See Rigby, *supra* note 196 (discussing the Statement of Policy).



specifically for the audit process or, rather, were prepared in other pursuit of the litigation.<sup>206</sup> A few courts have disagreed.<sup>207</sup>

### **1. Evaluative Materials Prepared in the Audit Process or in Other Contexts Are or May Be Protected**

The work product doctrine and particularly Federal Rule of Civil Procedure 26(b)(3) protect materials prepared “in the anticipation of litigation.”<sup>208</sup> Many courts addressing the issue have determined that evaluative materials prepared in the audit setting or other contexts are prepared, at least in part, because of the threat or reality of litigation and thus are protected by the work product doctrine.<sup>209</sup> Many courts have determined that the doctrine protects the materials even though they may have a business purpose in being a part of the SEC disclosure process.<sup>210</sup>

For example, in *United States v. Adlman*,<sup>211</sup> the court established that the work product doctrine might apply to a study prepared for an attorney assessing the likely result of litigation. The attorney had the study done so a decision could be reached as to whether the company should complete the transaction that would cause the litigation; the study was not created as part of the audit process.<sup>212</sup> The court determined that the work product doctrine protected the study if it “was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation.”<sup>213</sup> The court remanded for application of this test.<sup>214</sup>

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<sup>206</sup> See *infra* Section VII.A.1.

<sup>207</sup> See *infra* Section VII.A.2.

<sup>208</sup> FED. R. CIV. P. 26(b)(3). See also discussion *supra* Section IV.D.1.

<sup>209</sup> See, e.g., *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998); *Vacco v. Harrah’s Operating Co., Inc.*, 2008 WL 4793719 (N.D.N.Y. October 29, 2008); *Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*, 237 F.R.D. 176 (N.D. Ill. 2006).

<sup>210</sup> See, e.g., *Adlman*, 134 F.3d 1194.

<sup>211</sup> 134 F.3d 1194 (2d Cir. 1998).

<sup>212</sup> *Id.* at 1195.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1203-04.

Similarly, in *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*,<sup>215</sup> the court determined that the doctrine protected letters summarizing threatened and pending litigation created in the audit process even though the letters were part of the company's compliance with SEC regulations. The Court reasoned that if there was no litigation or the threat of it, there would have been no need for the letters discussing such. Thus, the letters were prepared "'because of' pending or threatened litigation."<sup>216</sup>

In *Tronitech, Inc. v. NCR Corp.*,<sup>217</sup> the court held that the work product doctrine protected an audit response letter, prepared by counsel, which evaluated a litigation matter. The court stated,

An audit letter is not prepared in the ordinary course of business but rather arises only in the event of litigation. It is prepared because of the litigation, and it is comprised of the sum total of the attorney's conclusions and legal theories concerning that litigation. Consequently, it should be protected by the work product privilege.<sup>218</sup>

In *Vacco v. Harrah's Operating Co, Inc.*,<sup>219</sup> the materials in question were reports prepared by the company at the request of the auditors that discussed pending litigation.<sup>220</sup> The court determined that the work product doctrine protected the materials.<sup>221</sup> Likewise, in *Merrill Lynch & Co., Inc. v.*

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<sup>215</sup> 237 F.R.D. 176 (N.D. Ill. 2006).

<sup>216</sup> *Id.* at 181.

<sup>217</sup> 108 F.R.D. 655 (S.D. Ind. 1985).

<sup>218</sup> *Id.* at 656. A California appellate court reached a similar conclusion in a case involving a lawyer's response to an audit inquiry relating to the client's insurer's auditor. In *Laguna Beach Cnty. Water Dist.*, 22 Cal. Rptr. 3d 387 (Cal. Ct. App. 2004), a plaintiff sued the Water District for negligent construction of a reservoir. The plaintiff sought to obtain materials, including the Water District's attorney's audit response, from the public entity charged with insuring the Water District. The materials dealt with the potential liability related to the construction of the reservoir. *Id.* at 389. The court stated that the audit response was clearly protected by the work product doctrine. *Id.* at 392. In response to the argument that there can be no work product protection because the auditor was performing a public function, the court stated that the "conclusion has no basis in law or logic." *Id.* The court continued that the fact that the auditor was performing a public function "does not mean it would divulge protected information." *Id.*

<sup>219</sup> 2008 WL 4793719 (N.D.N.Y. Oct. 29, 2008)

<sup>220</sup> *Id.* at \*1.

<sup>221</sup> *Id.* at \*6.

*Allegheny Energy, Inc.*,<sup>222</sup> the company created two reports evaluating litigation in an internal investigation and shared the reports with the company's independent auditor.<sup>223</sup> The court found that the documents were, without doubt, protected by the work product doctrine.<sup>224</sup>

In *Frank Betz Associates, Inc. v. Jim Walter Homes, Inc.*,<sup>225</sup> the court found that the doctrine protected materials containing litigation reserve amounts.<sup>226</sup> The court quoted language from other cases stating that the reserve amount reflected an attorney's professional opinion and noted testimony to the effect that the reserve was created "in the anticipation of litigation."<sup>227</sup>

Even when applying the minority "primary motivating purpose" test, as opposed to the more lenient "because of" test,<sup>228</sup> courts find evaluative materials protected by the work product doctrine. The court in *Southern Scrap Material Co. v. Fleming*,<sup>229</sup> determined that the doctrine protected audit response letters prepared by an attorney and provided to an independent auditor.<sup>230</sup> The documents were prepared because of litigation and not in the ordinary course of business<sup>231</sup> and reflected the attorney's "mental impressions, opinions, and litigation strategy."<sup>232</sup> In *In re Pfizer Inc. Securities Litigation*,<sup>233</sup> the court applied the "primary motivating purpose" test and stated, "[W]e conclude that

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<sup>222</sup> 229 F.R.D. 441 (S.D.N.Y. 2004).

<sup>223</sup> *Id.* at 444.

<sup>224</sup> *Id.* at 445.

<sup>225</sup> 226 F.R.D. 533 (D.S.C. 2005).

<sup>226</sup> *Id.* at 535.

<sup>227</sup> *Id.* at 534. *See also* *Gramm v. Horsehead Indus., Inc.*, 1990 WL 142404, \*2 (S.D.N.Y. Jan. 25, 1990) (applying the work product doctrine to materials that discussed settlement discussions regarding a claim against it).

<sup>228</sup> *See supra* Section IV.D.1.

<sup>229</sup> 2003 WL 21474516 (E.D. La. June 18, 2003).

<sup>230</sup> *Id.* at \*9.

