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# UNITED STATES v. ADLMAN: PROTECTION FOR CORPORATE WORK PRODUCT?<sup>\*</sup>

Charles M. Yablon<sup>†</sup> & Steven S. Sparling<sup>††</sup>

## INTRODUCTION

In the large law firms of America, there is a friendly but intense rivalry between those lawyers who work primarily on pending litigation and those who work mostly on counseling, negotiating, and drafting documents relating to corporate transactions. Most firms are structured into departments along these lines, so even the newest lawyer knows whether she is "litigation" or "corporate." Each group tends to socialize among itself and perpetrates scurrilous stereotypes about the other: corporate lawyers are seen as dull and pompous, litigators as overly aggressive and bombastic. The competition between these groups can become quite fierce at firm outings. Litigators, however, have traditionally been able to claim one form of legal recognition that their colleagues in the corporate department have been denied. Under standard views of the work-product doctrine, most of the work produced by litigators has been protected from subsequent disclosure. The work produced by corporate lawyers failed to merit the same degree of protection.

The recent decision of the United States Court of Appeals for the Second Circuit in *United States v. Adlman*,<sup>1</sup> however, threatens to disrupt this traditional dichotomy. It adopts a broad view of the work-product doctrine that may well protect much of the material generated by corporate as well as litigation departments. In *Adlman*, the court extended work-product protection to a memorandum prepared for a corporate client by an employee of the accounting firm of Arthur Anderson & Co. who was both a lawyer and an accountant.<sup>2</sup> The memorandum discussed the tax implications of a

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<sup>1</sup> 134 F.3d 1194 (2d Cir. 1998).

<sup>2</sup> *Id.* at 1195. The factual background of *Adlman* is set forth *infra* Part I.

proposed restructuring by the client, likely tax challenges by the IRS to the transaction, possible responses by the client, and made a recommendation as to the preferred method for structuring the transaction.<sup>3</sup> Judge Leval, in a decision with which Judge Cabranes joined and to which Judge KeARSE dissented, held that the memorandum had potentially been prepared "in anticipation of litigation." Therefore, the memorandum be protected as opinion work product even though no litigation was pending or threatened at the time the memorandum was prepared, and no such litigation would take place unless the contemplated business transaction occurred.<sup>4</sup>

In *Adlman*, the Second Circuit adopted an expansive interpretation of what it means for a document to be "prepared in anticipation of litigation" under Federal Rule of Civil Procedure 26(b)(3) ("Rule 26(b)(3)"),<sup>5</sup> holding that the rule encompasses not just material prepared "primarily to assist in litigation" but all material created "because of" litigation.<sup>6</sup> The court elucidated that test in the terms previously suggested by Professors Wright and Miller as applicable when "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."<sup>7</sup> The court then went on to apply that test expansively, holding that the protection could be asserted with respect to prospective litigation arising from events, like the proposed restructuring of the corporation, that had not yet taken place.

This Article describes the decision in *Adlman* and explores its implications, including the potential availability of work-product protection to lawyers and others engaged in business and tax planning, preparation of financial statements and disclosures under the securities laws, drafting of transactional documents, audit letters and other tasks that have traditionally fallen within the scope of the corporate law department.

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<sup>3</sup> See 134 F.3d at 1195.

<sup>4</sup> See *id.* at 1204 (holding that such documents could be prepared "in anticipation of . . . litigation" if they "would [not] have been prepared irrespective of the expected litigation" and remanding the decision to the district court).

<sup>5</sup> FED. R. CIV. P. 26(b)(3).

<sup>6</sup> See *Adlman*, 134 F.3d at 1203.

<sup>7</sup> *Id.* at 1202 (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2024, at 343 (2d ed. 1994)) (emphasis omitted).

## I. UNITED STATES V. ADLMAN

*Adlman* involved a proposed corporate restructuring in which Sequa Corporation, an aerospace manufacturer, would merge two of its wholly-owned subsidiaries, Atlantic Research Corporation and Chromalloy Gas Turbine Corporation. The transaction was expected to generate an enormous loss and a tax refund. Monroe Adlman, an attorney who held the position of vice president for taxes at Sequa, expected an IRS challenge and lawsuit when, and if, Sequa claimed such a refund.<sup>8</sup> Adlman requested that Paul Sheahen, an accountant and lawyer at Arthur Anderson & Co. "evaluate the tax implications of the proposed restructuring."<sup>9</sup>

On September 5, 1989, Sheahen submitted a fifty-eight page memorandum. It contained a detailed legal analysis of likely IRS challenges to the reorganization and the resulting tax refund claim, as well as the authorities on which the IRS might rely. Sheahen then proposed possible legal theories or strategies for Sequa to adopt in response, recommended preferred methods of structuring the transaction, and made predictions about the likely outcome of litigation.<sup>10</sup> Guided by Sheahen's memorandum, Sequa effectuated the merger, which resulted in a \$289 million loss and an eventual \$35 million tax refund.<sup>11</sup> As anticipated, the IRS audited Sequa and demanded, *inter alia*, the production of Sheahen's memorandum. Sequa denied this request, citing work-product protection. The IRS served a summons on Adlman and, when production was refused, brought an enforcement proceeding in the United States District Court for the Southern District of New York.<sup>12</sup>

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<sup>8</sup> See *id.* at 1195.

<sup>9</sup> *Id.*

<sup>10</sup> The memorandum provided:

detailed legal analysis of likely IRS challenges to the reorganization and the resulting tax refund claim; it contained discussion of statutory provisions, IRS regulations, legislative history, and prior judicial and IRS rulings relevant to the claim. It proposed possible legal theories or strategies for Sequa to adopt in response, recommended preferred methods of structuring the transaction, and made predictions about the likely outcome of litigation.

*Id.*

<sup>11</sup> Sequa's 1989 tax return used the loss to offset 1986 capital gains, resulting in the \$35 million refund. See *Adlman*, 134 F.3d. at 1195.

<sup>12</sup> See *id.* at 1195-96.

In that proceeding, Adlman asserted that the memorandum was protected by both the attorney-client privilege and work-product doctrine. Judge Knapp rejected the attorney-client privilege claim, holding that Arthur Andersen & Co. had not been consulted to give legal advice.<sup>13</sup> He held the work-product doctrine inapplicable because the memorandum was prepared in contemplation of events that had not yet occurred and, therefore, not in anticipation of actual litigation.<sup>14</sup> Accordingly, Judge Knapp granted the IRS petition to enforce the subpoena.

On appeal, the Second Circuit affirmed Judge Knapp's rejection of the attorney-client privilege claim but vacated the district court's enforcement order with respect to the work-product doctrine. The court held that while the non-occurrence of events giving rise to litigation prior to preparation of the documents was a factor to be considered, it did not necessarily preclude the application of work-product protection.<sup>15</sup>

On remand, Adlman contended that the memorandum was fairly prepared in "anticipation of litigation," as litigation was "virtually certain" to result from the merger.<sup>16</sup> Adlman noted that the IRS had annually audited Sequa for over thirty years and that the loss and refund generated from the merger legally compelled the IRS to file a report with the Joint Congressional Committee on Taxation.<sup>17</sup> Moreover, Adlman contended that the novel interpretation of the tax code employed for the Sequa merger, for which there were no IRS decisions or cases on point, made litigation inevitable.<sup>18</sup> The district court rejected this argument<sup>19</sup> and Adlman appealed again.

Judge Leval of the United States Court of Appeals noted that Adlman's appeal presented a question of first impression for the Second Circuit: "whether Rule 26(b)(3) is inapplicable to a litigation analysis prepared by a party . . . to inform a business decision which turns on the party's assessment of the likely outcome of

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<sup>13</sup> See *United States v. Adlman*, No. M-18-304, 1994 WL 191869, at \*2 (S.D.N.Y. May 16, 1994) (holding that Arthur Andersen & Co. had not been contacted in the pursuit of legal advice). This portion of the district court's ruling was later affirmed. See *United States v. Adlman*, 68 F.3d 1495, 1449-1500 (2d Cir. 1995).

<sup>14</sup> See *Adlman*, 1994 WL 191869, at \*3.

<sup>15</sup> See *Adlman*, 134 F.3d at 1196 (citing *Adlman*, 68 F.3d at 1501).

<sup>16</sup> *Id.*

<sup>17</sup> See *id.* (citing 26 U.S.C. § 6405(a) (1994)).

<sup>18</sup> See *id.*

<sup>19</sup> See *United States v. Adlman*, No. M-18-304, 1996 WL 84502, at \*1 (S.D.N.Y. Feb. 27, 1996).

litigation expected to result from the transaction."<sup>20</sup> Obviously, the memorandum in *Adlman* was not prepared solely, or even primarily, to aid in litigation. It had a clear business purpose—to provide guidance to the company in its restructuring as well as to provide a risk-assessment of potential litigation. On the other hand, the document had clear legal purposes. It set forth, analyzed, and evaluated the strength of the claims the IRS was likely to make in subsequent litigation.<sup>21</sup> Thus, the question presented to the Second Circuit was whether a memorandum which analyzed potential claims in a lawsuit arising from events that had not yet occurred, and prepared primarily for business planning purposes, could nevertheless be protected by the work-product doctrine. The Second Circuit's answer, by a two-to-one margin, was that the memorandum could be protected.

