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Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of United States v. Adlman

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Comment

Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of *United States v. Adlman*

I. Introduction

This casenote will examine the two Second Circuit opinions in *United States v. Adlman*.[1] The first issue discussed is the court's holding in *Adlman I* that a document prepared by an accountant at the request of in-house counsel, to determine the tax ramifications of corporate restructuring, is not a protected communication under the attorney-client privilege. This casenote will explore the validity of the accountant-client privilege,

1. 68 F.3d 1495 (2d Cir. 1995) [hereinafter *Adlman I*]; No. 96-6095, 1998 U.S. App. LEXIS 2633 (2d Cir. Feb. 13, 1998) [hereinafter *Adlman II*].

the use of the attorney-client privilege to an accountant as an agent of the attorney, as well as the standard for the application of the attorney-client privilege to in-house corporate counsel. Second, this casenote will examine the Second Circuit's decision in *Adlman I*, which held that a document prepared before the event that led to litigation could be found to have been prepared in anticipation of litigation.[2] In so holding, the court rejected the district court's formulation of a new test for applying work product protection to documents.[3] This casenote will also discuss Adlman's appearance before the Second Circuit in the *Adlman II*, where the court was required to interpret "in anticipation of litigation" for the first time.[4]

Section II will explain the attorney-client privilege and work product doctrine as each evolved prior to the *Adlman* decisions. Section III will discuss both Second Circuit opinions rendered in *Adlman*. Section IV will address the effects of *Adlman I* decision on the attorney-client privilege, especially as it pertains to in-house corporate counsel and agents of an attorney. It will also consider both of the *Adlman* decisions' effects upon the work product doctrine. Section V will summarize the important aspects and effects of the *Adlman* decision.

II. Background

A. *Attorney-Client Privilege*

The attorney-client privilege is the oldest privilege known in the common-law.[5] Dating as far back as the 1600s,[6] the attorney-client privilege was in existence during the reign of Elizabeth I as an extension of the right of individuals to avoid self-incrimination following the adoption of testimonial compulsion in England.[7] The privilege was created to prevent the attorney from having to testify, under oath, against his client, because such testimony would violate the attorney's honor as a gen-

2. *See Adlman I*, 68 F.3d at 1501.

3. *See id.*

4. *See Adlman II*, 1998 U.S. App. LEXIS 2633, at *9.

5. *See* United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).

6. *See* United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991).

7. *See Bilzerian*, 926 F.2d at 1292; 8 J. WIGMORE, EVIDENCE § 2290, 542-44 (McNaughton rev. 1961).

tleman.[8] Under the original scheme, the privilege belonged to the attorney.[9] Today, the privilege is recognized as the client's.[10] The client, then, determines whether a communication made to his or her attorney may be disclosed by the attorney, and has the authority to raise or waive the privilege.[11] The attorney may also raise the privilege on the client's behalf.[12]

To invoke the attorney-client privilege, the existence of the attorney-client relationship is not enough; the privilege must also be explicitly raised and claimed in connection with a particular communication.[13] The privilege must also be invoked before any disclosure of the communication sought to be protected has occurred, otherwise the privilege is waived.[14] Several tests have been articulated to determine whether the attorney-client privilege applies in a given situation.[15] In es-

8. *See* EDNA SELAN EPSTEIN, Section of Litigation, American Bar Association, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE at 2 (3d ed. 1997) [hereinafter EPSTEIN]; WIGMORE, *supra* note 7, § 2290 at 542-43.

9. *See* WIGMORE, *supra* note 7, § 2290, at 542-44.

10. *See Bilzerian*, 926 F.2d at 1292; WIGMORE, *supra* note 7, § 2290, at 542-44.

11. *See* EPSTEIN, *supra* note 8, at 2.

12. *See* In the Matter of a Grand Jury Subpoena Duces Tecum, 391 F.Supp. 1029, 1034 (S.D.N.Y. 1975) (allowing attorney to raise the attorney-client privilege even though the client was outside the country and could not assert it directly on his own behalf).

13. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); Shiner v. American Stock Exch., 28 F.R.D. 34, 35 (S.D.N.Y. 1961) (holding that the attempt to assert the attorney-client privilege before any specific questions were asked of the witness was premature; the privilege should be asserted only after specific questions were asked of the witness).

14. *See generally* EPSTEIN, *supra* note 8, at 25. In general, if a client communicates a matter to his or her attorney in the presence of a third person who is not an agent of the attorney, the communication is not confidential and is not protected by the attorney-client privilege because the nature of the communication indicates that the client did not intend for the communication to be confidential. *See id.* at 46.

15. *See* United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). *See also* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) (citing 8 WIGMORE, EVIDENCE § 2292, 554 (McNaughton rev. 1961)); United States v. Bein, 728 F.2d 107, 112 (2d Cir. 1984). Each case utilized the elements established by Wigmore: "(1) where legal advice of any kind is sought; (2) from a professional legal adviser in his capacity as such; (3) the communications relating to that purpose, (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or the legal adviser; (8) except the protection be waived." *Id.*; *See also* United States v. United Shoe Mach. Corp. , 89 F.Supp. 357, 358-59 (D. Mass. 1950) which used a third test as follows: "the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court,

sence, each test requires satisfaction of those elements articulated in *United States v. Schwimmer*.[16] The test enunciated in *Schwimmer* requires: (1) the attorney-client relationship; (2) communications made by the client relating to subject matter upon which professional advice is sought; and (3) confidentiality of the communication for which the protection is claimed.[17] The party asserting the privilege has the burden of proving that each element of the privilege applies.[18]

The attorney-client privilege also extends to certain agents of the attorney.[19] The need for extending the privilege beyond the attorney arose as a result of the complexity of litigation.[20] For example, an attorney often requires the assistance of secretaries, paralegals, investigators, and summer associates in order to effectively handle his or her case.[21] In certain contexts, however, it is difficult to discern whether the attorney-client privilege applies to an agent of the attorney.[22] This problem often arises in cases involving corporations that may require the help of an accountant in preparing the corporation's income taxes.[23] In order to obtain an accountant's assistance, the corporation must reveal information about its financial situation.[24] The question thus raised is whether the communication to the

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or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purposes of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.*

16. 892 F.2d 237, 243 (2d Cir. 1989).

17. *See id.*

18. *See* von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987); *Schwimmer*, 892 F.2d at 244.

19. *See Schwimmer*, 892 F.2d at 243.

20. *See* EPSTEIN, *supra* note 8, at 109.

21. *See* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) (quoting WIGMORE, *supra* note 7, § 2301, at 583) ("[t]he assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents").

22. *See* EPSTEIN, *supra* note 8, at 106-09.

23. *See* Ronald E. Friedman and Dan L. Mendelson, *The Need for CPA-Client Priviledge in Federal Tax Matters,* 1996 TAX ADVISER 154, 155.

24. *See generally id.*; United States v. Arthur Young and Co., 465 U.S. 805, 812 (1984) (discussing sources auditor must review in order to evaluate the adequacy and reasonableness of the corporation's reserve account for contingent tax liabilities).

accountant is privileged.[25] This was one of the issues addressed by the *Adlman I* decision.[26]

1. *Policy Justifications Underlying the Attorney-Client Privilege*

There are four major premises underlying the attorney-client privilege. First, legal matters can only be effectively handled if all available and relevant facts are disclosed to the attorney.[27] In *Upjohn v. United States*,[28] the United States Supreme Court stated that the attorney-client privilege is necessary to "encourage full and frank communication between attorneys and their clients,"[29] thereby serving as the basis for providing sound legal advice to the client.[30] Second, the attorney-client privilege helps calm the fear of potential clients that their communications with the attorney may be disclosed to a third party, keeping the potential client from seeking legal advice from an attorney.[31] Third, the attorney-client privilege encourages compliance with regulatory laws because the attorney is in the best position to advise clients regarding the law and urge them to follow it,[32] thereby "facilitat[ing] the administration of justice."[33] Finally, the attorney-client privilege may also discourage frivolous lawsuits in cases where an attorney finds, after full disclosure, that his client's case is too weak to pursue.[34]

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25. *See generally* Friedman and Mendelson, *supra* note 23, at 154-56.

26. *See infra* notes 302-319 and accompanying text.

27. *See* Upjohn v. United States, 449 U.S. 383, 389 (1981); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); Trammel v. United States, 445 U.S. 40, 51 (1980) (pointing out the importance of full disclosure).

28. 449 U.S. 383 (1981).

29. *Id.* at 389.

30. *See id.*

31. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that legal "assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); United States v. Grand Jury Investigation, 401 F.Supp. 361, 369 (W.D. Pa. 1975) ("at the base of the attorney-client privilege lies the policy that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered").

32. *See* EPSTEIN, supra note 8, at 4; Natta v. Hogan, 392 F.2d 686, 691 (10th Cir. 1968).

33. *Natta*, 392 F.2d at 691.

34. *See* James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege (Part I)*, 8 VILL. L. REV. 279, 303-309 (1963) (stating necessity of lawyer interpret-

In conflict with the attorney-client privilege is the liberal policy underlying the discovery rules of the Federal Rules of Civil Procedure.[35] The conflict between these theories is heightened in the corporate context, because of fear that a broadly construed attorney-client privilege will surround corporate affairs resulting in a zone of silence.[36] In order to fashion a rule for the attorney-client privilege in the corporate context, the judiciary has worked to balance these competing interests.[37]

2. *Attorney-Client Privilege In the Corporate Context*

The attorney-client privilege is not just restricted to individuals; it may also be asserted by a corporation.[38] In *Upjohn v. United States,*[39] the Supreme Court faced the question of which employees of a corporation were entitled to assert the attorney-client privilege on behalf of the corporation.[40] The *Upjohn* Court refused to "draft a set of rules"[41] for all situations to which the attorney-client privilege applies in the corporate context, holding that the presence of the attorney-client privilege should be determined on a case-by-case basis.[42] However, Chief Justice Burger, in his concurring opinion, developed a standard to pro-

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ing facts as they are relayed by the client in order to determine what actually happened).

35. *See* FED. R. CIV. PRO. 26-37. *See also* Jacqueline A. Weiss, *Beyond Upjohn: Achieving Certainty By Expanding the Scope of the Corporate Attorney-Client Privilege*, 50 FORDHAM L. REV. 1182, 1202-1205 (1982).

36. *See, e.g.*, Jarvis, Inc. v. American Tel. & Tel. Co., 84 F.R.D. 286, 291-92 (D. Colo. 1979); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 (D.D.C. 1978).

37. *See* Weiss, *supra* note 35, at 1202 and n. 120.

38. *See* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915); Radiant Burners v. American Gas Ass'n., 320 F.2d 314, 323 (7th Cir. 1963).

39. 449 U.S. 383 (1981).

40. *See Upjohn*, 449 U.S. at 386. The Supreme Court addressed two tests that evolved in the federal courts for determining to which employees the attorney-client privilege applied in the corporate context. *See id.* The first test is the "control group" test. *See id.* at 390. The control group consisted of those in a position to control or take substantial part in a decision about the corporation that may require the advice of an attorney. *See id.* The Supreme Court rejected this test. *See id.* at 397. The second test is the "subject matter" test. *See* EPSTEIN, *supra* note 8, at 74-81. The elements of this test, before *Upjohn*, were that: (1) the person making the communication to the attorney must have been employed by the corporation; (2) the communication must have been made at the direction of a corporate superior; and, (3) the communication must have been within the scope of the employee's duties. *See* EPSTEIN, *supra* note 8, at 79.

41. *Upjohn*, 449 U.S. at 396.

