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The Ability of Trade Associations to Receive Advice on Antitrust and Other Legal Risks: Are These Communications Protected from Discovery?

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Trade associations provide a collective voice for their members and a forum in which to solve common problems. Not surprisingly, the common problems that need a voice and require resolution often involve legal issues. The fact that most trade associations are comprised of members who are business competitors means that some of the common legal issues will likely concern antitrust implications of the activities of the trade association itself and many of its members.

Can trade associations receive legal advice in a manner that is practical to both the association and its members, while still maintaining the confidentiality offered by the attorney-client privilege or work product doctrine? This question becomes even more complex when the special considerations of antitrust legal advice are taken into account. The few courts to rule on this issue have taken varying approaches in their analysis. Their decisions do not always result in privilege protection for the trade association's legal communications.

Nevertheless, the current state of the law leaves room for trade associations to receive and share carefully planned legal advice on antitrust and other issues in a manner that is both useful to their members and maximizes protection from unwanted disclosure to litigation adversaries or government investigators. These steps include: (1) clearly labeling all trade association legal communications, (2) strictly limiting dissemination of such communications on a need-to-know basis, and (3) sharing legal communications with association members under the protection of a common legal interest agreement or confidentiality agreement.

The Attorney-Client Privilege and Work Product Doctrine Play a Critical Role in the Receipt of Sound Legal Advice

The attorney-client privilege exists to protect communications between an attorney and a client from disclosure to any third party, in litigation or otherwise. The related work product doctrine similarly protects a party's and its attorney's litigation-oriented documents from disclosure to adversaries. The purpose of these protections is to allow clients to communicate frankly with their attorneys, even when doing so reveals embarrassing or potentially harmful facts. This free flow of information allows attorneys to provide factually informed advice to their clients.

Because the attorney-client and work product privileges are in direct conflict with the notion that litigants are entitled to obtain relevant information

from each other, courts continually balance the benefits of the privilege against the need for parties to access relevant information. Most notably, attorney-client privilege is typically lost if the client or its lawyer discloses an attorney-client communication to a third person, and work product protection is forfeited if the document is disclosed in a manner that either does, or likely will, cause a litigation adversary to obtain it. Another key focus of a court's balancing process is deciding to whom the privilege applies; that is, who or what qualifies as a "client" and with whom may the client share privileged communications without causing a waiver of the protection.

With their complex structure, trade associations raise issues that lie at the crossroads of these two considerations. The ability of trade associations and their members to receive effective legal advice and subsequently protect it from disclosure depends on an understanding of these issues, not only by the lawyers, but by the association's officers and member representatives.

Applying Privilege to Trade Association Communications: Various Judicial Approaches

Joint Representation Approach. Several older trial court opinions have, with little analysis, held that all members of a trade association enjoy an attorney-client relationship with the association's legal counsel.[1] These cases involved associations with very large memberships.[2] Unfortunately, the opinions shed little light on what, if any, evidence the court considered to assess affirmative steps that the members took to establish an attorney-client relationship (aside from joining the association).[3] These opinions also fail to address the practical difficulties faced by an attorney who is charged with simultaneously representing the legal interests of the association and hundreds of its individual members.

Corporate Approach. The Restatement of Law, a guide that carries no independent authority, lumps unincorporated associations and corporations together for privilege analysis purposes. For unincorporated associations, however, the Restatement clarifies that "[m]embers of an unincorporated association . . . are not, solely by reason of their status as members, agents of the association for the purposes of this Section."[4] Although it is not clear on this point, the Restatement appears to differentiate between the core association staff, who are presumably akin to a corporation's employees, and the members, who are presumably akin to shareholders (and therefore not generally permitted to participate in or access privileged communications).

Case-by-Case Hybrid Approach. Some more recent court decisions have analyzed the privilege status of attorney-client communications made between trade association members and the association's attorney in a manner that takes into account many factors governing both the general nature of the attorney-member relationship and the circumstances surrounding the particular communications at issue. These courts approach the issue from an initial position that seems to favor the corporate approach, but leave open the possibility that the association member – not just the association entity – may be the association attorney's client under certain circumstances.

