University of Dayton Law Review

Volume 37 | Number 3 Article 2

4-2-2012

The Validity of the 2010 Federal Rule of Civil Procedure 26 Amendment Governing the Waiver of Work Product Protection: Is the Work Product Doctrine an Evidentiary Privilege?

Edward J. Imwinkelried
University of California, Davis

THE VALIDITY OF THE 2010 FEDERAL RULE OF CIVIL PROCEDURE 26 AMENDMENT GOVERNING THE WAIVER OF WORK PRODUCT PROTECTION: IS THE WORK PRODUCT DOCTRINE AN EVIDENTIARY PRIVILEGE?

Edward J. Imwinkelried[1]

> "[D]iscovery should not nullify the privilege of confidential communications between attorney and client. But those principles give us no real assistance here because what is being sought [, the attorney's work-product,] is . . . [not] a privileged communication between attorney and client."
>
> –Justice Jackson, concurring in *Hickman v. Taylor,* 329 U.S. 495, 516 (1947)

> "Since *Hickman v. Taylor*, . . . Congress, the cases, and the commentators have uniformly continued to view the 'work[-]product' doctrine solely as a limitation on pretrial discovery and not as a qualified evidentiary privilege."
>
> –Justice White, concurring in *United States v. Nobles,* 422 U.S. 225, 246 (1975)

---

[1] Edward L. Barrett, Jr. Professor of Law, University of California, Davis; author, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES (Richard D. Friedman ed., 2d ed. 2010).

I. INTRODUCTION

In 2010, an important set of amendments to the pretrial discovery provisions in Federal Rule of Civil Procedure 26 went into effect.[2] The amendments took effect after approval by the United States Supreme Court but without consideration by Congress.[3] Since 1993, Rule 26 had generally provided that as a part of mandatory pre-discovery disclosure, the proponent of a testifying expert had to submit a report outlining the expert's proposed testimony in detail.[4] As the years passed, the courts came to construe the provision quite broadly. In particular, many courts interpreted the provision as requiring the expert's proponent to disclose all prior drafts of the expert's final report as well as virtually every oral communication between the proponent and the expert about the report's subject matter.[5]

This broad interpretation of Rule 26 had untoward consequences.[6] To begin with, the expansive interpretation encouraged parties to adopt the practice of hiring two experts instead of one—one to consult with and another to testify. Since the disclosure requirement purported to apply only to testifying experts, the litigant could consult freely with the first expert with little fear that the opposition would either learn about the oral communications with the first expert or obtain copies of correspondence with that expert. After first consulting the non-testifying expert to shape the analysis, the litigant could then engage in a much shorter consultation with the testifying expert.[7] At the very least, the practice of consulting two experts increased the expense of pretrial preparation. Costs also grew due to the opposition's attempts to probe for the prior drafts by, and oral consultations with, the testifying expert. The courts' broad interpretation made pretrial preparation both more awkward and more expensive.

In 2010, Rule 26 was amended to address these problems.[8] With specified exceptions,[9] the amendment shields prior drafts of the required

---

[2] Justin J. Hakala, *A New Day for Expert Discovery*, 47 TRIAL, June 2011, at 16, 17; Gregory Joseph, *2010 Expert Witness Rule Amendments*, 21 THE PRACTICAL LITIGATOR, no. 6, Nov. 2010, at 51, 51; *Civil Rule 26 Work Product Changes, Other Procedural Rule Changes to Take Effect*, 79 U.S.L.W. (BNA) Nov. 30, 2010, at 1698, 1698.

[3] H. COMM. ON THE JUDICIARY, 111TH CONG., FED. R. CIV. P. V–VI (Comm. Print 2010).

[4] 28 U.S.C. app. § 26(a)(2)(B) (2006).

[5] Joseph, *supra* note 2, at 51–52.

[6] *See generally* Henry L. Hecht, *Proposed Amendments to Federal Rule 26 Offer Protections When Working with Experts*, 21 THE PRACTICAL LITIGATOR, July 2010, at 23, 24.

[7] *Id.* (discussing "discovery-avoidance").

[8] H.R. Doc. No. 111-111, at 59 (2010).

[9] FED. R. CIV. P. 26(b)(4)(C). Rule 26(b)(4)(C) states a general rule that the work product protection applies to such communications "regardless of the form of the communications." However, the amendment recognizes three exceptions to the general rule. The first is a communication relating "to compensation for the expert's study or testimony." FED. R. CIV. P. 26(b)(4)(C)(i). The Committee Note states that "compensation" includes potential additional work for the expert as well as compensation for work done by assistants, associates, and affiliated organizations. FED. R. CIV. P. 26 advisory committee's note. The second exception concerns "facts or data that the party's attorney provided [to the expert] and that the expert considered in forming the opinions to be expressed." FED. R. CIV. P. 26(b)(4)(C)(ii). The provision's wording indicates the scope of the exception. On the one hand, as the Note explains, the

expert report and the expert's oral communications with counsel from discovery.[10] The Advisory Committee explained that the purpose of the amendment is to extend the protection of the work-product doctrine to such drafts and oral communications.[11] The amendment should make pretrial preparation more efficient and less cumbersome. The question, though, is whether the amendment is valid.[12] While the amendment appears eminently sensible, it may run afoul of 28 U.S.C. § 2074(b). In pertinent part, that section provides that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."[13] The rub is that if the work-product doctrine is "an evidentiary privilege" within the intendment of § 2074(b), the amendment is invalid.[14] Although the United States Supreme Court promulgated the amendment, the amendment was never submitted to Congress for its approval.[15]

The thesis of this article is that the Rule 26 amendment is valid because the work-product doctrine is not "an evidentiary privilege" within the meaning of that expression in § 2074(b). Although there are superficial similarities between the work-product doctrine and true privileges, such as attorney-client, the doctrine is a procedural immunity, not a privilege. The first part of this article lists the apparent similarities between the work-product doctrine and the attorney-client privilege. In contrast, the second part identifies the numerous differences between the doctrine and the privilege. While the first two parts of the article analyze primarily formal aspects of the two principles, the third part compares the policy rationales of the doctrine and the privilege. The third part observes that the attorney-client doctrine is a true privilege in the sense that the privilege is a secondary means of protecting the client's primary autonomy interest; although the attorney can sometimes assert the privilege on the client's behalf, the autonomous client is the only privilege holder. The third part then demonstrates that in sharp contrast, the work-product doctrine is intended to facilitate the functioning of the adversarial system. The work-product doctrine treats both the client and the attorney as holders, but both enjoy the protection only in a representative capacity as functionaries within

---

communication must relate to "facts or data" rather than the attorney's "theories or mental impressions." FED. R. CIV. P. 26(b)(4)(C) advisory committee's note. On the other hand, it is not necessary that the expert ultimately chooses to rely on the facts or data; it is sufficient that he or she "considered" the facts or data in the process of forming his or her opinions. *Id.* The third exception relates to "assumptions that the party's attorney provided [to the expert] and that the expert relied on in forming the opinions to be expressed." FED. R. CIV. P. 26(b)(4)(C)(iii). At once, the third exception is broader and narrower than the second exception. The third exception is broader in that it is not limited to factual information. Yet, the third exception is narrower because the assumptions are discoverable only if the expert actually relied on the assumption in forming his or her opinion.

[10] FED. R. CIV. P. 26(b)(4)(B)–(C).

[11] FED. R. CIV. P. 26(b)(4) advisory committee's note.

[12] Joseph, *supra* note 2, at 54.

[13] 28 U.S.C. § 2074(b) (2006).

[14] Joseph, *supra* note 2, at 54.

[15] *Id.*

the adversarial system rather than as a means of vindicating their personal legal interests. In short, there is a fundamental difference between the work-product doctrine and the attorney-client privilege. The upshot is that the 2010 amendment to Rule 26 is valid even though it was never submitted to Congress for legislative approval.