42. *See id.* at 396-97.

vide guidance for the attorney-client privilege in the corporate setting, stating that:

> as a general rule, a communication is privileged when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.[43]

This case-by-case test is also used to determine whether the attorney-client privilege will apply to an agent of the attorney.[44]

a. *Accountants*

The attorney-client privilege may extend to an attorney's agent, such as an accountant, where the assistance of the accountant is necessary for effective client representation.[45] For example, in *United States v. Kovel*,[46] the defendant was an accountant working for a tax law firm.[47] Upon subpoena by the Internal Revenue Service ("IRS") to testify regarding alleged federal income tax violations by a client of the law firm, the defendant refused to answer several questions on the ground that the information was protected by the attorney-client privilege.[48] The Second Circuit balanced two competing views to decide whether the attorney-client privilege extended to a communication between a nonlawyer and the lawyer's client.[49] According to the first view, these privileges protecting communications should be restricted, not expanded, to aid the "investigation of truth and the enforcement of testimonial duty."[50] The court

43. *Id.* at 402-403 (Burger, C.J., concurring).

44. *See generally* United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989).

45. *See, e.g.*, *Schwimmer*, 892 F.2d at 243; United States v. Kovel, 296 F.2d 918, 921-23 (2d Cir. 1961).

46. 296 F.2d 918 (2d Cir. 1961).

47. *See Kovel*, 296 F.2d at 919.

48. *See id.*

49. *See id.* at 920-21.

50. *Id.* at 921 (quoting WIGMORE, *supra* note 7, § 2192, at 73).

noted that all communications to nonlawyers should not be protected simply by putting the nonlawyers on the law firm payroll and keeping them in the law offices.[51] On the other hand, the court recognized that the complexity of litigation prevents an attorney from effectively handling a client's case without the help of nonlawyers.[52] Ultimately, the court held that because lawyers must use nonlawyers, and because the client or attorney must often reveal privileged communications to nonlawyers, the privilege must extend to all persons who act as the attorney's agent.[53]

The *Kovel* court stated that the presence of an accountant as the attorney's agent should not destroy the attorney-client privilege.[54] The court expanded the scope of the attorney's agent to include an accountant by analogizing this situation to that of an interpreter called in to assist the attorney in rendering legal advice to his client.[55] In the case of an interpreter, the court suggested four scenarios where the elements of the attorney-client privilege were fulfilled: (1) the attorney sends a foreign speaking client to an interpreter to have a literal translation of the client's story produced; (2) the attorney has a more knowledgeable nonlawyer employee in the room to help because the attorney himself understands little of the foreign language; (3) same as (2) except the client brings the interpreter along instead of the attorney summoning an employee for help; and (4) the attorney sends the client to a nonlawyer proficient in the language to interview the client on the attorney's behalf and render his own summary of the situation, with the nonlawyer drawing on his own knowledge of the process, so the attorney can give the client sound legal advice.[56] According to the court, the fact that the communication was made in order to obtain legal advice from the lawyer was vital to the attorney-client

51. *See Kovel*, 296 F.2d at 921.

52. *See id.*

53. *See id.* (citing WIGMORE, *supra* note 7, § 2301, at 583).

54. *See Kovel*, 296 F.2d at 922.

55. *See id.* at 921. Interpreters have long been recognized as agents of the attorney whose presence during a conversation between attorney and client does not destroy the attorney-client privilege, and whose services are necessary to render sound legal advice. *See id. See, e.g.*, Maas v. Block, 7 Ind. 202 (1855).

56. *See Kovel*, 296 F.2d at 921-22.

privilege.[57] Thus, the privilege would not exist if the client was seeking accounting services, or if the advice sought was the accountant's and not the lawyer's.[58]

i. *Accountant-Client Privilege*

There is no general accountant-client privilege.[59] This principle was established by the Supreme Court in *Couch v. United States*,[60] and reaffirmed in *United States v. Arthur Young and Co.*[61] In *Young*, a firm of certified public accountants, acting as independent auditors of a corporation, refused to turn over the corporation's tax accrual workpapers[62] upon the demand of the IRS.[63] The Second Circuit[64] determined that a privilege should apply and fashioned an accountant work-product privilege.[65] The court found there was a public interest in ensuring the in-

57. *See id.*

58. *See id.*

59. *See* Couch v. United States, 409 U.S. 322, 335 (1973).

60. 409 U.S. 322, 335 (1973).

61. 465 U.S. 805, 817 (1984).

62. *See Young*, 465 U.S. at 812-13. Tax accrual workpapers are documents and memoranda relating to the accountant's evaluation of the company's reserves for contingent tax liabilities. *See id.* at 813. The reserves form an account called the tax accrual account, the noncurrent tax account, or the tax pool. *See id.* at 812. The accrual account represents the amount set aside by the corporation to cover adjustments and additions to the corporation's actual tax liability. *See id.* The accountant makes a determination of whether this account is sufficient by conducting an analysis of the corporation's books, records, and tax returns, in light of relevant Code provisions, Treasury Regulations, Revenue Rulings, and case law. *See id.* The auditor will also assess the opinions of management with regard to unclear, aggressive, or questionable tax positions that may have been taken on prior tax returns. *See Young*, 465 U.S. at 812-13. The auditor often uses a worse case scenario analysis to ensure that the corporation's exposure to additional liability is fully covered by the tax accrual account. *See id.* The tax accrual workpapers record this information. *See id.* at 813. These papers will contain, for example, an item-by-item analysis of the corporation's potential exposure to additional liability. *See id.* These papers pinpoint the weaknesses of a corporation's tax return by highlighting those areas where the corporate taxpayer has taken a position that may require payment of additional taxes. *See id.*

63. *See Young*, 465 U.S. at 808-809. The IRS can issue an administrative summons under 26 U.S.C. § 7602 (1992). This statute provides the IRS with broad information-gathering authority. *See Young*, 465 U.S. at 816.

64. *See* Arthur Young and Co v. United States, 677 F.2d 211 (2d Cir. 1982).

65. *See id.* at 219-21 (stating, "a work product privilege, similar to the privilege fashioned in *Hickman*, seems to us appropriate").

tegrity of the securities market, and this public interest was served by promoting full disclosure to public accountants.[66]

The Supreme Court stated that the underlying policy behind the Second Circuit's decision was to fashion a more expansive work-product remedy in the form of accountant-client privilege.[67] The Court reasoned that there already existed a procedural safeguard to prevent corporations from withholding information to auditors for fear that such information would be accessible to the IRS.[68] The auditor has a duty to determine the sufficiency of the tax accrual reserves, based on whether the corporation has adequately provided for its contingent tax liabilities.[69] If the auditor thought a corporation was withholding information, the auditor could not give an unqualified opinion as to the accuracy of the corporation's financial statements.[70] This requires the accountant to give a qualified opinion indicating potential problems in the corporation's financial records to the investing market.[71] Since no corporate officer would risk receiving a qualified opinion, the integrity of the securities market is protected.[72]

Other reasons exist for disallowing an accountant-client privilege. One is the evidentiary principle that disfavors privileges, since privileges prevent the use of highly relevant evidence.[73] According to this rationale, testimonial privileges are only tolerable when they are "within the narrowest limits required by principle."[74] According to Wigmore, "[t]here must be good reason, plainly shown, for their existence."[75] Second, the differing roles of an attorney and an accountant serve as a basis for declining the application of an accountant-client privilege.[76] An attorney's role is that of a confidential advisor with a duty of undivided loyalty to her client.[77] The attorney-client privilege

66. *See id.* at 219.
67. *See Young*, 465 U.S. at 817.
68. *See id.* at 818.
69. *See id.*
70. *See id.*
71. *See id.*
72. *See Young*, 465 U.S. at 819.
73. *See* WIGMORE, *supra* note 7, 2192, at 73.
74. *Id.*
75. *Id.*
76. *See Young*, 465 U.S. at 817-18.
77. *See id.* at 817.

aids the attorney in this role because it gives the client the assurance that the attorney will not repeat information relayed to her by the client.[78] It also encourages full disclosure from client to attorney, which is necessary for adequate representation.[79] An accountant, on the other hand, owes a duty of loyalty to the client, government agencies regulating the client's industry, the client's creditors, and the client's investors.[80] In *Couch*, the Court held that the accountant-client relationship was not of such a confidential nature as to create an expectation of privacy necessitating the protection of communications to an accountant under an accountant-client privilege.[81] The Court stated "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return."[82] Further, since an accountant can be criminally prosecuted for preparing a false return, he or she is highly encouraged to disclose any information given to him or her by the client.[83] This precludes a client from claiming he or she had an expectation of privacy or confidentiality.[84] Finally, unlike an attorney, the role of an accountant is to give information to the public about the client's financial statements and not to act as a confidential adviser to the client.[85]

Notwithstanding the Supreme Court's holding in *Couch*, the argument favoring the imposition of an accountant-client privilege is still being raised.[86] One argument in support of the privilege is that it conserves resources, for in order to protect tax-related communications to their accountants, the taxpayer must seek outside counsel.[87] This can be duplicative, time consuming, and expensive, especially for smaller businesses and smaller taxpayers.[88] Second, the privilege reduces the client's

78. *See supra* notes 27-32 and accompanying text.
79. *See supra* notes 27-32 and accompanying text.
80. *See Young*, 465 U.S. at 817-18.
81. *See* Couch v. United States, 409 U.S. 322, 335 (1973).
82. *Id.*
83. *See id.* at 335.
84. *See id.* at 335-36.
85. *See Young*, 465 U.S. at 817-18.
86. *See* Ronald E. Friedman and Dan L. Mendelson, *The Need for CPA-Client Priviledge in Federal Tax Matters,* 1996 TAX ADVISER 154, 155.
87. *See id.* at 156.
88. *See id.*

choice of adviser, because if the client wants the communication to be privileged, he or she must choose a lawyer for advice instead of, or in addition to, an accountant.[89] Third, several states have recognized some form of an accountant-client privilege.[90] However, even when a state recognizes such a privilege, it is not applicable in the federal courts.[91] Fourth, it has been argued that because accountants are treated the same as attorneys when they represent clients before the IRS, the information communicated to them by their clients should be privileged in the federal courts as well.[92]

The scope of the attorney-client privilege as applied to nonlawyers has also been found to exclude conversations between an accountant and client held outside the presence of the client's attorney, even though the subject matter of the conversation was the potential legal liability of the client.[93] Nonetheless, presence of the attorney when the conversation takes place is not always required, as evidenced by *United States v.*

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89. *See id.*

90. *See id.* at 155.

91. *See, e.g.*, Colton v. United States, 306 F.2d 633, 636 (2d Cir. 1962) ("questions of privilege in a federal income tax investigation are matters of federal law"); *In re* International Horizons, 689 F.2d 996, 999 (11th Cir. 1982); *In re* Kroh, 80 Bankr. 488, 489 (W.D. Mo. 1987).

92. *See* Ronald E. Friedman and Dan L. Mendelson, *The Need for CPA-Client Priviledge in Federal Tax Matters,* 1996 TAX ADVISER 154, 156.

