



2010

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Recommended Citation

Marks, Colin P. (2010) "The Anticipation Misconception," *Kentucky Law Journal*: Vol. 99 : Iss. 1 , Article 3.
Available at: <https://uknowledge.uky.edu/klj/vol99/iss1/3>

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ARTICLES

The Anticipation Misconception

*Colin P. Marks*¹

INTRODUCTION

IMAGINE that your client calls to obtain advice regarding the adequacy of the warnings and instructions on a new medical product prior to releasing the product on the market. After reviewing the product, its warnings, and background information, you prepare drafts of a memorandum and make numerous notes to yourself regarding the possible legal liability associated with the product. Finally, you send the client a memorandum outlining your thoughts and advice for reducing litigation risks. Some years later, litigation arises surrounding the product and the plaintiffs request to see the memorandum you prepared regarding potential liability, as well as any notes and materials used to create such memorandum. Your client refuses to produce the requested memorandum and materials on the grounds that they are protected by both the attorney–client privilege and work product doctrine. Although the memorandum may seem to be clearly protected by the attorney–client privilege, does the work product doctrine truly apply? And are the attorney’s notes, drafts, and research trails that were not shared with the client protected under the work product doctrine? The likely answer to these questions is “no” simply by

¹ Professor of Law, St. Mary’s University School of Law; JD, University of Houston Law Center; BS, University of Missouri–Columbia. This article was selected as a winner of the 2010 Southeast Association of Law Schools Call for Papers Competition. This article benefited from feedback received at workshops at the Southeast Association of Law Schools New Scholars Workshop and St. Mary’s University School of Law Works–In–Progress series. I would like to thank the following people for their comments and suggestions which have helped enormously in shaping this article: Judge Patrick Higginbotham, United States Court of Appeals for the Fifth Circuit; Judge Xavier Rodriguez, United States District Court for the Western District of Texas; Professors Erica Beecher–Monas, Wayne State University Law School; Elizabeth Burch, Florida State University College of Law; Kathy L. Cerminara, Nova Southeastern University; Joshua Douglas, University of Kentucky College of Law; Samir Parikh, Lewis & Clark Law School; Claudine Pease–Wingenter, Phoenix School of Law; and David A. Schlueter, St. Mary’s University School of Law. I would like to thank and acknowledge the hard work and assistance of my research assistants Jason Goss, Rusty Hoermann, Craig Jacobs, Matt Johnson, and Sarah Minter, in researching and writing this article as well as the assistance of the faculty services librarian at St. Mary’s, Katy Stein, in tracking down a number of difficult sources. I would also like to thank my wife Jill, daughter Savannah, and son George for their love and support.

virtue of the fact that they may not be deemed to have been prepared in “anticipation of litigation,” as that term is often interpreted as litigation being more than a remote possibility.² Confusion is added to the analysis as there is disagreement about whether the materials sought must be created in preparation of litigation or if it is permissible that some other business purpose also played a role in their creation, the latter being excluded under the term “anticipation of litigation” in some jurisdictions.

Many commentators and courts have cited to the Supreme Court decision of *Hickman v. Taylor* as the genesis of the work product doctrine and the requirement that to be afforded protection the material in question must be generated “in anticipation of litigation.”³ The oft quoted policy justification for the protection afforded is that attorneys should be allowed a “zone of privacy” within which to prepare their case for the client.⁴ This justification supports limiting protection to only work generated “in anticipation of litigation” because, presumably, outside of this context there

2 See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603–04 (8th Cir. 1977) (emphasizing that “anticipation of litigation” is the keystone to work product protection, and denying work product protection to a document that was clearly opinion work product but prepared before litigation was anticipated).

3 See, e.g., Liesa L. Richter, *The Power of Privilege and the Attorney–Client Privilege Protection Act: How Corporate America has Everyone Excited About the Emperor’s New Clothes*, 43 WAKE FOREST L. REV. 979, 987 n.36 (2008) (“[T]he work–product doctrine provides additional protection for the work product of an attorney made in anticipation of litigation.”) (citing *Hickman v. Taylor*, 329 U.S. 495, 508, 511–12 (1947)); *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008); *Micosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1263 (11th Cir. 2008); *Reg’l Airport Auth. of Louisville v. LFG, L.L.C.*, 460 F.3d 697, 713 (6th Cir. 2006); *In re Grand Jury Subpoenas*, 454 F.3d 511, 520 (6th Cir. 2006); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006); *In re Grand Jury Subpoena Dated Oct. 22, 2001*, 282 F.3d 156, 160 (2d Cir. 2002); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997); *Dairyland Power Coop. v. United States*, 79 Fed. Cl. 709, 721 (Fed. Cl. 2007); *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 444–45 (Fed. Cl. 2007); *Cabor v. United States*, 35 Fed. Cl. 442, 445 (Fed. Cl. 1996); Keith Paul Bishop, *The McNulty Memo – Continuing the Disappointment*, 10 CHAP. L. REV. 729, 731 n.10 (2007); Thomas C. Pearson & Gideon Mark, *Investigations, Inspections, and Audits in the Post–SOX Environment*, 86 NEB. L. REV. 43, 94 n.348 (2007); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1295 (2006); Laticke M. Lyles, Comment, *Cooperation or Coercion?: Why Selective Waiver is Needed in Government Investigations*, 52 ST. LOUIS U. L.J. 1291, 1297 (2008).

4 *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) (identifying the purpose of the work product doctrine as establishing a zone of privacy in which lawyers can analyze their case “free from . . . interference by an adversary”); *Hanson v. U.S. Agency for Int’l Dev.*, 372 F.3d 286, 292 (4th Cir. 2004) (indicating that the work product doctrine “serves to provide a zone of privacy within which to plan . . . [for a] case” (citation omitted) (internal quotation marks omitted)); *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (stating the purpose of the work product doctrine is “to preserve a zone of privacy in which” an attorney can prepare his or her case); *Pac. Gas & Elec. Co. v. United States*, 69 Fed. Cl. 784, 789 (Fed. Cl. 2006) (asserting that the work product doctrine is “intended to preserve a zone of privacy [where an attorney] can prepare and develop legal strategy”; see *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

is no need for the “zone of privacy.” However, a closer reading of *Hickman* reveals that although the facts of that case involved preparation for trial, the Supreme Court placed no such limit on the scope of protection afforded an attorney’s “mental impressions, conclusions, opinions, or legal theories,” known as “core” work product.⁵ In fact, the Supreme Court made very clear that such materials should be afforded special protection, above and beyond that afforded “ordinary” work product, which includes “written or oral information transmitted to the attorney and recorded as conveyed by the client.”⁶ Furthermore, although the Court utilized the “zone of privacy” justification, it also articulated a much broader concern for the effect discovery of such materials would have on the attorney–client relationship.

This policy concern shares much in common with the policy justification that is at the heart of the attorney–client privilege. Thus, a review of *Hickman* reveals at least two commonly held misconceptions about the case: (1) that it requires core work product to be produced in “anticipation of litigation” before protection can attach and (2) that the sole justification for the protection is to create a “zone of privacy” within which the attorney can work. Together, these misconceptions have produced problems that should be of concern to both the practitioner and academic. From a practical standpoint, these misconceptions have limited the scope of coverage given to the attorney’s core work product causing problems with knowing which items in the attorney’s file will be discoverable. Furthermore, as different jurisdictions have adopted varying standards, attorneys must deal with a lack of uniformity when it comes to protecting work product. Academically, these misconceptions are troubling because they have resulted in a system that encourages forum shopping and creates distinctions without any meaning or justification.

This article examines both the work product doctrine’s historical and philosophical roots to determine whether the “anticipation of litigation” requirement should be a bar to the protection of core work product from discovery. Part I examines the current state of the work product doctrine through Federal Rule of Civil Procedure (“Federal Rules”) 26(b)(3) and case law and compares the doctrine with the attorney–client privilege. Part I concludes by demonstrating how core work product can be discovered despite the protection of these two doctrines. Part II examines the *Hickman v. Taylor* case within its historical context, starting with the enactment of the first Federal Rules of Civil Procedure in 1938 and concluding with an analysis of the Court’s decision itself. Part III discusses the subsequent interpretations of *Hickman v. Taylor* and how the “anticipation of litigation”

5 FED. R. CIV. P. 26(b)(3); see *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

6 *Advance Publ’ns, Inc. v. United States (In re Antitrust Grand Jury)*, 805 F.2d 155, 163 (6th Cir. 1986) (citing *In re Sealed Case*, 676 F.2d 793, 811 (D.C. Cir. 1982); *Doe v. United States (In re Doe)*, 662 F.2d 1073, 1077 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *In re Special Sept. 1978 Grand Jury*, 640 F.2d 49, 63 (7th Cir. 1980)).

requirement, or anticipation misconception, got its start through, of all things, a student note in the Harvard Law Review. Part III concludes with a discussion of the Supreme Court's interpretations of Rule 26(b) as it currently exists.

Finally, Part IV examines the "anticipation of litigation" requirement in light of this historical development and proposes that the requirement is unjustified historically, philosophically, and as a matter of policy. Part IV, therefore, proposes that a new exception be established with regard to core work product, or rather recognition that an old exception continues to exist. This exception, based upon *Hickman*, would afford core work product a residuum of protection from discovery regardless of the context in which it was created, so long as an attorney created it in his or her role of providing legal assistance. Such an exception to discovery would grant core work product a privileged status similar to that received by attorney-client communications, a result that makes sense when the instrumental policy justification for the doctrine is taken into account. Recognition of this protection will be more in keeping with the holding of *Hickman* and will help dispel uncertainty as to the scope of the doctrine due to the various readings courts have given to the term "anticipation of litigation."

I. THE WORK PRODUCT DOCTRINE

Before delving into the historical and philosophical underpinnings of the work product doctrine, a brief overview of the doctrine as it stands today is necessary to demonstrate how the anticipation of litigation requirement can be problematic. Because parties often seek to protect material under both the work product doctrine and the attorney-client privilege, a brief review of the attorney-client privilege is in order as well as a discussion of how these protections differ. Although these doctrines cover slightly different materials, their philosophical underpinnings actually have much in common.