<sup>231</sup> *Id.* ("An audit letter is not prepared in the ordinary course of business but rather arises only in the event of litigation. It is prepared because of the litigation, and it is comprised of the sum total of the attorney's conclusions and legal theories concerning that litigation. Consequently, it should be protected by the work product privilege.").

<sup>232</sup> *Id.*

<sup>233</sup> 1993 WL 561125 (S.D.N.Y. 1993).

the primary motivating purpose behind the communications concerning individual case reserves was preparation for litigation.”<sup>234</sup>

The court in *In re Raytheon Securities Litigation*<sup>235</sup> did not go so far as to state that the work product doctrine protects all materials prepared by counsel for use in the audit and shared with the independent auditor. The court carved out a set of materials that would not enjoy the protection of the doctrine. The court stated that the work product doctrine does not protect information in audit opinion letters and other documents prepared by counsel if the information “must be disclosed in public financial statements of the company being audited.”<sup>236</sup> In the *Raytheon* matter the court requested that the materials be produced for an in camera review so that the court could determine whether they were the kind of materials that would be, eventually, disclosed in public financial statements and thus not deserving of the protection of the doctrine.<sup>237</sup>

## **2. Evaluative Materials Are Not Protected**

Not all courts agree that the work product doctrine protects materials that critically evaluate existing or potential litigation. All of these cases are suspect, however, because they do not apply in the traditional manner the majority “because of “ test for determining when material is prepared “in the anticipation of litigation” and therefore is protected by the doctrine.

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<sup>234</sup> *Id.* at \*3. The court clarified that aggregates of reserves are not protected by the work product doctrine. They have only a business purpose. *Id.* at \*4. *See also* Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987) (Regarding documents that contained case reserve information, the court stated, “The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product.”); *In re Honeywell Int’l, Inc. Secs. Litig.*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003) (the court applied the work product doctrine to documents created and produced or simply produced in the audit process); *Gutter v. E.I. DuPont de Nemours & Co.*, 1998 WL 2017926, \*1 (S.D. Fla. May 18, 1998) (the court noted that materials dealing with liability reserves are protected by the work product doctrine “because they reflect an attorney’s professional opinion about the value of a particular lawsuit”).

<sup>235</sup> 218 F.R.D. 354 (D. Mass. 2003)

<sup>236</sup> *Id.* at 359.

<sup>237</sup> *Id.*

Perhaps the most significant denial of work product protection is *United States v. Textron Inc.*<sup>238</sup> In *Textron*, the United States Court of Appeals for the First Circuit, *en banc*, refused to find that the work product doctrine applied to tax accrual work papers prepared by Textron's employees and others and shared with auditors.<sup>239</sup> These work papers dealt with the accounting of reserves for contingent tax liabilities.<sup>240</sup> The Internal Revenue Service sought these documents as well as documents prepared by Textron's independent auditor relating to the same matters.<sup>241</sup> All of the documents had the "immediate purpose ... to establish and support the tax reserve figures for the audited financial statements."<sup>242</sup> The court determined that the work product doctrine did not protect these materials because they were not documents that were prepared "in the anticipation of litigation." For the doctrine to protect the materials, the court required that the materials be prepared for use in litigation, not simply "in the anticipation of litigation" as determined by the "because of" test.<sup>243</sup> Noting that the doctrine does not protect materials prepared "'in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes,'"<sup>244</sup> the court surmised that "[a] set of tax reserve figures, calculated for purposes of accurately stating a company's financial figures, has in

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<sup>238</sup> 577 F.3d 21 (1<sup>st</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010).

<sup>239</sup> *Id.* at 24-25.

<sup>240</sup> *Id.* at 23-24.

<sup>241</sup> *Id.* at 24.

<sup>242</sup> *Id.* at 25.

<sup>243</sup> *See id.* at 27 ("the district judge did not say that the work papers were prepared *for use* in possible litigation—only that the reserves would cover liabilities that might be determined in litigation"); 29 ("From the outset, the focus of work product protection has been on materials prepared for use in litigation, ...."); 30 ("But many of the debatable cases affording work product protection involve documents unquestionably prepared for potential use in litigation if and when it should arise. There is no evidence in this case that the work papers were prepared for such a use or would in fact serve any useful purpose for Textron in conducting litigation if it arose."); 30 ("It is only work done in anticipation of or for trial that is protected."). In dissent, Judge Torruella states: "The majority purports to follow [the because of] test, but never even cites it. Rather, in its place, the majority imposes a 'prepared for' test, asking if the documents were 'prepared for use in possible litigation.' Maj. Op. at 27." *Id.* at 32. *See also* discussion *supra* Section IV.D.1.

<sup>244</sup> 30 (quoting FED. R. CIV. P. 26 Advisory Committee Note (1970)).

ordinary parlance only that purpose: to support a financial statement and the independent audit of it.”<sup>245</sup> Thus, the court denied that the work product doctrine protected the materials.<sup>246</sup>

Other cases in which courts have denied application of the work product doctrine hail from the 1980s and the courts are clearly not applying the “because of” test.<sup>247</sup> For example, in *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*,<sup>248</sup> the question before the court was whether the work product doctrine applied to letters from the attorney for the company to the company’s independent auditor.<sup>249</sup> The court held that the letters were not in anticipation of litigation but rather were “prepared to assist [the accountants] in the performance of regular accounting work done by such accounting firms.”<sup>250</sup> The court continued, “The motivating purpose behind the creation of the document is thus of critical importance.”<sup>251</sup> These letters were for “accounting-business purposes and not for litigation purposes.”<sup>252</sup> The court’s analysis makes clear that the court is willing to apply the work product doctrine only if litigation is the primary motivating purpose.

Likewise, in *Diasonics Securities Litigation*,<sup>253</sup> the court evaluated the application of the work product doctrine to materials, some of which assessed litigation as part of an independent audit.<sup>254</sup> The court refused protection because “the documents were generated for the business purpose of creating

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<sup>245</sup> *Id.* at 30.

<sup>246</sup> *Id.* at 31.

<sup>247</sup> See, e.g., *United States v. Gulf Oil Corp.*, 760 F.2d 292 (Temp. Emer. Ct. App. 1985); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 292 (D.D.C. 1987); *Diasonics Secs. Litig.*, 1986 WL 53402 (N.D. Cal. June 15, 1986).

<sup>248</sup> 117 F.R.D. 292 (D.D.C. 1987).

<sup>249</sup> *Id.* at 293.

<sup>250</sup> *Id.* at 298.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> 1986 WL 53402 (N.D. Cal. June 15, 1986).