In arriving at this result, the majority rejected an interpretation of the phrase "in anticipation of litigation"<sup>22</sup> set forth by the Fifth Circuit which holds that documents are work product only if they are created "primarily [ ] to assist in future litigation."<sup>23</sup> Instead, it adopted the more expansive interpretation proposed by Wright and Miller that such documents are protected as work product when they are prepared "because of" litigation.<sup>24</sup> The court noted that the work-product doctrine was intended to protect documents that set forth legal theories and analysis, and excluding documents from work-product protection merely because the legal analysis contained in them served other business purposes would severely undermine such protection.<sup>25</sup> Accordingly, the court held that "the

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<sup>20</sup> See *Adlman*, 134 F.3d at 1197.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* Only documents prepared "in anticipation of litigation" are protected by the work product doctrine. See *infra* Part II.

<sup>23</sup> See *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982). The *El Paso* case is discussed *infra* Part III.A.

<sup>24</sup> *Adlman*, 134 F.3d at 1198.

<sup>25</sup> See *id.* at 1199:

[T]he [work product doctrine] takes pains to grant special protection to the types of materials at issue in this case—documents setting forth legal analysis. . . . [I]t would oddly undermine [the doctrine's] purposes if such documents were excluded from protection merely because they were prepared to assist in the making of a business decision expected to result in the litigation. (citation omitted).

fact that a document's purpose is business-related appears irrelevant to the question whether it should be protected under Rule 26(b)(3).<sup>26</sup>

The Second Circuit expressly adopted the expansive and somewhat vague Wright and Miller test for determining whether documents are prepared in anticipation of litigation: i.e., whether, "in light of the nature of the document and the factual situation in the particular case, the document [could] fairly be said to have been prepared or obtained because of the prospect of litigation."<sup>27</sup> The court cautioned, however, that actual or anticipated litigation must play a causal role in the creation of the document. "[D]ocuments that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation" are not protected.<sup>28</sup> This, according to the majority, would largely exclude from protection documents prepared pursuant to regulatory statutes.<sup>29</sup>

Judge Kearse dissented, arguing that the court had "extended the work product privilege to a stage that precedes any possible 'anticipation' of litigation."<sup>30</sup> She noted that the memorandum merely contemplated events that had yet to occur, and that any documents so causally remote from actual or threatened lawsuits could not be considered prepared "in anticipation of litigation."<sup>31</sup>

<sup>26</sup> *Id.* at 1200.

<sup>27</sup> *Id.* at 1202 (quoting WRIGHT & MILLER, *supra* note 7, § 2024, at 343) (emphasis omitted).

<sup>28</sup> *Id.*

<sup>29</sup> See *Adlman*, 134 F.3d at 1201 n.5 (rejecting the Seventh Circuit's holding in *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 61-62 (7th Cir. 1980), in which the court held that the compelled creation of documents by regulation did not necessarily strip those documents of work product protection). The *Adlman* court declined to foreclose completely work product protection of regulatorially compelled documents. See *id.* ("Since the documents at issue [in *Special September 1978 Grand Jury*] were required to be prepared under Illinois law, it is *arguable* that they were not prepared 'because of' litigation.") (emphasis added).

The court also held that the IRS had failed to demonstrate the requisite need to overcome the memorandum's work product protection. See *id.* at 1204. The Second Circuit remanded the case to the district court, stating that the applicability of the work product doctrine to the memorandum hinged "on whether it would have been prepared irrespective of the expected litigation with the IRS." *Id.*

<sup>30</sup> *Adlman*, 134 F.3d at 1205 (Kearse, J., dissenting).

<sup>31</sup> See *id.*:

Where the only prospect of litigation is what would be anticipated if the party undertakes a contemplated transaction but not otherwise, and the materials in question were prepared in connection with providing legal advice to the party as to whether or not to undertake that transaction, I do not regard the materi-

Judge Kearse observed that such documents would frequently still be protected under standard principles of the attorney-client privilege.<sup>32</sup>

## II. THE WORK-PRODUCT DOCTRINE

To fully appreciate the impact of the *Adlman* decision, it is first necessary briefly to consider the mechanics and background of the work-product doctrine. The work-product doctrine provides qualified immunity from discovery to materials prepared in anticipation of litigation.<sup>33</sup> While ordinary work-product protection may be overcome by showing a "substantial need" for the materials and "undue hardship" in obtaining the substantial equivalent by other means, the work-product doctrine provides virtually absolute protection to materials containing a lawyer's mental impressions and opinions.<sup>34</sup>

The work-product doctrine is broader than the attorney-client privilege.<sup>35</sup> For example, work-product immunity is not waived

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al as having been prepared "in anticipation of litigation."

*id.*

<sup>32</sup> See *id.*

<sup>33</sup> See FED. R. CIV. P. 26(b)(3). See generally 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.70[1], at 26-206 (3d ed. 1998); WRIGHT & MILLER, *supra* note 7, § 2023, at 328-29. While usually thought of as embodied in Rule 26(b)(3) of the Federal Rules of Civil Procedure, the work product doctrine is actually somewhat broader than the Federal Rule. It applies in situations not covered by the Federal Rules, like the IRS subpoena involved in *Adlman*. Moreover, it was set forth by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), as a matter of federal common law. The *Hickman* decision is discussed *infra* notes 44-45 and accompanying text.

<sup>34</sup> See WRIGHT & MILLER, *supra* note 7, § 2023, at 329 (noting that the work product doctrine "gave virtually absolute protection to an attorney's mental impressions, legal theories, and the like."). The standard for attaining discovery of an attorney's work product opinion is not entirely clear. However, the circumstances for discovering such work product are extremely limited: a party seeking discovery must demonstrate more than a substantial need and undue burden. See *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981) ("[The mental impressions of counsel] cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship."). See generally MOORE ET AL., *supra* note 33, § 26.70[5][e], at 26-222 to 26-223 ("The majority of federal courts . . . have followed the better rule that 'opinion work product' is subject to disclosure on a showing of extraordinary circumstances.").

<sup>35</sup> "[Work product] is distinct from and broader than the attorney-client privilege, which protects only communications between attorney and his client." *In re Grand Jury Proceedings*, 604 F.2d 798, 801 (3d Cir. 1979). The disparity in scope between the work-product doctrine and the attorney-client privilege is derived from the distinct purposes underlying each doctrine. See, e.g., MOORE ET AL., *supra* note 33, § 26.70[8], at 26-228. Work-product immunity seeks to protect the adversarial system and the



necessarily by intentional disclosure to a third party and may be invoked by the client or the attorney.<sup>36</sup> Moreover, unlike the attorney-client privilege, both the client and lawyer may assert work-product immunity.<sup>37</sup> Consequently, the crime-fraud exception to privileges does not prevent the attorney from asserting work-product protection, assuming that the lawyer is unaware of the client's wrongdoing.<sup>38</sup>

Despite the work-product doctrine's broad scope, there are a plethora of manners in which the immunity can be waived. Failure to assert work-product protection constitutes a waiver.<sup>39</sup> In addition, there is a work-product waiver where intentional disclosure is made to a third party and such disclosure creates a substantial danger of disclosure to an adversary.<sup>40</sup> Inadvertent disclosure to an adversary will amount to a waiver if four factors are established: whether the party seeking discovery was misled by the inadvertent disclosure; whether precautions were taken against accidental disclosure; the time it took for the party seeking work-product immunity to discover the inadvertent disclosure; and notions of fair play and justice.<sup>41</sup> Moreover, work-product immunity is waived if the substance of the document is placed in issue by the party seeking protection.<sup>42</sup> Even if waived, however, work-product protection may continue to operate in subsequent proceedings.<sup>43</sup>

The work-product doctrine originated in the landmark Supreme Court decision in *Hickman v. Taylor*.<sup>44</sup> It should be noted that even that granddaddy of all work-product cases involved materials prepared for a lawsuit that had not yet occurred—notes taken by a

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attorney's thoughts and impressions. See *id.* In contrast, the attorney-client privilege safeguards client confidences, seeking to preserve the lawyer-client relationship and candor therein. See *id.*

<sup>36</sup> See MOORE ET AL., *supra* note 33, § 26.70[6][a], at 26-225.

<sup>37</sup> See MOORE ET AL., *supra* note 33, § 26.70[8], at 26-228.

<sup>38</sup> See MOORE ET AL., *supra* note 33.

<sup>39</sup> See MOORE ET AL., *supra* note 33, § 26.70[6][b], at 26-226.

<sup>40</sup> See MOORE ET AL., *supra* note 33, § 26.70[6][c], at 26-226; see also *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993).

<sup>41</sup> See MOORE ET AL., *supra* note 33. Inadvertent disclosure also raises an interesting question of whether opposing counsel is ethically obligated to refrain from reading patently accidental disclosure of confidential information. See generally *id.* at 26-226.1.

<sup>42</sup> See MOORE ET AL., *supra* note 33.

<sup>43</sup> See MOORE ET AL., *supra* note 33; see also *In re: Steinhardt*, 9 F.3d at 236 ("[W]e decline to adopt a per se rule that all voluntary disclosures to the government waive work product protection.").

<sup>44</sup> 329 U.S. 495 (1947).

lawyer for the owners of the tug boat *J.M. Taylor* during interviews with survivors of the mysterious sinking of the tug boat. The interviews took place about a month after the sinking, and over seven months before Hickman's lawsuit was filed.<sup>45</sup> In short, even the earliest of these cases recognized that work-product protection extends to documents where litigation is in prospect but has not yet actually occurred. *Adlman*, however, represents the latest in a long line of cases that have tried to delineate how imminent, how close, and how certain the prospect of litigation must be in order for material to qualify as prepared "in anticipation of litigation."