A. *Work Product Doctrine Under Federal Rule of Civil Procedure 26(b)(3)*

1. *The Scope of Work Product Protection.*—In short, the work product doctrine grants a qualified privilege to the work product of a party or its agents.⁷ While the work product doctrine in the civil context has its roots in the 1946 United States Supreme Court case of *Hickman v. Taylor*, today the

⁷ *United States v. Armstrong*, 517 U.S. 456, 474 (1996) (citations omitted); *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 514 n.2 (5th Cir. 1993); *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1429 (3d Cir. 1991) (citation omitted); Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 762 n.1 (1983); Charles M. Yablon & Steven S. Sparling, *United States v. Adlman: Protection for Corporate Work Product?*, 64 BROOK. L. REV. 627, 633 (1998) (citation omitted).

Hickman decision has been partially codified in Federal Rule of Civil Procedure 26(b)(3):⁸

(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.⁹

The rule has been summarized as giving a qualified privilege to materials that are “(1) documents and tangible things otherwise discoverable; (2) prepared in anticipation of litigation or for trial; and (3) by or for another party or by or for that other party's representative.”¹⁰ Though the first of these elements only speaks in terms of “documents and tangible things,” the protection also is afforded to intangible things, such as the recollections of an attorney or party requested through an interrogatory, via the original *Hickman* decision.¹¹

The second requirement that work product be “prepared in anticipation of litigation” presents difficulties in interpretation. Courts have responded to this by adopting a variety of approaches for when something actually meets this criterion.¹² As one commentator has noted, there appears to be,

8 FED. R. CIV. P. 26(b)(3); 2 EDNA SELAN EPSTEIN, *THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK–PRODUCT DOCTRINE* 795 (5th ed. 2007). The Federal Rules of Criminal Procedure offer a similar protection through Rule 16(b)(2). FED. R. CRIM. P. 16(b)(2); EPSTEIN, *supra*, at 795. Though this article will focus on the civil rules, reference may be made at some points to the work product doctrine in the criminal context.

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

10 EPSTEIN, *supra* note 8, at 797 (citing FED. R. CIV. P. 26(b)(3)); *see also* Anderson et al., *supra* note 7, at 792 (internal quotation marks omitted) (quoting FED. R. CIV. P. 26(b)(3)).

11 *In re Cendant Corp. Sec. Litig.* 343 F.3d 658, 662 (3d Cir. 2003) (citing 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2024 (West 1994)); *Duffy v. United States (In re Grand Jury Proceedings)*, 473 F.2d 840, 845–46 (8th Cir. 1973); EPSTEIN, *supra* note 8, at 815; Richard L. Marcus, *The Story of Hickman: Preserving Adversarial Incentives While Embracing Broad Discovery*, in *CIVIL PROCEDURE STORIES* 326, 349 (Kevin M. Clermont ed., 2d ed. Foundation Press 2008); Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673, app. at 762 (2009).

12 Patrick E. Higginbotham, *Duty to Disclose; General Provisions Governing Discovery*, in 6 JAMES WM. MOORE, *MOORE'S FEDERAL PRACTICE* § 26.70(3)(a) (3d ed. 2009) (“Courts have

at its core, two factors required for work product protection to apply: “there must be a threat of litigation and there must be a motivational component.”¹³ As for the first factor, one issue that arises is whether the action threatened qualifies as “litigation.” The Federal Rules do not define “litigation,” but courts generally have broadened the term to apply beyond merely litigation in federal district courts so as to extend to other “adversarial proceedings.”¹⁴ Documents prepared for compliance with federal securities laws have not been afforded work product protection,¹⁵ nor have the notes of an attorney taken during a conference call with the Food and Drug Administration regarding the failure rate of a medical device because no investigation was pending.¹⁶ Similarly, documents prepared in anticipation of a governmental investigation have not been granted work product protection,¹⁷ but once a governmental investigation has actually commenced, the work product doctrine may apply as the prospect of litigation is no longer remote.¹⁸

This leads to yet another problem with applying the work-product doctrine: When is litigation “anticipated”? The term “anticipation” is also not defined by the Federal Rules, leading courts again to apply various standards. Analyzing whether work product was produced in anticipation of litigation often requires an inquiry into the temporality of the threatened adversarial proceeding and an inquiry into the motivational factor cited above.¹⁹ As to the temporality of the litigation, the requirement is met when a proceeding has actually been initiated; however, the doctrine does not

devised various formulations regarding just how concrete the prospect of litigation must be before protection will attach to a given document.”); Anderson et al., *supra* note 7, at 845.

13 EPSTEIN, *supra* note 8, at 825 (citing Marten v. Yellow Freight Sys. Inc., No. CIV.A.96-2013-GTV, 1998 WL 13244, at *10 (D. Kan. Jan. 7 1998)).

14 Willingham v. Ashcroft, 228 F.R.D. 1, 4 (D.D.C. 2005); Deseret Mgmt. Corp. v. United States, 76 Fed. Cl. 88, 92-93 (Fed. Cl. 2007) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. h (2000)); EPSTEIN, *supra* note 8, at 826-27; Jerold S. Solovy et al., *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney Client Privilege and the Work Product Doctrine*, in INSURANCE COVERAGE 2009: TRENDS AND LITIGATION 225, 491 (PLI Litig. & Admin. Practice, Course Handbook Series No. 18542, 2009).

15 Biddison v. City of Chicago, No. 85 C 10295, 1989 U.S. Dist. LEXIS 3991, at *2 (N.D. Ill. Feb. 3, 1989); EPSTEIN, *supra* note 8, at 829-30.

16 *In re* Grand Jury Subpoena, 220 F.R.D. 130, 156 (D. Mass. 2004).

17 *Id.* at 147 (citing Guzzino v. Felterman, 174 F.R.D. 59, 63 (W.D. La. 1997)).

18 Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 513 (D.N.H. 1996) (citations omitted); see also *In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1239 n.4 (5th Cir. 1982); United States v. Amerada Hess Corp., 619 F.2d 980, 987 (3d Cir. 1980); Garrett v. Metro. Life Ins. Co., No. 95 CIV.2406 (PKL), 1996 WL 325725, at *3 (S.D.N.Y. June 12, 1996) (citing Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1261 (3d Cir. 1993)).

19 EPSTEIN, *supra* note 8, at 836; Equal Rights Ctr. v. Post Props., Inc., 247 F.R.D. 208, 210 (D.D.C. 2008) (citation omitted); United States *ex rel.* Fago v. M & T Mortg. Corp., 242 F.R.D. 16, 23 (D.D.C. 2007); Evans v. Atwood, 177 F.R.D. 1, 6 (D.D.C. 1997); Amway Corp. v. Procter & Gamble Co., No. 1:98-CV-726, 2001 WL 1818698, at *6 (W.D. Mich. Apr. 3, 2001).

require that a suit be filed for the protection to apply.²⁰ It is in this pre-suit context that the temporality requirement is at its most chimerical. It is often stated that the chance of litigation must be more than a mere possibility.²¹ “In general . . . a party must show more than a remote prospect, an inchoate possibility, or a likely chance of litigation.”²² Courts, however, vary on the level of temporality they will require, with some courts requiring a very high level of imminence while others seem content with a much lesser degree.²³ For instance, some courts have interpreted in “anticipation of litigation” to mean that protection will only extend to work product prepared “under the supervision of an attorney in preparation for the real and imminent threat of litigation or trial”²⁴ However, other courts have quoted a more liberal standard, requiring that there exist “a subjective belief that litigation was a real possibility, and that belief must [be] objectively reasonable,”²⁵ or an even less demanding standard that the alleged work product was prepared “with an eye toward litigation.”²⁶ This variance in the stringency of what qualifies as work product, due to when litigation is “anticipated,” has created a lack of uniformity across judicial districts and has the undesirable effect of increasing the likelihood of forum shopping.

Even if the documents are prepared for an adversarial proceeding qualifying as “litigation” and the temporality requirement is met, protection will not be afforded if the motivation for creating the document was not based upon the threatened litigation. For instance, many documents may have been produced for a business purpose, as well as for litigation.

20 EPSTEIN, *supra* note 8, at 837; *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998); *Grinnell Corp. v. ITT Corp.*, 222 F.R.D. 74, 78 (S.D.N.Y. 2003) (citing *Adlman*, 134 F.3d at 1200); *Collins v. Mullins*, 170 F.R.D. 132, 136 (W.D. Va. 1996) (citing *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 43 (D. Md. 1974)).

21 *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (citing *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 795 (D. Del. 1954)); *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974); *John M. Burman, The Work Product Doctrine*, Wyo. LAW., Apr. 2006, at 1, 5 (citation omitted).

22 *In re Gabapentin Patent Litig.*, 214 F.R.D. 178, 183 (D.N.J. 2003) (citation and internal quotation marks omitted).

23 *Anderson et al.*, *supra* note 7, at 845–46; EPSTEIN, *supra* note 8, at 850–51.

24 *Williams v. Sprint/United Mgmt. Co.*, No. 03–2200–JWL–DJW, 2006 WL 266599, at *10 (D. Kan. Feb. 1, 2006); *Banks v. United States*, No. Co3–5533RJB, 2005 WL 974723, at *3 (W.D. Wash. Mar. 22, 2005) (“In determining whether documents were prepared in anticipation of litigation, the court should consider whether the documents would not have been generated but for the pendency or imminence of litigation.” (citation omitted) (internal quotation marks omitted)).

25 *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *see also United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

26 *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (citing *Hickman*, 329 U.S. at 511).

Such dual-purpose documents raise doubts as to whether the documents were truly created in anticipation of litigation.²⁷ There is a split between circuits as to what is the correct degree of motivation required. The Fifth Circuit has articulated a standard for “anticipation of litigation” whereby the privilege can apply where litigation is not imminent, “as long as the *primary motivating purpose* behind the creation of the document was to aid in possible future litigation.”²⁸ The Second Circuit, in *United States v. Adlman*, rejected the “primary motivating purpose” test and instead opted for the “because of” rule whereby “documents should be deemed prepared in anticipation of litigation . . . if 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.”²⁹ The standard adopted by the Second Circuit is a direct adoption of the standard advanced by Charles Wright and Arthur Miller in their treatise *Federal Practice and Procedure*.³⁰ Wright and Miller encourage adoption of the “because of” standard, stating, “the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”³¹ Indeed, a number of circuits have joined the Second Circuit in adopting this approach in varying contexts, including the First,³² Third,³³ Seventh,³⁴ Eighth,³⁵ Ninth,³⁶ and D.C. Circuits.³⁷ The standard itself could be open to multiple interpretations, however, and the courts have not created a uniform standard.

