WHO OWNS WORK PRODUCT?

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This article explores the issue of who has, or who should have, the power to control or waive the work-product privilege: the attorney or the client. The Restatement of the Law Governing Lawyers *takes the position that work-product privilege is entirely subject to client control. Several American jurisdictions have taken the opposite position—that the privilege protects the ability of the bar to operate freely and therefore belongs to the lawyers who have created the product.*

Case law has thoroughly identified and vetted the theoretical justifications for the privilege itself. However, as in many other areas of the law, insufficient attention has been paid to the theoretical justifications for waiver. The failure of scholars, courts, and rule makers to distinguish issues regarding control of the privilege from the substantive underpinnings for the privilege has led to rules that are both simplistic and inadequate.

This article identifies the possible theoretical approaches to delineating an appropriate control and waiver principle, some reconcilable only with the Restatement *rule, others with the contrary position. It then highlights why the choice of theory becomes significant. The analysis illustrates that blind application of either extreme approach fails to account for important considerations underlying the work-product principle. The article thus proposes a model control and waiver statute that would more directly serve the reasons for which work-product privilege developed.*

Who owns work product? Consider the following scenario:

Lawyer X represents Client in a tax matter, relying in part on a comprehensive internal office memorandum the lawyer has prepared analyzing the ramifications of a recent comprehensive tax reform act. Subsequently, Client is sued by a law firm that competes with Lawyer X's firm. In discovery, the third-party law firm seeks disclosure of Lawyer X's internal office memorandum. Client is in-

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> different as to whether that memorandum is disclosed and does not want to delay the second litigation by opposing disclosure. Lawyer X, however, strongly desires to keep the memorandum secret on the grounds that the memorandum belongs to her firm, that the firm may reuse it in the future, and that the firm need not enable its competitor to benefit from its work. May Lawyer X assert the work-product privilege over Client's objection?

Now consider this variation, which reflects the potential conflict between lawyer and client even more starkly:

> Lawyer X is a successful plaintiffs' lawyer who specializes in suing HMOs. Lawyer X prepares and files an action, relying on a computer program and an investigative/discovery process that Lawyer X has developed and used successfully over the years. The insurer for the defendant HMO offers to settle on terms favorable to Lawyer X's client, but as a condition of settlement demands disclosure of the computer program and investigation/discovery plan, which will facilitate the defense of future HMOs sued by Lawyer X. In the absence of a settlement, these materials would be protected from discovery by the work-product privilege. Does the privilege reflect the lawyer's or the client's right to withhold the items?

These scenarios represent two of the many instances in which a lawyer and client might disagree about the potential disclosure of attorney work product. The recent *Restatement of the Law Governing Lawyers* takes the emphatic position that the decision whether to waive work-product privilege is entirely at the client's discretion.[1] The *Restatement* barely acknowledges the position several jurisdictions have taken, at the other extreme, that the work-product privilege is designed to protect the ability of lawyers to operate freely and therefore belongs to the lawyer who produced the product.[2]

This article considers who has, or who should have, the power to control or waive[3] the work-product privilege. Case law has thoroughly identified and vetted the theoretical justifications for the privilege itself.[4]

1. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 90 cmt. c (2000) [hereinafter RESTATEMENT] ("When lawyer and client have conflicting wishes or interests with respect to work-product material, the lawyer must follow the instruction of the client . . . .").

2. *See, e.g.*, CAL. CIV. PROC. CODE § 2018 (West 1998); N.Y. C.P.L.R. § 3101 (McKinney 2001) (referring to the work product of an "attorney," but providing that the attorney cannot withhold work product "at the expense of the client"); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977) (holding that work-product privilege protects the lawyer's own work and that "work product immunity may be invoked only by [the] attorney").

3. Most of the relevant authorities focus on the question of who may decide whether to waive the privilege and to give privileged documents to third persons. This article illustrates that important issues regarding disclosure of work product may arise in other contexts as well, some involving direct disagreements between lawyer and client about client access to the files. This article addresses the question of control of work product generally, and characterizes it as a question of "control and waiver doctrine."

4. *See infra* note 16.

However, as in many other areas of the law,[5] scant attention has been paid to the theoretical justifications for waiver. The failure of scholars, courts, and rule makers to distinguish issues regarding control of the privilege from the substantive underpinnings for the privilege has led to rules that are both simplistic and inadequate.

There are five possible theoretical approaches to delineating an appropriate control and waiver principle, some reconcilable only with the *Restatement* rule, others with the contrary position. Part I of this article sets forth the basic work-product doctrine and its substantive justifications. Part II identifies the existing waiver rules. Part III sets forth the five theories on which control and waiver doctrine might be based and highlights the ways in which the existing rules mesh with, and diverge from, the alternative theories. Part IV identifies a series of situations in which the choice of rule becomes significant. It illustrates why blind application of either extreme approach fails to account for important considerations underlying the work-product principle. Part V proposes an alternative approach that more directly serves the reasons why the work-product privilege developed. Finally, Parts VI and VII offer and analyze a model statute implementing that approach.

I. THE WORK-PRODUCT PRIVILEGE

At the outset, it is important to recognize that control and waiver doctrine, which is this article's focus, is likely to have different theoretical bases than the work-product privilege itself.[6] Courts and legislatures have adopted the privilege because they envision it as in some way allocating responsibility for developing litigation materials among the various parties.[7] The privilege provides a relatively bright-line rule for each side's determination of when information must be shared with the adversary. Control and waiver doctrine, in contrast, allocates decision-making authority and resolves disagreements between client and lawyer. The theory for assigning control to one or the other may have little to do with the adversary's entitlement to the material.

Work-product doctrine is designed to balance the ability of lawyers to prepare their cases free from prying eyes and the ability of parties in

5. *See, e.g.*, Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 412–16 (1998) (discussing unquestioned assumptions in the law of conflict-of-interest waivers).

6. *See generally* Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1524–50 (1991) (discussing the theoretical justifications for work-product privilege).

7. *See* Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 385–86 (1990) (discussing "'joint production' whereby the lawyer cannot get information helpful to his side of the case without also producing information helpful to the other side" and noting that "[a]n optimal rule . . . would seek to maximize the private incentive to undertake socially valuable joint production investigation subject to the constraint of duplication").

litigation to obtain properly discoverable information.[8] Work product consists of several types of information: (1) evidence and other facts[9] collected by the lawyer and her[10] agents; (2) research collected and memoranda prepared by the lawyer;[11] and (3) thoughts, opinions, and mental impressions formed by the lawyer (and typically committed to writing) about the case or the participants in the litigation.[12] For the most part, facts in the attorney's possession remain discoverable in civil matters[13] but information created by the lawyer is not,[14] absent a special justification by the party seeking disclosure.[15]

8. *See, e.g.*, *In re* Subpoenas Duces Tecum, 733 F.2d 1367, 1371 (D.C. Cir. 1984) (stating that "the work product privilege is a broader protection, designed to balance the needs of the adversary system to promote an attorney's preparation in representing a client against society's general interest in revealing all true and material facts relevant to the resolution of a dispute"); Allen, *supra* note 7, at 385 (noting the dilemma of civil discovery that "the lawyer cannot get information helpful to his side of the case without also producing information helpful to the other side . . . [both in] factual investigations and the resulting legal theor[ies]"); Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799, 826 (2001) (describing *Hickman v. Taylor*, 329 U.S. 495 (1947), as "[b]alancing the competing interests behind liberalized discovery and protecting the work product of the attorney").

9. *See, e.g.*, Kintera, Inc. v. Convio, Inc., 219 F.R.D. 503, 507 (S.D. Cal. 2003) ("Fact work product consists of factual material that is prepared in anticipation of litigation or trial. . . . [T]he court should consider whether the documents 'would not have been generated but for the pendency or imminence of litigation.'" (quoting Griffith v. Davis, 161 F.R.D. 687, 698–99 (C.D. Cal. 1995))); Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1384 (Fla. 1994) (applying work-product privilege to "fact work product" that "relates to the case and is gathered in anticipation of litigation"); *see also* Thomas D. Sawaya, *The Work-Product Privilege in a Nutshell*, FLA. B.J., July–Aug. 1993, at 32, 34 (describing fact work product as "documents and tangible things . . . prepared in anticipation of litigation or for trial"); Thornburg, *supra* note 6, at 1522 nn.35–42 (cataloguing examples of work product protected by the courts).

10. To avoid confusion, this article refers to the lawyer who holds work product as female and to clients and third parties as males.

11. *See, e.g.*, Natta v. Zletz, 418 F.2d 633, 637–33 (7th Cir. 1969) (identifying notes, memoranda and legal research as types of work product); 2,022 Ranch, L.L.C. v. Superior Court, 113 Cal. App. 4th 1377, 1389 (2003) (including research and memoranda as work product); Thomas M. DiBiagio, *Federal Criminal Law and the Crime-Fraud Exception: Disclosure of Privileged Conversations and Documents Should not be Compelled Without the Government's Factual Foundation Being Tested by the Crucible of Meaningful Adversarial Testing*, 62 MD. L. REV. 1, 3 (2003) ("the attorney work-product privilege shields any notes or memoranda prepared by an attorney that reflect his legal theories, research, opinions, or conclusions relating to his legal representation of the client").

12. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 400–01 (1981) (protecting lawyers' "mental impressions" regarding witness interviews); Pittman v. Frazer, 129 F.3d 983, 988 (8th Cir. 1997) (noting the protection for "mental impressions, conclusions, opinions, or legal theories regarding the litigation"); RESTATEMENT, *supra* note 1, § 87(2) (2000) (defining opinion work product as "the opinions or mental impressions of a lawyer"); Thornburg, *supra* note 6, at 1522–23 ("Courts have given work product immunity, however, for attorney notes reflecting witness statements or meetings, attorney opinion regarding the settlement value of a case or the client's chances of prevailing, trial strategy generally, lists of trial witnesses and their expected testimony, lists or copies of trial exhibits, deposition preparation, attitudinal surveys done on behalf of a litigant, and material such as might be found in a trial notebook . . . ." (footnotes omitted)). *See generally* Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333 (1978) (discussing the strong judicial protection accorded to opinion work product).

13. *See, e.g.*, Lugosch v. Congel, 219 F.R.D. 220, 240 (N.D.N.Y. 2003) ("in most instances, the work product doctrine does not extend to facts."); RESTATEMENT, *supra* note 1, § 87 cmt. g ("Work-product immunity does not apply to underlying facts of the incident or transaction involved in the litigation, even if the same information is contained in work product.").

Case law has offered a variety of justifications for the work-product privilege,[16] but these can be reduced to a few categories. First and foremost, the privilege assumes that lawyers in the adversarial system will represent clients most effectively when they are guaranteed a measure of professional confidentiality.[17] Two corresponding justifications are based on the sense that allowing discovery of ordinary work would create incentives for lawyers not to produce work product,[18] on the one hand, and

14. Hisaw v. Unisys Corp. 134 F.R.D. 151, 152 (W.D. La. 1991) (stating that work-product doctrine protects "work created in anticipation of litigation"); Ullman v. State, 647 A.2d 324, 332 (Conn. 1994) (stating that an attorney's interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs are protected from discovery); Willis v. Duke Power Co., 291 N.C. 19, 35 (1976) (applying the "anticipation of litigation" test to determine work product immunity); Riddle Spring Realty Co. v. State, 220 A.2d 751, 755 (N.H. 1966) (holding undiscoverable "the results of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation"); *cf.* ILL. SUP. CT. R. 201(b)(2) ("Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney."); *see also* James Holmes, Note, *The Disruption of Mandatory Disclosure with the Work Product Doctrine: An Analysis of a Potential Problem and a Proposed Solution*, 73 TEX. L. REV. 177, 185–86 (1994) (listing various types of created documents that qualify as "tangible ordinary work product").

15. *See, e.g.*, FED. R. CIV. P. 26(b)(3) ("A party may obtain discovery of [attorney work product] only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."); Logan v. Commercial Union Ins. Co., 96 F.3d 971, 976 (7th Cir. 1996) (discussing the hardship requirement of FED. R. CIV. P. 26(b)(3)); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.6.3 (1986) ("informational work product immunity can be set aside on a showing of substantial need or hardship on the part of the inquiring party"); *cf. In re* Murphy, 560 F.2d 326, 335 (8th Cir. 1977) (extending the "substantial need" and "undue hardship" rules to ordinary work product created in prior litigation).

16. *See generally In re* ANR Advance Transp. Co., 302 B.R. 607, 615–16 (E.D. Wis. 2003) (listing justifications cited in *Hickman v. Taylor* and other cases); Charles P. Cercone, *The War Against Work Product Abuse: Exposing the Legal Alchemy of Document Compilations as Work Product*, 64 U. PITT. L. REV. 639, 660–62 (2003) (identifying theoretical and policy justifications for the work-product privilege); Caroline T. Mitchell, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412, 424–32 (1983) (listing three separate rationales for the work-product doctrine); Thornburg, *supra* note 6, at 1538–50 (discussing the rationales for work product).

17. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 510–11 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."); Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985) ("Preserving the privacy of preparation that is essential to the attorney's adversary role is the central justification for the work product doctrine."); *In re ANR*, 302 B.R. at 616 ("[I]t is widely agreed that the principal justification for the doctrine is that protection of work product is necessary to preserve the adversary system of justice."); Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 529 (2002) ("work-product immunity creates at least a marginal increase in attorney preparation, and . . . facilitates efficient case preparation").

18. *See, e.g.*, *Hickman*, 329 U.S. at 511 (noting that work-product privilege is necessary to prevent lawyers from being deterred from commemorating their work in writings, which would lead to "inefficiency"); Allen, *supra* note 7, at 362 ("the work product doctrine . . . provides the level of confidentiality needed to induce the attorney to perform the optimal amount of legal investigation"); Edward H. Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269, 1279 (1969) (describing two dangers of complete discovery: "[f]irst, each party would be tempted to forego investigative efforts in the hope that the other party would develop a case to be seized ready-made through discovery; second, a party who did investigate would be fearful of developing potentially adverse information only to have to hand it to his opponent." (footnotes omitted)); Frank Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 356–64 (analyzing the work-product privilege as a property right in information); Megan McCrea, Case Note, *Disclosure of Attorney Work Product Under Federal Rule of Evidence 612: An Abrogation of*

to rely on the adversary's production of work,[19] on the other. Either eventuality undermines the premise of the adversary system that lawyers will actively pursue their own clients' causes and thus provide aggressive representation that produces appropriate results.[20] A fourth justification focuses on the expectations of clients, suggesting that if clients are not secure in the ability of their attorneys to protect the work they produce, clients will rely on lawyers less and limit their willingness to confide or participate in the preparation of litigation documents.[21] Finally, the protection of work product limits the possibility that lawyers will routinely

Work Product Protection?, 59 TEMP. L.Q. 1043, 1043–44 n.3 (1986) (arguing that unlimited discovery may disrupt the adversary system because it "might encourage laziness on the part of one or both attorneys").

19. *See, e.g.*, *Hickman*, 329 U.S. at 516 (Jackson, J., concurring) (arguing that without the privilege, lawyers would rely on "wits borrowed from the adversary"); United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995) ("The purpose of the doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation."); Laguna Beach County Water Dist. v. Super. Ct., 124 Cal. App. 4th 1453, 1459 (2004) ("the purpose of the work product doctrine is to protect information against opposing parties . . . in order to encourage effective trial preparation" (quoting BP Alaska Exploration, Inc., v. Super. Ct., 199 Cal. App. 3d 1240, 1256 (1988)); *see also* Daisy Hurst Floyd, *A "Delicate and Difficult Task:" Balancing the Competing Interests of Federal Rule of Evidence 612, the Work Product Doctrine, and the Attorney-Client Privilege*, 44 BUFF. L. REV. 101, 109 (1996) (arguing that the privilege encourages independent preparation of material); James A. Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery (Part II)*, 42 U. DET. L.J. 253, 270 (1965) (arguing that requiring disclosure of work product would deter lawyers from developing their own cases aggressively); D. Christopher Wells, *The Attorney-Client Work Product Doctrine and Carry-Over Immunity: Assessment of their Justifications*, 47 U. PITT. L. REV. 675, 684 (1986) ("[L]awyers may fail to prepare their clients' cases thoroughly on the premise that by discovering their adversaries' work product, they will be able to obtain the case already fully prepared.").

20. *See, e.g.*, Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980) (stating that without the privilege, "less work-product would be committed to paper, which might harm the quality of trial preparation"); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 736 (4th Cir. 1974) (holding that the privilege allows for the creation of work product, and "[n]o other rule is compatible with the interests of justice" or the adversary system); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?"*, 46 HASTINGS L.J. 679, 687 (1995) (discussing arguments that disclosure would undermine the adversarial system); Thornburg, *supra* note 6, at 1524–25 (discussing and questioning the argument that the work-product privilege promotes "adversarial gathering of facts" and therefore is necessary to preserve the adversarial system); *cf.* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 53–56 (1991) (explaining the theory of how adversarial lawyering produces appropriate results).