<sup>254</sup> *Id.* at \*1.

financial statements which would satisfy the requirements of the federal securities laws and not to assist in litigation.”<sup>255</sup>

In *United States v. Gulf Oil Corp.*,<sup>256</sup> the court applied the “primary motivating purpose” test and determined that the work product doctrine did not protect materials discussing and evaluating litigation prepared by or for the auditors.<sup>257</sup> The court took the view that the materials were not created to assist in litigation but rather they were created so the auditor could “prepare financial reports which would satisfy the requirements of the federal securities laws.”<sup>258</sup> The court stated, “[W]e hold that these documents do not constitute attorney work product because they were created primarily for the business purpose of compiling financial statements which would satisfy the requirements of the federal securities laws.”<sup>259</sup>

Similarly, in *United States v. El Paso Co.*,<sup>260</sup> the court refused to apply the work product doctrine to tax accrual work papers.<sup>261</sup> Adopting the “primary motivating purpose” test,<sup>262</sup> the court concluded that the “primary motivating purpose” of the tax pool analysis was is to anticipate, for financial reporting purposes, what the impact of litigation might be on the company’s tax liability.”<sup>263</sup> In the court’s view El Paso created the tax pool analysis “with an eye on its business needs, not on its legal ones.”<sup>264</sup> Thus, the court concluded, “the tax pool analysis does not contemplate litigation in the sense required to bring it within the work product doctrine.”<sup>265</sup>

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<sup>255</sup> *Id.*

<sup>256</sup> 760 F.2d 292 (Temp. Em. Ct. App. 1985).

<sup>257</sup> *Id.* at 296.

<sup>258</sup> *Id.* at 297.

<sup>259</sup> *Id.*

<sup>260</sup> 682 F.2d 530 (5<sup>th</sup> Cir. 1982).

<sup>261</sup> *Id.* at 532.

<sup>262</sup> *Id.* (quoting *United States v. Davis*, 636 F.2d 1028, 1040 (5<sup>th</sup> Cir. 1981)).

<sup>263</sup> *Id.* at 543.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

## **B. Materials Created by the Litigation Finance Entity**

An ALF entity might create materials itself that speak to the litigation and its benefits and burdens. A funder might do this as part of a study of a potential investment or in monitoring an existing investment. Because these materials likely reflect information from the attorney and client team and may include an attorney's thoughts and impressions about litigation theory and strategy, these materials might be a fertile source of information for an adversary if such materials enjoy no work product protection.

The work product doctrine appears not to protect materials prepared by the ALF entity unless the entity is a representative of the party.<sup>266</sup> Crafting an argument that the ALF entity is a representative of the party would be a difficult task indeed. Thus, materials prepared by a litigation funder would appear to have no work product protection.

The doctrine, however, protects a lawyer's mental impressions.<sup>267</sup> It seems illogical that work product protection would be withheld from this type of information, the very type of information the doctrine is designed to protect, simply because the creator of the tangible material containing the information is not a representative of the party.

A few courts have addressed the question of whether the work product doctrine applies to documents created by an independent auditor.<sup>268</sup> In *United States v. Deloitte LLP*,<sup>269</sup> Deloitte, the independent auditor of Dow Chemical Company, prepared a document summarizing a meeting in which

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<sup>266</sup> See FED. R. CIV. P. 26(b)(3). The rule defines "representative" of a party as "attorney, consultant, surety, indemnitor, insurer, or agent." *Id.*

<sup>267</sup> FED. R. CIV. P. 26(b)(3). See also discussion *supra* Section IV.D.1.

<sup>268</sup> See, e.g., *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984); *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010).

<sup>269</sup> 610 F.3d 129 (D.C. Cir. 2010)



the possibility of litigation and the accounting reserve requirements for such litigation was discussed.<sup>270</sup>

The government claimed that the memorandum created by the auditor could not enjoy work product protection because the auditor created it and the auditor was not a representative of the company.<sup>271</sup>

The government also claimed that the memorandum could not enjoy work product protection because the auditor created it as part of the audit process and thus the auditor did not create it “in the anticipation of litigation.”<sup>272</sup>

The court acknowledged that if the auditor was not a representative of the company, the protection of Rule 26(b)(3) did not apply. Yet, the court did not see the auditor’s possible lack of representative status as determinative of the applicability of the work product doctrine. The court reasoned that because the work product doctrine also protects an attorney’s mental impressions, if the auditor’s memo contained the “thoughts and opinions of counsel developed in anticipation of litigation,” the memo could be protected work product.<sup>273</sup>

In response to the argument that the auditor prepared the memo in the course of the audit and not “in the anticipation of litigation,” the court treated the document as it would all other materials prepared by a party or a party’s counsel. The court applied the majority “because of” test<sup>274</sup> and noted that “the question is whether [the document] records information prepared by Dow or its representatives because of the prospect of litigation.”<sup>275</sup> The court focused not solely on the function of the document, which might be to facilitate an audit, but also on the content of the document.<sup>276</sup> A document might be used for ordinary business purposes and yet also be protected by the work product

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<sup>270</sup> *Id.* at 133.

<sup>271</sup> *Id.* at 135.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 136.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 137.

<sup>276</sup> *Id.*

doctrine.<sup>277</sup> The court remanded for a determination of whether the document might contain material not protected along with the protected information.<sup>278</sup>

The United States Supreme Court in *United States v. Arthur Young & Co.*,<sup>279</sup> also evaluated auditor-created materials. The Internal Revenue Service sought access to a company's tax accrual work papers dealing with contingent tax liabilities prepared by the company's independent auditor.<sup>280</sup> The court held that no independent work product protection existed for independent auditors and grounded this position in the public role of auditors:

By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to investing public. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.<sup>281</sup>

While the Court in this opinion makes clear that no auditor work product privilege exists, it does not address the issue of whether a document prepared by an auditor and which contains an attorney's thoughts and opinions about a potential litigation may enjoy general work product protection.

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<sup>277</sup> *Id.* at 138 ("Under the more lenient 'because of' test, material generated in anticipation of litigation may also be used for ordinary business purposes without losing its protected status.").

<sup>278</sup> *Id.* at 139.

<sup>279</sup> 465 U.S. 805 (1984).

<sup>280</sup> *Id.* at 808.

<sup>281</sup> *Id.* at 817.

### C. Implications for Alternative Litigation Finance

Analysis of this body of case law relating to auditors suggests that courts are likely to conclude that the work product doctrine protects evaluative materials. This is true even if those materials are created in the ALF setting and even if the funder creates the materials.