In *Harper-Wyman Company v. Connecticut General Life Insurance Company*[5], the district court considered the privileged status of legal advice prepared by the American Council of Life Insurance's (ACLI) outside legal counsel. ACLI subsequently shared that legal advice with some of its members. The court refused to reach a "blanket conclusion that the association member is to be considered the client of the attorney."[6] Key to the court's analysis was whether communications to the members "were made with an expectation of confidentiality."[7]

The court was unconvinced that ACLI satisfied this element, noting that ACLI distributed its outside counsel's advice "to a group of unknown dimension."[8] Furthermore, ACLI "provided no basis

for concluding that the distribution was limited to in-house counsel. A number of documents indicate that non-attorney personnel of ACLI members also received them."[9] The court found that this lack of control over the dissemination reduced any expectation of confidentiality.

In *In re Circle K Corporation*, another district court considered whether the outside law firm for an official committee of debenture holders had established an attorney-client relationship with an individual debenture holder.[10] The court analogized the relationship between the committee and this individual to that of a trade association and its members. In doing so, it considered, but rejected, cases that have broadly found association members to be akin to clients of the association's attorney. Instead, it characterized an association's members as "vicarious clients," finding that "mere status as a constituent did not make the association member a client in the traditional sense of the association's lawyers. . . ."[11] Finding no evidence that the individual took affirmative steps to seek legal advice or otherwise establish an attorney-client relationship with the committee's attorney, the court rejected the notion that an attorney-client relationship existed between the attorney and individual.[12]

Perhaps the most detailed analysis of the relationship between a trade association's lawyers and its members is found in *United States v. American Society of Composers, Authors and Publishers*.[13] The issue there was whether an attorney for the association could represent the association in an action brought against it by an association member.

The court first recognized that a number of district court cases had held that members of an unincorporated association are clients of that association's attorney.[14] It also noted that "ASCAP has even conceded that 'ASCAP's general counsel is the attorney for each of ASCAP's members for purposes of invoking the attorney-client privilege against a third party, where a member has requested association-related legal advice.'"[15]

Nevertheless, the court opined that "in recent years, the law has reflected the influences of changing ethical codes. The mere status of being a member of an unincorporated association no longer makes one a client of the association's attorneys."[16] The court cited ethics opinions that specifically note, for professional obligation purposes, that a lawyer representing a trade association does not automatically represent each of the association's members.[17]

Considering the lack of a *per se* attorney-client relationship, the court then drew upon those ethical opinions to list relevant factors when determining whether a trade association attorney represents an individual association member. Of those factors, it focused on two, in particular. First, it found that ASCAP's articles of association put members on notice that ASCAP lawyers would act for the Society over the interests of individual members, if necessary.[18] Second, it determined that the large size of the association (100,000 members) is relevant to determining reasonableness of confidentiality expectations. Specifically, the court stated that "[i]t would defy common sense to believe that the attorneys for ASCAP also represent every one of these members. It would force ASCAP attorneys to recuse themselves from all member protests and require new attorneys to familiarize themselves with the governing documents and internal workings of ASCAP in order to effectuate a meaningful representation of the Society."[19]

Even though *American Society* concerned attorney disqualification more than attorney-client privilege, the factors it established to determine the attorney-client relationship raise practical difficulties for any association attorney who asserts that all members of the association are her clients. Given this, the automatic client approach may not be worth the practical trouble and potential ethical pitfalls, even if a court could be persuaded that it is still a valid way to protect shared legal advice.

Common Legal Interest Arrangements

Another way to protect legal advice shared among association members could be for the members to enter into a common legal interest agreement with each other and the association. The common legal interest doctrine permits parties who share identical interests to share attorney-client privileged information without waiving privilege protection.[20] A key element is that the lawyers for the respective parties need not be considered the lawyers for the other parties to the agreement. The agreement could (and should), therefore, specify that the association's lawyers are not the individual members' lawyers by virtue of the common legal interest arrangement. Two other aspects of the common legal interest doctrine can be problematic for trade association members if not addressed in advance.