II. THE SUPERFICIAL SIMILARITIES BETWEEN THE WORK-PRODUCT IMMUNITY AND THE ATTORNEY-CLIENT PRIVILEGE

At first blush, there appear to be a large number of common denominators between the work-product doctrine and the attorney-client privilege. For that matter, the courts often extend the term "privilege" to the work-product doctrine. In the seminal Supreme Court decision recognizing the doctrine, *Hickman v. Taylor*,[16] the Court not only analogized to the similar English doctrine, but the Court also pointed out that the English courts had designated the doctrine a "privilege."[17] However, Justice Murphy's lead opinion in *Hickman* described the doctrine as a procedural "immunity."[18] In the next decision in the Supreme Court line of authority on the doctrine, *United States v. Nobles*, Justice White's concurrence echoed *Hickman*.[19] Justice White acknowledged the English practice,[20] adamantly insisted that the work-product doctrine is not a privilege,[21] and recurred to *Hickman*'s "immunity" terminology.[22] However, in his lead opinion Justice Powell occasionally slipped into the English terminology. He twice described the doctrine as a "qualified privilege"[23] and used the descriptor "privilege" on three other occasions in his opinion.[24] Given Justice Powell's opinion, it is understandable that many contemporary commentators[25] and lower courts[26] refer to the work-product "privilege."

The work-product doctrine and the attorney-client privilege share a deeper, more important common denominator. While both doctrines can lead to the exclusion of logically relevant evidence, neither relies on the policy justification that the excluded evidence is unreliable. Neither

---

[16] Hickman v. Taylor, 329 U.S. 495, 495 (1947).
[17] *Id.* at 510 n.9.
[18] *Id.* at 506–07.
[19] United States v. Nobles, 422 U.S. 225, 225 (1975); *id.* at 242 (White, J., concurring).
[20] *Id.* at 244.
[21] *Id.* at 247.
[22] *Id.* at 251.
[23] *Id.* at 237, 239 (majority opinion).
[24] *Id.* at 239.
[25] *See generally* ANDRE A. MOENSSENS, CAROL E. HENDERSON & SHARON G. PORTWOOD, SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 49 (5th ed. 2007); Richard Cooper, *Business Crime: Work-Product Privilege*, NAT'L L.J., Dec. 22, 2003, 17, at 17; Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799 (2001).
[26] Lopes v. Vieira, 719 F. Supp. 2d 1199, 1201 (E.D. Cal. 2010) ("work-product privilege"); 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 1.3.11, at 92 n.322 (Richard D. Friedman ed., 2d ed. 2010) (collecting cases using that description).

doctrine is a means of enhancing the integrity of the fact-finding process. Quite to the contrary, the enforcement of either principle can result in the exclusion of relevant, highly trustworthy evidence.

There are also formal parallels between the work-product doctrine and the attorney-client privilege. In some cases, the two principles overlap and mandate the exclusion of the same item of evidence.[27] The attorney-client privilege protects confidential communications between client and attorney. For its part, the work-product doctrine protects information generated by the attorney's creative efforts.[28] Suppose that at the attorney's urging, the client prepares a diagram of the accident scene. The client draws the diagram and sends it to the attorney. The diagram is protected as a confidential attorney-client communication. Moreover, the diagram deserves work-product protection, since it came into existence as a result of the attorney's intervention. The same item of evidence is cloaked by both principles.

A further formal similarity is that a litigant's status as a joined party is not enough to confer standing on the litigant to object based on the work-product doctrine. In order to enjoy standing to invoke a privilege, the person must be the intended beneficiary of the privacy promoted by the privilege. A joined party may not assert someone else's attorney-client privilege[29] even if the contents of the communication would be devastating to the party's case. Thus, a criminal accused cannot invoke a witness's attorney-client privilege even when the contents of the witness's revelation to his or her own attorney are highly incriminating to the accused. Likewise, even a formally joined party cannot invoke someone else's work-product protection; to be a holder entitled to assert work-product protection, the person must be either the attorney who created the material or that attorney's client.[30] As the immediately preceding paragraph explained, the exclusion of evidence under either work-product doctrine or the attorney-client privilege has nothing to do with the supposed untrustworthiness of the evidence. Litigants have a right to reliable findings of fact and, therefore, are entitled to standing to invoke exclusionary rules premised on the unreliability of the evidence. However, neither the work-product doctrine nor the attorney-client privilege is designed to target unreliable evidence.

---

[27] IMWINKELRIED, *supra* note 26, § 1.3.11, at 92.

[28] *See* Ronald J. Allen, Mark F. Grady, Daniel D. Polsby & Michael S. Yashko, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 393 (1990); *see also* Steven W. Feldman, *The Work Product Rule in Criminal Practice and Procedure*, 50 U. CIN. L. REV. 495, 533 (1981).

[29] State v. Leek, 130 N.W. 1062, 1064 (Iowa 1911); State v. Snook, 107 A. 62, 62 (N.J. 1919), *aff'd*, 109 A. 289 (N.J. 1920); People v. Patrick, 74 N.E. 843, 844 (N.Y. 1905); Commonwealth v. McKenna, 213 A.2d 223, 226 (Pa. Super. Ct. 1965).

[30] *See In re* Grand Jury Proceedings, 43 F.3d 966, 968 (5th Cir. 1994); Lopes v. Vieira, 719 F. Supp. 2d 1199, 1201 (E.D. Cal. 2010) (citing *In re* Special September 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980)).

Even when work product or the privilege comes into play, the party seeking to introduce the evidence can sometimes surmount the doctrine. The work-product doctrine and the attorney-client privilege share similarities in this regard as well. To begin with, both can be waived.[31] In fact, Federal Rule of Evidence 502, approved by Congress in 2008, purports to announce some common waiver standards for work-product protection and attorney-client privilege.[32]

Waiver is not the only theory available to trump the two doctrines. All courts recognize a crime/fraud exception to the attorney-client privilege.[33] If the client sought the attorney's advice to enable the client for the illicit purpose of promoting an ongoing or future crime or fraud, the privilege never attaches.[34] Similarly, many courts have carved out a crime/fraud exception to the scope of the work-product doctrine.[35]

Finally, assume that the party asserting the doctrine or privilege makes out a prima facie case for doing so and that the opponent cannot invoke either waiver or a special exception such as crime/fraud to overcome the prima facie case. On those assumptions, the courts enforce the doctrine and the privilege with similar mechanisms, denying discovery[36] and barring the introduction of the protected material at trial.[37]

In light of all these commonalities between the work-product doctrine and the attorney-client privilege, it is no wonder that so many commentators and courts have fallen into the habit of describing the work-product doctrine as a "privilege." However, the existence of these commonalities is only part of the picture. As Part III will now demonstrate, there are numerous differences between the work-product doctrine and the attorney-client privilege—differences so fundamental that, as Part IV argues, the work-product doctrine should not be deemed a "privilege" under 28 U.S.C. § 2074(b).

III. THE DIFFERENCES BETWEEN THE WORK-PRODUCT IMMUNITY AND THE ATTORNEY-CLIENT PRIVILEGE

As Part II noted, there are undeniable similarities between the work-product doctrine and the attorney-client privilege. However, it is equally

---

[31] IMWINKELRIED, *supra* note 26, § 1.3.11, at 85 (work product); IMWINKELRIED, *supra* note 26, § 6.12.1, at 982 (attorney-client privilege).

[32] Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537 (codified as amended at 28 U.S.C. app. FED. R. EVID. 502 (2011)) (amending the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work-product doctrine).

[33] *See* IMWINKELRIED, *supra* note 26, § 6.13.2.d, at 1166–67.

[34] *Id.* at 1167; *see also* United States v. Zolin, 491 U.S. 554, 563 (1989).

[35] IMWINKELRIED, *supra* note 26, § 1.3.11, at 110 n.422 (collecting cases); *In re* Grand Jury Proceedings, J.P., Petitioner, 609 F.3d 909, 915 (8th Cir. 2010).

[36] FED. R. CIV. P. 26(b)(1) ("nonprivileged matter").

[37] *See* United States v. Nobles, 422 U.S. 225, 238 (1975).

clear that there are several significant differences.

One difference is historical. The attorney-client privilege has a much longer lineage than the work-product doctrine. The privilege originated in English law and is traceable back to 1577.[38] It is often asserted that the attorney-client privilege was the very first privilege recognized by the common-law courts.[39] The work-product doctrine is of much more recent origin. The seminal American precedent is *Hickman v. Taylor*, decided in 1947.[40] In 1946, the Advisory Committee had proposed an amendment to Federal Rule of Civil Procedure 30 that would have incorporated a version of the work-product doctrine.[41] However, before the Supreme Court took action on the proposed rule, it had occasion to decide *Hickman*. Finally, in 1970, work-product protection was incorporated into the text of Rule 26(b)(3).[42] Compared to the attorney-client privilege, the work-product doctrine is a legal newcomer.