2. *Production of Work Product Under Federal Rule 26(b)(3)(ii).*—As has already been noted, the work product doctrine is not an absolute

27 *See, e.g.*, *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661, 674 (D. Kan. 2001) (Stretching the concept of creation for a business purpose by finding that the defendant, R.J. Reynolds, was in the business of litigation, and thus “documents prepared in the ordinary course of that business of litigation without a tie to specific litigation are not protected by work product immunity.”).

28 *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981) (emphasis added). *But see In re Sealed Case*, 146 F.3d at 884; *Roxworthy*, 457 F.3d at 594; *Bally's Park Place Hotel & Casino*, 983 F.2d at 1260; *Nat'l Union Fire Ins. Co.*, 967 F.2d at 984.

29 *Adlman*, 134 F.3d at 1202–03 (internal quotation marks omitted) (quoting WRIGHT ET AL., *supra* note 11, § 2024).

30 WRIGHT ET AL., *supra* note 11, § 2024.

31 *Id.*

32 *Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002).

33 *Montgomery Cnty. v. MicroVote Corp.*, 175 F.3d 296, 305 (3d Cir. 1999).

34 *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976–77 (7th Cir. 1996).

35 *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002).

36 *United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 907 (9th Cir. 2003).

37 *Equal Emp't Opportunity Comm'n v. Lutheran Social Servs.*, 186 F.3d 959, 968 (D.C. Cir. 1999).

privilege but a qualified privilege. Thus, even if a party has carried its burden and demonstrated the applicability of the work product doctrine that does not end the inquiry. The party seeking production then carries the burden of showing the applicability of Rule 26(b)(3) (ii), i.e., a substantial need for the materials to prepare its case and an inability to obtain it by other methods without undue hardship.³⁸

In applying this rule, courts make a distinction between ordinary or “fact” work product and core or “opinion” work product.³⁹ Ordinary work product has been defined as the “written or oral information transmitted to the attorney and recorded as conveyed by the client.”⁴⁰ Such ordinary work product may be obtained, despite the privilege, by meeting the above test.⁴¹ But courts, based on the language of Rule 26(b) and the *Hickman* decision itself, give special protection to core work product. “[A]bsent waiver, a party may not obtain the ‘opinion’ work product of his adversary; i.e., ‘any material reflecting the attorney’s mental impressions, opinions, conclusions, judgments, or legal theories.’”⁴² Thus, core work product enjoys a greater level of protection than ordinary work product, but even the extent of that heightened protection is somewhat unclear. While some courts have articulated an absolute protection to core work product, many others, including the Supreme Court, have stopped short of affording it such status.⁴³

B. The Work Product Rule Distinguished from Attorney–Client Privilege

1. *The Attorney–Client Privilege and how it is Applied.*—In diversity cases, federal law mandates that state law governs the attorney–client privilege.⁴⁴ However, if the court’s jurisdiction is premised upon a federal question, the attorney–client privilege is defined by federal common law.⁴⁵ The elements of the attorney–client privilege are satisfied “(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure

³⁸ FED. R. CIV. P. 26(b)(3)(ii); EPSTEIN, *supra* note 8, at 811.

³⁹ *Advance Publ’ns Inc. v. United States (In re Columbia/HCA Healthcare Corp. Billing Practices Litig.)*, 293 F.3d 289, 294 (6th Cir. 2002).

⁴⁰ *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986) (citations omitted).

⁴¹ *Toledo Edison Co. v. G A Techs., Inc.*, 847 F.2d 335, 339–40 (6th Cir. 1988); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984) (per curiam). In this sense, the work–product privilege is not an absolute privilege, but more akin to a qualified privilege. EPSTEIN, *supra* note 8, at 797.

⁴² *In re Columbia/HCA*, 293 F.3d at 294 (quoting *In re Antitrust Grand Jury*, 805 F.2d at 163–64).

⁴³ EPSTEIN, *supra* note 8, at 947–50.

⁴⁴ FED. R. EVID. 501.

⁴⁵ *Id.*

by himself or the legal adviser, (8) unless the protection is waived.”⁴⁶ A more succinct statement of the privilege is that a party must show: “(1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.”⁴⁷

There are a few notable exceptions to the privilege. Disclosure of communications to third parties can lead to a waiver of the privilege.⁴⁸ Also, the communication must be for the purpose of securing *legal* advice as opposed to securing general business advice.⁴⁹ Where an in-house counsel also serves in a business role, the inquiry can be difficult and requires a hard look into whether the communication was made for a business as opposed to a legal purpose. “Business communications

46 *Banner v. City of Flint*, 99 F. App’x 29, 36 (6th Cir. 2004) (quoting *Reed v. Baxter*, 134 F.3d 351, 355–56 (6th Cir. 1998)); *United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005) (articulating a nearly identical standard).

47 EPSTEIN, *supra* note 8, at 65 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 (Tentative Draft No.1, 1988)); *Upjohn v. United States*, 449 U.S. 383, 395 (1981) (discussing elements of confidentiality and communication); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.”) (citations omitted); Colin P. Marks, *Corporate Investigations, Attorney–Client Privilege, and Selective Waiver: Is a Half–Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 158 (2006). Though individual state and federal courts have articulated variations of this standard, these four basic prongs remain consistent. For instance, the Third Circuit, in *In re Grand Jury Investigation*, described the elements as:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort;
- and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Investigation, 599 F.2d 1224, 1233 (3d Cir. 1979) (quoting *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950)). “Though this standard adds some nuances, such as the crime–fraud exception to the privilege, the basic standard remains the same. Furthermore, though this standard is articulated in terms of communications from a client to an attorney, the privilege also covers communications from an attorney to a client.” Marks, *supra*, at 158 & n.11 (citing *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 618 (D. Kan. 2001)).

48 *United Shoe Mach. Corp.*, 89 F. Supp. at 358, 360–61 (D. Mass. 1950) (holding that the privilege only applies where the communication was between the attorney and client without the presence of third-party strangers); *see also* Marks, *supra* note 47, at 159.

49 *United Shoe Mach. Corp.*, 89 F. Supp. at 60–61 (“Where a communication neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice, it is not privileged.” (citation omitted)); *see also* Marks, *supra* note 47, at 159.

are not protected merely because they are directed to an attorney, and communications at meetings attended or directed by attorneys are not automatically privileged as a result of the attorney's presence."⁵⁰ Thus, in cases where in-house counsel serves a dual legal/business role, courts will look at the nature of the communication to determine whether the primary purpose of the communication was to provide legal assistance.⁵¹

2. Policy Justifications for the Attorney–Client Privilege.—The attorney–client privilege has been described as one of the oldest existing legal privileges, dating back to ancient Rome, where it was initially used as a means to prevent an attorney from being called as a witness in his client's case.⁵² The justifications for the attorney–client privilege have evolved over the years. Today, the most commonly cited policy supporting existence of the privilege is that open and frank communications with an attorney

50 *Kramer v. Raymond Corp.*, Civ. No. 90–5026, 1992 WL 122856, at *1 (E.D. Pa. May 29, 1992) (citing *Super Tire Eng'g Co. v. Bandag, Inc.*, 562 F. Supp. 439, 441 (E.D. Pa. 1983)). At one time, many federal courts adopted a “control group” test to determine if communications between corporate employees and the corporate counsel were covered by the privilege. See *United States v. Lipshy*, 492 F. Supp. 35, 42–43 (N.D. Tex. 1979) (citation omitted). Under this test,

the privilege applied if the employee making the communication was in a position to control or take a substantial part in a decision about any action which the corporation might take upon the advice of the attorney, or if the employee was an authorized member of a body or group which had the authority such that he, in effect, personified the corporation.

Marks, *supra* note 47, at 162. However, this approach was squarely rejected by the Supreme Court in 1981 in *Upjohn Co.*, 449 U.S. at 391–93. See also *Nat'l Converting & Fulfillment Corp. v. Bankers Trust Corp.*, 134 F. Supp. 2d 804, 806 n.1 (N.D. Tex. 2001). Today, under federal law, “communications from lower echelon employees are within the privilege as long as the factors listed above are satisfied and the communications are made to the attorney in confidence to assist him or her in giving legal advice to the client corporation.” Marks, *supra* note 47, at 163 (citations omitted).

51 *Kramer*, 1992 WL 122856, at *1; *MSF Holding, Ltd. v. Fiduciary Trust Co. Int'l*, No. 03 Civ. 1818PKLJCF, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 7, 2005); *Avianca, Inc. v. Corriera*, 705 F. Supp. 666, 676 (D.D.C. 1989). Two other notable exceptions are that underlying facts are not protected, *Upjohn*, 449 U.S. at 395–96; *United States v. Rakes*, 136 F.3d 1, 3–4 (1st Cir. 1998); *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994), and the privilege does not apply to communications concerning an intended or continuing crime under the crime–fraud exception.

