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Work Product in the ERISA Context

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This article provides a high level review of certain issues with respect to the work product doctrine in the ERISA context.

RELATION TO ATTORNEY-CLIENT PRIVILEGE

Although the work product doctrine[1] is distinct from the attorney-client privilege they are frequently "inseparable twin issues" because "[w]henever the attorney client privilege is raised in on-going litigation, concomitantly the work product doctrine is virtually omnipresent."[2] The work product doctrine[3] is separate and distinct from and broader than the attorney-client privilege.[4] Unlike the attorney-client privilege, which is based on protecting the confidentiality of communications between attorney and client,[5] the work product doctrine is based on promoting the adversary system,[6] by protecting the confidentiality of materials prepared by an attorney in preparation for litigation.[7] As a district court judge expressed this point, "The two privileges[8] address different concerns.[9] Not only does the work product privilege doctrine serve to protect the confidentiality in the attorney-client relationship, but it also protects the attorney from undue and unfair disclosure."[10]

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Thus, courts have stated that the "primary purpose of the work product rule is to prevent exploitation of a party's efforts in preparing for litigation."[11] As one district court elaborated, "the purpose of the work product privilege is to prevent a potential adversary from gaining an unfair advantage over a party by obtaining documents prepared by the party or its counsel in anticipation of litigation which may reveal the party's strategy or the party's own assessment of the strengths and weaknesses of its case."[12] The way in which the work product doctrine preserves the adversary system is by granting attorneys a zone of privacy within which to work.[13] The doctrine creates a space in which attorneys can prepare their cases and test their theories away from the scrutiny of their adversaries.[14]

From a procedural perspective,[15] federal law[16] governs the applicability of the work product doctrine in all actions in federal court.[17] Additionally, unlike the attorney-client privilege, the attorney work product[18] doctrine is not absolute.[19] Rather, the work product privilege is a qualified privilege[20] protecting from discovery documents and tangible things produced by a party or his representative in anticipation of litigation.[21] The privilege, as codified in Federal Rules of Civil Procedure ("FRCP") 26(b)(3), provides that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer, or agent." Opinion work product has been determined to be discoverable when mental impressions are at issue and there is a compelling need for the material.[22] Thus, even where the attorney work product privilege facially applies, it may be overridden if the party that seeks the otherwise protected materials establish[es] adequate reasons to justify production."[23]

That is, even if otherwise protected by the work product doctrine, documents may be discovered if they are relevant and the requesting party " shows that it has substantial need[24] for the materials to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means."[25] However, to the extent that a court orders discovery under this FRCP rule, "it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[26]

Further, the work product doctrine does not apply to underlying facts in most instances.[27] Thus, the work product privilege does not protect the client's knowledge of the relevant facts, whether they were learned from counsel or facts learned from an attorney from an independent source.[28]

Courts have also indicated that the attorney-client privilege belongs to the client, and the work product privilege belongs solely to the attorney,[29] although other courts have held that the work product privilege may be asserted by both the attorney and the client.[30] Consistent with

that analysis, "the plaintiff does not stand in the same position with respect to the attorney for whom the work product rules is designed to benefit, as[he does to his] own trustees"[31] and because "the attorney work product doctrine fosters interests different from the attorney client privilege, it may be successfully invoked against a pension plan beneficiary, even though the attorney client privilege is unavailable."[32] That is, a defendant's waiver of the attorney-client privilege does not mean that the work product privilege is lost.[33]

BURDEN OF PROOF

The burden of establishing the existence of the work product privilege rests upon the party asserting it.[34] More specifically, the burden is on the party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged transaction. More broadly, the proponent of the privilege must establish not only the privileged relationship, but also the essential elements of the privilege.[35] More specifically, when a party withholds information otherwise discoverable by claiming that the information is protected by the work product privilege, the party must (i) expressly make the claim, and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."[36] A blanket claim as to the existence of the privilege does not satisfy the burden.[37] Objections based upon the work product privilege must be particularized, and a failure to do so may waive the privilege.[38] Further, a party's failure to meet its burden when the trial court is asked to rule upon the existence of work product immunity is not excused because the document is later shown to be one that would be privileged, if a timely showing had been made.[39]

The work product doctrine can be and is frequently established by a privilege log. However, it is important that sufficient information be provided in the privilege log[40] to determine whether the work product privilege applies.[41] If necessary, and without destroying the privileged nature of the communication, a district court may, in its discretion, require that withheld documents be withheld for in camera review where the party contesting the privilege shows that the intrusion is justified.[42] As discussed more fully, a plan participant or the Department of Labor may allege that the fiduciary exception applies to the work product doctrine. In *United States v. Mett*,[43] in a criminal case, the U.S. Court of Appeals for the Ninth Circuit held that the burden of proof is on the party seeking to establish an exception to the privilege. District courts in the Ninth Circuit have followed *Mett* in placing the burden

of proof on the party claiming the exception.[44] *Mett* has been followed outside of the Ninth Circuit,[45] but the majority rule appears to be that the burden of proof rests upon the administrator to establish that the fiduciary exception does not apply.[46]

IN ANTICIPATION OF LITIGATION

The party asserting the work product privilege bears the burden of establishing that the documents that he or she seeks to protect were produced "in anticipation of litigation,"[47] a concept which" embodies both a temporal and motivational aspect."[48] Determining whether a document was prepared in anticipation of litigation can be a slippery slope.[49] The work product doctrine is not available, if a party cannot show that documents were created because of litigation rather than for business reasons, or that the documents would not have been created in the same or substantially similar form but for litigation.[50] The work product doctrine has been held to be inapplicable to documents created in typical form, despite the potential for litigation.[51]