There are pronounced doctrinal differences in addition to the historical difference. One is that while the client is the sole holder of the attorney-client privilege,[43] many courts treat both the attorney and the client as holders of the work-product protection.[44] "[T]he work product privilege belongs to both the client and the attorney."[45] It is true that many jurisdictions permit,[46] or even require,[47] the attorney to assert the attorney-client privilege. However, in these situations the attorney is asserting the privilege on behalf of the client, not in the attorney's own right; if the client indicates that he or she is willing to waive the privilege, the attorney cannot

---

[38] Berd v. Lovelace, 21 Eng. Rep. 33 (1577); *see also* Dennis v. Codrington, 21 Eng. Rep. 53 (1580).

[39] Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 963 (N.D. Ill. 2010) ("the oldest") (citing Jaffee v. Redmond, 518 U.S. 1, 11 (1996)).

[40] Hickman v. Taylor, 329 U.S. 495, 495 (1947).

[41] Roger W. Kirst, *A Third Option: Regulating Discovery of Transaction Work Product Without Distorting the Attorney-Client Privilege*, 31 SETON HALL L. REV. 229, 237 (2000). The proposed amendment read:

> The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or except as provided in Rule 35, the conclusions of an expert.

Id. (quoting Report of Proposed Amendments to Rules of Civil Procedure For the District Courts of the United States, 5 F.R.D. 433, 456–57 (1946)).

[42] 28 U.S.C. app. § 26(b)(3), at 162 (2006).

[43] Sikes v. Segers, 587 S.W.2d 554, 559 (Ark. 1979); CAL. EVID. CODE § 953(a) (West 2009).

[44] *In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); Lopes v. Vieira, 719 F. Supp. 2d 1199, 1201 (E.D. Cal. 2010) (citing *In re* Special September 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980)).

[45] *In re* Grand Jury Proceedings, 43 F.3d at 972; *see also Lopes*, 719 F. Supp. 2d at 1201("The work-product privilege belongs to both the attorney and the client.").

[46] *See* Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998).

[47] *See, e.g.*, CAL. EVID. CODE § 955 (West 2009).

override the client and assert the privilege. In contrast, under the work-product doctrine, the attorney is deemed to have a discrete, personal interest in maintaining the privacy[48] of the derivative information created by virtue of the attorney's intervention.

There is a further reflection of the important, separate roles that the attorney and the client have under the work-product doctrine. In the case of the crime/fraud exception to the attorney-client privilege, the dispositive intent is the client's. If the client sought the attorney's advice to promote an ongoing or future crime or fraud, there is no privilege.[49] Even when the attorney is completely unaware of the client's illicit intent and is furnishing advice in good faith, the privilege never attaches.[50] The state of the law under the work-product doctrine is quite different—notwithstanding the client's verboten intent, an innocent attorney may invoke the work-product protection.[51]

Just as the work-product doctrine takes a more liberal position on standing to assert its protection, the scope of the work-product doctrine is broader than that of the attorney-client privilege. The stated rationale of the attorney-client privilege is to encourage the flow of communication between the client and the attorney.[52] Consequently, the privilege protects only communications between the client and attorney.[53] The work-product doctrine has much wider breadth. Of course, the client could arguably assert the attorney-client privilege to shield his or her own written statement that the client submitted to the attorney at the attorney's request. If the client created the statement at the attorney's suggestion for submission to the attorney, in a realistic sense, the existence of the written statement is a result of the attorney's creative efforts. However, the work-product doctrine is not limited to information obtained from the client. The doctrine can also shield information acquired from third parties other than the client.[54] The only criteria limiting the scope of the work-product doctrine are: (1) the

---

[48] Fred A. Simpson, *Has the Fog Cleared? Attorney Work Product and the Attorney-Client Privilege: Texas's Complete Transition into Full Protection of Attorney Work in the Corporate Context*, 32 ST. MARY'S L.J. 197, 223 (2001) ("attorney privacy").

[49] United States v. Zolin, 491 U.S. 554, 562–63 (1989).

[50] *In re* Grand Jury Proceedings (Appeal of the Corporation), 87 F.3d 377, 379 (9th Cir. 1996); United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988); United States v. Calvert, 523 F.2d 895, 909 (8th Cir. 1975).

[51] *In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); Radson & Waratuke, *supra* note 25, at 829–30 (citing *In re Grand Jury Proceedings*, 43 F.3d at 972). Moreover, if the client refuses to pay the fee, some jurisdictions permit the attorney to withhold at least part of the file reflecting the attorney's work product from the client. Thomas Spahn, *Is It Ethical to Withhold a File from a Client Who Won't Pay?*, LAW. WKLY. USA, July 19, 2011, at 156.

[52] 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. 1961).

[53] *See, e.g.*, CAL. EVID. CODE § 952 (West 2009).

[54] United States v. Nobles, 422 U.S. 225, 238–39 (1975).

information must be derivative rather than primary[55] (for instance, a witness statement created at the attorney's request rather than original physical evidence found at an accident scene); (2) in some sense, the derivative information must be the product of the attorney's creative intervention;[56] and (3) the purpose for the intervention must have been to generate information for litigation.[57]

In part because the work product doctrine has a far broader scope than the attorney-client privilege, absent an explicit provision in a statute or court rule, the courts have been reluctant to treat work-product protection as absolute. Of course, even the attorney-client privilege does not confer truly absolute protection; the opposition can overcome an objection based on the privilege by demonstrating the holder's waiver or the applicability of a special exception such as crime/fraud. However, neither the attorney-client privilege nor, for that matter, any true communications privilege can be defeated by an ad hoc, case-specific showing of the opposing litigant's need for the information.[58] The *Hickman* Court did not purport to confer absolute work-product protection on any category of information.[59] *Nobles* expressly states that the protection "derived from the work-product doctrine is not absolute."[60] To be sure, some modern statutes and court rules, such as California Code of Civil Procedure § 2018, recognize absolute protection for opinion or core work product.[61] However, without the benefit of such an explicit provision, the courts usually rule only that the party seeking discovery must make a more compelling showing of need to review opinion work product.[62] In the case of ordinary work product such as an expert's

---

[55] United States v. McVeigh, 954 F. Supp. 1441, 1451 (D. Colo. 1997); *see also* Mack v. Superior Court of Sacramento Cnty., 66 Cal. Rptr. 280, 283 (Cal. Ct. App. 1968).

[56] However, the attorney need not personally create the information. Mone v. Dep't of the Navy, 353 F. Supp. 2d 193, 195 (D. Mass. 2005) (work product could be prepared under the direction of an attorney); Commonwealth v. Liang, 747 N.E.2d 112, 115, 119 (Mass. 2001) (notes taken by a victim-witness advocate qualified for work product protection because the advocate was performing functions traditionally performed by prosecutors).

[57] Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 68 (1st Cir. 2002); Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1, 18 (D.D.C. 2004); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 75 (D.D.C. 2003); Gutman v. U.S. Dep't of Justice, 238 F. Supp. 2d 284, 294 (D.D.C. 2003); Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1288 (D. Kan. 2001); Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 203 (Tex. 1993).

[58] Admiral Ins. Co. v. U.S. Dist. Court for the Dist. of Ariz., 881 F.2d 1486, 1492 (9th Cir. 1980); United States v. Grice, 37 F. Supp. 2d 428, 431 n.13 (D.S.C. 1998) ("[N]o matter how great prosecutorial need for privileged information may be, the [attorney-client] privilege still prevails."); 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:2 (2d ed. 1999).

[59] Hickman v. Taylor, 329 U.S. 495, 511–12 (1947).

[60] United States v. Nobles, 422 U.S. 225, 239 (1975).

[61] CAL. CIV. PROC. CODE § 2018.030(a) (West 2012) ("A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.").