52 JOHN WILLIAM GERGACZ, *ATTORNEY–CORPORATE CLIENT PRIVILEGE* § 1.02–1.04 (3d ed. 2001). Wigmore described the privilege as being an accepted part of English law, however, this notion has come under attack as being inaccurate and possibly was nothing more than a makeweight to “distinguish [the attorney–client privilege] from those that Wigmore chose to deprecate as ‘novel privileges.’” 24 CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM JR., *FEDERAL PRACTICE & PROCEDURE* § 5472 (2d ed. 1986) (citing 8 J. WIGMORE, *EVIDENCE* § 2286, at 536 (McNaughton rev. ed. 1986)).

facilitate compliance with the law.⁵³ Thus, the privilege exists to promote full disclosure by the client and to foster a relationship of trust between the attorney and the client.⁵⁴ This justification has been labeled an “instrumental” one in that the privilege serves as an instrument, or a means to an end—that end being communications between attorney and client.⁵⁵ At its heart, this justification is based upon an assumption that without the privilege clients will not disclose necessary facts to the attorney.⁵⁶ Thus, the privilege has been described from a cost–benefit standpoint as cost–free to society as, without the privilege, the evidence at issue would not have been disclosed and discoverable in the first place.⁵⁷

Not surprisingly, because the attorney–client privilege is based upon an assumed benefit, it has been criticized as speculative and its value has been called into question.⁵⁸ This has caused some commentators to offer up alternative, non–instrumental justifications for the privilege, such as a “humanistic” privacy justification.⁵⁹ Imwinkelried distinguishes this justification noting, “the humanistic rationale does not rest on the factual assumption of a causal connection Rather, the rationale is that it is desirable to create certain privileges out of respect for personal rights such as autonomy or privacy.”⁶⁰ This privacy concern mirrors a primary justification that is often cited when explaining the work product doctrine—the benefits of having a “zone of privacy” within which an attorney can work.⁶¹ Nonetheless, this humanistic policy justification has not overtaken the instrumental justification, and the Supreme Court has continued to cite

53 Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney–Client Privilege*, 66 CALIF. L. REV. 1061, 1061 (1978) (“The privilege is also considered necessary to the lawyer’s function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.”).

54 *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985); *Palmer v. Farmers Ins. Exch.*, 861 P.2d 895, 904–05 (Mont. 1993).

55 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 5.1.1 (Richard D. Friedman ed., 2002).

56 *Id.*; *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998).

57 IMWINKELRIED, *supra* note 55. Interestingly, at one time, the paradigm for this justification was in the context of a trial lawyer being consulted for the purposes of litigation, before the rise of the in–house counsel, but the justification has been extended to the in–house counsel context as well. WRIGHT & GRAHAM, *supra* note 52; Vincent C. Alexander, *The Corporate Attorney–Client Privilege: A Study of the Participants*, 63 ST. JOHN’S L. REV. 191, 267–68 (1989) (“Interestingly, for several decades of its common law existence, the attorney–client privilege encompassed only communications relating to the litigation in which the lawyer’s testimony was sought. It was not until the mid–1800s that the privilege was held to include communications relating to ‘legal advice of any kind.’” (citations omitted)).

58 WRIGHT & GRAHAM, *supra* note 52.

59 *Id.*; IMWINKELRIED, *supra* note 55, § 5.1.2.

60 IMWINKELRIED, *supra* note 55, § 5.1.2.

61 *See supra* note 4.

approvingly to the instrumental justification in recognizing new privileges.⁶²

3. Coverage Under the Attorney–Client Privilege Versus the Work Product Doctrine.—It has been said that the scope of the work product doctrine is both broader and narrower than the attorney–client privilege.⁶³ It is broader in that it extends to materials beyond just communications.⁶⁴ It is narrower in that it only extends to materials created “in anticipation of litigation.”⁶⁵ In some instances, this coverage may overlap. For instance, in the hypothetical posited at the beginning of this Article in which litigation over a client’s product ensued, a memorandum prepared and given to the client assessing the merits of the pending case or cases would likely have dual coverage under both the attorney–client privilege (as the memorandum is a communication) and the work product doctrine (as the memorandum was created in anticipation of litigation). But returning to the documents at issue in the introductory hypothetical, would there be any protection for the drafts of a memorandum and attorney’s notes in his or her file regarding the possible legal liability? Any memoranda that are given to the client may come under the protection of the attorney–client privilege, but drafts, notes,

⁶² IMWINKELRIED, *supra* note 55; *Jaffee v. Redmond*, 518 U.S. 1, 9–12 (1996); *United States v. Zolin*, 491 U.S. 554, 562–63 (1989).

⁶³ Compare *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975) (“[T]he work-product doctrine is distinct from and broader than the attorney–client privilege.”), and *Advance Publ’ns Inc. v. United States (In re Columbia/HCA Healthcare Corp. Billing Practices Litig.)*, 293 F.3d 289, 294 (6th Cir. 2002), and *United States v. Pollard (In re Martin Marietta Corp.)*, 856 F.2d 619, 624 (4th Cir. 1988), with *In re OM Group Secs. Litig.*, 226 F.R.D. 579, 587 (N.D. Ohio 2005) (noting that the attorney–client privilege is different than the work product doctrine). See also Fred A. Simpson, *Has the Fog Cleared? Attorney Work Product and the Attorney–Client Privilege: Texas’s Complete Transition into Full Protection of Attorney Work in the Corporate Context*, 32 ST. MARY’S L. J. 197, 225–26 (2001) (“The work product doctrine provides a greater area of protection than the attorney–client privilege. In spite of its broad application, work product does not protect documents or tangible items not created in anticipation of litigation.” (citations omitted)); Kevin Mark Smith, *Preventing Discovery of Internal Investigation Materials: Protecting Oneself From One’s Own Petard*, J. KAN. B. ASS’N, Aug. 2000, at 28, 35 (“Because the work product doctrine is narrower in scope than the attorney–client privilege in that it only applies when litigation is ongoing or pending, an entity must next determine whether the investigation is being conducted as a result of pending litigation.” (citation omitted)); Kim J. Gruetzmacher, Comment, *Privileged Communications with Accountants: The Demise of United States v. Kovel*, 86 MARQ. L. REV. 977, 989 (2003) (“The attorney work product doctrine is at once broader and narrower than the attorney–client privilege.”).

⁶⁴ *In re Columbia/HCA*, 293 F.3d at 304 (“[T]he ‘work product doctrine is distinct from and broader than the attorney–client privilege’ and extends beyond confidential communications between the attorney and client to ‘any document prepared in anticipation of litigation by or for the attorney.’” (quoting *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986))).

⁶⁵ Gabriel L. Imperato, *Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Health Care Organization*, 51 ALA. L. REV. 205, 216 (1999) (“The key to this protection is that the work must be performed in anticipation of litigation.”).

and possibly even research trails the attorney creates could all be subject to discovery. Although these materials will all likely contain or reflect the mental impressions of the attorney, they were created pre-launch, at a time when litigation was remote. In other words, although the materials may represent core work product, to fall under the protection of the work product doctrine, even core material must be produced “in anticipation of litigation.”⁶⁶

This limitation can pose a significant problem for the transactional attorney. As Professor Roger Kirst has noted:

It seems unlikely that a transaction document will be found to have been created in anticipation of litigation as required by Rule 26(b)(3) to meet the definition of litigation work product. That leaves the attorney-client privilege as the obvious ground, so lawyers regularly rely on that privilege and assert that the transaction documents they wrote or edited are protected from discovery by the attorney-client privilege. Thus, the issue in the federal caselaw on discovery of transaction work product has been whether such material is privileged. The federal courts have almost always held that the federal law of the attorney-client privilege does not protect documents that do not reveal the client's confidential communications.⁶⁷

The case of *Hercules Inc. v. Exxon Corp.* illustrates the difficulty of protecting attorney work product in a patent prosecution context.⁶⁸ In *Hercules*, Hercules sued Exxon for infringement of a patent that disclosed a type of artificial rubber.⁶⁹ During discovery, Hercules refused to produce 255 requested documents, claiming that the documents were protected

66 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2026 (3d ed. 2010) (“As with all assertions of work-product protection, opinion work product is guarded against discovery only if prepared in anticipation of trial; mental impressions of an attorney in service to other objectives, such as negotiation of a transaction, are not protected by the doctrine.”); Anderson et al., *supra* note 7, at 820; Duke T. Oishi, *A Piece of Mind for Peace of Mind: Federal Discoverability of Opinion Work Product Provided to Expert Witnesses and its Implications in Hawai'i*, 24 U. HAW. L. REV. 859, 864 (2002); Robert D. Stokes, Note, *Discovering Investigative Reports Under the Work Product Doctrine*, 34 BAYLOR L. REV. 156, 159 (1982); Ettie Ward, *The Litigator's Dilemma: Waiver of Core Work Product Used in Trial Preparation*, 62 ST. JOHN'S L. REV. 515, 516 n.4 (1988).

67 Roger W. Kirst, *A Third Option: Regulating Discovery of Transaction Work Product Without Distorting the Attorney-Client Privilege*, 31 SETON HALL L. REV. 229, 230 (2000); *see also* United States v. Naegle, 468 F. Supp. 2d 165, 170 (D.D.C. 2007) (“When there is no intent that the communication remain confidential, the privilege does not attach.” (citing United States v. White, 950 F.2d 426, 430 (7th Cir. 1991))); *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 22 (1st Cir. 2003) (“The privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.” (citations omitted)); *Santrade, Ltd. v. Gen. Elec. Co.*, 150 F.R.D. 539, 542 (E.D.N.C. 1993) (noting same); *Marc Rich & Co. A.G. v. United States (In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983)*, 731 F.2d 1032, 1037 (2d Cir. 1984) (“[The attorney-client] privilege does not impede disclosure of information except to the extent that that disclosure would reveal confidential communications.” (citation omitted)).

68 *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977).

69 *Id.* at 141.

by either the attorney–client privilege or the work product doctrine.⁷⁰ The district court began its inquiry by classifying the documents into categories such as “[d]ocuments relating to the prosecution of the application for the patent in suit” or documents relating to a particular interference suit.⁷¹ The court then analyzed the documents under the attorney–client privilege finding that a number of the communications were not covered by the privilege, in part due to the communications not being premised upon the rendering of legal advice.⁷² The court then turned to the work product doctrine, analyzing the documents in light of the “anticipation of litigation” requirement.⁷³ Although the court agreed that an adversarial proceeding included a patent interference proceeding, it stopped short of finding that a document prepared to aid in the prosecution of a patent qualified under the “anticipation of litigation” requirement.⁷⁴

The scope of that privilege is still limited, however, by the requirement that the document be prepared “in anticipation of litigation.” The prosecution of an application before the Patent Office is not an adversary, but an *ex parte* proceeding. Although the process involves preparation and defense of legal claims in a quasi–adjudicatory forum, the give–and–take of an adversary proceeding is by and large absent.⁷⁵

Thus, the court held that a number of the documents, including drafts with attorneys’ handwritten notes, were subject to discovery.⁷⁶

Hercules demonstrates how documents, even ones that record the mental impressions of attorneys acting in their legal capacities, will fail to garner protection under the work product doctrine if litigation is not anticipated. However, transactional attorneys are not the only ones facing the prospect of their mental impressions being open to discovery. As has already been noted, documents created in anticipation of a government investigation, but prior to the commencement of the investigation, have also been found to be beyond the scope of the work product doctrine.⁷⁷

⁷⁰ *Id.* at 142.