### III. ANTICIPATION OF LITIGATION

Concerns about litigation underlie most of the work that lawyers perform. Contracts are drafted so that their intended terms will be enforceable in litigation. Opinions of counsel prophesy the likely result if the issue under consideration were submitted to a court in the relevant jurisdiction. Much of the work of lawyers in advising clients and negotiating with respect to transactions is conducted against the background that if things go wrong, the matter will wind up in litigation. It is not surprising, therefore, that the courts have had difficulty determining exactly when material has been prepared "in anticipation of litigation" and how imminent the prospective litigation must be to warrant work-product coverage.<sup>46</sup> Can the immunity include documents created in an effort to avoid or discourage litigation?<sup>47</sup> Moreover, in our litigious society where near-

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<sup>45</sup> The complaint named the two tug boat owners individually and in their capacity as partners, as well as the railroad which owned the ship that the *J.M. Taylor* was assisting when the accident occurred. See *id.*

<sup>46</sup> See *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982). ("[W]e concede that determining whether a document is prepared in anticipation of litigation is a slippery task."); *MOORE ET AL.*, *supra* note 33, § 26.70[3][a], at 26-210.1 ("Courts have devised various formulations regarding just how concrete the prospect of litigation must be before protection will attach to a given document."); Thomas Wilson, Note, *The Work Product Doctrine: Why Have an Ordinary Course of Business Exception?*, 1988 COLUM. BUS. L. REV. 587, 594 ("Courts have failed to formulate a single standard for determining whether the materials in question were 'prepared in anticipation of litigation.'").

<sup>47</sup> Cf. *United States v. Adlman*, 134 F.3d 1194, 1199-2000 (2d Cir. 1998) (noting that the question of whether corporate documents are primarily prepared for litigation is an uneasy task and providing hypothetical circumstances in which the policies underlying the work product doctrine should apply to corporate documents); *El Paso*, 682 F.2d at 534 (discussing the difficult risk-management decisions facing large corporations).

ly all business documents contemplate the possibility of litigation, how is it possible to distinguish documents prepared in anticipation of litigation from those that are discoverable because they are "prepared in the ordinary course of business?"<sup>48</sup>

Surprisingly, until the *Adlman* case, the Second Circuit had never had occasion to interpret the phrase "in anticipation of litigation" found in Rule 26(b)(3). Other federal courts, however, had reached various—often conflicting—views as to the meaning of that phrase. This Part traces the case law development of the meaning of "in anticipation of litigation" and the impact of *Adlman* on such development. The driving policy behind the work-product doctrine is to preserve the adversarial nature of litigation by protecting material that one side has prepared in anticipation of litigation from discovery by the other.<sup>49</sup> Courts have tended to construe "in anticipation of litigation" broadly<sup>50</sup> to avoid the perceived unfairness of giving one party access to the other's litigation planning and analysis. They have employed a number of different fact-based inquiries to determine whether a sufficient nexus exists between the documents and litigation.<sup>51</sup>

There are two essential questions raised in construing the meaning of "in anticipation of litigation." As to the first—what constitutes litigation—federal courts have generally agreed on a broad definition that includes not only judicial proceedings but also governmental investigations,<sup>52</sup> grand jury subpoenas,<sup>53</sup> and arbitrations and negotiations.<sup>54</sup> In addition to construing "litigation," how-

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<sup>48</sup> The ordinary course of business exception is discussed below. See *infra* notes 128-34 and accompanying text.

<sup>49</sup> See *El Paso*, 682 F.2d at 542 ("The accent in *Hickman* was on a lawyer's need for a sphere of privacy in preparing a lawsuit."); Jeff A. Anderson et al., Note, *Special Project: Work Product Doctrine*, 68 CORNELL L. REV. 760, 843 (1983).

<sup>50</sup> See Anderson et al., *supra* note 49, at 844-45 ("[A] party is aided by the fact that the anticipation of litigation standard is broader than a strict reading of that language might imply.").

<sup>51</sup> See WRIGHT & MILLER, *supra* note 7, § 2024, at 339.

<sup>52</sup> See *Martin v. Monfort, Inc.*, 150 F.R.D. 172, 173 (D. Colo. 1993) (holding that in anticipation of litigation may include an investigation by a federal agency when there are reasonable grounds to anticipate that litigation will arise). See generally MOORE ET AL., *supra* note 33, § 26.70[4], at 26-217.

<sup>53</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981); see also *United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir. 1990) (applying the work product doctrine to a case involving an IRS summons).

<sup>54</sup> See *Samuels v. Mitchell*, 155 F.R.D. 195, 200 (N.D. Cal. 1994) (holding arbitrations to be sufficiently adversarial to constitute litigation); *Reavis v. Metropolitan Property & Liab. Ins.*, 117 F.R.D. 160 (S.D. Cal. 1987) (applying work product protection to

ever, a court must also decide what it means to be prepared "in anticipation of" such litigation. This raises the always thorny issue of legal causation. A court must examine the nexus between the creation of the materials and the litigation at issue to determine whether a legally sufficient causal relationship exists between their creation and the prospective litigation.<sup>55</sup>

Courts construing the work-product doctrine have struggled to delineate a standard to determine when a document has been created in anticipation of prospective litigation.<sup>56</sup> They have applied several tests, including the prospect test,<sup>57</sup> the specific claim or concrete facts test,<sup>58</sup> more-than-remote-possibility test,<sup>59</sup> and eye toward litigation test.<sup>60</sup> These cases revealed a variety of factual circumstances in which federal courts were willing to hold that documents were protected under the work-product umbrella:<sup>61</sup> documents prepared for litigation that never occurred;<sup>62</sup> multi-purpose documents that aimed towards litigation and other con-

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documents created during negotiations aimed towards avoiding litigation).

<sup>55</sup> See *MOORE ET AL.*, *supra* note 33, § 26.70[3][a], at 26-210.1; *Anderson et al.*, *supra* note 49, at 845.

<sup>56</sup> See *MOORE ET AL.*, *supra* note 33, § 26.70[3][a], at 26-210.1; *WRIGHT & MILLER*, *supra* note 7, § 2024, at 343 n.10; *Anderson et al.*, *supra* note 49, at 844-46; *Wilson*, *supra* note 46, at 594-95.

<sup>57</sup> See *National Union Fire Ins. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 624 (8th Cir. 1977); *United States v. Exxon Corp.*, 87 F.R.D. 624, 638 (D.D.C. 1980); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1033 (N.D. Ga. 1974). See generally *WRIGHT & MILLER*, *supra* note 7, § 2024, at 343 n.10; *Anderson et al.*, *supra* note 49, at 845.

<sup>58</sup> See *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993); *Maertin v. Armstrong World Indus., Inc.*, 172 F.R.D. 143, 148 (D.N.J. 1997); *Reich v. Great Lakes Collection Bureau, Inc.*, 172 F.R.D. 58, 61 (W.D.N.Y. 1997); *United States v. Massachusetts Inst. of Tech.*, 957 F. Supp. 301, 305 (D. Mass. 1997); *Status Time Corp. v. Sharp Elecs. Corp.*, 95 F.R.D. 27, 29 (S.D.N.Y. 1982); *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 725 n.6 (N.D. Ill. 1978); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 42-43 (D. Md. 1974). This test is the origin of the Wright and Miller test adopted by the *Adlman* court. See *Anderson et al.*, *supra* note 49, at 845-46. See generally *WRIGHT & MILLER*, *supra* note 7, § 2024, at 343.

<sup>59</sup> See *Fox v. California Sierra Fin. Servs.*, 120 F.R.D. 520, 524 (N.D. Cal. 1988).

<sup>60</sup> See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Sterling Drug Inc. v. Harris*, 488 F. Supp. 1019, 1026 (S.D.N.Y. 1980); *United States v. Bonnell*, 483 F. Supp. 1070, 1078 (D. Minn. 1979); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 457 (N.D. Ill. 1974).

<sup>61</sup> See generally *MOORE ET AL.*, *supra* note 33, § 26.70[3][a], at 26-210.2 to 26-212; *WRIGHT & MILLER*, *supra* note 7, § 2024, at 343 n.10.

<sup>62</sup> See *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381, 389-90 (D. Minn. 1992); *Home Ins. v. Ballenger Corp.*, 74 F.R.D. 93, 101 (D. Ga. 1977); *Amey v. Geo. A. Hormel & Co.*, 53 F.R.D. 179, 180 (D. Minn. 1971).

cerns;<sup>63</sup> documents prepared after a claim was filed;<sup>64</sup> and documents created at the request of counsel,<sup>65</sup> in addition to documents prepared primarily for litigation.<sup>66</sup> Conversely, courts tended to exclude documents from work-product protection when they found that the prospect of litigation was too remote,<sup>67</sup> or where the documents were prepared in the ordinary course of business.<sup>68</sup> A now-abandoned line of cases denied work-product protection to documents prepared at the instigation of a nonlawyer.<sup>69</sup>

Emerging from this morass of tests—the existence of which is partially due to the fact-intensive inquiry generated by the work-product doctrine—is the common principle that courts will examine the circumstances surrounding the creation of a document, and the purpose for which it was created, in considering whether a sufficient causal nexus to litigation exists so as to apply work-product protection.<sup>70</sup> Although the *Adlman* court noted a dichotomy between courts that apply the primary purpose test and those that adopt Wright and Miller's "because of litigation" test, there are, as shown below,<sup>71</sup> substantial differences even among those courts that apply the more popular "because of litigation" standard. Among such courts, the Second Circuit's *Adlman* decision stands out as perhaps the most expansive interpretation of the work-product doctrine.