[62] United States v. Stewart, 294 F. Supp. 2d 490, 494 (S.D.N.Y. 2003) ("Work product does not receive absolute protection."); Hertzberg v. Veneman, 273 F. Supp. 2d 67, 75 (D.D.C. 2003) (citing FED. R. CIV. P. 26(b)(3)); Upjohn Co. v. United States, 449 U.S. 383, 400–03 (1981); *Hickman*, 329 U.S. at 512–13; United States v. Adlman, 134 F.3d 1194, 1197 (2d Cir. 1998); Tax Analysts v. I.R.S., 117 F.3d 607, 620 (D.C. Cir. 1997); Martin v. Office of Special Counsel, 819 F.2d 1181, 1187 (D.C. Cir. 1987) (opinion work product is covered by "special protection, nearly absolute"); *In re* Grand Jury Subpoenas

report, the universal view is that the protection is qualified. For example, under Federal Rule of Civil Procedure 26, the party seeking discovery can overcome the work-product protection by showing that he or she has a desperate need for the information and that he or she cannot obtain equivalent information from an alternative source by reasonable means.[63] In short, in most cases, a showing of compelling, case-specific need will trump work product.

Although work-product protection can be defeated more readily than the attorney-client privilege by a showing of ad hoc need, it is more difficult to defeat work-product protection than the attorney-client privilege by a claim that the holder has waived the protection.[64] As a general proposition, in the case of the attorney-client privilege, the holder loses the privilege by voluntarily making a disclosure to any person outside the circle of confidence.[65] Even if that person is closely allied with the holder and unlikely to divulge the information to the opposition, voluntary revelation destroys the privilege.[66] The waiver standard for work product is more demanding. The holder's disclosure of work-product material terminates the protection only when the holder has used the material "'in a way inconsistent with keeping it from an adversary' . . . . Specifically, 'disclosure to an adversary, real or potential, forfeits work[-]product protection.'"[67] Not only are most courts more reluctant to find the occurrence of a waiver of the work-product protection than in the case of the

---

Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness, 265 F. Supp. 2d 321, 333 (S.D.N.Y. 2003) (opinion work product "is discoverable, if at all, only upon a significantly stronger showing"); O'Connell v. Cowan, 332 S.W.3d 34, 43 (Ky. 2010) (quoting Morrow v. Brown, Todd & Heyburn, 957 S.W.2d 722, 726 (Ky. 1997)); Amy L. Pinkerton, Note, *Baker v. General Motors: The Work Product Doctrine in the Eighth Circuit*, 34 CREIGHTON L. REV. 475, 476, 515 (2001) (citing Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000)) (the protection for opinion work product is "nearly absolute," and the Supreme Court's decisions in *Hickman* and *Upjohn* "articulated that a higher standard is required to overcome opinion work product [protection] than the 'substantial need' and 'undue hardship' test used for ordinary work product").

[63] FED. R. CIV. P. 26(b)(3) ("[T]he party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.").

[64] United States v. Deloitte LLP, 610 F.3d 129, 139 (D.C. Cir. 2010).

[65] Hawkins v. Stables, 148 F.3d 379, 384 n.4 (4th Cir. 1998); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000). Even the disclosure to a "close relative" can have a waiver effect if there is no privilege between the relative and the person making the revelation. Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 85 MICH. L. REV. 1605, 1638 (1986) (citing Dutton v. State, 452 A.2d 127, 145 (Del. 1982)).

[66] MARCUS, *supra* note 65, at 1605–06.

[67] United States v. Textron Inc., 553 F.3d 87 (1st Cir. 2009) (quoting United States of America v. Mass. Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997)), *vacated, withdrawn, reh'g granted*, 560 F.3d 513 (1st Cir. 2009), *cert. denied sub nom* Textron, Inc. v. United States, 130 S. Ct. 3320 (2010); *see also In re* Chevron Corp., 650 F.3d 276, 290 (3d Cir. 2011); *Deloitte*, 610 F.3d at 139–41; E. I. DuPont de Nemours & Co. v. Kolon Indus., No. 3:09CV58, 2010 WL 1489966, at *8 (E.D. Va. Apr. 13, 2010) (although the plaintiff shared documents with federal law enforcement officials, sharing did not effect a waiver because the government was not an adversary and the plaintiff reasonably expected that the government would not disclose the information further); Robert C. Morris & Nancy T. Bowen, *Taxpayer Victory in* Deloitte *Breathes Fresh Air Into Continuing Battle Over Tax Accrual Work Papers*, 79 U.S.L.W. (BNA) 1199 (Aug. 17, 2010).

attorney-client privilege, when they do find a waiver, they often define the scope of the waiver more narrowly.[68]

One last difference relating to choice-of-law is worth noting. In a federal case where jurisdiction is based on diversity of citizenship, a court will look to the attorney-client privilege law of the state which supplies the substantive rule of decision.[69] In diversity cases, traditional choice-of-law rules dictate that, out of respect for the states' substantive policies, the court apply the state substantive rule. In pertinent part, Federal Rule of Evidence 501 reads "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."[70]

However, in the very same proceeding, the federal court applies its own work-product doctrine, the law of the forum.[71] This difference is highly suggestive; it implies that while communications privileges, such as attorney-client, effectuate the extrinsic policy of promoting certain social relationships, the rationale for the work-product doctrine is more procedural in character, resting on institutional policies underpinning the adversarial system. Part IV turns to and explores this distinction in underlying rationales.

IV. THE RADICALLY DIFFERENT RATIONALES FOR THE ATTORNEY-CLIENT EVIDENTIARY PRIVILEGE AND THE WORK-PRODUCT PROCEDURAL IMMUNITY

At first blush, the analysis in Parts II and III makes it tempting to conclude that the state of the law governing attorney work product is both complex and confusing. On the one hand, there are so many similarities between that body of law and the law governing the attorney-client communications. On the other hand, there are numerous, marked differences. The work-product doctrine appears at once broader and narrower than the attorney-client privilege. As we have seen, the work-product doctrine may be asserted by more types of holders, protects a broader range of information, and is more difficult to defeat on a waiver

[68] *E.g.*, Williams & Connolly LLP v. U.S. S.E.C., 729 F. Supp. 2d 202, 211 (D.D.C. 2010); *see* Cooper, *supra* note 25, at 17 (discussing *In re* Grand Jury Proceedings John Doe Co. v. United States, 350 F.3d 299, 300 (2d Cir. 2003)); Gregory P. Joseph, *Federal Practice: Privilege Trends*, NAT'L L.J., Mar. 29, 2004, at 12, 12 ("Traditionally, disclosure of work product does not effect a broad subject-matter waiver . . . . In contrast, waiver of the attorney-client privilege does generally extend to the entire subject matter.").

[69] Kandel v. Brother Int'l Corp., 683 F. Supp. 2d 1076, 1083 (C.D. Cal. 2009) (citing Frontier Refining, Inc. v. Gorman-Rupp, Co., 136 F.3d 695, 702 n.10 (10th Cir. 1998)); United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988)).

[70] FED. R. EVID. 501.

[71] *Kandel*, 683 F. Supp. 2d at 1083 (citing *Frontier*, 136 F.3d at 702 n.10 (10th Cir. 1998)); *United Coal*, 839 F.2d at 966).

theory. Yet, simultaneously, work-product protection can sometimes be overcome by a showing of the attorney's criminal or fraudulent intent and, even more significantly, in most cases by an ad hoc, case-specific showing of compelling need for the protected material. This state of the law seems perplexing. However, it is submitted that in the final analysis the law governing work product is both simple and sensible. After identifying the rationale behind the work-product doctrine and distinguishing it from the rationale for the attorney-client privilege, the work-product doctrine emerges as straightforward. Once we appreciate that work-product protection is a procedural immunity rather than an evidentiary privilege, we can make sense out of the law governing work product.

A. The Rationale for the Attorney-Client Evidentiary Privilege

The traditional rationale for the recognition of classic evidentiary privileges is Dean Wigmore's instrumental theory.[72] Wigmore believed that society should promote certain relations such as attorney and client; he thought that there was a widespread consensus that those relationships ought to be "sedulously fostered."[73] Laypersons such as clients need to consult a confidant such as an attorney to obtain the latter's advice.[74] However, Wigmore believed that most laypersons are so fearful of later compelled judicial disclosure of their communications to such confidants that, but for the assurance of confidentiality furnished by an evidentiary privilege, the average layperson would neither consult nor confide.[75] On that assumption, the courts should not only recognize privileges to protect such relationships, the privileges must also be absolute in character.[76] Given the typical layperson's fear, he or she would not consult and confide unless, at the very time of communicating, the layperson could confidently predict that the courts would later respect the confidentiality of the communication.[77] Thus,

---

[72] 8 WIGMORE, *supra* note 52, § 2285.

