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The Attorney-Client Privilege and the Work-Product Doctrine in Michigan

D. A. Celphane

Barbara McQuade

Leonard Niehoff

Daniel P. Malone

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I. Introduction

§1 In *Upjohn Co v United States,*[1] the United States Supreme Court acknowledged that the attorney-client privilege—the "oldest of the privileges for confidential communications known to the common law"—has the crucial purpose of "encourag[ing] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[2] Similarly, in *Hickman v Taylor,*[3] the Court stressed the importance of the work-product doctrine, noting that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[4] It is beyond question that, at a theoretical level, the attorney-client privilege and the work-product doctrine serve significant interests and that, at a practical level, attorneys constantly encounter issues involving these principles.

Nevertheless, many attorneys do not acquire their familiarity with these crucial principles in any systematic way. Law school courses and casebooks often treat these principles superficially, and busy practicing lawyers tend to research specific issues only as they arise in the course of their work. As a result, many attorneys (and perhaps some judges) may not clearly understand the significance, scope, and limits of these doctrines. This publication is an attempt to solve this problem by offering a systematic and thorough examination of the attorney-client privilege and the work-product doctrine under Michigan law.

Part II of this text addresses the attorney-client privilege; Part III addresses the work-product doctrine; and Part IV addresses ethics concepts of confidences and secrets. Wherever possible, Michigan authority has been cited and quoted. In some instances, federal cases are instructive in interpreting Michigan law or in filling an apparent gap in Michigan law; under those circumstances, the text freely cites and quotes from federal authority. The goal is to provide a comprehensive examination of these principles as interpreted by the Michigan courts. Readers who do not find their questions answered by this text, or who wish to inform their analysis of privilege issues with authorities from other states, are directed to Scott N. Stone and Ronald S. Liebman, *Testimonial Privileges* (1995); Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (ABA 4th ed 2001); *Attorney-Client Privilege in Civil Litigation* (Vincent S. Walkowiak ed, ABA 2d ed 1997); Paul R. Rice, *Attorney-Client Privilege in*

the United States, (1999 & supp); and Paul R. Rice, *Attorney-Client Privilege State Law* (1995 & supps).

II. The Attorney-Client Privilege

A. Sources and Interpretation

§2 In Michigan, the attorney-client privilege has largely developed through case law. Some statutory provisions recognize the privilege[5] and, like other common law principles, the privilege is subject to statutory revision and construction.[6] Nevertheless, in Michigan the privilege has primarily evolved through judicial analysis and interpretation.

The Michigan courts have approached the privilege from two different, and at times almost irreconcilable, perspectives. On some occasions, the Michigan courts have emphasized the importance of "the rights of the client" and, in order to protect those rights as vigorously as possible, have given a "liberal interpretation" to the privilege.[7] One court, in this spirit, noted that "the attorney-client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it jealously."[8] On other occasions, however, the Michigan courts have stressed that, since the privilege "tends to prevent a full disclosure of the truth," it should be "construed with some strictness, and not extended beyond the principle of public policy on which it is founded."[9] This tension—between inviolate confidentiality on one hand and undiluted truth on the other—is apparent throughout the case law. At times, the Michigan courts seem to gravitate toward one interpretive theory or the other, depending upon the circumstances and equities before them. Nevertheless, for the most part, a reassuring consistency emerges from the Michigan decisions on the law of privilege.

B. Definition

§3 The Michigan cases adopt numerous definitions of the attorney-client privilege. Although those definitions differ in their particulars, there is substantial continuity in their general terms. With some small—and for the most part unimportant—variations, the Michigan courts have adopted this definition of the privilege:

> The attorney-client privilege attaches to communications made [in confidence] by a client to his or her attorney acting as a legal adviser and made for the purpose of obtaining legal advice on some right or obligation.[10]

This definition resembles the often-cited formula adopted by Wigmore:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[11]

This text will explore and analyze the privilege by separately examining each of its elements.

C. The Privilege Attaches to Communications

§4 The attorney-client privilege applies to both written and oral communications.[12] The privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[13] The courts have held that:

> "[The] protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[14]

The courts have recognized, however, that "[t]he attorney-client privilege extends not only to communications, but [also] to observations made as a result of communications with an attorney."[15]

Still, the privilege exists in order "to encourage full and frank communication between attorneys and their clients;"[16] it does not exist so that "law office[s] [can] become … depositor[ies] for contraband and instrumentalities of crime."[17] Accordingly, the privilege does not extend to various objects that a client may have occasion to pass on to his or her attorney but that are not communicative.

Consider, for example, *People v Nash*.[18] In that case, the Michigan Supreme Court held that the attorney-client privilege did not attach to a wallet, ammunition box, revolver, and holster that a murder suspect had provided to her attorney.[19] The court further affirmed the trial court's decision allowing a police officer to testify that this evidence had been seized from the office of defense counsel. The court noted that the "attorney may … take possession of physical evidence when necessary to prepare for the defense of the client. He will do so, however, with the knowledge that the evidence must, within a reasonable time, be turned over to the applicable authorities and that his alteration of the character of the evidence by removal from its source or otherwise will not be privileged evidence at trial."[20]

D. The Privilege Attaches to Communications Made in Confidence

§5 The privilege attaches only to confidential communications.[21] It attaches to communications that have been expressly made confidential, as well as to those reasonably understood to be so intended:

> "It is of the essence of the privilege that it is limited to those communications as to which the client either expressly made confidential or which he could

> reasonably assume under the circumstances would be understood by the attorney as so intended."[22]

Thus, communications made with the intent that they be shared with a third party are not confidential and, as a general proposition, are not privileged.[23] Similarly, as a general proposition, statements made in the presence of third parties are not privileged.[24]

This principle has some exceptions. For example, statements made to or in the presence of certain third parties—such as agents of the attorney or of the client—are typically deemed confidential and privileged. These issues are discussed elsewhere in the text.[25]

Also, courts have disagreed as to whether information disclosed to an attorney, with the intention that the attorney draft a new document to be released to third parties, is protected by the attorney-client privilege.[26] One court, in analyzing this issue, held as follows:

> [T]he attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons. With regard to preliminary drafts of documents intended to be made public, the court holds that preliminary drafts may be protected by the attorney-client privilege. Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney-client privilege. The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.[27]

Sometimes multiple parties are represented by the same attorney in the same matter. Obviously, an attorney's communications with multiple parties will not be "confidential" among them. Thus, in such cases, where the attorney is "acting for [all] of them, no privilege attache[s] to the communications between them relative thereto."[28] The courts have held as follows:

> The rule is applicable that when two persons employ a lawyer as their common agent, their communications to him as to strangers will be privileged, but as to themselves, they stand on the same footing as to the lawyer and either can compel him to testify against the other as to their negotiations in any litigation between them, when the subject of the conversation is competent.[29]

One issue that arises occasionally is whether a communication with an attorney is confidential if that same information has been published elsewhere or is otherwise available from public sources. It has been recognized that

> the client's privilege in confidential information disclosed to his attorney "is not nullified by the fact that the circumstances to be disclosed are part of a public

> record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources."[30]

E. One Party to the Communication Must Be the Client

1. In General

§6 As it is typically defined, the attorney-client privilege attaches to communications made "*by a client* to his or her attorney."[31] Taken literally, this definition would suggest that communications made *to the client* would not be covered. For reasons that are perhaps obvious, this restrictive interpretation has not received much support:

> Theoretically, the privilege applies only to the client's statements and not to those of his attorney. But revelation of the attorney's statements, in the context of the case, might shed considerable light on the client's communications. Responding to this practical reality, the courts, generally speaking, grant privileged status to the statements of both client and attorney in order to fully protect the client's statements.[32]

At a minimum, courts have recognized that an attorney's communications to a client are privileged "to the extent that they are based on or contain confidential information provided by the client, or legal advice or opinions of the attorney."[33]

As a general proposition, the attorney-client privilege does not extend to information received by the attorney from third parties, such as potential witnesses.[34] An exception to this principle applies where the third party is an agent of the client,[35] and the courts have recognized that "[c]ommunications made through a client's agent are privileged."[36] As one court noted:

> "When a communication meets all the legal requirements entitling it to be privileged when made directly between an attorney and his client, *it is equally privileged when the communication is made through the client's agent or employee.* In other words, communications between an attorney and the agent of his client are entitled to the same protection from disclosure as those passing directly between the attorney and his client. *The agent as well as the attorney is prohibited from testifying* with respect thereto except by consent of the client, and this is *true even though the communications are made merely with a view to establishing the relation of attorney and client, and securing professional aid for the principle. … [W]here the client has used a confidential agent for transmission, which, under the circumstances, it was reasonably necessary for him to do, he will be protected against a betrayal of this confidence by such agent* to the same extent as against a betrayal of confidence by his attorney."[37]

Thus, one case recognized that the privilege embraced communications between an attorney and the parents of the nine-year-old child whose interests he represented.[38] The court noted that the child's parents "were, of necessity, acting as her agents in seeking legal advice."[39]

In another case, a psychiatrist was retained to examine a defendant in a criminal action. The defendant was, at least allegedly, unable to remember the details of a shooting in which he had been implicated. The court held that the psychiatrist's communications to the defendant's attorney were privileged:

> [S]ince the privilege clearly extends to confidential communications made directly by the client to the attorney, there is nothing to dictate a different result where that communication is made to the attorney by an agent on behalf of the client, such as a doctor or psychiatrist.[40]

Similarly, communications between a client and an attorney's agent may also be privileged.[41]

2. The Corporate Client

§7 These issues become more complex when the client is a corporation. This complexity is the result of two competing considerations. On one hand, a corporation is a legal entity separate and distinct from its officers, directors, and employees. On the other hand, a corporation cannot communicate except through its officers, directors, and employees. This raises a difficult question: under what circumstances does the privilege attach to an attorney's communications with the officers, directors, and employees of the client corporation?

Pursuant to the principle that the privilege should not be construed more broadly than necessary,[42] the courts have not generally extended it to all employees of a corporation without regard to their rank or role. The courts have, however, encountered difficulty in fashioning a test to determine which communications with which employees should be protected.

For many years, a large number of courts held that the privilege attached only to communications between the attorney and the "control group" of the corporation.[43] Such a group would include (but would not necessarily be limited to) members of controlling administrative bodies, such as the corporate board of directors.[44] The test "arguably offered a reasonable solution to the unique problems posed by corporate clients because it encouraged corporate officials possessing decision-making power to communicate with counsel, but prevented corporations from creating a broad 'zone of silence' by funneling communications from lower level employees to counsel."[45]

In the 1981 case of *Upjohn Co v United States,*[46] however, the United States Supreme Court rejected the "control group" test. It did so because (1) middle- and lower-level employees, who were not within the corporate control group, could "embroil the corporation in serious legal difficulties" and might "have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties;"[47] (2) "the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy;"[48] and (3) the

control group test "is difficult to apply in practice" and is "unpredictab[le]" in application.[49]

The first two of these objections are certainly sound. The third seems paradoxical, however, in light of the Supreme Court's flat refusal in *Upjohn* to "lay down a broad rule or series of rules"[50] and in light of the "case-by-case" analysis recommended by the Court.[51] The lower courts have subsequently struggled in their efforts to interpret *Upjohn* and to formulate a useful standard.[52]

In *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*—which postdates *Upjohn* by only a matter of months—the Michigan Court of Appeals held that "the attorney-client privilege belongs to the [corporate] control group."[53] This case probably should not be read to indicate, however, that *Fassihi* deliberately ignored *Upjohn* and consciously retained the "control group" test. This is so for several reasons. First, *Upjohn* was decided less than a month before *Fassihi* was submitted and, therefore, the court of appeals may simply have been unaware of the *Upjohn* decision. Second, *Fassihi* does not discuss *Upjohn* or state that it is rejecting the *Upjohn* analysis. And, finally, there may be nothing technically inconsistent between *Fassihi* and *Upjohn;* after all, even under the "case-by-case" analysis employed by the Supreme Court, communications with the corporate "control group" will often be privileged.

In 1988, the Michigan Supreme Court adopted new professional ethics rules which included MRPC 4.2, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The Michigan Rule tracks ABA Model Rule 4.2. The legislative history of the ABA Rule makes it clear that the drafters had *Upjohn* in mind, as evidenced by the Comment to the Rule:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule.

More recently, in *Hubka v Pennfield Township,* a case interpreting the Michigan Freedom of Information Act,[54] the Michigan Court of Appeals held that "where the attorney's 'client is an organization, the privilege extends to those communications between attorneys and *all agents or employees* of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication.'"[55] The *Hubka* court did not cite *Upjohn,*

instead relying on federal cases interpreting the federal FOIA statute, and may be limited to that context.[56]

Thus, under both the ethics rules and *Hubka,* it appears that Michigan follows the *Upjohn* formulation with regard to privilege and entity clients.

In any event, some guidance follows from reviewing the factors that the Supreme Court considered in *Upjohn* in determining that the privilege applied to the communications at issue there. The Court listed several significant factors:

> (1) The communications were made by Upjohn employees at the direction of corporate superiors, (2) so that Upjohn could receive legal advice from counsel; (3) the communications concerned matters within the scope of the employees' duties (4) which were not available from upper-level directors; (5) the employees were told the purpose of the communications; and (6) the communications were considered confidential when made and were not disseminated outside the corporation.[57]

Upjohn may lead to a more flexible—and ultimately more fair—application of the privilege in the corporate context. Whatever its other virtues, however, it cannot be said that *Upjohn* made it much easier for attorneys to ascertain, with any level of certainty, when the privilege attaches to communications with corporate employees.

One additional point of clarification is in order. A lawyer who is employed or retained to represent a corporation represents the corporation as distinct from its directors, officers, employees, members, shareholders, or other constituents.[58] Thus, when a representative of a corporation confers with the attorney for the corporation, the privilege attaches because the corporation is the client and not because the representative is the client. This can result in considerable confusion.

For example, in one case[59] the former vice president of a corporation moved to quash a grand jury subpoena issued to the corporation's attorney on the basis of privilege. The court concluded that (1) the corporation had decided to waive its attorney-client privilege and had authorized the attorney to cooperate in the grand jury investigation; (2) the evidence showed that the attorney's client was the corporation alone; (3) the vice president acted as an officer of the corporation in communicating with the attorney; and (4) the attorney did not represent the vice president as an individual. Based upon these findings, the court concluded that the vice president had no right to assert the privilege and quash the subpoena.

In the wake of accounting irregularities alleged at Enron, Qwest, WorldCom, MCA, and other companies, Congress recently passed the Sarbanes-Oxley Act of 2002, Pub L No 107-204, 116 Stat 745, to tighten securities laws and protect investors.[60] Rules promulgated under the act would require lawyers to make disclosures of client confidences and secrets, when such disclosures are prohibited by the lawyer's ethics duties.

As this book goes to press, the Securities and Exchange Commission and the ABA are at odds concerning those duties. For example, Section 307 of the act

specifies that the SEC's rules shall: "(1) [require] an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), [require] the attorney to report the evidence to the audit committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors."

Michigan Rule of Professional Conduct 1.13 addresses a lawyer's duties to an organizational client. MRPC 1.13(b) and (c) state in part:

> (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization, and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.
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> . . . .
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> (c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization.

There are important differences between the two sets of regulations, such as the following:

- The legislation requires a lawyer to report "evidence of a material violation" while the ethics rule is triggered upon the lawyer's "knowledge" of violations. The legislation provides no guidance regarding what constitutes "evidence" nor how to determine whether it is "material."
- The legislation requires a lawyer to report evidence of material "violation of securities law or breach of fiduciary duty or similar violation," while the ethics rule is triggered upon the lawyer's knowledge of "violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization." The ethics rule acknowledges that the entity only operates through its constituents, but that every act of a constituent does not constitute a violation by the entity.

- The legislation requires a lawyer to report the evidence to the chief legal counsel or chief executive officer of the company, while the ethics rule requires the lawyer to follow the corporate hierarchy in reporting violations.
- Under the legislation, if the inside counsel or CEO does not respond "appropriately," the lawyer is to report the matter to the company's audit committee or to the outside directors. Under the ethics rule, the lawyer has discretion regarding whether to pursue the matter further, and only when the conduct is "likely to result in substantial injury to the organization."

There are practical problems with the new act's formulation. Lawyers, even those hired for SEC-related matters, do not always have contact with the audit committee or with company directors. In a choice between an unknown lawyer's "evidence" and the explanation from company officials with whom the audit committee or director is familiar, the lawyer's "evidence" may have the lesser weight.

Further, the lawyer may not know what action, if any, is taken by the company in response to the "evidence." Even if the lawyer is informed of the company's action, the legislation does not give any guidance to the lawyer as to how to determine whether the action was "appropriate."

The ethics rule also affirms the lawyer's duty to properly advise the client, by assisting the lawyer in getting pertinent information into the hands of the proper decision makers. In contrast, the legislation was created to protect investors by improving the accuracy and reliability of corporate disclosures. The tension between these duties for the lawyer who wants to comply is apparent.

3. The Deceased Client

§8 The death of the client also raises complex questions regarding application of the privilege. Again, this complexity is the result of two competing considerations. On one hand, if the privilege seeks to encourage full and frank communication, then, as a theoretical proposition, it should continue *ad infinitum.* On the other hand, death silences the client (who, if alive, might waive any applicable privilege) and extraordinary hardships and injustices might result if the law also silenced the attorney. The courts have labored to accommodate these competing concerns.