The only court opinion addressing the question of whether the work product doctrine protects materials created in the ALF context has concluded that the doctrine protects such materials. In *Mondis Technology, Ltd. v. LG Electronics, Inc.*,<sup>282</sup> the court concluded that the work product doctrine applied, as an initial matter to materials created for and shared with potential investors who would potentially fund litigation because “those documents were at a minimum created for possible future litigation.”<sup>283</sup>

Most courts facing the issue of whether the work product doctrine protects the materials will apply the majority “because of” test to determine whether the materials were created “in the anticipation of litigation” and are therefore worthy of protection. Those courts likely will follow the lead of *Mondis* and the many independent auditor cases of recent years, cases decided in a very similar context, and find that the doctrine protects materials created by the attorney and client team that evaluate existing or future litigation. The “because of” test does not require that litigation be the only motivating reason for the materials’ creation; it must be a cause, not the only cause and not the most important cause.<sup>284</sup> Courts applying the “because of” test will likely conclude that the materials “can fairly be said to have been prepared or obtained because of the prospect of litigation.”<sup>285</sup> Without

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<sup>282</sup> 2011 WL 1714304 (E.D. Tex. May 4, 2011).

<sup>283</sup> *Id.* at \*3.

<sup>284</sup> See *supra* Section IV.D.1.

<sup>285</sup> WRIGHT & MILLER, *supra* note 155, at § 2024. See also discussion *supra* Section IV.D. 1 (discussing the “because of” test).

doubt, these materials were “created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation.”<sup>286</sup>

In the audit setting, courts have found that materials were created “in the anticipation of litigation” even though they were also created to comply with audit procedures mandated by the SEC.<sup>287</sup> Likewise, courts will likely find materials created in the ALF setting to be created “in the anticipation of litigation” even though they were also created to obtain funding or to continue to cooperate with the ALF entity who has already invested in the matter. Indeed, the preparation of the materials in the ALF setting has an even tighter nexus to the litigation than is true in the audit setting. In the audit setting, the audit and all the materials required for it occur because an SEC regulatory framework requires it. In the ALF setting, the materials are created so that the litigation can progress. The causal connection exists and is close.

While a court such as the court in *In re Raytheon Securities Litigation*<sup>288</sup> may be concerned that work product protection not extend to information that must be disclosed as part of a company’s public securities disclosure obligation,<sup>289</sup> such a court will not have a similar concern in the ALF context. Any disclosure made by the attorney and client team in an ALF setting is not a part of any regulatory scheme such as the securities laws. An ALF entity or an attorney and client team has no disclosure obligation akin to that imposed on entities by securities laws.

Some courts, such as those in the *Independent Petrochemical*, *Gulf Oil*, and *El Paso* cases, have not applied the doctrine in the analogous situation of independent auditors. Courts dealing with the question of application of the work product doctrine in the ALF setting are not likely to find these opinions precedential because in these cases the courts did not use the majority “because of” test for

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<sup>286</sup> United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998)(stating a version of the “because of” test).

<sup>287</sup> See, e.g., Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc., 237 F.R.D. 176 (N.D. Ill. 2006).

<sup>288</sup> 218 F.R.D. 354 (D. Mass. 2008).

<sup>289</sup> *Id.* at 359.

whether the materials were created “in the anticipation of litigation.” In contrast, these courts required litigation to be the “primary motivating purpose” for the creation of the materials. As the *Mondis* case illustrates,<sup>290</sup> however, even a court applying the “primary motivating purpose” test can find that materials created in the ALF context are materials created primarily because of litigation since those documents would not be created absent litigation.

Similarly, courts evaluating the application of the work product doctrine to the ALF setting will not likely follow the approach of the court in *Diasonics Securities Litigation*.<sup>291</sup> That court appeared to use a test that does not allow the work product doctrine to apply if a motivation for the creation of the material was an ordinary course of business motivation. “<sup>292</sup> Even if a court were inclined to follow the approach of *Diasonics*, such a court might well determine that materials created in an ALF setting were not created in the ordinary course of business since the funding motive is integrally tied to the underlying litigation or threat of it.

The court in *Textron* also applied a test that has not been a part of the mainstream of work product doctrine, a test requiring that the materials be “prepared for use in possible litigation.”<sup>293</sup> Thus, it is unlikely courts for which *Textron* is not precedential will follow it. Even for courts that follow it, a claim of work product protection for materials created in an ALF setting would be more doubtful but would not necessarily fail. The *Textron* court stated that the doctrine should not apply to materials prepared “in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for nonlitigation purposes.”<sup>294</sup> For materials specifically prepared for the ALF entity, there is an argument that the materials are prepared for nonlitigation purposes because the materials are for funding, not instrumental pursuit of the claim or defense, and certainly not “for use” in litigation. Of

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<sup>290</sup> See *supra* Section V.

<sup>291</sup> 1986 WL 53402 (N.D. Cal. June 15, 1986).

<sup>292</sup> *Id.* at \*1.

<sup>293</sup> *Id.* at 27.

<sup>294</sup> *Id.* at 30 (quoting FED. R. CIV. PRO. 26 Advisory Committee Note (1970)).

course, there is a strong argument that the materials, though on a micro level, for funding, are, in a macro sense, in pursuit of the claim or defense that requires the financing.

The fact that materials might be created by ALF entities may not be a bar to work product protection. These materials can reflect the mental impressions, thoughts, and opinions of the lawyer for the party whose litigation matter the funder is evaluating. While an ALF entity has its own powers of evaluation, the funder must base its evaluation upon materials conveyed by the lawyer and client team. As the *Deloitte* opinion suggests, work product protection may be available for portions of the materials relating to the lawyer's impressions. The *Arthur Young* opinion does not contradict this application of the doctrine.

#### **VIII. Does Disclosure to Alternative Litigation Finance Entities Waive Work Product Doctrine Protection?**

In both the audit setting and in the ALF setting, the lawyer and client team shares materials with a third party to the litigation, the auditor or the ALF entity. If a court determines that the work product doctrine applies to materials in the first instance, the next issue that must be addressed is whether sharing the materials with the auditor or the ALF entity waives the work product protection already enjoyed by the materials. The courts' analysis of the waiver question in independent auditor cases focuses on the policy behind the doctrine: protecting the adversary process and system. Consistent with this policy, courts generally find no waiver if disclosure does not increase the likelihood that the materials will find their way to an adversary.<sup>295</sup> Similar analysis and similar results should occur in the ALF setting.

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<sup>295</sup> See, e.g., *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004).