Documents that are used in the administration of a pension plan and would have been prepared regardless of pending litigation are not protected by the work product doctrine.[52] Similarly, "as a general rule, investigatory reports and materials are not protected by the attorney-client privilege or the work product doctrine merely because they are provided to, or prepared by, counsel." [53] Thus, the proponent of the work product privilege must show, at the very least, "some articulable claim likely to lead to litigation has arisen."[54] The threshold inquiry when analyzing the work product doctrine is whether the documents were in fact prepared in anticipation of litigation.[55]

The prospect of future litigation is insufficient to establish the work product privilege.[56] A number of courts have elaborated upon this point. For example, in *Marten v. Yellow Freight System, Inc*., the U.S. District Court for the District of Kansas explained that "the inchoate possibility, or even the likely chance of litigation, does not give rise to work product. To justify work product protection, the threat of litigation must be real and imminent."[57] However, even if litigation is imminent, the work product doctrine does not protect documents prepared in the ordinary course of business.[58]

If a party prepares a document in the ordinary course of business, it will not be protected even if the party is aware that the document may also be useful in the event of litigation.[59] In *Wikel v. Walmart Stores, Inc*., an Oklahoma district court explained that "because litigation is an ever present possibility in American life, it is more often the case then not that events are documented with the general possibility of litigation in mind. Yet the mere fact that litigation does eventually

ensue does not, by itself, cloak materials with work product immunity."[60] In *Shields v. Unum Provident Corp.*, the district court stated that "the mere fact that a document is prepared when litigation is foreseeable does not mean that the document was prepared in anticipation of litigation. Rather, the document must be prepared because of the prospect of litigation when the preparer faces an actual claim or potential claim following an actual [61] event or series of events that reasonably could result in litigation."

In *Logan v. Commercial Union Ins. Co.*,[62] the U.S. Court of Appeals for the Seventh Circuit explained that in determining whether a document is prepared in anticipation of litigation, courts:

> look to whether in light of the factual context the document can fairly be said to have been prepared or obtained because of the prospect of litigation… It is important to distinguish between an investigative report developed in the ordinary course of business as precaution for the remote prospect of litigation, and material prepared because of some articulable claim likely to led to litigation.[63]

In the U.S. Court of Appeals for the Third Circuit," to determine if a document is created by or for a party or its representatives is protected under the work product doctrine, the court examines whether the document has been prepared in anticipation of litigation, and because of the prospect of litigation, and for no other reason."[64]

In the U.S. Court of Appeals for the District of Columbia Circuit,[65] there is a two-pronged test for determining if the work product doctrine is applicable. First, the document must be prepared because of a subjective anticipation of litigation as contrasted with an ordinary business purpose. Second, the subjective anticipation of litigation must be objectively reasonable. The burden of proof is on the party claiming the protection to show that the anticipated litigation was the driving force behind the preparation of each requested document.[66]

In the U.S. Court of Appeals for the Fourth Circuit, a document is 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."[67]

In the U.S. Court of Appeals for the Fifth Circuit, in order to be protected from disclosure under the work product doctrine, the document must have been prepared "primarily or exclusively for litigation."[68]

In the Ninth Circuit, in circumstances where a document serves a dual purpose, that is, where it was not prepared exclusively for litigation, then the "because of" test is used.[69] Dual purpose documents are deemed prepared because of litigation if:

> 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. In applying the 'because of standard, courts must consider the totality of the circumstances and determine whether the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.[70]

In the Fifth Circuit and the Tenth Circuit, the "primary motivating purpose" for the creation of the document must be to aid in possible future litigation.[71]

The fact that litigation later occurs does not change the ordinary business nature of an attorney's advice into advice rendered in anticipation of litigation.[72] However, the anticipation of litigation doctrine requires only that "the material be prepared in anticipation of some specific litigation, not necessarily in preparation for the particular litigation in which it is being sought."[73]

Additionally, the weight of modern authority supports the conclusion that the work product doctrine extends to documents prepared in anticipation of prior terminated litigation, regardless of the interconnection of the issue or the facts.[74] Further, a document that has been prepared because of the prospect of litigation, even though it may assist in business decisions, will not lose its protection under the work product doctrine.[75] The U.S. Court of Appeals for the Second Circuit has also stated that "there is no rule that bars application of the work product rule to documents created prior to the event giving rise to litigation."[76]

FIDUCIARY EXCEPTION

An important possible exception to the work product doctrine arises under the fiduciary exception doctrine.[77] Rooted in the common law of trusts,[78] the fiduciary exception is based upon the rationale that the benefit of any legal advice obtained by a trustee regarding matters of plan administration runs to the beneficiaries. Consequently, "trustees cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege."[79] Applying the ERISA fiduciary's role to the role of trustees at common law, courts have relied upon one of two related rationales[80] in recognizing the fiduciary exception.[81]

First, applying the reasoning of the Fifth Circuit in *Garner v. Wolfinbarger*,[82] in which the court held that, in shareholder derivative actions against corporate officers, "availability of the privilege be

subject to the right of shareholders to show cause why it should not be invoked in the particular instance,"[83] some courts have concluded that the ERISA fiduciary's duty to act in the exclusive interest of beneficiaries supersedes the fiduciary's right to assert attorney-client privilege.[84]

Other courts have reasoned that the ERISA fiduciary, as a representative of the beneficiaries, is not the real client in obtaining advice regarding plan administration and "thus never enjoyed the privilege in the first place."[85]

Under either rationale, "where an ERISA trustee seeks an attorney's advice on a matter of plan administration and where the advice clearly does not implicate the trustee in a personal capacity, the trustee cannot invoke the attorney-client privilege against the plan beneficiaries."[86]