21. *See, e.g.*, *In re* Special September 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980) ("The purpose of the attorney-client privilege is to encourage clients to make full disclosure to their attorneys," and without the privilege, "the client would be reluctant to confide in his lawyer . . . ." (quoting Fisher v. United States, 425 U.S. 391, 403 (1976))); Merrill Lynch & Co., v. Allegheny Energy, Inc., No. 02-civ-7689, 2004 WL 2389822, at *3 (S.D.N.Y. Oct. 26, 2004) (noting "the need for a client to be able to confide in his or her . . . attorney" as one of three justifications for the work-product privilege); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 244 (1983) (describing the work-product privilege as a mechanism to "protect the lawyer's (and hence [the] client's) investment in research and analysis of a case"); Allen, *supra* note 7, at 361 (discussing the attorney-client and work-product privileges together as components of confidentiality and noting the argument that clients will use lawyers more because "one of the effects of the privilege must be to raise the cost of obtaining useful information once it is in the hands of the attorney"); Radson & Waratuke, *supra* note 8, at 801 (noting that "[t]he principle of confidentiality is as important to the work-product privilege as it is to the attorney-client privilege").

be called to testify,[22] which could lead to disqualification[23] and resulting delay and expense.

Simply noting the goal of protecting lawyers' ability to prepare their cases with some expectation of professional privacy does not resolve the question of whom the privilege is designed to protect. On the one hand, "privacy" by its terms seems like a personal right. Arguably, the lawyer's ability to form impressions, gather research, and develop opinions is an internal process that the privilege promises a lawyer may keep secret for her own benefit. On the other hand, the lawyer for the most part operates on behalf of a client. The work-product privilege can be seen as maximizing the lawyer's ability to represent the client well.

The *Restatement of the Law Governing Lawyers* seems to draw this distinction. In its definition of work product, it clearly differentiates two kinds of work product—ordinary work product[24] and opinion work product,[25] which refers to the lawyer's own private thoughts. As discussed below, however, the *Restatement* ultimately abandons this distinction when considering the issue of who owns the work product.[26] It treats the client as sole judge of when work product will be disclosed.[27]

The *Restatement's* position stems, in part, from the character of the *Restatement* itself. It is a work that purports to assemble rules of law, but

22. *See, e.g.*, United States v. Nobles, 422 U.S. 225, 253 (1975) ("The lower courts, too, have frowned on any practice under which an attorney who tries a case also testifies as a witness, and trial attorneys have been permitted to testify only in certain circumstances."); *Hickman*, 329 U.S. at 517 (Jackson, J., concurring) (noting that without the work-product privilege, attorneys may be forced to be a witness); Ceco Steel Prods. Corp. v. H. K. Porter Co., 31 F.R.D. 142, 144 (N.D. Ill. 1962) (holding that where there is uncertainty in a witness' testimony, the work-product privilege "guards against the mischief" of attorneys being called to impeach their witnesses); *In re ANR*, 302 B.R. at 615 (indicating the work-product privilege "is necessary to prevent the unseemly occurrence of a lawyer testifying against his client"); *cf.* DeWald v. Amsterdam Hous. Auth., 823 F. Supp. 94, 106 (N.D.N.Y. 1993) (requiring a lawyer to testify, but protecting against the disclosure of work product).

23. *See, e.g.*, *Hickman*, 329 U.S. at 514, 517 (Jackson, J., concurring) (identifying a situation in which an attorney's testimony would create a conflict of interest with his client and his client's testimony); *see also* Thornburg, *supra* note 6, at 1538, 1542 (noting the rationale that work-product privilege is necessary to "avoid lawyers testifying during discovery or trial"); *cf.* RESTATEMENT, *supra* note 1, § 108(1)(a) (noting that, with limited exceptions, a lawyer may not represent a client in a contested hearing or trial of a matter in which "the lawyer is expected to testify for the lawyer's client"); Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and its Exceptions . . .*, 81 NEB. L. REV. 1320, 1325 (2003) (suggesting that the work-product protection shields attorneys from "conflicting obligations"); Judith A. McMorrow, *The Advocate as Witness: Understanding Context, Culture and Client*, 70 FORDHAM L. REV. 945, 954 (2001) ("Concern about a lawyer being required to testify was a significant focus of the appellate court's decision in *Hickman v. Taylor* to protect attorney work product.").

24. RESTATEMENT, *supra* note 1, § 87(1) ("Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.").

25. *Id.* § 87(2) ("Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product.").

26. *See infra* text accompanying notes 42–58. The *Restatement*, however, does treat the distinction as relevant to the level of protection that work product receives from third-party discovery. *Compare* RESTATEMENT, *supra* note 1, § 88, *with* RESTATEMENT, *supra* note 1, § 89 (providing greater protection to opinion work product).

27. *See id.* § 90 cmt. c ("When lawyer and client have conflicting wishes or interests with respect to work-product material, the lawyer must follow instruction of the client.").

relies heavily on principles of professional responsibility.[28] The work-product doctrine by definition is an aspect of the law of evidence, but it can be viewed through a professional responsibility lens because it affects attorney-client relationships and must be administered with the attorney-client relationship in mind.[29] Thus, in resolving issues regarding control and waiver—and, in particular, who decides control and waiver issues and based on what criteria—the *Restatement* emphasizes professional responsibility considerations, such as attorney loyalty to clients and notions of adversariness.[30] These considerations may be less germane if the work-product doctrine is deemed, at least in part, to protect the interests of lawyers themselves.

II. THE EXISTING CONTROL AND WAIVER RULES

A. The Federal Approach

Many states have modeled their work-product statutes upon the pertinent federal rule of civil procedure,[31] which is based on the seminal case of *Hickman v. Taylor*.[32] In addition to obvious work product used to prepare for litigation,[33] Federal Rule of Civil Procedure 26(b)(3) protects against disclosure "the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation."[34] *Hickman* provides a number of justifications for this privilege, including that if work product were available upon demand, attorneys would stop writing down their thoughts, strategies, and mental impressions, which would in turn produce "[i]nefficiency, unfairness and sharp practices" in litigation.[35]

28. *See id.* Introduction (discussing the bases for the *Restatement*'s conclusions).

29. In other words, to the extent evidence rules assign to lawyers the task of administering the work-product privilege and waiver issues, each lawyer must be mindful of his professional obligations to act in her client's best interests and, when possible, to maintain the confidentiality of any information "relating to the representation" that the client wants to keep secret. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) [hereinafter MODEL RULES].

30. For example, section 90, comment c of the *Restatement* refers to § 21, which in turn allocates decision-making authority between lawyer and client along the lines of traditional ethics codes.

31. FED. R. CIV. P. 26(b)(3).

32. 329 U.S. 495 (1947); *see also* Allen, *supra* note 7, at 374–83 (describing the development of the rule).

33. The general work-product rule applicable in federal courts provides, in pertinent part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

FED. R. CIV. P. 26(b)(3).

34. In providing greater immunity to mental impressions and the like than to general work product, the rule makers were addressing the rights of third parties to discovery. This did not resolve the issues this article addresses; namely the relative rights of lawyers and clients to control or waive work product. *See also* CAL. CIV. PROC. CODE § 2018(c) (West 1998).

35. 329 U.S. at 511.

Neither *Hickman* nor the federal rule resolves the issue of how disagreements between client and lawyer should be resolved, because both focus on the ability of lawyer and client, jointly, to fend off third-party discovery of work product in the course of the particular litigation for which the product was prepared. When lower federal courts have addressed conflicts between lawyers and clients, they typically have sided with client requests for disclosure of work product.[36] But this approach has not been uniform. At least some courts have held that the privilege exists, at least in part, to protect lawyers and that lawyers have some interest in the privacy of their own work.[37]

To be sure, the federal courts—like courts in most jurisdictions—have recognized clients' right to obtain the core aspects of the lawyer's working file insofar as the contents are relevant to litigation concerning a claim or direct legal dispute between the client and the lawyer.[38] One court has asserted that "[t]o protect counsel from his own client . . . is a perversion of the privilege . . . in no way comporting with the *Hickman* rationale . . . ."[39] Yet in cases implicating the lawyer's privacy interests, some federal courts have suggested that the privilege belongs partly to the lawyer.[40]

In short, the federal authorities are mixed. They do not establish a clear waiver doctrine. Lawyers cannot hide behind the privilege to pre-

36. *See, e.g.*, Spivey v. Zant, 683 F.2d 881, 885 (5th Cir. 1982) (upholding a client's right of access to his lawyer's file); Gottlieb v. Wiles, 143 F.R.D. 241, 247 (D. Colo. 1992) ("an attorney may not withhold work product from his own client"); Martin v. Valley Nat'l Bank, 140 F.R.D. 291, 320 (S.D.N.Y. 1991) (asserting that *Hickman*'s rationale is inapplicable to an attorney's withholding of work product from a client).

37. *E.g.*, Fed. Land Bank v. Fed. Intermediate Credit Bank, 127 F.R.D. 473, 480 (S.D. Miss. 1989), *rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989) (holding that opinion work product belongs to the attorney); First Wisconsin Mortgage Trust v. First Wisconsin Corp., 86 F.R.D. 160, 1667 (E.D. Wis. 1980) ("The work product doctrine . . . is designed for the protection of the lawyer and the standards of the legal profession, as well as for the protection of the adversary process. Therefore, [the attorney] has some interest at least in the privacy of its own work product." (citations omitted)).

38. *See, e.g.*, Clark v. Milam, 847 F. Supp. 424, 427 (S.D. W. Va. 1994) (asserting that federal courts have uniformly found for a client seeking documents "created for him by his own lawyer"); *In re* Kaleidoscope, Inc., 15 B.R. 232, 242 (N.D. Ga. 1981) (holding that a lawyer could not assert the work-product privilege against the client); *cf.* Maxwell v. Florida, 479 U.S. 972, 976 n.2 (1986) (Marshall, J., dissenting from denial of *certiorari*) ("the privilege to withhold an attorney's work product [in a claim for regarding ineffective assistance of counsel] belongs to the client").

39. *In re* Standard Fin. Mgmt. Corp., 79 B.R. 97, 99 (D. Mass. 1987); *see also* Resolution Trust Corp v. H—, P.C., 128 F.R.D. 647, 649 (N.D. Tex. 1989) (finding an attorney's claim inconsistent with *Hickman*'s rationale); *Gottlieb*, 143 F.R.D. at 247 (holding that a lawyer may not withhold work product from his client); *cf. Spivey*, 683 F.2d at 884–85 (implementing broad language and requiring a lawyer to disclose items in the file reflecting the date of his appointment as counsel, but doing so with respect to work product from which all references to the attorney's personal thoughts and mental impressions had been excised).

40. *E.g.*, *Fed. Land Bank*, 127 F.R.D. at 480 (finding that end-products of the lawyer's work belong to the client, but that "[n]otes taken by the lawyer . . . internal memoranda and other documents prepared by the lawyer for his use in providing services to his client constitute the lawyer's work product and are property of the lawyer. Likewise, preliminary drafts of contracts, briefs, opinions, pleadings and other documents, the final drafts of which constitute the lawyer's end products, are the lawyer's work product . . . .").

vent clients from gaining access to information that would establish a failure of performance on the lawyers' part in litigation in which that performance is at issue. However, when clients or a third party wish to obtain information for other reasons and the lawyer has a justification for withholding, it is not clear who has the ultimate power to determine whether the documents must be disclosed or who bears the burden to move for a disclosure or protective order.[41]

B. The Restatement *Rule*

The *Restatement* addresses the issue of who owns work product, and who can waive the privilege, in two separate places. Section 46(2) sets forth a basic axiom: "On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse it."[42] The comments to section 46 identify several of the supposedly "substantial grounds" for the lawyer to refuse access.[43] Two are not germane to the issue this article addresses: a lawyer may refuse the client's request for access when (1) "compliance would violate the lawyer's duty to another;"[44] and (2) under limited circumstances, "for a client's own benefit," as in the case of a psychiatric report that might harm a mentally ill client.[45] The third exception is on point:

> A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the law firm's possible malpractice liability to the client.[46]

The comments, however, contain significant ambiguity concerning what documents the exception covers and how far it extends. The comment notes the exception's rationale: "The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved."[47]

41. *See, e.g.*, *In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994) (holding that a client's waiver of work-product privilege regarding documents suggesting client fraud may not deprive the attorney of the right to assert the privilege regarding her impressions about the case); *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir. 1980) (bifurcating the analysis of work-product privilege because the privilege "may be asserted by both the client and the attorney").

42. RESTATEMENT, *supra* note 1, § 46(2).

43. *Id.* § 46 cmts. a–d.

44. *Id.* § 46 cmt. c.

45. *Id.* It is important to note that the *Restatement* strictly circumscribes this exception, stating that ordinarily "what will be useful to the client is for the client to decide." *Id.*

46. *Id.*

47. *Id.*

Yet even where the exception applies, the *Restatement* nevertheless seems to adopt a client-oriented approach, noting that "[t]he lawyer's duty to inform the client . . . can require the lawyer to disclose matters discussed in the document even when the document itself need not be disclosed."[48] Moreover, section 46 makes clear that it applies only at the initial, private stage of the relationship when a client simply requests access.[49] Once litigation commences, "a tribunal may properly order discovery of the document when the discovery rules so provide."[50] The *Restatement* also does not elaborate on whether the lawyer may withhold documents other than those fitting within the three categories specifically mentioned in the comment.

Section 46 addresses all information in the lawyer's possession, not just work product.[51] Sections 87–90 deal more specifically with the question of whether the work-product privilege exists for the benefit of clients or attorneys. Initially, section 87 distinguishes between types of work product: "Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product."[52] But in identifying who gets to decide whether work product is disclosed to a third party, the *Restatement* does not differentiate between the two categories.

Both the lawyer and client may invoke the work-product privilege.[53] However, a lawyer's reason for invoking the privilege is confined, largely, to "protect[ing] the client's interests."[54] The lawyer may invoke the privilege "on the basis of the lawyer's independent interest in privacy"[55] if "doing so is not inconsistent with the interests of the client."[56] Yet, the *Restatement* clearly sides with the client when a difference of opinion, or a conflict of interest, arises: "When lawyer and client have conflicting wishes or interests with respect to work-product material, the lawyer must follow instruction of the client."[57]

Thus, despite the slight ambiguities raised by the comments to section 46, the *Restatement* ultimately places entire control of work product, and whether to waive it, in the client's hands. The lawyer may have personal interests in keeping the material private but, once litigation arises, the client may override those interests by waiving the privilege and instructing the attorney to disclose.

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* § 46(a).
52. *Id.* § 87(2).
53. *See id.* § 90(1) ("Work-product immunity may be invoked by or for a person on whose behalf the work product was prepared.").
54. *Id.* cmt. a.
55. *Id.* cmt. c.
56. *Id.*
57. *Id.*

C. The California Rule

California's work-product rule takes a clear and unambiguous position in direct conflict with the *Restatement*.[58] Section 2018 of the California Code of Civil Procedure provides, in attorney-friendly language:

> (a) It is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts. . . .
>
> (c) Any writing that reflects an attorney's impressions, conclusions, opinions or legal research or theories shall not be discoverable under any circumstances.[59]

Although there is some support for the proposition that this language should be read as creating a privilege for the lawyer *and* the client,[60] most California courts have construed section 2018 as establishing a privilege that belongs primarily to attorneys.[61]

The California Code itself contains exceptions. Most notably, an attorney may not use the privilege to avoid discovery in "an action between [the] attorney and his or her client or former client . . . if the work product is relevant to an issue of breach by the attorney of a duty to the attorney's client arising out of the attorney-client relationship."[62] However, in other cases of differing interests and positions, California courts

58. New York, like California, has a rule that appears to vest control of the privilege in attorneys. N.Y. C.P.L.R. § 3101(c) provides that "the work product of an attorney shall not be obtainable" and the discussion following the rule states that a waiver of the privilege by a client is not always effective. *See* Zachiva Commc'ns Corp. v. Millberg Weiss Bershad Spechthrie & Lerach, 223 A.D.2d 417 (N.Y. App. Div. 1996) (relying on *In re* Estate of Johnson, 142 Misc. 2d 690 (N.Y. Surr. Ct. 1989) for the proposition that the privilege belongs to the attorney and may be used by an attorney to deny a client access to internal notes and memoranda); *see also* Sage Real Estate Corp. v. Proskauer Rose Goetz & Mendelsohn, 91 N.Y.2d 30, 37–38 (1997) (allowing attorneys to rebut the presumption that a client is entitled to all documents in the file). Nevertheless, the weight of New York authority holds, at least, that an attorney cannot withhold work product at the client's expense. *E.g.*, Finn v. Riley, 202 A.D.2d 880, 880 (N.Y. App. Div. 1994); *In re* Vega, 94 A.D.2d 799, 800 (N.Y. App. Div. 1983); Melendez v. Union Hosp. of the Bronx, 88 A.D.2d 831, 832 (N.Y. App. Div. 1982).

59. CAL. CIV. PROC. CODE § 2018 (West 1998). For a discussion of the history of California's work-product rule, see Edward J. Solomon, Comment, *The California Work Product Privilege: Dissecting the Attorney's Brain*, 20 W. ST. U. L. REV. 253, 255–63 (1992). *See also* Thomas W. Hitachk, Comment, *Legal Malpractice and Discovery of Opinion Work Product in California: The Dilemma Created by Absolute Protection*, 17 PAC. L.J. 1393, 1393–1401 (1986) (discussing the development of the California rule).

