

## When Is A Document Prepared ‘In Anticipation Of Litigation’?

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The work-product doctrine generally protects from discovery by an adverse party any materials prepared by or for a party, including by in-house counsel, in “anticipation of litigation.”<sup>1</sup> The doctrine promotes the adversary system by allowing an attorney to assemble relevant information, develop legal theories, and plan legal strategies without undue concern as to whether his or her adversary will be privy to such preparation.<sup>2</sup>

The “anticipation of litigation” requirement is the most critical element of the doctrine for in-house counsel because it determines whether documents produced in the general counsel’s office are immune to discovery as work product or are discoverable as mere business documents prepared in the ordinary course of business. In one case, on learning of accounting irregularities, a company’s board commissioned an audit committee and a third party consultant to investigate and to draft reports. As a result of the investigation and reports, the company terminated certain personnel, reorganized internal financial controls, and reassured creditors and future lenders of the accuracy of its financial statements. Finding that these reports were prepared in the ordinary course of business, the court ruled that they were discoverable.<sup>3</sup>

### Different Standards

There are a number of different tests that courts use to determine whether documents have been produced in “anticipation of litigation.”

For example, some courts have indicated that the document must be prepared because of the prospect of litigation when the preparer faces an actual or a potential claim following an actual event or series of events that reasonably could result in litigation.<sup>4</sup>

Different courts have adopted a “function of the document” test. If the reason the adverse party seeks the documents is to help the adverse party understand the legal arguments of the party that prepared the documents, then the doctrine will protect the documents even if the party did not prepare them in anticipation of a specific or potential claim.<sup>5</sup>

Under a third test — the “primary motivation test” — a document is protected by the work-product doctrine if the primary motivation of the party preparing the document is to assist in possible future litigation,<sup>6</sup> or because of the prospect of future litigation.<sup>7</sup>

Federal courts are divided on the appropriate standard to apply under the primary motivation test. Some courts, such as the U.S. Court of Appeals for the Second Circuit, rule that if the document was prepared or obtained “because of the prospect of litigation,” then the document is protected from disclosure.<sup>8</sup>

Still other courts, including the U.S. Court of Appeals for the Fifth Circuit, require that a document have been prepared primarily to assist in litigation for it to be protected. Thus, they rule that so long as “the primary motivating purpose behind the creation of the document was to aid in possible future litigation,” then the document is protected by the doctrine.<sup>9</sup> The chart accompanying this article surveys the law in the federal circuits under the “primary motivation” test.

## **Practical Implications**

It is important to recognize that there are documents that would be protected under the standard affording protection only to documents prepared “because of” the prospect of litigation but that are discoverable under the “primarily to assist” test.

Suppose, for example, that a company contemplating a transaction, which it recognizes could lead to litigation, commissions its attorneys to prepare a memorandum assessing the likelihood of success in a litigation. This document should be protected in the Second Circuit, but probably not in the Fifth Circuit.

Moreover, suppose that a company contemplating a joint venture or partnership with another company requests that the other company have a memorandum prepared assessing the likelihood of success in existing litigation. This, too, should be protected in the Second Circuit but not in the Fifth Circuit.

Also imagine that at the request of an auditor determining the accuracy of litigation reserves in a company’s financial statements, the company commissions its attorneys to prepare a memorandum assessing the likelihood of success in existing litigation. Once again, this document should be protected from discovery requests under the work-product doctrine in the Second Circuit but it probably would not be protected in the Fifth Circuit.

The differences between the two tests were at the heart of the Second Circuit’s recent decision in United States v. Adlman.

The Adlman case arose when the Sequa corporation, an aerospace manufacturer with annual revenues of nearly \$2 billion, contemplated merging two of its wholly-owned subsidiaries, the Atlantic Research Corporation and the Chromalloy Gas Turbine Corporation. Sequa expected that the merger would produce an enormous loss and tax refund, which Monroe Adlman, Sequa’s vice president for taxes, expected would be challenged by the Internal Revenue Service and would result in litigation.