### A. Disclosure to an Auditor *Does Not* Waive Protection

Most courts deal with the issue have found that independent auditors are not adversaries of the companies the auditors audit in the work product doctrine sense of that term. The courts also have held that disclosure to auditors does not otherwise increase the likelihood that adversaries will have access to the materials disclosed. The courts recognize that the auditors are, in fact, independent.<sup>296</sup> The courts recognize that the job of the auditor is to critically analyze the financial information regarding the company and to insure that an accurate picture of the financial state of the company is reported to the public.<sup>297</sup> The courts also recognize that the auditor has a professional obligation to the company to keep information disclosed to the auditor confidential.<sup>298</sup> The courts thus recognize that the auditor and the company may not have universally unified interests but that fact does not mean that disclosure to auditors increases the likelihood of adversary access. Thus, waiver does not result from disclosure to auditors.

A recent treatment of the waiver issue in the audit context is *United States v. Deloitte LLP*,<sup>299</sup> in which the Dow Chemical Company disclosed materials to its independent auditor that related to a tax dispute with the government.<sup>300</sup> Dow disclosed these materials, materials protected by the work product doctrine, to the auditor so the auditor could “review the adequacy of Dow’s contingency reserves for” certain transactions.<sup>301</sup>

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<sup>296</sup> See, e.g., *Merrill Lynch*, 229 F.R.D. at 447.

<sup>297</sup> See, e.g., *id.*

<sup>298</sup> See, e.g., *Deloitte*, 610 F.3d at 142; *Merrill Lynch*, 229 F.R.D. at 448.

<sup>299</sup> 610 F.3d 129 (D.C. Cir. 2010)

<sup>300</sup> *Id.* at 133.

<sup>301</sup> *Id.* Dow claimed that Deloitte required access to the documents in order to render an unqualified audit opinion. *Id.*

In addressing the waiver issue, the *Deloitte* court stated that waiver occurs if the disclosure is “inconsistent with the maintenance of secrecy from the disclosing party’s adversary.”<sup>302</sup> Waiver can occur, says the court, by disclosure to an adversary or to a “conduit to an adversary.”<sup>303</sup> The *Deloitte* court concluded that the auditor was not the adversary or potential adversary of the company because Deloitte could not “be Dow’s adversary in the sort of litigation the Dow Documents address.”<sup>304</sup>

In addition, the Court concluded that the auditor was not a “conduit to Dow’s adversaries.”<sup>305</sup> The *Deloitte* court looked to “whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential.”<sup>306</sup> Such a belief, said the *Deloitte* court, can be present if the discloser and the recipient share “common litigation interests.”<sup>307</sup> The court added that such a belief can also originate in “a confidentiality agreement or similar arrangement.”<sup>308</sup> The court was of the opinion that disclosure of work product protected materials to the auditor was consistent with the “maintenance of secrecy” because Dow had a reasonable basis for believing that the auditor would keep the disclosed material confidential. This reasonable basis was grounded in the fact that the auditor had an ethical and professional obligation to keep material revealed in an audit confidential.<sup>309</sup>

Many other courts have agreed that a disclosure to an independent auditor is not a waiver.<sup>310</sup> For example, in *Merrill Lynch & Co. v. Allegheny Energy, Inc.*,<sup>311</sup> the court determined that two reports

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<sup>302</sup> *Id.* at 140 (quoting *Rockwell Int’l Corp. v. U. S. Dep’t of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) (quoting *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980))).

<sup>303</sup> *Id.* at 140.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 141.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 142. See American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct §301.01 (“A member in public practice shall not disclose any confidential client information without the specific consent of the client.”).

<sup>310</sup> See, e.g., *Secs. & Exch. Comm’n v. Berry*, 2011 WL 825742, \*8 (N.D. Cal. March 7, 2011) (disclosure to independent auditors of information gleaned from an investigation of back-dating practices did not waive the work product doctrine); *Secs. & Exch. Comm’n v. Schroeder*, 2009 WL 1125579, \*9 (N.D. Cal. Apr. 27, 2009) (disclosure to independent auditor is not waiver; auditor is not adversary); *Westernbank Puerto Rico v. Kachkar*, 2009 WL



created by the company as part of an internal investigation and that the work product doctrine protected absent disclosure<sup>312</sup> remained protected even though the reports were shared with the company's auditor.<sup>313</sup> The court recognized that waiver does not occur "unless disclosure is inconsistent with maintaining secrecy from possible adversaries."<sup>314</sup> Such a disclosure would occur "only if the disclosure 'substantially increases the opportunity for potential adversaries to obtain the information.'"<sup>315</sup> Recognizing that auditors must maintain independence from the entity being audited, the court acknowledged that some might consider this independence as adversarial.<sup>316</sup> The court refused to so conclude, stating:

[A]ny tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine. A business and its auditor can and should be aligned insofar as they both seek to prevent, detect, and root

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530131, \*8 (D.P.R. Feb. 9, 2009) ("The court agrees with the majority of courts, cited above, which have held that disclosure of work product protected material to outside auditors does not constitute waiver of work product protection."); *Regions Fin. Corp. v. United States*, 2008 WL 2139008, \*8 (N.D. Ala. May 8, 2008)(the independent auditor was not a potential adversary and the auditor agreed not to disclose information about the company so the auditor was not likely to disclose to another party); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176 (N.D. Ill. 2006) (no waiver); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 446 (S.D.N.Y. 2004)(disclosure to auditors is not waiver); *In re Raytheon Secs. Litig.*, 218 F.R.D. 354, 360 (D. Mass. 2003)("there is no evidence that materials disclosed to an independent auditor are likely to be turned over to the company's adversaries except to the extent that the securities laws and/or accounting standards mandate public disclosure"); *Gutter v. E.I. DuPont de Nemours & Co.*, 1998 WL 2017926, \*3 (S.D. Fla. May 18, 1995) (no waiver); *In re Pfizer Inc. Secs. Litig.*, 1993 WL 561125, \*6 (S.D.N.Y. Dec. 23, 1993)(no waiver by disclosure to outside auditor because auditor is not "a conduit to a potential adversary").

<sup>311</sup> 229 F.R.D. 441 (S.D.N.Y. 2004).

<sup>312</sup> *Id.* at 445.

<sup>313</sup> *Id.* at 446.

<sup>314</sup> *Id.* at 445 (quoting *Stix Prods. v. United Merchs. & Mfrs.*, 47 F.R.D. 334, 338 (S.D.N.Y. 1969)).

<sup>315</sup> *Merrill Lynch*, 229 F.R.D. at 445 (quoting *In re Pfizer Inc. Secs. Litig.*, 1993 WL 561125, at \*6 (S.D.N.Y. Dec. 23, 1993)).