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<sup>63</sup> See *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). In addition, *Adlman* stands for the proposition that the work product doctrine may apply to documents considering litigation that may stem from events that have not even occurred. See *MOORE ET AL.*, *supra* note 33, § 26.70[3][a], at 26-210.2 n.27.

<sup>64</sup> See *Spaulding v. Denton*, 68 F.R.D. 342, 345 (D. Del. 1975).

<sup>65</sup> See *United States v. O'Neill*, 619 F.2d 222, 227 (3d Cir. 1980).

<sup>66</sup> See *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982).

<sup>67</sup> See *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 795 (D. Del. 1954).

<sup>68</sup> See *Adlman*, 134 F.3d at 1202; *El Paso*, 682 F.2d at 542.

<sup>69</sup> See *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972). This line of cases has largely been abandoned. See generally *MOORE ET AL.*, *supra* note 33, § 26.70[3][c], at 26-213.

<sup>70</sup> See *MOORE ET AL.*, *supra* note 33, § 26.70[3][a], at 26-210.1; *Anderson et al.*, *supra* note 49, at 845.

<sup>71</sup> *Adlman*, 134 F.3d at 1198. The *Adlman* decision probably paints with too broad a brush. The case law on anticipation does not reflect the sharp dichotomy between the primary purpose and because of test as suggested by the Second Circuit. Indeed, several courts applying the because of test rely on primary purpose case law. See *infra* Part III.D. The two categories proffered by the *Adlman* court, however, provide a fair sketch of the respective ends of the work product spectrum.

### A. *The Primary Purpose Test: United States v. El Paso Co.*

The primary purpose test is associated with the Fifth Circuit Court of Appeals, the only circuit to adopt it expressly. The primary purpose standard requires that the "primary motivating purpose behind the creation of the document [is] to aid in possible future litigation."<sup>72</sup> The Fifth Circuit's primary purpose test was first fully articulated in 1981,<sup>73</sup> and is illustrated best by the circuit's decision in *United States v. El Paso Co.*<sup>74</sup>

El Paso Company ("El Paso") was a holding company for several corporations, principally located in Texas.<sup>75</sup> Due to its immense size, El Paso's in-house staff "expend[ed] over 10,000 hours" annually in preparing its tax return.<sup>76</sup> As part of its tax return preparation, El Paso created "tax-pool analysis" documents. These documents summarized El Paso's contingent tax liabilities, areas in which it was thought the company's return might be challenged and additional taxes assessed.<sup>77</sup> The IRS audited El Paso annually and sought disclosure of the tax-pool analysis documents.<sup>78</sup> El Paso refused, citing work-product protection.<sup>79</sup>

In considering El Paso's work-product claim, the Fifth Circuit discussed the various reasons for preparing such tax-pool analysis documents. The court noted that the tax code contains vast "gray areas," which require a large company to ascertain potential IRS challenges to the company's good-faith decisions in allocating assets within a given return.<sup>80</sup> In addition, public companies are compelled to ascertain and disclose contingent future tax liabilities by the Securities and Exchange Commission.<sup>81</sup> The Fifth Circuit deemed it significant that the tax-pool analysis documents did not

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<sup>72</sup> *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982) (quoting *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)).

<sup>73</sup> See *Davis*, 636 F.2d at 1040.

<sup>74</sup> *El Paso*, 682 F.2d at 542.

<sup>75</sup> *El Paso* held 67 subsidiaries. See *id.* at 533.

<sup>76</sup> *Id.*

<sup>77</sup> See *id.* at 532.

<sup>78</sup> See *id.* Specifically, the IRS requested "all analyses prepared by the El Paso Company regarding potential tax liabilities and tax problems." *Id.* at 533.

<sup>79</sup> See *El Paso*, 682 F.2d at 533 (noting that the head of El Paso's tax department simply returned the request to the IRS marked 'refused').

<sup>80</sup> See *id.* at 534. Indeed, the court noted that: "To thread one's way through this maze, the business or wealthy taxpayer needs the mind of a Talmudist and the patience of Job." *Id.*

<sup>81</sup> See *id.*; see also 15 U.S.C. § 78(l) (1994).

assist in the filing of a tax return but were prepared subsequent to filing.<sup>82</sup> Moreover, the documents did not require the input of an attorney and were prepared primarily for financial reporting purposes, rather than for any specific charge by the IRS or any imminent lawsuit.<sup>83</sup>

The Fifth Circuit denied El Paso's work-product claim solely on the basis that the tax-pool analysis documents were not prepared in anticipation of litigation.<sup>84</sup> The court held that "[l]itigation need not be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation."<sup>85</sup> Applying this standard to the tax-pool analysis documents, the *El Paso* court found that such documents were prepared largely due to securities regulation requirements.<sup>86</sup> The court noted that outside counsel handled El Paso's specific litigation claims, and that the tax-pool analysis documents were prepared without outside counsel's involvement.<sup>87</sup> With respect to litigation theories mentioned in the tax-pool analysis documents, the Fifth Circuit found that these portions of the documents pertained to general, tenuous litigation concerns, rather than to any specific preparation for trial.<sup>88</sup> Ultimately, the court held that the documents "carrie[d] much more the aura of daily business than [they did] of courtroom combat."<sup>89</sup>

Thus, the *El Paso* primary purpose test mandates that the court determine the single, primary purpose for which a document has been created and protect only those documents created primarily to

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<sup>82</sup> *El Paso*, 682 F.2d at 534.

<sup>83</sup> See *id.* at 534-35; see also *id.* at 535 ("The tax pool analysis is undertaken solely to insure that the corporation sets aside on its balance sheet a sufficient amount to cover contingent tax liability.").

<sup>84</sup> See *id.* at 542 ("Even assuming that El Paso's tax pool analysis otherwise qualifies for work product protection . . . the doctrine [is] unavailable here because the tax pool analysis is not prepared 'in anticipation of litigation.'").

<sup>85</sup> *Id.* at 542-43 (quoting *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)).

<sup>86</sup> See *id.* at 543 ("[T]he primary motivation is to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability.").

<sup>87</sup> See *El Paso*, 682 F.2d at 543. This observation assisted in satisfying the Fifth Circuit's inquiry as to whether the tax-pool analysis had a sufficient link to any concrete prospects of litigation. See *id.* ("El Paso's tax pool analysis is . . . distant from actual litigation . . .").

<sup>88</sup> See *id.* at 543-44 ("The tax pool analysis concocts theories about the results of possible litigation; such analyses are not designed to prepare a specific case for trial or negotiation.").

<sup>89</sup> *Id.* at 544.

aid in a particular, anticipated litigation. Although the *El Paso* court specifically stated that litigation did not have to be imminent to qualify for work-product protection, it should be noted that in *El Paso*, the documents at issue had been prepared at a time when the prospect of litigation was quite remote and hypothetical.

B. *The "Because of Litigation" Test: Binks Manufacturing Co. v. National Presto Industries*

In *Binks Manufacturing Co. v. National Presto Industries*,<sup>90</sup> the Seventh Circuit applied the Wright and Miller "because of litigation" test; yet, it did so in a way that limited application of work-product protection to litigation that was fairly imminent and involved "articulable" claims. The case arose out of a dispute involving an "industrial spray finishing and baking system," which Presto had previously purchased from Binks Manufacturing Company.<sup>91</sup> The system did not function properly. Presto claimed it had been improperly manufactured; Binks claimed that Presto was not operating the system properly.<sup>92</sup>

At issue in the case were three memoranda prepared by an in-house Presto attorney who had traveled to the Presto plant where the faulty system was installed.<sup>93</sup> The first memorandum, addressed to Presto's general counsel, set forth a recommended strategy to be employed in negotiations with Binks.<sup>94</sup> A second memorandum, also addressed to the general counsel, entitled "Evaluation of Binks Situation," described a conversation between the lawyer and three Presto executives and detailed problems with the baking system.<sup>95</sup> A third memorandum from the lawyer also detailed the system's malfunction and sought to allocate responsibility between Presto and Binks for the system's breakdowns.<sup>96</sup> The trial court granted work-product protection to the first memorandum but not the other two.<sup>97</sup>

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<sup>90</sup> 709 F.2d 1109 (7th Cir. 1983).

<sup>91</sup> *Id.* at 1111.

<sup>92</sup> *Id.*

<sup>93</sup> See *id.* at 1113.