⁷¹ *Id.*

⁷² *Id.* at 147–48. It is not entirely clear if the documents may have been subject to discovery due to some other reason; the court discussed the argument that some of the communications may not have been to individuals covered by the privilege but dismissed this attack. *Id.* at 145–47. The court then discussed the requirement that the attorney “is ‘acting as a lawyer’–giving advice with respect to the legal implications of a proposed course of conduct” and then concluded that on the basis of the foregoing, the following documents were not protected by the attorney–client privilege. *Id.* at 147–48.

⁷³ *Id.* at 150–51.

⁷⁴ *Id.* at 151–52.

⁷⁵ *Id.* at 152.

⁷⁶ *Id.*

⁷⁷ *In re* Grand Jury Subpoena, 220 F.R.D. 130, 158–59 (D. Mass. 2004); Guzzino v. Felterman, 174 F.R.D. 59, 63 (W.D. La. 1997); see also *In re* Bank One Secs. Litig., First Chi.

Indeed, even when a problem has arisen, documents may not be said to be prepared in anticipation of litigation if the prospect is deemed remote.

For instance, in the case of *In re Grand Jury Subpoena*,⁷⁸ a case that in many ways mirrors the hypothetical proposed in the introduction, a corporation was under investigation by a grand jury for distributing adulterated and misbranded medical devices in violation of provisions of the Food, Drug, and Cosmetic Act (FDCA).⁷⁹ In 1998, the Food and Drug Administration (FDA) initially approved the device at issue for manufacture, but prior to and during the initial period of shipping the devices, it was discovered that the devices were failing both in routine tests and in actual shipped devices.⁸⁰ After a series of calls involving the corporation's officers, attorney, and the FDA, among others, the corporation decided to stop production of the device.⁸¹ The grand jury sought to compel the corporation's attorney to produce the notes he took during these calls with the FDA.⁸² The corporation and attorney resisted and sought a protective order, claiming the notes were protected under the work product doctrine.⁸³

After an extensive review of the work product doctrine, including its various applications in different jurisdictions, the court ultimately denied the protective order, finding that the notes were not produced in anticipation of litigation.⁸⁴ What is striking about the court's decision, however, is its rather blunt statement that the notes were classic core work product. The court stated:

There can be little doubt that if prepared in anticipation of litigation, an

S'holder Claims, 209 F.R.D. 418, 425 (N.D. Ill. 2002) (finding that documents prepared in response to an investigation by the Office of the Comptroller of Currency were not protected by the work product doctrine because the documents "were not prepared due to the anticipation of litigation, but rather [arose] from the evolution of business activities at Bank One as a result of an OCC inquiry"); *In re Leslie Fay Cos. Secs. Litig.*, 161 F.R.D. 274, 280 (S.D.N.Y. 1995) (holding that documents prepared by an audit committee in light of an SEC investigation were not protected by the work product doctrine because the investigation by the audit committee was not conducted *primarily* in anticipation of litigation).

78 *In re Grand Jury Subpoena*, 220 F.R.D. 130.

79 *Id.* at 133. To ensure that readers of the opinion could not learn the identity of the corporation or other parties involved, the court created fake names such as XYZ Corporation. *Id.* at 134-35, n.1.

80 *Id.* at 134.

81 *Id.* at 139-40.

82 *Id.* at 133.

83 *Id.*

84 *Id.* at 156-62. The court noted that the corporation and its attorney were in a "catch-22" of sorts in that if they claimed they anticipated either a lawsuit or adverse FDA action, this would be based on failures in the field of the device which would put the company out of compliance with the FDCA and thus the notes could be discoverable under the crime-fraud exception. *Id.* at 157-58. Ultimately, the court concluded that the corporation and attorney had a weak anticipation showing and had also failed to show that the notes were produced because of the prospect of litigation. *Id.* at 162.

attorney's notes of conference calls between a client and a regulatory agency are the sort of materials that the work product doctrine protects. Indeed, they typically qualify as opinion work product, because "when taking notes, an attorney often focuses on those facts that she deems legally significant."⁸⁵

Despite the fact that the attorney clearly took the notes to aid him in fulfilling his duties to his client, the court nonetheless found them discoverable. The court ruled that the notes were not generated in "anticipation of litigation" as the FDA had not actually begun an investigation and the prospect of private litigation was not likely at the time the documents were created.⁸⁶

In both *Hercules* and *In re Grand Jury Subpoena*, the court recognized that the documents sought reflected the mental impressions of an attorney acting in his or her capacity as legal counsel; yet the courts denied protection of the work product on an assumption that even core work product can only be protected if it was generated "in anticipation of litigation."⁸⁷ This raises a rather basic question of whether the assumption that the "anticipation of litigation" requirement applies to core work product is correct or even justified. The remainder of this Article discusses the origin of what is, in fact, a misunderstanding of the protection that should be afforded to core work product.

II. THE GENESIS OF THE WORK PRODUCT RULE

As with most articles that address the work product doctrine, a discussion of the seminal case of *Hickman v. Taylor* is in order.⁸⁸ However, a mere recitation of the Supreme Court's holding does not do justice to the nuances of the rule or the purposes for which it was created. To truly understand *Hickman*, it is necessary to set up the historical context in which it was decided as well as the state of the Federal Rules of Civil Procedure as they existed at that time.

85 *Id.* at 155–56 (quoting *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000)).

86 *Id.* at 157–62. [T]he possibility of litigation must be more than inchoate. *Id.* at 158.

87 *Id.* at 155–62; *Hercules, Inc. v. Exxon Corp.* 434 F.Supp. 136, 151–52 (D. Del. 1977); *see also Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603–04 (8th Cir. 1977) ("That the contents of the report constituted 'work product' cannot be denied; nor is there any question that the report contained the mental impressions, conclusions and opinions of those who wrote it, including their interpretations of what the interviews with individuals revealed. However, it is obvious that Law Firm's work was not done in preparation for any trial, and we do not think that the work was done in 'anticipation of litigation,' as that term is used in Rule 26(b)(3), although, of course, all parties concerned must have been aware that the conduct of employees of Diversified in years past might ultimately result in litigation of some sort in the future.").

88 *Hickman v. Taylor*, 329 U.S. 495 (1947).

A. *The First Rules of Federal Civil Procedure and Their Purpose*

The first Rules of Civil Procedure were adopted in 1938.⁸⁹ Prior to the adoption of these rules, discovery procedures were severely limited. The adversarial process reigned supreme and gamesmanship was the order of the day in litigation.⁹⁰ Thus, all discovery, including what would later be termed “work product,” was often unavailable to the other side except in circumstances where a court might equitably find that compulsion was required.⁹¹ It was in this setting that Roscoe Pound, then Dean of the University of Nebraska’s College of Law, gave a speech to the American Bar Association questioning the propriety of a system that valued the adversarial system over justice.⁹² This speech reportedly helped initiate efforts that led to the adoption of the Rules Enabling Act of 1934.⁹³

The first rules covered a variety of matters, including discovery. The rules represented a stark contrast to the gamesmanship that had existed prior to their adoption, and indeed, it appears there were a number of courts that were wary of them.⁹⁴ With regard to discovery, the rules formally provided for when depositions could be taken and their

89 *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252, 1265 (3d Cir. 1993) (citation omitted); *Furman v. Cirrito*, 782 F.2d 353, 355 (2d Cir. 1986); *Henley v. FMC Corp.*, 189 F.R.D. 340, 349 n.8 (S.D. W. Va. 1999) (citation omitted); *Montalvo v. Hutchinson*, 837 F. Supp. 576, 577 (S.D.N.Y. 1993); *In re Watford*, 192 B.R. 276, 279 (Bankr. M.D. Ga. 1996).

90 Marcus, *supra* note 11, at 326–27; see *Hickman*, 329 U.S. at 500–01 (noting the “cumbersome” methods of obtaining discovery prior to the Federal Rules of Civil Procedure).

91 Marcus, *supra* note 11, at 326–27; Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 360 (1987) (“Before the new rules, federal discovery was virtually nonexistent . . .”).

92 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 405–06 (1906); Marcus, *supra* note 11, at 326 (quoting Pound, *supra*, at 404–05); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944–48 (1987).

93 Marcus, *supra* note 11, at 328 (quoting John H. Wigmore, *Roscoe Pound’s St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUD. SOC. 176, 176 (1936)).

94 *Discovery Procedure Symposium: Before the 1946 Conference of Third U.S. Circuit Court of Appeals*, 5 F.R.D. 403, 418–19 (1946) [hereinafter *Discovery Procedure Symposium*] (“As I think everyone in this room knows, under the old practice, before the Rules, the trial of a lawsuit was more like a sporting proposition: If you got the better lawyer, you had a better chance of winning; if you could conceal all the facts, you had a better chance of winning.”); Marcus, *supra* note 11, at 329 (quoting *Hickman v. Taylor*, 153 F.2d 212, 217 n.6 (3d Cir. 1945)).

scope,⁹⁵ when interrogatories had to be served,⁹⁶ and for the production of documents and things.⁹⁷ Although these rules made exceptions for

95 FED. R. CIV. P. 26 (1938) (amended 1948). Rule 26 read, in pertinent part:

(a) When depositions may be taken.

By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination.

Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

Id.

96 FED. R. CIV. P. 33 (1938) (amended 1948). Rule 33 provided:

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

Id.

97 FED. R. CIV. P. 34 (1938) (amended 1948). Rule 34 provided:

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects,

privileged materials,⁹⁸ meaning documents revealing attorney–client communications would remain protected under the attorney–client privilege, the rules made no exception for documents created in the course of preparing for litigation. In the absence of a rule on point, courts soon began to adopt a variety of approaches on how to deal with such materials.