The general rule is that "confidential communications between client and attorney are not to be revealed *at any time.*"[61] The privilege survives the death of the client and will be enforced as against third parties whose interests are adverse to those of the decedent client.[62]

The privilege does not, however, prevent the attorney for a deceased testator from disclosing communications that pertain to the execution of, and intentions underlying, the client's will:

> The great weight of the authorities and the text-writers is that communications between attorney and client during the preparation of a will are not privileged. This rule, where the contest is between parties not strangers to the estate, appears to be universal, except where a statute controls.[63]

As the courts have noted, after the death of the testator "where all the parties are claiming under him, the principal reason for the privilege of secrecy no longer exists."[64] Indeed, a contrary rule that gagged the attorney would, in many cases, flout the wishes of the deceased client.[65]

F. One Party to the Communications Must Be an Attorney

§9 As noted above, the attorney-client privilege attaches to communications made "by a client *to his or her attorney.*"[66] This seemingly simple proposition is rendered more complicated by the fact that—like many types of relationships between human beings—the relationship between an individual and his or her attorney does not lend itself to bright lines and clear demarcations. In resolving questions concerning this element of the privilege, courts have generally been deferential to the intentions and understanding (or misunderstanding) of the client.

Thus, the Michigan courts have held that "if a communication should be made to an attorney in fact, by a party under an impression that such attorney had consented or agreed to act as the attorney of such party, [then] such communication would be privileged, although the attorney himself may not have so understood the agreement."[67] In addition, communications made for the purpose of establishing an attorney-client relationship are privileged, even if the attorney ultimately declines to undertake the representation.[68] Thus, in one case, plaintiff consulted with an attorney who was ultimately retained by defendant. In the course of cross-examining plaintiff, defense counsel referred to statements made during the consultation. Plaintiff objected to this testimony, the objection was sustained, and the trial court was affirmed:

> [P]laintiff and his wife visited [defense] counsel's office to consult him in regard to this case and to engage his professional services. Counsel stated to the court that plaintiff then made a statement of facts, to which he listened; that he there declined to take the case and was not retained; that he proposed to show that plaintiff then made 'contradictory statements.' Objection to this line of inquiry was sustained on the ground that such communications were privileged. We are of [the] opinion that such testimony was rightly rejected. It clearly appeared that plaintiff visited counsel at his office before this action was brought to consult him professionally and retain his services. The communications then made, and which counsel sought to disclose, were made during a conference for the purpose of establishing the relation of attorney and client in this very case. Tentatively, and until counsel declined to take the case, such relation did exist. The

> communication related to matters in which the professional services of counsel were desired and asked.[69]

Furthermore, the Michigan courts have recognized that "[i]t is not necessary that a fee be asked or expected in order to entitle the client to invoke the protection of this relation."[70] It is not essential to the attorney-client relation "that any fee be paid, promised, or charged."[71]

Indeed, the privilege even attaches to communications that a "client" makes to someone he or she erroneously believes to be an attorney. The courts have held that "[c]onfidential communications made in reliance upon the supposed relation of attorney and client, whether the party assuming to act as such is an attorney or not, are excluded upon the plainest principles of justice."[72]

Also, just as the privilege attaches to communications between attorneys and their clients' agents,[73] so the privilege also attaches to communications between clients and their attorneys' agents.[74] This principle has been applied to communications made by a client to a physician retained by the client's attorney to assist in preparation of a case,[75] to statements made before a shorthand reporter "acting as the agent of the attorney,"[76] to statements made by a client to a polygraph examiner retained to assist the client's attorney,[77] and to communications with a variety of other individuals employed as attorneys' agents.[78]

In some circumstances, the privilege may extend to communications between codefendants or their counsel. "A joint defense extension of the attorney-client privilege has been applied to confidential communications shared between co-defendants which are 'part of an on-going and joint effort to set up a common defense strategy.'"[79]

Finally, it should be noted that, as a general proposition, the attorney-client privilege does not apply to the mere *existence* of the attorney-client relationship.[80] Under certain circumstances, however, the privilege may apply to the fact of the relationship and the identity of the client, such as where disclosure of this information would be tantamount to revealing confidential communications.[81]

G. The Communication Must Be Made for the Purpose of Obtaining Legal Advice

§10 The privilege attaches to communications "made for the purpose of obtaining legal advice on some right or obligation."[82] If the communication is made for that purpose, then the privilege will afford fairly broad protection in order to encourage full disclosure:

> While few people consult attorneys unless they personally have matters pending which require the advice of counsel, the object of the rule is to seal the lips of the attorney who in his confidential relation has received from his client that full and complete disclosure of facts necessary to give the proper advice. It may involve pending litigation or expected litigation. It may involve assumption of future obligations or guidance on a course of future conduct. The advice given

> may be as to a present condition, one liable to occur one year, or 10 or 20 years hence. It may be given on a question of present vital importance or upon a purely academic proposition. In order to obtain such advice, and safe advice, the client must communicate all the facts necessary, whether favorable to himself or against himself. The privilege attaches by reason of the confidential relation rather than by reason of the character or importance of the advice sought.[83]

Of course, where the communication is not made for the purpose of obtaining legal advice, the privilege does not attach.[84] Accordingly, "where an attorney's general purpose concerns legal rights and obligations, but the attorney also gives nonlegal advice, then the scope of the matter protected by the privilege will depend upon the circumstances of the individual transaction."[85]

In many cases, the question of whether the communication was made for the purpose of obtaining legal advice will be easily answered. This element of the privilege does, however, raise some interesting issues. One such issue is whether communications relating to the attorney-client fee arrangement are privileged. A liberal interpretation of the privilege might suggest that fee arrangements are made for the ultimate purpose of obtaining legal advice and are, therefore, privileged. Courts have suggested, however, that the privilege does not attach to communications pertaining to fee arrangements because such communications "cannot be construed as in the nature of seeking legal advise *[sic]*."[86]

Also, complex issues may arise in connection with attorneys who, as the expression goes, "wear a number of different hats." Consider the in-house corporate counsel who is involved in management and financial decisions,[87] the real estate attorney who sells property, the income tax attorney who is also a certified public accountant, or even the attorney who is a close friend or relative of the purported client. In such cases, it may be difficult to determine when the lawyer is being consulted as an attorney for purposes of obtaining legal advice, and when the lawyer is being consulted in a different capacity or for other reasons.

H. The Client May Waive the Privilege

§11 The privilege belongs to the client and, although either the attorney or the client can assert it, only the client may waive it.[88] The attorney can waive the privilege only with the client's permission.[89] If the client is deceased, the personal representative of the client's estate may be able to waive the privilege.[90]

Certain conduct may, in itself, waive the privilege. Thus, in "a situation involving an error of judgment where the person knows the information is being released but concludes that the privilege will survive for whatever misguided reason," the privilege is destroyed.[91] In contrast, the privilege may not be deemed waived where information is released through mere inadvertence.[92] For example, failure to include a statement in an e-mail notifying recipients of its confidential or privileged nature does not defeat the privilege or constitute a waiver. No

authority requires that a document be expressly marked confidential or privileged in order for it to be subject to the attorney-client privilege.[93]

Furthermore, a client may waive the privilege by charging his or her former attorney with incompetency, unpreparedness, breach of duty, fraud, or other improper or unprofessional conduct.[94] The rationale underlying this principle is clear: if the privilege were not waived under these circumstances, the attorney could offer no defense to such charges.

In addition, the client may waive the privilege by offering testimony concerning his or her communications with the attorney. The Michigan courts have recognized that "the attorney-client privilege is waived as to a confidential communication when the client testifies on direct examination concerning the communication."[95] In one case, the Michigan Court of Appeals noted as follows:

> Professor Wigmore instructs that the client's offer of his own testimony in the case at large is not a waiver of the privilege. Otherwise the privilege of consultation would be exercised only at the cost of closing the client's mouth on the stand. Nor will the client's offer of his own testimony as to specific facts which he has happened to communicate to the attorney operate as a waiver of the privilege. It is only where the client offers his own or his attorney's testimony as to a specific communication to the attorney that the privilege is waived as to all communications to the attorney on the same matter.[96]

A client does not waive the privilege by submitting documents to a court for *in camera* review so the court can ascertain whether the privilege applies to those documents.[97]

Finally, the courts have also held that a criminal defendant who "makes himself a witness for the people should be required to give a full and complete statement of all that he and his associates may have done or said" and such a witness "should be allowed no privileged communications."[98]

Questions concerning the scope of waiver are among the most complex, and most uncertain, in the law of privilege. Although there is very little Michigan authority on point, most courts have recognized that, when the privilege is waived, that waiver extends to all communications on the same subject matter.[99] This rule is easier to state than to apply. Indeed, an attorney attempting to advise a client concerning the scope and ramifications of a waiver faces the daunting task of forecasting how broadly or narrowly the court will view the "subject matter" of the communication.[100] Nor is this task made any less daunting by the principle that, once the client has waived the privilege, it is waived forever.[101]

I. The Privilege Does Not Apply to Communications Having an Unlawful Purpose

§12 The attorney-client privilege does not attach to communications having an unlawful purpose:

> Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so.[102] The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases.[103]

The policy reasons underlying this principle are obvious.

The so-called "crime-fraud exception" applies only to ongoing or future crimes, not crimes that have been committed in the past.[104] The crime-fraud exception requires a showing of a reasonable basis to suspect (1) the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof.[105] This showing must be made without reference to the allegedly privileged material.[106] The crime-fraud exception exists even where the attorney is unaware that the advice is sought in furtherance of an improper purpose.[107] The crime or fraud need not actually have occurred for the exception to be applicable; it need only have been the objective of the client's communication.[108]

In recent years, the "crime-fraud exception" has received an expansive interpretation by some courts, although this trend has not (or at least not yet) appeared in Michigan decisions.[109]

J. Internal Investigative Reports

§13 Frequently, clients, particularly entity clients, contact lawyers to perform internal investigations. If the matter results in litigation, the question arises as to whether the investigative results, including the lawyer's recommendations, may be withheld on grounds of privilege or work product.

Whether the investigative results and lawyer input are privileged depends on whether the client can show that the elements of privilege have been met. Some courts have concluded that investigations conducted prior to notice of any claim are actually in the form of internal audits and part of the client's business. When a lawyer is asked to conduct such an investigation, the lawyer is merely performing a business function for the client.

Under the same reasoning, if the investigation is conducted prior to notice of any claim, some courts have held the investigation could not have been "in anticipation of litigation" and the investigative report does not qualify as work product.

In *In re Perrigo Co*, 128 F3d 430 (6th Cir 1997), plaintiffs filed a stockholder's derivative action on behalf of the company. The company filed a motion to dismiss based upon a report of a 4-month allegedly independent investigation

which concluded the suit was not in the company's best interests. The investigative reporter was assisted by outside counsel in preparing the report. Plaintiffs sought production of the report, which was refused under work-product and attorney-client privilege. The district court held the privileges were waived when the company relied on the report to support the motion to dismiss, then, upon reconsideration, held that although work-product privilege applied, plaintiffs had shown substantial need and undue hardship meriting disclosure. The company still resisted disclosure, and sought mandamus in the court of appeals. The court rejected the attorney-client privilege claim, because the report was being presented to the court as a defense of the derivative claims, not to the client to enable the client to make legal decisions.

After determining that mandamus was an appropriate remedy, the court of appeals applied the state derivative statute, finding that the intent of the statute could not have been to require disclosure of the report of the independent investigator, since required disclosure would chill the investigative effort. The court agreed that the equities involved in the case weighed in favor of disclosure to plaintiff shareholders, but not to the public as part of the judicial record. The public would not get access until the district court read the report and weighed the interests of the public against the interests of the company in maintaining its privilege as to all or part of the report. When the district court intends to rely on the report in making a decision in the case, it should conduct a hearing regarding whether the report or parts of it should be disclosed or remain sealed. Adequate protection is provided if the report is made available to plaintiffs under a protective order, and to the district court under seal. A submission *in camera* does not waive the privilege. A simple reliance on the report for legal purposes, however, or a placing before the court for a legal determination, does not place the document in the public domain.

In *Tennessee Laborers Health & Welfare Fund v Columbia/HCA Healthcare Corp (In re Columbia/HCA Healthcare Corp Billing Practices Litig)*, 293 F3d 289 (6th Cir 2002), defendant had been investigated by the government for health care billing fraud. The government sought access to defendant's internal audit reports, for which defendant was claiming protection under privilege and work-product doctrines. Eventually, defendant entered into settlement talks with the government, where defendant provided the reports under a strict confidentiality agreement.[110]

Subsequently, defendant was sued by private insurers, who also sought the internal audit reports. The court of appeals rejected defendant's argument that it could use a limited waiver of privilege and work product to give the audit reports to the government, and retain those same privileges to resist disclosure to other parties. First, the court held that the government maintains no special position meriting upholding a selective waiver. Second, a selective waiver would improperly allow a party to use the privileges as sword and shield, discriminating among

opponents. Third, the court rejected the concept that parties could tailor the evidentiary privilege or work-product protection by a contract or agreement. In concluding that selective or limited waivers in fact waived the privilege, the court concluded:

> The decision to enter into settlement negotiations, and to disclose otherwise confidential information in the process, is a tactical one made by the client and his or her attorney. All litigation-related tactical decisions have an upside and a downside. By refusing the doctrine of selective waiver, the Court agrees with the First Circuit that the "general principle that disclosure normally negates the privilege is worth maintaining. To maintain it here makes the law more predictable and certainly eases its administration." [111]

The court applied similar reasoning to the work-product doctrine, concluding that once the information is disclosed, protection is waived.

K. Inadvertent and Involuntary Disclosure

§14 A lawyer may come into possession of such materials through a variety of ways. Expedited discovery schedules involving voluminous document and data exchanges have resulted in the mistaken or inadvertent disclosure of privileged material. Clients, witnesses, or third parties may deliver confidential materials to the lawyer, sometimes legitimately obtained and sometimes unlawfully obtained. The lawyer's own investigative efforts, or those of the lawyer's agents, may uncover confidential materials.

A number of courts have addressed situations of inadvertent disclosure, involuntary disclosure, or third-party disclosure of materials protected by legal privileges or work-product doctrines. "Inadvertent disclosure" occurs when parties have mistakenly or negligently sent otherwise protected materials to persons not authorized to view them. "Involuntary disclosure" cases involve court-ordered or legally regulated disclosures that are not chosen by the party. "Third-party disclosures" are cases where information, solicited or unsolicited, is obtained from nonparties. In each of these situations, the lawyer may have done nothing improper to obtain the information, but, upon review of the materials, it is clear they are covered by attorney-client privilege, work-product privilege, or some other confidentiality rule or law.

In inadvertent disclosure cases, the question is not only whether the materials are privileged, but whether the privilege has been knowingly and voluntarily waived by the transmittal. One group of cases holds that inadvertent disclosure constitutes a waiver, regardless of whether the disclosure was negligent or intentional. *E.g., Wichita Land & Cattle Co v American Fed Bank, FSB*, 148 FRD 456 (D DC 1992); *Underwater Storage, Inc v United States Rubber Co*, 314 F Supp 546 (D DC 1970); *Golden Valley Microwave Foods, Inc v Weaver Popcorn Co*, 132 FRD 204 (ND Ind 1990).

> It is difficult to be persuaded that these documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made. One measure of their continuing confidentiality is the degree of care exhibited in their keeping, and the risk of insufficient precautions must rest with the party claiming the privilege.

United States v Kelsey-Hayes Wheel Co, 15 FRD 461, 465 (D Mich 1954).

A second line of cases holds that inadvertent disclosure is an exception to the waiver of the privilege. *Monarch Cement Co v Lone Star Indus, Inc*, 132 FRD 558 (D Kan 1990); *Mendenhall v Barber-Greene Co*, 531 F Supp 951 (ND Ill 1982). In order to preserve attorney-client privilege, which may only be waived by the client and not by the lawyer, courts should not deem the privilege waived when disclosure is caused by the lawyer's negligence. "Inadvertent production is the antithesis" of a knowing waiver of the privilege. 531 F Supp at 955.

A third line of cases begins with either a presumption of waiver or a presumption of nonwaiver, then looks to the efforts made by the privilege holder to protect or retrieve the privileged materials. Several factors are considered, including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) fairness.

> In our view, an analysis which permits the court to consider the circumstances surrounding a disclosure on a case-by-case basis is preferable to a *per se* rule of waiver. This analysis serves the purpose of the attorney client privilege, the protection of communications which the client fully intended would remain confidential, yet at the same time will not relieve those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted.

Alldrad v Grenada, 988 F2d 1425, 1434 (5th Cir 1993).

In Michigan state courts, a document that has been inadvertently disclosed does not lose its privileged status, because it is not a knowing waiver. *Chrysler Corp v Sheridan*, No 227511, 2001 Mich App LEXIS 2136 (July 10, 2001); *Sterling v Keidan*, 162 Mich App 88, 412 NW2d 255 (1987).