<sup>94</sup> See *id.*

<sup>95</sup> See *Binks Mfg. Co.*, 709 F.2d at 1113.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*



On appeal, the Seventh Circuit, while citing the Wright and Miller test, also approvingly cited prior case law which held that "[t]he mere contingency that litigation may result is not determinative."<sup>98</sup> The court sought to distinguish between routine investigations of possible claims conducted in the ordinary course of business and those in which there is a clear intent to litigate.<sup>99</sup> Reviewing the circumstances which had lead to the creation of the lawyer's memoranda in *Binks*, the court found no indication that the parties thought litigation was imminent or even likely to occur. To this effect, the court stated:

We conclude though, that while there may have been "the remote prospect of litigation" when [Presto's lawyer] prepared his memoranda, the appellant has failed to meet its burden of proving that the memoranda were "prepared . . . because of the prospect of litigation" or, that "some articulable claim, likely to lead to litigation" had arisen.<sup>100</sup>

The Seventh Circuit in *Binks* sought to limit the scope of the "because of litigation" test by holding that any prospective litigation must be likely and not remote at the time the document at issue is created. This is seen most clearly in the court's statements concerning the first memorandum, which recommended negotiating strategies based on a lawyer's evaluation of the claim, and seems most clearly to include legal opinions and analyses, which was held by the lower court to be protected by the work-product doctrine. The lower court's ruling with respect to this document had not been appealed. However, the Seventh Circuit stated, consistent with their ruling in *Binks*, that even the first memorandum was not protected as work product.

### C. Further Articulation of Anticipation of Litigation Standards

While the Seventh Circuit in *Binks* sought to limit the scope of the "because of litigation" test in terms of imminence and likelihood of litigation, the Eighth Circuit, in *Simon v. G.D. Searle & Co.*,<sup>101</sup> sought to reintroduce concepts of "purpose" into the "because of litigation" test. At issue in *Simon* were "risk-management docu-

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<sup>98</sup> See *id.* at 1118-19 (citing *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982)).

<sup>99</sup> See *id.* at 1120.

<sup>100</sup> *Binks Mfg. Co.*, 709 F.2d at 1120 (citations omitted).

<sup>101</sup> 816 F.2d 397 (8th Cir. 1987).

ments."<sup>102</sup> These documents were prepared by defendant Searle "in an attempt to keep track of, control, and anticipate the cost of Searle's product liability litigation."<sup>103</sup> When such suits were filed against Searle, its legal department prepared reserve estimates which "embody the attorney's estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations, and other factors."<sup>104</sup> These individual analyses were then sent to the risk-management department where they were aggregated and used for a variety of business planning purposes including budget, profit, and insurance considerations.

After reciting the Wright and Miller test and the ordinary course of business exception, the Eighth Circuit concluded that "we do not believe it can be said that the risk management documents were prepared for purposes of litigation."<sup>105</sup> The risk management department in *Simon* "was not involved in giving legal advice or in mapping litigation strategy in any individual case."<sup>106</sup> It would seem, therefore, that in the Eighth Circuit's view, the purpose for which these documents were prepared disqualified them from work-product protection. However, the *Simon* decision went on to say that to the extent such documents "disclose the individual case reserves calculated by Searle's attorneys,"<sup>107</sup> they were exempt from disclosure. There is an anomaly in this holding, which the dissent in *Simon* points out.<sup>108</sup> If the documents in *Simon* were not prepared in anticipation of litigation, then no part of them should be protected as work product. Yet, it is also clear that the individual case reserves, which involve lawyer evaluation of pending litigation, implicate the core concerns of the work-product doctrine. The *Simon* case may be read as holding that where such core concerns are involved, a litigation purpose is either presumed or not required.

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<sup>102</sup> See *id.* at 399.

<sup>103</sup> *Id.* at 400.

<sup>104</sup> *Id.* at 400-01.

<sup>105</sup> *Id.* at 401.

<sup>106</sup> *Simon*, 816 F.2d at 401.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 405 (Gibson, J., dissenting).

Concerns about the purpose and motivation for the creation of documents also appear in the Third Circuit's decision in *United States v. Rockwell International*.<sup>109</sup> Similar to *Adlman*, *Rockwell International* arose out of an IRS investigation but involved the discovery of Rockwell's "free reserve file."<sup>110</sup> Documents in that file analyzed the "soft spots" in Rockwell's tax return, including the possibility and consequences of an adverse IRS ruling with respect to such soft spots, the likelihood of such a ruling and the various negotiating and settlement positions.<sup>111</sup> In remanding the case for further factual findings, the Third Circuit essentially applied the *El Paso* "primary purpose" test, holding that the court below had to make a factual determination "with specificity" as to "Rockwell's motivation in creating and maintaining the free reserve file."<sup>112</sup> If it was maintained to "aid Rockwell in future negotiations and litigation with the IRS," it was protected.<sup>113</sup> If it was "maintained so that Rockwell may comply with generally accepted accounting principles and SEC reporting requirements," it was not.<sup>114</sup> The opinion assumes that the lower court will determine one motivation or another to be the primary purpose for the creation of the file.

In *National Union Fire Ins. v. Murray Sheet Metal Co.*,<sup>115</sup> the Fourth Circuit adopted a version of the *Binks* standard but made the requirements of imminence and likelihood of litigation even clearer. In remanding the case for further factual findings, the court found that a vague concern about potential litigation would not be enough to trigger work-product protection.<sup>116</sup> As it noted, "members of society tend to document transactions and occurrences to avoid the foibles of memory and to perpetuate evidence for the resolution of future disputes," but a concern with the mere possibility of litigation does not make a document work product.<sup>117</sup> Rather, the court stated that the work-product doctrine is only applicable when "the

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<sup>109</sup> 897 F.2d 1255 (3d Cir. 1990).

<sup>110</sup> See *id.* at 1256.

<sup>111</sup> See *id.* at 1258 n.1.

<sup>112</sup> *Id.* at 1266.

<sup>113</sup> *Id.*

<sup>114</sup> *Rockwell Int'l*, 897 F.2d at 1266.

<sup>115</sup> 967 F.2d 980 (4th Cir. 1992).

<sup>116</sup> See *id.* at 984.

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

preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation."<sup>118</sup>

#### D. *The Adlman Decision and Anticipation of Litigation*

In light of these prior decisions, the *Adlman* case clearly breaks new ground. All of the circuit court cases discussed above sought to limit the scope of the work-product doctrine either by reference to the primary purpose for which the material was prepared or based on the likelihood and imminence of prospective litigation. *Adlman*, however, expressly rejects the "primary purpose" limitation and almost as clearly rejects the idea that prospective litigation must be imminent or reasonably likely in order for documentation to qualify for work-product protection. The result is a very broad protection for all material that may be causally connected to concerns, thoughts, or fears of prospective litigation. The only limit expressly recognized by *Adlman* is the "ordinary course of business" exception, and even that is narrowly construed to apply only to documents that would have been produced in substantially similar form without the prospect of litigation.

Writing for majority, Judge Leval clearly demarcates the Second Circuit standard from the "primary purpose" analysis of the Fifth Circuit and rejects the latter standard. He states:

We believe that a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product, much less primarily or exclusively to aid in litigation. Preparing a document "in anticipation of litigation" is sufficient.<sup>119</sup>

The documents at issue in *Adlman* seem to have had a dual purpose: both to aid in the planning of the proposed merger and to evaluate and prepare for the prospective IRS litigation that would be brought about by the merger.<sup>120</sup> Given the court's legal analysis, it did not have to determine which purpose was primary. The language of the opinion goes further, however, and strongly suggests

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<sup>118</sup> *Id.*

<sup>119</sup> United States v. *Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998).

<sup>120</sup> See *id.* at 1197-98.

that a document prepared because of litigation, but which is created solely for business purposes, is still protected by the work-product doctrine.<sup>121</sup> This would seem to be the import of the court's statement that:

We see no basis for adopting a test under which an attorney's assessment of the likely outcome of litigation is freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance. The fact that a document's purpose is business-related appears irrelevant to the question whether it should be protected under Rule 26(b)(3).<sup>122</sup>

In short, the purpose for which a document was prepared now appears to be irrelevant in the Second Circuit when determining whether a document qualifies for work-product protection. The dispositive question is whether the documentation at issue would have been prepared in "substantially similar form but for the prospect of litigation."<sup>123</sup>

This "but for" standard of causation, however, raises the familiar question of how remote and attenuated the causal chain can be and still have legal significance. Will the Second Circuit follow the *Binks* and *National Union* cases and limit work-product protection to situations where the prospective litigation is likely and not remote? It seems clear that the *Adlman* court will apply work-product immunity to documents analyzing litigation arising from events that have not yet occurred. On the facts of *Adlman*, although litigation with the IRS was seen as virtually certain if the merger went through and the tax refund claim was asserted, the merger and tax refund

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<sup>121</sup> Indeed, several decisions cited by *Adlman* discuss the "primary" or "driving" force behind the creation of the document in applying the Wright and Miller test. *Id.* at 1202 (citing *National Union Fire Ins. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (adopting the Wright and Miller test but noting that "[d]etermining the driving force behind the preparation of each requested document is [ ] required in resolving a work product immunity question."); *Binks Mfg. Co. v. National Presto Indus.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983) (adopting the Wright and Miller test, yet relying on primary purpose case law to determine the applicability of the work product doctrine); see also *Rockwell*, 897 F.2d 1255, 1266 (3d Cir. 1990) (relying on the Wright and Miller test and then inquiring into the motivating factor behind the creation of the document). The thread connecting those decisions to *Adlman* is the consistent application of a broad fact-based inquiry in applying work product protection. See, e.g., *id.* (extending its examination beyond the motivating factor in the creation of the document to the other elements of the work product doctrine). A more accurate couching of the case law depicts *El Paso* and *Adlman* as existing on different ends of the anticipation of litigation spectrum.