93. *See* United States v. Bein, 728 F.2d 107, 112-13 (2d Cir. 1984). In *Bein*, a company was selling deferred delivery gold and silver contracts. *See id.* at 109. Prior to establishing the company, the two men who formed the company met with two lawyers and an accountant to determine the legality of the business. *See id.* at 110. During the meeting, the lawyers referred to a case which held that deferred delivery gold and silver option contracts were illegal option contracts. *See id.* The accountant read the case after the meeting and told one of the men considering forming the company that his company could not sell option contracts. *See id.* The Second Circuit upheld the admittance of this conversation at trial, reasoning that the conversation did not meet the test for the existence of the attorney-client privilege. *See Bein*, 728 F.2d at 112. This was true since the conversation occurred after the meetings with counsel and after legal advice had been obtained. *See id.* at 112-13. Further, the accountant was functioning as an accountant, not as a professional legal advisor. *See id.* at 113. Also, the accountant's view of the propriety of the business, whether or not it was based upon the accountant's view of the law, was not covered by the attorney-client privilege. *See id.* Finally, the accountant's presence at the legal meeting may have facilitated the defendant's understanding that he was receiving technical legal advice, but performing that function does not cloak the accountant with the expertise, ethical obligations, or professional rights of one admitted to the bar. *See id.*

Schwimmer.[94] In *Schwimmer*, the court held that the attorney-client privilege applied to communications between the defendant and an accountant because the defendant was directed by his attorney to speak freely with the accountant.[95] The court stated that the key factor in applying the attorney-client privilege to an attorney's agents is that the communication must be made in confidence for the purpose of obtaining legal advice from the lawyer.[96] This means that information provided to an accountant by a client at the direction of his lawyer for interpretation and analysis is privileged to the extent of its connection with the legal representation.[97]

b. *In-House Counsel*

The attorney-client privilege applies to in-house counsel.[98] However, the extent of the privilege extends remains unclear.[99] As previously noted, communications made to an attorney seeking advice other than legal advice are not privileged.[100] This becomes an issue in the corporate context where the in-house attorney performs some services not exclusively related to legal advice.[101] Where a corporate decision is based on both business and legal decisions, the business decisions are not protected solely because legal considerations are also involved.[102] In one such situation, the court held that advice rendered by in-house counsel, with responsibilities other than rendering legal advice, is only protected if there is a clear showing that the in-house

94. 892 F.2d 237 (2d Cir. 1989).

95. *See Schwimmer*, 892 F.2d at 244.

96. *See id.* at 243.

97. *See id.*

98. *See* Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968).

99. *See* Laura G. Ferguson, *Protecting the Confidentiality of Communications with Corporate Tax Counsel: Drawing the Line Between Legal and Business Advice*, CORP. LEGAL TIMES, July 1996, at 47.

100. *See* United States v. IBM, 66 F.R.D. 206, 212 (S.D.N.Y. 1974) (holding that legal advice given may not be privileged if it is incidental to the business advice); Hardy v. New York News, Inc., 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987) (finding that business aspects of corporate decisions were not protected solely because legal considerations were also involved).

101. *See* Ferguson, *supra* note 99 at 47; *See also*, Jaret Seiberg, *Docket: Attorney-Client Privilege Ruling Merits Heads-Up Series*, AM. BANKER, May 15, 1996, at 3.

102. *See Hardy*, 114 F.R.D. at 643-44.

attorney gave the advice in a professional legal capacity.[103] Examples of advice considered business advice, not legal advice, include income tax preparation and accounting services.[104] At least one jurisdiction has been unwilling to distinguish between legal or business services provided by a lawyer in the context of tax returns.[105] Under the ambit of *Kovel*, however, advice given to counsel by an expert in order to assist him in giving legal advice to a client is protected by the attorney-client privilege.[106] Based on the wide array of precedent following *Kovel*, it was unclear how the attorney-client privilege extended to in-house counsel.[107] The *Adlman* decision addresses this issue and helps to establish guidelines for an in-house attorney.[108]

B. *Work Product*

The work product doctrine evolved out of the same basic principle underlying the attorney-client privilege: an attorney cannot render full and adequate representation unless certain information is kept out of the reach of adversaries.[109] However, the work product doctrine encourages careful and thorough preparation by the attorney, whereas the attorney-client privilege focuses on encouraging the client to fully disclose all information to his or her attorney.[110] In addition, unlike the attorney-client privilege, which is absolute,[111] the work-product

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103. *See In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984).

104. *See, e.g., In re* Witness Before the Grand Jury, 631 F. Supp. 32, 33 (E.D. Wis. 1985).

105. *See* Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 39 (D. Md. 1974) (holding that the attorney-client privilege was not lost in a patent case because the communication contained technical data not directly related to rendering legal advice).

106. *See supra* notes 44-57 and accompanying text; United States v. Kovel, 296 F.2d 918, 921-23 (2d Cir. 1961) (finding that the fourth analogy, comparing accountants to interpreters, would apply); *supra* note 53 and accompanying text.

107. *See generally* Ferguson, *supra* note 99, at 47; Seiberg, *supra* note 101 at 3.

108. *See infra* notes 320-340.

109. *See* EPSTEIN, *supra* note 8, at 99.

110. *See* EPSTEIN, *supra* note 8, at 99.

111. *See supra* notes 27-31 and accompanying text; EPSTEIN, *supra* note 8, at 287-89.

privilege is qualified.[112] The work product doctrine was introduced in the landmark case of *Hickman v. Taylor*.[113]

1. *Hickman v. Taylor*[114]

In *Hickman*, a tugboat sank in the Delaware River, killing five crew members.[115] The tugboat owners hired a law firm to defend them against potential suits by representatives of the deceased crew members.[116] Shortly after the accident, the attorney assigned to represent the respondent tug owners interviewed the survivors of the accident.[117] The attorney obtained signed statements from them with an eye toward the anticipated litigation.[118] The petitioners, representatives of one of the decedents, sought to elicit these statements from the attorney.[119] The attorney refused to turn over the documents on the ground that they contained information obtained in preparation of litigation.[120]

The Supreme Court held that although the discovery rules are to be interpreted broadly and liberally, public policy requires written statements, private memoranda, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties, to be free from discovery.[121] Moreover, a lawyer should be able to "prepare his legal theories and plan his strategy without undue and needless interference."[122] If discovery of such information upon demand by opposing counsel was allowed, it would cause a lawyer to leave unwritten what he now writes down for fear of having to turn it over to opposing counsel.[123] The Court feared that demoraliza-

112. *See* Hickman v. Taylor, 329 U.S. 495, 512 (1947); United States v. Jordan, 591 F.2d 753, 774 (D.C. Cir. 1978). The qualified privilege depends on the information being sought and the adversary's need for the information. *See id.*; EPSTEIN, *supra* note 8, at 287-89.

113. 329 U.S. 495 (1947).

114. *Id.*

115. *See id.* at 498.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See Hickman*, 329 U.S. at 498-99.

120. *See id.* at 499.

121. *See id.* at 510.

122. *Id.* at 511.

123. *See id.*

tion of the legal profession would eventually result if attorneys were permitted to borrow the wits of their adversaries.[124]

The work product doctrine does not protect every statement obtained or prepared by counsel with an eye toward litigation.[125] Rather, the protection can be overcome if the party seeking discovery can show sufficient need.[126] The *Hickman* court also stated that the attorney's thoughts, mental impressions, and theories were at the heart of the adversary system, and therefore deserve the highest protection.[127] This concept is now referred to as "opinion work product," which receives almost absolute protection.[128] Work-product not containing the attorney's mental processes is referred to as "ordinary work product," and is subject to a lower threshold of discoverability upon a showing of need and hardship.[129]

124. *See Hickman*, 392 U.S. at 511.
125. *See id.*
126. *See id.* at 511-12.
127. *See id.* at 512-13.
128. *See* EPSTEIN, *supra* note 8, at 291.
129. *See* EPSTEIN, *supra* note 8, at 291. *See also*, National Union Fire Ins. v. Murray Sheet Metal, 967 F.2d 980, 984-85 (4th Cir. 1992).

2. *Codification of the Work-Product Doctrine: Federal Rule of Civil Procedure 26(b)(3)*[130]

The principles of *Hickman* were, for the most part,[131] codified in Federal Rule of Civil Procedure 26(b)(3).[132] The elements required under Rule 26(b)(3) include: (1) documents and tangible things otherwise discoverable; (2) prepared in anticipation of litigation or for trial; and (3) by or for another party or by or for that other party's representative.[133] Work-product protection does not extend to facts contained in documents which may be discovered through depositions or interrogatories, but only reaches formulations of the facts and thoughts concerning information recorded by the attorney in preparation for litigation.[134] In order to overcome the qualified immunity, the party seeking discovery must establish a substantial need for the materials and the inability to obtain the substantial equivalent without undue hardship.[135] Even upon such a showing, the court must still protect against disclosure of the attorney's mental processes from his or her adversary.[136]

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130. *See* FED. R. CIV. P. 26(b)(3), which provides in pertinent part:

> "[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation."

Id.

131. *See* EPSTEIN, *supra* note 8 at 293 (stating that Federal Rule 26(b)(3) does not provide the same protection as found in *Hickman* because it is limited to pretrial discovery; it protects materials prepared by a party's representative other than the party's attorney; and finally, it only addresses the discovery of documents and tangible things).

132. *See* FED. R. CIV. P. 26(b)(3) Advisory Committee's notes; EPSTEIN, *supra* note 8, at 293.

133. *See* FED. R. CIV. P. 26(b)(3); United States v. Jordan, 591 F.2d 753, 774 (D.C. Cir. 1978).

134. *See National Union*, 967 F.2d at 984 n.5.

135. *See* FED. R. CIV. P. 26(b)(3).

136. *See id.*

3. *Anticipation of Litigation Requirement*

In the corporate context, documents are created for a variety of reasons, including preparing for litigation; improving the company's product,[137] increasing the safety of the workplace,[138] and adhering to a statutory requirement.[139] When a corporation becomes involved in a lawsuit, such documents may be sought by the corporation's adversary.[140] If the corporation claims that the documents are protected by the work product doctrine, it must support its claim by establishing that the documents in issue were created in anticipation of litigation.[141]

Overall, courts do not require that a pending lawsuit satisfy the anticipation of litigation requirement.[142] This concept, however, is limited to preclude too much protection for documents based on any remote possibility of litigation in the future.[143] To accommodate these competing interests, courts have articulated three major tests to provide a fair amount of protection.[144] The first test is the "specific claim requirement," which focuses on how concrete a potential claim is at the time the doc-

137. *See* Soeder v. General Dynamics Corp., 90 F.R.D. 253, 255 (D. Nev. 1980). The court held an in-house investigation of an airplane accident was not protected by work product doctrine because it was motivated by the desire to improve the product, guard against adverse publicity, protect the company's economic interests, and prepare for litigation. *See id.*

138. *See National Union*, 967 F.2d at 985. Following a fire in a plastics plant, an in-house investigation of the circumstances surrounding the fire was conducted by those charged with safety responsibilities. *See id.* The court remanded for consideration of whether the documents were created in anticipation of litigation. *See id.*

139. *See* United States v. El Paso Co., 682 F.2d 530, 542-44 (5th Cir. 1982). Tax-pool analyses prepared in compliance with public reporting requirements were not discoverable because the primary motivation in creating them was to comply with the reporting requirements, not to prepare for possible litigation over tax returns filed by the company. *See id.*

140. *See, e.g., National Union*, 967 F.2d at 984; SCM Corp. v. Xerox Corporation, 70 F.R.D. 508, 512 (D. Conn. 1976).

141. *See supra* note 133 and accompanying text.

142. *See* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 42 (D. Md. 1974) (finding that it is not necessary that documents be prepared after litigation has commenced; rather material prepared when litigation is merely a contingency can be protected); *Upjohn*, 449 U.S. at 386-87, 397-402 (Supreme Court applying work product doctrine even though there were no proceedings against the company when the documents were prepared).

143. *See, e.g.,* SCM Corporation v. Xerox Corp., 70 F.R.D. 508, 515 (D. Conn. 1976).

144. *See infra* pages 29-35.

uments are prepared.[145] The second is the "function of the documents" test, which focuses on how the documents are actually going to be used by the preparer.[146] The third is the "primary motivation" standard, which looks to the real reason behind the creation of the documents.[147] When analyzing a work product claim, the document in issue will generally be either a business document or an investigative document.[148]

a. *Business Documents*

Under the work-product doctrine, a document prepared in the ordinary course of business is not considered to have been prepared in anticipation of litigation, and is therefore not given work-product protection.[149] Thus, a report which is regularly created for bookkeeping, accounting, personal, or other purposes is considered to be prepared in the ordinary course of business, even if it may be useful in preparing for litigation.[150] Similarly, opinion letters, written by a company's attorneys relating to whether the sale of shares without SEC registration could result in liability, were held to have been prepared as a matter of routine procedure and not in anticipation of litigation.[151] The ordinary course of business limitation also includes documents prepared pursuant to a statutory or regulatory duty.[152]

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145. *See infra* notes 179-192 and accompanying text.