60. *Cf.*, Dowden v. Super. Ct., 73 Cal. App. 4th 126, 129–30 (1999) (rejecting the argument that a *pro se* litigant has no work-product privilege because he is not an attorney, finding that he was entitled to claim privilege because he was standing in the shoes of an attorney).

61. *See, e.g.*, People *ex rel.* Lockyer v. Super. Ct., 83 Cal. App. 4th 387, 398 (2000) (holding that the attorney is the holder of the privilege, but suggesting that a client may sometimes assert the privilege on the attorney's behalf); Lohman v. Super. Ct., 81 Cal. App. 3d 90, 101 (1978) (emphasizing that the attorney is the holder of work-product privilege); Mack v. Super. Ct., 259 Cal. App. 2d 7, 10 (1968) (holding that the privilege belongs to the attorney, but that the client may assert it in the attorney's absence).

62. CAL. CIV. PROC. CODE § 2018(f).

have not only held the privilege to belong to the attorney, but also allowed the attorney to disclose the information to third parties for use against the client[63]—though the attorney risks subsequent legal liability for malpractice or other inappropriate behavior.[64]

This absolute position has proven controversial despite the clear language of the statutory authority for the courts' conclusions. A few California courts have implemented work-product waiver principles in the client's favor.[65] One federal court has attempted to reconcile the federal and California positions by treating section 2018(a) as merely stating a public policy in favor of the creation of a work-product privilege but not precluding the proposition that the client is entitled to access to, and control of, the product.[66] In addition, at least two bar associations have issued opinions in which they have asserted that the mandate of the rule of civil procedure is limited by attorneys' professional duty to communicate with clients and act loyally to them.[67] Nevertheless, California law remains fairly unified in recognizing that the privilege itself, and the right to waive it, are vested by rule in attorneys.[68]

63. Lasky, Haas, Cohler, & Munter v. Super. Ct., 172 Cal. App. 3d 264, 279 (1985) ("the attorney is the intended exclusive holder of the work-product privilege and . . . it may be asserted even against his client in the context of litigation where adversaries of the client seek discovery for use against the client"); *cf.* Fellows v. Super. Ct., 108 Cal. App. 3d 55, 65 (1980) (holding that an attorney can assert the work-product privilege over her client's objection).

64. *See Lasky*, 172 Cal. App. 3d at 273–75 (1985) (discussing *Rumac, Inc. v. Bottomley*, 143 Cal. App. 3d 810, 812 (1983) and holding that an attorney is the sole holder of the work-product privilege, but may be liable to the client for withholding work product insofar as the client owns the work done on his behalf).

65. *See, e.g.*, John F. Matull & Assocs., Inc. v. Cloutier, 194 Cal. App. 3d 1049, 1056 (1987) ("The law is clear that 'an attorney's work product belongs absolutely to the client.'" (quoting Kallen v. Delug, 157 Cal. App. 3d 940, 950 (1984))); Weiss v. Marcus, 51 Cal. App. 3d 590, 599 (1975) (holding that the determination of who owns work product does not depend on whether the attorney has been paid for his services).

66. Roberts v. Heim, 123 F.R.D. 614, 634–35 (N.D. Cal. 1988).

67. *See, e.g.*, San Diego County Bar Ass'n Legal Ethics Comm., Op. 2004-1 (2004), http://www.sdcba.org/ethics/ethicsopinion04-1.html (holding that an attorney's duty of loyalty to the client forecloses a lawyer from asserting the privilege over her client's objection); Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 1992-127, 1992 WL 166235 [hereinafter COPRAC] (relying on Cal. R. Prof'l Conduct 3-700(D)(1) to conclude that an attorney must turn over to the client all documents that are reasonably necessary to the client's representation). The author of this article notes that he is an Advisor to the San Diego County Bar Legal Ethics Committee, but that he did not draft or vote on the San Diego opinion cited above.

68. *See, e.g.*, Wells Fargo Bank v. Super. Ct., 990 P.2d 591, 600 n.5 (Cal. 2000) ("The attorney, however, rather than the client, is the holder of the work product privilege."); State Comp. Ins. Fund v. Super. Ct., 91 Cal. App. 4th 1080, 1091 (2001) (holding that only the attorney may claim the work-product privilege for documents created for the attorney's own reference); Mylan Labs., Inc. v. Soon-Shiong, 76 Cal. App. 4th 71, 81 n.2 (1999) (holding that the attorney holds the privilege); *cf.* Eddy v. Fields, 121 Cal. App. 4th 1543, 1549 (2004) (noting in dicta that the statutory work-product privilege and a client's right of access to the file "pose an apparent conflict, one that has not been definitively resolved by the courts").

D. End Product Versus Entire File Standards

Most states' definitions of what materials constitute work product for purposes of discovery, whether statutory or found in common law, are clear and comprehensive.[69] The *Restatement* differentiates between ordinary work product and attorney work product, but does not seem to make a significant distinction between the two in deciding how waiver principles apply.[70] Surprisingly, therefore, with respect to the single issue of when a client may demand access to, or copies of, material in an attorney's file, some jurisdictions have adopted an approach (called the "end product standard") that treats some categories of work product differently than others.[71]

The issue ordinarily arises in one of two contexts: (1) a lawsuit or impending lawsuit (i.e., a substantive disagreement) between the client and lawyer concerning the lawyer's performance;[72] or (2) a situation in which the client has not fully paid the lawyer's fees, but nevertheless seeks access to the file in order to continue prosecuting the legal matter (either by himself or using another attorney).[73] In the first context, the law uniformly provides that a lawyer cannot use the work-product privilege to immunize herself from suit.[74] In the second, professional responsibility rules, at least, are wary of allowing lawyers to blackmail clients into paying fees by withholding resources the clients need for legal representation.[75] Still, lawyers in both situations have personal interests that deserve some acknowledgment. Therefore, the basic legal considerations do not inexorably lead to the conclusion that clients are entitled to *all* information in the lawyer's possession simply because that information might be deemed work product for purposes of discovery in litigation against third parties.

69. *See, e.g.*, TEX. R. CIV. P. 192.5(a)–(c) (listing details of what work product includes); Ullman v. State, 647 A.2d 324, 332 (Conn. 1994) (stating that work product includes an attorney's "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible items" and defining work product more generally as all results of an attorney's activities in the course of preparing for trial); *cf.* ILL. S. CT. R. 201(b)(2) ("Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.").

70. *See supra* text accompanying note 24.

71. *See generally* Brian J. Slovut, Note, *Eliminating Conflict at the Termination of the Attorney-Client Relationship: A Proposed Standard Covering Property Rights in the Client's File*, 76 MINN. L. REV. 1483 (1992) (proposing a rule for client access after the termination of the attorney-client relationship).

72. *E.g.*, Koen Book Distribs. v. Owell, Trachtman, Logan, Carrle, Bowman & Lombardo, 212 F.R.D. 283, 286 (E.D. Pa. 2002); Lasky, Haas, Cohler & Munter v. Super. Ct., 172 Cal. App. 3d 264, 278–79 (1985); Weiss v. Marcus, 51 Cal. App. 3d 590, 599 (1975); Shapo v. Tires'n Tracks, Inc., 782 N.E.2d 813, 819–20 (Ill. App. Ct. 2002).

73. *E.g.*, United States v. Ringwalt, 210 F. Supp. 2d 653, 654–56 (E.D. Pa. 2002); Nat'l Sales & Serv. Co., v. Alper, 667 P.2d 738, 739–40 (Ariz. 1983); Melendez v. Union Hosp. of Bronx, 88 A.D.2d 831, 831 (N.Y. App. Div. 1982); Britton & Gray, P.C. v. Shelton, 69 P.3d 1210, 1215 (Okla. Civ. App. 2003).

74. *See supra* note 72.

75. *See supra* note 73.

Many states have resolved this dilemma through the lens of professional considerations rather than legal rules.[76] The pertinent decisions often are found in ethics opinions, which typically have taken one of two approaches.[77] Some states have embraced a fully client-oriented position, adopting an "entire file standard" under which clients are presumptively entitled to any document their attorneys created during the course of the representation.[78] Others have adopted a more lawyer-friendly "end product standard," under which clients are entitled only to documents that they specifically hired their attorneys to produce, including court documents and client memoranda.[79]

76. *See, e.g.*, CAL. R. PROF'L CONDUCT 3-700 (obligating an attorney to "promptly release to the client, at the request of the client, all the client's papers and property," including "correspondence, pleadings, deposition transcripts, exhibits, physical evidence, experts' reports, and other items reasonably necessary to the client's representation").

An interesting exception is Michigan, in which several ethics opinions initially interpreted ethics considerations as mandating the entire file standard but were ultimately overruled by another ethics opinion that observed that legal principles should control the issue. *Compare* Mich. St. Bar Comm. on Prof'l and Judicial Ethics, Syllabus CI-926 (1983), *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/ci_926.html (referring to the entire file standard), *with* State Bar of Michigan Bd. of Comm'rs, Formal Ethics Op. R-19 (2000), http://www.michbar.org/opinions/ethics/numbered_opinions/r-019.htm ("the determination of what papers the client is entitled to receive and what information is the property of the client are questions of law"). *See also* John W. Allen, *Ownership of Lawyer's Files About Client Representations, Who Gets the "Original"? Who Pays for the Copies?*, 79 MICH. B. J. 1062 (2000) (discussing Michigan's standard).

77. *See generally* Slovut, *supra* note 71 (discussing the differences between the entire file and the end product standards).

78. *E.g.*, Alaska Bar Ass'n Ethics Comm., Op. 2003-3 (2003), http://www.alaskabar.org/index.cfm?ID=5618 (finding that clients are entitled to access to their attorneys' entire file, subject to narrow exceptions); COPRAC, *supra* note 67, (discussing the need for the attorney to turn over all relevant paper and property in the client's file to the client or his successor attorney and stressing the need for cooperation between the attorney and new counsel); Conn. Bar Assoc., Informal Op. 00-3, 2000 WL 1370746, at *2 (2000) ("Other than a narrow range of work product documents, and materials of which copies have already been provided to a client, the files belong to the client"); Ohio Bd. Of Comm'rs on Grievances & Discipline, Op. 92-8, 1992 WL 739411 (1992) (finding that an attorney has an ethical duty to deliver the entire case file to a former client upon request); Or. St. Bar Ass'n, Formal Op. 1991-125, 1991 WL 279216, at *2 (1991) ("As a general proposition . . . attorneys are obligated to turn over their entire client files to their former clients."); *accord* MASS. RULES OF CT. 3:07; Resolution Trust Corp. v. H—, P.C. 128 F.R.D. 647, 650 (N.D. Tex. 1989) (stating that legal memoranda and attorney's notes are paid for by the client and thus are the property of the client); Swift, Currie, McGhee & Hiers v. Henry, 276 Ga. 571, 573 (2003) ("a client is entitled to discover any document which the attorney created during the course of representation"); Averill v. Cox, 145 N.H. 328, 339 (2000) ("[A] client's file belongs to the client, and upon request, an attorney must provide the client with the file."); Sage Realty v. Proskauer, Rose, Goetz & Mendelsohn L.L.P., 91 N.Y.2d 30, 35 (N.Y. 1997) (concluding that a client has an "expansive general right" to the attorney's files); Maleski v. Corporate Life Ins. Co., 641 A.2d 1, 6 (Pa. Commw. Ct. 1994) (holding that a client has a right to all files for which he has paid, including notes and memoranda); *cf.* Metro-Goldwyn-Mayer, Inc. v. Super. Ct., 25 Cal. App. 4th 242 (1994) (appearing to disagree with the California ethics committee conclusions and limiting client access); Sylvia E. Stevens, *Bar Counsel: Client Files, Revisited: What Goes in Them—and Who Owns Them*, 63 OR. ST. B. BULL., Jan. 2003, at 31 (discussing the relatively few legal authorities discussing a client's right to a previous attorney files and noting support for the majority view that clients should be entitled to full access).

79. *See, e.g.*, Colo. Bar Ass'n Ethics Comm., Formal Op. 104 (1999), *available at* http://www.cobar.org/group/display.cfn?GenID=1825 (exempting personal attorney work product, internal memoranda, and lawyer notes reflecting personal impressions and comments); N.C. State Bar, Op. RPC 178, 1994 WL 901316, at *1 (1994) (noting in dicta that "a lawyer must provide a former client with originals or copies of anything in the file which would be helpful to the new lawyer but that '[t]he

It is important to note that the entire file standard seems to require a lawyer to produce even intimate, private observations about the client or the representation.[80] Nevertheless, none of the opinions that purport to follow the standard actually have mandated that an attorney disclose personal notes. Numerous entire file states have issued opinions excepting from disclosure some materials that attorneys might consider private.[81]

The ambivalence reflected in the latter opinions highlights the core issue that this article addresses. On the one hand, these jurisdictions emphasize client protection and assert that ownership of work product belongs to clients. On the other hand, the decision makers do not entirely believe their own proclamations, sensing that attorneys too have some

discharged lawyer's notes made for his own future reference and study and similar things not representing a completed work product need not be turned over'"); R.I. Sup. Ct. Ethics Advisory Panel, Op. 92-88 (exempting "attorney's work product"); *accord* Fed. Land Bank v. Fed. Intermediate Credit Bank, 127 F.R.D. 473, 479 (S.D. Miss. 1989), *rev'd on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989) (exempting from disclosure "tools" used by a lawyer "without which the attorney cannot construct the appropriate legal representation for which the client has retained him and which the client has every right to expect. . . . [T]hese documents are ones to which the client has no entitlement"); Lasky, Haas, Cohler & Munter v. Super. Ct., 172 Cal. App. 3d 264, 279 (Cal. Ct. App. 1985) ("[T]he attorney is the intended exclusive holder of the work product privilege and [the privilege] may be asserted even against his client in the context of litigation where adversaries of the client seek discovery for use against the client"); Thomas v. Hartford Mut. Ins. Co., No. 01C-01-046 HDR, 2004 Del. Super. LEXIS 158 (Del. Super. Ct. 2004) (rejecting a client's access to correspondence between an insurer and his attorney absent a showing of a "compelling" need); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92, 98 (Mo. Ct. App. 1992) (holding that a client does not have a property right to attorney documents relating to internal thoughts and that ethical considerations do not warrant their surrender); Estate of Johnson, 538 N.Y.S. 2d 173 (1989) (holding that "internal, undisclosed notations of an attorney's thoughts and analyses . . . are absolutely protected from disclosure"); *cf.* Il. State Bar Ass'n, 94-13, 1995 WL 874715, *3 (1995) ("With respect to . . . the lawyer's notes and factual or legal research material . . .[i]n the absence of controlling Illinois authority or a clear majority in the other states, the Committee concludes that the better rule is that these materials are the property of the lawyer.") (holding that "internal, undisclosed notations of an attorney's thoughts and analyses . . . are absolutely protected from disclosure").

80. *See, e.g.*, COPRAC, *supra* note 67 (holding that, under the entire file standard of Cal. R. Prof'l Conduct 3-700(d)(2), an attorney must disclose her "impressions, conclusions, opinions, legal research, and legal theories"); *see also* Ashcroft & Gerel v. Shaw, 728 A.2d 798, 815 (Md. Ct. Spec. App. 1999) (holding that the work-product privilege "does not apply to the situation in which a client seeks access to . . . items created or amassed by his attorney during the course of representation"); *accord* Maleski v. Corporate Life Ins. Co., 646 A.2d 1, 6 (Pa. 1994).

81. *See, e.g.*, Ala. St. Bar, Formal Op. 19 86-02 (1986), http://alabar.org/ogc/fopDisplay.cfm?oneId=379 (excepting legal analysis, personal notes, research or inter-office memos); Ariz. St. Bar Comm. on Rules of Prof'l Conduct, Op. 92-1 (1992), http://www.myazbar.org/Ethics/pdf/91-10.pdf (excepting personal notes and outlines); Colo. Bar Ass'n, Ethics Comm., Formal Op. 104, http://www.cobar.org/static/comms/ethics/fo/fo_104.htm (excepting prior research, internal memoranda, conflict checks, personnel assignments, and personal notes); Conn. St. Bar, Comm. on Prof'l Ethics, Informal Op. 92-21 (1992) (excepting attorney's personal work product, such as handwritten notes and internal drafts and memoranda); Ill. St. Bar, Ethics Op. 94-13 (1995) (excepting personal notes and research); Or. State Bar, Formal Op. 1991-125, http://www.osbar.org/_docs/ethics/1991-125.pdf (excepting materials from prior case used by the attorney and the attorney's personal notes that do not reflect on the strength of the underlying case); R.I. St. Bar, Ethics Ops. 92-88, 93-76 (excepting unrelated personal notes, time sheets, and records of conversations with clients).

ownership interests.[82] The relative importance of the client and lawyer interests may change, and become even more confusing, when the work-product issues arise in contexts other than direct attorney-client disputes. The failure to fully analyze the work-product privilege and the reasons why control of work product might be given to one or the other party has prevented the decision makers from identifying a coherent doctrine.[83] Hence, the decisions express standards that later opinions seem to undercut.