Involuntary disclosure was addressed in *Leibel v General Motors Corp*, 250 Mich App 229, 646 NW2d 179 (2002). In that case, a document had been disclosed in one proceeding after an out-of-state court overruled objections of privilege, and the parties in the Michigan case argued that once disclosed in the other forum, the document was no longer protected. The court held that since the document was produced only under court order, and not voluntarily, it did not lose its privileged status for the purpose of the Michigan litigation.

Where the information is disclosed through an independent source, and neither the parties nor their counsel had any role in providing the information, the

privilege is retained. Without evidence or allegation that the objecting party knowingly, voluntarily, or negligently waived any protection, the disputed documents do not lose any protection they may have had in the party's possession.[112]

In these cases the lawyer is faced with the ethical duty to diligently represent the client, and the ethical duty of fairness to the opposing party and furtherance of the administration of justice.

On the one hand, some authorities suggest that a receiving lawyer may have ethical duties to review the materials and use them for the client's interests. In Michigan Ethics Opinion CI-970 (1983), a claimant in civil rights litigation against a county unit of government came into possession of an internal evaluation document of the opposing party and advised his lawyer. Neither the client nor the lawyer had anything to do with the removal of the document, described as "'an internal self-evaluating and critical report by the county's affirmative action officer.'" The lawyer kept the document in the client file, not notifying the county of its receipt, and later used the document while deposing the county's affirmative action officer in an attempt to impeach the credibility of the witness.

The opinion concludes that the lawyer did not violate ethics rules by using the report at trial, provided it was admissible in evidence. If the lawyer knew or should have known that the report was not admissible, then former MCPR DR 7-106 would prohibit its use at trial in support of any statements or inferences the lawyer might make.[113]

In American Bar Association Opinion 92-368 (1992), the Committee addressed the ethics duties of the receiving lawyer that must be considered when the lawyer receives obviously privileged materials. Those duties include diligent representation of the client, protection of client confidences and secrets, and client loyalty, on the one hand, and fairness to opposing parties, respect for the rights and privileges of other parties, and duties to the administration of justice on the other. ABA Op 92-368 states:

> If the Committee were to countenance, or indeed encourage, conduct on the part of the receiving lawyer which was in derogation of this strong policy in favor of confidentiality, the Committee would have to identify a more important principle which supports an alternative result. As the Committee examines the potentially competing principles, we conclude that their importance pales in comparison to the importance of maintaining confidentiality.

ABA Op 92-368 concludes that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide the instructions of the lawyer who sent them.

American Bar Association Opinion 94-382 (1994) addresses receipt of protected materials from an unauthorized sender, such as a client, witness, or non-

party. The opinion concludes that, upon recognizing the privileged or confidential nature of the materials, the receiving lawyer should (1) either refrain from reviewing them or review them only to the extent necessary to determine confidentiality, (2) notify the adversary's lawyer of the receipt, and (3) follow the adversary's instructions for the materials or refrain from using them until a determination is made by a court.

Although neither *Leibel* nor *Sheridan* courts addressed lawyer conduct, the issue was raised in *Resolution Trust Corp v First of America Bank*, 868 F Supp 217 (WD Mich 1994). In that case, defense counsel inadvertently sent to plaintiff's counsel a copy of a letter to defendant outlining the defense strategy. The document was clearly marked "privileged." The receiving lawyer told defense counsel he had the information, but he refused to return it. The court followed the reasoning of the ABA opinion and ordered the destruction of the inadvertently disclosed materials. The court refused to order disqualification of the receiving counsel because, inter alia, there was no clear precedent at that time, and because defendant did not show substantial prejudice.

When the privilege has not been waived, the most common remedy is an order to return disputed materials. Where the return of documents would not prevent parties from using the substance of the information gained, as distinct from the documents themselves, counsel have been ordered not to use the materials. Where the disclosure has been significant, the substance cannot be eradicated, and a party can show prejudice, a stronger remedy, such as disqualification of counsel or dismissal of the action, is appropriate.

L. Some Mechanical Considerations

§15 The courts "strongly disfavor" generalized invocations of the attorney-client privilege,[114] although as a practical matter this is often how the issue is initially raised. If a dispute over a claim of privilege arises, the court should conduct an *in camera* review of the documents at issue.[115] Privilege is, of course, a legal issue to be decided by the court.[116]

Privilege issues should, to the extent possible, be resolved before trial. It is error for a prosecutor, in the presence of the jury, to inquire about privileged communications or to request a defendant to waive the attorney-client privilege.[117] Furthermore, even a question that does nothing more than require a witness to affirm or deny that a statement was made to his or her attorney invades the privilege,[118] and such questions should not be posed before the jury.

More and more frequently, lawyers are subpoenaed for client file information. A line of Michigan ethics opinions sets forth the lawyer's duty when receiving a subpoena or other request for client information.[119]

- Notify the client of the request and determine whether the client consents to the disclosure.

- If the client consents, turn over the requested information; a lawyer has no independent grounds to decline disclosure if the client has consented. If the client does not consent, then determine whether the information may be legally protected, by attorney-client privilege, work-product immunity, or some other right.
- If there is a good faith legal ground for denying access and the client agrees to use it, decline the request for information, state the grounds for the denial, then await a court ruling regarding whether the information must nevertheless be disclosed.

Whether a court ruling ordering disclosure must be appealed depends on the information, the impact on the client, whether the client has other counsel in the matter, and other factors. Historically, a lawyer was required to refuse to comply with the court order, be brought before the court, be found in contempt, and then appeal the contempt citation. The First, Third, and Sixth Circuit Courts of Appeals now allow immediate consideration of claims of privilege and attorney work product for subpoenaed or discovery materials. The First and Third permit an immediate appeal,[120] while the Sixth Circuit permits a mandamus action.[121]

III. The Work-Product Doctrine

A. Introduction

§16 The previous sections explained that the attorney-client privilege aims at protecting from disclosure certain communications between attorney and client. It promotes full and frank communications that may be less likely to occur without such protection.

The remaining sections address the Work-Product Immunity doctrine. Because it, too, affords certain information protection from disclosure, courts and attorneys frequently discuss the attorney-client privilege and the work-product immunity doctrine jointly. Clearly, situations exist where the protections overlap. But the scope and the purpose of each is quite distinct.

Work-product immunity affords protection from disclosure of certain documents and tangible things prepared in anticipation of litigation. Preparation of a client's case mandates certain privacy protections from unwarranted intrusion by opposing parties and their attorneys.

B. Discovery vs Work-Product Protection

§17 Michigan has a strong historical commitment to a "far-reaching, open and effective" discovery practice.[122] This commitment has emphasized a liberal construction of discovery rules to further the ends of justice.[123]

Despite this endorsement of liberal discovery, Michigan courts apparently have an equally healthy respect for the adversarial nature of our legal system.[124] Judicial enforcement of the "work-product doctrine"[125] has safeguarded the fruits

of an attorney's trial preparation from the discovery attempts of an opponent, the ordinarily far-reaching scope of discovery notwithstanding.

Work product does not protect all underlying *information* from disclosure. Rather, it protects a party from having to produce *materials* that contain the information. The protection applies to certain material prepared in anticipation of litigation not only by attorneys but also, for example, by consultants, insurers, or agents of the party or attorney. Moreover, the scope of the protection afforded depends upon the nature of the information contained in the materials sought. "Factual" work product may be discoverable but only upon a showing that the party seeking discovery has substantial need of the otherwise-protected materials and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. "Core" work product, however, which consists of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, deserves absolute protection from disclosure according to the applicable standard contained in MCR 2.302(B)(3)(a).

Simply stated, the work-product doctrine offers protection from discovery of "documents and tangible things" prepared in anticipation of litigation.[126] Its premises rest upon the notion that an attorney's proper preparation of a client's case necessitates a certain degree of privacy, "free from unnecessary intrusion by opposing parties and their counsel."[127] In contrast to the absolute privilege that typically accompanies attorney-client communications, however, work-product materials garner only a qualified immunity from disclosure[128]—an adverse party may discover work-product material by a sufficient showing of need.[129] As judicially and statutorily developed, the work-product doctrine attempts to balance an attorney's need to effectively prepare for trial with society's interest in the ascertainment of truth.[130]

C. Historical Development of the Michigan Work-Product Rule

§18 Michigan courts recognized the work-product doctrine at least as early as 1962.[131] The first incarnation of the work-product rule in Michigan appeared in the last three sentences of then-applicable Rule 306.2 of the General Court Rules of 1963.[132] Under GCR 306.2, a party, "[u]pon motion seasonably made … and upon reasonable notice and for good cause shown," could seek court protection from divulging "any writing prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation."[133] Where a party satisfied these requirements, GCR 306.2 mandated the trial court to deny the adverse party's discovery request unless the party seeking the production or inspection could prove unfair prejudice. Rule 306.2 also recognized an absolute prohibition on the production or inspection of "any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories."[134]

Practitioners seeking simple answers to work-product questions would not easily find them within the subparts of the General Court Rules. The General Court Rules "organized" the work-product and other discovery provisions throughout multiple sections of the discovery subchapter. These sections, moreover, frequently contained overlapping standards. Thus, while GCR 306.2 contained the essence of Michigan's work-product rule, a smattering of work-product concerns and terminology could also be found in GCR 302.2[135] and 310.[136]

D. The Current Michigan Rule[137]

§19 In 1985, Michigan restructured its organization of the discovery subchapter.[138] Rule 2.302 of the Michigan Court Rules consolidates the general rules of discovery. The revisions attendant to the "new" rule further liberalize Michigan's discovery process.[139]

The rule regarding discovery of trial preparation materials was also amended. The current version of Michigan's work-product rule is codified at MCR 2.302(B)(3)(a) and provides:

> (3) *Trial Preparation: Materials*
>
> (a) Subject to the provisions of subrule (B)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.[140]

While much of the text of MCR 2.302(B)(3) was "new" when adopted, the competing concerns of liberal discovery and the work-product doctrine were not.[141] The "good cause" prerequisite that was central to the discovery subsections of the General Court Rules[142] was replaced with sufficient findings of relevance and a showing of "substantial need" and "undue hardship" under MCR 2.302(B)(3)(a).[143]

Rule 2.302(B)(3)(a) is largely identical to the federal work-product rule, Rule 26(b)(3) of the Federal Rules of Civil Procedure.[144] As stated by authors Dean and Longhofer:

> The Michigan rules were amended to coincide more closely with their federal counterparts [because] [s]imilarity between the two sets of rules permits the Michigan courts to benefit from the numerous federal decisions interpreting the

> federal discovery rules. … MCR 2.302(B)(3) is, for all practical purposes, identical to the current federal rule.[145]

Michigan decisions on the work-product doctrine are fewer in number than federal decisions on the issue. The Michigan work-product rule's current textual alignment with its federal counterpart, however, enables a Michigan court to glean guidance from its federal sister.[146]

To better understand the legal setting from which the Michigan (and federal) decisions stem,[147] §20 presents a brief discussion of the United States Supreme Court case of *Hickman v Taylor*.[148] The sections that follow are devoted to an analysis of the elements that comprise the Michigan work-product doctrine.

E. Origins of the Work-Product Doctrine

§20 Modern work-product doctrine[149] derives its origin from the United States Supreme Court's seminal decision in *Hickman v Taylor*.[150] The *Hickman* case involves a wrongful death action against the owners of the "J.M. Taylor," a tugboat that sank while engaged in a towing operation. An attorney for defendant tug owners privately interviewed the survivors and took statements from them "with an eye toward the anticipated litigation."[151]

During the discovery period, attorneys for the estate of one of the deceased crew members sent interrogatories to the tug owners. One interrogatory sought the discovery of (1) any crew members' statements which were taken in connection with the sinking, (2) the exact provisions of such statements, if they were oral, and (3) copies of any statements or reports.[152]

Defendant tug owners refused to answer the interrogatory on the ground of privilege. The district court held that the third-party statements did not fall within the attorney-client privilege and ordered defendants to comply with the interrogatory request on pain of contempt.[153] The Third Circuit Court of Appeals reversed the district court's judgment.[154] The court of appeals held that the information sought was part of the "work product of the lawyer" and thus privileged from discovery under the Federal Rules of Civil Procedure.[155]

The Supreme Court affirmed the judgment of the Third Circuit Court of Appeals.[156] The *Hickman* Court held that the attorney-client privilege does not extend to statements or information that an attorney secures from a witness while acting for his or her client in anticipation of litigation.[157] Nevertheless, the Court acknowledged that it is "essential" for a lawyer to "work with a certain degree of privacy" in order to properly represent his or her client.[158]

The *Hickman* Court held that an opposing party may obtain production of a lawyer's "work product"—even though it is not protected by the absolute attorney-client privilege—only upon a showing of necessity:

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, dis-

> covery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.[159]

Hickman broadly identified a qualified work-product exception to the general principle of open discovery under the Federal Rules of Civil Procedure.[160] The *Hickman* Court balanced the divergent needs of privacy and discovery and placed the burden "on the one who would invade [the] privacy to establish adequate reasons to justify production."[161]

F. The Mechanics of the Michigan Work-Product Rule

§21 The work-product rule applies during the discovery stage only.[162] It neither limits the use of evidence nor the availability of materials at trial.[163] Thus, a party who is denied receipt of a witness' statement on work-product grounds will be permitted to access that statement for purposes of cross-examination and impeachment, should that witness testify at trial.[164]

The mechanics of the Michigan work-product rule operate in a manner similar to an affirmative defense. Rule 2.302(B)(1) authorizes discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action."[165] There is seldom disagreement that "work product" material is relevant.[166] *Hickman*, moreover, rejected the argument that an attorney's work product is "privileged."[167]

Under Michigan (and federal) work-product jurisprudence, a crucial distinction exists between materials and documents assembled in anticipation of litigation and the facts contained within those items.[168] Rule 2.302(B)(3)(a) protects only the former. There is no statutory or common law protection against discovery

> by any permitted means, of the facts that the adverse party or that party's lawyer has learned, of the identity of persons who furnished such facts, of the existence or non-existence of documents, or of the underlying documents themselves.[169]

G. The Elements of the Work-Product Rule

§22 The *Hickman* decision established three fundamental propositions in the area of work-product doctrine:

1. Material collected by counsel in the course of preparation for possible litigation is protected from disclosure in discovery;
2. These materials receive qualified protection from disclosure, since an adversary may obtain discovery of some of this material upon a showing of sufficient need; and

3. The mental impressions of the attorney, including the attorney's beliefs, interpretations, and observations, are at the core of our adversary system and are thus accorded exceptional, if not absolute, protection.

The *Hickman* principles have been codified to a large extent in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Under Fed R Civ P 26(b)(3) (and the *Hickman* holding), work-product immunity may be overcome if the party seeking discovery sustains the burden of showing both: (1) a "substantial need of the materials," and 2) an inability to obtain the "substantial equivalent" of the information "without undue hardship."

The provisions of MCR 2.302(B)(3)(a) are in accord with those of Fed R Civ P 26(b)(3). As with the federal rule, the Michigan work-product doctrine protects

1. documents and tangible things;
2. otherwise discoverable under MCR 2.302(B)(1)[170];
3. prepared in anticipation of litigation or for trial;
4. by or for another party or by or for that party's representatives (including an attorney, consultant, surety, indemnitor, insurer, or agent).

Michigan courts, moreover, obligate an opponent seeking discovery of factual work-product material to show that

> he cannot, by reasonable exertion of his own efforts, obtain equivalent materials and that he, therefore, has, as it is variously expressed, "substantial need" or "cause" for their production, so that undue hardship (unfair prejudice or injustice) is avoided.[171]

Even where one seeking discovery for "factual" work product satisfies this burden, any production ordered "shall," pursuant to the plain, unambiguous language of MCR 2.302(B)(3)(a), "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney *or other representative of a party* concerning the litigation."[172]

H. Documents and Tangible Things

1. Early Michigan Court Treatment

§23 Prior to the enactment of MCR 2.302(B)(3)(a), the types of materials covered by Michigan's work-product rule engendered much disagreement among the various court decisions. Unlike the current rule, which tracks the terminology of the federal rule, GCR 306.2 referred to "statements" and "writings," rather than to "documents and tangible things." Early court opinions, therefore, did not have the full benefit of the federal courts' interpretations of the work-product doctrine.

Amendments to GCR 306.2 spawned judicial uncertainty as to whether Michigan's work-product doctrine protected "statements" or "writings." This

confusion stemmed from the Michigan Supreme Court's 1965 deletion of a sentence that specifically gave qualified protection to "statements" obtained from an adverse party or other witness.[173]

Subsequent interpretations of that amendment fell into two camps. One view took the position that "statements" were indeed distinctive from "writings" and that, unless a "statement" fell within the attorney-client privilege, it was freely discoverable.[174] "Statements" included those documents whose usefulness was apparent at trial for impeachment or refreshing witness recollection.[175] "Writings," on the other hand, could be discovered without a "showing of hardship."[176] An example of a "writing" would be a document that contained a "report of [a party's] findings upon investigating, interviewing witnesses, or conducting experiments, etc., in anticipation of litigation or preparation for trial."[177]

A competing view was that the amendment to GCR 306.2 merely sought to avoid redundancy within the rule.[178] These opinions derived their holdings from the seemingly indiscriminate use of the term "statement" in Michigan Supreme Court opinions.[179] Under this view, there was no meaningful distinction between a "statement" and a "writing."

