

ATTORNEY WORK PRODUCT

As it intersects with the public records law

Confidentiality and Privileges CLE—November 12, 2020

AAG Sarah Larson, Office of Open Government

- ❖ **Wis. Stat. § 804.01(2)(c)1.** = codifies common law attorney WP doctrine from *State ex rel. Dudek v. Circuit Ct. for Milwaukee County*, 34 Wis.2d 559, 150 N.W.2d 387 (1967)
 - In discovery, 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”
 - If non-inadvertent (purposeful) disclosure of material, protection is waived
 - If inadvertent disclosure of material, protection may not be forfeited if:
 - Holder of privilege/protection took reasonable steps to prevent disclosure; and
 - Holder took reasonable steps to rectify the error
 - See Wis. Stat. § 905.03(5) (forfeiture under A/C privilege statute)

- ❖ **Attorney/Client Privilege v. Attorney Work Product**
 - **A/C privilege** (Wis. Stat. § 905.03(2))
 - Provides sufficient grounds to deny access under PRL without resorting to PRL balancing test
 - *George v. Records Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992); *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996)
 - “Absolute” privilege, unless waived by client or other exception applies under Ch. 905
 - *Dilger v. Metro. Prop. & Cas. Ins. Co.*, 2015 WI App 54, ¶ 21, 364 Wis. 2d 410, 868 N.W.2d 177

 - **Atty WP** (Wis. Stat. § 804.01(2)(c)1.)
 - Is also a statutory and common-law exception to disclosure under PRL
 - *Seifert v. School Dist. of Sheboygan Falls*, 2007 WI App 207, ¶¶ 27-28, 305 Wis. 2d 582, 740 N.W.2d 177
 - “Qualified” privilege in that privilege gives way upon showing that:
 - Party seeking discovery has substantial need of the materials in the preparation of the case; and
 - Party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means.
 - ◆ See Wis. Stat. § 804.01(2)(c) 1.; *Borgwardt v. Redlin*, 196 Wis. 2d 342, 353-54, 538 N.W.2d 581 (Ct. App. 1995)
 - Qualified privilege owned by client; can only be waived voluntarily at client’s direction
 - *Borgwardt*, 196 Wis. 2d at 353-54
 - WP is partly broader than A/C privilege because it applies to WP of others besides lawyers, but it’s mostly narrower than A/C privilege because it applies only to materials prepared in anticipation of litigation

❖ **To what does Attorney Work Product Doctrine apply?**

- “Material, information, mental impressions and strategies and attorney compiled in preparation for litigation”; or “in anticipation of litigation”
 - *Seifert*, 2007 WI App 207, ¶ 28; *Dilger*, 2015 WI App 54, ¶ 21
- Test is “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.”
 - *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 61, 251 Wis. 2d 68, 640 N.W.2d 788
- Applies to WP of others, not just lawyers—protects “those investigations and analyses made by a party or by the party’s agent, who may but need not be a lawyer”
 - *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (lawyer preparing for litigation must assemble, sift, and analyze information)
- Protects trial prep materials, but not underlying facts they contain (*e.g.*, witness names)
 - *Meunier v. Ogurek*, 140 Wis. 2d 782, 412 N.W.2d 155 (Ct. App. 1987)
- Sometimes protects routine business materials, but only if prepared “with an eye towards litigation” (*SXR Shelby Mut. Ins.*, 67 Wis. 2d 469)
- “Ordinary” WP v. “Opinion” WP (per Dan Blinka)

❖ **When does Attorney Work Product Doctrine apply?**

- Regardless of whether litigation had commenced at time of documents’ preparation, and regardless of whether “litigation” is the proceeding in which the protection is asserted
 - *Dilger*, 2015 WI App 54, ¶ 21
- “Prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced.”
 - *Borgwardt*, 196 Wis. 2d at 353-54. *See also Dudek*, 34 Wis. 2d at 590 (doctrine is “designed to reward industry and discourage indolence”)
- If possibility of litigation “loom[s], even if not certainly and imminently”
 - *Seifert*, 2007 WI App 207, ¶ 28

❖ **Intersection of PRL and WP doctrine** = *Seifert*, 2007 WI App 207, ¶ 28

- Presumption of access under Wis. Stat. § 19.35(1)(a) is “defeated” because attorney work product qualifies under the “otherwise provided by law” exception in the PRL
- PRL cannot be used to circumvent established principles that shield WP
- PRL governs general public access to records relevant to pending litigation, but parties to the litigation should request records through discovery to ensure orderly access to records
 - *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 56, 284 Wis. 2d 162, 699 N.W.2d 551
 - *See also* OAG 1-85 (access to records by parties to litigation is governed by discovery rules, not by public records law); Wis. Stat. § 19.35(1)(j)
- Under Wis. Stat. § 19.35(1)(am)1., a record subject’s access to records about himself/herself might also be constrained if the record is collected or maintained in connection with a complaint, investigation, or other circumstances that *may lead to* enforcement action, administrative proceeding arbitration proceeding, or court proceeding
 - No requirement that the investigation be current; statute also applies to completed investigations (*Seifert*, 2007 WI App 207, ¶¶ 26-27)