III. FIVE THEORETICAL APPROACHES TO CONTROL AND WAIVER

The following section of this article focuses directly on the issue of control and waiver of the work-product privilege. It suggests that one can analyze the issue of who should be responsible for the release of work product using five difference theoretical models. It then describes how the alternative theories support or relate to the existing control and waiver doctrines.

A. Autonomy

One view of legal representation is that the lawyer's function is primarily to enhance the autonomy of clients—in making decisions about their conduct, about how to deal with the legal system, and in exercising choices that the legal system requires a party to litigation to make.[84] Under this theory, lawyers are simply facilitators of clients' exercise of autonomy. Lawyers provide information that enables clients to make choices about courses of action in a way that clients believe most benefit them.

One might, for example, view the decision of whether a client may waive a conflict of interest by a lawyer from several perspectives: (1) whether waiver benefits the legal system;[85] (2) whether, as an empirical matter, the waiver would benefit the client;[86] or (3) whether the client has

82. It is probably for these reasons that the Model Rules take a wishy-washy approach, providing tautologically that "[U]pon termination of representation, a lawyer shall . . . surrende[r] papers and property to which the client is entitled." MODEL RULES, *supra* note 29, R. 1.16(d).

83. *Cf. In re* Grand Jury Proceedings, 604 F.2d 798, 801–02 (3d Cir. 1979) (holding that the privilege can only be waived jointly by the lawyer and client).

84. *See, e.g.*, Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 630–33 (discussing the importance of honoring client autonomy); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 367 (1989) (discussing the role of autonomy in the theoretical justifications for attorney-client confidentiality); *see also* RESTATEMENT, *supra* note 1, § 122 cmt. g(iv), Reporter's Note ("The preferred position, taken in the Comment, is that in most circumstances concern for client autonomy warrants respecting a client's informed consent.").

85. Rather than considering whether the client desires or benefits from waiver, a conflict of interest rule might, for example, rely on the system's interest in having an unconflicted attorney represent the client. *See* Zacharias, *supra* note 5, at 419–20 (noting several systemic interests).

86. From a client's perspective, a waiver of a conflict of interest may be defensible even if the client will receive less aggressive representation than an unconflicted attorney would provide. *Id.* at

made a rational and informed choice.[87] Under an autonomy approach to waiver, the first two perspectives are unimportant. The only pertinent question is whether the client has been able to exercise his right to choose. Some jurisdictions, like California, have adopted an approach to conflict waivers that places considerations of autonomy at the forefront.[88]

An autonomy-based approach to work-product privilege control and waiver would place the client's interest ahead of the attorney's. The decision of whether to disclose work product is one of many that must be made in legal matters. The lawyer's sole interest should be enabling the client to make a reasoned decision. Selfish or systemic interests are secondary, if relevant at all.

B. Loyalty

A second theory of representation acknowledges the special expertise of lawyers and downplays autonomy by placing some decisions in lawyers' hands. This theory is most clearly embodied in Rule 1.2 of the pre–2002 Model Rules of Professional Conduct,[89] which seems to accord lawyers (rather than clients) the discretion to make tactical decisions.[90] Presumably, a lawyer's superior knowledge calls for legal, rather than lay, decision making on the matter.

Under this theory, however, lawyers typically are still expected to exercise their decision-making authority in a way that maximizes the clients' interests.[91] Loyalty is the key.[92] Lawyers are not supposed to put their interests, or those of third parties, first.[93]

414–15. Similarly, the decision to retain a lawyer on a limited basis can sometimes benefit the client, but in other cases may result in poorer representation than the client could obtain elsewhere. *See* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 946 (1998) (discussing when limited retainer agreements are appropriate).

87. The Model Rules, for example, limit client autonomy to waive conflicts based on the likely effect of a conflict on the representation, even when the decision to waive may be rational. MODEL RULES, *supra* note 29, R. 1.7(a)(2); *see also* Zacharias, *supra* note 5, at 418 (questioning the Model Rule approach).

88. CAL. R. OF PROF'L CONDUCT 3-310(c) (allowing clients to waive all conflicts). *But cf.* Klemm v. Super. Ct., 75 Cal. App. 3d 893, 898 (1977) (creating an exception to Rule 3-310(c)); Zacharias, *supra* note 5, at 425–29 (explaining *Klemm*).

89. MODEL RULES, *supra* note 29, R. 1.2 (pre-2002 version).

90. *See id.* ("a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means that are to be pursued"). The comment to the version of Model Rule 1.2 that was adopted in 2002 is less clear on whether the lawyer controls the means of litigation when an unresolvable conflict in the approaches of the lawyer and client develops. The comment states: "this Rule does not prescribe how . . . disagreements are to be resolved." MODEL RULES, *supra* note 29, R. 1.2 cmt.

91. *See id.*, R. 1.3 cmt. ("A lawyer must also act with commitment and dedication to the interests of the client" though she need not "use offensive tactics" or avoid treating "all persons involved in the legal process with courtesy and respect . . . .").

92. *See, e.g.*, WOLFRAM, *supra* note 15, § 4.1, at 146 ("the client-lawyer relationship in the United States is founded on the lawyer's virtually total loyalty to the client and the client's interests").

93. *See, e.g.*, Fred C. Zacharias, *Reply to Hyman and Silver: Clients Should Not Get Less Than They Deserve*, 11 GEO. J. LEGAL ETHICS 981, 984 (1998) (arguing that attorneys owe clients some fiduciary duties even at the retainer stage of representation).

In the work-product context, this theory would allow a lawyer to decide when waiver is appropriate. She is, after all, more familiar with what the definition of work product includes and whether disclosure is likely to hurt the client's cause. But the loyalty approach would limit the basis upon which the lawyer may exercise decision-making authority—to whether disclosure best serves the client's interests. Moreover, the relevant client interests include autonomy considerations; in other words, the desires of the client and, to the extent that the client sees a benefit in personally exercising decision-making authority, the importance of informing the client and putting the client in a position to participate. The lawyer's own privacy concerns should never be the driving force.

C. Paternalism

A third approach to lawyer and client decision making that is embodied in some aspects of representation is paternalistic.[94] A lawyer may be authorized to make certain decisions because she knows better than the client what is in the client's best interests.[95] This approach, like the loyalty approach, expects lawyers to be mindful of their obligations to serve the client. But it differs in recognizing that the client, even if fully informed and capable of making a decision, may sometimes make poor choices that should be overruled, and sometimes ignored.[96] It also acknowledges the possibility that informing the client of the issues and options can be counter-productive.[97]

In the work-product context, these considerations might be particularly pertinent to situations in which the file contains information not relevant to the representation that might nonetheless poison the attorney-client relationship.[98] A desire by the attorney to withhold such information is not necessarily selfish, because maintaining the relationship will benefit the client. A paternalistic approach would allow the attorney to withhold even if the client insists that he would prefer to know the information the file contains.

94. *See* Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 214–27 (2001) (categorizing professional rules into "autonomy respecting provisions," "moderately paternalistic provisions," and "fully paternalistic provisions").

95. Under the Model Rules, a lawyer is, for example, authorized to make tactical decisions and to make decisions for mentally impaired clients. MODEL RULES, *supra* note 29, Rs. 1.2, 1.14.

96. Thus, for example, lawyers are sometimes expected to decline representation because a conflict of interest may affect the quality of the representation even though the client has been informed and chooses to waive the conflict. *See* Zacharias, *supra* note 5, at 410–16 (discussing rules like Model Rule 1.7).

97. Giving information can be counter-productive for a variety of reasons. It may confuse or mislead the client, cause the client emotional distress, undermine the client's faith in the lawyer (e.g., because the lawyer's explanation reveals that the lawyer correctly has doubts about the solution), or simply allow the client to make a choice that sounds reasonable but that the lawyer knows is poor.

98. This may include, for example, personal impressions that the attorney has formed about the character of the client.

D. Lawyer Protectionism

The three approaches discussed thus far each assume that, whoever makes the decision of whether to disclose work product or waive the work-product privilege, the ultimate decision should be based upon the client's desires or interests. There is an obvious alternative. The lawyer's own interests in nondisclosure might be factored in.

For example, in the tax memorandum scenario described in this article's introduction, if only the client's interests count, the privilege should be waived. Pressing the privilege would delay the litigation and add to the client's costs, without any corresponding potential benefits for the client. That analysis pertains both if the client is allowed to make an autonomous decision or if the lawyer acts for the client emphasizing loyalty or paternalistic superiority. The only justification for allowing the lawyer to refuse disclosure would be that the lawyer herself has privacy, economic, or other ownership interests in the memorandum that she has prepared.

E. Property

A fifth approach, and the one most jurisdictions seem to have adopted, is simply to designate work product as property belonging to the client or the lawyer.[99] Once ownership is classified, it ordinarily is clear who should control waiver decisions: the owner.

A property approach has superficial appeal because, typically, the client has paid for the product.[100] Accordingly, it seems anomalous to suggest that he may be deprived of the fruits of his contract. Thus, the *Restatement* accords the client full authority to overrule lawyers' decisions regarding work product in cases of disagreement.[101]

Yet, as the contrasting California code provision suggests while also adopting a property rule, the mere fact of ownership does not mean that clients always know best when disclosure is appropriate or that lawyers' concerns can never trump the owner's interest in disclosure. By assigning work product ownership to lawyers, the California rule makers essentially concluded that clients' payments entitle them only to competent service, not particular documents that are produced in the process.

99. *Cf.* Charles F. Luce, Jr., *Who Owns the Client File*, http://www.mgovg.com/ethics/9ownfile.htm (last visited Aug. 10, 2005) (arguing that ownership "is not, as it may seem, a rhetorical question, though in the author's opinion it should be").

100. *See* Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647, 650 (N.D. Tex. 1989) (considering attorney's notes to be the client's property because the client has paid for them); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Discus, 824 S.W.2d 92, 96 (Mo. Ct. App. 1992) (applying an end product standard based on the reasoning that that is what the client paid for); Maleski v. Corporate Life Ins. Co., 641 A.2d 1, 6 (Pa. Commw. Ct. 1994) (entitling clients to all files for which they have paid); *cf.* Weiss v. Marcus, 51 Cal. App. 3d 590, 599 (1975) (holding that the determination of who owns work product does not depend on whether the attorney has been paid for his services).

101. RESTATEMENT, *supra* note 1, § 90 cmt. c.

F. Compromise Theories

The five theories described above need not be deemed exclusive. Indeed, throughout the regulation of attorney-client relationships, different approaches have been applied to different decision-making contexts.[102] Moreover, since the broad definition of work product that most American jurisdictions have adopted includes many types of product, it is plausible to anticipate that some considerations might seem more significant with respect to different items.[103]

An approach to control and waiver of privilege might, therefore, acknowledge the interests of both lawyers and clients. Presumably, the end product standard discussed above reflects an attempt by courts to fashion a bright-line rule for when client rights subside in importance[104] and when a lawyer's privacy interests become dominant. Other methods of reconciling the potential conflict are possible.

G. The Connection Between the Theories and Existing Waiver Doctrines

The *Restatement* (and, in part, the federal) approach to waiver comports with the autonomy and loyalty theories. The *Restatement* emphasizes loyalty by providing that a lawyer's decision whether to disclose work product must "protect the client's interests."[105] Yet the *Restatement* also allows a client to overrule a lawyer's decision even when the lawyer has acted loyally.[106] Autonomy considerations apparently become dominant.

Depending on how one interprets the California approach, it can be justified using either paternalistic or protectionist theories. Lawyers seem to direct the waiver decisions. But it is less clear on what basis they may exercise their unilateral decision-making authority. If the theory underlying the California Code is that lawyers are the experts but must decide on the basis of what best serves their clients, then the code is paternalistic in nature. If, in contrast, the California Code means what it actually appears to say, then it protects lawyers' interests directly even when those are inconsistent with client desires or interests. As we have seen, courts and ethics boards have interpreted the California Code in both ways.[107]

Although the *Restatement* and California approaches seem to assert clear principles, ambiguity underlies both. The *Restatement* favors client

102. *See generally* Zacharias, *supra* note 94 (discussing and explaining the professional codes' inconsistent reliance on notions of autonomy, loyalty, and paternalism).

103. That, indeed, may be the reason that the *Restatement* initially differentiated between types of work product. *See supra* text accompanying note 24.

104. In other words, the end product standard adopts a view that clients have only paid for and gained vested rights in material that is made public upon their behalf.

105. RESTATEMENT, *supra* note 1, § 90 cmt. a.

106. *Id.* § 90 cmt. c.

107. *See supra* text accompanying note 65.

interests, but at least refers to opinion work product that implicates dignitary and privacy[108] concerns on the part of attorneys.[109] It also authorizes a lawyer to invoke the privilege "on the basis of [her] independent interest,"[110] at least when she can do so consistently with a client's interests. The California approach, while favoring lawyers, has been interpreted by some courts and ethics committees as being limited by obligations to clients.[111]

This ambiguity suggests that even jurisdictions that impose a one-sided rule may have reason to authorize departures from the rule. The end-product standard that some states have adopted for direct conflicts between lawyers and clients is a form of compromise approach. For the most part, however, states have avoided adopting waiver principles that directly acknowledge that sometimes loyalty and autonomy considerations should govern but that in other instances lawyer protectionism is appropriate.

IV. WHY THE THEORY MATTERS

The issues seem easy when a client has paid for particular work product and wants access to the product (or wishes it disclosed) for his own benefit and for use in the manner that he and the attorney anticipated at the time the product was created. Thus, for example, when a client requests information in a file in order to continue a legal matter (either representing himself or represented by a new attorney), the law in virtually all jurisdictions is clear: the lawyer must turn it over.[112] Any other rule would undermine the implicit contract for the lawyer's services and would prevent clients from efficiently asserting their legal rights whenever they choose to part company with their initial attorney. Allowing a lawyer to consider her own interests ahead of the client would violate fundamental professional principles of loyalty and fiduciary obligations.

108. "Dignitary" interests encompass the interest in avoiding embarrassment or other forms of personal denigration, while "privacy" interests include potentially non-emotional interests in maintaining the security of information from third parties.

109. RESTATEMENT, *supra* note 1, § 87(2).

110. *Id.* § 90 cmt. c.

111. California's professional rules clearly take this position, providing that lawyers must release to the client, at the client's request, "items reasonably necessary to the client's representation." CAL. R. PROF'L CONDUCT 3-700; *accord* COPRAC, *supra* note 67.

112. *See, e.g.*, *In re* Struthers, 877 P.2d 789, 797 (Ariz. 1994) ("Struthers violated [the state's ethical rules] in one instance 'when, after one client terminated his representation, he refused the client and her new attorney access to her file'"); Kallen v. Delug, 157 Cal. App. 3d 940, 950 (1984) (holding it to be a breach of the ethics rules for an Attorney to retain a client's files after discharge and request for those files); *cf.* CAL. R. PROF. CONDUCT 3-700(D)(1) (requiring that, subject to any protective order or non-disclosure agreement, a lawyer shall release to the client all client papers and property whether the client has paid for them or not); *In re* X.Y., 529 N.W.2d 688, 690 (Minn. 1995) (noting that the file belonged to the client and was properly returned to her upon her request).

The issues become more difficult when one or more of the elements just mentioned disappears: for example, when (1) a third party rather than the client seeks the information, (2) the client is indifferent to whether the material is disclosed, (3) the client has not paid for the product, (4) the client wishes to use the product for some (unanticipated) purpose other than to succeed in the initial legal matter, or (5) granting access would injure the client. In these situations, the client interests are different than in the first context. The client may want access simply because of ownership interests or interests in autonomy; in other words, he simply desires to be informed. The client may want to resell the information in the file to a third party. Or the client may want to use, or reuse, the information for his own benefit, but not in a way that the lawyer expected (or agreed to) when she accepted the case.

The lawyer, similarly, may have a variety of interests in controlling disclosure of work product to the client or a third party. The law, for the most part, has deemed one of these interests invalid; namely, the interest in preventing the client from using the information to prove that the lawyer breached her obligations to the client.[113] When a client seeks information for that purpose, he essentially seeks to enforce the initial contract with the lawyer. By requiring disclosure, work-product statutes and judicial decisions essentially are concluding that the demand fits within the category of disclosures that are required because they are part and parcel of the retainer agreement.

The legitimate lawyer interests in directing the waiver decision fit within four basic categories. First, there are client-centered interests. A lawyer may assert control, for example when a third party requests information, because she believes disclosure would not be in the client's best interest. Similarly, she may wish to deny the client access to information in the file that might harm the attorney-client relationship or otherwise inflict psychological injury on the client, even though the information does not have direct bearing on the legal matter itself.

Second, the lawyer may have personal dignitary and privacy interests. She may be embarrassed by the product in the file, either because it reflects weak ideas that she later rejected or because it expresses personal impressions about the client, witnesses, or aspects of the case unrelated to the merits.