First, no party to the common interest arrangement may unilaterally waive privilege for legal advice either received from another party or made as part of a collaborative effort among the parties.[21] Accordingly, if a trade association shares a legal memorandum with its members pursuant to a common legal interest agreement, then the trade association should make clear to those members that they are not authorized to share the memorandum with persons outside of the common interest relationship. Similarly, a member that shares its privileged documents with the association should make clear that neither the association nor any member may further disseminate those documents.

Second, while some courts have found that anticipated litigation is not a prerequisite to invoking the common interest doctrine,[22] a number of others have held that the common interest doctrine applies only when the parties to the common legal interest agreement reasonably anticipate becoming co-defendants in litigation concerning the shared legal problem.[23]

Special Antitrust Issues with Common Interest Arrangements

In the antitrust context, one federal appellate court refused to find that the common legal interest doctrine protected a legal memorandum that an offshore drilling company shared with other offshore drilling companies pursuant to a common legal interest arrangement. The memorandum at issue in *In re Santa Fe International Corporation*, 272 F.3d 705 (5th Cir. 2001), was an analysis by the company's lawyers of laws governing wages and benefits for offshore workers. The company asserted that it circulated this memorandum to the other companies "for the purpose of ensuring compliance with the antitrust laws and minimizing any potential risk associated with the exchange of wage and benefit information."[24] This common interest arrangement prompted an antitrust lawsuit by offshore oil workers against the common interest parties on the basis that they met and exchanged information to "set, stabilize, maintain, or limit the wages and benefits paid to offshore drilling employees."[25]

In assessing the company's common legal interest claim, the court first found that "there must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might some day result in litigation, before communications between one possible future co-defendant and another, such as the ones here made between one horizontal competitor and another, could qualify for protection [under the common legal interest doctrine]."[26] Since contemporaneously created documents did not reference anticipated litigation and the information exchange occurred many years before litigation ensued, the court did not find the company's claim of anticipated litigation to be credible.[27]

Although it did not expressly state that it was applying a unique rule to cases raising antitrust concerns, such concerns clearly influenced the court. Explaining its holding, the court stated:

"There is no justification within the reasonable bounds of the attorney-client privilege for horizontal competitors to exchange legal information, which allegedly contains confidences, in the absence of an actual, or imminent, or at least directly foreseeable, lawsuit."[28]

Another court came to the opposite conclusion when confronted with the issue of a non-litigation based common interest between parties sharing antitrust concerns. *In re Sulfiric Acid Antitrust Litigation*, 235 F.R.D. 407, 415 (N.D. Ill. 2006), involved a report prepared by a mining company that it shared with a Canadian smelting company. The report included legal advice from one company's lawyer about shared antitrust concerns. The companies created the report as a precautionary measure rather than because of anticipated litigation.

The court observed that the purposes of the common interest doctrine and the attorney-client privilege are "to promote the broader public interests in 'the observation of law and administration of justice.'"[29] The court then observed that "[a]chieving the former goal manifestly does not require that there be actual or contemplated litigation. Indeed, in response to the explosion of regulations from federal and state agencies, business entities routinely seek the advice of lawyers precisely so that they may avoid litigation by planning for the future."[30] In sharp contrast to *Santa Fe*, the court held that "the undifferentiated use of the label 'joint defense' rather than the more accurate term, 'common interest' to describe the doctrine, suggests inaccurately that joint litigation is a necessary, rather than merely a sufficient condition for the doctrine's application." [31]

Of particular importance to antitrust concerns, the court rejected the notion that a non-litigation based common interest presumably focuses on business, rather than legal concerns: "While [the companies] shared a common business interest, they also shared a common legal interest regarding the compliance with antitrust and other laws affecting the sale of sulfuric acid."[32]

Work Product Doctrine

Attorney-client privilege aside, the most robust protection for legal advice shared by a trade association with its members may attach where the advice is framed in a manner that affords it work product protection. To invoke work product protection, the documents (or other communications) must be made in anticipation of litigation. Courts vary on just how imminent the litigation threat must be, but at least one federal court of appeals has used antitrust advice as an example of an issue giving rise to a reasonable anticipation of litigation.[33]