[73] *Id.*

[74] *Id.*

[75] *Id.* (the assurance of confidentiality furnished by the privilege had to be truly "essential to the . . . satisfactory maintenance of the [protected] relation"); *see also* JOHN CUTLER & CHARLES F. CAGNEY, POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE 102 (8th ed. 1904) ("In the absence of the above-mentioned rule, no man would dare to consult a professional adviser with a view to his defence, or the enforcement of his rights...") (citing Bolton v. Corp. of Liverpool (1833) 1 Myl. & K. 88, 94); 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 723 (Gaunt, Inc. 1997) (1842) ("If such communications were not protected, no man . . . would dare to consult a professional adviser") (quoting Bolton v. Corp. of Liverpool (1833) 1 Myl. & K. 88, 94); PAUL MATTHEWS & HODGE M. MALEK, DISCLOSURE 209 (2d ed. 2001) (quoting Lord Brougham in Greenough v. Gaskell (1833) 1 Myl. & K. 98, 103) ("a man would not venture to consult any skilful (sic) person or would only dare to tell his counsel[lor] half his case"). The Greenleaf is an especially significant citation, since "Wigmore took over" that treatise and it "evolved into Wigmore's own treatise in 1904." David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115, 119 (2002).

[76] 1 IMWINKELRIED, *supra* note 26, § 3.2.4.

[77] In *Upjohn*, the Court echoed Wigmore's view when it asserted that the participants in confidential conversations "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain . . . is little better than no

Wigmore viewed privileges as an instrument or means to the end of fostering these consultations and confidences.[78] Wigmore was willing to recognize waiver because the holder can largely control whether a waiver occurs.[79] Similarly, Wigmore was willing to permit limited exceptions to privileges so long as the exceptions were announced beforehand and stated in bright-line terms.[80] Neither waiver nor such exceptions prevent the holder from making the necessary prediction at the time of the communication. However, Wigmore firmly believed that the courts should not permit an opposing litigant to defeat the privilege by a later ad hoc, case-specific showing of need for the information.[81] That possibility would deprive the holder of the required predictive ability and deter the average holder from consulting.

In the past few decades, empirical research has called into question Wigmore's basic assumption that the typical layperson will not consult or confide absent the assurance of a formal evidentiary privilege.[82] Wigmore may have overestimated the extent to which the world revolves around the courtroom. The instrumental theory remains "the establishment line," but the available research data demonstrate that the theory's "empirical assumptions" are "ungrounded."[83] Studies of both legal clients[84] and therapists' patients[85] have fairly uniformly yielded the following findings. The lack of a formal evidentiary privilege would probably deter a minority of clients and patients from consulting and confiding.[86] However, most clients and patients rely on factors other than the existence of a formal evidentiary privilege in deciding whether to consult with and confide in lawyers and therapists.[87] Even the typical client and patient might be more guarded in their communications, especially their written communications, with lawyers and therapists but would, for the most part, still be willing to consult and confide absent a privilege.[88]

---

privilege at all." Upjohn v. United States, 449 U.S. 383, 393 (1981). In 1996, the Court approvingly cited that passage. Jaffee v. Redmond, 518 U.S. 1, 18 (1996).

[78] 1 IMWINKELRIED, *supra* note 26, § 3.2.4.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* § 5.2.2; Daniel Northrup, *The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document to be Released to Third Parties: Public Policy Calls for at Least the Strictest Application of the Attorney-Client Privilege*, 78 FORDHAM L. REV. 1481, 1505–16, 1519 (2009) (after surveying some of the empirical studies, the author concludes that "a significant percentage of Americans . . . [do not] rely on the privilege when communicating with attorneys").

[83] Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1688, 1690 (2001); 1 IMWINKELRIED, *supra* note 26, § 5.2.2(b) (collecting studies).

[84] 1 IMWINKELRIED, *supra* note 26, § 5.2.2(b) (2d ed. 2010) (collecting studies).

[85] *Id.* § 5.2.2(a) (collecting studies).

[86] *Id.* § 5.2.2(a).

[87] *Id.* § 5.2.2(b).

[88] *Id.* § 5.2.2(d).

These findings have prompted some commentators[89] and courts[90] to seek a more normative justification for recognizing privileges protecting relationships such as attorney and client. A humanistic theory is gradually gathering support as at least a supplement[91] to the traditional instrumental theory. The humanistic theory makes explicit what is only implicit in Wigmore's theory, namely, the conception of privileges as a means of protecting the personal autonomy of citizens in a liberal democracy.[92] Wigmore urged the courts to recognize privileges to encourage laypersons to communicate information to consultants and thereby enable the consultants to provide the layperson with more informed legal or medical advice.[93] However, the provision of advice is not an end in itself; it is hardly an ultimate social good in a democracy. The value of the advice is that it enables the layperson to better exercise his or her personal autonomy by making more intelligent, independent life-preference choices.[94] The ultimate value warranting the creation of privileges is the protection of democratic citizens' personal autonomy.[95]

In this light, many of the features of the privilege doctrine that contrast with the work-product doctrine are readily explicable. Consider, for instance, the proposition that although both the client and the attorney are holders of the work-product immunity, only the client holds the privilege. Again, the raison d'etre for creating privileges is safeguarding the client's personal autonomy. It is true that in some instances, the attorney can assert the privilege,[96] but the attorney does so on the client's behalf, not in the attorney's own right. The interest to be vindicated is the client's personal autonomy rather than any separate interest of the attorney.

This view of the rationale for privileges also explains why, unlike the work-product doctrine, privileges protect only communications between the layperson and the confidant. In Wigmore's mind, privileges are instruments for removing disincentives for laypersons to communicate information to confidants and for confidants to communicate advice to the

---

[89] 2 IMWINKELRIED, *supra* note 26, § 10.4.2–.3 (during the Congressional deliberations over the proposed Federal Rules of Evidence, scholars such as Professors Charles Black, Kenneth Graham, and Thomas Krattenmaker and other witnesses such as late Judge Patricia Wald either submitted letters or presented testimony attacking the traditional instrumental theory and advancing humanistic theories).

[90] In *In re Sealed Case* and *Jaffee*, the lower courts relied on humanistic reasoning and treated the privileges as qualified. *See In re* Sealed Case, 124 F.3d 230, 233–37 (D.C. Cir. 1997); Jaffee v. Redmond, 51 F.3d 1346, 1355–57 (7th Cir. 1995); Edward J. Imwinkelried, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in* Jaffee v. Redmond, *518 U.S. 1 (1996)*, 49 HASTINGS L.J. 969, 970 (1998).

[91] 1 IMWINKELRIED, *supra* note 26, § 5.3.4.

[92] *Id.* § 5.3.3(b).

[93] *Id.* § 5.3.3(c)(12).

[94] *Id.* § 5.3.3(c)(9)–(15).

[95] *See also* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 909 (C.D. Cal. 2010) ("rights associated with the 'autonomy of self . . . include[] freedom of thought, belief, expression, and certain intimate conduct'") (quoting Lawrence v. Texas, 539 U.S. 558, 562 (2003)).

[96] *E.g.*, CAL. EVID. CODE § 955 (West 2009).

laypersons. The only step that the law needs to take to promote that objective is to confer protection on the communications themselves. The layperson's communication conveys the information the confidant needs to formulate his or her advice, and in return, the confidant's communication conveys the advice to the layperson. Expanding the privileges' protective ambit beyond communications would exceed the objective and unnecessarily suppress relevant, possibly reliable evidence.

