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A VIRGINIA-SPECIFIC SUMMARY GUIDE: The Attorney-Client Privilege and the Work Product Doctrine

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A Virginia-Specific Summary Guide: The Attorney-Client Privilege and the Work Product Doctrine

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A VIRGINIA-SPECIFIC SUMMARY GUIDE: THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

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CHAPTER 34

CREATING AND ASSERTING WORK PRODUCT PROTECTION

34.1 INTRODUCTION

Any potential litigants or their "representatives" can create protected work product, and both clients and lawyers have some power to assert that protection.

- This contrasts with the attorney-client privilege's client-centric principles.

34.2 CREATION OF PROTECTED WORK PRODUCT

The work product rule could not be any clearer in explaining who can create protected work product.

- The protection can extend to "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[1]

34.3 LAWYER NEED NOT BE INVOLVED

Despite this crystal-clear rule language, some courts inexplicably protect only lawyer-created or lawyer-directed work product.

VA The Eastern District of Virginia[2] and a Virginia circuit court[3] inexplicably held that the work product protection applied only if a lawyer prepared, directed, or requested preparation of documents.

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[1] Fed. R. Civ. P. 26(b)(3) (emphasis added).

[2] *Brainware, Inc. v. Scan-Optics, Ltd*., Civ. A. no. 3:11cv755, 2012 U.S. Dist. LEXIS 97121, at *4 (E.D. Va. July 12, 2012); *ePlus, Inc. v. Lawson Software, Inc*., 280 F.R.D. 247, 257 (E.D. Va. 2012); *Yorktowne Shopping Center, LLC v. Nat'l Surety Corp*., Civ. A. No. 1:10cvl333, 2011 U.S. Dist. LEXIS 52032, at *2-3 (E.D. Va. May 16, 2011); *E.I. DuPont De Nemours and Co. v. Kolon Industries, Inc*., Civ. A. No. 3:09cv58, 2010 U.S. Dist. LEXIS 36530, at *10 (E.D. Va. April 13, 2010).

Most courts properly apply the rule as written.

VA The Eastern District of Virginia[4] and Virginia circuit courts[5] held that work product doctrine can apply without a lawyer's involvement.

- Even pro se parties can create protected work product.

34.4 ADVANTAGES OF A LAWYER'S INVOLVEMENT

Although work product protection does not depend on lawyers' involvement, such involvement can provide some advantages.

- Among other things, lawyers' involvement might provide separate attorney-client privilege protection; help establish that the litigants anticipated litigation (and thus involved lawyers); help demonstrate that the withheld documents were motivated by litigation rather than prepared in the ordinary course of business or for some other non-litigation purpose; bolster an opinion work product protection claim.[6]

34.5 CLIENT AND LAWYER REPRESENTATIVES

On its face, the work product rule can protect documents created by litigants, prospective litigants or their representatives. [34.501]

Client representatives can create protected work product. [34.502]

- Examples include nonlawyer company employee, including risk management department employee; union official assisting a company employee at an arbitration; potential witness who participated in an email chain communication with the party's lawyer; consultant; investigator; other company assisting the party; forensic accountant; accountant; insurance carrier;

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[3] *Cintas Corp. No. 2 v. Transcon. Granite, Inc.*, 77 Va. Cir. 234, 237 (Va. Cir. Ct. 2008).

[4] *In re S<3>LTD.*, 252 B.R. 355, 363 (Bankr. E.D. Va. 2000).

[5] *McDonald v. Sentara Medical Group*, 64 Va. Cir. 30, 36-37 (Va. Cir. Ct. (2004); *Lopez v. Woolever*, 62 Va. Cir. 198, 200 (Va. Cir. Ct. 2003); *Bartee v. CSX Transp., Inc.*, No. LX-2976-1, slip op. at 2 (Va. Cir. Ct. June 21, 1995); *Economics v. K. Mart Corp.*, 33 Va. Cir. 55, 55 (Va. Cir. Ct. 1993); *Wilson v. Norfolk & Portsmouth Belt Line R.R.*, 69 Va. Cir. 153, 169-70 (Va. Cir. Ct. 2005); *Larson v. McGuire*, 42 Va. Cir. 40, 43 (Va. Cir. Ct. 1996).

[6] *See infra* Chapter 41.

insurance claims adjuster; public relations consultant; investment banker.

Lawyer representatives can create protected work product. [34.503]

- Examples include computer forensic company; investigator; accountant; paralegal; public relations consultant; FBI agent; litigation consultants assisting in witness preparation; claims adjuster; cameramen preparing surveillance videotape.

Given the broad work product doctrine protection for either clients' or lawyers' representatives, it should not matter who retains or pays such representatives. [34.504]

34.6 FRIENDLY THIRD PARTIES' ROLE

The difference between attorney-client privilege and work product doctrine protection involving third parties becomes most acute when considering friendly third parties.