146. *See infra* notes 191-203 and accompanying text.

147. *See infra* notes 204-215 and accompanying text.

148. *See generally* Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L. J. 917, 925-29 (1983).

149. *See* FED. R. CIV. P. 26(b)(3) advisory committee's notes on alterations to the Rule made in 1976: "[m]aterials assembled in the ordinary course of business, or made pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by this subdivision." *Id.; See* Martin v. Valley Nat'l Bank of Arizona, 140 F.R.D. 291, 304 (S.D.N.Y. 1991). The work product rule only applies to documents prepared primarily to assist anticipated or ongoing litigation, therefore, if a party creates a document in the ordinary course of business, it is not protected by work product, even if the party realizes that the document might also be useful in the event of litigation. *See id.*; FED. R. CIV. P. 26(b)(3) advisory committee's notes.

150. *See* Cohn, *supra* note 148, at 928, n.93.

151. *See* Garfinkle v. Arcata, 64 F.R.D. 688, 690 (S.D.N.Y. 1974).

152. *See* United States v. El Paso Co., 682 F.2d 530, 543 (5th Cir. 1982); Abel Inv. Co. v. United States, 53 F.R.D. 485, 489 (D. Neb. 1971).

Some documents fall outside the purview of ordinary business documents, and into the realm of the investigative document.[153] For example, following an accident, a corporation may investigate, *inter alia*, the cause of the accident, ways to prevent another accident in the future, and potential liability.[154] In the course of its investigation, the corporation may prepare documents detailing this information.[155] Since accidents are not an everyday occurrence, these documents will probably not be considered to have been created in the ordinary course of business.[156]

b. *Investigative Documents*

Investigative documents are created following an accident or event.[157] Since the 1970 amendments to the Federal Rules of Civil Procedure, three major lines of reasoning involving investigative reports have been developed.[158] The majority rule was established in *Thomas Organ Co. v. Jadranska Slobodna Plovidba*.[159] In *Thomas*, the defendant wanted the plaintiff to turn over two documents that were relevant to his claim,[160] but the plaintiff argued that the documents were privileged under the work product doctrine.[161] The court held that a report or statement made to a party's agent, which was not requested by or prepared for an attorney, or which otherwise reflects an attorney's legal expertise, is conclusively presumed to have been made in the ordinary course of business.[162] Therefore, the court concluded that such a report is not granted work product protection.[163]

The court based its opinion largely on policy reasons, finding its decision consistent with the Federal Rules' underlying

153. *See generally* Cohn, *supra* note 148, at 925-29.
154. *See id.*
155. *See id.*
156. *See id.*
157. *See* Robert D. Stokes, *Discovering Investigative Reports Under the Work Product Doctrine*, 34 BAYLOR L. REV. 156 (1982).
158. *See id.* at 154-57.
159. 54 F.R.D. 367 (N.D. Ill. 1972). *See also* Stokes, *supra* note 157, at 161.
160. *See Thomas*, 54 F.R.D. at 368-69.
161. *See id.*
162. *See id.* at 372.
163. *See id.*

policy of liberal discovery.[164] Further, the court reasoned that any document prepared after an event which is likely to lead to litigation is not deemed to be automatically prepared in anticipation of litigation, and is not within the purview of work-product protection.[165] If such an approach were adopted, then nothing created for an insurance company would ever be discoverable, because an insurance company only investigates situations after an event has occurred.[166] Courts wishing to adhere to the goal of providing liberal discovery have thus construed Federal Rule 26(b)(3) very narrowly.[167]

The second line of cases evolved out of *Almaguer v. Chicago, Rock Island & Pacific Railroad Co.*[168] In *Almaguer*, the plaintiff sustained injuries in an accident while working for the defendant.[169] The accident was witnessed by one person, whose written statement was obtained by the defendant's claim agent as part of the investigation, before the plaintiff retained counsel.[170] The court held that the witness' statement was prepared in anticipation of litigation,[171] reasoning that statements taken by a claim agent immediately after an accident are taken in anticipation of litigation.[172] The policies supporting this rule include: protecting the litigant's evaluation of his case; encouraging independent preparation for trial; and preventing one side from gaining automatic access to the preparatory work of the other side.[173] Further, the *Almaguer* court noted that the expectation of litigation in this circumstance was reasonable and supported the conclusion that the document was prepared in anticipation of litigation.[174]

The third approach is a hybrid of the *Thomas* rule and the *Almaguer* rule, and was articulated in *Hercules Inc v. Exxon Corp.*[175] In *Hercules*, the court described the anticipation of liti-

164. *See id.* at 373.
165. *See Thomas*, 54 F.R.D. at 373.
166. *See id.*
167. *See* Stokes, *supra* note 157, at 160-61.
168. 55 F.R.D. 147 (D. Neb. 1972).
169. *See id.* at 148.
170. *See id.*
171. *See id.*
172. *See id.*
173. *See* Stokes, *supra* note 157, at 161-62.
174. *See Almaguer*, 55 F.R.D. at 149.
175. 434 F. Supp. 136 (D. Del. 1977).

gation test as whether, in light of the nature of the documents and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained in anticipation of litigation.[176] This approach requires the court to balance the liberal policy of the federal rules against the need to protect an attorney's preparation of his or her case.[177] It allows protection for an attorney who reasonably anticipates litigation based on some action of his or her client, but does not allow a blanket protection when the possibility of litigation is too remote.[178]

4. *Common-law Tests to Determine Whether a Document was Created in the Anticipation of Litigation*

a. *Specific Claim Requirement*

There are several situations where the distinction between a document prepared in the ordinary course of business and one prepared in anticipation of litigation becomes confused. For example, in *SCM Corp. v. Xerox Corp.*,[179] plaintiffs, pursuant to antitrust litigation, sought a memoranda prepared by attorneys in the Xerox patent department.[180] The memoranda contained public information, brief descriptions of patents, and legal opinions regarding patent applicability.[181] The court held that the documents were not sufficiently connected to the litigation to merit protection since no specific claim against the company was present at the time of preparation.[182] The court went on to state that "legal departments are not citadels in which public, business, or technical information may be placed to defeat dis-

176. *See id.* at 151. This test is essentially the same test articulated by CharlesWright and Arthur Miller:

> Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.

8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE 2024, at 343 (2d ed. 1994).

177. *See Hercules*, 434 F. Supp. at 150.

178. *See infra*, note 184 and accompanying text.

179. 70 F.R.D. 508 (D. Conn. 1976).

180. *See id.* at 515.

181. *See id.*

182. *See id.*

covery and thereby ensure confidentiality."[183] Thus, the specific claim requirement prevents a company from protecting any document it so desires by merely involving a lawyer in the production of the document.[184]

In *National Union Fire Ins. v. Murray Sheet Metal*,[185] a case involving investigative documents, the Fourth Circuit adopted the specific claim requirement as set forth in *Hercules*.[186] In *National Union*, an in-house investigation was conducted following a fire which later became the subject of an insurance dispute.[187] The court provided some guidelines for analyzing work product application in this situation, stating that the critical factor is the driving force behind the creation of the requested document.[188] The court stated that "[t]he document must be prepared because of the prospect of litigation when the preparer faces an actual or potential claim following an actual event or series of events that reasonably could result in litigation."[189] The court then pointed out two factors which weighed against finding the documents were prepared in anticipation of litigation.[190] First, the documents were created by persons in charge of safety in the workplace, thus calling into question whether

183. *Id.*

184. *See* United States v. Jordan, 591 F.2d 753, 775 (D.C. Cir. 1978) (finding that the work-product doctrine does not extend to every document created by an attorney, but is limited to materials prepared in the anticipation of litigation); Hercules Inc. v. Exxon Corp., 434 F.Supp. 136, 151 (D. Del. 1977) (holding that work-product is restricted to documents prepared in anticipation of litigation because an attorney who does not envision litigation, except as a remote contingency, will not anticipate requests for discovery, and therefore the fear of disclosure will not deter adequate consideration of the client's problem); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980) (although every audit potentially could lead to litigation, the possibility alone is not enough to support a claim of work product protection); Fustok v. Conticommodity Serv. Inc., 106 F.R.D. 590, 591-92 (S.D.N.Y. 1985) (finding that a report was not protected by the work-product privilege because the prospect of litigation was not identifiable when the report was written, since no specific claim had already arisen); Gould Inc. v. Mitsui Mining & Smelting, 825 F.2d 676 (2d Cir. 1980) (holding that the application of the work product doctrine depends upon the "existence of a real, rather than speculative, concern that the thought processes of . . . counsel in relation to pending or anticipated litigation would be exposed").

185. 967 F.2d 980 (4th Cir. 1992).

186. *See id.* at 981.

187. *See id.*

188. *See id.* at 984.

189. *Id.*

190. *See National Union,* 967 F.2d at 985-86.

these persons were preparing the documents in anticipation of litigation.[191] Second, many documents were prepared by an employee before counsel was retained or before the insurance company was notified, casting doubt on the proposition that the documents were prepared for litigation purposes.[192]

b. *Function of the Documents*

Unlike *Hercules* and *National Union*, some courts do not apply the specific claim requirement.[193] Instead, those courts may apply a test which focuses on the function of the documents.[194] For example, in *Delaney, Migdail & Young v. IRS*,[195] the court found that policy reasons justified applying the function of the documents test in lieu of the specific claim requirement.[196] In *Delaney*, the plaintiffs, pursuant to the Freedom of Information Act, sought production of two memoranda analyzing the legal ramifications of a new system of statistical sampling, adopted by the IRS, to be used for auditing large accounts.[197] The plaintiff claimed that the documents were not prepared in anticipation of litigation because the agency had not demonstrated that a specific claim had arisen.[198] The function of the documents was to advise the agency of the types of challenges likely to be brought against it, the agency's potential defenses, and the likely outcome.[199] Utilizing policy arguments from *Hickman*, the court stated that the plaintiffs were only trying to obtain the documents to gain the agency attorneys' assessment of the program's legal vulnerabilities in order to make sure that it did not miss anything in crafting its legal cases against the program.[200] The court ultimately held that the documents were entitled to work product protection.[201] The *Delaney* court explicitly declined to follow the specific claim requirement, because it would ignore the function performed by

191. *See id.* at 984.
192. *See id.* at 986.
193. *See* Delaney, Migdail & Young v. IRS, 826 F.2d 124 (D.C. Cir. 1987).
194. *See id.* at 127.
195. 826 F.2d 124 (D.C. Cir. 1987).
196. *See id.* at 126-27.
197. *See id.* at 125-26.
198. *See id.* at 126-27.
199. *See id.* at 127.
200. *See Delaney*, 826 F.2d at 127.
201. *See id.*

the withheld material and would conflict with well established rules of discovery.[202]

c. *Primary Motivation Standard*

The final consideration for determining whether a document was created in anticipation of litigation is the primary motivation, or purpose, for creating the document.[203] The primary motivation standard has been described as follows:

> preparation was primarily motivated by the prospect of litigation . . . but not material prepared for other legal eventualities or for business purposes. The standard in this Section looks to the reasonable anticipation of the lawyer who prepared the material at the time it was prepared. The fact that anticipated litigation did not in fact ensue does not destroy the work product status of material . . . . [T]he immunity covers only material produced with litigation as the primary object of attention. Whether such was the motivation is determined by considering the factual context in which materials are prepared, the nature of the materials, and the expected role of the lawyer, if any, in ensuing litigation.[204]

The primary motivation standard was applied in *In re Leslie Fay Companies Securities Litigation.*[205] In *Leslie Fay*, a class action suit brought by shareholders pursuant to findings of accounting irregularities in the company's financial statements,[206] the court held that materials generated while investigating complaints of fraud, in connection with the issuance of securities, were not entitled to work product protection.[207] The court reasoned that even though litigation could reasonably be anticipated under the circumstances, there was an insufficient show-

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202. *See id.*

203. *See* Soeder v. General Dynamics Corp., 90 F.R.D. 253, 255 (D. Nev. 1980) (finding that the primary motivation was not to prepare for litigation, but to improve the product, guard against adverse publicity, and protect the company's economic interests); *National Union*, 967 F.2d at 984 (finding that the critical factor is the driving force behind the preparation of each requested document); *El Paso*, 682 F.2d at 543-44 (finding that primary motivation was "to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability").

204. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 136(k) (Tentative Draft No. 6, 1993).

205. 161 F.R.D. 274 (S.D.N.Y. 1995).

206. *See id.* at 277.

207. *See id.* at 280.

ing that the documents were created in anticipation of litigation.[208] Rather, the primary motivation for the investigation was business related,[209] so the documents were not shielded by work product protection.[210]

The court based its determination of the primary motivation upon the circumstances surrounding the creation of the documents.[211] The Audit Committee used the investigation and report to decide who to fire, to determine the magnitude of the fraud, to re-organize new organization and financial structure, and to reassure creditors and future lenders that the responsible parties and problematic policies were being removed.[212] The court stressed the importance of looking at the overall circumstances to determine what is really going on,[213] pointing out that the company would have conducted the investigation even if there had been no litigation.[214]

One resounding principle emerges from close examination of the various tests and types of documents being analyzed: the crucial factor in determining whether work product protection applies is the circumstances, in their entirety, under which the protection is being claimed.[215] Labeling a document as either a "business" document or an "investigative" document adds no clarity to the issue. In fact, practically any document before a court could easily be placed into either category.[216] Once a court

208. *See id.*
209. *See id.*
210. *See Leslie Fay*, 161 F.R.D. at 280.
211. *See id.*
212. *See id.* at 280-81.
213. *See id.* at 281.
214. *See id.*
215. *See generally id.* at 280 ("reasonableness" in relation to the anticipation of litigation requirement focuses on the temporal limits of the doctrine's application based on the circumstances surrounding the case); Delaney, Migdail & Young v. IRS, 826 F.2d 124, 126-27 (D.C. Cir. 1987) (looking beyond the law firm's argument that there was no specific claim when the document was prepared by the IRS to the fact that the law firm was merely attempting to "borrow the wits" of the IRS attorneys); National Union Fire Insurance v. Murray Sheet Metal, 967 F.2d 980, 984 (4th Cir. 1992) (weighing all of the facts in order to reach a conclusion on whether work product protection applied).
216. *See, e.g., National Union*, 967 F.2d 980, 984. Arguments supporting either type of document could be made in regard to the investigative report in issue in *National Union*. *See id.* at 981. It could be argued that since the document was created, following a fire, in order to investigate the cause of the fire, the document was an investigative document. *See id.* at 984. However, it could also be argued

attempts to provide rigid rules in applying the work product doctrine, it loses sight of the importance of looking to the circumstances in which it was created.[217] This was the error the district court made in the *Adlman I* decision.[218] The court tried to develop a concrete rule to apply in all situations, which is not practical in the context of work product doctrine.[219] The Court of Appeals was correct in reversing the district court's development of the rule.[220]

III. Lead Case: United States v. Adlman I[221]

A. *Facts*

The action was brought by the United States to enforce an Internal Revenue Service (IRS) summons issued to Monroe Adlman.[222] Adlman was an in-house attorney and Vice President of Taxes for Sequa Corporation.[223] The summons was for production of a preliminary and final draft of a memorandum prepared by Sequa's auditors, Arthur Andersen & Co. pursuant to Adlman's request.[224] Adlman refused to turn over the documents, claiming they were protected by the attorney-client privilege and work-product doctrine.[225]

Adlman requested the memorandum in order to determine the likely tax consequences of a plan to combine two subsidiary corporations owned by Sequa.[226] The memorandum was written by an accountant and partner at Arthur Andersen who special-

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that since the company policy was to undergo such an investigation whenever there was any kind of accident, including a fire, the document was created in the ordinary course of business. *See id.* Further, if the document had been created by someone in the industry of investigating claims based on accidents, such as an insurance claims agent, it could be argued the investigation was in the ordinary course of business for the claims agent. *See id.*

217. *See infra* notes 268-271 and accompanying text. The *Adlman* court points out two instances where the rigid rule established by the district court would be incorrect in its application.

218. *See infra* notes 371-389 and accompanying text.

219. *See infra* notes 371-389 and accompanying text.

220. *See infra* notes 371-389 and accompanying text.

221. 68 F.3d 1495 (2d Cir. 1995).

222. *See id.* at 1496.

223. *See id.*

224. *See id.*

225. *See id.*

226. *See Adlman I*, 68 F.3d at 1497.

ized in evaluating the tax implications of corporate restructuring.[227] Following the creation of the memorandum, the restructuring took place according to Arthur Andersen's suggestions.[228] Because of the reorganization, Sequa stood to receive a large tax refund.[229] The IRS audited Sequa's tax returns from 1986 through 1989.[230] Pursuant to the audit, the IRS requested the memorandum prepared by Arthur Andersen, which Sequa refused on the grounds that the information was protected by the attorney-client privilege and work-product doctrine.[231]

B. *Procedural History*

1. *District Court*

The district court held that the documents were not protected by the attorney-client privilege because the objective evidence surrounding the communication did not suggest that the attorney-client privilege was invoked.[232] Namely, there was no evidence to distinguish Arthur Andersen's work on this particular occasion from any of the other work Arthur Andersen performed for Sequa.[233] The court also held that the documents were not protected by the work product doctrine and ordered disclosure of the document to the IRS, based on the fact that the document was prepared before the transaction took place.[234] Thus, the court articulated the rule that the possibility of litigation based on an event which has not yet occurred is not enough to justify work product protection.[235]

C. *The Parties' Arguments*

Adlman argued that the attorney-client privilege applied to the consultation and that the help he received from Arthur Andersen was within the attorney-client privilege under *Kovel*, since the help was rendered to assist Adlman in giving advice to

227. *See id.*
228. *See id.*
229. *See id.*
230. *See id.* at 1498.
231. *See Adlman I*, 68 F.3d at 1498.
232. *See id.* at 1499.
233. *See id.*
234. *See id.*
235. *See id.*

his client.[236] In support of his claim, Adlman noted that one of his duties was to advise Sequa's management of the consequences of a particular transaction under the tax laws.[237] However, due to his lack of expertise in the corporate reorganization provisions of the tax code, he was forced to seek the help of the Arthur Andersen accountant to interpret the provisions for him.[238] Adlman claimed he was acting in his capacity as a lawyer advising the corporation when he had the document prepared, and it was clear to both himself and Arthur Andersen that the memorandum was private and confidential.[239] Adlman further stated that after reading the final Arthur Andersen memorandum, he was able to draw his own conclusions regarding the tax consequences of the restructuring, and advised Sequa accordingly.[240]

Addressing the work product claim, Adlman also argued that he was certain that Sequa would "end up in litigation with the IRS" over the reorganization.[241] This belief was based on the following: the IRS audited Sequa every year, so this transaction would not escape their attention; the large amount of the claimed tax loss would require review by the Congressional Joint Committee on Taxation; and, there was no case or ruling directly on point.[242]

The government claimed that Arthur Andersen was a tax and business advisor to Sequa's management.[243] The memorandum was tax advice given to Sequa as part of Arthur Andersen's larger role as consultant to Sequa's management, and not simply advice as an accountant assisting an attorney in rendering legal advice.[244] The government also introduced evidence that Arthur Andersen's services in connection with the memorandum were not billed separately from any of the other services Arthur Andersen performed for Sequa's management.[245] Thus,

236. *See Adlman I*, 68 F.3d at 1498.
237. *See id.*
238. *See id.*
239. *See id.*
240. *See id.*
241. *Adlman I*, 68 F.3d at 1498.
242. *See id.*
243. *See id.* at 1499.
244. *See id.*
245. *See id.*

this service was not provided to aid Adlman in advising his client, but was provided directly to the management as an accounting service, which is not entitled to receive work product protection.[246]

D. *The Court's Analysis*

1. *Attorney-Client Privilege*

Adlman claimed that the advice he received from Arthur Andersen met the criteria in *Kovel*, thus establishing that the communication was protected by the attorney-client privilege.[247] In *Kovel*, the court held that the attorney-client privilege would extend to communications by an attorney's client to an accountant hired by the attorney to assist the attorney in understanding the client's financial information.[248] The *Kovel* court stressed that vital to the privilege was that the communication be made in confidence for the purpose of obtaining legal advice from the attorney.[249] The Second Circuit in *Adlman I* found that Adlman failed to meet his burden of establishing that the facts were within the *Kovel* principle because the facts were subject to competing interpretation and there was no reason to upset the decision of the district court.[250] The principle the court relied upon was that if Sequa provided information to Arthur Andersen in order to seek their expert advice on the tax implications of the proposed transaction, the attorney-client privilege would not apply.[251] The evidence supported the notion that Arthur Andersen was not hired by Adlman, in his capacity as attorney, to render legal advice, but that Arthur Andersen was hired by Sequa for general tax advice.[252] This conclusion was drawn largely because there was nothing to separate the advice provided for Adlman from the advice given to Sequa as part of Arthur Andersen's tax advisor role.[253] There were no separate billing statements and Arthur Andersen prepared the

246. *See Adlman I*, 68 F.3d at 1500.
247. *See id.*
248. *See supra* notes 45-57 and accompanying text.
249. *See supra* notes 45-57 and accompanying text; United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).
250. *See Adlman I*, 68 F.3d at 1500.
251. *See id.*
252. *See id.*
253. *See id.*

memorandum analyzing the problem because Adlman lacked the expertise to do so himself.[254] Thus, both the lack of contemporaneous documentary proof supporting Adlman's position, along with the presence of proof supporting the government's position, was enough to defeat Adlman's claim that the communication was protected by the attorney-client privilege.[255]

2. *Work Product*

The district court relied on two cases to hold that a document, created before the event which gives rise to litigation, cannot be created in anticipation of litigation and is therefore not subject to the work product protection.[256] The first case was *National Union Fire Insurance Co. v. Murray Sheet Metal.*[257] *National Union* held that the critical factor in determining whether work product protection applied was the motivation behind the preparation of each document.[258] The court further stated that the "document must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation."[259] The *Adlman I* court distinguished the *National Union* decision on the ground that the *National Union* court was only stressing the causal relationship between the anticipated litigation and the creation of the document, but the court did not formulate a requirement that the event leading to litigation had already occurred.[260] Further, the facts of *National Union* did not include a dispute about the timing of the preparation of the document, because the event, a fire, occurred before the document was prepared.[261] Thus, the court's statement was dictum.[262]

254. *See id.*

255. *See Adlman I*, 68 F.3d at 1500 and n.1.

256. *See id.* at 1501-1502.

257. 967 F.2d 980 (4th Cir. 1992). *See supra* notes 185-192 and accompanying text.

258. *See National Union*, 967 F.2d at 984.

259. *Id.*

260. *See Adlman I*, 68 F.3d at 1501.