Third, the lawyer may wish to protect herself from economic or legal ramifications that might result from disclosure of the information, other than ramifications the client would wish to inflict. The lawyer may

113. *See, e.g.*, Rose v. State Bar of California, 49 Cal. 3d 646, 655 (1989) (reserving the question of whether an attorney is obliged to hand over work product to a former client's attorney in a malpractice action, but stating that "there can be no doubt that the balance of an attorney's litigation file is the property of the client and must be surrendered promptly upon request"); McKim v. State, 528 N.E.2d 484, 485–86 (Ind. Ct. App. 1988) (compelling an attorney to provide the file to a former client seeking to pursue an action against the attorney after losing a criminal trial).

fear that the information will support a lawsuit against her brought by third parties. Or it may support discipline or administrative or criminal investigation. Although clients sometimes have an interest in disclosures that produce these results, they often will be indifferent or even may prefer that the information remain secret.

Fourth, the lawyer may have a property interest in the work produced. She may plan to reuse the product in other cases, as in the tax memorandum scenario.[114] She may have created a form of service that she can sell on the open market. Or she may believe the client is entitled to disclosure, but only once the client has completed his own obligation to complete payment for the work. Whether the lawyer has a colorable right to claim ownership in any of these situations may, of course, depend on the extent to which the client has engaged and paid the lawyer directly for creating all or part of the product.

To make the conflicting interests a bit more concrete, let us consider a few scenarios. Suppose a law firm develops an item that can be reused in other cases. The type of comprehensive research memorandum described above,[115] a computer program that provides a model for client-business plans, wills, or other contractual arrangements,[116] and a duplicable tax-shelter program[117] or model legal opinion[118] are all examples of information that a client's file would include that a lawyer might resist sharing with the client. Under some circumstances, the client will have paid for the creation of the entire information or document, but

114. *Cf.* United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998) (applying the work-product privilege to a 58-page general and specific memorandum analyzing merger law, commissioned by a law firm in anticipation of a merger by a client).

115. *See supra* text accompanying note 1.

116. Lawyers and law firms have always reused legal forms and research memoranda that they have produced in the past. In recent years, changing technology has forced lawyers increasingly to provide clients with specific applications created through reusable general products, such as computerized software and data bases, that the law firm has developed for the express purpose of using it as a model. *Cf.* Justin D. Leonard, *Cyberlawyering and the Small Business: Software Makes Hard Law (But Good Sense)*, 7 J. SMALL & EMERGING BUS. L. 323, 326–27 (2003) (noting competition in "cyberlawyering" by nonlawyer entrepreneurs and encouraging increasing involvement by lawyers in the production and use of "cyberlawyering" software). These innovations include: (1) advanced software programs and forms that assist clients in areas such as marketing, Elizabeth Ann Tursi, *Merging Marketing, Tech, Research; Client Intelligence Software Offers One Stop Service for Gathering, Delivery of Data*, NAT'L L.J., Feb. 2, 2004, at S4; (2) business and patent management, Claudia MacLachlan, *The New Tech Gurus: Large Firms Pay Top Dollar for Computer System Savants*, LEGAL TIMES, Jan. 24, 2000, at 33; (3) tax preparation, Leonard, *supra*, at 332; and (4) structuring businesses, MacLachlan, *supra*, at 33.

117. *See Senate Subcommittee Minority Staff Releases Report on Tax Shelter Industry*, TAX NOTES TODAY, Nov. 19, 2003, at 12, (identifying the practice of lawyers and accountants of "developing a steady supply of generic 'tax products' that can be aggressively marketed to multiple clients"); Richard Lavoie, *Making a List and Checking it Twice: Must Tax Attorneys Divulge Who's Naughty and Nice?*, 38 U.C. DAVIS L. REV. 141, 177 (2004) (discussing attorneys who promote tax shelters); Steven C. Salch, *Big Brother is Watching You! The Proposed Circular 230 Amendments and the New, New Office of Professional Responsibility*, SJO96 ALI-ABA 631, 638–40 (2004) (describing various tax shelter vehicles that depend on lawyer participation).

118. In recurring areas of law, lawyers may prepare a model or form opinion that they can adjust, when necessary, to fit the situations of individual clients.

that will not always be the case. The lawyer might have prepared the item on her own nickel to prepare herself for representing clients in the subject area.[119] The lawyer might have apportioned the time used to prepare the item among multiple clients.[120] Or, the lawyer might not have charged directly for the creation of the item itself, but instead charged indirectly through her hourly rate; in other words, the lawyer might simply have charged the client high fees based upon the benefit the client derives from the lawyer's expertise.[121]

The client has a legally established right to work product that he has purchased; for example, his own tax plan, his own business plan or will, and documents relating to his own tax shelter.[122] In a claim against the lawyer for breach of performance, the client also may have a right to the

119. It is not unusual for lawyers, particularly lawyers starting to practice in a new field of law, to read all of the pertinent cases and produce a memoranda summarizing the law for use in the subsequent representation of multiple clients. Technically, these memoranda and other reusable items may not qualify as classic work product because they have not been created specifically in the course of ongoing or impending litigation. *See, e.g.*, Calabro v. Stone, 225 F.R.D. 96, 100 (E.D.N.Y. 2004) (holding documents were not created in "anticipation of litigation" and therefore not given work-product immunity); *cf.* Thornburg, *supra* note 6, at 1524 (arguing that the "dominant argument for work product focuses on the requirements of the adversarial system"). As a practical matter, however, lawyers may be thinking of potential litigation far in advance of a case being filed and the justifications for protecting their work and thought processes may be equally applicable at the earlier stage. Accordingly, some jurisdictions have broadened the definition of work product. *See, e.g.*, Laguna Beach County Water Dist. v. Super. Ct., 124 Cal. App. 4th 1453, 1463 (2004) (holding that the work-product privilege in California "applies as well to writings prepared by an attorney while acting in a nonlitigation capacity" (quoting County of Los Angeles v. Super. Ct., 82 Cal. App. 4th 819, 833 (2000))); Rumac, Inc. v. Bottomley, 143 Cal. App. 3d 810, 812 (1983) (recognizing a "counselor work product" rule under which material produced for the purposes of giving legal advice is deemed to be work product and concluding that there is "no valid reason to differentiate between the writings reflecting the private thought processes of a lawyer acting on behalf of a client at the beginning of a business deal and the thoughts of a lawyer when that business deal goes sour with resultant litigation"). Others have interpreted the created-for-litigation element expansively to include product "prepared in anticipation of litigation." *See, e.g.*, United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998) (applying work-product privilege to an expert opinion regarding the likely consequences of a merger); *see also* Keara M. O'Donnell, *Expanding Scope of Attorney-Work Product Doctrine:* United States v. Adlman, http://library.lp.findlaw.com/1998/May/1/130443.html (visited Aug. 10, 2005) (discussing the application of the work-product privilege to product created by lawyers for the purpose of giving clients business advice). The better view probably is that, even if the privilege is designed to optimize the "joint production" of information in litigation, *see generally* Allen, *supra* note 7, many forms of legal advice and lawyer preparation are provided with the expectation that litigation might result. *See* Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 THE RECORD 534, 535 (1975) (arguing that "it is not only for [actually] litigated matters that the adversary system constitutes the living ambience"). The justifications for facilitating lawyers' ability to provide legal services without fear that their opinions and mental processes will be revealed in eventual litigation discovery does not depend on temporal limits based on when the product is developed.

120. In other words, a lawyer may assign a value each client received from access to a generally usable product created by the firm and charge each client a portion of the cost of producing the product.

121. The lawyer's expertise, in short, may reflect, in part, her use of or access to the preexisting information, program, or research resource in her possession.

122. A client who has purchased such a product unquestionably is entitled to file it, use it for its intended purpose, or give it to a new lawyer who will follow up on the representation started with the original, product-producing attorney.

relevant underlying material the lawyer used to provide the services.[123] Some clients, however, desire the background research, model, or program for other reasons: to reuse them in the future in other matters without having to pay for legal representation; to market them or sell them to other potential clients of the lawyer; or to provide them to the lawyer's competitors. The lawyer has a claim that the ability to reuse or resell the work product is hers alone.[124] Arguably, in some of the examples, the lawyer may even have a common-law copyright on the material.[125]

The theory on which the right to control disclosure is based determines whether an attorney may appropriately decline to give the client the documents. Under a pure property theory, the result may depend on the language of the retainer agreement and how much of the underlying work the client paid for. A loyalty rationale, even a paternalistic loyalty theory, arguably requires lawyers to sublimate their personal economic interests. Autonomy theory might focus on whether the information in question is relevant to decisions the client has authority to make. Lawyer protectionist theories would give the lawyer more control.

The potential conflicts between lawyer and client can be of a different variety. Suppose that the lawyer has put into writing personal impressions of the client, witnesses, or the merits of the cause of action itself. Or suppose that the file contains tentative research or legal conclusions that the lawyer later rejected, but that in hindsight make the lawyer seem unintelligent or incompetent. If the client learns of these items or they become public, the items can have serious adverse effects: they may embarrass the lawyer, convince the client that the lawyer is not committed to his cause, falsely suggest that the lawyer has failed to perform adequately, or turn other clients, witnesses, or third parties against

123. *See, e.g.*, Lasky, Haas, Cohler & Munter v. Super. Ct., 172 Cal. App. 3d 264, 269 (1985) (requiring disclosure in action against a former attorney of uncommunicated "impressions, conclusions, opinions, legal research and theories").

124. A related situation is one in which the file reflects the lawyer's unique method of prosecuting particular types of cases, which the lawyer would prefer to keep secret. *Cf.* St. Bar of Wis. Prof'l Ethics, Op. E-00-3 (2000), http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_ethics_opinions (holding that hardware and software that a law firm uses to store documents is the property of the law firm, not the client). Arguably, like the reusable resource or reusable product, the lawyer has a proprietary interest in keeping his mode of practice secret, though perhaps one that has a lesser claim to copyright or property law protection. *See, e.g.*, Sporck v. Peil, 759 F.2d 312, 313–15 (3d Cir. 1985) (involving a work-product privilege claim by an attorney that disclosing subpoenaed documents used to prepare a deposition witness would, through the identification of the documents, reveal the attorney's "mental impressions and legal opinions as to how the evidence relates to the issues"). This article would, for the most part, treat the two types of information similarly and would preserve a distinction between potentially proprietary information for which the client has been charged and that which the attorney has contributed informally. A lawyer who wishes to retain tight control over the processes by which she works should be prepared to negotiate with the client regarding control when commencing the representation.

125. *See generally* David Hricik et al., *Save a Little for Me: The Necessity of Naming as Inventors Practitioners Who Conceive of Claimed Subject Matter*, 55 MERCER L. REV. 635 (2004) (arguing that some conceptual additions by a patent lawyer to a client's inventions may require naming the lawyer as an inventor, arguably vesting the lawyer with co-ownership).

the lawyer. These consequences will occur whether or not the lawyer ultimately believes or relies upon the conclusions that the file documents. Their mere disclosure can embarrass the lawyer or otherwise undermine her relationships with persons to whom the internal documents refer.

The potential adverse consequences for clients are less relevant under an autonomy approach to work-product waiver than, say, under a client-loyalty approach. The autonomy theory suggests that even if disclosing the embarrassing product ultimately would undermine the attorney-client relationship, the client has a right to know.[126] It is up to the client to decide how much credence, or emphasis, to place on the information in deciding whether the lawyer's performance has been appropriate or competent. Loyalty reasoning, in contrast, would allow the lawyer to preempt the client's information-gathering and decision-making authority, to make for the client the decision of whether disclosure is in the client's interest. A protectionist theory might recognize that the lawyer's independent interests in avoiding subsequent consequences trump the client's right to know.[127]

The issues become even more complicated when one factors in situations in which third parties seek disclosure and the lawyer and client either disagree about whether disclosure is beneficial or one of the two is indifferent about the outcome. Consider some cases in which a third party wants disclosure of the lawyer's product to use against the client, but not in a way that the law takes into account in determining the substantive work-product issue.[128] The third party may, for example, want to obtain information that he can subsequently use against the client in a separate case against the client in which the lawyer is not involved.[129] The third party may wish to obtain critical comments by the lawyer in

126. Of course, the lawyer may suggest to the client that he should not insist upon disclosure.

127. One other category of situations involving potential disagreements between lawyer and client arise when the client seeks the lawyer's product because it will benefit the client in litigation against another client of the lawyer. This issue, however, is better conceived as one in which a conflict between clients has developed. The *Restatement*, in discussing waiver issues, does suggest that lawyers sometimes may refuse to disclose information to clients because of superior "obligations to third parties," but the *Restatement* does not explain how such conflicts should be resolved. RESTATEMENT, *supra* note 1, § 46 cmt. c; *cf.* Metro-Goldwyn-Mayer, Inc v. Super. Ct., 25 Cal. App. 4th 242, 249 (1994) (holding that a former corporate client suing its own majority shareholders over a merger that left the corporation bankrupt is entitled to disclosure of work product pertaining to the merger from his former attorney now representing the majority shareholders in an unrelated matter).

128. In other words, assume that the third party would not be entitled to the item under standard work-product law without a waiver, but nonetheless asks the lawyer and/or client to disclose the material to him.

129. Consider, for example, these possibilities: (1) a lawyer who represented an insured person in an accident case is asked for work product by the insurance company, for use in separate litigation involving the client's insurability; (2) a trust beneficiary seeks access to the file of the lawyer who formerly represented the trustee, for use in a potential breach of fiduciary duty cause of action against the trustee; and (3) a grand jury investigating a criminal defendant seeks the file of defendant's former counsel in a separate case. All of these examples involve work product that was not created for purposes of litigation against the third party, but which nonetheless may benefit the third party.

order to embarrass the client[130] or to obtain proprietary information that the third party can use to compete commercially.

Under a property or lawyer protectionist approach, a lawyer who truly does not care whether the third party gains access arguably can waive the work-product privilege.[131] Autonomy and loyalty approaches would either place control in the client's hands or require the lawyer to exercise her judgment so as to protect the client's interests.

As a practical matter, a lawyer in most of these situations will not act contrary to his client's interests even if authorized to do so—because that would be bad for business, separate confidentiality principles preclude disclosure, or her professional sense of loyalty to the client pushes the lawyer in the direction of maintaining the work-product privilege. There are situations, however, in which the client is not in a position to make his own view known and in which the lawyer therefore may be inclined to emphasize her own interests.[132] Similarly, in cases in which the third party (e.g., the government) seeks the information for use against a separate third person or in a criminal case, the lawyer's imperative to heed the client's wishes also may decrease.

In the parallel type of case, in which a third party wishes to use the product to the lawyer's disadvantage and the client has no personal inclination on the question of whether to waive the privilege, it is easy to envision the development of a true conflict. Suppose, for example, bad feelings develop in matrimonial litigation between the lawyer and the opposing client. The opposing client seeks work product that he might be able to use against the lawyer in a lawsuit against him (for example, for abuse of process or intentional infliction of emotional distress). Or suppose, in cases like the tax memorandum scenario, the opposing attorney wants the product in order to use it himself. Here, the client at best is indifferent to the third-party request that the work-product privilege be waived, and at worst would be inclined to accede to the request simply in order to avoid the cost and delay of opposing a discovery motion.

Again, the theory underlying the waiver doctrine determines the appropriate outcome. If the waiver is designed to protect the lawyer or to safeguard property rights, the lawyer may sometimes be able to put his

130. For example, a newspaper may be interested in obtaining information about a public figure (e.g., Michael Jackson) that the lawyer's work product may contain, even if the newspaper does not need the information for the litigation in which it is involved.

131. One important caveat bears mention here. Although the law of privilege might allow a lawyer to waive particular material, that does not absolve her of the obligation to consider whether principles of attorney-client confidentiality or loyalty to the client still apply and override her right to disclose. *See infra* text accompanying note 182 (discussing loyalty and confidentiality requirements in the context of a proposed model statute governing control and waiver of work product).

132. For example, the lawyer for a deceased party may wish to protect work product against heirs, or potential heirs, who seek the information. *E.g.*, Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Discus, 824 S.W.2d 92 (Mo. Ct. App. 1992). Or, in instances in which a receiver or bankruptcy trustee has succeeded the original client in interest, the original client may no longer be in a position to make decisions about the case.

own interests first. If, on the other hand, client autonomy or loyalty govern, the lawyer's interests must give way.

V. A PROPOSED APPROACH

The existing work-product and work-product waiver doctrines do not make fine distinctions. They appear to be based simply on a property approach—either the lawyer or the client "owns" work product and, accordingly, the decision of whether a particular piece of work product should be waived always belongs to that person as well. Thus, according to the *Restatement*, in cases of disagreement, the client's view always controls.[133] Under provisions like the California code, lawyers get to make the decision.[134]

As we have also seen, however, these approaches are too inflexible. In some of the scenarios we have discussed, the party excluded from decision-making control often has a strong normative argument for participation in the decision. Accordingly, states employing rigid rules typically have bent them in individual cases.[135] Nevertheless, these jurisdictions have never adopted, or been willing to recognize the need for, a theoretical approach that takes into account the countervailing interests. Instead, in order to manufacture flexibility, they have tended either to misstate the law[136] or to assert other ethical or code provisions that they insist trump the ordinary work-product principle.[137]

Consider, for example, a recent ethics opinion by the San Diego County Bar Association that addressed the lawyer's responsibility to dis-

133. *See supra* text accompanying note 57.