Thus, as indicated by *Mett*, courts that have recognized the fiduciary exception have also indicated two limitations on its application. First, the fiduciary exception does not apply to a fiduciary's communication with an attorney regarding his or her personal defense, in contemplation of civil or criminal proceedings, in an action for breach of fiduciary duty.[87]

Second, communications between ERISA fiduciaries and plan attorneys regarding settlor functions such as adopting, amending, or terminating an ERISA plan are not subject to the fiduciary exception.[88] However, the *Garner* rule that a party seeking to overcome a privilege show good cause, has generally not been applied in the ERISA context,[89] including specifically with respect to work product.[90] As the district court stated in *Durand*, "[t]he Garner good cause requirement is inconsistent with the majority view in ERISA cases which presumes the beneficiaries are the "component" of the attorney-client privilege unless the fiduciary demonstrates the confidential communications concern a non-fiduciary matter."[91]

FIDUCIARY EXCEPTION TO WORK PRODUCT DOCTRINE

While the origins of the fiduciary exception were with regard to the attorney-client privilege, courts have also been asked its possible application to the work product doctrine. However, while "courts have not been consistent or even always clear in their application of the fiduciary exception to work product protection,"[92] most courts have concluded that it does, and found that there is "no legitimate basis on which to distinguish between the attorney-client privilege and the work product protection when applying the fiduciary exception in the ERISA context."[93] There are, however, contrary views, holding

that there is no corollary fiduciary exception to the work product doctrine.[94]

In *Jicarilla Apache Nation v. United States*,[95] the Court of Federal Claims stated that:

> In refusing to apply the fiduciary exception to work product, other cases have observed that this exception, as applied to the attorney-client privilege, is based upon mutuality of interest between the fiduciary and the beneficiaries. The have logically opined that 'once there is sufficient anticipation of litigation to trigger the work product immunity…this mutuality is destroyed, making it unreasonable to indulge the fiction that counsel, hired by the fiduciary, is also constructively hired by the same party counsel is expected to defend against.'[96]

Some district courts take the position that a full and fair review exception to the work product doctrine requires a fiduciary who denies a claim for benefits to afford the beneficiary an opportunity for a full and fair review of the decision denying the claim, and this review includes the right to review all documents relevant to the claims administrative process.[97]

In *Anderson v. Sotheby's, Inc*., the district court explained that "if the work product doctrine protected these documents, then no ERISA plan fiduciary could ever obtain discovery into the records of an administrator's investigation of the claim, because the administrator could almost always claim that it anticipated possible litigation."[98] In *Lugosch v. Congel*, the district court stated that:

> The Garner rule and/or fiduciary exception is limited to invasion of the attorney client privilege and is not extended to the work product doctrine… An obvious reason why this rule is not extended to work product is that there is evidently an absence of mutuality of interests between the fiduciary and the principal. Another reason is that the work product doctrine belongs to the litigator and not the litigant fiduciary, and it is the lawyer's impressions, strategies, and theories, the law is attempting to guard.[99]

However, in some instances, the issue does not need to be addressed, because if an attorney is defending a fiduciary, the fiduciary exception would not be applicable.[100]

As the district court explained in *Martin v. Valley National Bank of Arizona*, "Although the parties are in dispute as to whether the fiduciary exception applies to work product, we need not address that issue here, because in this case, the normal limitations of the work

product rule and the limitations that would be imposed by the fiduciary exception, are co-extensive."[101]

NOTES

1. This article is intended to provide a high level review of certain issues with respect to the work product doctrine in the ERISA context and it does not address issues relating to the work product doctrine such as waiver of the doctrine or its potentially differing application with respect to insurance companies.

2. *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 126 (N.D.N.Y. 2007), cited in Michelle De Stefano Beardslee, Taking the Business Out of Work Product, 80 Fordham Law Review 2791 (2011) (hereinafter "Beardslee, Taking the Business").

3. In *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), the Supreme Court held that written material and mental impressions prepared or formed by an attorney in the course of performing legal duties on behalf of a client were protected from discovery as the attorney's work product in the absence of undue prejudice or hardship to the party seeking discovery.

4. *United States v. Nobles*, 422 U.S. 225, 238, n.11 (1995); *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 661-662 (3d Cir. 2003); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 294 (6th Cir. 2002); *In re Green Grand Jury Proceedings*, 492 F.3d 976, 980 (8th Cir. 2007); *In re Grand Jury Proceedings*, 219 F 3d 175, 190 (2d Cir. 2000); *Murphy v. Gorman*, 271 F.R.D. 296, 311 (D.N.M. 2010); *Johnston v. Aetna Life Ins. Co.*, 2017 WL 465443 (S.D. Fla. Oct. 16, 2017); *O'Blenis v. National Elevator Industries Pension Plan*, 2015 WL 3866229 (D.N.J. June 18, 2015); *Solis v. The Food Employers Labor Relations Association*, 644 F.3d 221 (4th Cir. 2011); *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.*, 2012 WL 3062294 (N.D. Cal. July 26, 2012); *United States v. Amer. Tel. and Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir 1980); *Harvey v. Standard Insurance Co.*, 52 EBC 2185, 2011 WL 4368348 (N.D. Ala. Sept. 15 2011).

5. By protecting confidential communications, the privilege "encourage[s[the full and frank communication between attorneys and their clients" to ensure that clients receive sound legal advice based on complete disclosure. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular System, Inc.*, 237 F.R.D. 618, 622 (N.D. Cal. 2006).