2. The Current Interpretation

§24 The "writing"/"statement" controversy was put to rest by Michigan's adoption of the Fed R Civ P 26(b)(3) terminology in 1985. Current disputes over work-product definitions will presumably lead Michigan courts to look to, if not adopt, the federal decisions.[180]

Rule 2.302(B)(3)(a) of the Michigan Court Rules authorizes qualified immunity for "documents and tangible things otherwise discoverable."[181] The work-product privilege does not shield information from disclosure.[182] Rather, the work-product doctrine protects a party from having to turn over the actual materials that embody that information.[183]

Among the materials protected by MCR 2.302(B)(3)(a) are written memoranda,[184] witness statements,[185] reports, maps, diagrams, and photographs.[186] The work-product doctrine has been construed on a federal level to afford no protection to an attorney's clandestine tape recordings of conversations with adversary witnesses.[187]

An attorney's indexing or abstracting scheme may also implicate work-product concerns where the documents' ordering reflects the lawyer's mental impressions and legal strategies. A panoply of federal decisions exists on the matter.[188]

I. Prepared in Anticipation of Litigation or for Trial

§25 Among the federal circuits, courts have articulated inconsistent tests to satisfy the Fed R Civ P 26(b)(3) "in anticipation of litigation" prong of the work-product rule. Federal courts and commentators differ in their treatment

of the standards required for a document to meet the "in anticipation of litigation" element.[189]

In *United States v Davis,*[190] for example, the Fifth Circuit concluded that

> litigation need not necessarily be imminent, as some courts have suggested … as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.[191]

The Seventh Circuit, on the other hand, has held that "a remote prospect of future litigation is not sufficient" to satisfy the "in anticipation of litigation" test.[192] Professors Miller and Wright, to the contrary, state:

> Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.[193]

To come within the ambit of the Michigan work-product doctrine, materials must be "prepared in anticipation of litigation or for trial."[194]

Recently, in *Leibel v General Motors Corp,*[195] the Michigan Court of Appeals addressed this issue. The case involved a 1992 memorandum ("1992 Memo"), expressly marked "confidential" and "privileged," prepared by an in-house attorney of defendant. The document contained analysis and strategies for defending recurring litigation involving seatbacks. In May 1997, Charles Leibel sustained injuries in an automobile accident. In the ensuing litigation, counsel for Mr. Leibel filed an amended complaint claiming negligent design of his vehicle's seatbacks and attached a copy of the 1992 Memo to his pleading. Defendant, General Motors, immediately filed a motion to obtain plaintiff's copy of the 1992 Memo. It sought an order that the attorney-client privilege and the work-product doctrine protected its 1992 Memo, that no waiver had occurred, and that plaintiff was barred from using the document. The trial court denied General Motors relief, in effect finding waiver of the attorney-client privilege.

On appeal, the *Leibel* court reversed and, as to work product, ruled that the document was prepared in anticipation of litigation. Moreover, because the document contained core work product (i.e. thought processes and legal analysis), the *Leibel* court determined that the 1992 Memo was "absolutely privileged" under work product and that it did not matter whether plaintiff could establish substantial need and undue hardship.[196] In its discussion of work product and documents prepared "in anticipation of litigation," the *Leibel* court referenced *Great Lakes Concrete Pole Corp v Eash,*[197] wherein the Michigan Court of Appeals literally interpreted the requirement as follows:

> "It is generally understood that litigation need not have actually been commenced, or threatened, before it may be stated that materials were prepared in

> anticipation of litigation. It is generally sufficient if the prospect of litigation is identifiable, either because of the facts of the situation or the fact that claims have already arisen."[198]

Prior consultations with an attorney are relevant in determining whether materials were prepared "in anticipation of litigation." At least one federal court, however, has stated that such prior contact, while relevant, may not be "conclusively determinative" as to whether a document was prepared in anticipation of litigation.[199] This is because, as in Michigan, the work-product rule protects materials prepared in anticipation of litigation by nonattorneys.[200] Several federal courts have concluded, moreover, that the work-product doctrine may also protect documents prepared in anticipation of a prior, but now-terminated, litigation.[201]

There is no work-product immunity for documents that are prepared in the "ordinary course of business" rather than for purposes of litigation.[202] In the federal arena, insurance company investigations and accident reports that involve claims resulting in litigation are often considered to be undertaken in the ordinary course of business and are generally excluded from work-product protection.[203] The federal courts have similarly denied qualified immunity for documents that have as a primary purpose something other than the recording of information in anticipation of litigation.[204]

J. By or for Another Party or by or for That Party's Representatives

§26 The Michigan work-product rule acknowledges that much of what is prepared "in anticipation of litigation" must be assembled by nonlawyers.[205] MCR 2.302(B)(3)(a), like its federal counterpart, authorizes qualified immunity from discovery for "documents and tangible things … prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent)."[206]

By its terms, MCR 2.302(B)(3)(a) prohibits the discovery of materials compiled by a party or a party's representative. The court rule does not, however, apply the same restrictions to the work product of an attorney for a nonparty.[207] Consequently, work-product protection is not given to materials prepared by nonparties to the litigation.[208]

The "by or for another party" element, perhaps more than any other work-product issue, has undergone the greatest change in Michigan work-product law. Early Michigan court opinions exhibit critical distinctions based upon who prepared a given document. These decisions perceived the application of the work-product doctrine to material gathered and prepared by nonlawyers to be inappropriate.[209]

Exemplifying this archaic perception was the Michigan Supreme Court's decision in *JA Utley v Borchard.*[210] In *Utley,* the supreme court held:

> No [work product] privilege arises when an attorney, engaged by an insurer to prepare for litigation, simply "directs" or "supervises" the taking of statements and the doing of other preparatory work *by employees of the insurer.* Such employees are selected, hired, and paid by the insurer, not by the attorney, and they owe primary allegiance to their employers. They are agents of the insurer rather than the attorney … . On the other hand, when an attorney thus engaged—by an insurer prior to suit—actually hires and arranges to pay his own selected agent, say an independent adjusting firm … or a private investigator, or a physician, to investigate and take statements, or to obtain and report to such hiring attorney desired preparative information, the documentary statements and reports thus forthcoming become a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office.
>
> ….
>
> To enjoy the privilege … the document must be the attorney's own work product; not the product of work done by agents and employees owing primary allegiance to their employers rather than to the attorney.[211]

Several subsequent developments in Michigan work-product law indicate that the *Utley* distinction is no longer valid.

The *Utley* holding was criticized in *Powers v City of Troy.*[212] In *Powers,* the court stated:

> The statement in *J.A. Utley Company* …, distinguishing between (i) materials prepared by the attorney and those engaged by him and (ii) preparatory work by others, is not consistent with Rule 306.2, which explicitly precludes such a distinction. The discovery orders affirmed in *Utley* were entered under the former practice. … We take it, therefore, from the form of Rule 306.2 that the *Utley* distinction between materials prepared by attorneys and by other persons has been superseded by Rule 306.2 and is no longer to be drawn.[213]

Any doubts which may have remained after *Powers* were surely resolved by the 1985 revisions to the Michigan work-product rule. MCR 2.302(B)(3)(a) focuses upon the motivation behind the preparation, rather than upon the preparer of the document. The Michigan rule, as with Fed R Civ P 26(b)(3), explicitly expands the group of individuals whose communications may qualify for work-product immunity beyond that of the attorney and the party.

K. Substantial Need/Undue Hardship

§27 The Michigan work-product doctrine affords only a qualified immunity to materials which fall within the work-product definition. Parties who seek to pierce the veil of immunity must show a "substantial need of the materials in the preparation of the case" and an "[inability] without undue hardship to obtain the substantial equivalent of the materials by other means."[214] The out-

come of this balancing of interests rests in the sound discretion of the trial judge.[215]

Under MCR 2.302(B)(3)(b)[216] and MCR 2.302(B)(3)(c),[217] a party or non-party may always obtain its own prior statements without showing substantial need or undue hardship.[218] The provisions, which also appear in Fed R Civ P 26, reaffirm prior decisions such as *Wilson v Borchard,*[219] wherein the Michigan Supreme Court permitted plaintiff to obtain a copy of a statement previously given to defendant's insurance agent.

MCR 2.302(B)(3)(b) and (c) presumably make unnecessary the balancing test undertaken in *LaCroix v Grand Trunk Western RR Co,*[220] where the Michigan Supreme Court concluded that plaintiff's amnesia constituted "substantial reason" shown to allow him access to a previously given statement.[221] These subparts also question the continuing validity of the Michigan Supreme Court's conclusion in *Covington Mut Ins Co v Copeland,*[222] where the court denied defendant's request for production of a statement previously given to plaintiff's attorney where defendant conceded she had no good cause for production of the statement.

Leaving aside statements previously given under MCR 2.302(B)(3)(b) and (c), Michigan has more case law on the substantial need/undue hardship issue than on all the other Michigan work-product elements combined. To the dismay of practicing attorneys, however, these opinions often use differing terminology to describe when a party may overcome the work-product immunity.[223]

Regardless of the terminology chosen in years past, current opinions are uniform in their holdings that no inspection of work-product materials is permitted absent a finding of substantial need and undue hardship.[224] As noted by the Michigan Court of Appeals in *Great Lakes Concrete Pole Corp v Eash,* "Despite the procedural differences between the old and the new rules, a party requesting discovery of work product documents must show substantial need and undue hardship."[225] This need, moreover, must be supported with a sufficient factual showing, "as opposed to [a] mere statement of counsel."[226]

Michigan courts have found "substantial need" and "undue hardship" to exist where witness statements are taken shortly after a particular incident occurs.[227] Courts view the temporal aspect of these statements as "unique" in nature, and especially useful for impeachment purposes.[228] As perceived by the court in *Lynd v Chocolay Township,* "[these] statements could not be reproduced, if at all, without 'undue hardship.'"[229] To the contrary, Michigan courts have not found discovery of work-product materials necessary where alternative methods of obtaining the information were available to the requesting parties.[230]

The decisions on what constitutes a sufficient showing to overcome the work-product qualified immunity are not readily susceptible to generalization. As was well put by one federal court on the issue:

> In the last analysis, the determination must rest upon the balance struck in the particulars of a concrete case between the competing interests of full disclosure and protection for the fruits of the lawyer's labor.[231]

A Michigan court's reaction to a party's showing of substantial need will also likely turn on the specific facts of the case before it.

L. Attorney's Mental Impressions

§28 The *Hickman* decision provides the underpinnings for the assertion that an attorney's mental impressions are accorded exceptional, if not absolute, protection from discovery. In discussing the discoverability of "Interrogatory 38," the *Hickman* court wrote:

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.[232]

Rule 2.302(B)(3)(a) states that a court "*shall protect* against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[233] As indicated in *Leibel v General Motors Corp*, 250 Mich App at 247, this language affords "absolute" protection to the contents of documents covered by the last sentence of MCR 2.302(B)(3)(a).

The United States Supreme Court, in *Upjohn Co v United States,*[234] noted that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes."[235] Though the Court did not hold that such information was absolutely shielded from discovery, it did hold that a far greater showing of necessity was required than the government had made.[236]

Several federal courts have held that an attorney's mental impressions are absolutely immune from discovery.[237] As written by the Fourth Circuit in *Duplan Corp v Moulinage et Retorderie de Chavanoz:*[238]

> [N]o showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories. This is made clear by [Rule 26(b)(3)'s] use of the term "shall" as opposed to "may."[239]

Legitimate "truth-ascertaining" reasons exist for giving absolute immunity to an attorney's mental impressions. An attorney's account of witness statements creates a genuine danger of inaccuracy. The attorney's selective memory of such

prior statements may also clue an adversary to the attorney's trial strategy.[240] As recognized by the *Hickman* Court:

> Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony … would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.[241]

Michigan case law provides that an attorney's mental impressions are absolutely protected from discovery.[242] In *Leibel v General Motors Corp,* as in *Great Lakes Concrete Pole Corp v Eash,* the Michigan Court of Appeals was quite explicit in its directions to the trial court to excise from the information requested any portions constituting an attorney's mental impressions:

> [B]efore plaintiffs' discovery of discoverable work product commences, the trial court must remove those portions of the memoranda, correspondence, and test results disclosing the subjective mental impressions, conclusions, opinions or legal theories of defendants, their attorneys, or other representatives, including employees of defendant Dow. Test results not evidencing such subjective impressions are subject to disclosure. Where documents evidence both objective facts and subjective impressions, the court shall excise those portions of the documents which represent such subjective impressions.[243]

In *People v Gilmore*, 222 Mich App 442, 564 NW2d 158 (1997), the court addressed this issue in the *criminal* law setting. After explaining that public policy principles underlying the work-product privilege in the civil context apply equally to criminal cases, *id.* at 451, the *Gilmore* court concluded that not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney, in that case a prosecutor. *Gilmore* involved an attempt to discover a prosecutor's "disposition record" which contained his thought processes and mental impressions. In finding that the work-product doctrine protected this document from discovery, the *Gilmore* court said:

> On the basis of the public policy principles underlying the work-product privilege, pre-MCR 6.201 criminal cases applying the work-product privilege, and the language of MCR 6.201(C) recognizing the continued applicability of privileges, we conclude that the work-product privilege applies in the context of criminal proceedings to the work product of the prosecutor [as well as to the defense counsel].[244]

Gilmore, 222 Mich App at 453.

The strength of the language used in *Great Lakes Concrete Pole* and in *Gilmore* suggests that a Michigan court is unlikely to force a party to reveal the

subjective impressions of its attorneys or representatives. Though the Michigan Supreme Court has not yet spoken to whether MCR 2.302(B)(3)(a) absolutely protects such materials, it may be safe to conclude that the Michigan courts will demand an exceptionally strong showing of "substantial need" before considering the release of an attorney's mental impressions. This threshold showing of necessity was not found in *Great Lakes Concrete Pole.*

M. Waiver of Work-Product Qualified Immunity: Attorney-Client Privilege and Work-Product Doctrine Policies Revisited

1. In General

§29 The absolute privilege that attaches to attorney-client communications and the qualified immunity that accompanies an attorney's work product are independent and grounded in two distinct policies. The attorney-client privilege is intended to promote communication between attorney and client by protecting client confidences; the work-product doctrine is designed to balance the needs of the adversary system.[245]

The differences between the attorney-client privilege and the work-product doctrine are basic. The attorney-client privilege belongs to the client alone, while the work-product doctrine may be asserted by either the client or the attorney.[246] Only confidential communications between the attorney and client, made to facilitate legal representation, are protected by the attorney-client privilege. The work-product doctrine, on the other hand, encompasses any document prepared in anticipation of litigation by or for the attorney. The work-product doctrine has thus been described as "distinct from and broader than the attorney-client privilege."[247]

As a result of these basic differences, actions which may be a waiver of the attorney-client privilege will not necessarily constitute a waiver of work-product protection.[248] As explained in *United States v American Telephone & Telegraph Co:*[249]

> The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.
>
> By contrast, the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent. The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. … A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintain-

ing secrecy against opponents, should be allowed without waiver of the privilege.[250]

2. Waiver by Disclosure

§30 In the federal arena, however, numerous decisions on waiver of work-product immunity exist. The federal courts are in agreement that a waiver of the attorney-client privilege does not necessarily effect a waiver of work-product doctrine protection.[251] The federal courts have held that, unlike a waiver of the attorney-client privilege, waiver of work-product immunity requires more than the mere disclosure of confidential information. Instead, the disclosure must be "inconsistent with the adversary system."[252]

The central issue with waiver by disclosure of work-product immunity, as opposed to waiver by disclosure of the attorney-client privilege, is "whether the material has been kept away from adversaries, rather than whether it has been kept within the attorney-client relationship."[253] Voluntary disclosure of work-product documents to an adversary is uniformly held to be "inconsistent with the adversary system," and thus a waiver of work-product immunity.[254] The Fifth Circuit has concluded, however, that when a party is compelled to disclose privileged work product, and does so only after objecting and taking other reasonable steps to protect the privilege, one court's disregard of the privileged character of the material does not waive the privilege as to that material before another court.[255]

Several federal courts have likewise held that if a party discloses for reasons not related to the facilitation of its trial preparation, for example, to an adversary primarily to encourage settlement, the party is deemed to have waived the work-product privilege.[256] Co-counsel may, however, share "work product, including ideas, opinions, and legal theories, with those having similar interests in fully preparing litigation against a common adversary."[257] Moreover, at least one federal court has held that work-product protections are not waived simply by transmission of documents to an expert witness.[258]

3. Implied Waiver

§31 As with the attorney-client privilege, courts disfavor the use of the work-product privilege "as a 'sword' at times and, when convenient, as a 'shield' at other times."[259] Thus, in *United States Hosiery Corp v Gap Inc,*[260] a trademark infringement action, the court granted plaintiffs' motion for discovery of an "Extensive Field Survey," which was indisputably work-product material, where defendant had already voluntarily disclosed some privileged documents relating to the same subject matter as the Extensive Field Survey.[261]

In a similar vein, an implied waiver of work-product immunity will occur where a party makes testimonial use of work-product materials.[262] The United States Supreme Court, in *United States v Nobles,*[263] held that an implied waiver is

created, thus triggering the normal rules of evidence with respect to cross-examination, where testimonial use of work product occurs.[264]

The facts of *Nobles* are instructive on the issue of implied waiver of work-product protection through testimonial use of the materials. In *Nobles,* defense counsel hired a private investigator after the alleged crime, a bank robbery, had taken place. The investigator interviewed two witnesses, a bank teller and a customer, both of whom were present during the alleged robbery. The investigator memorialized these interviews in a written report.