Although the work product problem was not the only troublesome issue faced by the first rules, it was certainly one of the most controversial and the Advisory Committee to the Federal Rules soon began to explore language to address the issue.⁹⁹ Courts dealing with objections to the production of such materials generally fell into one of two camps. Some courts held that such materials must be produced, regardless of whether they were generated by an attorney or by a third party employed by the party claiming protection.¹⁰⁰ The Advisory Committee noted, however, that a number of cases had protected such materials from discovery, although the reasons were hardly uniform.¹⁰¹ As the Committee noted:

Thus it has been held by some courts that statements obtained from

or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Id.

98 See FED. R. CIV. P. 26(b) (1938) (amended 1948) (“[T]he deponent may be examined regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . .”) (emphasis added); FED. R. CIV. P. 34 (amended 1948) (“[T]he court . . . may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, *not privileged*, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control . . .”) (emphasis added).

99 Marcus, *supra* note 11, at 329; Walter P. Armstrong, *Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments*, 5 F.R.D. 339, 354–55 (1946).

100 Bowles v. Ackerman, 4 F.R.D. 260, 262 (S.D.N.Y. 1945); Blank v. Great N. Ry., 4 F.R.D. 213, 214–15 (D. Minn. 1943); Sarmiento v. Edwards Taxi Co. (*In re Citizens Cas. Co.*), 3 F.R.D. 171, 172 (S.D.N.Y. 1942); Revheim v. Merritt–Chapman & Scott Corp., 2 F.R.D. 361 (S.D.N.Y. 1942); Seligson v. Camp Westover, Inc., 1 F.R.D. 733, 734 (S.D.N.Y. 1941); Matthies v. Peter F. Connolly Co., 2 F.R.D. 277, 277–78 (E.D.N.Y. 1941); Colpak v. Hetterick, 40 F. Supp. 350, 351 (E.D.N.Y. 1941); Kane v. News Syndicate Co., 1 F.R.D. 738, 739 (S.D.N.Y. 1941); Price v. Levitt, 29 F. Supp. 164, 165–66 (E.D.N.Y. 1939); Bough v. Lee, 29 F. Supp. 498, 501 (S.D.N.Y. 1939); Kulich v. Murray, 28 F. Supp. 675, 676 (S.D.N.Y. 1939); Bough v. Lee, 28 F. Supp. 673, 675 (S.D.N.Y. 1939); *see also* Hickman v. Taylor, 153 F.2d 212, 217–18 n.8 (3d Cir. 1945) (summarizing cases where discovery was permitted).

101 Armstrong, *supra* note 99, at 5 F.R.D. at 457–59.

witnesses, parties or others are not material as evidence, or are hearsay and inadmissible, and discovery has been denied. . . . Some courts have also emphasized what they thought to be the unfairness of letting the other party, through discovery, obtain free of charge the material gathered or prepared by his adversary; that to permit such a course would penalize diligence and put a premium on laziness; and that discovery should not constitute a “fishing expedition.”. . . Some courts have held that it is improper to seek any evidentiary matter gathered by or for the adversary party after commencement of the action. . . . And a number of cases, as to particular matters to be discovered, have either denied the discovery because no reason or cause therefor was shown regarding the data sought, or denied discovery on the general principle that no inquiry should be made into the adversary’s preparation of his case for trial.¹⁰²

Thus, courts were split as to what to do with material generated when litigation was pending. It was within this context that the *Hickman* case was decided.

B. *Hickman v. Taylor at the Trial and Appellate Level*

On February 6, 1943, a tug boat named the *J.M. Taylor*, owned by the partnership of Taylor & Anderson, capsized and five of the seamen on board were killed, including Norman Hickman.¹⁰³ Soon after the accident, Taylor & Anderson hired an attorney, Mr. Fortenbaugh, to defend the partnership in any subsequent suit that might arise in connection with the sinking of the *J.M. Taylor*.¹⁰⁴ On March 4, 1943, a steamboat inspector’s hearing was held where the four surviving members of the crew testified; immediately after the hearing, Fortenbaugh interviewed these witnesses and obtained written statements from them.¹⁰⁵ Fortenbaugh also interviewed other relevant witnesses “and in some cases made memoranda of what they told him.”¹⁰⁶ Thereafter, settlements were reached with representatives of three of the five dead seamen.¹⁰⁷

On November 26, 1943, Hickman’s father, as administrator of his son’s estate, brought suit against Taylor & Anderson under the Jones Act, 46 U.S.C.A. § 688, alleging his son’s death resulted from Taylor & Anderson’s negligence.¹⁰⁸

¹⁰² *Id.* at 458–59 (internal citations omitted).

¹⁰³ *Hickman v. Taylor*, 4 F.R.D. 479, 480 (E.D. Pa. 1945); Marcus, *supra* note 11, at 332–33.

¹⁰⁴ *Hickman*, 4 F.R.D. at 481; Marcus, *supra* note 11, at 333.

¹⁰⁵ *Hickman*, 4 F.R.D. at 481.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 480; Marcus, *supra* note 11, at 334. Curiously, the district court referred to Hickman as the plaintiff’s wife, which Richard Marcus points out is incorrect. Marcus, *supra* note 11, at 334 n.43. As Marcus also points out, suit was also filed against Baltimore & Ohio Railroad (B&O). *Id.* at 334. B&O was the owner of a sunken car float that the *J.M. Taylor* had

Pursuant to Rule 33, the plaintiff requested that Taylor & Anderson produce copies of any statements members of the crew made to Fortenbaugh after the accident.¹⁰⁹ Taylor & Anderson refused, claiming that the interrogatory called for “privileged matter obtained in preparation for litigation.”¹¹⁰ The district court subsequently held a hearing where Fortenbaugh testified by deposition on how and why the statements were made.¹¹¹

In defending its refusal to produce the statements, the defendants cited to *Stark v. American Dredging Co.*,¹¹² in which the district court denied a request for production of witnesses’ statements made in preparation for trial.¹¹³ Judge Kirkpatrick, sitting with an en banc panel from the Eastern District of Pennsylvania, refused to recognize a broad, sweeping protection from discovery of all things produced in anticipation of litigation.¹¹⁴ In doing so, the court first noted the liberal scope of discovery under the Federal Rules: “The guiding principle is the broad conception of the Rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with the orderly and efficient functioning of the judicial process.”¹¹⁵ The *Hickman* court distinguished the *Stark* decision as simply recognizing that the Federal Rules granted the court discretion to limit production, but it then disapproved *Stark* in that it placed a burden on the party seeking production to show “good cause.”¹¹⁶ The court reformulated the rule as “[u]nless, under the circumstances of any particular case, the [c]ourt is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked.”¹¹⁷

Turning to the statements at issue, the court first noted that any firm

been hired to tow across the Delaware River the night of the accident. *Id.* at 332.

¹⁰⁹ *Hickman*, 4 F.R.D. at 480. The interrogatory read:

State whether any statements of the members of the crews of the Tugs ‘J. M. Taylor’ and ‘Philadelphia’ or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug ‘John M. Taylor.’ Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.

Id. (quoting Interrogatory No. 38).

¹¹⁰ *Id.* (quotation marks omitted).

¹¹¹ *Id.* at 481.

¹¹² *Stark v. Am. Dredging Co.*, 3 F.R.D. 300, 302 (E.D. Pa. 1943).

¹¹³ *Hickman*, 4 F.R.D. at 481.

¹¹⁴ *Id.* at 481–82 (“We do not regard [the *Stark*] decision as laying down a hard and fast rule that statements obtained for [preparation for trial] are privileged, or exempt from production for any other reason.”).

¹¹⁵ *Id.* at 481.

¹¹⁶ *Id.* at 482.

¹¹⁷ *Id.* (internal quotation marks omitted).

would conduct an investigation to determine its own ship's seaworthiness and whether its employees were responsible.¹¹⁸ Although the court did not state so expressly, it appears that the court was implying that business concerns could have driven the investigation. Whether the statements were prepared in anticipation of litigation or not, the court felt that they should be produced. Though the court noted that it could not compel production of materials within the traditional boundaries of the attorney–client privilege, it found that the statements to Fortenbaugh were not covered by this privilege.¹¹⁹ Without the protection of this privilege, the court found that the statements should be produced under the broad scope of discovery permitted by the Federal Rules of Civil Procedure.¹²⁰ Interestingly, the court placed an important limit on this discovery; the court limited discovery of Fortenbaugh's "mental impressions, opinions, legal theories and other collateral matter" and held that the court should review Fortenbaugh's materials and only produce those portions "containing statements of facts obtained from witnesses which it considers to be within the proper scope of discovery."¹²¹ The court thus ordered production of the witness statements for the court to make such a determination.¹²² Taylor & Anderson and Fortenbaugh refused to produce the statements and the assigned judge found them in contempt of court.¹²³

The district court's ruling was appealed to the Third Circuit and was heard en banc.¹²⁴ As an initial matter, the appellate court noted that the promulgation of the Federal Rules of Civil Procedure had indeed introduced a sea change in the way discovery was to be conducted.¹²⁵ The court summarized:

We must discard, for instance, the concept that there is something close to a property right in the information which the lawyer digs up about the client's case and has in his possession. We must also discard the notion that questions from the other side can be fended off on the ground that the opponent's lawyer is simply engaged in a fishing expedition. These notions

¹¹⁸ *Id.*

¹¹⁹ *Id.* The court gives little explanation on this point but it is worth noting that the status of the attorney–client privilege as it related to businesses was very much a matter of debate until the Supreme Court case of *Upjohn*. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Under the *Upjohn* formulation of the rule, it is very possible that the statements made to Fortenbaugh by the employees would be privileged. *See supra* Part II.B.1 and note 46.

¹²⁰ *Hickman*, 4 F.R.D. at 482.

¹²¹ *Id.* at 482–83.

¹²² *Id.*

¹²³ *Hickman v. Taylor*, 153 F.2d 212, 214 (3d Cir. 1945). This actually created a desirable result for the defendants as the order to produce the statements, which normally would not be eligible for interlocutory appeal, was now immediately reviewable. *Id.* at 214 n.1. Marcus, *supra* note 11, at 336.