6. Courts and commentators have advanced a number of other justifications for the work product doctrine in addition to protecting the adversary system. *See*, *ANR Advance Transportation Company; Loeffler v. Lanser*, 302 BR 607, 2003 WL 22989019 (E.D. Wisc. Dec. 12, 2003); Charles P. Cerrone, The War Against Work Product Abuse: Exposing the Legal Alchemy of Document Compilations as Work Product, 64 Univ. Pitt. L. Rev. 639, 660-662 (2003). When work product immunity does not serve to protect the adversary system, at least one court has suggested there should not be any immunity despite what may best serve individual interests. *ANR Advance Transportation Company*; *Loeffler v. Lasser*, *supra*; Sherman L. Cohn, The Work Product Doctrine: Protection, not Privilege, 71 Geo. L.J. 917, 943 (1983).

7. *Westinghouse Electric Co. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *WSOL v. Fiduciary Management Associates, Inc.*, 1999 WL 1129100(N.D. Ill. Dec. 7,1999); *Tatum v. R.J. Reynolds Tobacco, Co.*, (M.D.N.C. Feb. 15, 2008). *See, also*, *Anderson v. The Torrington Company*, 120 F.R.D. 82 (N.D. Ind. 1987) (purpose of

work product rule is not to protect evidence from disclosure to outside world but rather to protect it from the knowledge of opposing counsel and clients, thereby preventing its use against the lawyer gathering the material).

8. Technically, the protection afforded by work product is not a privilege as the term is used in the Federal Rules of Civil Procedure or the laws of evidence. *Hickman v. Taylor*, *supra*, n. 3, at 509-510 and n. 9 (1947), cited in *Durand v.Hanover Insurance Group, Inc*., 2016 WL 6089739 (W.D. Kentucky, Oct. 14, 2016).

9. Because of the different purposes served, the standard of waiver for work product protection is more lenient than the standard for waiver of the attorney-client privilege. *McMorgan & Company v. First California Mortgage Co*., 931 F. Supp. 703 (N.D. Cal. 1996).

10. *Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ill. 1981).

11. *Holmgren v. State Farm Mutual Auto Insurance Co*., 976 F.2d. 573, 576 (9th Cir. 1992); *Admiral Insurance Co. v. U.S. District Court*, 881 F.2d. 1486, 1494 (9th Cir. 1989). In order for an attorney to properly prepare his or her client's case, the attorney must be able to "assess information, sift what he considers to be the relevant from irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, *supra*, n. 3.

12. *United States v. Textron Inc*., 507 F. Supp. 2d 138, 152 (D.R.I. 2007), reversed on other grounds 577 F.3d. 21 (1st Cir. 2009).

13. *Hickman v. Taylor*, *supra*, n. 3.

14. *In re Special September 1978 Grand Jury*, 640 F.2d 49, 62 (7th Cir. 1980).

15. "The work product doctrine is a procedural rule of federal law," *In re Prof'ls Direct Ins. Co*., 578 F.3d 432, 439 (6th Cir. 2009) quoted in *Kushner v. Nationwide Mutual Insurance Company*, 2018 WL 3454685 (S.D. Ohio July 18, 2018).

16. Federal Rules of Civil Procedure ("FRCP") 26(b)(3).

17. *Wultz v. Bank of China, Ltd*., 304 F.R.D. 384, 393 (S.D.N.Y. 2015); *MVT Securities, LLC v. Great West Casualty Company*, 2021 WL 3861814 (D. New Mex. Aug. 30, 2021) (state law governs the applicability of the attorney client privilege in a diversity action, while federal law governs the work product privilege); *Central Valley AG Cooperative v. Leonard*, 2019 WL 1900987 (D. Neb. Apr. 29, 2019) (federal courts follow federal attorney client privilege law in all federal cases other than civil diversity, and apply the federal work product doctrine in all federal cases); *Allied Irish Bank PLC v. Bank of America, N.A*., 252 F.R.D. 163, 173 (S.D.N.Y. 2008); *Parneros v. Barnes & Noble*, 18 cv 7834 (JGK) (GWG) (S.D.N.Y. Oct. 4, 2019); *The Wellinger Family Trust 1998 v. Hartford Life & Accident Co*., 2013 WL 244714 (D. Colo. June 3, 2013); *Frontier Refining, Inc. v. Gorman Ripp, Inc*., 136 F.3d 695, 702, n. 10 (10th Cir. 1998). *Cf. Swindler & Berlin v. United States*, 524 U.S. 399, 403(1998) *Shields v Unum Provident Corp*., 2007 WL 764298 (S.D. Ohio 2007); *Moss v. Unum Life Ins. Co*., 495 Fed. Appx. 583, 595 (6th Cir. 2012).

18. While the privilege is commonly referred to as the attorney work product privilege, there is no requirement that an attorney be involved. The Advisory Committee Notes (1973) to Rule 26(b)(3) confirm that the intention of the rule was to protect material also prepared by non-attorneys. *See Parneros v. Barnes & Noble*, *supra*, n.4. As explained by the U.S. Court of Appeals for the Third Circuit in *In Re Cendant Corp. Securities Litigation*, 343 F.3d 658, 662 (3d Cir. 2003), quoting *U.S. v. Nobles*, *supra*, n.4 at 238-39: "Attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary

that the work product doctrine protect materials prepared by agents of the attorney as well as those prepared for the attorney himself." *See also*, *Perez v. Mueller*, 2016 WL 6882851 (E.D. Wisc. Nov. 22, 2016) and *Kushner v. Nationwide Mutual Ins. Co.*, 2018 WL 3454685, *supra*, n. 15 (Materials can be subject to the work product doctrine even if a non-attorney creates them).