Adlman asked an outside accountant and lawyer, Paul Sheahen, to evaluate the tax implications of the proposed restructuring. Sheahen submitted a memorandum to Adlman in draft form and then, after further consultation, prepared a final version of it. The final memorandum was a 58-page detailed legal analysis of likely IRS challenges to the reorganization and the resulting tax refund claim; it contained discussion of statutory provisions, IRS regulations, legislative history, and prior judicial and IRS rulings relevant to the claim. It proposed possible legal theories or strategies for Sequa to adopt in response, recommended preferred methods of structuring the transaction, and made predictions about the likely outcome of litigation.

Sequa decided to go ahead with the restructuring. In the transaction, Sequa sold 93 per cent of its stock in Atlantic Research to Chromalloy for \$167.4 million, and the remaining 7 per cent to Bankers Trust for \$12.6 million. The reorganization resulted in a \$289 million loss. Sequa claimed the loss on its tax return and carried it back to offset prior capital gains, thereby generating a claim for a refund of \$35 million.

In an ensuing audit of Sequa’s tax returns, the IRS requested a number of documents concerning the restructuring transaction. Sequa acknowledged the existence of Sheahen’s memorandum, but cited the work-product doctrine as the ground for declining to produce it. The IRS then served a summons on Adlman for production of the memorandum.

When Adlman declined to comply, the IRS filed an action in the United States District Court for the Southern District of New York to enforce the subpoena. Adlman argued that the memorandum was protected by the work-product doctrine because it included legal opinions

prepared in reasonable anticipation of litigation. Litigation was virtually certain to result from the reorganization and Sequa's consequent claim of tax losses, Adlman asserted. Indeed, he pointed out, Sequa's tax returns had been surveyed or audited annually for at least 30 years. In addition, as Adlman noted, the size of the capital loss to be generated by the restructuring at issue was expected to result in a refund so large that the Commissioner of Internal Revenue would be required by federal law to submit a report to the Joint Congressional Committee on Taxation.<sup>10</sup> Adlman also contended that Sequa's tax treatment of the restructuring was based on an interpretation of the tax code without a case or IRS ruling directly on point. In light of the circumstances of the transaction, Adlman asserted that there was no doubt that Sequa would end up in litigation with the IRS. Sheahen concurred, opining that "any corporate tax executive would have realistically predicted that this capital loss would be disputed by the IRS" because of the "unprecedented and creative nature of the reorganization, the fact that Sequa was continually under close scrutiny by the IRS and the size of the refund resulting from the capital loss."

The district court nevertheless rejected Adlman's work-product claim, concluding that the memorandum had not been prepared in anticipation of litigation. Adlman appealed.

### **The Second Circuit's Decision**

In its decision, the Second Circuit first examined the "primarily to assist in" litigation standard. The circuit court stated that this formulation was exemplified by a line of cases from the Fifth Circuit. The Second Circuit pointed out that in one case, United States v. Davis,<sup>11</sup> the Fifth Circuit denied protection to documents made in the course of preparation of a tax return. This result, the Second Circuit agreed, was well justified as there was no showing whatsoever of anticipation of litigation. The Second Circuit pointed out that in a statement that might be characterized as dictum, the Fifth Circuit had declared that the work-product doctrine applied only if the "primary motivating purpose behind the creation of the document was to aid in possible future litigation."<sup>12</sup>

The Second Circuit continued by noting that in another Fifth Circuit case,<sup>13</sup> a large public corporation sought to shield documents that analyzed prospective liabilities that might result from litigation with the IRS over its tax returns. The documents had been prepared not to assist in litigation but to establish and justify appropriate reserves in the company's financial statements. Treating the dictum in the Davis case as law, the Fifth Circuit held that because the "primary motivating force" behind the preparation of the document was not to ready the company for litigation but rather to bring its financial books into conformity with generally accepted auditing principles, and because the documents' liability analysis was "only a means to a business end," the documents were not prepared in anticipation of litigation and enjoyed no work-product protection.