For most federal courts, anticipating litigation is only the first element necessary to invoke work product protection. The party must also create the document *because of* that anticipated litigation in a manner that is substantially different than it would have been created absent the anticipated litigation.[34] The vast majority of courts do, however, apply the "but for" test in a manner that provides work product protection to documents created to analyze a business transaction if the document does so by analyzing the impact of contemplated litigation on the transaction.[35]

Therefore, antitrust advice provided by outside counsel to its trade association client, although given on issues stemming from business concerns, could qualify for work product protection if it addresses those business concerns in the context of how certain courses of action might lead to litigation involving the association (and its members). Work product protection in this context hinges on the likelihood that the business options at issue would actually lead to litigation and would not have been considered in substantially the same manner irrespective of those litigation concerns.

For example, a trade association may be able to argue that antitrust or patent infringement advice

is, by its very nature, not an ordinary business concern and inherently invokes serious litigation questions, particularly when focused on a specific, ongoing activity rather than set out as a general policy. Given that many courts look to contemporaneously created documents to assess the credibility of a party's assertion that it created a document because of anticipated litigation,[36] advice and subsequent discussions about it should clearly mention litigation concerns and be prominently marked "work product in anticipation of litigation."

If it can credibly establish that the advice meets the work product doctrine's criteria, then a trade association will be much better positioned to share this advice with other members without waiver. Unlike the attorney-client privilege, most courts permit parties to share work product with non-adversarial third parties if that disclosure is done in a manner that minimizes the risk of further disclosure.[37]

Although work product may be shared more freely than advice that is protected only by the attorney-client privilege, trade associations should still strictly control further dissemination of the work product by its members. A failure to maintain control over shared work product could cause a court to conclude that the trade association did not share it in a manner that is consistent with protecting it from eventual disclosure to adversaries.[38]

The trade association can demonstrate control by limiting disclosure of legal advice to those members who share clear common legal interests with the trade association on the subject of the advice. The trade association can achieve this either by entering into a common legal interest agreement with those members or simply by entering into an agreement restricting dissemination of the shared advice beyond members' in-house counsel and certain designated officers.

Recommendations and Conclusion

To maximize protection for the legal advice provided to trade associations, while allowing the association to maximize the value of that legal advice, trade associations and their lawyers can take the following steps:

- Clearly label the legal advice as "Privileged & Confidential, Attorney-Client Communication" and, if applicable, "Work Product Prepared in Anticipation of Litigation." Merely including these labels does not cloak a document with privilege protection. This seemingly simple step does, however, provide strong contemporaneous evidence of the author's view that the document constituted legal advice and that the author intended it to remain confidential. This evidence bolsters the argument that the attorney and client's expectation of continued confidentiality is reasonable.

- Limit disclosure of any legal advice to trade association members who have demonstrated a need for it and who are unlikely to become litigation adversaries with the trade association on the topic. For example, the trade association could limit dissemination to members of certain association committees that are involved in the issue to which the legal advice pertains.

- Prior to disclosing legal advice to any members, the trade association should enter into a confidentiality agreement with them. The agreement should: (1) clearly identify the legal issues common to the association and those members, (2) note that members are not authorized to further disclose or otherwise waive the trade association's privileges for information shared pursuant to the agreement, (3) limit disclosure within its members to in-house lawyers, senior officers and a limited set of additional individuals on a "need to know" basis, and (4) make clear that the association's lawyers continue to represent only the association entity, not individual members. The trade association should also

encourage at least one in-house lawyer from its members to be the primary contact for any discussion of the advice, thereby emphasizing the legal nature of the issue over any non-legal business issues.

Trade associations, by their complex nature, raise privilege issues that are yet to be fully settled by U.S. courts. Nevertheless, by familiarizing themselves with the law discussed in this article and taking the steps outlined, above, trade associations can substantially bolster their ability to protect their lawyers' legal advice that they share with their members. Through this protection, they can foster more frank, useful communications with both their lawyers and members to address common legal issues.