134. *See supra* text accompanying note 68.

135. *See infra* notes 136–37.

136. Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347 (N.Y. Sup. Ct. 1995) (explaining that in a client's action against a former attorney, the attorney had no possessory rights in the former client's file and the attorney may not retain the files by asserting Fifth Amendment privileges, despite New York law to the contrary); *cf.* Allen, *supra* note 76, at 1062–63 (noting that "opinions of the Ethics Committee have previously been based upon an erroneous legal proposition concluding global proprietary file ownership by the client").

137. *See, e.g.*, COPRAC, *supra* note 67 (finding as an ethics matter that, despite California's statutory designation of the work-product privilege as belonging to the attorney, "the attorney must provide the client with items generated during the representation so that the client does not have to hire new counsel to regenerate these same items," including the attorney's impressions, conclusions, opinions, legal research, and legal theories); Eddy v. Fields, 121 Cal. App. 4th 1543, 1549–50 (2004) (citing "equity" as the reason why an attorney was held to have waived the work-product privilege with respect to a client); Metro-Goldwyn-Mayer, Inc. v. Super. Ct., 25 Cal. App. 4th 242, 249 (1994) (holding an attorney's use of work product was "not conscionable" and therefore deemed the privilege to have been waived); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92, 98 (Mo. Ct. App. 1992) (stating that the attorney's duty to disclose the entire file to the client is "created by the ethical imperatives of the practice of law, and it may even have a counterpart in a legal duty. But, the client's correlative right to the attorney's performance of his ethical duty need not be and is not a property right."); *cf.* Roberts v. Heim, 123 F.R.D. 614, 634 (N.D. Cal. 1988) ("California now has two 'absolutes' which appear to be in irreconcilable conflict with each other. The first 'absolute' pertains to the attorney work-product privilege with respect to his impressions, conclusions, opinions, or legal research or theories. The second 'absolute' is the client's right to the attorney's work product when he demands his files from his attorney.").

close potentially privileged work product when both she and the client are sued for malicious prosecution relating to prior litigation and the client has asserted an "advice of counsel" defense.[138] Disclosure would benefit the client, but might subject the attorney to liability. Under California privilege law, as we have seen, the attorney is the holder of the privilege. Yet the Ethics Committee cited the conflicting *Restatement* provisions and "long-standing federal practice" to support the conclusion that the lawyer has an independent ethical duty to put the client's interests ahead of her own.[139]

Opinions such as these are flawed in simply assuming that ethics rules trump statutory provisions or other rules that directly assign the right to control work product to lawyers.[140] The opinions nonetheless are important in pointing out that the statutory provisions or rules themselves paint with too broad a brush. To avoid misleading lawyers, clients, and courts, work-product privilege standards should take into account, or incorporate, professional responsibilities of attorneys. They also should confront realistically the values that the various waiver theories seek to protect.

This article therefore proposes an approach to work product that incorporates the best aspects of each waiver theory described above.[141] The decision of who controls decisions regarding disclosure probably should depend upon the context in which the issue arises. It also should vary with different portions of the body of work the lawyer has produced. Although this article recognizes that states can reasonably disagree about some aspects of work-product privilege, general principles on which most states agree should produce significant commonalities in control and waiver doctrines.

First, all jurisdictions should be willing to recognize the overriding principle of lawyer responsibility upon which the San Diego ethics opinion relies.[142] Whatever the personal rights of lawyers may be under work-product rules, they must be exercised with a view to the lawyer's

138. San Diego County Bar Ass'n Legal Ethics Comm., Op. 2004-01 (2004), *supra* note 67.

139. *Id.*

140. The opinion relies upon the lawyer's ethical duties of loyalty, to provide access to the client's file in antagonistic litigation, and to communicate with clients and concludes:

> The Federal law and the Restatement reflect the appropriate deference to the proposition that an attorney's absolute duty of loyalty to his or her client by subordinating the attorney's interest in work-product to the client's needs [sic]. Older California case law interpreting "absolute" work-product protection as solely for the benefit of the attorney does not sufficiently consider the contrary and superceding duties owed by the attorney to the client.

Id.

141. Brian Slovut has proposed a statutory approach for the limited situation in which the attorney-client relationship has been terminated. Slovut, *supra* note 71. Slovut would designate specific documents as mandatorily disclosable to clients. *Id.* at 1508–09. Although Slovut's approach, like this article's, makes finer distinctions than traditional work-product waiver principles, it attempts to do so through formal bright-line rules. This article, in contrast, proposes a theoretical approach to categorizing work product that reconciles competing interests in light of the underlying goals of the privilege and control and waiver doctrine.

142. San Diego County Bar Ass'n Legal Ethics Comm., Op. 2004-01 (2004), *supra* note 67.

obligations of loyalty, including the duty to keep secret information relating to the representation[143] when the client wishes her to do so.[144] This suggests that terms of work-product provisions that seem to vest absolute rights in attorneys, like California's, underestimate (at least publicly) lawyers' obligation to restrain the exercise of their rights. Under any legitimate understanding of waiver authority, lawyers ordinarily should not be permitted to use or disclose information against their clients' interests.

In contrast, although client autonomy is a significant value that the law recognizes in many contexts,[145] it rarely has been perceived as an absolute value.[146] Ethics codes, for example, typically place control of tactical decisions during litigation in the hands of lawyers rather than clients.[147] Moreover, in those limited areas in which a lawyer has personal rights that allow her to deal with the client largely at arm's length—for example, in arranging fees, deciding whether to accept representation, and deciding whether to withdraw—her obligation to enhance the client's ability to make decisions ordinarily has been set aside.[148] For similar reasons, respect for client autonomy does not automatically require that all work-product waiver decisions be subject to clients' control. Statements to the contrary simply overemphasize the autonomy principle.

When one analyzes the work-product issues more specifically, autonomy considerations are relevant mainly in a single situation: when a loyal attorney does not want to give the client work product because she fears the client will misunderstand its significance or unduly rely on the information in a way that will undermine the attorney-client relationship. Autonomy notions suggest that this determination should be the clients to make. Consistent with autonomy reasoning, the assessment of a client who construes a lawyer's contribution to the file as illustrating a lack of loyalty or esteem on the part of the lawyer, or as reflecting incompetence, can be more accurate than the attorney's.

143. This is the typical view of the contours of protected attorney-client confidences. *See, e.g.*, MODEL RULES, *supra* note 29, R. 1.6(a) (defining protectable confidential information as including all "information relating to the representation").

144. *Cf.* Slovut, *supra* note 71, at 1498–50 (relying upon a lawyer's "duty as fiduciary" to disclose documents to the client that contain material facts).

145. *See generally* Zacharias, *supra* note 94 (discussing the emphasis on autonomy throughout the professional codes).

146. *See id.* at 227–33 (citing code provisions that limit client autonomy). Perhaps the strongest proponents of heavy reliance on autonomy are Monroe Freedman and Stephen Pepper. *E.g.*, MONROE H. FREEEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 58–61 (3d ed. 2004); Pepper, *supra* note 84, at 630–33.

147. *See supra* note 90 (discussing the pre-2002 and post-2002 versions of Model Rule 1.2).

148. Most observers assume that the lawyer may deal with the client at arms' length in negotiating over fees and whether to accept the representation. There is, however, a viable argument that lawyers owe clients a limited fiduciary obligation to act in their interests, or at least to avoid acting against their interests, even at the retainer stage of the representation. *See, e.g.*, Zacharias, *supra* note 86, at 946–49 (suggesting lawyers' obligations to prospective clients); *see also* Zacharias, *supra* note 5, at 433 n.138 ("the lawyer's obligation to prioritize her client's interests over her own extends to the retainer stage of the representation").

In the end, the argument that a lawyer should be able to impose her own decision to withhold potentially embarrassing or misleading information depends on two empirical questions. First, in a particular case, is the client in a position to know or understand whether learning the information alone may damage his position? In other words, even if the client theoretically should be allowed to evaluate the importance of the work product for the purpose of making subsequent decisions, is he likely to be damaged by learning of the information even if he ultimately agrees with the lawyer's evaluation of the product? Second, in cases involving informal lawyer contributions to files more generally, can society make a judgment whether clients are more likely to be injured by disclosure of the product than they are to benefit from being able to make subsequent autonomous decisions regarding the product?

To the extent a jurisdiction wishes to rely upon a paternalistic rationale—under which lawyers may make waiver decisions without any regard to client autonomy—it is important that the grant of authority be confined to situations in which clients truly are likely to be injured by disclosure. In other areas of representation, the reasons to hide information from clients—not to ask the client if he really wants to know—have been severely limited in recognition of autonomy's benefits.[149] There appears to be no justification for work-product rules to depart from that general approach.

This brings us to the most difficult issue: how should states approach work product when lawyers have their own interests in controlling disclosure? Potentially valid interests exist, ranging from proprietary/property interests, to privacy interests in preserving the secrecy of their own impressions and thoughts, to dignitary interests in hiding embarrassing information that indeed the client might have paid for and that is potentially germane to the representation.[150] It is important for work-product control and waiver rules to differentiate among these interests, because different considerations apply to each.

Consider, for example, potentially proprietary information that both the lawyer and client might want to reuse or sell. Initially, a property analysis seems appropriate: if the client paid for the information and its production was anticipated as part of the retainer agreement, then authority over the information is properly allocated to the client. Moreover, because the lawyer is in the better position to anticipate the types of product she will use or produce and is also in better position to draft provisions in the retainer agreement that anticipate disagreements over

149. Under Model Rule 1.14, for example, a lawyer may withhold information from, or make decisions for, a client who suffers from a disability that prevents or would interfere with autonomous decision making. MODEL RULES, *supra* note 29, R. 1.14 (allowing the lawyer to take "reasonably necessary protective action"). However, that authority is limited in time and scope, until the client recovers or the lawyer is able to arrange for decision making by the court or a third-party guardian ad litem. *Id.* cmt.

150. *See supra* text accompanying notes 98–99.

which products the client has purchased, it seems fair to construe ambiguity about proprietary information in client's favor.[151] In other words, it makes sense to assign the client authority over all products that he has paid for in whole or large part, subject to the ability of the client and lawyer to bargain over control.

It is important to note why contractual notions should govern this issue, particularly with respect to original work by the attorney.[152] In the absence of some reason to transfer ownership of the product, ownership may belong to the attorney under common-law property notions and, more importantly, federal copyright law.[153] To the extent state law governing work product overrules the initial ownership assignment, it may conflict with prior law and be invalid.[154] If, on the other hand, the lawyer and client have bargained over ownership, expressly or implicitly, the transfer of control to the client is justified.[155]

What, then, of potentially proprietary work product for which the lawyer has not charged the client directly. The fact that a lawyer consults a resource, such as the tax memorandum, does not mean that the client has purchased it any more than the client has purchased resources produced by third parties (e.g., treatises, case reporters, and law review articles). Nor does the fact that the client has paid a high fee for the lawyer's expertise, which may be based in part on his possession of a unique resource, mean that the expertise itself is transferred to the client. Indeed, clients pay differing fees to lawyers with different expertise all the time. Unless the client can establish that the retainer anticipated or incorporated the sale of the asset, the ownership considerations described above call for a presumption that original proprietary information belongs to the attorney.[156]

151. *Cf.* Slovut, *supra* note 71, at 1507 (declining to "address ownership questions in a retainer agreement" because "many attorneys do not use retainer agreements").

152. Such as the tax memorandum or reusable program discussed above.

153. *See* Leonard DuBoff, *Client Files, Revisited: Copyright Protection and Ownership Might Not Be What You Think*, http://www.osbar.org/publications/bulletin/01apr/managingyourpractice.htm (arguing that lawyers have a copyright interest in their "original work of authorship").

154. In other words, a privilege statute that by fiat takes from the lawyer control of property that belongs to the attorney under federal copyright law might be preempted by the federal law. *See id.* (arguing that lawyers are independent contractors rather than employees and, as such, retain ownership of legal work they produce for the client); *see also* Stanley F. Birch, Jr., *Copyright Protection for Attorney Work Product: Practical and Ethical Considerations*, 10 INTELL. PROP. L. 255, 260 (2003) (arguing that the client's interest in work product does not extend to the underlying intellectual property right).

155. *See, e.g.*, Easterbrook, *supra* note 18, at 356 (comparing an evidentiary privilege to a property right "to withhold information unless the adversary makes a concession (pays a price) worth enough to induce the privilege holder to waive (sell) his rights").

156. This analysis may sometimes give rise to a factual issue concerning the expectations of the lawyer and client at the commencement of the representation. Presumably, to the extent work-product law presumes that the lawyer and client did not anticipate a transfer of ownership, the client should have a right to rebut the presumption and show that, under the totality of the circumstances, it is reasonable to conclude that the lawyer in fact sold her rights to the material.

When the lawyer has apportioned the cost of creating a resource or background product (like the tax memorandum) among multiple clients, one might decide control issues simply on the basis of who has the greatest investment in the material. Several considerations, however, militate in favor of vesting control in the lawyer. First, the predominant investment approach may create a conflict of interest among clients.[157] Second, the very fact of the cost apportionment suggests that what the clients actually sought to purchase was the end product, or service, for which the shared resource was used. Third, as a practical matter, establishing the relative ownership and economic interests of the multiple clients often will be difficult, particularly when the clients have paid for their representation on different bases.[158] Therefore, unless a particular client has a special justification for claiming personal ownership,[159] control over the resource ordinarily should remain with the lawyer.

Issues relating to lawyers' privacy and dignitary interests in work product cannot be resolved with the same reference to property and copyright law. For the most part, when a lawyer commits thoughts to the file, the client has compensated her for that service. The client therefore usually owns the resulting document. Any justification for withholding the document from the client must be based not on a property rationale, but rather on loyalty or paternalistic reasoning that disclosure truly would harm the client.

What, though, if the lawyer claims she did not charge the client for the product? For example, suppose the lawyer on her own time added a memorandum to the file expressing doubts about the character of his client or a witness or about the conduct of another attorney involved in the case. She does this, in part, to create a record in the event that her own conduct is subsequently questioned.[160]

If this information is not directly pertinent to the success or failure of the legal matter, the client's claim to such information seems limited. The client could not force the lawyer to orally disclose her personal impressions on unrelated matters. The product, as defined, is not an inte-

157. In other words, if more than one client claims the predominant ownership interest, the lawyer inevitably must side with one against the other in making the determination. Moreover, in discussing the relative ownership interests with the multiple clients, the lawyer risks breaching confidentiality because information relating to each of their representations should not be shared.

158. Thus, for example, a client being represented on a contingency or pro bono basis may not be able to establish his investment in the product in the same way as a client who has paid the attorney an hourly fee. Similarly, clients who pay different hourly rates may both claim that they have paid fully for the product.

159. For example, because of particular provisions in the retainer agreement or a special understanding that was reached between the lawyer and client.

160. A similar issue may arise when a lawyer consults a law firm's in-house counsel concerning an ethical issue involved in the case. Who controls disclosure of the resulting material or information—be it pursuant to work product, attorney-client, or some other privilege—may depend at least in part on whether the client is charged for the consultation. *See generally* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1724 (2005) (arguing "for broad protection of communication with law firm in-house counsel" against mandatory disclosure to clients).

gral part of the representation. While it may be relevant to some decisions the client might be authorized to make—including whether to continue retaining this attorney—the underlying rationale for the work-product privilege suggests that there are some types of product that the lawyer should be able to create free from the risk of disclosure.[161]

The more difficult issue arises with respect to private impressions for which the attorney did not charge the client but which are directly relevant to the litigation. Suppose, for example, that the attorney produces a post-deposition memorandum in which she evaluates the potential quality of the client and related persons as witnesses and, in that memorandum makes disparaging remarks about some of them. When the client subsequently dismisses the attorney and seeks the file for use in the same matter with the help of another attorney, must the lawyer include the disparaging memo that she had intended simply as a private reminder for future events?

Many ethics codes take a clear position on this subject. They mostly conclude that, when information is needed by a client in order to fully represent himself, loyalty considerations militate in favor of disclosure.[162] Indeed, some jurisdictions require lawyers to create materials, including personal impressions about the case, that the client might need in order to proceed.[163]

161. *See e.g.*, Upjohn Co. v. U.S. 449 United States 383, 400 (1981) (holding that "mental impressions, conclusions, opinions or legal theories of an attorney" have special protection from disclosure); Hickman v. Taylor, 329 U.S. 495, 510 (1947) (describing the public policy behind the work-product privilege as protecting against "unwarranted inquiries" into the files and mental impressions of attorneys); Vardon Golf Co. v. BBMG Golf Ltd., 156 F.R.D. 641, 646 (N.D. Ill. 1994) (recognizing an absolute privilege for mental impressions of an attorney); *see also* Slovut, *supra* note 71, at 1498 (arguing in favor of an end product standard that does not chill lawyer creativity because it allows lawyers to dare to commit potentially damaging impressions to paper).