The Second Circuit in Adlman rejected this view of the work-product doctrine. It declared that a requirement that documents be produced primarily or exclusively to assist in litigation to be protected was at odds with the policies behind the work-product doctrine and the text of Federal Rule of Civil Procedure 26(b)(3), which simply grants protection against discovery to documents and materials prepared in anticipation of litigation. The Second Circuit emphasized that Rule 26(b)(3) nowhere states that a document must have been prepared to aid in the conduct of litigation to constitute work product, much less primarily or exclusively to aid in litigation.

The Second Circuit continued by noting that the text of Rule 26(b)(3) did not limit its protection to materials prepared to assist at trial. Instead, it stated, the rule broadly and expressly stated that work-product privilege applied not only to documents "prepared . . . for trial" but also to those prepared "in anticipation of litigation." In the circuit court's view, the fact that the rule also covers documents prepared in anticipation of litigation confirmed that the drafters of the rule

considered this to be a different and broader category.

In addition, the Second Circuit declared, the rule granted special protection to the materials at issue in Adlman's case: documents setting forth legal analysis. Although the rule generally withholds protection for documents prepared in anticipation of litigation if the adverse party showed "substantial need" for their disclosure and inability to obtain their equivalent by other means, even where the party seeking disclosure has made such a showing the rule directs that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of [a party or its representative] concerning the litigation." This provision was intended to ratify the principles that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed work of the other side, the court said.

The Second Circuit added that in addition to the plain language of the rule, the policies underlying the work-product doctrine suggested strongly that work-product protection should not be denied to a document that analyzed expected litigation merely because it was prepared to assist in a business decision. In the circuit court's view, framing the inquiry as whether the primary or exclusive purpose of the document was to assist in litigation threatened to deny protection to documents that implicated key concerns underlying the work-product doctrine.

The circuit court continued by declaring that it saw "no basis" for adopting a test under which an attorney's assessment of the likely outcome of litigation was freely available to his or her litigation adversary merely because the document was created for a business purpose rather than for litigation assistance. "The fact that a document's purpose is business-related appears irrelevant to the question whether it should be protected" under the work-product doctrine, the circuit court stated. The circuit court then ruled that the standard advocated by the IRS — where documents assessing the strengths and weaknesses of one's case, or the likelihood of settlement and its expected cost, were unprotected if prepared for a business purpose rather than to assist in litigation — was unwarranted.

The Second Circuit next explained that it believed the "because of" litigation test was the appropriate standard. This standard, the circuit court declared, accorded with the plain language of the Rule 26(b)(3) and the purposes underlying the work-product doctrine. Where a document was created because of the prospect of litigation, analyzing the likely outcome of that litigation, it did not lose protection under the "because of" test if it was created to assist with a business decision, the Second Circuit pointed out.

The court then vacated the district court's decision and remanded the case to that court for it to apply the "because of" test.

## **Conclusion**

The work-product doctrine can protect a great deal of documents and other materials from discovery. Because one of the most important aspects of the doctrine is whether these documents were prepared in "anticipation of litigation," it is important for litigants to focus on the applicable standard. Different federal circuits have interpreted the requirement differently. Unless the U.S. Supreme Court resolves the division, whether a document is discoverable in a particular case will depend in many instances on the court that is making the decision.

