

**CHALLENGING AND PRESERVING
CLAIMS OF PRIVILEGE AND WORK PRODUCT PROTECTION**

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The Attorney-Client Privilege

Ala. Rule. Evid. 502

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or a representative of the client and the client's attorney or a representative of the attorney, or (2) between the attorney and a representative of the attorney, (3) by the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party concerning a matter of common interest, (4) between representatives of the client and between the client and a representative of the client resulting from the specific request of, or at the express direction of, an attorney, or (5) among attorneys and their representatives representing the same client.

Fed. Rule Evid. 502

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

- 1. State law governs application of the attorney-client privilege in a federal diversity action.** F.R.E. 501; *Bivins v. Rogers*, 207 F. Supp. 3d 1321, 1324 (S.D. Fla. 2016) (finding that "[s]tate law provides the rule of decision in diversity actions where a party asserts the attorney-client privilege."); *see also Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 696 (S.D. Fla. 2007) ("Florida law governs application of the attorney-client privilege in a federal diversity action.")

2. The purpose of the communication must be primarily to seek legal advice.

- “There is general agreement that the protection of the privilege applies only if the primary or predominate purpose of the attorney-client consultations is to seek legal advice or assistance.” 1 Paul R. Rice, *Attorney–Client Privilege in the United States* § 7:5.
- “There are substantial policy reasons for holding that business documents submitted for attorney review are not by that virtue automatically exempt as privileged or work product protected communications.” *Visa USA, Inc. v. First Data Corp.*, 2004 WL 1878209, *8 (N.D. Cal. 2004).
- When the business “simultaneously sends communications to both lawyers and non-lawyers, it usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.” *Id.* (citing *United States v. Chevron Corp.*, 1996 WL 444597 (N.D. Cal. 1996)); *United States v. International Business Machines Corp.*, 66 F.R.D. 206, 213 (S.D.N.Y. 1974) (“If the document was prepared for purposes of simultaneous review by legal and non-legal personnel, it cannot be said that the primary purpose of the document is to secure legal advice.”). *In re Vioxx*, 501 F. Supp. 2d at 805; Attorney–Client Privilege § 7.2.1 (“Because of the ease with which e-mail technology allows in-house counsel to be brought into discussions, counsel are contacted far more frequently, and through those contacts, are likely encouraged to participate in regular business matters far more frequently and broadly than was the case in the past.”).
- When the business “simultaneously sends communications to both lawyers and non-lawyers, it usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.” *Seroquel Prods.*, 2008 WL 1995058, at *4 (quoting *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 805 (E.D. La. 2007)).
- “No misconception seems to be more common . . . than the belief that if a document or draft has been through the hands of an attorney, it thereby automatically becomes enshrouded in privilege’s veil of secrecy . . . Nothing is further from reality. Insulation from discovery cannot be so readily or fraudulently obtained.” *In re Seroquel Prod. Liab. Litig.*, 2008 WL 1995058, at *7 (M.D. Fla. May 7, 2008).

3. Even if “the communication between the attorney and client is privileged, . . . the underlying facts are discoverable.” *Southern Bell*, 632 So. 2d at 1387 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)).

4. **The burden of proof for invoking the attorney-client privilege rests with the party asserting the privilege.**
5. **In some states, a claim of privilege raised by a corporation is subject to a “heightened level of scrutiny.”** *See, e.g., Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994).
 - The Florida Supreme Court has subjected claims of privilege to a heightened level of scrutiny “to minimize the threat of corporations cloaking information with the attorney-client in order to avoid discovery....” *Southern Bell Tel. & Tel. Co.*, 632 So. 2d at 1383.
 - *In re Denture Cream Prod. Liab. Litig.*, 2012 WL 5057844, at *5 (S.D. Fla. Oct. 18, 2012) (“The Florida Supreme Court has held that, unlike a claim of attorney-client privilege made by an individual, a claim of privilege raised by a corporation is subject to a ‘heightened level of scrutiny.’”) (quoting *Southern Bell Tel. & Tel. Co.*, 632 So. 2d at 1383)); *First Chicago International v. United Exchange Co. Ltd.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989) (“Any standard developed, therefore, must strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery.”).
6. **Communications involving third-parties and communications that do not involve an attorney can be privileged.**
 - *Bennett v. CIT Bank, N.A.*, 432 F. Supp.3d 1370 (N.D. Ala. 2020) (The “common interest doctrine” provides that if counsel communicates with his or her client in the presence of a third party who has a sufficient common legal interest in the subject matter discussed, then those communications remain confidential and thus privileged.)
 - *In re Denture Cream Products Liab. Litig.*, 2012 WL 5057844, at *13 (S.D. Fla. Oct. 18, 2012) (“[S]imply because a communication is made between two corporate employees, neither of whom are attorneys, that fact is not determinative of whether that communication primarily involves business advice rather than legal advice for purposes of the attorney-client privilege to that correspondence.”).
 - *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 38 (E.D.N.Y. 1973) (stating that “there is no requirement that, in a strict sense, the attorney or his representative must be either the sender or recipient of a confidential communication, but only that the communication, if made between representatives of the client, must be specifically for the purpose of obtaining legal services for the client.”).
 - *In re Vioxx Products Liab. Litig.*, 501 F. Supp. 2d 789, 811 (E.D. La. 2007) (finding that a privilege applies not only to communications between corporate employees and