Further, conceptualizing privileges as a means of safeguarding personal autonomy explains why the proponents of Wigmore's theory could plausibly argue that privileges should be absolute. As a disciple of the great utilitarian philosopher Jeremy Bentham,[97] Wigmore took the position that the primary objective of the legal system is to achieve rectitude of decision, the correct implementation of the rules of law enunciated by legislatures and courts.[98] Initially, it might seem difficult to reconcile that position with advocating the recognition of absolute privileges because the enforcement of a privilege leads to the exclusion of relevant, perhaps reliable evidence, and depriving the courts of such evidence possibly resulting in an erroneous decision. However, remember that Wigmore believed that the average layperson would not consult or confide but for the assurance of confidentiality furnished by evidentiary privileges. On that assumption, on net in most cases, the recognition of a privilege would not impede the legal system's search for truth. Although the enforcement of the privilege resulted in the exclusion of relevant evidence, the evidence would never have come into existence but for the privilege.[99] As one commentator restated Wigmore's view:

> In a perfect [Wigmorean] world, . . . the privilege would shield no evidence. Privilege generates the communication that the privilege protects. Eliminate the privilege, and the communication disappears. . . . [T]he privilege would protect only . . . statements that would not otherwise have been made. . . . [T]he privilege is not a but-for cause of all [privileged] communications.[100]

---

[97] *See generally* WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE (1985) (comparing the styles of Bentham and Wigmore).

[98] 1 IMWINKELRIED, *supra* note 26, § 3.2.2; *see* WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 78 (1994); TWINING, *supra* note 97, at 179; *see also* Ronald J. Allen & Esfand Nafisi, Daubert *and its Discontents*, 76 BROOK. L. REV. 131, 146 n.2 (2010) (citing Tehan v. United States, 382 U.S. 406, 416 (1966)) (referring to the Supreme Court's supposition that "[t]he basic purpose of a trial is the determination of truth").

[99] Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 71 (2002) (the theory is that "the privilege protects only attorney-client communications that arguably would not otherwise exist").

[100] Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 31; *see also* John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 480 (1982) ("By hypothesis, a perfectly defined corporate privilege would protect 'only those disclosures – necessary to obtain informed legal advice – which might not have been made absent the privilege.' . . . An ideal privilege would generate no costs because all protected

On occasion, the Supreme Court itself has voiced this belief.[101]

As previously stated, subsequent empirical research has undermined Wigmore's generalization that the average layperson would not consult or confide absent a privilege. However, at a deeper level, viewing privileges as a means of vindicating personal autonomy enables one to construct a plausible case for classifying privileges as absolute.[102] One can agree with Wigmore that the primary objective of the legal system should be rectitude of decision. One can even concede that, in turn, the legal system's achievement of that primary objective ought to be a priority for a democratic society. However, that objective is not the only value in a democratic society. Respect for personal autonomy has or approaches the status of an ultimate, fundamental value in a democratic society.[103] If any value can justify occasional frustration of the legal system's pursuit of rectitude of decision, it is respect for personal autonomy. Many of these life-preference choices are autonomous decisions which receive enhanced protection under constitutional law.[104] Here too, the conception of privileges as protections for autonomy helps rationalize one of the important respects in which privileges differ from work product.

Lastly, this conception of privileges helps explain the seemingly anomalous choice-of-law rules that in a diversity case, a federal court looks to state privilege law but applies federal work-product doctrine. In a diversity case the federal court applies state substantive rules of decision out of respect for the state's substantive policy choices.[105] Those choices certainly include measures a state has decided to implement to protect its citizens' personal autonomy. Indeed, it is hard to imagine a more

---

information would be undisclosed absent the privilege.") (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)).

[101] Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998) ("without the privilege, the client may not have made such communications in the first place" and "the loss of evidence is more apparent than real"); Jaffee v. Redmond, 518 U.S. 1, 11–12 (1996) ("[T]he likely evidentiary benefit that would result from the denial of a [psychotherapist] privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled . . . . Without a privilege, much of the desirable evidence to which litigants such as [plaintiff] seek access – for example, admissions . . . by a party – is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged."); *Fisher*, 425 U.S. at 403 (the attorney-client privilege is intended to "protect[] only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege").

[102] However, positing that view of privileges does not dictate the categorization of privileges as absolute. Some have argued that the humanistic view of privileges should lead to their reclassification as qualified. 1 IMWINKELRIED, *supra* note 26, § 5.4.4. Interestingly enough, in several lower court cases which relied on the humanistic theory rather than Wigmore's instrument rationale, the courts treated privileges as qualified. *In re* Sealed Case, 124 F.3d 230, 231, 234–35 (D.C. Cir. 1997); *Jaffee*, 51 F.3d at 1357 (7th Cir. 1995) (quoting Herbert v. Lando, 441 U.S. 153, 175 (1979); *In re* Subpoena Served Upon Jorge S. Zuniga, 714 F.2d 632, 640 (6th Cir. 1983)).

[103] *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 22 (1988).

[104] *E.g.*, 1 IMWINKELRIED, *supra* note 26, § 6.2.1(b) (collecting constitutional law cases on the spousal relation); *id.* § 6.2.3(b) (collecting cases on freedom of religion); *id.* § 6.2.7(b) (collecting cases on the psychotherapist relationship).

[105] Erie R.R. Co. v. Tompkins, 304 U.S. 62, 78 (1938).

substantive category of policy choices. If, as we shall soon see, work-product doctrine rests on institutional and procedural concerns rather than substantive policy choices, then it is quite consistent for the federal court sitting in a diversity case to follow state privilege law but apply its own work-product doctrine.

The conclusion that emerges from the above discussion is that a person's right to an evidentiary privilege is secondary in nature. The law accords persons privilege rights in order to secure their primary right to personal autonomy. If a person can freely consult with confidants, such as lawyers and therapists, the person can make more intelligent, independent decisions about key life-preference choices impacting their future. Secondary privilege rights safeguard personal autonomy, a fundamental right of the highest order in a liberal democracy.

B. The Rationale for the Work Product Immunity

When we reflect on the justification inspiring the work-product doctrine, a very different picture emerges. As the preceding subpart demonstrated, holders enjoy secondary privilege rights to secure their primary right to personal autonomy. In contrast, holders possess whatever rights they enjoy under the work-product doctrine in an essentially representative capacity, namely, as functionaries in the adversarial legal system.

In both its criminal and civil legal systems, the United States has long been committed to the adversarial mode of adjudication.[106] The Supreme Court acknowledged that commitment in both *Hickman*,[107] a civil proceeding, and *Nobles*,[108] a criminal case. In an adversarial system, the parties have primary responsibility for developing the facts before trial and presenting testimony about the facts at trial.[109] The classic apologia for adversarial adjudication is the Joint Statement of the American Bar Association and the American Association of Law Schools on Professional Responsibility ("Joint A.B.A.-A.A.L.S. Statement"), published in 1958.[110] The argument runs that if attorneys representing clients know that they

---

[106] STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 34 (1988); EDMUND MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 3 (1956); Monroe H. Freedman, *Professional Responsibility of the Civil Practitioner*, *in* EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER 151, 152 (Donald T. Weckstein ed. 1970); *see also* United States v. Deloitte LLP, 610 F.3d 129, 139–41 (D.C. Cir. 2010); E. Allan Lind, John Thibaut & Laurens Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1129–30 (1973).

[107] Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("a common law trial is and always should be an adversary proceeding").

[108] United States v. Nobles, 422 U.S. 225, 230 (1975) ("we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts").

[109] LANDSMAN, *supra* note 106, at 34; Lind, Thibaut & Walker, *supra* note 106, at 1129–30, 1135.

[110] *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159–61 (1958).

largely control pretrial discovery as well as the evidentiary trial presentation, they will have the maximum incentive to unearth and prove the relevant facts at trial.[111]

Although the Joint A.B.A.-A.A.L.S. Statement is the classic articulation of the policy case for the adversarial system, an article by Professor Ronald Allen and several coauthors is the leading article drawing the work-product doctrine as a corollary of the adversarial theory.[112] They explain that the doctrine can function as a stimulus for the production of information (a legal good) for adversarial trials.[113] In other words, without the shield of the work-product doctrine, attorneys would fear that they might be gathering evidence that the opposition would later use against them at trial.[114] The *Hickman* Court embraced this corollary.[115] The Court noted the attorney's lead responsibility in assembling the evidence for trial.[116] The Court recognized that if construed too liberally, the newly minted discovery provisions in the Federal Rules of Civil Procedure would create a disincentive to the performance of that responsibility.[117] In Justice Jackson's words, in an adversarial system, the attorney is not entitled to exploit the opposition's pretrial preparation efforts; the attorney should not be allowed to prepare by relying on "wits borrowed from the adversary."[118] The Court fashioned the work-product doctrine in order to prevent such exploitation and protect the privacy of a litigator's work in an adversary proceeding.[119] Hence, the work-product doctrine serves as an important safeguard, reinforcing the adversarial system.[120]

In this light, the rationale for the work-product doctrine is more akin to the rationale for government officials' tort immunity under 42 U.S.C. § 1983.[121] The statute generally imposes liability on persons who violate citizens' constitutional rights.[122] However, the courts have evolved various

---

[111] LANDSMAN, *supra* note 106, at 34 (the attorneys "will . . . undertake a[] [more] extensive search for better evidence," and their efforts will "improve the overall quality of the evidence upon which adjudication will be based"). In the words of the California Code of Civil Procedure § 2018.020(a), the work product protection is calculated "to encourage [attorneys] to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." CAL. CIV. PROC. CODE § 2018.020(a).