<sup>316</sup> *Id.* at 447.

out corporate fraud. Indeed, this is precisely the type of limited alliance that courts should encourage.<sup>317</sup>

The *Merrill Lynch* court noted that the auditor had “an ethical and professional obligation to maintain materials received from its client confidential, unless disclosure was required by law or accounting standards.”<sup>318</sup> The court concluded that there could be no required disclosure other than a general statement by the auditor that a proper audit was impossible because of “internal control deficiencies.”<sup>319</sup> Thus, the auditor was neither an adversary nor a conduit to an adversary and disclosure to the auditor did not waive the work product doctrine protection.<sup>320</sup>

In *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*,<sup>321</sup> the court acknowledged that waiver can occur with disclosure to third parties “in a manner which substantially increases the opportunity for potential adversaries to obtain the information”<sup>322</sup> but the court refused to find that disclosure to an auditor was such a disclosure. The *Jaffe* court stated, “the fact that an independent auditor must remain independent from the company it audits does not establish that the auditor also has an adversarial relationship with the client as contemplated by the work product doctrine.”<sup>323</sup> In the court’s view, “[d]isclosing documents to an auditor does not substantially increase the opportunity for potential adversaries to obtain the information.”<sup>324</sup>

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<sup>317</sup> *Id.* at 448.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 448-449.

<sup>320</sup> *Id.* at 449.

<sup>321</sup> 237 F.R.D. 176 (N.D. Ill. 2006)

<sup>322</sup> *Id.* at 183 (quoting *Vardon Gold Co. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 534 (N.D. Ill. 2003) (quoting *Blanchard v. EdgeMark Fin. Corp.*, 192 F.R.D. 233, 237 (N.D. Ill. 2000))).

<sup>323</sup> *Lawrence E. Jaffe*, 237 F.R.D. at 183.

<sup>324</sup> *Id.*

Likewise, in *Regions Financial Corp. v. United States*,<sup>325</sup> the court decided that the auditor was neither a potential adversary nor a conduit to an adversary for purposes of waiver, and based this conclusion on the fact that the auditor was bound by a confidentiality agreement.<sup>326</sup> The court noted, “perhaps most importantly, a confidentiality agreement protected any documents [the company] gave to [the auditor], an agreement that assured that [the auditor] could not give the documents to another party.”<sup>327</sup>

In *Gutter v. E.I. DuPont de Nemours & Co.*,<sup>328</sup> the court, determined that disclosure of materials to an independent auditor does not waive the work product protection because “there is an expectation that confidentiality of such information will be maintained by the recipient.”<sup>329</sup> The court also stated: “Transmittal of documents to a company’s outside auditors does not waive the work product privilege because such a disclosure ‘cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs.’”<sup>330</sup>

In *In re Pfizer Inc. Securities Litigation*,<sup>331</sup> the court refused to find a waiver of work product protection for materials shared with an independent auditor. The court stated that waiver occurs “only if disclosure ‘substantially increases the opportunity for potential adversaries to obtain the information.’”<sup>332</sup> In the situation at hand, the court noted that the company and the auditor “obviously shared common interests in the information.”<sup>333</sup> The court concluded that the auditor was “not

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<sup>325</sup> 2008 WL 2139008 (N.D. Ala. May 8, 2008).

<sup>326</sup> *See id.* at \*8.

<sup>327</sup> *Id.*

<sup>328</sup> 1998 WL 2017926 (S.D. Fla. May 18, 1998).

<sup>329</sup> *Id.* at \*3.

<sup>330</sup> *Id.* at \*5 (quoting *Gramm v. Horsehead Indus., Inc.*, 1990 WL 142404 (S.D.N.Y. Jan. 25, 1990)).

<sup>331</sup> 1993 WL 561125 (S.D.N.Y. Dec. 23, 1993).

<sup>332</sup> *Id.* at \*6 (quoting *In re Grand Jury Subpoenas Dated December 18, 1981 & January 4, 1982*, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982)).

<sup>333</sup> *Id.* at \*6.

reasonably viewed as a conduit to a potential adversary.”<sup>334</sup> Other courts have reached similar results in the audit context.<sup>335</sup>

## **B. Disclosure to an Auditor *May or May Not* Waive Protection**

The court in *In re Raytheon Securities Litigation*<sup>336</sup> was more tentative. The court began its waiver analysis with the familiar touchstone that a disclosure not “inconsistent with maintaining secrecy against opponents” does not act as a waiver.<sup>337</sup> Rather, a waiver occurs if a disclosure “substantially increased the opportunities for potential adversaries to obtain the information.”<sup>338</sup> The court then noted that no evidence suggested that materials disclosed to an auditor “are likely to be

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<sup>334</sup> *Id.*

<sup>335</sup> In *Vacco v. Harrah’s Operating Co., Inc.*, 2008 WL 4793719 (N.D.N.Y. Oct. 29, 2008), the court determined that sharing material with the independent auditor did not waive the protection of the work product doctrine. *See id.* at \*7. In so finding, the court rejected the argument that the independent nature of the auditor made the auditor adversarial and the disclosure a waiver. *See id.* at \*6.

In *Southern Scrap Material Co. v. Fleming*, 2003 WL 21474516 (E.D. La. June 18, 2003), the court determined that audit response letters prepared by an attorney and provided to the company’s independent auditor were protected by the work product doctrine and that disclosure to the auditors was not waiver of that protection. *See id.* at \*9.

In *Laguna Beach County Water Dist. v. Superior Court*, 22 Cal. Rptr. 3d 387 (Ct. Ct. App. 4<sup>th</sup> Dist. 2004), the court determined that disclosure of attorney audit response letters did not waive work product protection. *See id.* at 392-93. In response to the argument that there can be no work product protection because the letters were disclosed to an auditor who was performing a public function, the court stated that the “conclusion has no basis in law or logic.” *Id.*, at 392. The court continued that the fact that the auditor was performing a public function “does not mean it would divulge protected information.” *Id.*

In *Gramm v. Horsehead Indus., Inc.*, 1990 WL 142404 (S.D.N.Y. Jan. 25, 1990), the court evaluated whether work product doctrine protected documents shared with accountants which discussed the settlement of a claim against it. *Id.* at \*4. The court stated:

[W]aiver of work-product protection will be implied only if the document is disclosed in circumstances that make it substantially more likely that the document will be revealed to the party’s adversary. Thus, disclosure to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver of protection of the rule.