At trial, the witnesses testified for the prosecution. Defense counsel relied on the investigator's report during their cross-examinations. Both witnesses denied having made statements to the investigator that cast doubt on their trial testimony. The Supreme Court indicated that up to that point, no waiver of the work-product privilege had occurred.[265]

Defense counsel's next trial tactic changed the Court's conclusion. Counsel sought to examine the investigator on the witness stand and contrast his recollection of the contested statements with the recollections of the two witnesses. The trial court ruled that the defense would need to submit a copy of the entire portion of the investigator's report dealing with the statements to the prosecution for inspection at the end of the investigator's testimony. The defense refused to disclose the report. As a consequence, the investigator was not allowed to testify at trial. The Supreme Court agreed with the trial court's decision, and indicated that defendant, "by electing to present the investigator as a witness, waived the [work product] privilege with respect to matters covered in his testimony."[266] As the Court reasoned:

> What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances. Counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, there normally is no waiver. But where, as here, counsel attempts to make a testimonial use of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents.[267]

No Michigan court has expressly held that use of work-product materials at trial effects an implied waiver of the privilege. Several appellate opinions exist, however, which seem to embrace the notion of implied waiver through testimonial use of work-product materials.[268] These opinions meld the issue of "implied waiver" into their discussions of "substantial need/undue hardship," to find that the impeachment value of work-product documents is a sufficient cause to warrant access to such materials. This dicta, read together with the Supreme Court's decision in *Nobles,* suggests that a Michigan court would likely find an implied waiver of work-product immunity where a party makes a testimonial use of the materials.[269]

4. Selective Waiver

a. In General

§32 A technique sometimes used to further resolution of a matter is to share information among parties under a purported confidentiality agreement. The parties agree that the information sharing is for a limited purpose and does not waive any privileges that may exist.[270]

These agreements are not independent bases for privilege, but expand application of attorney-client privilege or work-product doctrine to circumstances in which they otherwise might not apply by allowing disclosure without destroying the privileged nature of those communications. *See, e.g., Griffith v Davis*, 161 FRD 687 (CD Cal 1995).

b. Government Agency ("Voluntary Sharing")

§33 *Tennessee Laborers Health & Welfare Fund v Columbia/HCA Healthcare Corp (In re Columbia/HCA Healthcare Corp Billing Practices Litig)*, 293 F3d 289 (6th Cir 2002), addresses the impact of such an agreement. During the course of a federal investigation of billing practices, Columbia/HCA released certain internal audit reports to the Department of Justice under a confidentiality agreement that allegedly preserved any existing privilege. The federal investigation settled with a fine.

Subsequently, insurance companies and private parties sued Columbia/HCA for various billing improprieties, and sought the same audits, claiming any privilege had been waived when the audits were shared with the Department of Justice. The trial court granted plaintiffs' motion to compel and the question was appealed.

After considering cases in other jurisdictions where information had been shared during government investigations, the court of appeals rejected "the concept of selective waiver, in any of its various forms." 293 F3d at 302. The court noted that sharing with the government agency could not be covered under attorney-client privilege, since it was not a communication between lawyer and client. If there are policy advantages to encouraging cooperation with the government in private investigations, the same interests apply in other litigation with other parties. With regard to work-product immunity, the court held that if there were any disclosure to an adversary, work-product protection would fail.

c. Other Actions ("Involuntary Sharing")

§34 Although voluntary sharing of material, such as an agreement, would forfeit protected status, involuntary sharing would not do so. In *Leibel v General Motors Corp*, 250 Mich App 229, 646 NW2d 179 (2002), defendant was litigating in various cases in multiple jurisdictions on several theories. Plaintiffs' counsel in several cases established a document database and shared those documents with other plaintiffs' counsel. While litigating in another jurisdiction,

defendant had been asked to produce certain documents, declined to do so under grounds of privilege, and was ordered to produce.

In the Michigan case, plaintiffs attached a shared document to their amended complaint. Defendant claimed the document was privileged and should be returned to defendant. Plaintiffs claimed that if the document had been produced in other cases, it was no longer privileged.

The court held that involuntary disclosure, due to court orders or inadvertence in other cases, does not constitute a voluntary waiver of the privilege. Absent a true waiver, a document retains its privileged status regardless of whether it has been publicly disclosed. The case was remanded for determination of whether the prior productions were voluntary. *See Leibel v General Motors Corp*, 250 Mich App 229, 646 NW2d 179 (2002).

IV. Confidences and Secrets

§35 In Michigan, attorney-client privilege is a law of evidence, adopted by court rule. The Michigan Rules of Professional Conduct (MRPC) are also rules adopted by the Michigan Supreme Court, and must be read coextensively with other rules and laws governing how lawyers treat information.

MRPC 1.6 addresses confidentiality as follows:

> Rule 1.6 Confidentiality of Information.
>
> (a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (b) Except when permitted under paragraph (c), a lawyer shall not knowingly:
>
> (1) reveal a confidence or secret of a client;
>
> (2) use a confidence or secret of a client to the disadvantage of the client; or
>
> (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.
>
> (c) A lawyer may reveal:
>
> (1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
>
> (2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
>
> (3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;
>
> (4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

> (5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.
>
> (d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

The Rule prohibits a lawyer from disclosing or using "confidences and secrets" of a client without the client's consent, unless one of the exceptions in paragraph (c) applies. When one of the exceptions in paragraph (c) applies, the lawyer has discretion, but no duty, to reveal the confidence or secret.

"Confidences" are coterminous with "privileged" information.

Lawyers are also professionally required under the Rule to protect "secrets," information not protected by privilege. The distinctions between confidences and secrets are more understandable by reference to examples.

Michigan Ethics Opinions provide guidance in complying with ethics duties. Michigan Ethics Opinions are authored by members of the State Bar Committee on Professional and Judicial Ethics. Opinions of limited interest or based upon narrow facts are released as informal opinions of the Committee. Opinions of wide interest to the general bar are considered by the State Bar Board of Commissioners and are released as formal opinions. Since, in Michigan, enforcement of the rules is handled by boards established by the Michigan Supreme Court, and not by the State Bar, ethics opinions do not have the force and effect of law, are not binding on courts, and do not constitute an absolute defense to a charge of unethical conduct.[271] To the extent that the opinions are well-reasoned, however, they have been cited by courts and disciplinary agencies.

In Michigan Ethics Opinion RI-77 (1991), a lawyer was applying for a bank loan for the law practice, and the bank requested client names, addresses, and receivables as evidence of collateral. The Opinion concluded that although the information was not likely to be privileged, it was information gained in the representation that could be embarrassing or detrimental to the client, and could not be disclosed without client consent. In contrast, Michigan Ethics Opinion RI-311 (1999) addressed whether a legal services organization may reveal the names and addresses of clients to the Legal Services Corporation. The Opinion concluded that in light of the federal laws requiring the disclosure (*cf.* MRPC 1.6(c)(2)), the legal services lawyers did not violate ethics rules by providing the information.

In Michigan Ethics Opinion RI-207 (1994), a lawyer was asked for a former client's current address, so a party could serve a bill of costs. The Opinion concluded that the lawyer could not provide the information without the client's consent. In contrast, Michigan Ethics Opinion RI-160 (1993) addressed a lawyer who, while representing a client in a civil matter, learned the client was a fugitive from justice in an unrelated matter. Since the lawyer had knowledge that the cli-

ent was continuing to violate a court order by remaining a fugitive, the exceptional circumstances in MRPC 1.6(c)(4) applied and the lawyer had discretion to reveal the client's location.

Of special interest is Michigan Ethics Opinion RI-261 (1996). A lawyer represented a client in several matters, came to the conclusion that the client should not be granted parole, and wanted to share his observations and conclusions with the parole board. The Opinion reasoned that although the lawyer did not intend to reveal attorney-client communications, the observations and impressions the lawyer used to reach his conclusions were "information gained in the professional relationship" with the client. Even if this information did not meet the definition of a client confidence, it would constitute a secret, i.e. a disclosure that would be embarrassing or detrimental to the client, that is protected under MRPC 1.6. Absent an applicable exception in MRPC 1.6(c), the lawyer could not disclose the information to the parole board without the client's consent.[272]

Since secrets include everything gained in the representation that could be embarrassing or detrimental, it is clear that information from opposing counsel, another party, or a witness is protected. Such information would not be protected by privilege, since it is not a "communication" between a lawyer and a "client."

V. Conclusion

§36 Attorneys should approach privilege issues with caution. Broad invocations of these privileges may obstruct discovery of the truth and offend principles of good-faith pleading. Narrow invocation of these privileges may result in waiver and in unfair prejudice to the client. Privilege issues often do not lend themselves to clear answers or bright-line tests, and attorneys will face difficult choices when confronting such issues.

The courts should appreciate—and historically have appreciated—these dilemmas and can play a vital role in their favorable resolution. By undertaking such action as conducting an *in camera* review or construing subject-matter waiver in advance of disclosure, the courts can lend crucial guidance to attorneys who find themselves caught between problematic alternatives. Also, by construing these privileges so that they serve the core purpose of encouraging full and frank communications between attorneys and clients, the court can ensure that these privileges retain their force and legitimacy.

End Notes

1. *Upjohn Co v United States*, 449 US 383 (1981).
2. *Id.* at 389.
3. *Hickman v Taylor*, 329 US 495 (1947).
4. *Id.* at 510.

5. *See, e.g.,* MCL 15.243(1)(g) (exempting from disclosure under the Freedom of Information Act "[i]nformation or records subject to the attorney-client privilege"); MCL 767.5a (providing that the privilege applies to pretrial attorney-client communications in criminal cases); see also MRE 501.
6. *People v Sorna*, 88 Mich App 351, 358, 276 NW2d 892 (1979) ("the common-law attorney-client privilege is not immune from development by case law or modification by statute"); MRE 501; *see also* MCL 15.268(e) and *Booth Newspapers, Inc v Regents of Univ of Michigan*, 93 Mich App 100, 107, 286 NW2d 55 (1979) (under Open Meetings Act, public body's meetings with attorney may be closed only under limited circumstances).
7. *Lindsay v Lipson*, 367 Mich 1, 5, 116 NW2d 60 (1962); *see also Hamilton v People*, 29 Mich 173, 184 (1874) (referring to the "broad and sensible" doctrine of privilege); *Sterling v Keidan*, 162 Mich App 88, 98–99, 412 NW2d 255 (1987).
8. *Chore-Time Equip, Inc v Big Dutchman, Inc*, 255 F Supp 1020, 1021 (WD Mich 1966).
9. *Watson v Detroit Free Press*, 248 Mich 237, 239–240, 226 NW 854 (1929); *see also People v Nash*, 418 Mich 196, 219, 341 NW2d 439 (1983); *Conlon v Dean*, 14 Mich App 415, 422–423, 165 NW2d 623 (1968); *Parker v Associates Disc Corp*, 44 Mich App 302, 306, 205 NW2d 300 (1973); *US Fire Ins Co v Citizens Ins Co*, 156 Mich App 588, 592, 402 NW2d 11 (1986); *In re Grand Jury Investigation No 83-2-35*, 723 F2d 447, 451 (6th Cir 1983), *cert denied sub nom Durant v United States*, 467 US 1246 (1984); *United States v Goldfarb*, 328 F2d 280 (6th Cir), *cert denied,* 377 US 976 (1964); *In re Grand Jury Proceedings*, 434 F Supp 648, 649 (ED Mich 1977), *aff'd,* 570 F2d 562 (6th Cir 1978).
10. *See, e.g., Ravary v Reed*, 163 Mich App 447, 453, 415 NW2d 240 (1987) (citing *Alderman v People*, 4 Mich 414, 422 (1857) and *Kubiak v Hurr*, 143 Mich App 465, 472–473, 372 NW2d 341 (1985)). *See also Grubbs v K Mart Corp*, 161 Mich App 584, 589, 411 NW2d 477 (1987); *Taylor v Blue Cross & Blue Shield*, 205 Mich App 644, 654, 517 NW2d 864 (1994). It should be noted that the Michigan Rules of Professional Conduct impose a duty upon attorneys to preserve client confidentiality. *See* MRPC 1.6. The scope of that rule is not coextensive with the privilege. (See Comment to MRPC 1.6, pointing out that "[t]he [ethical] rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.") See discussion in Part IV, Confidences and Secrets, §35.
11. Wigmore, *Evidence,* §2292, at 554 (rev ed 1961) (cited with approval in *In re Bathwick's Estate*, 241 Mich 156, 159, 216 NW 420 (1927); *United States v Goldfarb*, 328 F2d 280, 281, *cert denied,* 377 US 976 (1964)).
12. *In re Bathwick's Estate*, 241 Mich 156, 158–159, 216 NW 420 (1927).

13. *Upjohn Co v United States*, 449 US 383, 395 (1981); *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 452, 528 NW2d 778 (1995) (technical facts underlying communications were not protected just because they were communicated to attorney); *Hubka v Pennfield Township*, 197 Mich App 117, 121, 494 NW2d 800 (1992), *rev'd in part on other grounds,* 443 Mich 864, 504 NW2d 183 (1993); *United States v John Doe*, No 91-5299, 1991 US App LEXIS 26484, at *7 (6th Cir Sept 5, 1991) (unpublished) (records and ledger sheets in possession of attorney pertaining to disbursements from client's escrow account were not themselves communications relating to legal advice).
14. *Upjohn Co v United States*, 449 US 383, 395–396 (1981) (citing and quoting *Philadelphia v Westinghouse Elec Corp*, 205 F Supp 830, 831 (ED Pa 1962)).
15. *People v Nash*, 418 Mich 196, 223, 341 NW2d 439 (1983).
16. *Upjohn Co v United States*, 449 US 383, 389 (1981); *see also People v Nash*, 418 Mich 196, 219, 341 NW2d 439 (1983); *Grubbs v K Mart Corp*, 161 Mich App 584, 589, 411 NW2d 477 (1987); *Kubiak v Hurr*, 143 Mich App 465, 473, 372 NW2d 341 (1985); *Parker v Associates Disc Corp*, 44 Mich App 302, 306, 205 NW2d 300 (1973) ("[t]he purpose of the privilege is to enable a client to confide in his attorney secure in the knowledge that such a communication would not be disclosed"); *People v Johnson*, 203 Mich App 579, 585, 513 NW2d 824 (1994).
17. *People v Nash*, 418 Mich 196, 225, 341 NW2d 439 (1983).
18. *People v Nash*, 418 Mich 196, 341 NW2d 439 (1983).
19. *See* 418 Mich at 219. The court observed "That the evidence involved in the present case was physical and non-testimonial is not disputed." *Id.*
20. 418 Mich at 224–225. The court also, however, expressed "dismay over what is reported to be an increasing trend toward law office searches," and observed that the "specter of law-enforcement officers rummaging through the files and papers of a nonsuspect lawyer's office has grave implications" concerning the attorney-client privilege. *Id.* at 217.
21. *Cady v Walker*, 62 Mich 157, 158, 28 NW 805 (1886); *People v Andre*, 153 Mich 531, 540, 117 NW 55 (1908); *Schenet v Anderson*, 678 F Supp 1280, 1282 (ED Mich 1988); *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 452, 528 NW2d 778 (1995); *Hubka v Pennfield Township*, 197 Mich App 117, 122, 494 NW2d 800 (1992), *rev'd in part on other grounds,* 443 Mich 864, 504 NW2d 183 (1993).
22. *People v Harris*, 6 Mich App 478, 480, 149 NW2d 473 (1967) (quoting with approval McCormick, *Evidence,* §95, at 190).
23. *See Owen v Birmingham Fed Sav & Loan Ass'n*, 27 Mich App 148, 163, 183 NW2d 403 (1970) ("communications by a client to his attorney which are intended to go to a third party do not fall within the privilege"); *Leibel v*

General Motors Corp, 250 Mich App 229, 242, 646 NW2d 179 (2002) ("'[O]nce otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears.' However, importantly for our analysis, our Courts have strongly 'repudiated the theory that once the confidential information has been published, the privilege of objecting to its repetition has been waived.'") (quoting *Oakland County Prosecutor v Department of Corr*, 222 Mich App 654, 658, 564 NW2d 922 (1997) and *Sterling v Keidan*, 162 Mich App 88, 93, 412 NW2d 255 (1987), respectively); *Ravary v Reed*, 163 Mich App 447, 455, 415 NW2d 240 (1987); *Yates v Keane*, 184 Mich App 80, 457 NW2d 693 (1990); *United States v John Doe*, No 91-5299, 1991 US App LEXIS 26484, at *9 (6th Cir Sept 5, 1991) (unpublished) (records and ledger sheets in possession of attorney pertaining to disbursements from client's escrow account were not confidential because they were intended to be shared with third-party banks in transferring funds).