corporation's counsel, but also to communications among corporate employees discussing or transmitting counsel's advice).

- However, the lack of any lawyer involvement can still be a “factor tending to weigh against Defendants in showing the privileged nature of that communication.” *United States v. Davita, Inc.*, 301 F.R.D. 676, 682 (N.D. Ga. 2014).
- “The ultimate touchstone for application of the privilege . . . is whether the communication revealed advice from, or a request for advice made to, an attorney in some fashion.” *Id.*

7. A communication is not necessarily privileged simply because a lawyer is copied or sends the communication.

- *See U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Cen.*, 2012 WL 5415108, at *4 (M.D. Fla. Nov. 6, 2012).
- “Where a lawyer provides non-legal business advice, the communication is not privileged.” *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3rd Cir. 2007).
- Do not rely on the common misconception about the attorney-client privilege, which is the “belief that if a document or draft has been through the hands of an attorney, it thereby automatically becomes enshrouded in privilege’s veil of secrecy.” *In re Seroquel Prod. Liab. Litig.*, 2008 WL 1995058, at *7 (M.D. Fla. May 7, 2008).
- “[T]his ‘collaborative effort’ argument, if successful, would effectively immunize all internal communications of the drug industry, thereby defeating the broad discovery authorized in the Federal Rules of Civil Procedure.” *In re Vioxx*, 501 F. Supp. 2d at 796.

8. Investigative Audits or Reports are Rarely Protected by the Attorney-Client Privilege.

- “We find that the [investigative] audits cannot be classified as a ‘communication’ for the purposes of the attorney-client privilege. The audits consist of systematic analyses of data and cannot be considered the type of statement traditionally protected as a ‘communication.’” *Southern Bell v. Deason*, 632 So. 2d 1377, 1384 (Fl. 1994).
- “A communication within the protection of the attorney-client privilege is any act by which information is conveyed.... By definition then, the attorney-client privilege protects only against the disclosure of the contents of the communication itself between an attorney and the attorney's client; it does not protect against the disclosure of the underlying facts by the person who has personal knowledge of those facts, even though that person may have consulted with an attorney.” *Ex parte Alfa Mutual Insurance Co.*, 631 So.2d 858, 860 (Ala. 1993).

The Self-Critical Analysis Privilege

1. The Eleventh Circuit has not recognized the “self-critical analysis” privilege.

- *See Bonnell v. Carnival Corp.*, I 3-22265-CIV, 2014 WL 10979823, at *4-5 (S.D. Fla. Jan. 31, 2014) (“The self-critical analysis privilege ‘has been recognized by some courts, but never fully embraced by courts in our district or circuit.’”)
- “[T]he self-critical analysis privilege . . . has been recognized by some courts, but never fully embraced by courts in our district or circuit. Nor has such a privilege been recognized in the Federal Rules.” *Hill v. Celebrity Cruises, Inc.*, No. 09-23815-CIV, 2010 WL 5419006, at *2 (S.D. Fla. Dec. 23, 2010)); *see also Jones v. Carnival Corp.*, No. 04-20407-CIV, ECF No. 136 (S.D. Fla. Sept. 27, 2005) (“[T]he Eleventh Circuit has yet to recognize the self-critical analysis privilege”).
- “We also disagree with any objection to the production of this information based on a “self critical analysis” privilege that has not been codified by Rule 26, adopted by the Supreme Court, the Eleventh Circuit Court of Appeals, or the Florida Supreme Court as a matter of state law.” *Jaber v. NCL (Bahamas) Ltd.*, No. 14-20158-CIV, 2014 WL 12629670, at *5 (S.D. Fla. Oct. 24, 2014).
- “The Undersigned rejects Carnival's invitation to apply the self-critical analysis privilege in this case. Neither party was able to present a case from this Circuit recognizing this privilege, and the Undersigned could not find one, either.” *Bonnell v. Carnival Corp.*, I 3-22265-CIV, 2014 WL 10979823, at *5 (S.D. Fla. Jan. 31, 2014).