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[1] *See Philadelphia Housing Authority v. American Radiator*, 294 F. Supp. 1148 (E.D. Pa. 1969); *United States v. American Radiator & Standard San. Corp.*, 278 F. Supp. 608 (W.D. Pa. 1967); *Schwartz v. Broadcast Music, Inc*., 16 F.R.D. 31 (D.C.N.Y. 1954). Although more modern cases do not make this same presumption, some noted scholars continue to assert that trade association members should be considered clients of the association's attorney. *See, e.g.,* Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:48 (2d ed. 2008) ("The question of who is the "client" in the association or partnership contexts is generally answered differently than in the corporate context. Corporate stockholders are not generally considered to be the corporate 'client' even though they own the entity. Members of an association or general partners in a partnership, however, are distinguished from corporate stockholders in a number of ways. First, the purpose of the association or partnership collective usually relates directly to the interests of the membership. Second, its members or general partners are actively involved in its operation and management. Third, it has no legal status independent of its members. Fourth, it often communicates with legal counsel through those members. In the association and partnership contexts, both the individual members or general partners and their respective entities are perceived as being the 'client' relative to confidential communications between those who personify the entities and their legal counsel.").

[2] *Philadelphia Housing Authority*, 294 F. Supp. at 1150; *American Radiator*, 278 F. Supp. at 613 (both cases involved communications between an attorney on the Philadelphia Plumbing Fixtures & Manufacturing Association's executive committee and officers of member corporations); *Schwartz*, 16 F.R.D. at 32 (involving communications between an attorney for the 700-member Songwriters of America and an individual member).

[3] *Schwartz*, 16 F.R.D. at 32.

[4] Restatement (Third) of The Law Governing Lawyers § 73 cmt. D.

[5] No. 86 C 9595 (N.D. Ill. Apr. 17, 1991).

[6] *Id*. at *5.

[7] *Id*.

[8] *Id*.

[9] *Id*. at *6 (citation omitted).

[10] 199 B.R. 92 (S.D.N.Y. 1996).

[11] *Id*. at 99 (citations omitted).

[12] *Id*. at 100.

[13] 129 F. Supp. 2d 327 (S.D.N.Y. 2001).

[14] *Id*. at 337 (citations omitted).

[15] *Id.* (citing ASCAP reply Mem.).

[16] *Id.* (citing *Circle K*, 199 B.R. at 99; *Willig, Williams & Davidson v. Walters*, No. CIV. A. 93-0642 at *3 (E.D. Pa. June 22, 1993)).

[17] *American Society*, 129 F. Supp. 2d at 338 (citing N.Y.C. Assn. B. Comm. Prof'l and Jud. Ethics, Formal Op. 1 (1999) ("There is no *per se* rule that representation of a trade association creates an attorney-client relationship with each member of the association, but the particular circumstances of the representation may create an attorney-client relationship with one or more of the members."); ABA Formal Op. 92-365 ("by representing the [trade] association a lawyer does not necessarily enter into a client-lawyer relationship with each member")).

[18] *American Society*, 129 F. Supp. 2d at 338.

[19] *Id*. at 339.

[20] *See*, *e.g.*, *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) ("Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.").

[21] *See*, *e.g.*, Restatement (Third) of Law Governing Lawyers § 76 cmt. g (2000). In the absence of an agreement to the contrary, any member may waive the privilege with respect to that person's own communications. Correlatively, a member is not authorized to waive the privilege for another member's communication.

[22] *See*, *e.g.*, *United States v. BDO Seidman LLP*, 492 F.3d 806, 816 (7th Cir. 2007) ("communications need not be made in anticipation of litigation to fall within the common interest doctrine"); *In re Sulfiric Acid Antitrust Litig*., 235 F.R.D. 407, 415 (N.D. Ill. 2006) ("the common interest doctrine" [d]oes not require that there be actual or contemplated litigation").

[23] *See*, *e.g.*, *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 711 (5th Cir. 2001); *In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990) (Finding the common legal interest doctrine to be synonymous with the joint defense doctrine, the court stated: "Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.").

[24] *Santa Fe*, 272 F.3d at 713.

[25] *Id*. at 707.

[26] *Id*. at 711.

[27] *Id*. at 714 ("[W]hen the threat of litigation is merely a thought rather than a palpable reality, the joint discussion is more properly characterized as a common business undertaking, which is unprivileged, and certainly not a common legal interest.").