¹²⁴ *Hickman*, 153 F.2d at 214.

¹²⁵ *Id.* at 216–17.

are hard to get rid of, but we take it that they are contrary to the idea of this discovery portion of the Federal Rules.¹²⁶

Despite the broad purpose of the Federal Rules in facilitating the discovery process, the appellate court expressed concern over the unfettered production of materials, which might impinge upon the attorney–client relationship.¹²⁷ Of particular concern was the possibility that an attorney could be called as a witness in the same case in which he was acting as an advocate to verify the content of a witness statement.¹²⁸ Although the Canons of Ethics frowned upon such a situation, the appellate court noted that the Federal Rules’ “privilege” exceptions (which prevented the discovery of privileged material) did not cover the statements at hand as third parties made the statements and not clients.¹²⁹ District courts addressing the issue had split as to how to handle the production of such materials, leaving the Third Circuit with no clear direction.¹³⁰ Nonetheless, the court held that “intangible things, the results of the lawyer’s use of his tongue, his pen, and his head, for his client,” material that the court termed “work product of the lawyer,” were covered by the exception to privileged material under the Federal Rules.¹³¹ The Third Circuit justified this extension of the term “privileged” on public policy grounds:

Those members of the public who have matters to be settled through lawyers and through litigation should be free to make full disclosure to their advisers and to have those advisers and other persons concerned in the litigation free to put their whole–souled efforts into the business while it is carried on.¹³²

C. Development of the Work Product Doctrine by the Advisory Committee and under Hickman v. Taylor

While *Hickman* was working its way through the court system, the Advisory Committee to the Federal Rules was busy attempting to reach

¹²⁶ *Id.*

¹²⁷ *Id.* at 219–20.

¹²⁸ *Id.*

¹²⁹ *Id.* at 220, 222. As noted above, the statements from Taylor & Anderson’s employees could arguably be privileged under a modern construction of the attorney–client privilege. *See supra* note 119 and accompanying text.

¹³⁰ *Id.* at 220 n.13. The appellate court, in a lengthy footnote, summarized the varying decisions and their reasoning. *Id.*

¹³¹ *Id.* at 223 (internal quotation marks omitted).

¹³² *Id.* (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (John T. McNaughton rev. 1961)). Wigmore advocated that the policy of the attorney client privilege necessarily involves full disclosure; “[i]n order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; hence the law must prohibit such disclosure except on the client’s consent.” WIGMORE, *supra*.

a resolution via rule making to the work product problem.¹³³ At first, the Committee adopted an approach that seemed much more in line with those cases holding that broad discovery should be allowed into trial preparation materials.¹³⁴ In its first preliminary draft of amendments to the Rules, proposed in 1944, the Committee's solution was to amend Rule 30(b) to provide for protective orders against discovery "into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial . . ." ¹³⁵ The burden, however, of seeking the protective order was on the adverse party that was resisting the discovery request.¹³⁶ One year later, the Advisory Committee proposed a second draft, keeping the protective order approach to work product materials but with a more expansive explanatory note.¹³⁷ The note explained that the purpose of the rule was to make clear that discovery of materials prepared in anticipation of litigation was permitted and such materials were not privileged, but that the district courts would retain discretion to deny discovery into such materials via the protective order.¹³⁸ However, as district courts were already divergent in their approaches on how to handle such materials, the lack of direction on how to exercise discretion as to whether to issue a protective order would lead to confusion, a fact that the Committee recognized without resolution at that time.¹³⁹

In 1946, the Committee, possibly in response to the vigorous debate that centered around the treatment of trial preparation material, changed its proposed amendment on how to treat such material.¹⁴⁰ The new proposal to amend Rule 30, which was very similar to the language contained in today's Rule 26(b)(3), read:

The court shall not order the production or inspection of any writing

¹³³ Anderson et al., *supra* note 7, at 771–72 (citations omitted).

¹³⁴ Marcus, *supra* note 11, at 330.

¹³⁵ ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 43 (1944) [hereinafter ADVISORY COMMITTEE, PRELIMINARY DRAFT] (emphasis omitted); Marcus, *supra* note 11, at 330; Anderson et al., *supra* note 7, at 772.

¹³⁶ ADVISORY COMMITTEE, PRELIMINARY DRAFT, *supra* note 135, at 43; Marcus, *supra* note 11, at 330.

¹³⁷ ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 43 (1945) [hereinafter ADVISORY COMMITTEE, SECOND DRAFT], at 38–40 (1945); Marcus, *supra* note 11, at 331 (citations omitted); Anderson et al., *supra* note 7, at 772 (citation omitted).

¹³⁸ ADVISORY COMMITTEE, SECOND DRAFT, *supra* note 137, at 39 (1945); Marcus, *supra* note 11, at 331 (citation omitted); Anderson et al., *supra* note 7, at 772 (citations omitted).

¹³⁹ ADVISORY COMMITTEE, SECOND DRAFT, *supra* note 137, at 39–40; Anderson et al., *supra* note 7, at 772 (citation omitted).

¹⁴⁰ Armstrong, *supra* note 99, at 356 (1946) ("There is no Amendment about which there is a greater or stronger division of opinion among members of the Bar.").

obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.¹⁴¹

This amendment was put forth without the opportunity for comment from the bar,¹⁴² but that is not to say that the Committee was without a clear understanding of the conflicting views on how trial preparation materials should be treated.¹⁴³ Indeed, at a 1946 symposium on discovery procedures held before the Third Circuit Court of Appeals (the same circuit from which *Hickman* came), George Wharton Pepper, the vice-chairman of the Advisory Committee, noted that the amendment the Committee arrived upon was the result of debate between those who favored complete discovery and those who favored complete exclusion of trial preparation materials.¹⁴⁴ As Mr. Pepper stated, "It seems to me, looking at the things as clearly as I can, that what the Committee has attempted comes about as near as possible to steering a middle course between two extreme views neither of which would give anything like general satisfaction to the bar."¹⁴⁵ How the Committee came upon the exact language used is also not entirely clear, though it was surely influenced by the district court decisions denying discovery based on good cause,¹⁴⁶ as well as the *Hickman* decisions themselves.¹⁴⁷ The language

¹⁴¹ *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 456-57 (1946) [hereinafter *Report of Proposed Amendments*] (emphasis omitted); Armstrong, *supra* note 99, at 356.

¹⁴² Armstrong, *supra* note 99, at 340, 356.

¹⁴³ *Id.* at 356 ("[The Amendment] may be that this is the best that can be done if a position is to be taken between complete exclusion and complete discovery.")

¹⁴⁴ *Discovery Procedure Symposium*, *supra* note 94, at 406-07. This symposium demonstrates the heated debate between the opposing views amongst the Bar. Among the speakers were Samuel Fortenbaugh, the attorney from *Hickman* (which at the time of the symposium was on appeal to the United States Supreme Court), advocating in favor of exclusion, *id.* at 408, and Mr. Abraham Freedman, who advocated in favor of discovery. *Id.* at 418-26.

¹⁴⁵ *Id.* at 407.

¹⁴⁶ See *Report of Proposed Amendments*, *supra* note 141, at 458-59 (noting that a number of cases had denied discovery "because no reason or cause therefor was shown regarding the data sought, or denied discovery on the general principle that no inquiry should be made into the adversary's preparation of his case for trial" and listing the cases).

¹⁴⁷ *Id.* at 459-60 (discussing *Hickman*). In fact, the Committee expressed its doubts as to the result of the Third Circuit's decision in *Hickman*, as the Committee believed that the term "privileged," which the Circuit Court found to encompass trial preparation materials, was not intended to be used so broadly. *Id.* at 460 ("The Committee believes that the term 'privileged' as used in that rule was not designed to include anything more than that embraced within the rule of testimonial exclusion regarding privileged communications as developed under the applicable laws of evidence, both common-law and statutory."); Armstrong, *supra* note

in the amendment may also have been influenced by English law, which did not permit the discovery of trial preparation materials.¹⁴⁸ Regardless of how it struck the balance in its proposal, the Committee had come to what it felt was a fair compromise; the decision was now left to the Supreme Court to either adopt the rule or deal with the problem through judicial decision-making via *Hickman*, which was on appeal before the Supreme Court.¹⁴⁹ The Court chose the latter.¹⁵⁰

The Supreme Court granted certiorari based upon the divergence of views in the district courts on how to deal with trial preparation materials and cited to the Advisory Committee's Report on the problem.¹⁵¹ After initially dealing and dispensing with the procedural irregularity of how the case came before it,¹⁵² the Court turned to the merits by first noting, as had the district and appellate courts, that in keeping with the purpose of their promulgation, the discovery rules were to be read liberally.¹⁵³ The Court noted, however, that discovery was not without limits and that privileged materials would not be subject to discovery.¹⁵⁴ Ultimately, the Court found the materials at issue before it, the witness statements and Fortenbaugh's

99, at 356.

¹⁴⁸ *Discovery Procedure Symposium*, *supra* note 94, at 414–18 (statements of Mr. Thomas E. Byrne and Mr. Harrison G. Kildare, both of the Philadelphia Bar, reciting English law excluding trial preparation documents). Mr. Kildare noted:

The time-tested English rule is embodied in effect in the first part of the proposed Addition to Rule 30(b), as follows:

“The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial”

Id. at 471. Mr. Kildare then criticized the qualification permitting the judge the discretion to allow discovery. *Id.* at 418.

¹⁴⁹ *Report of Proposed Amendments*, *supra* note 141, at 460 (1946); Marcus, *supra* note 11, at 331.

¹⁵⁰ Marcus, *supra* note 11, at 338; Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 499 (1969) [hereinafter *Advisory Committee, Discovery*] (“In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule.”).

¹⁵¹ *Hickman*, 329 U.S. 495, 500 & n.1 (1947).