261. *See id.*

262. *See id.*

The second case relied upon by the district court was *SCM Corp. v. Xerox Corp.*[263] *SCM* held that the critical factor in finding that a document was prepared in anticipation of litigation is that there must be a specific claim which makes the prospect of litigation identifiable.[264] The *Adlman I* court distinguished *SCM* because the specific claim requirement only stressed the need for a specific claim, not a requirement that the actionable facts have already occurred.[265]

Moreover, the *Adlman I* court emphasized that there is no rule that a document must be prepared following the actionable event in order to merit work product protection, and the court saw no reason to create one.[266] The court illustrated its point by noting that if a party decides to trade under a disputed trademark, or publishes a book with a contested copyright, the party may very well expect to be sued, even though the event has not yet occurred that would give rise to the litigation.[267] The event in these situations is either the actual trade of the trademark or the publication of the book.[268] According to the court, there is no reason to deny work-product protection in this situation to any document created before such events if the document was created to prepare for litigation.[269] These examples represent situations which would constitute reasonable, prudent action on the part of the attorney, worthy of work product protection as articulated in the Wright and Miller test.[270]

E. *Subsequent History*

1. *The District Court on Remand*[271]

The district court, on remand, held that the memorandum was not work product based on its finding that Sequa's primary purpose in creating the document was to determine whether or

263. 70 F.R.D. 508 (D. Conn. 1976).
264. *See id.* at 515.
265. *See Adlman I*, 68 F.3d at 1501-1502.
266. *See id.* at 1501.
267. *See id.*
268. *See id.*
269. *See id.*
270. *See Adlman I*, 68 F.3d at 1501. *See also supra* note 176 and accompanying text.
271. United States v. Adlman, 79 A.F.T.R.2d 97-1946 (S.D.N.Y. 1996).

not it should go through with a multi-million dollar deal.[272] It therefore could not be found that the document was created principally or exclusively in the anticipation of litigation.[273]

2. *The Second Appeal to the Second Circuit Court of Appeals [Adlman II]*[274]

The remanded decision was appealed to the Second Circuit to determine "whether a study prepared for an attorney assessing the likely result of an expected litigation is ineligible for protection under . . . Rule [26(b)(3)] if the primary or ultimate purpose of making the study was to assess the desirability of a business transaction, which, if undertaken, would give rise to the litigation."[275] To answer this question, the Second Circuit was required to interpret, for the first time, the anticipation of litigation requirement in Rule 26(b)(3).[276] The court ultimately adopted a two part test, holding that a document falls within Rule 26(b)(3) protection when it "was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation."[277]

The court considered two alternative interpretations of the anticipation of litigation requirement to reach its conclusion.[278] The first interpretation focuses on whether the documents were prepared "primarily or exclusively to assist in litigation."[279] The second interpretation, formulated by Wright and Miller, focuses on "whether the documents were prepared 'because of' existing or expected litigation."[280] The court ultimately adopted the "because of" test.[281]

The court rejected the primarily to assist in litigation standard as inconsistent "with the text and policies of . . . Rule [26(b)(3)]."[282] Citing to the text of Rule 26(b)(3), the court noted

272. *See id.*
273. *See id.*
274. United States v. Adlman, No. 96-6095, 1998 U.S. App. LEXIS 2633 (2d Cir. Feb. 13, 1998).
275. *Id.* at *2.
276. *See id.* at *8.
277. *Id.* at *2.
278. *Id.* at *12.
279. *See Adlman II*, 1998 U.S. App. LEXIS 2633, at *12.
280. *Id. See also supra* note 176 and accompanying text.
281. *See id.* at *13.
282. *See id.* at *15.

that the rule expressly provides protection to "documents 'prepared . . . for trial'" and to documents "prepared 'in anticipation of litigation.'"[283] This language demonstrates that Rule 26(b)(3) was not intended to provide protection only to documents created to assist in preparation for litigation, because the language "prepared for trial" would adequately protect these documents.[284] The inclusion of "in anticipation of litigation" indicates that the drafters intended to provide protection beyond just documents created "primarily to assist in litigation."[285]

The court also found that the policy rationale behind Rule 26(b)(3) would be undermined by the use of the primarily to assist in litigation standard.[286] In support of this conclusion, the court first noted that when a court orders production of a document based upon an adverse party's showing of substantial need, Rule 26(b)(3) mandates that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of . . . [a party or representative] concerning the litigation."[287] Second, the Advisory Committee notes to Rule 26(b)(3) state 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 preparatory work of the other side."[288] Based on the textual references to the Rule and the Advisory Committee notes, the court stated that a blanket exclusion of documents created to assist in making a business decision from work product protection would cripple the policy underlying the rule.[289]

The court also noted that the primarily to assist in litigation standard places companies in a precarious situation,[290] because if the company wants to protect its litigation prospects by using less candor or by making the document less complete, it subjects itself to uninformed decision making.[291] Conversely,

283. *Id.*
284. *See Adlman II*, 1988 U.S. App. LEXIS 2633, at *15.
285. *See id.* at *15-16.
286. *See id.* at *17-18.
287. *Id.* at *16 (quoting FED. R. CIV. P. 26(b)(3)).
288. *Id.* at *16 (quoting FED. R. CIV. P. 26(b)(3) Advisory Committee's notes).
289. *See Adlman II*, 1998 U.S. App. LEXIS 2633, at *16-22.
290. *See id.* at *21.
291. *See id.*

forcing production of a document that thoroughly addresses the company's litigation strategies, including the strengths and weaknesses of its case, would be highly prejudicial to the company's litigation prospects.[292]

Finally, the court addressed language found in Rule 26(b)(3) which favors the primarily to assist in litigation standard.[293] For example, the caption to Rule 26(b)(3) reads "trial preparation," and the Advisory Committee notes refer to "trial preparation materials" when discussing work product protection.[294] The court summarily rejected the argument that these references were persuasive evidence that the primarily to assist in litigation standard was the better interpretation of rule 26(b)(3).[295] The court "attach[ed] small importance to these references," given that the express text of the Rule and commentary also refers to documents prepared "in anticipation of litigation."[296]

Turning to the Second Circuit decision in *Adlman II*, the court could not determine which test the district court applied on remand. Therefore, the court vacated the district court's decision and remanded for the district court to apply the "because of" test.[297] Thus, that if the district court finds that "substantially the same" memorandum would have been prepared in any event, in the "ordinary course of business" of undertaking the restructuring, then the "because of" test was not met because the memorandum was not prepared "because of" the expected litigation.[298] If however, the district "court finds the memorandum would not have been prepared but for" the corporation's anticipation of litigation with the IRS, then the "because of" test was met.[299]

292. *See id.*
293. *See id.* at *17.
294. *See Adlman II*, 1998 U.S. App. LEXIS 2633, at *17.
295. *See id.*
296. *See id.*
297. *See id.* at *31-33.
298. *See id.* at *32-33.
299. *See Adlman II*, 1998 U.S. App. LEXIS 2633, at *33.

IV. Analysis

A. *Attorney-Client Privilege*

Corporations as taxpayers often require the assistance of in-house counsel as well as outside advice, due to the complexity of the tax laws and the fact that penalties can be assessed if income tax returns are completed incorrectly.[300] In order to obtain such assistance from an outside source, such as an accountant, information about the company's financial situation must be related to the accountant.[301] Further, any memoranda, assessments, and opinions rendered by the accountant may assess a variety of positions a corporation can take on a tax return, which if turned over to the IRS during discovery, will point out to the IRS the problems with the tax return and increase exposure to liability.[302] Thus, it is clear why corporations want to increase the expanse of the attorney-client privilege for communications made to accountants and advice rendered by the accountants.[303] On the other hand, granting too much of an attorney-client privilege will build a zone of silence around corporate affairs that will shield too much information from the government, thereby granting corporations license to side step tax laws.[304]

The *Adlman I* decision represents a sound weighing of these competing policies, and also accurately reflects the evolution the attorney-client privilege in the corporate context. In fact, *Adlman I* adds a level of clarity to the law by providing guidelines for when the attorney-client privilege is properly applied to accountant-client communications in the corporate setting.

300. *See* Friedman, *supra* note 23, at 155. *See also* 26 U.S.C. §§ 6651-6724, 7201-7344 (1996).

301. *See supra* notes 19-24 and accompanying text.

302. *See supra* note 62.

303. *See supra* note 62.

304. *See supra* notes 35-37 and accompanying text.

1. *Application of the Attorney-Client Privilege in the Corporate Context*

a. *Accountant-Client Privilege*

The *Adlman I* court did not deviate from the rule of law stated in *Couch* and affirmed in *Young* that there is no accountant-client privilege.[305] In spite of arguments to the contrary, the *Adlman I* court was correct in rejecting an accountant-client privilege. Several arguments have been voiced throughout the corporate community in favor of an accountant-client privilege.[306] Arguments in favor of an accountant-client privilege consist of conserving resources, preserving the client's choice of tax adviser, the fact that some states allow an accountant-client privilege, and the fact that CPAs and other enrolled agents represent taxpayers before the IRS in the same manner as lawyers under rules for administration of practice before the IRS.[307] These arguments are not persuasive. A corporation may conserve some resources if there was an accountant-client privilege. In practical terms, however, a corporation like Sequa, with in-house attorneys, is going to utilize these attorneys for all of its legal problems. That is their role within the corporate entity. If an accountant is also needed, that will not alter the fact that the corporation will have already called upon its own attorney for advice on such a matter. This argument can really only apply to small corporations who lack in-house counsel.

Notwithstanding the fact that a small corporation may not have in-house counsel, it is still prudent business practice and in the best interests of the corporation to hire an attorney in addition to an accountant. An accountant lacks knowledge in many areas of the law, such as procedural issues, which would require an attorney's services. Finally, the help needed from an accountant may not merit protection, even if an attorney is involved. For example, if the accountant is helping an attorney prepare the corporation's tax return, the information relayed will not be protected by the attorney-client privilege, for tax re-

305. *See supra* notes 59-61 and accompanying text.
306. *See supra* notes 86-92 and accompanying text.
307. *See supra* notes 86-92 and accompanying text.

turn preparation is considered business advice, not legal advice.[308]

For similar reasons, the limitations on a corporation's choice of adviser will not be extensive due to the fact that a corporation like Sequa has in-house counsel. Even in situations requiring the services of an accountant, the attorney will be involved. If communications in such a situation would merit protection if communicated to the attorney, then it is not difficult for the attorney to take appropriate steps to insure that the communications to the accountant are also protected. If what is being sought is accounting services, then the communications simply do not merit protection.

In addition, the fact that some states recognize an accountant-client privilege is not a sufficient reason for recognizing the privilege at the federal level. Corporations, especially ones with in-house counsel, are sophisticated entities, who should be aware of the differences in the law between the state and federal level. The fact that accountants are allowed to represent clients as attorneys before the IRS may give a client the impression that the attorney-client privilege would apply in this situation. This could be a problem for a person unfamiliar with the legal system. Here, however, the corporation is a sophisticated entity, which should be aware that communications to an accountant would not be privileged. Further, the Court's reasoning in *Couch* is applicable to this situation, where the Court stated that the accountant-client privilege was not of such a nature as to create an expectation of privacy in the client.[309]

The arguments against the imposition of an accountant-client privilege substantially outweigh those favoring the accountant-client privilege. First, under evidentiary principles, testimonial privileges are only tolerable when they are designed to protect weighty and legitimate competing interests.[310] This is based on the notion that the use of the privilege serves as an "obstacle to the administration of justice"[311] because it prevents the use of highly relevant evidence. This argument certainly applies to the *Adlman I* decision. In *Adlman I*, the IRS sought the

308. *See* WIGMORE, *supra* note 7, at § 2192, at 73.
309. *See supra* notes 81-84 and accompanying text.
310. *See supra* notes 81-84 and accompanying text.
311. *See supra* notes 81-84 and accompanying text.

memoranda drawn up by Arthur Andersen in an effort to explain the tax consequences of proposed corporate restructuring.[312] The restructuring occurred as recommended by Arthur Andersen, thus the tax consequences analyzed in the Arthur Andersen memoranda were highly relevant to what Sequa claimed on its tax returns for the years during the restructuring.[313] By refusing to turn over the memoranda, Sequa was withholding highly relevant information from the government, frustrating the purpose of the broad discovery and evidentiary principles.