2. Alabama courts have mentioned but not recognized the SCA privilege.

The Work Product Doctrine

Fed. Rule Civ. P 26(b)(3) *Trial Preparation: Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i) they are otherwise discoverable under Rule 26(b)(1); and
- (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Ala. Rule Civ. P. 26(b)

(4) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of the rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

* * *

(5)(B) *Trial Preparation: Experts.* A party may discover facts known or opinions held by an expert who has been retained, specially employed or assigned by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

1. **The burden of proof in establishing the work product doctrine lies with the party claiming its protection.** *Stern v. O'Quinn*, 253 F.R.D. 663, 674 (S.D. Fla. 2008).
2. **The Work Product Privilege is broader than the attorney-client privilege.**
 - “The work product doctrine is distinct from and broader than the attorney-client privilege, and it protects materials prepared by the attorney, whether or not disclosed to the client, as well as materials prepared by agents for the attorney.” *Fojtasek v. NCL (Bahamas) Ltd.*, 262 F.R.D. 650, 653 (S.D. Fla. 2009) (citing *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979)).
 - “[B]ecause the work product privilege looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, it is not automatically waived by the disclosure to a third party.” *In re Grand Jury Subpoena*, 220 F.3d 406, 409 (5th Cir. 2000).
 - *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (“The ‘testing question’ for the work-product privilege . . . is ‘whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’”).

- *Ex parte Mobile Gas Service Corp.*, 123 So. 3d 499 (Ala. 2013) (reversing trial court’s order allowing discovery from engineering consultant hired after defendant was ordered by the Alabama Department of Environmental Management to conduct an investigation because the defendant anticipated the possibility of litigation).
- *Ex parte USA Water Ski, Inc.*, 135 So. 3d 247 (Ala. 2013) (reversing trial court’s order requiring production of a post-incident report written years before the filing of the lawsuit because there was an anticipation of potential litigation related to the incident).

3. Work product doctrine privilege may be waived.

- *U.S. v. Nobles*, 422 U.S. 225, 239 (1975).
- *Brasfield & Gorrie, LLC v. Hirschfeld Steel Group LP*, 2021 WL 5449203, 2:20-cv-00984-LSC (S.D. Ala. Nov. 22, 2021)

4. Two types of “work product:” (1) *opinion* work product and (2) *fact* work product.

- Opinions generally protected from discovery. Fact work product discoverable upon showing of “substantial need” and “undue hardship.” *Nobles*, 422 U.S. at 685.
- Opinion work product is only discoverable in “very rare and extraordinary circumstances.” *Cox v. Admin. U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994).
- Opinion work product “enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.” *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994) (quoting *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)). In fact, “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.” *Hickman*, 329 U.S. at 510.
- “[F]act work product may encompass factual material including the result of a factual investigation.” *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d at 183; *Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d at 152 (reversing district court’s determination that certain investigative documents were opinion work product, as opposed to fact work product because they did not reveal “counsel’s legal impressions or views of the case”); *see also Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) (“[P]urely factual material embedded in attorney notes” may not be opinion work product).

5. The Work-Product Doctrine does not protect documents prepared in the ordinary course of business.

- *Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96, 106 (S.D.N.Y. 2007) (“[W]ork product protection is not available for documents ‘that are prepared in the ordinary

course of business or that would have been created in essentially similar form irrespective of litigation.”) (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