19. *United States v. Christensen*, 828 F.3d. 763, 805 (9th Cir. 2015) *John and Cindy Skogen v. RFJ Auto Group, Inc. Employee Benefit Plan*, 2020 WL 5039101 (E.D. Tex. Aug. 26, 2020).

20. *United States v. Nobles*, *supra*, n. 4 at 237-238 (1975), quoting *Hickman v. Taylor*, *supra*, n 3.

21. *Admiral Ins. Co. v. U.S. District Court for District of Arizona*, 881 F.2d. 1486, 1494 (9th Cir.1989); *Cusack-Acocella v. Dual Diagnosis Treatment Center*, 2019 WL 2621921 (C.D. Cal. May 1, 2019).

22. *Holmgren v. State Farm Mutual Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992); *Ferraro & DiMercurio, Inc., v St. Paul. Mercy Ins. Co.*, 173 F.R.D. 7, 16-17 (D. Mass. 1987). *Cf. In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) and *In re Allen*, 106 F.3d 582 (4th Cir. 1997) ("[O]pinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.").

23. *United States v. Christensen*, *supra*, n.19, quoting *Hickman v. Taylor*, *supra*, n.3.

24. Unlike the work product doctrine, the attorney client privilege in its federally recognized form cannot be overcome simply by a showing of need. *Upjohn Co. v. United States*, 449 U.S. 396 (1981); *Martin v. Valley National Bank of Arizona*, 140 F.R.D. 291 (S.D.N.Y. 1991).

25. FRCP 26(b)(3)(A)(ii). *See also*, *Republic of Ecuador v. Mackey*, 742 F.3d 860, 866 (9th Cir. 2014).

26. FRCP 26(b)(3)(B).

27. *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73 (N.D.N.Y. 2003); *Callwave Communications, LLC v. Wavemarket, Inc.*, 2015 WL 831539 (N.D. Cal. Feb. 23, 2015); *Garcia v. City of El Centro*, 214 F.R.D. 587,591 (S.D. Cal. 2003); *Perez v. Mueller*, *supra*, n. 18. *But*, *see*, *U.S. Airlines Pilots Association v. Pension Benefit Guaranty Corporation*, 274 F.R.D 28 (D. D.C. 20111), quoting *Judicial Watch, Inc. v. Dept. of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005). ("This Circuit's case law is clear that the work product doctrine simply does not distinguish between factual and deliberative material.").

28. *Tribune Co. v. Purcigliotti*, 1997 WL 10924 (S.D.N.Y. January 10, 1997).

29. *Panter v. Marshall Field & Co.*, 80 F.R.D. 718 (N.D. Ill. 1978).

30. *Edelstein v. Optimum Corporation*, 2012 WL 219, 292 (D. Nebr. June 14, 2012); *In re Green Grand Jury Proceeding*, *supra*, n.4. *Cf. Donovan v. Fitzsimmons*, *supra*, n. 10. (The right to assert the work product privilege belongs at least in part, if not solely, to the attorney and not the client (collecting cases).)

31. *Helt v. Metropolitan District Comm'r*, 113 F.R.D. 7, 12 (D. Conn. 1986).

32. *Wildbur v. Arco Chemical Co.*, 974 F.2d 631 (5th Cir. 1992).

33. *Handgoals, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Cal. 1976); *Panter v. Marshall Fields Co.*, *supra*, n. 29. A number of courts have held that an attorney may invoke the work product doctrine on its own even if the client cannot assert it

or the client has not directed the attorney to assert it. *Martin v. Valley National Bank of Arizona*, *supra*, n. 24.

34. *Shields v. Unum Provident Corp.*, *supra*, n. 17; *Solis v. The Food Employers Labor Relations Association*, *supra*, n. 4; *Edelstein v. Optimum Corp.*, *supra*, n. 30; *In re Unisys Corp. Retiree Medical Benefits Litigation*, 1994 WL 6883 (E.D. Pa. Jan. 6, 1994); *Conoco, Inc. v. U.S. Department of Justice*, 687 F.2d 724, 730 (3d Cir. 1982); *Gill v. Bausch & Lomb Supplemental Retirement Plan*, 2012 WL 2132280(W.D.N.Y. June 12, 2012); *Luce v. Ullico Pension Plan and Trust*, 2006 WL 8449143 (D. D.C. August 30, 2006); *Lewis v. Unum Corporation Severance Plan*, 2001 WL 394859 (D. Kan. April 4, 2001); *Goldenberg v. Indel, Inc.*, 2012 WL 12906333 (D. N.J. May 3, 2012); *Kushner v. Nationwide Mutual Ins. Co.*, *supra*, n. 15. *Cf. McCoos v. Denny's Inc.*, 192 F.R.D. 675, 683 (D. Kan. 2000) (A defendant must make a clear showing that the privilege applies).

35. *In re Horowitz*, 482 F.2d 72, 82 (2d Cir.), *cert. den.* 414 U.S. 867 (1973); *Martin v. Valley National Bank of Arizona*, *supra*, n. 24; *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. den.* 481 U.S. 1015 (1987).

36. FRCP 26(b)(5)(A).

37. *FDIC v. First Heights Bank, FSB*, 1997 US Dist. LEXIS 23321 (E.D. Mich. March 12, 1997); *Kelling v. Bridgestone/Firestone, Inc.*, 157 F.R.D. 496, 497 (D. Kan. 1994); *Shields v. Unum Provident Corp.*, *supra*, n. 17; *Johnson v. Gross*, 611 Fed. Appx. 54, 547 (11th Cir. 2011) (Blanket privilege assertions are generally not acceptable). *Cf. Woznicki v. Raydon Corporation*, 2019 WL 5703085 (M.D. Fla., Oct. 25, 2019) (work product privilege cannot generally be applied against testifying).