## Notes 1-13 —

- <sup>1</sup> See *Hickman v. Taylor*, 329 U.S. 495, 508 67 S. Ct. 385, 392 (1947); see, also, Fed. R. Civ. P. 26(b)(3) (protects documents and tangible things prepared in anticipation of litigation).
- <sup>2</sup> See *Hickman*, 329 U.S. at 508 67 S. Ct. at 392; see also *Upjohn Co. v. United States*, 449 U.S. 383, 397-98 101 S. Ct. 677, 686 (1981); *United States v. Nobles*, 422 U.S. 225, 237 95 S. Ct. 2160, 2169 (1975).
- <sup>3</sup> See *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274, 280 (S.D.N.Y. 1995).
- <sup>4</sup> See e.g., *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 151 (D. Del. 1977).
- <sup>5</sup> See, e.g., *Delaney, Migdail & Young v. I.R.S.*, 826 F.2d 124, 127 (D.C. Cir. 1987).
- <sup>6</sup> See, e.g., *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982), cert. denied, 466 U.S. 944, 104 S. Ct. 1927 (1984).
- <sup>7</sup> See, e.g., *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).
- <sup>8</sup> See *Adlman*, 134 F.3d at 1202 (quoting Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, 8 Fed. Prac. and Proc., Civil 2d. 2024, at 343 (1994)).
- <sup>9</sup> *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982) (quoting *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir.), cert. denied, 454 U.S. 862, 102 S. Ct. 320 (1981)); see also *Collins v. International Dairy Queen (In re Kidder Peabody Sec. Litig.)*, 168 F.R.D. 4549, 462, 466 (S.D.N.Y. 1996).
- <sup>10</sup> See 26 U.S.C. 6405(a).
- <sup>11</sup> 636 F.2d 1028 (5th Cir. 1981).
- <sup>12</sup> *Davis*, 636 F.2d at 1040.
- <sup>13</sup> *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982).

## Federal Courts Applying The Primary Motivation Test

1st Circuit: probably “[b]ecause of”; *City of Worcester v. HCA Mgmt. Co.*, 839 F. Supp. 86, 88 (D. Mass. 1993) (applying “[b]ecause of test,” stating court “must . . . determine whether the prospect of litigation was the actual and primary motivation”)

2nd Circuit: “because of”; *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (quoting Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, 8 Federal Practice and Procedure, Civil 2d 2024, at 343 (1994))

3rd Circuit: “because of”; *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979)

4th Circuit: “because of”; *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992)

5th Circuit: “primarily...to assist”; *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982); see also *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir.), cert. denied, 454 U.S. 862, 102 S. Ct. 320 (1981)

6th Circuit: probably “because of”; *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.*, 19 F.3d 1432, 1994 WL 58999, at \*3 (table) (6th Cir. Feb. 25, 1994) (applying “because of” test and quoting *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992)); see also *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 686 (W.D. Mich. 1996) (applying “because of” test)

7th Circuit: “because of”; *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983)

8th Circuit: “because of”; *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), cert. denied, 484 U.S. 917, 108 S. Ct. 268 (1987)

9th Circuit: apparent split among district courts; *Griffith v. Davis*, 161 F.R.D. 687, 699 (C.D. Cal. 1995) (applying “primarily to [assist]” test and citing *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir.) , cert. denied, 454 U.S. 862, 102 S. Ct. 320 (1981)); but see *Combined Ins. Co. of America v. Hansen*, 1990 WL 146440 (D. Or. Sept. 18, 1990) (applying “because of” test and citing *Wright & Miller*, 8 Federal Practice and Procedure, Civil 2024, at 198 (1970))

10th Circuit: apparent split among district courts; *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 485 (D. Kan. 1997) (applying “primarily to assist” test, stating “a party must show that the document was prepared principally or exclusively to assist in anticipated or ongoing litigation”); but see *Schmidt v. California State Auto. Ass’n*, 127 F.R.D. 182, 184 (D. Nev. 1989) (applying “because of” test, citing *Wright & Miller*, 8 Federal Practice and Procedure, Civil 2024, at 198 (1970))

11th Circuit: apparent split among district courts; *Shipes v. BIC Corp.*, 154 F.R.D. 301, 305 (M.D. Ga. 1994) (applying “because of” test, citing *Wright & Miller*, 8 Federal Practice and Procedure, Civil 2024, at 198 (1970)); but see *CSX Transp., Inc. v. Admiral Ins. Co.*, 1995 WL 855421, at \*2 (M.D. Fla. July 20, 1995) (alluding to “primarily to assist” test)

D.C. Circuit: “because of”; *Senate of Puerto Rico v. United States Dep’t of Justice*, 823 F.2d 574, 581 (D.C. Cir. 1987)

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