[112] *See* Allen, Grady, Polsby, & Yashko, *supra* note 28.

[113] *Id.* at 387 (citing Frank Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 310 (1981)).

[114] Radson & Waratuke, *supra* note 25, at 806 (citing Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

[115] Hickman v. Taylor, 329 U.S. 495, 511 (1947).

[116] *Id.*

[117] *Id.*

[118] *Id.* at 516 (Jackson, J., concurring).

[119] *Id.* at 497, 509–10 (majority opinion), 512; *see also* Simpson, *supra* note 48, at 223 (citing *Hickman*, 329 U.S. at 509) (discussing the protection of "attorney privacy").

[120] Simpson, *supra* note 48, at 228 (citing Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 201 (M.D.N.C. 1988)) ("the work product doctrine safeguards the adversarial system").

[121] 42 U.S.C. § 1983 (2006).

[122] *Id.*

absolute[123] and qualified[124] immunities for several functionaries in the legal system, including judges,[125] their clerks,[126] prosecutors,[127] and even private witnesses.[128] The courts have not conferred these immunities to protect any personal, primary rights of these government officials and citizens, but have done so to remove disincentives from the performance of these individuals' functions within the legal system.[129] Thus, the courts reason that so long as the official acts reasonably while exercising discretion,[130] the official should not be held liable for his or her action. Like attorneys operating within the adversarial system, these government officials enjoy their procedural immunity from tort liability in a representative capacity.

The courts typically use the expression procedural "immunity" to describe the doctrines insulating government officials from liability under 42 U.S.C. § 1983.[131] So too, the better considered work-product decisions describe that doctrine as a procedural "immunity" rather than a privilege. In the majority opinion in the landmark *Hickman* case, Justice Murphy used the term of art "immunity" to describe the new work product doctrine.[132] He

---

[123] Bechard v. Rappold, 287 F.3d 827, 829 (9th Cir. 2002) (citing Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998)); Powell v. Ridge, 247 F.3d 520, 524–25 (3d Cir. 2001).

[124] Harris v. Bornhorst, 513 F.3d 503, 511 (6th Cir. 2008) (citing Williams v. Mehra, 186 F.3d 685, 691 (6th Cir. 1999) (en banc)); Barnes v. Wright, 449 F.3d 709, 718 n.8 (6th Cir. 2006) (citing Dickerson v. McClellan, 101 F.3d 1151, 1157 (6th Cir. 1996)); Koch v. Rugg, 221 F.3d 1283, 1294 (11th Cir. 2000) (citing Behrens v. Pelletier, 516 U.S. 229, 306 (1996)); Oliver v. Woods, 209 F.3d 1179, 1185 (10th Cir. 2000) (citing Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir. 1995)); Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649, 668 (E.D.N.C. 1999) (citing S.P. v. City of Tacoma Park, 134 F.3d 260, 266 (4th Cir. 1998)).

[125] Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 433 n.8 (1993); Forrester v. White, 484 U.S. 219, 225 (1988); Stump v. Sparkman, 435 U.S. 349, 356–57 (1978).

[126] Delaney v. District of Columbia, 659 F. Supp. 2d 185, 194 (D.D.C. 2009) (citing Wagshal v. Foster, 28 F.3d 1249, 1252 (D.C. Cir. 1994)).

[127] Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976); Stein v. Disciplinary Bd. of Supreme Court of N.M., 520 F.3d 1183, 1194 (10th Cir. 2008); Gray v. Poole, 243 F.3d 572, 577 (D.C. Cir. 2001); Masters v. Gilmore, 663 F. Supp. 2d 1027, 1038 (D. Colo. 2009); Cipolla v. Cnty. of Rensselaer, 113 F. Supp. 2d 305, 315 (N.D.N.Y. 2000).

[128] Todd v. Weltman, Weinberg & Reis Co., 434 F.3d 432, 437 (6th Cir. 2006); Heavrin v. Nelson, 384 F.3d 199, 202 (6th Cir. 2004); Castellano v. Fragozo, 352 F.3d 939, 958 (5th Cir. 2003); Gauger v. Hendle, 349 F.3d 354, 358 (7th Cir. 2003) (citing Briscoe v. LaHue, 460 U.S. 325, 345–46 (1983)) ("[W]itnesses, including police officers testifying for the prosecution in a criminal trial, have absolute immunity from a damages suit based on their testimony.").

[129] Coffin v. Brandau, 642 F.3d 999, 1018 (11th Cir. 2011) (quoting Hunter v. Bryant, 502 U.S. 224, 229 (1991)) (internal quotation marks omitted) ("This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued."); Burns v. Pa. Dept. of Corr., 642 F.3d 163, 176 (3d Cir. 2011).

[130] Roberts v. Spielman, 643 F.3d 899, 903 (11th Cir. 2011); Bletz v. Gribble, 641 F.3d 743, 750 (6th Cir. 2011) (citing Solomon v. Auburn Hills Police Dep't, 389 F.3d 167, 172 (6th Cir. 2004)); Rondigo, L.L.C. v. Twp. of Richmond, 641 F.3d 673, 681 (6th Cir. 2011) (citing Pearson v. Callahan, 555 U.S. 223, 231 (2009)); Williams v. City of Boston, 771 F. Supp. 2d 190, 205 (D. Mass. 2011) (citing *Pearson*, 555 U.S. at 231); Fils v. City of Aventura, 768 F. Supp. 2d 1188, 1199 (S.D. Fla. 2010) (citing McCullough v. Antolini, 559 F.3d 1201, 1205 (11th Cir. 2009)); Tessler v. Paterson, 768 F. Supp. 2d 661, 669 (S.D.N.Y. 2011) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[131] *E.g.*, *Stein*, 520 F.3d at 1195 (citing Mireles v. Waco, 502 U.S. 9, 9–10 (1991)); Barnes v. Wright, 449 F.3d 709, 719 n.8 (6th Cir. 2006) (citing Hartman v. Moore, 547 U.S. 250, 262 (2006)); *Gauger*, 349 F.3d at 358; United States v. Philip Morris USA, Inc., 337 F. Supp. 2d 15, 27 (D.D.C. 2004); Pyle v. Hatley, 239 F. Supp. 2d 970, 983 n.23 (C.D. Cal. 2002).

[132] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

made it clear that the doctrine he was announcing was not an evidentiary privilege.[133] It is true that in passing, the Court observed that the English courts used the expression "privilege" to describe their version of the doctrine.[134] However, the opinion does not contain even a faint suggestion that the Court favored adopting that terminology. Unfortunately, Justice Powell's lead opinion in *Nobles* muddied the waters. In several passages, the justice described the work product doctrine as a privilege or qualified privilege.[135] However, in his concurring opinion in *Nobles*, Justice White was careful to emphasize that the doctrine is a procedural immunity,[136] not an evidentiary privilege.[137] Although the wording of Justice Powell's lead opinion has misled many courts and commentators into using the "privilege" terminology, even today many courts insist that the work-product doctrine should not be labeled a privilege.[138] Rather, in the interest of clarity and precision they use the label procedural "immunity."[139]

The preceding subpart demonstrated that the conception of the attorney-client privilege as a secondary right reinforcing the primary right to personal autonomy explicates many of the distinctive features of privilege doctrine. Similarly, the view of the work-product doctrine as conferring protection on holders only in a representative capacity as functionaries in the adversarial system helps rationalize the peculiar features of that doctrine.