38. *Anderson v. Reliance Standard Life Ins. Co.*, 2012 WL 32568 (D. Md. January 5, 2012).

39. *Peat Marwick Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984).

40. *Bowne v. Ambrose Corp.*, 150 F.R.D. 465 (S.D.N.Y. 1993) is instructive as to what a privilege log should contain.

41. *In re Unisys Corp. Retiree Medical Benefits Litigation*, *supra*, n. 34.

42. *In Re Grand Jury Investigation*, 974 F.2d 1068, 1074-1075 (9th Cir. 1992); *Cusack Acocella v. Dual Diagnostics Treatment Center*, *supra*, n 21.

43. 178 F.3d 1058 (9th Cir. 1999).

44. *Klein v. NW Mutual Ins. Co.*, 806 F. Supp 2d 1120, 1129 (S.D. Cal. 2011); *Kennes v. Metro West Asset Management, LLC*, 2018 WL 5274856 (C.D. Cal. May 17, 2018); *Cusack-Acocella v. Dual Diagnosis Treatment Center, Inc.*, *supra*, n. 21.

45. *Clark v. Unum Life Ins. Co. of America*, 799 F. Supp. 2d 527, 537 (D. Md. 2011), cited in *Ferguson o/b/o the Estate of John Ferguson v. United of Omaha Ins. Co.*, 2012 WL 6649192 (D. Md. Dec. 18, 2012); *Luper v. Board of Trustees of Police and Fire Retirement System of Wichita, Kansas*, 2017 WL 32166662 at *3 (D. Kan. July 28, 2017); *Phillips v. Boilermaker-Blacksmith National Pension Trust*, 2021 WL 4453574 (D. Kan. Sept. 20, 2021) (plaintiffs have burden to show fiduciary exception applies to work product protected documents). *Cf. Aull v. Cavalcade Pension Plan*, 185 F.R.D., 618, 626 (D. Colo. 1998), cited in *Lassman v. Phelps Dodge Corp. Life*, 2006 WL 6912650 (D. Colo. Sept. 29, 2006) (a party asserting the waiver of a privilege has the burden of establishing the waiver) and *John and Cindy Skogen v. RFJ Auto Group, Inc. Employee Benefit Plan*, *supra*, n. 19.

46. *Durand v. Hanover Ins. Group*, 2017 WL 151399 (W.D. Ky. January 13, 2017) (collecting cases); *Kushner v. Nationwide Mutual Ins. Co.*, *supra*, n. 15.

47. *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *United States v. City of Torrance*, 163 F.R.D. 590 (C.D. Cal. 1995); *O'Neal v. Healthshare/THA*, 2008 WL 11411198 (W.D. Tex. Oct. 20, 2008).

48. *AmWay Corp. v. Proctor & Gamble Co.*, 2001 WL 1818698 at *6 (W.D. Mich. Apr. 3, 2001), cited in *Beardslee*, Taking the Business, fn. 174.

49. *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), quoted in *Skogen v. RFJ Auto Group, Inc. Employee Benefit Plan*, *supra*, n. 19. *See also*, *Guardsmark, Inc. v. Blue Cross and Blue Shield of Tennessee*, 206 F.R.D. 202 (W. D. Tenn. 2002) ("Courts have had difficulty in verbalizing a test to determine whether writings or documents were prepared in anticipation of litigation or for trial.").

50. *In re Premera Blue Cross Custodial Data Security Breach Litigation*, 2017 WL 4857596 (D. Ore. Oct. 27,2017).

51. *United States v. Acquest Transit, LLC*, 319 F.R.D. 83, 91 (W.D.N.Y. 1981), cited in *Metzgar v. UA Plumbers and Steamfitters Local No. 22*, 2018 WL 2744904 (W.D.N.Y. June 6, 2018).

52. *In re Royal Ahold N.V. Securities and ERISA Litigation*, 230 F.R.D. 433, 435 (D. Md. 2005); *Luce v. Ullico Pension Plan and Trust*, *supra*, n. 34.

53. *OneBeacon Ins. Co. v. Forman Int'l Ltd.*, 2006 WL 377010 at *5 (S.D.N.Y. December 15, 2006).

54. *Binks Mfg. Co. v. National Presto Industries, Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983); *Coastal State Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980); *Martin v. Valley National Bank of Arizona*, *supra*, n. 24.

55. *Sandra T.E. v. Berwyn School District*, 600 F.3d 612, 622 (7th Cir. 2010); *Carlson & DeLuca v. Northrop Grumman Corp.*, 2018 WL 845650 (N. D. Ill. Feb. 5, 2018).

56. *Whitman v. United States*, 108 F.R.D. 59 (D. N.H. 1985).

57. 1998 WL 13244 (D. Kan., Jan. 6, 1998).

58. *Allen v. Chicago Transit Authority*, 198 F.R.D. 495, 500 (N.D. Ill. 2001); *Carlson and DeLuca v. Northrop Grumman Severance Plan*, 2018 WL 845650 (N.D. Ill. Feb. 5, 2018).

59. *Binks Mfg. Co. v. National Presto Ind., Inc.*, *supra*, n. 54 and *Martin v. National Valley Bank of Arizona*, *supra*, n. 24.

60. 197 F.R.D. 493, 495 (N.D. Okla. 2000). *See also*, *The Wellinger Family Trust 1998 v. Hartford Life*, *supra*, n. 17.