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

<sup>123</sup> *Id.* at 1195.

claim were, themselves, contingent events that had not yet occurred and whose occurrence was completely under the control of those asserting the work-product claim. In that sense, the prospect of litigation in *Adlman* was substantially more contingent and remote than in *Binks* or similar cases where the events which were to give rise to the litigation had already occurred at the time the documents were prepared. Yet, the Second Circuit, unlike the court in *Binks*, was willing to grant work-product protection to such documents.<sup>124</sup>

*Adlman* expressly holds that documents prepared in connection with events that have not yet occurred can have sufficient causal connection to prospective litigation arising from such events to warrant work-product protection.<sup>125</sup> This does not mean, however, that the contingent nature of such events is irrelevant to work-product analysis. Indeed, *Adlman* states that "non-occurrence" is a "factor to be considered."<sup>126</sup> Judge Leval further noted that work-product protection would be available, "where a party faces the choice of whether to engage in a particular course of conduct virtually certain to result in litigation and prepares documents analyzing whether to engage in the conduct based on its assessment of the likely result of the anticipated litigation."<sup>127</sup> This statement is consistent with the view that some kind of probability assessment still limits the Second Circuit's causation analysis. Documents based on litigation arising from contingent future events may be work product, but only when litigation is "virtually certain" to follow from the occurrence of such events. While this is a plausible reading of

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<sup>124</sup> In most instances, work product protection is applied where there is a case pending or when a specific event has already occurred that makes litigation a distinct possibility. See, e.g., *National Union*, 967 F.2d at 984 (requiring an actual claim or an actual event to apply work product protection); *Binks*, 709 F.2d at 1120 (denying work product protection where no threat of litigation had been made when the document in question was prepared). The only other circuit court case that might be construed as extending work product to documents prepared prior to the occurrence of events giving rise to the litigation is *Commonwealth of Puerto Rico v. Department of Justice*, 823 F.2d 574 (D.C. Cir. 1987), but that case arose out of a very different factual setting involving a criminal investigation by the Justice Department. In most respects, *Adlman* appears to be on the outer edge of the work product spectrum in construing the imminence requirement of work product protection.

<sup>125</sup> *Adlman*, 134 F.3d at 1196 ("Although the non-occurrence of events giving rise to litigation prior to preparation of the documents is a factor to be considered . . . it does not necessarily preclude application of work-product privilege."); see also *supra* Part I.

<sup>126</sup> *Adlman*, 134 F.3d at 1196.

<sup>127</sup> *Id.*

Judge Leval's opinion, it is by no means the only one. Given the concern for protecting a lawyers' theories and analyses that pervades the opinion, it is equally likely that Judge Leval would even apply work-product protection to a tax planning document which considered possible IRS challenges to a proposed transaction and found the likelihood of such a lawsuit remote, so long as it contained lawyers' thought processes and legal theories.

The one limitation on the application of the work-product doctrine which the *Adlman* court explicitly recognizes is the exception for material prepared in the ordinary course of business.<sup>128</sup> Here too, however, the *Adlman* court created a new formulation designed to reconcile the Wright and Miller test with the ordinary course of business exception. In remanding the case for further findings, the Second Circuit directed the district court to determine

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<sup>128</sup> Documents that are prepared in a company's ordinary course of business or pursuant to regulatory requirements are not generally shielded by the work-product doctrine. See generally MOORE ET AL., *supra* note 33, § 26.70[3][b], at 26-212; WRIGHT & MILLER, *supra* note 7, § 2024, at 346. This principle is found in the Advisory Committee's notes to Rule 26(b)(3) and, despite pointed criticism, has been deemed an exception to the work-product doctrine. See *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987); *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982); *McDougall v. Dunn*, 468 F.2d 468, 473 (4th Cir. 1972).

Several courts and commentators have asserted that the ordinary course of business standard undermines the purpose of the work-product doctrine by enabling an adverse party to obtain the work, thoughts, and opinions of counsel that would otherwise be protected had the document been prepared outside of the ordinary course of business. See, e.g., *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 18 (D. Md. 1980); *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 92 (E.D. Mo. 1980); *Anderson et al.*, *supra* note 49, at 848-49. See generally *Wilson*, *supra* note 46.

The exception is premised on the notion that litigation is an omnipresent possibility in American life, and that it would therefore undermine the liberal discovery standards of the Federal Rules of Civil Procedure to prevent discovery whenever a company routinely prepared documents for merely hypothetical litigation contingencies. See *National Union Fire Ins. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) ("[B]ecause litigation is an ever-present possibility in American life, it is more often the case than not that events are documented with the general possibility of litigation in mind."); *Wilson*, *supra* note 46, at 597 ("Providing work product protection to materials merely because they were prepared by an attorney would create a dark veil of secrecy over most of what a company does and would negate the policy of giving discovery a broad and liberal application."). As a result, "courts use [the ordinary course of business exception] to limit the protection given to internal documents of large manufacturing and insurance companies and to documents prepared by nonlawyers." *Anderson et al.*, *supra* note 49, at 848.

"whether [the memorandum] would have been prepared irrespective of the expected litigation with the IRS."<sup>129</sup> It went on to explain that:

If the district court concludes that substantially the same Memorandum would have been prepared in any event—as part of the ordinary course of business of undertaking the restructuring—then the court should conclude the Memorandum was not prepared because of the expected litigation and should adhere to its prior ruling denying the protection of the Rule.<sup>130</sup>

Note that this standard demarcates the line between documents prepared in the ordinary course of business (and, therefore, unprotected by work product) and documents prepared because of litigation (which fall under the work-product protection).<sup>131</sup> Using this analysis, documents prepared in the ordinary course of business are not exceptions to the work-product rule but simply fail to meet the "because of" litigation standard. Analyzing whether a document is prepared in the ordinary course of business or for litigation is common in the work-product case law.<sup>132</sup>

What is new about the *Adlman* decision is the court's indication that a document is not prepared in the ordinary course of business if it or its *substantial equivalent* would not have been created but for the prospect of litigation.<sup>133</sup> *Adlman* gives no guidance as to how different a document needs to be from its ordinary business counterpart in order to confer work-product protection. For example, one can easily imagine, on remand, that the district court in *Adlman* would conclude that even absent the threat of IRS litigation, Arthur Anderson & Co. would have been asked to produce some document providing advice concerning the proposed restructuring, but that absent the IRS litigation threat it would have focused on entirely different concerns. Under the "substantially similar" test, the content of such a hypothetical document would be highly relevant in determining whether work-product protection applies to the document that was actually created.

Finally, it should be noted that the ordinary course of business limitation reintroduces concepts of business purpose that *Adlman* otherwise banishes from work-product analysis. Indeed, it is quite

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<sup>129</sup> *Adlman*, 134 F.3d at 1204.

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

<sup>131</sup> See *id.*

<sup>132</sup> See *supra* note 128 and accompanying text.

<sup>133</sup> See *Adlman*, 134 F.3d at 1195.



conceivable that the *Adlman* court might have reached the same result that the Fifth Circuit came to in *El Paso* by focusing not on the purpose of the documents but on their preparation in connection with regulatory requirements.<sup>134</sup>

#### IV. *ADLMAN* AND WORK-PRODUCT PROTECTION FOR CORPORATE DOCUMENTS

This Part considers the effect of the *Adlman* standard on the application of work-product protection to a variety of corporate documents, contrasting it with the primary purpose test where relevant to illustrate more fully the differences, similarities, and scope of the new standard. This comparison is easy to do with *Adlman* because Judge Leval specifically discussed the potential impact of the new standard on some common corporate documents, in particular, risk-management assessments, investigative reports, and opinion letters. However, while the *Adlman* opinion expands work-product immunity for each of these types of documents, the extent of such expansion and its interrelationship with the ordinary course of business and regulatory compliance exception must still be evaluated.

##### A. *Risk-Management Documents*

For the purpose of this Article, a risk-management document can be defined as one in which the impact and merit of potential litigation is assessed with respect to proceeding with a certain business decision. Under the primary purpose test, such documents were only subject to protection when the litigation motivations were shown to outweigh the business purposes for creating the documents.<sup>135</sup> This was likely to be difficult to establish, particularly when substantial revenue hinged on the decision whether to proceed with the planned course of action.<sup>136</sup> The "because of"

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<sup>134</sup> See *supra* note 29 and accompanying text; see also *United States v. Rockwell Int'l*, 897 F.2d 1255, 1266 (3d Cir. 1990) (relying on the Wright and Miller test and denying work-product protection to tax documents similar to those in *El Paso* and relying on the regulatory exception to work product).

<sup>135</sup> See *supra* Part III.A.

<sup>136</sup> See *Harper v. Auto-Owners Ins.*, 138 F.R.D. 655, 661 n.2 (S.D. Ind. 1991) ("Documents prepared for concurrent purposes . . . should not be classified as work product."); *Scott Paper Co. v. Ceilcote Co.*, 103 F.R.D. 591 (D. Me. 1984) (denying work-

litigation standard, however, potentially offers considerably more refuge for risk-management documents under the work-product umbrella. Indeed, *Adlman* itself involved such a risk-management document.<sup>137</sup>

A question left open by the *Adlman* court, however, is the full effect of regulatory requirements on risk-management documents. Many risk assessments by public companies are done to comply with periodic disclosure requirements. The Second Circuit, pursuant to the ordinary course of business exception, indicated an aversion to conferring work-product protection on documents prepared in response to governmental regulation.<sup>138</sup> However, while the court indicated resistance to such work-product claims, it merely deemed them "arguable."<sup>139</sup> Indeed, a flat denial of work-product protection to such documents would contradict *Adlman's* driving principle that work-product questions are necessarily fact-driven causation inquiries that preclude bright-line rules.<sup>140</sup>

Corporate law departments routinely prepare memoranda regarding clients' disclosure obligations: when to disclose; what constitutes material information needed to be disclosed; or whether to go forward with an initial public offering given the attendant discovery obligations of such an undertaking. On the one hand, *Adlman* seems to recognize that blanket work-product protection of all such routine documents would undermine the aims of liberal discovery by threatening to shield nearly all corporate documents.<sup>141</sup> However, when a corporate action is contemplated and a memorandum is prepared discussing whether the action is material and must be disclosed pursuant to SEC reporting regulations, and assessing the likelihood of a private or SEC lawsuit if no such disclosure is made, it is difficult to see how protection for such a document could be

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product immunity to a risk-management document where its primary purpose was to address business considerations). See generally *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982) (balancing business concerns against litigation issues).