- *Soeder v. Gen. Dynamics Corp.*, 90 F.R.D. 253, 255 (D. Nev. 1980) (“The distinction between whether Defendant's ‘in-house’ report is work product or prepared in the ordinary course of business is an important one.”).
- Work product protection is unavailable for documents “that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.” *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *see also* Wright & Miller § 2024, at 346 (“[E]ven though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation”).
- *Harris v. Hyundai Motor Manufacturing Ala., LLC*, 2021 WL 1536577, 2:19cv919-MHT (M.D. Ala. April 19, 2021) (“The work-product doctrine, however, does not apply to all internal investigations that may ultimately end in litigation. Even when litigation may be forthcoming, work-product protection is unavailable for documents that are prepared “in the ordinary course of business.” *Adams*, 282 F.R.D. at 633. As this court has made clear, an organization cannot contend in good faith that all of its internal-affairs investigations are in anticipation of litigation. *See id.* at 634. Particularly if the organization routinely conducts investigations into all complaints of discrimination, there must be more evidence that the relevant documents were made specifically in anticipation of litigation.”)

6. Central question -- Was the document intended for use in litigation?

- *Ex parte Schnitzer Steel Industries, Inc.*, 142 So.3d 488 (Ala. 2013) (reversing trial court’s order compelling production of investigative report prepared by defendant’s safety director after an employee accident because it was prepared in anticipation of litigation).
- “[E]ven if a document has some purpose within the ordinary course of business, the document is protected as work product if it is substantially infused with litigation purpose.” *Developers Sur. & Indem. Co. v. Harding Vill., Ltd.*, 2007 WL 2021939, at *2 (S.D. Fla. July 11, 2007).
- *Ex parte Schnitzer Steel Industries, Inc.*, 142 So.3d 488 (Ala. 2013) (reversing trial court’s order compelling production of investigative report prepared by defendant’s safety director after an employee accident because it was prepared in anticipation of litigation).
- *Ex parte Ala. Dept. of Youth Serv.*, 927 So. 2d 805 (Ala. 2005) (reversing trial court’s order requiring production of investigative reports because they were prepared in anticipation of litigation).

7. Documents produced in connection with an investigation are often not protected by the work product privilege.

- “If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is producible in civil pretrial discovery.” *Janicker by Janicker v. George Washington Univ.*, 94 F.R.D. 648, 649 (D.D.C. 1982).
- “[W]ork product protection is not available for documents ‘that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of litigation.’” *Allied Irish Banks*, 240 F.R.D. at 106.
- “The fact that Defendant anticipates the contingency of litigation following a crash of one of its aircraft does not automatically qualify Defendant’s “in-house” report as work product. Certainly, litigation is a contingency to be recognized by any aircraft accident. However, given the equally reasonable desire of Defendant to improve its aircraft products, to protect future pilots and passengers of its aircraft, to guard against adverse publicity in connection with such aircraft crashes, and to promote its own economic interests by improving its prospect for future contracts for the production of said aircraft, it can hardly be said that Defendant’s “in-house” report is not prepared in the ordinary course of business.” *Soeder v. General Dynamics Corp.*, 90 F.R.D. at 254.

8. Factual work product – the “substantial need” and “undue hardship” test

- A non-exhaustive list of factors are assessed in determining substantial need including: (1) the importance of the materials to the party seeking them for case preparation, (2) the difficulty the party will have obtaining them by other means, and (3) the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents he seeks. *See Fed. R. Civ. P. 26, Advisory Comm. Notes (1970 amds.); see also F.T.C. v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 155 (D.C. Cir. 2015) (“[A] moving party’s burden is generally met if it demonstrates that the materials are relevant to the case, the materials have a unique value apart from those already in the movant’s possession, and ‘special circumstances’ excuse the movant’s failure to obtain the requested materials itself.”).
- A “common justification for discovery is the claim which relates to the opposite party’s knowledge that can only be shown by the documents themselves.” *Id.* (citing *Bird v. Penn Central Co.*, 61 F.R.D. 43 (E.D. Pa. 1973); *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 296 F. Supp. 979, 983 (E.D. Wis. 1969)).
- *Adams v. Gateway, Inc.*, 2003 WL 23787856, at *15 (D. Utah Dec. 30, 2003) (“As to any work product items which are ‘factual’ work product, substantial need and undue hardship will probably be present by the inherent nature of [a] technical project”).