[28] *Santa Fe*, 272 F.3d at 714 ("[T]he record in this case is neither clear nor indisputable with respect to Santa Fe's motive for sending its in-house counsel's memorandum to its horizontal offshore drilling competitors. It is possible that the disclosures were made to facilitate future price fixing in violation of the antitrust laws, as the plaintiffs contend. Alternatively, the disclosures were perhaps made in the sole interest of preventing future antitrust violations, as the defendants argue in their motion for reconsideration, in which case they hardly could be seen as the commencement of an allied litigation effort. Furthermore, it is difficult to find that the disclosures were made for the purpose of forming a common defense against alleged prior violations of the antitrust laws, in view of Santa Fe's stout denials that in 1991 it anticipated or perceived a threat of future antitrust litigation.").

[29] *Sulfuric Acid*, 235 F.R.D. at 416 (citing *United States v. Zolin*, 491 U.S. 554, 562 (1989)).

[30] *Sulfuric Acid*, 235 F.R.D. at 416.

[31] *Id.* at 417.

[32] *Id*.

[33] *See In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998) ("It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur. . . . [A]sked by a client to evaluate the antitrust implications of a proposed merger and advised that no specific claim had yet surfaced, a lawyer knowing that work product is unprotected would not likely risk preparing an internal legal memorandum assessing the merger's weaknesses, jotting down on a yellow legal pad possible areas of vulnerability, or sending a note to a partner—'After reviewing the proposed merger, I think it's O.K., although I'm a little worried about . . . What are your views?' Nor would the partner respond in writing, 'I disagree. This merger is vulnerable because . . . ' Discouraging lawyers from engaging in the writing, note-taking, and communications so critical to effective legal thinking would, in *Hickman*'s words, 'demoraliz[e] the legal profession, and " the interests of the clients and the cause of justice would be poorly served.'" (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

[34] *See, e.g., United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) ("[I]t should be emphasized that the 'because of' formulation that we adopt here 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.").

[35] The *Adlman* court also offered the following as a hypothetical situation giving rise to work product protection: "A company contemplating a transaction recognizes that the transaction will result in litigation; whether to undertake the transaction and, if so, how to proceed with the transaction, may well be influenced by the company's evaluation of the likelihood of success in litigation. Thus, a memorandum may be prepared in expectation of litigation with the primary purpose of helping the company decide whether to undertake the contemplated transaction." *Id.* at 1199. While seven

other federal circuits follow some version of the "but for" standard articulated in *Adlman*, two other take a divergent view. *See United States v. Textron*, 577 F.3d 21, 28-32 (1st Cir. 2009), cert. denied, 78 USLW 3375 (2010) (denying work product protection where "[t]here is no evidence . . . that the [documents] were prepared for use [in litigation] or would in fact serve any useful purpose for [petitioner] in conducting litigation if it arose"); *United States v. El Paso Co.*, 682 F.2d 530, 543-44 (5th Cir. 1982) (denying work product protection where the "primary motivating force" for creating the documents was "not to ready [the party] for litigation").

[36] *See, e.g.*, *Santa Fe*, 272 F.3d at 714.

[37] *See, e.g., In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981) ("Disclosure to a person with an interest common to that of the attorney or client normally is not inconsistent with an intent to invoke the work product doctrine's protection and would not amount to such a waiver."); Restatement (Third) of Law Governing Lawyers § 91 cmt. B at 662 (1998) ("Work product protection is waived by disclosure to third parties if it occurs in circumstances in which there is a significant likelihood that an adversary in litigation will obtain the materials."); *accord* 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2024, at 210 (1970). Additionally, In the *Circle K* bankruptcy case discussed above, the court found that the committee's disclosure of legal advice to one of the creditors waived attorney-client privilege, but it also found that the same disclosure did not waive work product protection.

[38] *See, e.g., Griffith v. Davis*, 161 F.R.D. 687, 699-70 (C.D. Cal. 1995) ("[Work product] waiver is found when the disclosure 'substantially increases the opportunity for potential adversaries to obtain the information.' Thus, work product is forfeited by disclosure 'in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material.'") (citation omitted).