Second, the role of an attorney and an accountant are different.[314] This difference forms the foundation for allowing an attorney-client privilege, while refusing an accountant-client privilege.[315] An attorney's role is to be a confidential advisor, owing a duty of undivided loyalty to his or her client.[316] The attorney-client privilege is instrumental in building and maintaining this kind of relationship between an attorney and his or her client because it provides the client with the assurance that information revealed to the attorney will not be repeated by the attorney without the client's consent.[317] An accountant, on the other hand, does not simply owe a duty of loyalty to the client, but also to the government agencies regulating the client's industry, the client's creditors, and the client's investors.[318] In *Couch*, the Court rejected outright the assertion that a client's records were entitled to protection based on the client's claim of reliance on the confidential nature of the accountant-client relationship and the client's resulting expectation of privacy.[319] The Court stated that "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return."[320] Further, the fact that the accountant can be criminally prosecuted for preparing a false

312. *See* United States v. Aldman, 68 F.3d 1495, 1496 (2d Cir. 1995).
313. *See id.* at 1497.
314. *See* Couch v. United States, 409 U.S. 322, 335-36 (1973).
315. *See id.*
316. *See supra* note 77 and accompanying text.
317. *See generally, supra* note 31 and accompanying text.
318. *See supra* note 80 and accompanying text.
319. *See Couch*, 409 U.S. at 335.
320. *Id.* at 335-36.

return, highly encouraging the accountant to disclose any information given to him or her by the client, precludes a client from claiming that he or she had an expectation of privacy or confidentiality.[321] In addition, the role of an accountant is to give information to the public about the client's financial statements, not to serve as a confidential advisor to the client.[322]

Adlman I serves as an example of a corporation attempting to protect its communications made to an accountant. While Sequa claimed that its accountant, Arthur Andersen, was hired to assist Adlman in rendering legal advice, the facts establish that Arthur Andersen was hired to provide tax advice to the corporation directly.[323] Because Adlman also happened to be an attorney, the corporation tried to cloak the information Arthur Andersen had in the form of the attorney-client privilege.[324] In reality, however, this case is very similar to *Couch* in that a client was attempting to conceal information given to its accountant from the IRS. But under the reasoning of *Couch*, there is no reasonable expectation of privacy or confidentiality between an accountant and client.[325] Thus, the *Adlman* court's decision regarding the attorney-client privilege was consistent with the case law regarding communications between accountants and clients.

b. *Application of the Attorney-Client Privilege to an Accountant as an Agent of the Attorney*

Following the *Upjohn* decision, whether the attorney-client privilege applies in the corporate context is determined on a case-by-case basis.[326] The burden of proof is on the party asserting the attorney-client privilege.[327] Thus, the *Adlman I* decision was analyzed in light of its facts with the burden of proof placed on Sequa.[328] However, *Upjohn* gave no clear guidelines for lower federal courts to determine when the attorney-client priv-

321. *See id.*
322. *See supra* note 85 and accompanying text.
323. *See* United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995).
324. *See generally supra* notes 224-227 and accompanying text.
325. *See supra* notes 81-84 and accompanying text.
326. *See supra* note 42 and accompanying text.
327. *See supra* note 42 and accompanying text.
328. *See Adlman*, 68 F.3d at 1499-1500.

ilege applies in the corporate context.[329] The *Kovel* case established the elements Sequa had to show in order for the attorney-client privilege to apply: a confidential communication, made to obtain legal advice, from a lawyer.[330] However, applying the *Kovel* test and subsequent case law to *Adlman I*, the facts of *Adlman I* fall far short of justifying the application of the attorney-client privilege to the memoranda prepared by Arthur Andersen.

Under *Kovel*, Sequa needed to establish that there was a confidential communication to obtain legal advice from a lawyer.[331] In *Adlman I*, information pertaining to the corporation's decision to reorganize, as well as corporate financial information, was given to Arthur Andersen to enable it to analyze Sequa's tax position in light of the tax code.[332] To satisfy the *Kovel* test, the information must have been rendered to increase Adlman's understanding of the tax code so he could furnish legal advice to Sequa.[333] Otherwise, if Sequa was merely seeking tax advice from Arthur Andersen, the advice sought would be the accountant's, not the attorney's, and the privilege would not apply.[334] The facts in *Adlman I* establish that the information was being used as accounting advice by Sequa, not that Adlman was utilizing Arthur Andersen's expertise to help him advise his client.[335] First, Adlman was not only Sequa's attorney, he was also Sequa's Vice President for Taxes.[336] This meant that Adlman had business as well as legal roles within the corporation. Any communications made under the business role are not protected by the attorney-client privilege.[337] Second, Arthur Andersen was regularly employed by Sequa, the client, for accounting services.[338] There was nothing to distinguish this transaction from any other accounting work

329. *See generally supra* notes 41-43 and accompanying text. *See also* Weiss, *supra* note 35 at 1182.

330. *See supra* note 57 and accompanying text.

331. *See supra* note 57 and accompanying text.

332. *See Adlman I*, 68 F.3d at 1497.

333. *See id.* at 1500.

334. *See id.* at 1499-1500.

335. *See id.* at 1500.

336. *See id.*

337. *See Adlman I*, 68 F.3d at 1500.

338. *See id.*

that Arthur Andersen performed for Sequa.[339] Third, Arthur Andersen also gave advising services to Sequa in connection with the restructuring.[340] Namely, Arthur Andersen sent a summary of its recommendations and conclusions directly to Sequa management, not to Adlman for his analysis and use in rendering legal advice.[341] Fourth, Adlman lacked the expertise to analyze the tax implications of the restructuring, meaning that Arthur Andersen had to perform this analysis.[342] This places the kind of advice Arthur Andersen rendered outside of the realm of explaining or merely interpreting the tax code for Adlman, into actually performing the analysis on behalf of Sequa. This also defeats the possibility of drawing an analogy to the accounting advice rendered by Arthur Andersen and the interpreter analogy given in *Kovel*.[343] In order for the analogy to apply, the accountant could only explain the tax code provisions, and how certain facts fall within the tax code, not advise the corporation as to how it should handle a particular situation. That is the role of the attorney if the attorney-client privilege is going to be invoked. Thus, *Adlman* is consistent with *Kovel* by failing to permit the use of the attorney-client privilege to protect Arthur Andersen's memoranda.

c. *In-House Counsel and the Attorney-Client Privilege*

A problem often arises when in-house corporate counsel asserts the attorney-client privilege. In order for advice given by in-house counsel to be protected, it must be legal advice.[344] Often, in-house counsel has dual business and legal responsibilities within a corporation, as in *Adlman*.[345] Under *Hardy*, the business aspects of a corporate decision based on both business and legal decisions are not protected just because legal considerations are also involved.[346] Similarly, *In re Sealed Case* held

339. *See id.*
340. *See id.* at 1497.
341. *See id.*
342. *See Adlman I*, 68 F.3d at 1498.
343. *See supra* notes 56-58 and accompanying text.
344. *See supra* note 100 and accompanying text.
345. *See Adlman I*, 68 F.3d at 1496.
346. *See* Hardy v. New York News, Inc., 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987).

that in order for advice rendered by an in-house attorney who was also a company vice-president to be protected, there must be a clear showing that the in-house attorney gave the advice in a professional legal capacity.[347] Also, tax preparation and accounting services are not considered legal advice.[348] It was asserted before the Court of Appeals in *Adlman I* that in-house counsel was being held to a higher standard than outside counsel, on the grounds that in-house counsel has to make a clear showing that the advice was legal advice, that it was not accounting service, and that the advice was not part of tax return preparation.[349] Outside counsel does not bear this elevated burden because the dual role problem is lacking; it is much more clear when outside counsel was hired for legal advice.[350] In addition, commentators of the *Adlman I* decision have determined that the district court placed upon in-house counsel and corporations the requirement to separate transactions sought to be privileged from other work accountants perform for the law firm.[351] This issue was effectively handled in *Adlman I*.[352] The court explained that the district court's opinion did not require separate retainer and billing arrangements in order to protect the attorney-client privilege.[353] Rather, the district court merely examined the circumstances as a whole as required by *Upjohn* and *Kovel* in order to determine whether the attorney-client privilege was applicable.[354] Thus, the district court did not place a requirement upon in-house counsel to obtain separate retainer and billing arrangements in order to preserve the attorney-client privilege.[355]

The claim that in-house counsel is held to a higher level of scrutiny when the attorney-client privilege is asserted has merit. However, this higher burden is necessary to preserve the balance of competing policies courts have achieved.[356] The ad-

347. *See In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984).
348. *See supra* note 104 and accompanying text.
349. *See* Ferguson, *supra* note 99 at 47.
350. *See id.*
351. *See id.*
352. *See Adlman I*, 68 F.3d at 1500, n.1.
353. *See id.*
354. *See id.*
355. *See id.*
356. *See supra* notes 27-37 and accompanying text.

ded requirement upon in-house counsel is that there must be a clear showing that the advice rendered is legal advice.[357] No such requirement is necessary for outside counsel because outside counsel lacks business responsibilities within the corporation.[358] If no such requirement were placed upon in-house counsel, business advice would fall within the protection of the attorney-client privilege. Thus, any activity performed by the in-house attorney would be shielded. To build a wall of silence, a corporation would merely have to funnel all documents, including strictly business documents, through an in-house attorney.

This would not comport with the policies underlying the attorney-client privilege.[359] Since rendering business advice is not part of an attorney's duty, such a practice does not preserve the attorney's role as a confidential advisor.[360] It does not encourage "full and frank communication"[361] between the attorney and his or her client so that the attorney can provide adequate representation, because the advice will usually have nothing to do with litigation. There is also little risk that the corporate client will avoid full disclosure out of fear that what is said is business advice and unprotected by the attorney-client privilege.[362] This is so because the corporation is a sophisticated client, and has probably been involved in litigation before. Second, if a member of a corporation is asking for business advice, the attorney can so inform him or her and warn the person that the advice will not be privileged. The *Adlman I* case makes the delineation between business and legal advice clearer by giving examples of acts indicative of privileged information.[363] The court's examples included: separating information requested from an accountant to aid an attorney from the general work that the accountant performs for the company in terms of a separate billing statement and work agreement; having the accountant communicate only with the attorney, and not directly to directors; and being able to make a showing that the

357. *See supra* note 103 and accompanying text.
358. *See* Ferguson, *supra* note 99 at 47.
359. *See supra* notes 27-37 and accompanying text.
360. *See generally,* Ferguson, *supra* note 99 at 47.
361. *See supra* note 29 and accompanying text.
362. *See supra* note 31 and accompanying text.
363. *See supra* note 254-257 and accompanying text.

attorney reached his or her own legal conclusion based on the information that the accountant provided.[364] Had the *Adlman* court refused to require the distinction between business and legal advice, it would have allowed too much protection for corporations and would have been contrary to prior case law. This would have actually made the law governing the application of the attorney-client privilege in the corporate context unclear, and would undermine the purpose of the attorney-client privilege by reducing the certainty of the application of the privilege in corporate situations.