162. *See, e.g.*, CAL. R. PROF'L CONDUCT 3-700(D)(1) (requiring a lawyer, upon the termination of a representation and at the request of the client, to turn over to his client all documents reasonably related to the former representation); MO. S. CT. R. OF PROF'L CONDUCT 1.16(b); WASH. R. OF PROF'L CONDUCT 1.15(b), (d) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client . . . ." "[A] lawyer shall take steps . . . to protect a client's interests, such as . . . surrendering . . . information to which the client is entitled"). *But cf.* Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92, 97–98 (Mo. Ct. App. 1992) (holding that a former client has the right to documents for which he paid as well as documents that need to be filed, but documents that are part of the process of arriving at the documents to which the former client is entitled are not the property of the former client); Fed. Land Bank of Jackson in Receivership v. Fed. Intermediate Credit Bank of Jackson, 127 F.R.D. 473, 480 (S.D. Miss. 1989) *rev'd on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989) (requiring production of work product consisting of final reports gathered by the attorney for the representation, but allowing the attorney to retain all other preliminary documents and internal memoranda).

163. *See* COPRAC, *supra* note 67 (noting that California law requires a former attorney to hand over everything in the file reasonably necessary to continue the client's case including personal impressions, and stating that "[w]here the need arises for successor counsel to learn matters that have not been reduced to writing, the original attorney should provide this information to the client and to successor counsel . . . .").

Other jurisdictions attempt to resolve such issues through inflexible application of an end product or whole file standard.[164] These rule-based approaches fail adequately to consider and balance the reasons why disclosure sometimes should be mandated and the reasons why the lawyer sometimes should be able to produce personally helpful materials without fear of embarrassing disclosure. Although the provisions of ethics codes can go too far in emphasizing loyalty,[165] the basic principle underlying the approach of the codes is sound: unless the lawyer, who is in the best position to know, can establish that the information will not be useful for the client's future representation in the matter, she should owe a duty to disclose.

The above analysis suggests that a model statute governing control of work product should acknowledge that different considerations apply to different categories of work product. When information in the file is needed to further a client's case, now or in the future, loyalty and autonomy concerns seem most important. When the information is not needed for the representation and is potentially harmful to the client, loyalty considerations remain important but a statute should balance the benefits of paternalism and autonomy, based in part on an assessment of the likelihood that harm to the client will result from disclosure. The lawmakers, however, also must consider the detrimental effect of a disclosure rule on lawyers' ability to represent clients effectively and the likelihood of tactical abuses of a rule that requires disclosure to third parties. With respect to some categories of work product, a property approach makes sense, yet it is important for a statute that relies on this rationale to delineate carefully among different types of work product. And, when factual premises underlie a statute's determination that a particular approach should dominate, the statute should resolve whether and how the presumptions in the statute can be challenged in an appropriate case.

164. *See supra* text accompanying note 69; *see also* Ill. St. Bar Ass'n Advisory Opinion on Prof'l Conduct, Op. 94-13, 1995 WL 874715, at *5 (1995) ("documents such as the lawyer's personal research, drafts and notes of interviews, which reflect the candid, rough and blemished private thoughts of the lawyer are the tools of the lawyer's trade to which the client has no entitlement"); Ariz. St. Bar Comm. on Rules of Prof'l Conduct, Op. 92-1, 3–4 (1992) (summarizing prior Ethics Opinions, stating that an attorney must turn over the entire file, but noting an exception for the attorney's personal thoughts about the case and strategy); Estate of Johnson, 538 N.Y.S.2d 173, 173–74 (N.Y. Sur. Ct. 1989) (holding categorically that work product containing the opinions, reflections, and thought processes of lawyers is not discoverable by a former client, but that evidentiary materials to be used in subsequent litigation are discoverable).

165. CAL. R. PROF'L CONDUCT 3-700(D)(1) (requiring disclosure of all client papers and property upon the termination of a representation and at the request of the client); *accord* Cal. St. Bar Comm. on Prof'l Responsibility and Conduct, Ethics Op. 1992-127, 1992 WL 166235, at *1 (1992) (finding that an attorney must turn over all papers and property in the client's file to the client or to successor counsel).

VI. A MODEL STATUTE

Assume that a state adopts a generic definition of work product[166] and work-product privilege,[167] along the lines of the *Restatement*. Let us also assume that state law provides for particular substantive exceptions to the privilege and makes its own determination of when the needs of judicial administration require the disclosure of work product even when the privilege applies.[168] How might a state write a statute specifically governing control or waiver of work product that implements this article's analysis?

The first step would be to differentiate among discrete categories of product and to distinguish between work the client has purchased and that which less clearly belongs to the client. This might best be accomplished through a definitional section, as follows:

A. DEFINITIONS

1. "End product" refers to documents that are filed in court or published to third parties in connection with ongoing or anticipated litigation.

2. "Intermediate case-specific work product" refers to research memoranda and other written material created by an attorney on behalf of the client for the creation of which the client has been charged.

3. "Background work product" refers to general material created by an attorney and used as background information or as a resource that is helpful in producing or developing other documents specific to the representation and in providing legal representation to the client. This material may include product for the creation of which the client has been charged, not been charged, or charged in part.

4. "Observational work product" refers to personal notes, mental impressions, and opinions of an attorney about matters relating to the case. Observational work product can concern matters directly relevant to the representation of the client or matters tangential to the representation. It may also include

166. Section 87(1) of the *Restatement* provides: "Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation." RESTATEMENT, *supra* note 1, § 87(1).

167. Section 87(3) of the *Restatement* provides: "Except for material which by applicable law is not so protected, work product is immune from discovery or other compelled disclosure to the extent stated [below]." *Id.* § 87(3). Sections 88 and 89 then state the basic proposition that "[w]hen work product protection is invoked . . . work product is immune from discovery or other compelled disclosure unless an exception . . . applies . . . ." *Id.* §§ 88–89 (citations omitted).

168. *See, e.g.*, *id.* § 88(1)–(2) (providing for disclosure when a litigant "has a substantial need for the material in order to prepare for trial; and . . . is unable without undue hardship to obtain the substantial equivalent of the material by other means").

> product for the creation of which the client has been charged, not been charged, or charged in part.
>
> 5. "Contested work product" refers to work product contained in the attorney's file that is relevant to ongoing or anticipated litigation between the client and attorney concerning the attorney's alleged failure of performance in the representation during which the attorney created the product.
>
> 6. "Product for the creation of which the client has been charged" refers to items for which an attorney has billed, or intends to bill, or at the time of creation intended to bill the client and for which billing is reasonably anticipated under the terms of the representation.[169] In cases in which the lawyer is representing the client on a *pro bono* or contingency basis, "product for the creation of which the client has been charged" refers to items for the creation of which the attorney would have billed a paying client.

These definitions, including the caveats at the end of definitions (3)–(5), identify nine separate (but sometimes overlapping) categories of work product that a model control and waiver rule should distinguish. Some of these categories align with traditional approaches. End product (i.e., section A(1)) and contested work product (i.e., section A(5)) are categories that clients always have been able to control, because they consist of public documents or documents necessary to litigation between the client and lawyer. Sections A(2) and A(3) distinguish between items that the client has expressly or implicitly commissioned the lawyer to create and items in which the lawyer sometimes might claim a proprietary interest. Observational work product (i.e., section A(4)) consists of informal observations a lawyer might commit to writing that, as discussed earlier, the lawyer might prefer to keep secret out of fear that it will harm the client or the attorney-client relationship or will prove personally embarrassing.

The substance of the model rule should address cases in which the client seeks copies of or access to the work product from the lawyer separately from cases in which a third party seeks disclosure (with or without the client's consent). So, let us analyze the direct demand first. Consider this proposal regarding work product that is relevant to litigation or potential litigation between the client and lawyer:

> B. When a client requests his or her attorney to disclose work product to the client,
>
> 1. In litigation or anticipation of litigation between the attorney and client:

169. This article and the proposed model statute do not address the separate issue of whether lawyers should be able to withhold work product for which the client has been charged but for which the client has not paid. *See generally* John Leubsdorf, *Against Lawyer Retaining Liens*, 72 FORDHAM L. REV. 849 (2004) (analyzing whether attorneys' liens on client files are appropriate).

> (a) The attorney must disclose
>
> (i) work product that is required to be disclosed under evidentiary law or court order;
>
> (ii) contested work product;
>
> (iii) all other work product except as provided in section B(1)(b).
>
> (b) The attorney may decline to disclose background work product that is not also contested work product and for which the client has not been charged.
>
> (c) When the attorney discloses background work product pursuant to this section, the attorney shall clearly identify the material as potentially non-transferable and
>
> (i) if the disclosed material includes items for which the client has not been charged, the client may only use those items for purposes of the litigation and may not publish those items to third persons except insofar as is necessary for the litigation;
>
> (ii) if the disclosed material includes items for which the client has been charged only in part, the client may only use those items for purposes of the litigation and may not publish those items to third persons except insofar as is necessary for the litigation unless a court first determines that the client is entitled to publish the items to third persons.[170]

In most jurisdictions, a lawyer may never use the work product as a shield against discovery in litigation against the client involving the lawyer's performance.[171] Section B(1)(a)(ii) reaffirms that principle in large measure. The subsequent subsections, however, create an exception for the disclosure and use of certain materials that the lawyer can claim as proprietary information.[172] When the client has been charged for the material, in whole or in part, he is entitled to access. In contrast, under B(1)(b), the lawyer may withhold this category of information if the client has not been charged unless it is directly germane to the attorney-client litigation.[173] If the client receives proprietary information because

170. When there is a dispute in the context of litigation regarding the contents of particular work product, *in camera* review is an appropriate and efficient way of resolving the conflict. *See* State Comp. Ins. Fund v. Super. Ct., 91 Cal. App. 4th 1080, 1089–90 (2001) (approving the use of *in camera* review to evaluate whether particular material is covered by the work-product privilege). If a court is not yet involved because the request for disclosure is still informal, though in anticipation of litigation, *in camera* review may become an appropriate means of resolving the work-product dispute once litigation is filed.

171. *See supra* text accompanying notes 40 and 115.

172. *See supra* text accompanying note 99.

173. One court that adopted this approach reasoned that clients, as a general matter, only have a right to products and services for which they pay but that clients also have a limited right of access to additional information likely to aid them in understanding the products and services. Corrigan v.

it is germane or because he has been partly charged, B(1)(c) balances loyalty and autonomy considerations against the lawyer's economic interests. It does so by subdividing the rights to the product—in effect granting a license to the client. Section B(1)(c) protects the lawyer's interests in proprietary material for which the client has not been charged by limiting the client's use of the information; the client may not transfer or publish it.[174] In the grey area, in which the client has been charged in part and ownership therefore is contested, the model provision limits transfer and publication until a court can decide the ownership issue.

It is important to note that this section of the proposed rule does not provide a lawyer with an opportunity to shield potentially harmful or embarrassing observational work product from the client. That is so for several reasons. First, most of the lawyer's observations will, in fact, be relevant to claims regarding the lawyer's performance, so the lawyer's potential interest in avoiding embarrassment must be set aside for practical reasons.[175] Second, in the context of antagonistic litigation, one cannot count on the lawyer to act loyally to the client with respect to information that might damage the lawyer. A loyalty-based approach, including a paternalistic approach,[176] would therefore not be suitable. Third, in this context, client autonomy in evaluating the lawyer's observations deserves more respect, especially if the client is represented in the second litigation by a different lawyer who can explain the significance of the material to the client objectively. Fourth, to the extent the fear of damaging the attorney-client relationship is the key to approaches that might give the lawyers control over observational materials, once litigation is imminent the relationship has already deteriorated beyond repair.

Jurisdictions implementing this model provision might reasonably substitute an alternative approach with respect to observational work product that a lawyer wishes to withhold because it might expose her to embarrassment or other consequences at the hands of third parties, but not the client. Distinguishing such material would be consistent with the notion of protecting the lawyer's dignitary and privacy interests while still safeguarding client interests. It also would fit the rationale for work-product privilege that seeks to promote the willingness of lawyers to commit thoughts to paper without fear of their revelation to third par-

Armstrong, Teasdale, Schlafly, Davis & Discus, 824 S.W.2d 92, 98 (Mo. Ct. App. 1992); *cf.* Weiss v. Marcus, 51 Cal. App. 3d 590, 599 (1975) (holding, based on a Los Angeles County Bar ethics opinion, that the work-product privilege is the client's regardless of whether the attorney has been paid for her services).

174. *Cf.* BP Ala. Exploration, Inc. v. Super. Ct., 199 Cal. App. 3d 1240, 1253 (1988) (in theory authorizing an attorney to prevent a client's transfer to third parties of work product that the attorney previously provided to the client).

175. *Cf. In re* Vega, 94 A.D.2d 799, 800 (N.Y. App. Div. 1983) (rejecting an alleged right of a lawyer to withhold documents from the client that might subject the lawyer to malpractice liability, on the grounds that the lawyer's self-interest is superseded by her obligation to act in the client's interests).

176. *See supra* text accompanying note 94.

ties.[177] This article's model statute does not incorporate the distinction for two practical reasons: (1) as an empirical matter, clients only rarely will have an incentive to disclose such material to third parties; and (2) in the context of antagonistic lawyer-client litigation, it is safer not to place in lawyers' hands the authority to make potentially self-serving determinations concerning the private nature of the material. Nevertheless, jurisdictions that add a subsection for observational materials encompassing the distinction could not be faulted.

Consider next what should happen when the client seeks access to work product not because he wishes to sue the attorney, but simply because he would like to see (or use) the material.

> B. When a client requests his or her attorney to disclose work product to the client, . . .
>
> 2. Not in the course or anticipation of litigation between the attorney and client:
>
> (a) The attorney must disclose end product, intermediate case-specific work product, and background work product for the creation of which the client has been charged.
>
> (b) The attorney may decline to disclose background work product for the creation of which the client has not been charged or only partially charged, subject to a determination by a court that the client owns or has a right to control this product.
>
> (c) The attorney must disclose observational work product for the creation of which the client has been charged unless
>
> (i) disclosure is likely to
>
> (1) significantly harm the client; or
>
> (2) significantly harm the attorney-client relationship and the attorney has discussed with the client whether the attorney should withhold disclosure; or
>
> (ii) the product is only tangentially relevant to the continuation of the representation and disclosure would embarrass the attorney, nondisclosure is unlikely to harm the client or the attorney-client relationship or significantly limit the client's ability to make decisions about the representation, and the attorney has discussed with the client whether the attorney should withhold disclosure.
>
> (d) The attorney may decline to disclose observational work product for the creation of which the client has not been charged unless

177. *See supra* text accompanying note 18.

> (i) disclosure is likely to be useful to the client in making decisions about the representation and disclosure is unlikely to harm the client; or
>
> (ii) disclosure is likely to be useful to the client in making decisions about the representation and disclosure is unlikely to harm the attorney-client relationship.

There are several reasons to address clients' informal or friendly requests for work product differently from requests in the context of antagonistic litigation. First, no court is involved, so *in camera* determination of empirical issues (e.g., is the client likely to be harmed by disclosure) ordinarily is not feasible.[178] Second, the attorney-client relationship remains intact, so there is more need to protect it. Conversely, the disclosure of embarrassing observational work product is more likely to be damaging.

Proposed section B(2)(a) gives the client a right of access to all items for which he has been charged except for potentially injurious observational work product. The section assumes that the client will ordinarily be charged for end product and intermediate case-specific work product. For reasons previously discussed,[179] section B(2)(b) puts the onus on clients to obtain a court order for the involuntary disclosure of background work product for which they have not been, or have been proportionately, charged. The model statute's assumption is that, in most cases, lawyers have the prime proprietary interest in these materials.

Sections B(2)(c) addresses observational work product for which the client has been charged. It takes a paternalistic posture in the limited category of cases in which disclosure is *likely* to *significantly* injure the client directly or harm the attorney-client relationship. When, however, the potential injury is to the attorney-client relationship, B(2)(c)(ii) requires the lawyer to take the client's autonomy interests into account by discussing the disclosure issue with the client, presumably focusing on the potential damage that disclosure might produce.

It is important to note that the model statute is making a significant value choice here—one about which rule makers might reasonably differ. Section B(2)(c) and (d) authorize lawyers sometimes to withhold observational documents because of their potential harm to clients or the attorney-client relationship, but do not extend the same authority with respect to non-observational documents. There are two empirical assumptions underlying this distinction. First, the risk of significant harm will be more frequent with respect to observational material. Second, in

178. In other words, obtaining *in camera* review would be an expensive proposition because an independent lawsuit (*e.g.*, a suit for a declaratory judgment) would need to be filed. This is of lesser concern in the antagonistic context, in which it is anticipated that the client will eventually file suit against the lawyer in any event.

179. *See supra* text accompanying note 159.

the few friendly situations in which the disclosure of non-observational material to a client is likely to cause harm, the lawyer will ordinarily be able to persuade the client to allow her to withhold. When she cannot, the model statute draws the balance in favor of client autonomy.

Autonomy considerations are taken into account in the context of observational material as well, but in a different way. Section B(2)(c) limits the lawyer's right to withhold to situations in which harm is likely and potentially significant. It also requires the lawyer, when feasible, to discuss with the client her reasons for limiting the client's autonomy. In the end, however, because no judge is available in the informal access context to make an *in camera* determination of the likelihood of harm, the statute ultimately gives the decision-making authority to the attorney.