Why should the attorney qualify as a holder of the work-product doctrine when only the client holds the attorney-client privilege? The client is the only holder of the privilege because the privilege secures the client's personal right to autonomy. The attorney can claim the work-product immunity because he or she plays the lead role in creating the information that the adversarial system is calculated to generate. Many courts[140] and commentators[141] refer to the "attorney" work-product doctrine—a clear reflection of the attorney's paramount role. Admittedly, some courts also allow the client to assert the work-product protection.[142] Moreover, the client can personally participate in the creation of protected material as when the client prepares a written statement for the attorney's use in trial

---

[133] *Id.* at 509–10.

[134] *Id.* at 510 n.9.

[135] United States v. Nobles, 422 U.S. 225, 239 (1975).

[136] *Id.* at 251 (1975) (White, J., concurring).

[137] *Id.* at 247.

[138] Magill v. Superior Court of the Cnty. of Madera, 103 Cal. Rptr. 2d 355, 385 (Cal. Ct. App. 2001) ("The statutory protection afforded an attorney's work product is not one of the enumerated privileges, but a separate and distinct doctrine....") (citing People v. Coddington, 2 P.3d 1081, 1142 (Cal. 2000)); Pope v. State, 207 S.W.3d 352, 357–58 (Tex. Crim. App. 2006).

[139] Holliday v. Extex, 447 F. Supp. 2d 1131, 1138 (D. Haw. 2006) ("'[T]he work-product doctrine is a procedural immunity and not an evidentiary privilege.'") (quoting F.D.I.C. v. Fid. & Deposit Co. of Md., 196 F.R.D. 375, 381 (S.D. Cal. 2000)).

[140] *Magill*, 103 Cal. Rptr. 2d at 385.

[141] Simpson, *supra* note 48, at 223.

[142] Lopes v. Vieira, 719 F. Supp. 2d 1199, 1201 (E.D. Cal. 2010) (citing *In re* Special September 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980)).

preparation. However, the typical client has neither the time nor the legal expertise to generate even a significant percentage of the evidence needed for trial. In the vast majority of cases, that creative role falls to the attorney. It is the attorney's privacy[143] that must be shielded to encourage the attorney to energetically perform that role. Because the attorney is the primary producer or creator of the work-product material, the attorney ought to have standing to object based on the work-product doctrine.

Why should the work-product immunity extend to types of information in addition to the attorney-client communications protected by the evidentiary privilege? The privilege has a narrow mission—to facilitate the flow of communications between attorney and client to enable the client to obtain sound, informed advice. The immunity has a much broader objective—to facilitate the creation of all the various types of evidence that can be useful at trial. It would frustrate the purpose of the work-product immunity to confine it to the same narrow scope as the attorney-client privilege.

Why in the typical case does the work-product immunity confer only qualified protection while the attorney-client privilege is absolute in character? As we have seen, the attorney-client privilege is a secondary right protecting the primary right to personal autonomy, which approaches the status of an ultimate value in a liberal democracy.[144] The work product-immunity facilitates the functioning of the adversarial system. Although the American legal system pursues several objectives, the conventional wisdom is that the system's primary goal ought to be rectitude of decision.[145] If in a given case the opponent can show that suppressing the work-product material would cause a wrongful decision, the primary systemic value comes into play and trumps the work-product immunity that merely facilitates the system's operation. The primacy of that value explains why, absent explicit language in a statute or court rule,[146] the courts have sensibly concluded that the work product-doctrine accords the holder only qualified protection.

Why does a federal court in a diversity action apply the work-product doctrine of the federal forum rather than looking to the state law, as it does in the case of evidentiary privileges? In diversity actions, the state's substantive policies, reflected in the state rules of decisions, govern.[147] In a philosophic sense, it is hard to imagine any policy more substantive and

---

[143] Simpson, *supra* note 48, at 223.

[144] GEORGE P. SMITH, II, HUMAN RIGHTS AND BIOMEDICINE 4 (2000) ("Perhaps the central most concern within human rights today, as evolved over history, is the ethical principle of autonomy or self-determination."); *see also* DWORKIN, *supra* note 103, at 30–31; JOSEPH RAZ, THE MORALITY OF FREEDOM 408, 424–25 (1986).

[145] Tehan v. United States, 382 U.S. 406, 416 (1966); Allen & Nafisi, *supra* note 98, at 146.

[146] *See supra* notes 55–59 and accompanying text.

[147] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

more central to a democracy than the state's choices as to the extent to which it will secure its citizens' personal autonomy. As previously stated, many of these life-preference choices enjoy heightened constitutional protection.[148] However, the work-product immunity is procedural in character, facilitating the functioning of the adversary system. The federal trial judge is the overseer of the administration of the adversarial system in his or her courtroom, and it makes eminently good sense that the judge should therefore apply the federal courts' own conception of adversariness and the related work-product doctrine.

V. CONCLUSION

This article began by posing the question of whether the 2010 amendments to Federal Rule of Civil Procedure 26 are valid. As the Introduction noted, the amendments purport to apply work-product protection to certain communications between attorneys and their experts as well as drafts of the experts' reports. There is a widespread feeling that those amendments are desirable, if not necessary; the prior state of the law had made it quite expensive and very awkward for attorneys to communicate effectively with their testifying experts before trial. However, regardless of whether the amendments are well-advised, the still nagging question is their validity. If the work-product doctrine is a "privilege" under 28 U.S.C. § 2074, the amendments are invalid; although they were promulgated by the Supreme Court, they were never submitted to Congress for approval. It should now be evident that the amendments are valid as well as desirable. The work-product is a procedural immunity, not an evidentiary privilege. Hence, amendments regulating the extent of work-product immunity do not have to run the gauntlet of 28 U.S.C. § 2074.

Although the Court acted within its powers in issuing the amendments, Congress has unfortunately confused the issue by enacting Federal Rule of Evidence 502 in 2008. As Part II pointed out, that rule prescribes some common waiver rules for the attorney-client privilege and the work-product doctrine.[149] The problem is not that the rule announces several identical waiver standards for the privilege and the doctrine; Part II pointed out that in many respects, the contours of the attorney-client privilege and work-product doctrine are similar. Rather, the problem is that Congress chose to include both sets of rules in the same statute and situated that statute in the Federal Rules of Evidence. That choice could mislead some courts into thinking that like the attorney-client privilege, the work-product immunity is an evidentiary rule. Why else include the waiver rules for work product in a provision of the Federal Rules of *Evidence*? The

[148] *See supra* note 102 and accompanying text.
[149] *See supra* note 32.

waiver privilege rules belong in Rule 502, but the waiver rules of work-product protection should have been incorporated in Federal Rule of Civil Procedure 26.

An important insight can be gleaned from comparative law. Like the United States, many democratic countries recognize an attorney-client privilege or legal professional privilege.[150] That is to be expected. As Part IV argued, the secondary privilege right reinforces the primary right to personal autonomy. To a greater or lesser degree, every liberal democracy values the right to personal autonomy. However, even a cursory inspection of evidence law in other liberal democracies reveals that very few of those countries have also developed a work-product doctrine.[151] One of the few is England.[152] Of course, like the United States, England has adopted the adversarial mode of litigation.[153] Indeed, England gave birth to the adversarial system.[154] It is no accident that many adversarial legal systems have developed a work-product immunity while most liberal democracies with an inquisitorial legal system lack a comparable doctrine. In the continental systems, the judicial officer takes the lead role in collecting and generating the evidence needed to decide the dispute. The recognition of a work-product doctrine, reflecting the attorney's central creative role, is a hallmark of a legal system committed to an adversarial mode of procedure. The doctrine creates a limited immunity from discovery for, and erects a hurdle to, the admissibility of materials that functionaries of the adversarial system generate to facilitate the system's operation. Conceiving the doctrine as a procedural immunity will sharpen the differences between the work-product protection and privilege.[155] More importantly, formulating the work-product doctrine in this fashion helps explicate those differences and renders the law governing both the immunity and the attorney-client privilege more coherent.

---

[150] 2 IMWINKELRIED, *supra* note 26, § 12.2.1–.6 (discussing the law in England, Ireland, Australia, Canada, France, and Germany).

[151] *Id.*

[152] Hickman v. Taylor, 329 U.S. 495, 510 n.9 (1947).

[153] *See id.*

[154] LANDSMAN, *supra* note 106, at 5–19.

[155] In earlier articles, the author has explored some of the specific differences between the attorney-client privilege and the work product doctrine. Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265, 310–13 (2011); Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19, 23–24 (1990).