- *Foley v. Juron Assocs.*, 1986 WL 5557, at *2 (E.D. Pa. May 13, 1986) (ordering production of engineering reports in a securities case because “[t]he knowledge acquired from the [engineering] reports can realistically be shown only by the facts contained in the documents themselves.”) (citing *In re International Systems and Controls Corporation Securities Litigation*, 693 F.2d at 1235).
- *Gillespie v. Charter Communications*, 133 F. Supp. 3d 1195 (E.D. Mo. 2015) (ordering the production of incident reports in a discrimination case because plaintiff had no other means to obtain the documents requested).
- *F.T.C. v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 157–58 (D.C. Cir. 2015) (finding that the FTC had shown a substantial need and undue hardship for materials relating to financial analyses and forecasts in an unfair trade practices case).
- *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 142 (D.D.C. 2012) (ordering the production of an audit report in a case where the federal government sought to enforce a subpoena on the basis that a report was the only evidence available to determine when a contractor became aware of any potential overpayments made on the government contract, which went to the heart of the government’s case).
- *Huggins v. Fed. Express Corp.*, 250 F.R.D. 404, 407 (E.D. Mo. 2008) (ordering the production of photographs because of the plaintiff’s inability to obtain equivalent information in a negligence case).
- *Harris v. Provident Life & Accident Ins. Co.*, 198 F.R.D. 26 (N.D.N.Y. 2000) (ordering the production of medical reports because they were critical to the defense in showing that the insured did not have a latex allergy and that there was no breach of a disability insurance policy).
- *Peterson v. Wallace Computer Servs., Inc.*, 984 F. Supp. 821, 826 (D. Vt. 1997) (finding in a sexual harassment suit by a former employee that a plaintiff had a substantial need to review notes and memoranda prepared by the employer’s employees during their investigation into the plaintiff’s sexual harassment allegations).
- *Nationwide Mut. Fire Ins. Co. v. Smith*, 174 F.R.D. 250, 253 (D. Conn. 1997) (ordering the production of information about meetings and conversations with experts in a bad faith action where insureds were entitled to discovery about how the insurer processes fire claims and why it denies those claims).
- *Varuzza by Zarrillo v. Bulk Materials, Inc.*, 169 F.R.D. 254, 257 (N.D.N.Y. 1996) (ordering the production of a statement that the plaintiff gave to an insurance investigator following an accident in a personal injury case because although the statement fell within the scope of the work product doctrine, defendants needed the statement to assist in filling the gaps in plaintiff’s testimony and for impeachment purposes).

- Courts have often compelled the production of *photographs* and videos because other discovery devices cannot act as an adequate substitute for the unique content found therein. *See, e.g., Zoller v. Conoco, Inc.*, 137 F.R.D. 9, 10 (W.D. La. 1991) (ordering the production of photographs in a personal injury action because the plaintiff was unable to obtain a substantial equivalent to the content of a picture other than the picture itself).
- *Resolution Tr. Corp. v. Heiserman*, 151 F.R.D. 367, 375 (D. Colo. 1993) (“[I]t is beyond dispute that the defendants need the information requested. It contains the evidence upon which [the plaintiff] bases its complaint. For example, this discovery includes: a) the acts which [the plaintiff] contends were negligent, insufficient, negligent per se, or a breach of fiduciary duty....”).
- *Vallabharapurapu v. Burger King Corp.*, 276 F.R.D. 611, 617 (N.D. Cal. 2011) (finding that substantial need and undue hardship test was met by plaintiffs showing that performing own surveys of 600 Burger King locations would cost over \$600,000 and take more than two years to complete)
- *Heiserman*, 151 F.R.D. at 375-76 (“[I]t is beyond dispute that the defendants need the information requested . . . [and] [i]t would be extremely difficult, not to mention wasteful, for defendants to attempt to replicate [the plaintiff’s] three-year investigation when the information it seeks is readily available to the [plaintiff].”).
- Under Rule 26(b)(4)(B), the party seeking discovery from the non-testifying expert consulted in anticipation of litigation ‘carries a heavy burden in demonstrating the existence of exceptional circumstances.’ Exceptional circumstances are shown if the party seeking discovery is unable to obtain equivalent information from other sources. The party seeking discovery may meet the exceptional circumstances standard in one of two ways. First, the moving party may show that the object or condition at issue is destroyed or has deteriorated after the non-testifying expert observes it but before the moving party’s expert has an opportunity to observe it. Second, the moving party may show there are no other available experts in the same field or subject area. *Ex parte Mobile Gas Service Corp.*, 123 So. 3d at 515, quoting *Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 128 F. Supp. 2d 1148, 1151–52 (N.D.Ill.2001) (internal citations omitted).