Why might rule makers choose a different balance? Consider, for example, an expert's report that assesses the client's mental capacity and includes negative comments that might damage the client psychologically. If the lawyer cannot convince the client to allow her to withhold this document, section B(2)(a) probably would require disclosure. A jurisdiction's decision to take a more paternalistic approach, placing loyalty to the client over autonomy considerations here, certainly cannot be dismissed as unwarranted; it simply deems the likelihood and frequency of harm resulting from a disclosure rule to be more significant. Indeed, the *Restatement* appears to favor this more paternalistic view.[180]

These observations pertain only to situations in which disclosure might cause harm to the client, not harm (or embarrassment) to the attorney. Section (B)(2)(c)(ii) distinguishes and provides limited protection to lawyers' personal dignitary interests in observational work product. The presumption is that, if the client has been charged for the creation of the product, the lawyer has less right to withhold the information in order to avoid personal embarrassment. However, when the embarrassing information is only tangentially relevant to the prosecution of the case and the lawyer can fairly conclude that the client's interests, including the interest in autonomy, will not be significantly affected,[181] the statute provides the lawyer a limited right to withhold.

Section B(2)(c) gives the attorney more leeway to withhold observational work product when she has not charged the client for it. Under these circumstances, the lawyer continues to owe a duty of loyalty to the client. She therefore must endure an adverse effect on her personal interests if the client needs the information to make decisions and the deci-

180. *See* RESTATEMENT, *supra* note 1, § 46 cmt. c (using the example of a negative psychiatric report and concluding that a lawyer may refuse a client's request for work product when fulfilling it might harm the client).

181. This portion of the model statute again requires the attorney to discuss with the client the fact of nondisclosure, in order to ensure that the client's concerns (i.e., the bases of his desire for autonomy, if any) are taken into account.

sion to withhold cannot be justified on separate paternalistic grounds. When, however, the client merely seeks the information for curiosity's sake, the attorney's privacy interests control.

Consider next situations in which a third party seeks disclosure of work product in litigation. If evidentiary law requires disclosure, the attorney obviously must obey, as required in section C(1)(a) below. The following provision, however, considers other situations in which the client, even after consultation, instructs the attorney to withhold or disclose the product and the attorney desires (or at least is willing) to do the opposite. In most respects, the relative authority of the lawyer and client is the same as under section B(2), but a few additional considerations become germane.

C. When a person other than a client requests an attorney to disclose work product

1. In litigation,

(a) The attorney must disclose all work product required to be disclosed under evidentiary law or court order;

(b) The attorney must follow his or her client's instruction not to disclose work product except that the attorney may disclose work product for the creation of which the client has not been charged and which is not subject to attorney-client confidentiality or attorney-client privilege;

(c) The attorney must follow his or her client's instruction to disclose work product except that the attorney may decline to disclose

(i) observational work product for the creation of which the client has not been charged; and

(ii) observational work product for the creation of which the client has been charged if disclosure is

(A) likely to significantly harm the client; or

(B) likely to significantly harm the attorney-client relationship and the attorney has discussed with the client whether the attorney should withhold disclosure; or

(C) only tangentially relevant to the continuation of the representation, disclosure would embarrass the attorney, and the attorney has discussed with the client whether the attorney should withhold disclosure; and

(iii) Background work product for the creation of which the client has not been charged or only partially charged unless the court determines that the client owns or has a right to control disclosure of this product.

> (d) If the attorney declines to disclose work product pursuant to section C(1)(c) and the client does not agree to pay the expense, if any, of resisting disclosure to the third party, the attorney may not assess the client for any fees and costs relating to resisting disclosure.
>
> (e) When there is a dispute between the attorney and client regarding who controls the decision to disclose particular work product pursuant to section C(1), either the attorney or client may request the court presiding over the litigation to review the product in question *in camera* and to resolve the issue on an *ex parte* basis.[182]

When a client instructs an attorney to keep secret protected work product, the attorney ordinarily must comply because such information will relate to the representation and therefore be confidential or privileged. Section C(1)(b) covers the rare situation in which confidentiality and privilege exceptions do not apply. In those few instances, an attorney should be able to disclose proprietary or purely personal information when doing so would not violate other professional considerations (such as loyalty to the client). When, however, the client has been charged for the material, it belongs to him; the lawyer is required to honor her principal's ownership interest.

In the more likely scenario in which the client is willing to allow the attorney to disclose material that the attorney would prefer to keep secret, the model provision takes into account the principle that work product, in part, is designed to safeguard the ability of lawyers to assume that their intermediate work will not be forcibly disclosed to third parties. Section C(1)(c) therefore identifies three categories of exception to the client's control.[183] The attorney is given significant control over product in which she has a privacy or proprietary interest and for the creation of which the client has not been charged. As in section B(2)(c), observational work product that the lawyer has created for the client and for which she has been charged may only be withheld under limited circumstances in which it is likely to harm the client or is only tangentially relevant.

Section C(1)(d) addresses a significant practical issue. When a lawyer wishes to withhold work product because of her own interests in the material, that may lead to a disputed discovery issue in the litigation.

182. If the initial request for information is informal, *in camera* review does not become a viable option until the client or third party files suit.

183. In considering these situations, it is important to remember that a lawyer usually will be able to control his client's decisions regarding when to object. In a sense, therefore, the real issue often is whether the lawyer has advised the client honestly that disclosure might be in the client's overall interest unless the lawyer is willing to pay for fighting disclosure, and even then might be warranted to avoid delay. By balancing the lawyer's and the client's interests in disclosure and making clear the lawyer's obligation to foot the bill when she is acting in her own interests, the proposed statute addresses these considerations directly.

The client's recognized sphere of autonomy clearly includes the ability to capitulate to an adversary in order to avoid paying the expense of litigation. Thus, if a client is unwilling to press the privilege claim but the lawyer wishes to do so, section C(1)(d) requires the attorney to bear the expense.

Finally, section C(1)(e) formally recognizes the availability of the court to resolve disputed issues of control when they arise in litigation. Section (C)(1)(e) authorizes courts to examine the material *in camera* and to exclude the adversary from the private controversy between the attorney and client.

The following nonlitigation parallel to section C(1) largely tracks its counterpart. It simply removes the subsections relating to judicial participation in the decision and to the costs of litigation.

> C. When a person other than a client requests an attorney to disclose work product . . .
>
> 2. Outside the context of litigation,
>
> (a) The attorney must follow his or her client's instruction not to disclose work product except that the attorney may disclose work product for the creation of which the client has not been charged and which is not subject to attorney-client confidentiality or attorney-client privilege;
>
> (b) The attorney must follow his or her client's instruction to disclose work product except that the attorney may decline to disclose
>
> (i) observational work product for the creation of which the client has not been charged; and
>
> (ii) observational work product for the creation of which the client has been charged if disclosure is
>
> (A) likely to significantly harm the client; or
>
> (B) likely to significantly harm the attorney-client relationship and the attorney has discussed with the client whether the attorney should withhold disclosure; or
>
> (C) only tangentially relevant to the continuation of the representation, disclosure would embarrass the attorney, and the attorney has discussed with the client whether the attorney should withhold disclosure; and
>
> (iii) Background work product for the creation of which the client has not been charged or only partially charged unless the court determines that the client owns or has a right to control disclosure of this product.

VII. EVALUATING ALTERNATIVES

The essential premise of the proposed model statute is that a single bright-line rule governing control and waiver of the work-product privilege does not do justice to the various forms work product may take. States could, of course, accomplish the goals of the proposed statute more simply—by adopting a rule that control and waiver of the work-product privilege belongs jointly to lawyers and clients and leaving it to case law and ethics opinions to flesh out the details. This article's statutory approach, however, provides far more guidance to lawyers, clients, and courts. Moreover, even in jurisdictions that do opt for the simpler alternative, the proposed statute has value in identifying the criteria that courts and ethics committees responding to a simple rule would need to consider.

The model statute differentiates among products using an analysis that implements the reasons for allowing lawyers or clients to assume control. Nevertheless, to the extent that a dispute is exclusively between the lawyer and the client and does not implicate judicial or third-party interests, the statute largely sets default rules that the lawyer and client can readjust through bargaining at the outset of the representation. Thus, for example, a lawyer who charges a client for preparing a reusable item, like the tax memorandum in our introductory scenario, could agree with the client in the retainer agreement that the lawyer and not the client retains any copyright interest and the exclusive right to reuse the item.[184]

If one concedes that the model statute largely provides default rules, however, a reasonable argument can be made for an entirely alternative—and again simpler—approach to control and waiver. As a practical matter, except when dealing with highly sophisticated clients, lawyers have more knowledge and control over the non-price terms of legal representation. They write the retainer agreements, know their ramifications, and typically are able to convince clients that all terms other than price are routine and non-negotiable. That being the case, why not set the default rules in favor of clients and put the entire onus upon lawyers to negotiate changes? Such a rule could be written in bright-line fashion, avoiding the density and complication of the proposed model statute.

There are three responses. First, it is unhealthy to set rules that are likely to be non-optimal with the expectation that each will be negotiated. The commencement of attorney-client relationships often is an

184. In other words, the copyright (or right to reuse) is an item of the client's property that the lawyer can purchase from the client, so long as she can do so without impacting the representation or violating her fiduciary obligations to the client. At the retainer stage—in setting the terms of the representation—the lawyer typically is viewed as engaging in a largely arm's length transaction that allows the lawyer to bargain over fees and other terms without violating conflict-of-interest rules. *Cf.* Zacharias, *supra* note 93, at 984 (acknowledging the uniqueness of negotiations over the terms of representation).

emotional time for clients. It is already difficult for lawyers to begin the process of earning the client's trust. The more that lawyers need to raise issues that implicate their self-interest and ask clients to engage in arms-length bargaining, the more difficult it becomes to gain that trust.[185]

Second, even if some bargaining is anticipated, it makes better sense to have the negotiations begin from a default position that both parties know rule makers have deemed normatively appropriate. Rules such as these have important communicative functions.[186] They help lawyers explain issues to clients and help clients understand that the lawyer's explanation may not be entirely self-serving. Conversely, to the extent a lawyer writes a retainer agreement departing from the default rule in her own favor, that raises a red flag for the client that the issue merits discussion. In establishing a baseline, the rules provide some predictability and calm in the attorney-client relationship, which will be disturbed only when the lawyer or the client perceive a special issue that warrants a disturbance.

Third, a few aspects of the rules may not be subject to readjustment. Some jurisdictions may, for example, reject the ability of clients to insist upon lawyer disclosures that will harm the clients.[187] In some situations, the waiver doctrine may depend on the availability, or non-availability, of courts to mediate disputes, which implicates a societal interest in how the rule is formulated.[188] Thus, it may be too facile to assume that all rules, including a "put the onus on the lawyer" rule, comport equally with society's normative outlook.

185. It is precisely for this reason that one should downplay the conceptualization of the initial contacts between lawyer and client as being at arm's length, and that lawyers should be deemed to have some fiduciary duty to consider the client's interests even at the retainer stage of representation. *See id.* (discussing attorneys' obligations to clients at the retainer stage); Zacharias, *supra* note 86, at 946–47 (discussing the bounds of lawyers' obligations in negotiating fees and performance). In a world ruled purely by economic theory, lawyers should raise all potential areas of dispute with clients and bargain over the appropriate result. In the real world, such an approach would produce needless adversariness between lawyer and client. The appropriate resolution is to rely upon lawyers and to impose upon them an ethical obligation to consider the client's interests. If a work-product issue is important and a dispute is likely to arise, a lawyer arguably has a fiduciary responsibility to raise it rather than resolving it in her own favor at the retainer stage.

186. *See generally* Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 267 (1993) (discussing the effect of the presence of norms in the professional codes on lawyers' ability to deal with clients); *cf.* Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 650–59 (1994) (noting limits on the ability of ethics standards to influence lawyer and client behavior).

187. This attitude underlies the approach of jurisdictions that adopt conflict-of-interest rules that limit client autonomy to waive conflicts that will negatively affect their representation. *See* Zacharias, *supra* note 5, at 417–18 (discussing the Model Rules' paternalistic approach to conflict waivers).

188. Section C(1)(e) of the model statute, for example, provides that in certain situations "either the attorney or client may request the court presiding over the litigation to review the product in question *in camera* and to resolve the issue on an *ex parte* basis." The statute's baseline approach will affect how often such judicial determinations will be required. If, for example, the statute provides no baseline except to require a court to determine the implied contract, judicial intervention will be necessary in every case involving a dispute.

Even if a rule justified only by its bright-line nature is inappropriate, the model statute does still leave considerable room for adjusting the defaults. A contractually oriented alternative to setting the defaults therefore seems attractive. Why not craft a rule that requires courts, on an ad hoc basis when disputes arise, to determine what these parties would have agreed upon had they considered the issue at the time of the retainer agreement? In other words, why not have a court identify the implicit terms of the contract between the lawyer and client?

This approach probably is unrealistic because it would encompass significant transaction costs. It provides little predictability. Issues would need to be litigated frequently. Lawyer-client litigation in the midst of litigation with third parties can be disruptive. The approach also may ignore some normative judgments the model statute makes that should not be deemed entirely negotiable.[189] Still, if one envisions the control and waiver issue primarily from a property perspective—as depending exclusively upon how the parties have assigned the rights in their contractual relationship—an analysis that attempts to construct, or reconstruct, the actual contract may be a theoretically purer way of implementing the underlying normative considerations.

To avoid the transaction cost deficiencies, a jurisdiction might set its statutory defaults not on the normative consideration of what it thinks is an appropriate baseline, but rather on a calculation of what an objective lawyer and objective client should agree to in an ordinary case.[190] In other words, the jurisdiction might take a Rawlsian contractual approach. It would establish defaults for actual lawyers and clients based upon what objective lawyers and clients would deem reasonable if unfettered by the emotions of the situation.

In the end, the Rawlsian contractual approach probably would arrive at most of the same conclusions that this article reaches using an approach that emphasizes a societal evaluation of what is appropriate based on the theories underlying control and waiver doctrine. There are two advantages of the model statute, however. First, the statute's mode of analysis applies to all situations, including those involving third-party and judicial interests, not just ones in which the exclusive issue is whether the client has purchased the rights to work-product material. Second, the statute acknowledges at least the possibility that, in some situations, jurisdictions might not consider absolute the right of the lawyer and client to bargain away their default rights.[191]

189. *See supra* text accompanying note 187.

190. By focusing on ordinary objective lawyers and clients, the Rawlsian approach may set defaults that are different than what specific (e.g., sophisticated clients and specialized lawyers) might select. As discussed below, however, these clients ordinarily will be in a position to know of their special status and can change the defaults through bargaining. *See infra* note 191.

191. It is important to note that only a few situations fit this category in the proposed statute. Usually, a lawyer can by agreement cede her rights by charging the client for an item or agreeing not to exercise her discretion to withhold (for example, with respect to personally embarrassing observa-

In the final analysis, therefore, the approach of this article's model statute is more comprehensive, more practical, and potentially more satisfying normatively than a purely property-based, contractual approach. The results of the two conceptual approaches often merge. The model statute also incorporates the property view's key perspective concerning lawyers' superior ability to change the defaults by placing the onus on the lawyer to do so in certain areas of potential dispute.[192] However, particularly in a few areas involving proprietary information that are likely to recur, the model statute adopts a default based on what seems ordinarily to be the more justified position rather than attempting to identify or reconstruct the lawyer and client's actual expectations.

VIII. CONCLUSION

When one assembles the definitions and four substantive provisions governing control and waiver of work product that are discussed above and adds them to the basic substantive work-product provisions, one is left with a far lengthier and more complex statute than traditional formulations of work-product waiver rules. Simplicity is not a virtue in this arena. It masks the existence of the varying types of work product that can raise issues. It inevitably overlooks some of the competing interests and considerations that waiver and control doctrine should confront. The model provisions address the complexities and incorporates the lessons to be drawn from all five of the possible theoretical approaches to the subject.

There is some room for play. Individual jurisdictions may choose alternative resolutions with respect to particular subcategories of work product. The model statute, however, provides a useful starting point—an outline through which rule makers can address the issues in a uniform manner. It requires the rule makers to acknowledge that control and waiver is a subject distinct from the substantive privilege itself, to recognize the competing interests and possible conceptualizations of control and waiver doctrine, and to differentiate among categories of work product. In so doing, it for the first time provides a theoretical foundation for the development of a coherent control and waiver doctrine.

tional material). Similarly, a client can cede his rights by limiting the scope of the representation or making an agreement not to demand certain material. It is largely in situations involving the lawyer's authority to protect the client from disclosures that will harm the client or the attorney-client relationship that the statute may prevent bargaining. *See, e.g.*, Proposed Statute, §§ B(2)(c), C(1)(c), C(2)(b)(ii). In some scenarios involving these concerns, a lawyer may have a fiduciary obligation to preserve that authority even when the client asks (or offers to pay) her to surrender it.

192. Thus, upon the client's request, the lawyer must disclose to third parties in litigation all proprietary work for which the client has been charged. Proposed Statute, § C(1)(c)(iii).