<sup>137</sup> *Adlman*, 134 F.3d at 1200 ("We see no basis for adopting a test under which . . . [discovery is permitted] merely because the document was created for a business purpose rather than for litigation assistance."); see also *American Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972) (providing work-product protection to risk-management letters regarding patent infringement).

<sup>138</sup> See *supra* note 29.

<sup>139</sup> See *supra* note 29.

<sup>140</sup> *Adlman*, 134 F.3d at 1203 n.6 (construing Second Circuit precedent and disavowing a "categorical rule" for work-product).

<sup>141</sup> See *supra* Part I.

denied consistent with the decision in *Adlman*. Perhaps it would make a difference if the prospect of litigation from such disclosure or nondisclosure were virtually certain.

The key to acquiring work-product immunity for such regulatory documents is demonstrating that such documents would not have been prepared in "substantially similar" form but for the anticipated litigation.<sup>142</sup> In *Adlman*, the court suggested the removal of the Sequa memorandum from the ordinary course of business exception precisely because the document's make-up was substantially different from the company's ordinary business documents.<sup>143</sup> The bar of work-product immunity for documents prepared pursuant to regulation stems from the same sentence in the Advisory Committee notes to Rule 26(b)(3) as the ordinary course of business exception.<sup>144</sup> If corporate documents—substantially modified in response to a virtually certain prospect of litigation—are exculpated from the ordinary course of business exception, then the same doctrinal protection is conceivably available for regulatory documents that are substantially different than the norm due to the virtually certain prospect of litigation.<sup>145</sup>

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<sup>142</sup> See *Adlman*, 134 F.3d at 1195 ("Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3)."); see also *Cochran v. St. Paul Fire & Marine Ins. Co.*, 909 F. Supp. 641, 645 (W.D. Ark. 1995) (providing work-product protection to documents that substantially deviate from normal business documents). Deviation from the normal business document or routine can be achieved in a number of ways, including: involvement of outside counsel, or special treatment by in-house counsel.

<sup>143</sup> See *Adlman*, 134 F.3d at 1202 ("[I]t should be emphasized that the 'because of' formulation that we adopt . . . withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.").

<sup>144</sup> See *supra* Part II.

<sup>145</sup> See *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 61-62 (7th Cir. 1980); see also *Maertin v. Armstrong World Indus.*, 172 F.R.D. 143, 148 (D.N.J. 1997) ("The work product doctrine clearly precludes the protection of documents . . . pursuant to public requirements *unrelated to litigation* . . .") (emphasis added). *Special September* involved two subpoenas to compel discovery of a law firm's reports and documents stemming from its representation of a not-for-profit trade association. The firm had assisted the association in filing a state mandated campaign contribution report which had neglected to disclose certain funds. See *Special September*, 640 F.2d at 53. The association was simultaneously indicted by a grand jury for illegal political campaign contributions. See *id.* The Government claimed that the work-product doctrine was inapplicable, as Illinois law compelled the preparation of documents sought by the subpoenas. See *id.* at 61. The Seventh Circuit held that the documents were prepared in anticipation of litigation since a concrete prospect of litigation existed throughout the grand jury indictment, despite the fact that the documents were also prepared according to Illinois report-

## B. Investigative Reports

Investigative reports—documents that examine the cause of an infraction or accident—receive diverse treatment by courts with respect to work-product protection.<sup>146</sup> Specifically, insurance reports and non-insurance reports receive disparate work-product treatment.<sup>147</sup> The linchpin for the analysis of these documents is whether the investigative report, which almost invariably will have been created in part because of prospective litigation, can be classified as falling within the ordinary course of business.<sup>148</sup>

First-party insurance adjusters' reports are generally held to fall outside the scope of work-product protection, as the insurer owes a duty to the insured to prepare the report.<sup>149</sup> Thus, under the *Adlman* standard, such documents would have been prepared irrespective of litigation. Third-party insurance claims fare better in the work-product realm. The touchstone for third-party insurance investigative reports appears to be whether there is a concrete prospect of litigation when the claim is prepared.<sup>150</sup> Insurance reports are also more likely to be protected when the accident in question is of such a nature that litigation is a foregone conclusion.<sup>151</sup> Because

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ing requirements. See *id.* at 61-62 ("[I]t is clear that the law firm knew before it began to prepare the reports that the Grand Jury as well as the Illinois State Board of Elections wanted information concerning political contributions by the Association."). Work-product protection, however, was ultimately withheld due to the association's fraudulent conduct. See *id.* at 63 ("[T]he Association cannot invoke the work product doctrine as to the subpoenaed documents because of its prima facie fraud in the filing of the reports.").

<sup>146</sup> See generally MOORE ET AL., *supra* note 33, § 26.70[3][c], at 26-213 (detailing judicial treatment of investigative reports).

<sup>147</sup> See MOORE ET AL., *supra* note 33.

<sup>148</sup> See generally MOORE ET AL., *supra* note 33.

<sup>149</sup> See MOORE ET AL., *supra* note 33, at 26-213 to 26-214 ("The rationale is that when an insured presents a first party claim, the insurance company owes the insured a duty to adjust the claim in good faith, and there is no initial contemplation of litigation.") (citing *Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125, 126 (D. Colo. 1993)).

<sup>150</sup> See MOORE ET AL., *supra* note 33, at 26-215 ("If the probability of a lawsuit is immediately apparent to the claims adjuster upon initially surveying the incident, it is likely that the court will find that the investigative report was prepared in anticipation of litigation.").

<sup>151</sup> See MOORE ET AL., *supra* note 33. ("If the probability of a lawsuit is immediately apparent to the claims adjuster upon initially surveying the incident, it is likely that the court will find that the investigative report was prepared in anticipation of litigation.") (citing *Raso v. CMC Equip. Rental, Inc.*, 154 F.R.D. 126, 128 (E.D. Pa. 1994)); see also *Suggs v. Whitaker*, 152 F.R.D. 501, 506 (M.D.N.C. 1993) (protecting insurance investigation documents when the accident was of a nature that litigation was virtually certain to occur).

such reports often have a dual purpose—serving insurance companies' daily business transactions and responding to litigation—the Second Circuit's rejection of the primary purpose standard is likely to make more of such reports subject to work-product protection.<sup>152</sup>

Non-insurance investigative reports pose issues similar to those found in risk-management documents. Again, the business purpose of such reports has traditionally been a basis for denying them immunity.<sup>153</sup> The more business driven the report, the less likely that work-product immunity will be granted.<sup>154</sup> Under *Adlman*, this factor is likely to become less important and other factors, including the involvement of counsel, which distinguishes documents prepared because of litigation from those prepared in the ordinary course of business, are likely to assume added significance.<sup>155</sup> Deviations from the ordinary course of business, such as special treatment by counsel or a particularly glaring prospect of litigation for the specific event, may augment the chances of achieving work-product immunity.<sup>156</sup>

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<sup>152</sup> Compare *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998) (holding that dual purpose documents may still be protected by the work-product doctrine when such documents would not have been prepared but for litigation concerns), with *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982) (holding that a dual purpose document can be stripped of work-product protection when litigation purposes are outweighed by other concerns), and *Snyder v. Winter*, 159 F.R.D. 14 (W.D.N.Y. 1994) (holding that accident reports must be prepared exclusively for litigation and not in the ordinary course of business).

<sup>153</sup> See *MOORE ET AL.*, *supra* note 33, § 26.70[3][c], at 26-216 ("Even in cases in which a specific claim is involved, if there are other, equally strong reasons for preparing the report, such as product improvement, safety of future product users, or avoidance of adverse publicity, courts will generally require production of the report.") (citing *Soeder v. Gen. Dynamics Corp.*, 90 F.R.D. 253, 255 (D. Nev. 1980) (precluding work-product immunity for an investigatory aircraft accident report due to overriding business incentives for preparing the report)).

<sup>154</sup> See *supra* Part III.A; see also *Resnick v. Am. Dental Assoc.*, 95 F.R.D. 372 (N.D. Ill. 1982) (holding an internal sex discrimination investigation unprotected by work product, as it was primarily business driven).

<sup>155</sup> See *McMahon v. Eastern S.S. Lines, Inc.*, 129 F.R.D. 197, 198-99 (S.D. Fla. 1989) (applying work-product protection to a fire investigation report when outside counsel was brought in instead of involving regular counsel). But see *E.E.O.C. v. Commonwealth Edison*, 119 F.R.D. 394, 395 (N.D. Ill. 1988) (applying the primary purpose test and denying work-product immunity when there was no indication of a break from routine procedure in preparing a discrimination investigation report).