*Id.* at \*5. The court determined that any disclosure to the accountants of Horsehead was not a waiver because there was no substantial danger that the documents would be disclosed to the plaintiffs, given that accountants have a duty of confidentiality. *Id.* at \*5 n.8.

*See also* *Tronitech, Inc. v. NCR Corp.*, 108 F.R.D. 655 (S.D. Ind. 1985). The court held that an attorney’s evaluation of litigation shared with an auditor in the context of an annual audit enjoyed work product protection. *See id.* at 655. There was no waiver of the protection because the jurisdiction, Indiana, recognized a privilege for accountant-client communications and “audit letters are produced under assurances of strictest confidentiality.” *Id.* at 657.

<sup>336</sup> 218 F.R.D. 354 (D. Mass. 2003)

<sup>337</sup> *See id.* at 359-60 (quoting *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)).

<sup>338</sup> *Id.* at 360.

turned over to the company's adversaries except to the extent that the securities laws and/or accounting standards mandate public disclosure."<sup>339</sup> Because the record lacked sufficient evidence to determine what an auditor might be expected to disclose, the court ordered further evidentiary proceedings to make these determinations.<sup>340</sup> Thus, the court indicated that disclosure of materials to an auditor waives the protection of the doctrine if public disclosure is to follow but does not waive the protection of the doctrine if further disclosure is not required.

### **C. Disclosure to an Auditor *Waives* Protection**

In contrast, a few courts have found that disclosure of materials to an auditor waives work product doctrine protection. The most recent of these is *Medinol, Ltd. v. Boston Scientific Corp.*<sup>341</sup> In *Medinol*, the company shared minutes of a special litigation committee meeting with the independent auditor.<sup>342</sup> The court stated that sharing materials with entities that share an interest with the company does not waive the work product protection.<sup>343</sup> The *Medinol* court continued, "[h]owever, where the third party to whom the disclosure is made is not allied in interest with the disclosing party or does not have litigation objectives in common, the protection of the doctrine will be waived."<sup>344</sup> Because, in the court's view, by definition, independent auditors "must not share common interests with the company they audit," disclosure to auditors waives work product protection.<sup>345</sup> The court stated that "the sharing by Boston Scientific's lawyers of selected aspects of their work product, although perhaps not substantially increasing the risk that such work product would reach potential adversaries, ... did not serve any litigation interest, ... or any other policy underlying the work product doctrine."<sup>346</sup> The court

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<sup>339</sup> *Id.*

<sup>340</sup> *See id.*

<sup>341</sup> 214 F.R.D. 113 (S.D.N.Y. 2002).

<sup>342</sup> *Id.* at 114.

<sup>343</sup> *Id.* at 115.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 116.

<sup>346</sup> *Id.*

thus created a novel requirement that all disclosures are waivers unless the disclosures “serve the privacy interests that the work product doctrine was intended to protect.”<sup>347</sup> The *Medinol* court’s position is in stark contrast to the virtually universal position of other courts that disclosures are not waivers unless the disclosures harm the purpose of the doctrine by making access by an adversary more likely.<sup>348</sup> Because the company and the auditor in *Medinol* “did not share ‘common interests’ in litigation,” and because, in the court’s view, disclosures to the auditor “did not therefore serve the privacy interests that the work product doctrine was intended to protect,” the court determined that disclosure to the auditor waived work product doctrine protection.<sup>349</sup> Since the *Medinol* decision, several courts have specifically considered it and have declined to find that disclosure to auditors waives the work product doctrine.<sup>350</sup>

An earlier case had reached a similar result as that in the *Medinol* case. In *Diasonics Securities Litigation*,<sup>351</sup> the company disclosed materials to its auditor that had been prepared regarding an acquisition and that the court acknowledged may have been protected absent the disclosure. The court then found that disclosure of the documents to the auditor waived any possible work product protection.<sup>352</sup> The court stated, “While disclosure to one with a common interest under a guarantee of confidentiality does not necessarily waive the protection, ... the relationship between public accountant

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<sup>347</sup> *Id.* at 117.

<sup>348</sup> See discussion *supra* Section IV.D.2.

<sup>349</sup> *Medinol*, 214 F.R.D. at 117.

<sup>350</sup> In *Vacco v. Harrah’s Operating Co., Inc.*, 2008 WL 4793719 (N.D.N.Y. Oct. 29, 2008), the court stated, “*Medinol*, however, has been almost uniformly rejected as adopting far too restrictive a view regarding the circumstances under which a waiver can occur.” *Id.* at \*6. See also *Secs. & Exch. Comm’n v. Berry*, 2011 WL 825742, \*6-7 (N.D. Cal. March 7, 2011) (rejecting *Medinol*’s view); *Secs. & Exch. Comm’n v. Roberts*, 254 F.R.D. 371, 381-82 (N.D. Cal. 2008) (declined to follow *Medinol*’s position that sharing materials with an auditor waives the work product doctrine for the materials).

<sup>351</sup> 1986 WL 53402 (N.D. Cal. June 15, 1986).

<sup>352</sup> See *id.* at \*1.

and client is at odds with such a guarantee because the public accountant has responsibilities to creditors, stockholders, and the investing public which transcend the relationship with the client.”<sup>353</sup>

#### **D. Implications for Alternative Litigation Finance**

In deciding whether disclosure of materials protected by the work product doctrine to an ALF entity waives that protection, one must begin where courts evaluating disclosures in the independent auditor setting begin: with the question of whether the disclosure is “inconsistent with the maintenance of secrecy from the disclosing party’s adversary.”<sup>354</sup> As many courts have explained, waiver occurs if a disclosure “substantially increased the opportunities for potential adversaries to obtain the information.”<sup>355</sup> The court in *United States v. Deloitte LLP*<sup>356</sup> posed an analysis that asks whether the party to whom the protected materials are disclosed is an adversary or a conduit to an adversary. In answering this query, the *Deloitte* court focused the analysis on “whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential.”<sup>357</sup> A reasonable basis might exist with a shared common interest between the discloser and the recipient or it might exist if the recipient had an obligation or other reason to keep the materials disclosed confidential.<sup>358</sup>

Applying this analysis in the ALF setting should result in a finding that the ALF entity is not an adversary and is not a conduit to an adversary. Thus, a court should find no waiver of protection if the

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<sup>353</sup> *Id.*

<sup>354</sup> *United States v. Deloitte LLP*, 610 F.3d 129, 140 (quoting *Rockwell Int’l Corp., v. U.S. Dep’t of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) (quoting *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D. C. Cir. 1980))).