Even friendly third parties' participation in, or later sharing of, privileged communications normally forfeits or waives that fragile privilege.[7]

In contrast, such friendly third parties generally can create protected work product if acting as litigants' "representatives"; participate in work product-protected documents' creation; receive protected work product doctrine-protected documents without waiving that robust protection.

- A third party's presence during otherwise privileged communications normally aborts privilege protection, even though that third party may count as a client "representative" capable of creating protected work product—ironically even while participating in communications whose privilege protection her presence has destroyed.

34.7 NON-TESTIFYING EXPERTS

Analyzing work product protection for non-testifying experts' documents involves an unusual and complicated analysis. [34.701]

[7] *See supra* Chapters 19 and 26.

A unique rule, rather than the general work product rule, governs non-testifying experts' documents. [34.702]

- Fed. R. Civ. P. 26(b)(4)(B) supplies the protection.

To deserve such protection, non-testifying experts must be retained in "anticipation of litigation." [34.703]

Such non-testifying experts must also be "specially employed"—which normally precludes regular corporate employees from playing that protected role. [34.704]

Non-testifying experts with underlying factual knowledge cannot claim immunity from discovery about such factual knowledge. [34.705]

Similarly, non-testifying experts later playing a testifying expert role normally face discovery of materials created or considered in the latter role. [34.706]

In contrast to the law firm context, courts generally do not recognize imputation of knowledge among testifying and non-testifying experts working at the same consulting organization. [34.707]

Non-testifying experts might have to disclose factual knowledge they gained in entirely different situations. [34.708]

Non-testifying experts later designated as testifying experts may have to disclose documents created in their previous role.[8] [34.709]

Courts disagree about discovery of non-testifying experts designated as testifying experts, but later "de-designated." [34.710]

- Some courts hold that such experts regain their protected status, while some courts take the opposite approach.

Courts disagree about whether litigants can withhold non-testifying experts' existence and identity. [34.711]

- Some courts hold that such non-testifying experts' existence and identity are off-limits as irrelevant, but some courts find that litigants must provide such basic information.

[8] *See infra* Chapter 49.

34.8 TESTIFYING EXPERTS

Testifying experts' documents also involve several work product issues, which were dramatically altered in the 2010 changes to the Federal Rules of Civil Procedures. [34.801]

Before the 2010 rules changes, most courts held that testifying experts' documents fell under the specific rule covering experts, rather than the work product rule. [34.802]

After the 2010 rules changes, litigants can withhold as work product testifying experts' draft reports and communications with the litigants' lawyers (other than such communications' factual components underlying the testifying experts' opinions). [34.803]

Because the 2010 federal rules changes at most extend qualified work product protection to testifying experts' draft reports, those experts presumably have to save and log such drafts. [34.804]

The work product doctrine can protect clients' and lawyers' own documents created during their dealings with testifying experts, but not shared with such experts. [34.805]

34.9 PARTIES' ASSERTION OF WORK PRODUCT PROTECTION

Unlike the attorney-client privilege, both clients and their lawyers possess some ownership rights in work product and therefore usually can assert that protection.

34.10 NON-PARTIES' ASSERTION OF WORK PRODUCT PROTECTION

On its face, the work product rule can protect documents created "by or for another party or its representative." [34.1001]

- This Fed. R. Civ. P. 26(b)(3) language has created complicated situations, and could result in great mischief.

The rule makes it clear that any party's representative can create protected work product in the right circumstances. [34.1002]

However, unless a non-party acted as a party's representative, it cannot generally create protected work product based on someone else's anticipation of litigation. [34.1003]

VA The Eastern District of Virginia[9] and the Western District of Virginia[10] inexplicably held that only litigation parties can create protected work product.

If applied logically, the rule should allow non-parties to create protected work product if they anticipate litigation, even if they do not later become parties. [34.1004]

- Many courts recognize this common sense rule interpretation.

- Otherwise, plaintiffs could threaten several potential defendants with litigation, but not sue all of them—and then discover materials created by the threatened but unsued non-party.

Despite such a strategy's obvious mischief, some courts inexplicably limit work product protection to documents created by parties to the litigation in which adversaries seek discovery. This approach does not make much sense. [34.1005]

34.11 OWNERSHIP OF LAWYERS' FILES

Ownership of lawyers' files raises both ethics and privilege issues. [34.1101]

In applying the ethics rules, some states require lawyers to provide their former clients only the "final" version of documents in lawyers' files, while some courts require lawyers to relinquish their entire file to former clients. [34.1102]

- In litigation between lawyers and their former clients, normal discovery rules might grant more access to such files than that mandated by the ethics rules. [34.1103]

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[9] *Rickman v. Deere & Co*., 154 F.R.D. 137, 138 (E.D. Va. 1993).

[10] *Collins v. Mullins*, 170 F.R.D. 132, 137 (W.D. Va. 1996).