<sup>156</sup> See *Adlman*, 134 F.3d at 1195-96 (discussing the intensive legal focus of the memorandum and the "virtually certain" prospect of litigation); see also *Cochran v. St. Paul Fire & Marine Ins.*, 909 F. Supp. 641, 645 (W.D. Ark. 1995); *Raso*, 154 F.R.D. at 129 (protecting investigative reports by an insurance investigator when the accident in-

More specifically, the *Adlman* decision raises interesting questions with respect to investigatory reports that arise in conjunction with governmental agency investigations. First, it remains unclear whether independent investigatory reports that are initiated before a government agency notifies a company of a potential infraction are covered by the work-product doctrine.<sup>157</sup> Second, it is unclear whether reports of investigations taken pursuant to orders by a government agency can nonetheless receive work-product immunity.<sup>158</sup>

*Adlman* is likely to make it easier to extend work-product immunity to reports prepared by a company before any governmental investigation takes place, particularly if it can be shown that the company knew a supplemental government investigation was virtually certain to occur.<sup>159</sup> Indeed, the memorandum in *Adlman* is analogous to such a hypothetical, in that *Sequa* contemplated a

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volved "catastrophic" injuries).

<sup>157</sup> Reports created after a government agency contacts a corporation have been conferred work-product immunity. See *Maartin v. Armstrong World Indus.*, 172 F.R.D. 143 (D.N.J. 1997) (applying work-product protection to investigatory reports prepared while the company was under governmental investigation); *Martin v. Monfort, Inc.*, 150 F.R.D. 172 (D. Colo. 1993) (protecting internal studies prepared subsequent to the Department of Labor's contacting a corporation to inform the business that Fair Labor Standards Act violations may exist).

<sup>158</sup> At least one court has protected an internal study conducted after a regulatory agency instructed the company to conduct the study in question and when that regulatory agency had rules compelling disclosure of such materials. See *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252 (3d Cir. 1993). *Martin* was a chemical exposure case in which a Bally's bartender, Martin, developed a skin condition in response to chemicals maintained around the bar. Martin reported the exposure to the Occupational Health and Safety Administration ("OSHA"). See *id.* at 1254. OSHA was too busy to pursue Martin's complaint and eventually instructed Bally's to investigate and correct the infractions to avoid litigation with OSHA. See *id.* Bally's counsel ordered an investigation and a report was generated as a result. OSHA demanded a copy of the report and threatened action in lieu of a failure to disclose. See *id.* at 1254-55. Bally's refused to disclose, claiming, *inter alia*, work-product immunity. Complicating Bally's work-product claim was the fact that OSHA maintained a "records access" rule, 29 C.F.R. § 1910.1020, which "requires employers to make available to OSHA . . . records which the employer [ ] voluntarily generate[s] . . . [including] 'exposure records,' which include records monitoring toxic substances in the workplace." *Martin*, 983 F.2d at 1256 (citing 29 C.F.R. § 1910.1020(c)(5)-(6)). However, the court concluded that the records access rule incorporated work-product protection. See *id.* at 1258. Turning to the work-product issue, the court noted that routine reports created to comply with OSHA requests would normally be excluded from work-product immunity, but held that the instant report was not a routine report, as "substantial evidence supports the conclusion that [Bally's counsel] reasonably anticipated litigation at the time he commissioned it." *Id.* at 1261.

<sup>159</sup> Recall that governmental investigations may constitute "litigation" for the purposes of work-product analysis. See *supra* note 52.

merger which it was virtually certain the IRS would investigate. Hence, *Adlman* again appears to push the boundaries of the work-product doctrine deeper into the corporate realm.

Similarly, if a corporation is virtually certain that a governmental agency will compel an investigation upon the occurrence of some conduct, *Adlman* leaves open the potential of work-product immunity for legal analyses produced prior to the occurrence of that conduct.

Complicating the government-compelled investigation hypothetical is the possibility of regulatory requirements that such documents be routinely created. The presence of a regulatory duty raises issues encountered in the risk-management document evaluation discussed above,<sup>160</sup> namely, whether a document that is substantially different from a document routinely produced will qualify for work-product protection under the *Adlman* standard.

### C. Opinion Letters

Lawyer opinion letters—those required by securities law or accounting standards to be sent by corporate counsel to an independent auditor for financial reporting purposes—have largely been denied work-product immunity in prior cases.<sup>161</sup> Such documents not only run afoul of the primary purpose test, since they are invariably prepared primarily for some purpose other than litigation, but would also seem to fall squarely within the exception for documents prepared in accordance with regulatory requirements.<sup>162</sup> Accordingly, even courts applying a more lenient work-product standard than the primary purpose test have been reluctant to confer work-product immunity on opinion letters.<sup>163</sup>

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<sup>160</sup> See *supra* notes 137-44 and accompanying text.

<sup>161</sup> See generally Melissa D. Shalit, Note, *Audit Inquiry Letters and Discovery: Protection Based on Compulsion*, 15 CARDOZO L. REV. 1263 (1994). Opinion letters from counsel to client that assess the client's litigation prospects are a different matter and are generally protected work product if the letters are sufficiently connected to the prospect of litigation. See, e.g., *Hager v. Bluefield Reg'l Med. Ctr., Inc.*, 170 F.R.D. 70 (D.D.C. 1997); *Sylgab Steel & Wire Corp. v. Imoco-Gatgeway Corp.*, 62 F.R.D. 454 (N.D. Ill. 1974).

<sup>162</sup> See *United States v. Gulf Oil Corp.*, 760 F.2d 292 (Temp. Emerg. Ct. App. 1985) (denying opinion letters work-product protection, as the primary purpose was SEC compliance); *McEwen v. Digitran Sys., Inc.*, 155 F.R.D. 678 (D. Utah 1994) (same).

<sup>163</sup> See, e.g., *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974) (precluding work-product protection due to the regulatory exception).

Yet *Adlman* included a hypothetical in which Judge Leval felt an opinion letter might well be entitled to such protection. He envisioned a situation in which:

A business entity prepares financial statements to assist its executives, stockholders, prospective investors, business partners, and others in evaluating future courses of action. Financial statements include reserves for projected litigation. The company's independent auditor requests a memorandum prepared by the company's attorneys estimating the likelihood of success in litigation and an accompanying analysis of the company's legal strategies and options to assist it in estimating what should be reserved for litigation losses.<sup>164</sup>

Judge Leval concluded that under such a scenario, "the protection of the Rule should be accorded to such studies in these circumstances."<sup>165</sup> Judge Leval's hypothetical mentions preparation of financial statements which include reserves for projected litigation. It would seem he is envisioning documents prepared regularly in the ordinary course of business, perhaps even pursuant to regulatory statutes. Of course, Judge Leval does not state that the reserve figures, themselves, would be protected. Protection would only be accorded to the lawyer's letter to the auditors which, in his hypothetical, also contains information about legal strategies and options. Still, the extension of work-product protection to such documents, even if periodically written in accordance with regularly prepared financial statements, would seem to narrow the ordinary course of business exception substantially.

The *Adlman* hypothetical regarding audit letters underscores the Second Circuit's emphasis on protection of counsel's thoughts and legal theories to insure free communication and preparation for trial<sup>166</sup> and properly notes that even protecting drafts of opinion letters can serve such goals. Nevertheless, when such documents are prepared as a standard part of a corporation's regulatory compliance, it is likely that they are beyond even the broad reach of the *Adlman* work-product doctrine.<sup>167</sup>

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<sup>164</sup> United States v. *Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998).

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

<sup>166</sup> See *supra* Part I.

<sup>167</sup> See *supra* note 29.



## CONCLUSION

It will likely be a long time before the real significance of *Adlman* can be fully assessed. Issues of privilege tend to be determined by district courts and discovery masters. They are fact intensive and subject to very limited review. Yet, the Second Circuit's mandate in *Adlman* is clear and unequivocal. Documents containing legal theories, analyses, and opinions regarding prospective litigation are to be protected from disclosure from opposing parties in order to maintain the basic integrity of the adversarial system. Reading opposing counsel's assessment and theories of litigation, even when such assessments are made well before any actual lawsuit, should be like reading someone else's mail, an activity neither condoned nor facilitated by the courts.

The danger of *Adlman*, however, is in its very expansiveness, in the reluctance of the court to impose any clear limits on what kinds of documents can be plausibly linked to future litigation and thus fall under work-product protection. One can easily imagine corporate lawyers trying to shield much of their work from subsequent disclosure by labeling their comments on draft contracts as "assessments of prospective litigation claims" and their drafts of SEC disclosure language as "recommendations for avoiding prospective securities litigation." As Judge Kearse noted in dissent, such corporate advice will be protected by attorney-client privilege, when contained in confidential attorney-client communications.<sup>168</sup> When not so contained, it is unclear why it should be protected at all. To the extent that *Adlman* becomes a means of expanding the protection of legal advice far beyond the traditional scope of the attorney-client privilege, it will not be a salutary development.

However, it may well be that the ordinary course of business and regulatory exceptions which *Adlman* retains will be sufficient to prevent any expansion of work-product protection from getting out of hand. While *Adlman* is a powerful statement of the continuing vitality of the work-product doctrine, it is hardly the last word on the subject.

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<sup>168</sup> See *Adlman*, 134 F.3d at 1205 (Kearse, J., dissenting).