24. *Hartford Fire Ins Co v Reynolds*, 36 Mich 502 (1877); *House v House*, 61 Mich 69, 72, 27 NW 858 (1886); *Cady v Walker*, 62 Mich 157, 158–159, 28 NW 805 (1886); *People v Durfee*, 62 Mich 487, 491, 29 NW 109 (1886); *Frank v Morley's Estate*, 106 Mich 635, 640, 64 NW 577 (1895); *Owen v Birmingham Fed Sav & Loan Ass'n*, 27 Mich App 148, 162, 183 NW2d 403 (1970); *Eicholtz v Grunewald*, 313 Mich 666, 672, 21 NW2d 914 (1946); *cf. In re Heiler's Estate*, 288 Mich 49, 52, 284 NW 641 (1939) ("Disclosures made to an attorney in the presence of a third party are not privileged unless made in confidence").
25. See §6–§9.
26. *See Schenet v Anderson*, 678 F Supp 1280, 1282 (ED Mich 1988).
27. *Schenet v Anderson*, 678 F Supp 1280, 1283–1284 (ED Mich 1988).
28. *Denby v Dorman*, 261 Mich 500, 503, 246 NW 206 (1933); *see also Kline v Gulf Ins Co*, No 1:01-CV-213, 2001 US Dist LEXIS 20603, at *15 (WD Mich Nov 26, 2001) (unpublished) (quoting *Grand Trunk Western R Co v HW Nelson Co*, 116 F2d 823, 835 (6th Cir 1941)) ("[T]he rule in Michigan is that 'when two persons employ a lawyer as their common agent, their communications to him as strangers will be privileged, but as to themselves, they stand on the same footing as to the lawyer and either can compel him to testify against the other' regarding communications made in the course of the common representation."); *Cady v Walker*, 62 Mich 157, 158–159, 28 NW 805 (1886); *Carpenter v Carpenter*, 154 Mich 100, 102–103, 117 NW 598 (1908).
29. *Grand Trunk Western R Co v HW Nelson Co*, 116 F2d 823, 835 (6th Cir 1941) (citing *Denby v Dorman*, 261 Mich 500, 246 NW 206 (1933); *House*

v House, 61 Mich 69, 27 NW 858 (1886); and *Cady v Walker*, 62 Mich 157, 28 NW 805 (1886)).

30. *General Elec Co v Valeron Corp*, 428 F Supp 68, 74 (ED Mich 1977) (quoting *Emle Indus, Inc v Patentex, Inc*, 478 F2d 562, 572–573 (2d Cir 1973), which in turn quoted H. Drinker, *Legal Ethics* 135 (1953)).
31. See note 10 and §3.
32. Lilly, *An Introduction to the Law of Evidence* 405 (2d ed 1987).
33. *Schenet v Anderson*, 678 F Supp 1280, 1281 (ED Mich 1988). Where legal advice and opinions are concerned, the work-product doctrine will, in many cases, also apply. See Part III, The Work-Product Doctrine, §16–§34. *See also Hubka v Pennfield Township*, 197 Mich App 117, 122, 494 NW2d 800 (1992), *rev'd in part on other grounds,* 443 Mich 864, 504 NW2d 183 (1993) (attorney's letter directed to one other than the client or client's agent was not privileged); *John Labatt Ltd v Molson Breweries*, 898 F Supp 471, 475 (ED Mich 1995) (privilege applied to communications between client and registered patent agent but only insofar as they related to presentation and prosecution of trademark application, and ended after trademarks were issued).
34. *In re Estate of Dalton*, 346 Mich 613, 619, 78 NW2d 266 (1956).
35. *Id.*; *cf. Parker v Associates Disc Corp*, 44 Mich App 302, 306, 205 NW2d 300 (1973) ("Attempting to claim the attorney-client privilege for a communication made by a party's agent after that agent has been in contact with an attorney is getting rather far afield").
36. *Grubbs v K Mart Corp*, 161 Mich App 584, 589, 411 NW2d 477 (1987); *see also Koster v June's Trucking, Inc*, 244 Mich App 162, 167, 625 NW2d 82 (2000) ("[O]ur Supreme Court has explicitly held that no relationship exists between counsel for an insured and the insurer."); *People v Bland*, 52 Mich App 649, 653, 218 NW2d 56 (1974).
37. *People v Bland*, 52 Mich App 649, 653–654, 218 NW2d 56 (1974) (emphasis added in *Bland*) (quoting 58 Am Jur, *Witnesses,* §498, at 279).
38. *Grubbs v K Mart Corp*, 161 Mich App 584, 589, 411 NW2d 477 (1987).
39. *Id.*
40. *People v Hilliker*, 29 Mich App 543, 548, 185 NW2d 831 (1971); *cf. People v Sorna*, 88 Mich App 351, 276 NW2d 892 (1979) (statutory provision required submission to prosecutor of any independent psychiatric report prepared for the defense).
41. See §9.
42. See note 9 and §2.
43. *See, e.g., United States v Upjohn Co*, 600 F2d 1223, 1226 (6th Cir 1979).
44. *Id.*
45. Note, "The Attorney-Client Privilege and the Corporate Client: Where Do We Go After *Upjohn*?," 81 Mich L Rev 665, 669 (1983). For a brief sum-

mary of the competing pre-*Upjohn* tests, see also Alexander V. Lyzohub, "The Scope of the Attorney-Client Privilege in the Corporate Context," 62 Mich B J 526 (1983).

46. *Upjohn Co v United States*, 449 US 383 (1981).
47. *Id.* at 391.
48. *Id.* at 392.
49. *Id.* at 393.
50. *Id.* at 386.
51. *Id.* at 396.
52. Note, "The Attorney-Client Privilege and the Corporate Client: Where Do We Go After *Upjohn*?," 81 Mich L Rev 665, 672–674 (1983).
53. *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 518, 309 NW2d 645 (1981).
54. MCL 15.243(1)(h) [now MCL 15.243(1)(g)].
55. *Hubka v Pennfield Township*, 197 Mich App 117, 121, 494 NW2d 800 (1992), *rev'd in part on other grounds,* 443 Mich 864, 504 NW2d 183 (1993) (quoting *Mead Data Central, Inc v United States Dep't of the Air Force*, 566 F2d 242, 253 n24 (DC Cir 1977)) (emphasis added); *see Forner v Bureau of Commercial Servs*, No 226995, 2001 Mich App LEXIS 1063, at *2–*3 (Mar 20, 2001) (unpublished).
56. *Hubka*, 197 Mich App at 121.
57. Note, "The Attorney-Client Privilege and the Corporate Client: Where Do We Go After *Upjohn*?," 81 Mich L Rev 665, 672 n20 (1983) (citing *Upjohn Co v United States*, 449 US 383, 394 (1981)).
58. *See* MRPC 1.13(a).
59. *In re Grand Jury Proceedings*, 434 F Supp 648 (ED Mich 1977), *aff'd,* 570 F2d 562 (6th Cir 1978).
60. The purpose of the act, as cited by the legislature, is to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. Section 307 of the act orders the Securities and Exchange Commission to adopt rules for lawyers "appearing and practicing before the Commission in any way in the representation of issuers."
61. *Lorimer v Lorimer*, 124 Mich 631, 637, 83 NW 609 (1900) (quoting *Chirac v Reinicker*, 24 US 280, 294, 11 Wheat 280 (1826)) (emphasis added).
62. *See Lorimer v Lorimer*, 124 Mich 631, 638–639, 83 NW 609 (1900).
63. *In re Loree's Estate*, 158 Mich 372, 377, 122 NW 623 (1909); *see also Warner v Kerr*, 216 Mich 139, 145–146, 184 NW 425 (1921); *cf. McCarthy v Ford (In re Ford Estate)*, 206 Mich App 705, 708, 522 NW2d 729 (1994) (privilege did not attach to communications with attorney who was serving in capacity of witness to execution of will).
64. *Eicholtz v Grunewald*, 313 Mich 666, 672, 21 NW2d 914 (1946).

65. As to the role of the decedent's representative in waiving the privilege, see §11.
66. See note 10 and §3. *See also Ewers v White's Estate*, 114 Mich 266, 270, 72 NW 184 (1897); *Tepsich v Howe Constr Co*, 377 Mich 18, 22, 138 NW2d 376 (1965); *Shapiro v Wendell Packing Co*, 366 Mich 289, 294, 115 NW2d 87 (1962).
67. *Alderman v People*, 4 Mich 414, 422 (1857); *see also Kearns v Fred Lavery Porsche Audi Co*, 745 F2d 600, 603 (Fed Cir 1984), *cert denied,* 469 US 1192 (1985); *Banner v City of Flint*, 136 F Supp 2d 678, 684 (ED Mich 2000) ("While the attorney-client privilege can be waived by the person holding it, Plaintiff has cited no authority to suggest that a client, uninformed by her attorney concerning the availability of the privilege, can 'knowingly' waive her privilege, particularly when the attorney questioning her is the attorney who had the obligation to inform her of the availability of the privilege. … Regardless of the wishes of the parties litigating the *Banner* case, this Court has an independent interest and the inherent authority to enforce the rules of professional conduct.").
68. *Devich v Dick*, 177 Mich 173, 178, 143 NW 56 (1913).
69. *Devich v Dick*, 177 Mich 173, 178, 143 NW 56 (1913); *see also Schon v Lawrence*, 258 Mich 543, 546, 242 NW 745 (1932); *cf. Ford v McLane*, 131 Mich 371, 374, 91 NW 617 (1902).
70. *Mack v Sharp*, 138 Mich 448, 451, 101 NW 631 (1904).
71. *Devich v Dick*, 177 Mich 173, 179, 143 NW 56 (1913).
72. *People v Barker*, 60 Mich 277, 297, 27 NW 539 (1886).
73. See §6–§8.
74. *See generally Watson v Detroit Free Press*, 248 Mich 237, 240, 226 NW 854 (1929); *cf. JA Utley Co v Borchard*, 372 Mich 367, 126 NW2d 696 (1964).
75. *Lindsay v Lipson*, 367 Mich 1, 116 NW2d 60 (1962); *see also McCarthy v Belcher*, 128 Mich App 344, 340 NW2d 848 (1983); *cf. Kissel v Nelson Packing Co*, 87 Mich App 1, 4, 273 NW2d 102 (1978) (privilege did not attach to communications made to defense counsel by physician he had retained that were based upon physician's examination of plaintiff).
76. *Grubbs v K Mart Corp*, 161 Mich App 584, 589, 411 NW2d 477 (1987); *see Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618, 576 NW2d 709 (1998) ("Finally, we find that the information that plaintiff seeks to discover from defendant's paralegal is not confidential"; an employee or agent must act in a representative capacity and be authorized to bind or act on behalf of the corporation regarding the subject matter at issue to qualify as a "client" for purposes of the attorney-client privilege).
77. *People v Marcy*, 91 Mich App 399, 406, 283 NW2d 754 (1979).
78. *Id.* (referring to accountants, investigators, engineers, and appraisers).

79. *United States v Moss*, 9 F3d 543, 550 (6th Cir 1993) (quoting *Haines v Liggett Group, Inc*, 975 F2d 81, 94 (3d Cir 1992)); *see also* G. Heller, "Raising the Joint Defense Privilege," The Federal Lawyer (January 1997).
80. *See People v Meier*, 47 Mich App 179, 197, 209 NW2d 311 (1973); *see also Chambers v Midland Country Club*, 215 Mich App 573, 575, 546 NW2d 706 (1996) (information regarding the date upon which an attorney-client relationship is entered into is not privileged).
81. *Ravary v Reed*, 163 Mich App 447, 454, 415 NW2d 240 (1987); *see also In re Grand Jury Investigation No 83-2-35*, 723 F2d 447, 452 (6th Cir 1983), *cert denied sub nom Durant v United States*, 467 US 1246 (1984); *cf. Stanczyk v Streeter*, 365 Mich 511, 513, 113 NW2d 806 (1962) (trial judge erred by ordering defendant's counsel to furnish opposing counsel with current itinerary of travels of his clients).
82. See cases cited in note 10 and §3. *See also Schenet v Anderson*, 678 F Supp 1280, 1281 (ED Mich 1988).
83. *In re Bathwick's Estate*, 241 Mich 156, 160, 216 NW 420 (1927); *cf. Agee v Williams*, 17 Mich App 417, 423–424, 169 NW2d 676 (1969) ("any communication made by a client to his attorney in respect to his business affairs or troubles of any other kind must be regarded as [privileged]").
84. *See, e.g., House v House*, 61 Mich 69, 72, 27 NW 858 (1886); *Herald Co v Ann Arbor Pub Sch*, 224 Mich App 266, 279, 568 NW2d 411 (1997) (attorney-client privilege did not apply to school district lawyer's interview of teacher accused of misconduct because interview was adversarial and not conducted for purpose of defending school in lawsuit).
85. *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 468, 425 NW2d 695 (1988) (citing 8 Wigmore, *Evidence,* §2296, at 567 (rev ed 1961).
86. *US Fire Ins Co v Citizens Ins Co*, 156 Mich App 588, 593, 402 NW2d 11 (1986).
87. *Cf. Chore-Time Equip, Inc v Big Dutchman, Inc*, 255 F Supp 1020 (WD Mich 1966) (discussing roles of in-house and outside patent counsel); *McClarty v Gudenau*, 166 BR 101, 102 (ED Mich 1994) (in bankruptcy proceeding, trustee may not waive privilege for debtor as to communications with debtor's former attorneys).
88. *See Passmore v Estate of Passmore*, 50 Mich 626, 627, 16 NW 170 (1883); *People v Van Alstine*, 57 Mich 69, 78–79, 23 NW 594 (1885); *Eicholtz v Grunewald*, 313 Mich 666, 670, 21 NW2d 914 (1946); *In re Estate of Dalton*, 346 Mich 613, 621, 78 NW2d 266 (1956); *Agee v Williams*, 17 Mich App 417, 423, 169 NW2d 676 (1969); *People v Bortnik*, 28 Mich App 198, 201, 184 NW2d 275 (1970); *In re Estate of Arnson*, 2 Mich App 478, 485, 140 NW2d 546 (1966); *Kubiak v Hurr*, 143 Mich App 465, 473, 372 NW2d 341 (1985); *Grubbs v K Mart Corp*, 161 Mich App 584, 590, 411

NW2d 477 (1987); *Schaibly v Vinton*, 338 Mich 191, 61 NW2d 122 (1953); *Ravary v Reed*, 163 Mich App 447, 453, 415 NW2d 240 (1987).

89. *See People v Nash*, 418 Mich 196, 219, 341 NW2d 439 (1983).
90. *See Eicholtz v Grunewald*, 313 Mich 666, 670, 21 NW2d 914 (1946); *Steketee v Newkirk*, 173 Mich 222, 232, 138 NW 1034 (1912); *Grand Rapids Trust Co v Bellows*, 224 Mich 504, 511, 195 NW 66 (1923); *McKinney v Kalamazoo-City Sav Bank*, 244 Mich 246, 253, 221 NW 156 (1928); *McClarty v Gudenau*, 166 BR 101, 102 (ED Mich 1994).
91. *Sterling v Keidan*, 162 Mich App 88, 98, 412 NW2d 255 (1987).
92. See discussion in §14.
93. *See Chrysler Corp v Sheridan*, No 227511, 2001 Mich App LEXIS 2136, at *9 (July 10, 2001) (unpublished).
94. See *Everett v Everett*, 319 Mich 475, 483–484, 29 NW2d 919 (1947), and authorities cited therein. *See also People v Houston*, 448 Mich 312, 332–333, 532 NW2d 508 (1995) (defendant waived privilege by claiming that counsel had made decisions without consulting him); *People v Mitchell*, 454 Mich 145, 168, 560 NW2d 600 (1997); *Howe v Detroit Free Press, Inc*, 440 Mich 203, 236, 487 NW2d 374 (1992); *People v Compeau*, 244 Mich App 595, 597–598, 625 NW2d 120 (2001) ("The privilege exists to allow a client to confide in the attorney and be safe in the knowledge that the communication will not be disclosed. In this case, however, the element of confidentiality is lacking. As the trial court noted, when defendant spoke to his attorney the uniformed bailiff was in his usual position in the courtroom and his presence was obvious to all persons in the room. Situated in this public location during public proceedings, and under the scrutiny of the bailiff, defendant chose to communicate with counsel by speaking to the attorney in a manner that could be overheard by a third person rather than covering his mouth and quietly whispering or by communicating in writing. Under these circumstances, defendant failed to take reasonable precautions to keep his remark confidential and thus the communication was not privileged." (citation omitted)).
95. *McCarthy v Belcher*, 128 Mich App 344, 348, 340 NW2d 848 (1983); *see also Passmore v Estate of Passmore*, 50 Mich 626, 627, 16 NW 170 (1883); *Hartford Fire Ins Co v Reynolds*, 36 Mich 502, 503 (1877); *Leverich v Leverich*, 340 Mich 133, 137, 64 NW2d 567 (1954); *cf. Erickson v Milwaukee, LS&W Ry Co*, 93 Mich 414, 53 NW 393 (1892) (client did not waive privilege by correcting his testimony after counsel advised him that either interpreter or court reporter had apparently misunderstood his testimony).
96. *Kubiak v Hurr*, 143 Mich App 465, 473, 372 NW2d 341 (1985); *see also People v Squire*, 123 Mich App 700, 706, 333 NW2d 333 (1983); *Kelsey-Hayes Co v Motor Wheel Corp*, 155 FRD 170, 171 (WD Mich 1991)

("Where a party asserts reliance on advice of counsel as an element of his defense, the party thereby waives the attorney-client privilege."); *Haworth, Inc v Herman Miller, Inc*, No 1:92 CV 877, 1993 US Dist LEXIS 20427, at *12, 32 USPQ2d (BNA) 1365 (WD Mich 1993) (unpublished) (defendant "opened up the door to discovery of its own patent counsel" by asserting certain defenses).