61. *Supra*, n. 34, citing *Arkwright Mutual Ins. Co. v. National Union Fin.Ins. Co.*, 1994 US App. LEXIS 38328 (6th Cir. Feb. 25, 1994). *See also*, *Allen v Honeywell Retirement Earnings Plan*, 698 F. Supp. 2d 1197 (D. Ariz. 2010). *Cf.* Wright & Miller, Federal Practice and Procedure Section 2024 at 198 ("The test should be whether in light of the nature of the document and the factual situation in a particular case, the document can fairly be said to have been prepared or obtained because of prospective litigation.")

62. 96 F.3d 971 (7th Cir. 1996).

63. *Id.* at 976.

64. *In re Gabapenton Patent Litigation*, 214 F.R.D. 178, 184 (D. N.J. 2003).

65. *In re Sealed*, 146 F.3d 881 (D.C. Cir. 1988).

66. *United States v. Roxworthy*, *supra*, n. 47.

67. *National Union Fire Ins. Co. v. Murray Sheet Metal, Inc.*, 967 F.2d 980, 984 (4th Cir. 1992), quoted in *Coffman v. Metropolitan Life Ins. Co.*, 204 F.R.D. 296 (S.D. W. Va. 2001). The Fourth Circuit also stated in that case that "determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question."

68. *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. den.* 466 US 944 (1984).

69. *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011), citing *In re Grand Jury Subpoena, Mark Torf/Torf Environmental Mgmt*, 357 F.3d 900, 907 (9th Cir. 2004).

70. *Id.* at 568.

71. *O'Neal v. Healthshare/THA*, 2008 WL 11411198 (W.D.. Tex. Oct. 20, 2008); *United States v. Davis*, 636 F.2d 1082, 1040 (5th Cir. 1981), ("Litigation need not be imminent… so long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation."); *Skogen v. RFJ Auto Group, Inc. Employee Benefit Plan*, *supra*, n19; *Aull v. Cavalcade Pension Plan*, 185 F.R.D. (D. Colo. 1998); *McEwen v. Digitron Systems, Inc.*, 155 F.R.D. 678, 682 (D. Utah 1994). *Cf. Mid State Cardiology Associates v. Thompson*, 2005 WL 8175586 (M.D. Tenn. Aug. 2, 2005) (Courts have considered whether the "primary motivation "or the 'driving force behind the creation of the documents was the threat of litigation.").

72. *Garfinkle v. Arcana National Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974).

73. *In re Ford Motor Co.*, 110 F.3d 967. *See also*, *In re Processed Eggs Product Anti-Trust Litigation*, 2011 WL 4974269 (E.D. Pa. 2011), cited in *Cottillion v. United Refining Company*, 2011 WL 6989832 (W.D. Pa. December 20, 2011).

74. *In re Murphy*, 560 F.2d 326, 333-335 (8th Cir. 1977) (collecting cases), cited in *Panterv.Marshall Field Co.*, *supra*, n. 29.

75. *Struogo v. BEA Associates*, 197 F.R.D. 519, 521 (S.D.N.Y. 2001); *Henry v. Champlain Enterprises, Inc.*, *supra,* n. 27.

76. *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995).

77. *See also*, Stacey Cerrone, Reconciling the Attorney Client Privilege with ERISA's Fiduciary Exception, Bloomberg Law Reports-Employee Benefits, (October 11, 2010); Howard Shapiro, An Update on ERISA Attorney Client Privilege and the work product doctrine under ERISA's fiduciary exception, Lexology, July 1, 2011.

78. English courts first developed the fiduciary exception as a principle of trust law in the 19th century. The rule was that when a trustee obtained legal advice to guide the administration of the trust and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice. While the fiduciary exception quickly became an established feature of English common law, it did not appear in the United States until the twentieth century. *See*, *United States v. Jicarilla Apache Nation*, 546 U.S. 162, 170-173 (2011), quoted in *Durand v. Hanover Insurance Group, Inc.*, *supra*, n. 8. While the fiduciary exception had its origin in English trust law, it has since been applied to numerous fiduciary relationships. *See*, Charles F. Gibbs and Cindy D. Hanson, The Fiduciary Exception to a Trustee's Attorney/Client Privilege, 21 ACTEC NOTES 236 (1995).

79. *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A. 2d, Del Ch.(1976).

80. *See*, generally, Rust E. Reid, William R. Mureiko, and D'Ana H. Mikeska, Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 *Real Property Probate & Trust Law Journal* 54 (1996).

81. As applied in the ERISA context, the fiduciary exception provides that "an employer acting in the capacity of an ERISA fiduciary is disabled from asserting the attorney client-privilege against plan beneficiaries on matters of plan administration." *Becher v. Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997).

82. 430 F.2d. 1093 (5th Cir. 1970).

83. *Id*. at 1103-1104.

84. *Bland v. Fiatallis North America, Inc*., 401 F.3d 779, 787 (7th Cir. 2005), *Becher v. Long Island Lighting Co.*, *supra*, n. 81.

85. *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999). *See also*, *United States v. Doe*, 162 F.3d. 554, 556 (9th Cir. 1999); *Wildbur v. Arco Chemical Co*., *supra*, n. 32; *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co*., 543 F. Supp. 906, 909 (D. D.C. 1992).

86. *United States v. Mett*, *supra*, n, 85 at 1064.

87. *United States v. Mett*, *supra*, n.85, at 1064. This liability exception frequently applies to communications between a plan administrator and counsel after a final decision regarding benefits has been made, although the liability exception may be applied to communications between plan administrator and counsel that occurred prior to that date.