B. *Work Product Doctrine*

1. *Underlying Policies and Application of Federal Rule of Civil Procedure 26(b)(3)*

The policy decisions underlying work product doctrine were developed in *Hickman*.[365] As a limitation to the liberal policy of the federal discovery rules, work product doctrine allows an attorney to plan for trial and prepare legal theories without interference from opposing counsel.[366] It also aims at preventing one attorney from borrowing the wits of his or her adversary through discovery requests for documents prepared by opposing counsel, for no better reason than to make sure that nothing was missed in preparing for his or her own case.[367] These policies were embodied in Federal Rule of Civil Procedure 26(b)(3), which provides work product protection to a document or tangible thing otherwise discoverable, which was prepared in anticipation of litigation or for trial, and was prepared by or for another party or by or for that other party's representative.[368] In *Adlman I* and *Adlman II*, Adlman claimed that the work product doctrine applied to the memoranda prepared by Arthur Andersen at Adlman's request.[369] The issue in *Adlman I* and *Adlman II* arose with the second element, whether the document was prepared in the anticipation of litigation.[370] Upon ex-

364. *See supra* note 254-257 and accompanying text.
365. *See supra* notes 121-125 and accompanying text.
366. *See supra* note 122 and accompanying text.
367. *See supra* notes 123-124 and accompanying text.
368. *See supra* notes 130-133 and accompanying text.
369. *See supra* notes 242-244 and accompanying text.
370. *See generally, supra* notes 257-271 and accompanying text.

amination of the two district court opinions, it is evident that the district court was seeking bright line rules to guide other courts and practitioners. In both appeals, the Court of Appeals has appropriately rejected these bright line rules in favor of a case-by-case approach which requires courts to carefully examine all of the facts and circumstances to determine whether production of the documents comports with the policies of Rule 26(b)(3).

2. *Anticipation of Litigation*

a. *The District Court's New Test*

In its first decision, the district court formulated a new bright line rule to apply when determining whether a document was created in "anticipation of litigation."[371] The district court held that a document created *before* the event giving rise to litigation could not be created in anticipation of litigation.[372] The Court of Appeals correctly overruled the application of this new rule of law.

One source of divergence between the district court and the Court of Appeals was each court's interpretation of the *SCM* case.[373] The difference of opinion involved the statement, "[a] specific claim must have arisen to make the prospect of litigation identifiable in order for the work product rule to apply."[374] The district court read this language as a requirement that the event giving rise to the litigation must have occurred before the document was prepared, while the Court of Appeals found that the statement was only a reference to the requirement of a specific claim as opposed to a speculative claim.[375] The Court of Appeals' interpretation more accurately comports with precedent. As the Court of Appeals noted, no case law has ever required that the event occur before the document is created in order for work product privilege to apply.[376] The principle underlying the Court of Appeals' holding is that a rigid rule which applies to every fact situation cannot be used in work product

371. See supra notes 232-235 and accompanying text.
372. *See supra* notes 235-236 and accompanying text.
373. *See supra* notes 264-267 and accompanying text.
374. SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 515 (D. Conn. 1976).
375. *See supra* notes 264-267 and accompanying text.
376. *See supra* note 267 and accompanying text.

doctrine. A heavily fact based and circumstance oriented inquiry to determine what was *really* going on at the time the document(s) was created is required, namely, to determine whether the attorney was actually preparing for litigation or whether the attorney was attempting to avoid a discovery request. If a rigid rule is established whereby a given fact unrelated to the thinking or reasons behind the creation of the document automatically places the document either within or outside of work product protection, the anticipation of litigation requirement has been effectively written out of the statute. Each case requires its own fact specific inquiry, for there will always be situations where a given set of circumstances, in conjunction with certain facts, will merit work product protection, whereas the same set of circumstances may not merit protection based upon just a couple of varying facts. For example, the Second Circuit in *Adlman I* noted that a document created before the event which causes litigation could merit work product protection, as where a publisher publishes a book under a disputed copyright.[377] In this situation, the publisher can expect to be sued, even though the event, the publication, has not yet occurred.[378] Work product doctrine should shield any memoranda prepared pursuant to this fact situation.[379] If the district court's test applied, however, the document would be summarily excluded because it was created before the event which caused the litigation. This example demonstrates where the rigid rule fails, for if universally applied, courts would ignore the purpose for creating the document, which would render the anticipation of litigation requirement meaningless. It would also punish prudent parties for reasonable foresight, and may lead to other problems, such as loss of evidence, fading memory, and witnesses. Thus, the rigid rule adopted by the district court was wisely expelled by the Court of Appeals.

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377. *See supra* notes 268-270 and accompanying text.

378. *See supra* notes 268-270 and accompanying text. *See also* United States v. Adlman, 68 F.3d 1495, 1501 (2d. Cir. 1995) ("there is no rule that bars application of work product protection to documents created prior to the event giving rise to litigation. Nor do we see any reason for such a limitation").

379. *See Adlman I*, 68 F.3d at 1501.

b. *The Court of Appeals Interpretation of the Anticipation of Litigation Requirement*

In *Adlman II*, the Second Circuit held that the language in anticipation of litigation requires a showing that 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."[380] By adopting the "because of" test instead of the "primarily to assist in litigation" standard, the Second Circuit has once again appropriately rejected a bright line rule in favor of a fact and circumstance oriented solution that allows the court to reach a conclusion based on the reality of the situation.

Work product doctrine is a protection that must be carefully guarded to protect an attorney's legal product while also adhering to the opposing policy of liberal discovery underlying the Federal Rules of Civil Procedure.[381] The ensuing struggle between these competing policies has been compounded by the search for bright lines to guide practitioners and their clients. After all, this is an area where relative certainty is desireable because the rule is intended to provide attorneys with a zone of comfort in rendering legal advice.[382] To reach the conclusion most consistent with the Rule's policy concerns, courts must carefully evaluate all of the facts and circumstances of the case to determine the reality of the situation.

The cases in this area, regardless of the interpretation of the anticipation of litigation test being applied, illustrate that the courts do in fact reach the conclusion that most effectively perpetuates these policies. The courts then apply a rule that allows them to reach that conclusion while also attempting to provide a bright line to guide lower courts and practitioners. For example, both the *SCM* and *Gould* courts used the specific claim requirement to deny work product protection to the documents at issue.[383] Underlying each holding was the finding that in reality, one side was attempting to stifle the free flow of information.[384] However, applying the specific claim requirement in

380. Adlman II, 1998 U.S. App. LEXIS 2633 at *2.
381. *See supra* notes 27-37 and accompanying text.
382. *See supra* notes 27-34 and accompanying text.
383. *See supra* notes 179-184 and accompanying text.
384. *See supra* note 184 and accompanying text.

the *Delaney* case would have required the production of documents that the court found contained legal theories and mental impressions.[385]

In *Delaney*, the plaintiffs filed a Freedom of Information request for memoranda, prepared by IRS attorneys, which analyzed the legal ramifications of a contemplated new auditing system.[386] The memoranda contained mental impressions and legal theories of IRS attorneys, as they were written to advise the agency of the types of challenges likely to be brought against it, the potential defenses for the agency, and the likely outcome of a challenge to a proposed auditing system.[387] However, since the program was not in effect, and in fact had not even been announced to the public at the time the memoranda were created, the specific claim test was not met.[388] Thus, if the specific claim test were applied, the court would have had to order the production of the memoranda.[389] Because the court found that, in reality, the plaintiffs were seeking the documents in order to gain the agency attorneys' assessment of the program's legal vulnerabilities to make sure that they did not miss anything in crafting their legal challenges to the program, production would have been contrary to the rule's policies.[390] To reach a conclusion consistent with this policy, the court applied the function of the documents rule holding that work product protection applied.[391]

Similarly, as demonstrated in *Adlman*, the primarily to assist in litigation standard cannot be universally applied to all situations and reach a result consistent with work product policy principles. The primarily to assist in litigation standard is another attempt to draw a bright line, because it requires automatic denial of work product protection to documents created for a business purpose. This is inappropriate as demonstrated by the "publisher" example provided by the Second Circuit in *Adlman I* and *II*, where a memorandum was prepared to analyze the ramifications of publishing a book even though the

385. *See supra* notes 196-202 and accompanying text.
386. *See supra* note 197 and accompanying text.
387. *See supra* note 199 and accompanying text.
388. *See supra* notes 201-202 and accompanying text.
389. *See supra* note 202 and accompanying text.
390. *See supra* note 200 and accompanying text.
391. *See supra* notes 199-202 and accompanying text.

copyright was contested.[392] In this case, the memorandum was created primarily for a business purpose, to determine whether or not to go forward with publication even though the copyright is contested.[393] The document is also likely to contain an attorney's mental impressions and legal analysis which should be afforded work product protection.[394] Otherwise, opposing counsel could benefit from the labor of the publisher's attorney by obtaining the document through discovery. This would conflict with the policy of preventing one attorney from borrowing the wits of his or her adversary, so a different rule would have to be applied to reach the desired result.

The *Adlman* case involves the same problem. In *Adlman*, the memoranda were prepared largely for a business purpose, to determine whether to restructure based upon the tax ramifications of the restructuring and the fact that Sequa would be audited by the IRS pursuant to the restructuring.[395] According to the court, simply because creation of the documents was motivated by a business purpose, it should not be automatically excluded from work product protection.[396] Here, this business decision was going to subject Sequa to litigation, and preparing for that likelihood by analyzing the legal implications of the restructuring and the chances of success was prudent action by the corporation and its attorney.

One issue raised by this analysis is the fear that corporations will be easily able to shield documents from discovery, providing them with a zone of secrecy.[397] The "because of test" adopted by the Second Circuit adequately addresses this concern by requiring a showing that the document would not have been prepared in substantially similar form but for the prospect of litigation.[398] In order to meet this element, a corporation will have to make a substantial showing that the document was in fact created because of the prospect of litigation.[399] For example, in *Adlman*, it will be extremely difficult for Sequa to demon-

392. *See supra* note 267 and accompanying text.
393. *See supra* notes 267-268 and accompanying text.
394. *See supra* note 267 and accompanying text.
395. *See supra* notes 227-230 and accompanying text.
396. *See supra* notes 256-270 and accompanying text.
397. *See supra* notes 35-37 and accompanying text.
398. *See supra* notes 297-299 and accompanying text.
399. *See supra* note 277 and accompanying text.

strate that it would not have prepared the memoranda in issue if it had not been certain of an IRS audit. The memorandum was created largely for business purposes, to analyze the potential tax ramifications of contemplated corporate restructuring, and Sequa will be hard pressed to argue that it would not have created such a document in the ordinary course of business.

V. Conclusion

The *Adlman I* decision resolved the issues of the application of the attorney-client privilege and work product doctrine in the corporate context in a manner consistent with precedent. The court's decision with regard to the attorney-client privilege was important to protect the sanctity of the privilege and guard against allowing corporations to shield much of their activity from the reach of the courts. The court accomplished this by refusing to apply the attorney-client privilege to communications made to an accountant, and clearly outside the scope of an attorney providing advice to his client. The court reached this outcome through three major steps. First, it refused to apply an accountant-client privilege. Second, it recognized the appropriate circumstances for finding that communications to an accountant as an agent of the attorney should be protected. Third, it clarified when the work produced by in-house counsel will be protected by the attorney-client privilege. By adding certainty to the application of the attorney-client privilege, the court enhanced its application in the corporate context because there will be less concern over whether a particular communication is protected or not. The court also kept the privilege from extending too far, thereby preventing corporations from having too much secrecy.

Additionally, the court preserved the balance established through the common law with regard to work product doctrine in the corporate context. By striking down a rigid rule that a document created before the event which caused the litigation cannot be protected by the work product doctrine, the court preserved the case-by-case inquiry into the facts of each case, as required by the anticipation of litigation element of Federal Rule of Civil Procedure 26(b)(3). The court also protected the case-by-case inquiry by holding that the anticipation of litigation requirement is satisfied by showing that the document was

created because of anticipated litigation, and would not have been created in substantially the same form but for the prospect of the litigation. In adopting the "because of test," the court rejected the primarily to assist in litigation standard which would summarily exclude from work product protection any document created for a business purpose. Since the issue is not black and white one, but rather one which requires a careful inquiry into the facts and circumstances surrounding the creation of the document, the court wisely rejected the mechanical approach offered by the primarily to assist in litigation standard.

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