97. *Grubbs v K Mart Corp*, 161 Mich App 584, 590, 411 NW2d 477 (1987).
98. *Alderman v People*, 4 Mich 414, 423 (1857); *see also People v Bortnick*, 28 Mich App 198, 200, 184 NW2d 275 (1970); *Hamilton v People*, 29 Mich 173, 183–184 (1874); *People v Gallagher*, 75 Mich 512, 516, 42 NW 1063 (1889).
99. *See Kubiak v Hurr*, 143 Mich App 465, 473, 372 NW2d 341 (1985) ("It is only where the client offers his own or his attorney's testimony as to a specific communication to the attorney that the privilege is waived as to all communications to the attorney *on the same matter*") (emphasis added); *see also Kelsey-Hayes Co v Motor Wheel Corp*, 155 FRD 170, 172 (WD Mich 1991) ("Regarding the scope of the waiver in patent cases, courts generally construe the scope of the subject matter narrowly."); *see generally* Scott N. Stone and Ronald S. Liebman, *Testimonial Privileges,* §1.57 (1995).
100. *See In re Grand Jury Proceedings October 12, 1995*, 78 F3d 251, 255 (6th Cir 1996) (taking narrow view of subject matter waiver, holding that disclosures of attorney advice about specific aspects of marketing plan waived privilege only as to those aspects of plan, not as to entire plan).
101. *See In re Estate of Arnson*, 2 Mich App 478, 485, 140 NW2d 546 (1966); *McCarthy v Belcher*, 128 Mich App 344, 348, 340 NW2d 848 (1983).
102. See MPRC 1.6 for further guidance.
103. *People v Van Alstine*, 57 Mich 69, 79, 23 NW 594 (1885); *see also Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 519, 309 NW2d 645 (1981); *Ravary v Reed*, 163 Mich App 447, 455, 415 NW2d 240 (1987).
104. *People v Paasche*, 207 Mich App 698, 706, 525 NW2d 914 (1994).
105. *People v Paasche*, 207 Mich App 698, 707, 525 NW2d 914 (1994) (citing *In re John Doe, Inc*, 13 F3d 633, 637 (2d Cir 1994)).
106. 207 Mich App at 707.
107. See *United States of America v Collis*, 128 F3d 313 (6th Cir 1997); *In re Grand Jury Proceedings (Corporation)*, 87 F3d 377 (9th Cir 1996).
108. *United States v Collis*, 128 F3d 313, 321 (6th Cir 1997).
109. For a discussion of the exception and its application in complex litigation, see Ronald L. Motley and Tucker S. Player, "Issues in 'Crime-Fraud' Practice and Procedure: The Tobacco Litigation Experience," 49 SC L Rev 187 (Winter 1998).

110. In pertinent part, the agreement provided: "'[T]he disclosure of any report, document, or information by one party to the other does not constitute a waiver of any applicable privilege or claim under the work product doctrine. Both parties to the agreement reserve the right to contest the assertion of any privilege by the other party to the agreement, but will not argue that the disclosing party, by virtue of the disclosures it makes pursuant to this agreement, has waived any applicable privilege or work product doctrine claim.'" *Tennessee Laborers,* 293 F3d at 292.
111. 293 F3d at 304 (quoting *United States v Massachusetts Inst of Tech*, 129 F3d 681, 685 (1997)).
112. The *Leibel* court also noted that "[n]o Michigan case supports the proposition that a document loses its privileged status when it is obtained by one of the parties from an independent source." *Leibel,* 250 Mich App at 241.
113. *See also Aerojet-General Corp v Transport Indem Ins*, 18 Cal App 4th 996 (1993) (lawyer receiving confidential memo of opposing counsel which names potential witness may not be sanctioned for using information to client's advantage, and arguably is ethically required to so use material). *See also* Philadelphia Ethics Op 91-19 (lawyer's destruction of confidential material turned over by lawyer's client, without notification to opposing counsel, may be violation of lawyer's duties of diligence and competence in representing client); Maryland Ethics Op 89-53 (concludes there is no ethics obligation to notify opposing counsel or tribunal when privileged materials are received unsolicited from unidentified source); New York City Ethics Op 1989-1 (if client gives lawyer private communications from adverse party, lawyer must have client's consent before disclosing documents to opposing counsel and providing copies; if client does not consent, lawyer must withdraw).
114. *See In re Grand Jury Investigation No 83-2-35*, 723 F2d 447, 454–455 (6th Cir 1983), *cert denied sub nom Durant v United States*, 467 US 1246 (1984).
115. *See, e.g., Grubbs v K Mart Corp*, 161 Mich App 584, 411 NW2d 477 (1987).
116. *Hartford Fire Ins Co v Reynolds*, 36 Mich 502 (1877).
117. *People v Meier*, 47 Mich App 179, 197, 209 NW2d 311 (1973); *see also People v Foster*, 175 Mich App 311, 319, 437 NW2d 395 (1989), *overruled on other grounds by People v Fields*, 450 Mich 94, 538 NW2d 356 (1995); *People v Dahrooge*, 173 Mich 375, 380, 139 NW 22 (1912).
118. *People v Williams*, 57 Mich App 521, 525, 226 NW2d 547 (1975).
119. JI-32 (1990), subpoena issued to judge concerning former deceased client; CI-550 (1980), revealing impressions and observations; CI-665 (1981), subpoena issued to lawyer who answered interrogatories; CI-702 (1981), duty to seek judicial determination; CI-925 (1983), IRS subpoena; CI-1103

(1985), deposition of opposing counsel; CI-1188 (1987) conversations and impressions between client's two lawyers.

120. *In re Grand Jury Subpoenas*, 123 F3d 695 (1st Cir 1997); *Kelly v Ford Motor Co (In re Ford Motor Co)*, 110 F3d 954 (3d Cir 1997).
121. *In re Perrigo Co*, 128 F3d 430 (6th Cir 1997).
122. *Daniels v Allen Indus, Inc*, 391 Mich 398, 403, 216 NW2d 762 (1974); *Peters v Gaggos*, 72 Mich App 138, 142, 249 NW2d 327 (1976).
123. *Peters v Gaggos*, 72 Mich App 138, 142, 249 NW2d 327 (1976).
124. *Powers v City of Troy*, 28 Mich App 24, 37, 184 NW2d 340 (1970).
125. *See Hickman v Taylor*, 329 US 495 (1947), as discussed in notes 148–161 and accompanying text.
126. *See generally* MCR 2.302(B)(3). Fed R Civ P 26(b)(3); see notes 170–231 and §22–§27 further explaining the elements of the Michigan work-product rule.
127. *Hickman,* 329 US at 510.
128. *Powers,* 28 Mich App at 30.
129. See notes 214–231 and §27 for a discussion of this element of the work-product doctrine.
130. *See, e.g., In re Subpoenas Duces Tecum*, 738 F2d 1367, 1371 (DC Cir 1984). Perhaps the best pronouncement of the competing policies behind the Michigan work-product rule appears in *Powers v City of Troy*, 28 Mich App 24, 37, 184 NW2d 340 (1970).
131. *See LaCroix v Grand Trunk W RR Co*, 368 Mich 321, 322, 118 NW2d 302 (1962).
132. 2 Robert Dean and Ronald S. Longhofer, *Michigan Court Rules Practice*, Rule 2.302 at 209 (West 1998 & Supp) [Dean & Longhofer].
133. GCR 306.2.
134. GCR 306.2.
135. GCR 302.2 (Scope of Examination).
136. GCR 310 (Discovery and Production of Documents and Things for Inspection, Copying or Photographing).
137. MCR 2.302(B)(4) deals with discovery from expert witnesses. As the rule recognizes, the facts known and opinions held by an expert "are not work product." *Backiel v Sinai Hosp of Detroit*, 163 Mich App 774, 778, 415 NW2d 15 (1987). Such facts and opinions are subject to discovery by means of interrogatories, deposition, and further discovery ordered by the court. *Backiel,* 163 Mich App at 778.

    This text addresses discovery from expert witnesses only insofar as Michigan cases have broached the issue: *Backiel v Sinai Hosp of Detroit*, 163 Mich App 774, 415 NW2d 15 (1987); *Kissel v Nelson Packing Co*, 87 Mich App 1, 273 NW2d 102 (1978); *Roe v Cherry-Burrell Corp*, 28 Mich

App 42, 184 NW2d 350 (1970); *Klabunde v Stanley*, 384 Mich 276, 181 NW2d 918 (1970).

For further discussion on Michigan judicial treatment of MCR 2.302(B)(4), see Dean & Longhofer, note 132, at 213–221.

138. *See generally* MCR 2.300 et seq.
139. *Lawrence v Bay Osteopathic Hosp, Inc*, 175 Mich App 61, 437 NW2d 296 (1989) (MacKenzie, J., dissenting in part).
140. MCR 2.302(B)(3)(a).
141. *Backiel v Sinai Hosp of Detroit*, 163 Mich App 774, 415 NW2d 15 (1987).
142. *See* GCR 306.2 and 310.
143. See notes 214–231 and §27 for a discussion of the "substantial need"/ "undue hardship" component of discovering work-product materials.
144. Fed R Civ P 26(b)(3).
145. Dean & Longhofer, note 132, at 197, 209.
146. *See In re Subpoena Duces Tecum to Wayne County Prosecutor*, 191 Mich App 90, 477 NW2d 412 (1991), *remanded on other grounds,* 440 Mich 870, 486 NW2d 742 (1992).
147. *See Powers v City of Troy*, 28 Mich App 24, 28, 184 NW2d 340 (1970) ("[b]oth the 'work product' rubric and the language of our Court rule … spelling out the work product restriction are traceable to *Hickman v Taylor*").
148. *Hickman v Taylor*, 329 US 495 (1947).
149. The work-product doctrine originates from the English common law attorney's professional privilege. Scott N. Stone & Ronald S. Liebman, *Testimonial Privileges* (1995) at 140 (see note 99).
150. *Hickman v Taylor*, 329 US 495 (1947). For a discussion of the other landmark U.S. Supreme Court decision regarding this privilege, *United States v Upjohn,* see notes 1, 2 and §1; notes 13, 14, 16 and §4; notes 46–51 and §7.
151. *Hickman v Taylor*, 329 US 495, 498 (1947). For a discussion of the other landmark U.S. Supreme Court decision regarding this privilege, *United States v Upjohn,* see notes 1, 2 and §1; notes 13, 14, 16 and §4; notes 46–51 and §7.
152. *Hickman,* 329 US at 498–499.
153. *Id.* at 499 (citing *Hickman v Taylor*, 4 FRD 479 (ED Pa 1945)). The attorneys were, in fact, held in contempt for their refusal to comply with the court's order.
154. *Hickman,* 329 US at 500 (citing *Hickman v Taylor*, 153 F2d 212 (3d Cir 1945)).
155. *Hickman,* 153 F2d at 223. The Third Circuit's opinion states:

> [O]ne is tempted to say that the lawyer's files are impregnable against any inquiry from outside. But that depends upon what the lawyer puts in them. A piece of a machine which has hurt someone, a document needed

> to show a fact, many things required in a lawsuit find their way from client's hands to lawyer's file and are not to be concealed until the day of trial for that reason. But here we are dealing with intangible things, the results of the lawyer's use of his tongue, his pen, and his head, for his client. This was talked about as the "work product of the lawyer" in the argument of the case. This is a phrase which seems pretty well to describe what we are after, though we hesitate to adopt it as a label for our concept for fear that it may contain implications not now apparent to us. It does with fair accuracy describe what we are excluding here under the term privilege.

156. *Hickman,* 329 US at 514.
157. *Id.* at 508.
158. *Id.* at 510.
159. *Id.* at 511.
160. *Powers,* 28 Mich App at 29.
161. *Hickman,* 329 US at 512.
162. *United States v Nobles*, 422 US 225 (White, J. concurring), *on remand,* 522 F2d 1274 (9th Cir 1975).
163. *Id.*
164. *See, e.g., Thermo-Plastics R&D, Inc v General Accident Fire & Life Assurance Corp*, 42 Mich App 418, 202 NW2d 703 (1972); *Lynd v Chocolay Township*, 153 Mich App 188, 395 NW2d 281, *leave denied,* 426 Mich 878 (1986); *Kalamazoo Yellow Cab Co v Sweet*, 363 Mich 384, 109 NW2d 821 (1961); *Powers v City of Troy*, 28 Mich App 24, 184 NW2d 340 (1970); *Peters v Gaggos*, 72 Mich App 138, 249 NW2d 327 (1976).
165. MCR 2.302(B)(1).
166. *See Jones v New York Central RR Co*, 8 Mich App 575, 155 NW2d 216 (1967).
167. *Hickman,* 329 US at 499.
168. *Hickman,* 329 US at 505.
169. Dean & Longhofer, note 132, at 211.
170. MCR 2.302(B)(1) contains a broad grant of authority to discover "any matter, not privileged, which is relevant. This text does not discuss the issue of relevancy other than to assume its existence as a threshold requirement. For a discussion of relevancy in the discovery context, see Dean & Longhofer, note 132, at 203. Similarly, for a discussion of "privileged" matters as they relate to Michigan discovery, see Dean & Longhofer, note 132, at 203–207; this text, notes 5–121 and §2–§15.
171. *Powers,* 28 Mich App at 33.
172. MCR 2.302(B)(3)(a) (emphasis added).
173. Before 1965, GCR 306.2 stated, in part:

> The court shall not order the production or inspection of any *writing* prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation. … The court shall not order the production or inspection or any *statement* obtained from an adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation.

GCR 306.2 (1963 version) (emphasis added). After 1965, the above sentence dealing with "statements" was excised from the rule.

174. See 2 Honigman & Hawkins, *Michigan Court Rules Annotated* 25 (2d ed 1969 Supp) [hereinafter Honigman & Hawkins]. These authors made the following comment on the Rule's amendment:

> Since this restriction upon the discovery of "statements" has now been eliminated, it is even more important to distinguish between "statements" and "writings." The former may now be freely discovered, unless they fall within the strict definition of the attorney-client privilege. But the latter may not be discovered except on a showing of hardship.

Id. at 25.

175. On this issue, authors Honigman and Hawkins stated:

> As indicated above, an important reason for permitting discovery of statements is their usefulness at trial for impeachment or refreshing recollection. Any document which might be so used can be classified as a "statement."

176. Honigman & Hawkins at 25 (see note 174).
177. Honigman & Hawkins at 28–29 (see note 174). This same piece of paper, however, would be considered a "writing," and thus not protected by the work-product protection, if it were, in reality, a "statement," that is, a record of the party's recollection of the event, prepared or acknowledged by him, such that it would have potential evidentiary significance for purposes of refreshing his recollection, for impeachment, or as an admission of the party-opponent. *Id.*
178. *See, e.g., Powers v City of Troy*, 28 Mich App 24, 184 NW2d 340 (1970); *Peters v Gaggos*, 72 Mich App 138, 249 NW2d 327 (1976).
179. *See, e.g., Covington Mut Ins Co v Copeland*, 382 Mich 109, 168 NW2d 220 (1969) (dealing with stenographic statement taken by plaintiff's attorney prior to litigation).
180. For a noteworthy discussion of these topics in other jurisdictions, see Edna Selan Epstein, *The Attorney-Client Privilege & the Work-Product Doctrine* (ABA 4th ed 2001).
181. MCR 2.302(B)(3)(a).
182. At the federal level, *see APL Corp v Aetna Cas & Sur Co*, 91 FRD 10, 14 n2 (D Md 1980) ("facts" are different than "mental impressions"); *In re Grand Jury Subpoena Dated Nov 8, 1979*, 622 F2d 933 (6th Cir 1980)

(grand jury not entitled to access attorneys' memoranda on witness interviews since it either already had this information or could easily obtain it elsewhere).

183. *See Brock v Frank V Panzarino, Inc*, 109 FRD 157, 160 (EDNY 1986) (court denied defendant access to statements made by employees of plaintiff since employees were available for depositions). *But see Eoppolo v National RR Passenger Corp*, 108 FRD 292, 293 (ED Pa 1985) (defendant ordered to answer interrogatory requesting "information you or any of your representatives have or are aware of relating to the accident" since no document was sought).
184. *In re Grand Jury Subpoena*, 478 F Supp 368, 376 (ED Wis 1979).
185. *People v Tronti*, 176 Mich App 544, 550, 440 NW2d 62, *leave denied,* 433 Mich 919 (1989).
186. *JA Utley Co v Borchard*, 372 Mich 367, 371 n2, 126 NW2d 696 (1964).
187. *Chapman & Cole v Itel Container Int'l BV*, 865 F2d 676, 686 (5th Cir), *cert denied sub nom Urquhart & Hassell v Chapman & Cole*, 493 US 872 (1989).
188. *See, e.g., James Julian, Inc v Raytheon Co*, 93 FRD 138 (D Del 1982) (assembly of binder which contained nonprivileged documents that were reviewed by witnesses prior to depositions reflected legal theory, impressions, or conclusions and was, therefore, work product); *Sporck v Peil*, 759 F2d 312, 316 (3d Cir), *cert denied,* 474 US 903 (1985) (disclosure of documents would reveal mental processes used to select and organize documents). *But see Gould, Inc v Mitsui Mining & Smelting Co*, 825 F2d 676, 680 (2d Cir 1987) (*Sporck* may not apply where larger pool of documents from which attorney culled his selection are not available to adversary); *In re Shell Oil Refinery*, 125 FRD 132, 133–134 (ED La 1989) (mere selection of documents for copying from larger pool of discovery materials is not opinion work product).