<sup>355</sup> *WRIGHT & MILLER, supra* note 155, §2024. *See also In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011) (“it is only in cases in which the material is disclosed in a manner inconsistent with keeping it from an adversary that the work-product doctrine is waived.”). *See also* discussion *supra* Section IV. D. 2.

<sup>356</sup> 610 F.3d 129 (D.C. Cir. 2010).

<sup>357</sup> *Id.* at 141.

<sup>358</sup> *Id.*

ALF entity is bound by a confidentiality agreement. Absent such an agreement, a finding of waiver is possible.

If the attorney and client team discloses work product protected materials to assist the ALF entity in the decision whether to invest in the matter, the possibility of a finding of waiver is at its highest. At this point in the relationship, the ALF entity has no particular affinity for the litigation adversary so there is no obvious motivation for the potential funder to share the information with the adversary. Yet, the ALF entity has very little affinity for the attorney and client team either at this juncture; it may walk away from the team without investing in the matter.

As courts do not view auditors as adversaries of the sharing company, likewise, courts are not likely to view ALF entities to be adversaries for purposes of the work product doctrine. Yet, at the initial investment investigation stage of the entity's involvement, a court may not find a legally sufficient common interest just as courts sometimes do not recognize a sufficient common interest between auditors and the audited company. If the ALF entity decides to pass on the investment opportunity, there is no solid basis for a reasonable belief on behalf of the attorney and client team that the disclosed material will not find its way to an adversary. A court might find that disclosure to the ALF entity waives work product protection absent some other basis for a reasonable belief in confidentiality on the part of the ALF entity.

A reasonable expectation of confidentiality can be created, however, as the *Deloitte* court noted, by "a confidentiality agreement or similar arrangement."<sup>359</sup> If the ALF entity enters into a binding and unqualified agreement not to disclose the materials shared with the entity, the attorney and client team likely has a reasonable expectation that the ALF entity will not disclose the materials. The entity is not an adversary and by contract has made clear it is not a conduit to an adversary. Thus, there is no

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<sup>359</sup> *Id.*



waiver of the work product doctrine. Because confidentiality is essential for work product protection to exist, and because work product protection is important for the ALF market to thrive, ALF entities should have no objection to binding themselves to a duty of confidentiality in the initial evaluation stage.

In the second scenario of disclosure, a lawyer and client team may disclose protected materials to an ALF entity as part of a status reporting obligation after the entity has decided to invest in the matter. In analyzing whether such a disclosure increases the likelihood that the materials will find their way to the hands of an adversary, it is not likely that a court would find the entity to be an adversary or a conduit to an adversary. Because the ALF entity maximizes investment value if the litigation matter ends in success for the attorney and client team, courts may find that the entity and the attorney and client team share a common interest such that no waiver of work product privilege occurs with disclosure to the ALF entity. At the very least, the shared interest eliminates any conclusion that the funder is an adversary.

Courts may have concern, however, that the ALF entity might be a conduit to an adversary. While the entity's and the discloser's interests are more aligned than if the entity had not yet decided to invest, because the standards of commonality some courts apply are stringent,<sup>360</sup> some courts might fall short of recognizing that the entity has a legally sufficient common interest with the attorney and client team such that the entity is not a conduit to an adversary. Framing the issue as the *Deloitte* court did, the attorney and client team may not have a "reasonable basis for believing that the recipient would keep the disclosed material confidential."<sup>361</sup>

Once again, an unconditional and binding agreement in which the ALF entity agrees to treat all disclosed materials confidentially can provide a reasonable basis for a belief that the entity will not further disseminate the material but will keep the material confidential. Thus, a court can conclude that

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<sup>360</sup> See discussion *supra* Section IV.D.2.

<sup>361</sup> *Deloitte*, 610 F.3d at 141.

a disclosure to an ALF entity as part of the entity's monitoring role does not waive the work product doctrine protection.

These conclusions are supported by the only published case in which a court has dealt substantively with the question of whether a disclosure to an ALF source waives work product protection for the shared materials. The court in *Mondis Technology, Ltd. v. LG Electronics, Inc.*<sup>362</sup> opined that sharing materials with potential investors who had entered into nondisclosure agreements “did not substantially increase the likelihood that an adversary would come into possession of the materials.”<sup>363</sup> Thus, the court refused to find a waiver of the work product doctrine.<sup>364</sup>

In addition, courts have repeatedly concluded that auditors are not adversaries or conduits to adversaries, though the auditors' interests and the interests of the company may not be identical. Repeatedly, courts have determined that disclosures to auditors do not increase the likelihood that the materials will come into the hands of adversaries.<sup>365</sup> Several courts have placed weight on the fact that auditors have an obligation of confidentiality that exists as the result of a nondisclosure agreement or that exists in the professional code that regulates the conduct of auditors.<sup>366</sup>

Even if a court were inclined to look to the *Medinol* opinion for guidance, as other courts have not done,<sup>367</sup> the court may not find a waiver. In the *Medinol* court's view, to avoid waiver, the disclosure must “serve any litigation interest, or any other policy underlying the work product doctrine.”<sup>368</sup> Even with this analysis, a court might find that disclosure to an ALF entity furthers the litigation interest of success on the underlying claim such that the court might not find a waiver. Since the *Medinol* court

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<sup>362</sup> 2011 WL 1714304(E.D. Tex. May 4, 2011).

<sup>363</sup> *Id.* at \*3.

<sup>364</sup> *Id.* See also discussion *supra* Section V.

<sup>365</sup> See discussion *supra* Section VIII.A.

<sup>366</sup> See, e.g., *Deloitte*, 610 F.3d at 142; *Regions Fin. Corp. v. United States*, 2008 WL 2139008 (N.D. Ala. May 8, 2008).

<sup>367</sup> See discussion *supra* Section VIII.B.

<sup>368</sup> *Medinol*, 214 F.R.D. at 116.

indicated that even a disclosure that does not substantially increase the risk of disclosure to adversaries might constitute a waiver,<sup>369</sup> the existence of a confidentiality agreement would be irrelevant except, perchance, as evidence of common interest.

## **IX. Conclusion**

As the ALF market develops, the question of the effect of the presence of ALF entities in litigation on the protection of the work product doctrine looms as a significant issue. This article concludes that the involvement of ALF entities should not affect work product doctrine protection. Materials evaluating litigation and created in the context of ALF should enjoy (and courts will likely conclude that they enjoy) the protections of the work product doctrine, even if an ALF entity creates those materials. Second, sharing protected materials with ALF entities should not waive that protection if ALF entities enter into binding nondisclosure agreements with regard to any shared materials.

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<sup>369</sup> *Id.*