88. *Bland v.Fiatallis N.A., Inc*., *supra*, n. 84, at 787-788. *See also*, *Abbott v. Pipefitters Local Union No. 522 Hospital, Medical & Life Benefit Plan*, 94 F.3d 236, 239 (6th Cir. 1996); *Hudson v. General Dynamics*, 73 F. Supp. 2d 201 (D. Conn. 1999); *Everett v. USAIR Group, Inc*., 165 F.R.D. 1, 4 (D. D.C. 1995); *Solis v. Food Employers Labor Relations Association*, *supra*, n. 4; *Wachtel v. HealthNet, Inc*., 482 F.3d. 225, 232-34 (3d Cir.2007).

89. *See*, *Washington Baltimore Newspaper Guild, Local 35 v. Washington Star*, *supra*, n. 85, fn. 5 (not applying a good cause exception as "there is no legitimate need for a trustee to shield his actions from those whom he is obligated to serve."). *See also*, *Solis v. Food Employers Labor Relations Association*, *supra*, n. 4 (collecting cases). *Cf.* An ERISA case in which *Garner* was applied was *Donovan v. Fitzsimmons*, *supra*, n. 10.

90. *Lawrence E. Jaffe Pension Plan v. Household, International*, 244 F.R.D. 412 (N.D. Ill. 2006); *In re International Systems and Control Corp. Securities Litigation*, 693 F.2d. 1235, 1239 (5th Cir. 1982); *Cox v. Administrators U.S. Steel and Carnegie*, 17 F.3d 1386, 1423 (11th Cir 1994); *Strougo v. BEA Associates*, *supra*, n. 75.

91. *Durand v. The Hanover Ins. Group*, *supra*, n.8 at *15.

92. *Mid State Cardiology Associates, P.C. v. Thompson*, *supra*, n.71. *Cf. Gill v. Bausch & Lomb Supplemental Retirement Income Plan*, *supra*, n. 34.

93. *Durand v. Hanover Insurance Group, Inc*., *supra*, n. 8; *Solis*, *supra*, n.4; *Cusack-Acocella v. Dual Diagnosis Treatment Center*, *supra*, n. 21 (In the ERISA context, documents subject to the fiduciary exception to the attorney client privilege are also not protected by the work product doctrine); *Garimani v. First Unum Life Ins. Co*., 2010 WL 11596655 (C.D. Cal. Sept. 30, 2010); *Carr v. Anheuser Busch Companies, Inc*., 791 F. Supp. 2d 762 (E.D. Mo. 2011), aff'd 495 Fed. App'x 757,

765 (8th Cir. 2012); (The analysis as to whether the fiduciary exception apples is the same for both privileges), cited in *Scalia v. Reliance Trust Co.*, 17-cv-4540 (SRN/EOW) (D. Minn. May 4, 2020); *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620 (E.D. Mo. 2000) (same); *Allen v. Honeywell Retirement Earnings Plan*, 698 F. Supp. 2d 1197, 1202, fn. 6 (D. Ariz. 2010) (Documents subject to the fiduciary exception to the attorney client privilege are not protected by work product, because they are not prepared in anticipation of litigation); *Wittman v. Unum Life Ins. Co. of America*, 2018 WL 2970873 (E.D. La. June 13, 2018); *Wildbur v. Arco Chemical Co.*, *supra*, n. 32; *Harvey v. Standard Insurance Company*, *supra*, n. 4; *Buzzanger v. Life Insurance Co. of North America*, 2010 WL 1292162 (E.D. Mo. April 5, 2010) (Until there is a divergence of interest, the fiduciary exception applies to the work product doctrine); *David v. Alphin*, 2010 WL 3719899 (W.D. N.C. Sept. 17, 2010) (An ERISA plan fiduciary may not assert the attorney client privilege and work product privilege against plan participants on matters of plan administration including investment of plan assets); DOL Regulation 2571.7(b) ("The administrative law judge may also not protect attorney work product prepared to assist the fiduciary in its fiduciary capacity from discovery or use by the Secretary in the proceedings."). *Cf. Kushner v. Nationwide Mutual Insurance Co.*, *supra*, n. 15; (Trial courts in and outside the Sixth Circuit have held that the fiduciary exception applies to the work product doctrine); *Fortier v. Principal Life Ins. Co.*, 2008 WL 2323918 (E.D.N.C. June 2, 2008) (a fiduciary exception to both privileges has been recognized in some circuits, citing *Tatum v. RJ Reynolds Tobacco Company*, *supra*, n. 17 at 488, 493.

94. *OHI Asset Lender v. Woodland Manor Improvement Association*, 2010 WL 11693554 (D. R.I. Aug.13, 2010).

95. 88 Fed Cl. 12 (Ct. Fed. Cl. 2009). *See also*, *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, *supra*, n. 34 (The fiduciary exception applies only to documents withheld on the basis of attorney client privilege. Documents withheld on the basis of work product are not subject to disclosure even if they were prepared by or for employers in their fiduciary capacity).

96. *Id.*, citing *In re International Supplies and Controls Corp. Securities Litigation*, 693 F.2d. 1235, 1239 (5th Cir. 1982).

97. *Anderson v. Sotheby's, Inc.*, 2006 WL 2637535 (S.D.N.Y. Sept. 11, 2006); *Malty v. The Absolut Spirits Co., Inc.*, 2009 WL 800142(S.D. Fla. March 25, 2009).

98. *Anderson v. Sotheby's, Inc.*, *supra*, n. 97.

99. 219 F.R.D. 220 (N.D.N.Y. 2003).

100. *Goldenberg v. Intel, Inc.*, *supra*, n. 34.

101. *Supra*, n. 24.