    On a related issue, the growing reliance on computer-aided litigation may similarly create work-product concerns for the Michigan courts. See Edna Selan Epstein, *The Attorney-Client Privilege & the Work-Product Doctrine* (ABA 4th ed 2001), at 497–499, for a discussion of federal decisions that have encountered this issue.
189. Where document preparation precedes the commencement of litigation, federal courts and commentators have offered a variety of formulas for the "necessary nexus" between the creation of material and the prospect of litigation. *In re Grand Jury Investigation*, 599 F2d 1224, 1229 (3d Cir 1979); *see, e.g., In re Grand Jury Investigation*, 412 F Supp 943, 948 (ED Pa 1976) (threat of litigation must be "real and imminent"); *Stix Prods, Inc v United Merchants & Mfrs, Inc*, 47 FRD 334, 337 (SDNY 1969) (prospect of litigation must be "identifiable"); 4 Moore's Federal Practice ¶ 26.63

[2-1], at 26-349 (1970) (litigation must "reasonably have been anticipated or apprehended").

190. *United States v Davis*, 636 F2d 1028 (5th Cir), *cert denied,* 454 US 862 (1981).
191. *Id.* at 1040 (citations omitted).
192. *See In re Special September 1978 Grand Jury (II)*, 640 F2d 49, 65 (7th Cir 1980).
193. 8 Wright & Miller, *Federal Practice & Procedure: Civil* §2024, at 198 (1978) (footnote omitted).
194. MCR 2.302(B)(3)(a).
195. *Leibel v General Motors Corp*, 250 Mich App 229, 646 NW2d 179 (2002).
196. The *Leibel* court did, however, remand the matter on the waiver issues relating to both the attorney-client privilege *and* to work product.
197. *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 385 NW2d 296 (1986).
198. *Id.* at 654 n2 (quoting 2 Martin, Dean & Webster, *Michigan Court Rules Practice*, Rule 2.302, at 173 (West 1985)). Martin, Dean & Webster, in turn, cites to *United States v Davis*, 636 F2d 1028 (5th Cir), *cert denied,* 454 US 862 (1981). Moreover, in *Koster v June's Trucking, Inc*, 244 Mich App 162, 171, 625 NW2d 82 (2000), the court of appeals reminded that this protection from disclosure may also extend to documents prepared by "nonlawyer" representatives (e.g., insurers).
199. *See APL Corp v Aetna Cas & Sur Co*, 91 FRD 10, 17 (D Md 1980) (referencing 1970 Advisory Committee Notes to Rule 26(b)(3), 48 FRD 487, 501 (1970)).
200. See §26 for a discussion on the availability of work-product protection for nonattorneys.
201. *In re Murphy*, 560 F2d 326 (8th Cir 1977). While no Michigan case has so directly held, there is at least one Michigan court which has viewed this application of the work-product doctrine with approval. *See In re Subpoena Duces Tecum to Wayne County Prosecutor*, 191 Mich App 90, 95, 477 NW2d 412 (1991).
202. As stated in the Advisory Committee Notes to the 1970 Amendments to the Federal Rules:

> Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by [Rule 26(b)(3)].

48 FRD 487, 501 (1970); *see also* Dean & Longhofer, note 132, at 211.

203. *See, e.g., Westhemeco, Ltd v New Hampshire Ins Co*, 82 FRD 702 (SDNY 1979); *Stout v Norfolk & W Ry Co*, 90 FRD 160 (SD Ohio 1981). With

regard to the discoverability of insurance accident reports under Fed R Civ P 26(b)(3), federal courts have taken three basic positions:

1. statements secured by a claimant or claims adjuster are prepared in the regular course of the employee's duties and thus are not prepared in anticipation of litigation but in the regular course of business; *see Thomas Organ Co v Jadranska Slobodna Plovidba*, 54 FRD 367, 373 (ND Ill 1972);
2. these statements are "prepared in anticipation of litigation," but the reports are discoverable nonetheless because they are both necessary and not reproducible after any lapse of time; *see Teribery v Norfolk & W Ry Co*, 68 FRD 46, 48 (WD Pa 1975);
3. these statements come within the purview of the work-product qualified immunity and the party seeking discovery of them must show both substantial need and undue hardship; *see Almaguer v Chicago, Rock Island & Pac RR Co*, 55 FRD 147 (D Neb 1972).

204. *See, e.g., Whitman v United States*, 108 FRD 5 (D NH 1985).

205. *See People v Tronti*, 176 Mich App 544, 550, 440 NW2d 62, *leave denied,* 433 Mich 921 (1989), wherein the court liberally quotes from the language of the U.S. Supreme Court in *United States v Nobles*, 422 US 225 (1975):

> [T]he [work product] doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

422 US at 238–239.

206. MCR 2.302(B)(3)(a).

207. *In re Subpoena Duces Tecum to Wayne County Prosecutor*, 191 Mich App 90, 477 NW2d 412 (1991).

208. In *In re Subpoena Duces Tecum to Wayne County Prosecutor*, 191 Mich App 90, 477 NW2d 412 (1991), the Michigan Court of Appeals refused to extend work-product protection to cover materials prepared by nonparties to the litigation. The court held:

> No matter how compelling the … policy argument might be, the fact remains that MCR 2.302(B)(3)(a), by its own terms, deals only with the work product of parties or their representatives.
>
> … [B]ecause the Supreme Court limited the application of MCR 2.302(B)(3)(a) to parties and representatives of parties, it is for the Supreme Court to determine whether the policy considerations behind the work-product rule warrant extension of the doctrine to nonparties and their representatives.

191 Mich App at 98.

209. *See, e.g., Kalamazoo Yellow Cab Co v Sweet*, 363 Mich 384, 109 NW2d 821 (1961); *Wilson v Borchard*, 370 Mich 404, 122 NW2d 57 (1963); *JA Utley Co v Borchard*, 372 Mich 367, 126 NW2d 696 (1964).
210. *JA Utley Co v Borchard*, 372 Mich 367, 126 NW2d 696 (1964).
211. *Id.* at 372–373 (citations omitted).
212. *Powers v City of Troy*, 28 Mich App 24, 184 NW2d 340 (1970).
213. *Id.* at 33–34.
214. MCR 2.302(B)(3)(a); *see Powers,* 28 Mich App at 33.
215. *See Utley,* 372 Mich at 375 ("the judge should make [a] formal determination of the ever-present question of discretion, that is, whether a denial in whole or in part of production and inspection as sought will unfairly prejudice the causes of the respective [parties]").
216. MCR 2.302(B)(3)(b) provides as follows:

> Without the showing required by subrule (B)(3)(a), a party or a nonparty may obtain a statement concerning the action or its subject matter previously made by the person making the request. A nonparty whose request is refused may move for a court order.

217. MCR 2.302(B)(3)(c) defines a "statement previously made" as:

> (i) a written statement signed or otherwise adopted or approved by the person making it; or
>
> (ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

218. See also Dean & Longhofer, note 132, at 212–213.
219. *Wilson v Borchard*, 370 Mich 404, 122 NW2d 57 (1963).
220. *LaCroix v Grand Trunk Western RR Co*, 368 Mich 321, 118 NW2d 302 (1962).
221. *Id.* at 324–325.
222. *Covington Mut Ins Co v Copeland*, 382 Mich 109, 110, 168 NW2d 220 (1969). The court in *Covington Mutual* analyzed production of the requested statement under GCR 1963, 310.1 and GCR 1963, 306.2.
223. Much of this seeming ambiguity derives from textual differences attendant to the evolving Michigan work-product rule. Thus, opinions which interpreted former Rule 306.2 of the General Court Rules spoke of "unfair prejudice" and "undue hardship or injustice." Decisions which discussed GCR 310, which dealt with "Discovery and Production of Documents and Things for Inspection, Copying or Photographing," on the other hand, were concerned with whether a party seeking to discover these items had shown "good cause" or "cause."

224. See *Powers v City of Troy*, 28 Mich App 24, 33, 38, 184 NW2d 340 (1970), for additional insight into the fundamental premise of the various verbal formulations of the substantial need/undue prejudice element.
225. *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 654 n3, 385 NW2d 296 (1986); *see also Peters v Gaggos*, 72 Mich App 138, 249 NW2d 327 (1976); *Powers v City of Troy*, 28 Mich App 24, 184 NW2d 340 (1970); *Welch Foods v Packer*, No 1:94 CV 814, 1995 US Dist LEXIS 16158, at *8–*9 (WD Mich July 14), *aff'd,* 1995 US Dist LEXIS 15110 (WD Mich Sept 27, 1995) (permitting deposition of in-house counsel where no other method was available for obtaining information, information was relevant, and was crucial to preparation of case).
226. *Johnston v Narmore*, 1 Mich App 160, 166, 134 NW2d 837(1965), *aff'd,* 378 Mich 491, 146 NW2d 655 (1966); *see also JA Utley Co v Borchard*, 372 Mich 367, 126 NW2d 696 (1964). See also *Peters v Gaggos*, 72 Mich App 138, 249 NW2d 327 (1976), where the court characterized the requisite showing of necessity as follows:

> It has been held that the "good cause" requirement is satisfied "'when the moving party demonstrates that the information sought is or might lead to admissible evidence, *is material to the moving party's trial preparation,* or is for some other reason necessary to promote the ends of justice.'"

72 Mich App at 148 (quoting, in part, *Daniels v Allen Indus, Inc*, 391 Mich 398, 406, 216 NW2d 762 (1974)).
227. *See Lynd v Chocolay Township*, 153 Mich App 188, 395 NW2d 281 (1986); *Peters v Gaggos*, 72 Mich App 138, 249 NW2d 327 (1976).
228. *See Lynd v Chocolay Township*, 153 Mich App 188, 395 NW2d 281 (1986); *Peters v Gaggos*, 72 Mich App 138, 249 NW2d 327 (1976).
229. *Lynd,* 153 Mich App at 195.
230. *See People v McIntosh*, 400 Mich 1, 252 NW2d 779 (1977) (no substantial need to review prosecutor's dossier of jury information where contents of dossier compiled from public records); *People v Martin*, 57 Mich App 84, 225 NW2d 174 (1974) (information available from other sources); *People v Heard*, 58 Mich App 312, 227 NW2d 331 (1975) (all information, except prosecutor's personal observations, was publicly available to defense counsel). *But see People v Aldridge*, 47 Mich App 639, 209 NW2d 796 (1973) (principles of fundamental fairness should permit defendant to review prosecutor's dossier of impaneled jury) (opinion criticized by the Michigan Supreme Court in *People v McIntosh*).
231. *United States v Swift & Co*, 24 FRD 280, 284 (DC Ill 1959) (as quoted in Wright & Miller, *Federal Practice & Procedure: Civil* §2025 at 214 (1970)).

232. *Hickman v Taylor*, 329 US 495, 510 (1947).
233. MCR 2.302(B)(3)(a) (emphasis added).
234. *Upjohn Co v United States*, 449 US 383 (1981).
235. *Id.* at 399.
236. *Id.* at 401–402.
237. *See, e.g., In re Grand Jury Proceedings*, 473 F2d 840, 848 (8th Cir 1973).
238. *Duplan Corp v Moulinage et Retorderie de Chavanoz*, 509 F2d 730 (4th Cir 1974), *cert denied,* 420 US 997 (1975).
239. *Id.* at 734.
240. See note 188 and §24.
241. *Hickman v Taylor*, 329 US 495, 512–513 (1947).
242. See discussion of *Leibel v General Motors Corp,* in notes 195, 196, and §25.
243. *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 657, 385 NW2d 296 (1986). On the burden of the trial court to examine each piece of work-product material for the presence of subjective impressions, the *Eash* court wrote:

> We are not unsympathetic to the burden placed on trial courts where the work product or attorney-client privilege is claimed as to volumes of documents in complex litigation. One method employed in the federal courts to alleviate this burden and assist the trial judge requires the party claiming a privilege to compile a list of documents which identifies each document by number, date, author, addressee, recipients of copies, and the general nature of the document. This facilitates adversarial input on the appropriateness of disclosure while protecting disclosure of the privileged contents.

Id. at 656 n6.

244. *People v Gilmore*, 222 Mich App 442, 453, 564 NW2d 158 (1997). Moreover, the *Gilmore* court held that whether documents may be protected by work product presents an issue of law. *Id.* at 448. *See also Messenger v Ingham County Prosecutor*, 232 Mich App 633, 591 NW2d 393 (1998) (FOIA).
245. *In re Martin Marietta Corp*, 856 F2d 619, 624 (4th Cir 1988), *cert denied,* 490 US 1011 (1989); *see also Miller v Haulmark Transp Sys*, 104 FRD 442, 445 (ED Pa 1984).
246. *In re Grand Jury*, 106 FRD 255, 256 (D NH 1985); *Carter v Gibbs*, 909 F2d 1450, 1451 (Fed Cir), *cert denied,* 498 US 811 (1990).
247. *United States v Nobles*, 422 US 225, 238 n11, *on remand,* 522 F2d 1274 (9th Cir 1975).
248. *United States v Gulf Oil Corp*, 760 F2d 292, 295 (Temp Amer Ct App 1985).
249. *United States v American Tel & Tel Co*, 642 F2d 1285 (DC Cir 1980).

250. *Id.* at 1299 (footnotes omitted).
251. *See, e.g., In re Grand Jury*, 106 FRD 255, 257 (D NH 1985); *Shields v Sturm, Ruger & Co*, 864 F2d 379, 382 (5th Cir 1989).
252. *Hartford Fire Ins Co v Garvey*, 109 FRD 323, 328 (ND Cal 1985). In evaluating whether an inadvertent disclosure of work-product materials will affect a waiver of the privilege, federal courts have sometimes examined the adequacy of the precautions taken by the producing party. *See generally* James P. Ulwick, "Producing by Mistake," 18 ABA Litigation 20 (Spring 1992).
253. Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (ABA 4th ed, 2001) at 613.
254. *See, e.g., Hartford Fire Ins Co v Garvey*, 109 FRD 323, 328 (ND Cal 1985); *Republic of Philippines v Westinghouse Elec Corp*, 132 FRD 384 (D NJ 1990); *Carter v Gibbs*, 909 F2d 1450 (Fed Cir), *cert denied,* 498 US 811 (1990).
255. *Shields v Sturm, Ruger & Co*, 864 F2d 379, 382 (5th Cir 1989).
256. *See, e.g., In re Crazy Eddie Sec Litig*, 131 FRD 374, 379 (EDNY 1990); *In re Chrysler Motors Corp Overnight Evaluation Program Litig*, 860 F2d 844, 846 (8th Cir 1988).
257. *Crazy Eddie,* 131 FRD at 379.
258. *Hamel v General Motors Corp*, 128 FRD 281, 284 (D Kan 1989).
259. *United States Hosiery Corp v Gap, Inc*, 707 F Supp 795, 798 (WDNC 1988).
260. *United States Hosiery Corp v Gap, Inc*, 707 F Supp 795 (WDNC 1988).
261. *Id.* at 798.
262. *See United States v Nobles*, 422 US 225 (1975); *In re Martin Marietta Corp*, 856 F2d 619 (4th Cir 1988), *cert denied,* 490 US 1011 (1989).
263. *United States v Nobles*, 422 US 225 (1975).
264. *Id.* at 239–240.
265. *Id.* at 239 (as cited by *In re Martin Marietta Corp,* 856 F2d at 624).
266. *Nobles,* 422 US at 239.
267. *Id.* at 239 n14.
268. *See Lynd v Chocolay Township*, 153 Mich App 188, 395 NW2d 281 (1986); *Peters v Gaggos*, 72 Mich App 138, 249 NW2d 327 (1976); *Pearson v Vander Wier*, 3 Mich App 41, 141 NW2d 685 (1966).
269. In *Michlin v Canon, Inc*, 208 FRD 172, 174 (ED Mich 2002), the court determined that assertion of a defense (or presumably, a claim) can also result in a "subject matter" waiver of documents otherwise protected by the work-product doctrine. In that case, the court entered an order allowing defendant the opportunity to abandon the defense and thereby preserve its work-product protection of the documents at issue.

270. Joint Defense Agreements are examples of agreements among aligned parties to protect shared information that would otherwise be unavailable under privilege or other legal claim. Stipulated protective orders are examples of agreements among adverse parties purporting to limit the scope of any waiver that might be deemed to have occurred from sharing information.
271. Michigan Ethics Opinions, "Rules of the Committee," Rule 7, Scope and Effect of Opinions (1992); *Watts v Polaczyk*, 242 Mich App 600, 607, 619 NW2d 714 (2000).
272. Earlier ethics opinions interpreting the former Michigan Code of Professional Responsibility similarly forbade the disclosure of a lawyer's impressions and observations, even though they were not "communications" protected by attorney-client privilege. *See, e.g.,* CI-550 (1980), impressions of a client's mental capabilities.