¹⁵² *Id.* at 504–505. There was some question as to whether the case was even properly before the Court as the plaintiff had not properly attempted to depose Fortenbaugh under Rule 26; but, the Court chose to move forward with the case rather than force the plaintiff to go through the empty formality of pursuing the correct procedural device. *Id.*

¹⁵³ *Id.* at 507 (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

¹⁵⁴ *Id.* at 508.

recollections of those interviews, were not protected by the attorney–client privilege, and the word “privilege,” as used in the Rules, did not extend to material produced in anticipation of litigation.¹⁵⁵ The Court held:

We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney–client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client’s case; and it is equally unrelated to writings which reflect an attorney’s mental impressions, conclusions, opinions or legal theories.¹⁵⁶

Since the Third Circuit had found the materials to be “privileged,” the Supreme Court overruled the Third Circuit on this point.

Although the materials were not privileged, the Supreme Court still found in favor of Taylor & Anderson (and Fortenbaugh)¹⁵⁷ based on its concern over the plaintiff’s attempts to delve into the files of the opposing attorney without any showing of necessity.¹⁵⁸ The Court concluded that the plaintiff was able to obtain information from the interrogatories and that nothing prevented the plaintiff from interviewing the same witnesses Fortenbaugh had interviewed.¹⁵⁹ The Court found this particularly disturbing because the plaintiff’s justification for requesting the material was to “help prepare himself to examine witnesses and to make sure that he has overlooked nothing.”¹⁶⁰ The Supreme Court thus created a new rule that protected the work product of an attorney from discovery unless the party seeking disclosure could prove necessity and prejudice.¹⁶¹ The Court

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 513–14.

¹⁵⁸ *Id.* at 508–09.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 513.

¹⁶¹ *Id.* at 509 (“We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner’s case or cause him any hardship or injustice.”). The Court defined work product as including that which was reflected in “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . .” *Hickman*, 329 U.S. at 511. *See also In re San Juan DuPont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988) (citing *Hickman* as the genesis of the “substantial need/undue hardship standard”); *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (citing *Hickman* as the creation of the substantial need and undue hardship standard).

did not stop there, however, and went on to make a distinction between what it termed “non-privileged facts” and production of “oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda.”¹⁶² As to the latter materials, the Court expressed doubt whether any showing of necessity could be made to justify production but stopped short of giving such materials an unqualified immunity.¹⁶³

Reflecting upon the Supreme Court’s decision in *Hickman*, a few points are worth highlighting with regard to the scope and policy behind the protection the Court afforded an attorney’s work product. First, much of the materials that were being sought, and with which the Court was concerned, would be termed core work product in modern parlance. It also merits pointing out that although the materials at issue in *Hickman* were prepared in anticipation of litigation, the Court did not make “in anticipation of litigation” a requirement for the protection afforded. Indeed, the Court could have easily recognized this requirement, as it was before the Court as a proposed amendment to the Rules; yet it chose instead to address the issue through the *Hickman* decision, which made no such qualification.¹⁶⁴ In this vein, the Court did not confine its reasoning to the litigation context, but instead, in justifying the protection, described a lawyer’s role in terms of “performing his various duties,” protecting his “clients’ interests” and “giving . . . legal advice” as well as generally preparing the client’s case.¹⁶⁵

The Court appeared to offer multiple justifications as to why the protection was necessary. One of the most commonly cited was the “zone of privacy” justification, where the Court stated:

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.¹⁶⁶

This justification is based on a balancing of the merits of having a well-functioning adversarial system with open discovery. This “adversarial” justification is also apparent in the Court’s concern over *Hickman*’s

¹⁶² *Hickman*, 329 U.S. at 512.

¹⁶³ *Id.* at 512–513.

¹⁶⁴ *Id.* at 510 n.9 (noting that the English courts had developed a privilege covering “documents prepared by or for counsel with a view to litigation”). However, the Supreme Court did not make such a qualification in its own opinion. *Id.* at 510–12.

¹⁶⁵ *Id.* at 510–11.

¹⁶⁶ *Id.*

counsel's admission that he only wanted to obtain the materials in question to make sure he had not missed something;¹⁶⁷ in other words, he wanted the information so he could reap the benefits of Fortenbaugh's insight and ability as a lawyer. This not only aligns with the concerns the Advisory Committee articulated about achieving a proper balance between the two opposing views (complete exclusion versus complete discovery) of how such materials should be treated,¹⁶⁸ but also seems to be a nod that to allow the production of such materials "penalizes the diligent," and puts a "premium on laziness," justifications that were sometimes used by district courts to support denying production of work product materials.¹⁶⁹

A second justification is the often-overlooked concern of the effect on the legal profession itself and upon the attorney-client relationship. After articulating the adversarial justification for the protection, the Court went on to state:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.¹⁷⁰

These considerations, which again seem to speak particularly to core work product, bear much in common with the instrumental policy justifications for having the attorney-client privilege.¹⁷¹ The reference to not writing down a thought or fact for fear of discovery reflects a concern that the interests of a client would be negatively affected. In his concurrence, Justice Jackson pointed out a further instrumental concern that production of such material could have the undesirable effect of forcing attorneys to take the witness stand in cases in which they are advocates,¹⁷² a concern that is mirrored in the policies underlying the attorney-client privilege.

¹⁶⁷ *Id.* at 513.

¹⁶⁸ Armstrong, *supra* note 99, at 356.

¹⁶⁹ *Report of Proposed Amendments, supra* note 141, at 458, 460 (internal quotation marks omitted). The Advisory Committee, in formulating its proposed amendment, rejected these as tests for whether production should be denied. *Id.*

¹⁷⁰ *Hickman*, 329 U.S. at 511.

¹⁷¹ See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) ("[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice."); *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 177 (S.D. Ohio 1993) (quoting *Weintraub*, 471 U.S. at 348); Marks, *supra* note 47, at 157.

¹⁷² *Hickman*, 329 U.S. at 516-17 (Jackson, J., concurring).

III. POST-*HICKMAN* DEVELOPMENT OF THE WORK PRODUCT DOCTRINE

A. *The Road to Rule 26(b)(3) and the Anticipation Misconception*

Although the “anticipation of litigation” requirement was not articulated in the *Hickman* decision itself, the requirement soon found its way into district court opinions. The case of *Rediker v. Warfield*, a 1951 United States District Court for the Southern District of New York opinion, appears to be one of the earliest articulations of this requirement.¹⁷³ The plaintiff in *Rediker* was an attorney who brought suit against Warfield and Scott, who were also attorneys, and against the International Bank for Reconstruction and Development for allegedly interfering with a contract the plaintiff had with Ulen Realization Corporation to collect a claim from the Government of Iran.¹⁷⁴ The plaintiff issued interrogatories regarding communications Warfield and Scott, as legal counsel for Ulen, had with International Bank.¹⁷⁵ Warfield and Scott resisted, in part, on the basis that the interrogatories would delve into material protected under the work product doctrine.¹⁷⁶ The court, citing to little more than the *Hickman* decision, denied work product protection and noted that the communications at issue “were not in the course of preparation for trial [n]or does it appear that they were in anticipation of prospective litigation.”¹⁷⁷ The court went on to distinguish the case before it from *Hickman* on the basis that in *Rediker* the attorneys were also the defendants.¹⁷⁸ The court, however, gave little explanation as to why it was asserting an anticipation of litigation requirement other than its broad citation to *Hickman*.

Despite that case’s lack of explanation, the *Harvard Law Review*, in a 1961 student-written survey of developments in discovery law, cited to the *Rediker* case (and only the *Rediker* case) to support the assertion that “[a]lthough work-product protection is not limited to material gathered after commencement of an action, it has been held to apply *only when material is obtained in anticipation of litigation*.”¹⁷⁹ The “Developments Note” went on to justify the requirement, claiming:

Since a lawyer who does not envision litigation will not anticipate discovery requests, the fear of disclosure should not affect the way in which the material

¹⁷³ *Rediker v. Warfield*, 11 F.R.D. 125 (S.D.N.Y. 1951).

¹⁷⁴ *Id.* at 126–27.

¹⁷⁵ *Id.* at 127.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 128.

¹⁷⁸ *Id.*

¹⁷⁹ *Developments in the Law – Discovery*, 74 HARV. L. REV. 940, 1030 (1961) [hereinafter Developments Note] (emphasis added) (citing to the *Rediker* opinion as its only support for the statement).

is prepared. For example, if the owner of real property employs an attorney to investigate the marketability of his title preparatory to offering it for sale, it seems that the fruits of the lawyer's search should be fully discoverable if litigation relating to a subsequent sale contract should eventuate. In such circumstances, as in all those in which a lawyer is asked to assist in planning future conduct, even though he might recognize the ever present possibility of litigation, he is prompted chiefly by his responsibility to avoid embroiling his client in controversy.¹⁸⁰

This reasoning, however, is flawed. At best it is naïve as to the nature of the work of an attorney, and at worst it is circular. The reasoning is naïve in that it assumes that an attorney who is doing his or her job will not fear discovery of work product because the work product was produced to avoid litigation rather than to engage in litigation. Yet, the very same material that was used to avoid litigation could just as easily assist an opponent in litigation as notes made in preparation for litigation.¹⁸¹ Indeed, the reasoning seems to ignore the Supreme Court's admonition that "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."¹⁸²

The reasoning could be viewed as circular in that it seems to assume that an attorney who does his or her job will not end up in litigation and so there should be no fear of discovery. But for an attorney to best complete the client's designated tasks, the attorney must feel free to make notes and create work product without fear of discovery. Thus, for attorneys to do their job they must work without fear of discovery, which can only be done if they are doing their job. The break down of this reasoning may stem from what Professor Kirst identifies as a fundamental misreading of *Hickman*.

The logic of the *Developments Note* is flawed at a fundamental level, because it depends on combining two ideas the Supreme Court had carefully separated in *Hickman*—whether the information is discoverable and whether the information can be discovered from the lawyer's materials. In *Hickman* the Court stressed that the information was routinely discoverable as a matter of course from the client. The work product doctrine of *Hickman* was a limitation on routinely discovering the information from the lawyer's materials.¹⁸³

Despite the fact that the "Developments Note" cites no case to support its reasoning, the Court of Appeals for the Second Circuit cited to it the very

¹⁸⁰ *Id.*

¹⁸¹ Anderson et al., *supra* note 7, at 788 n.175.

¹⁸² *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

¹⁸³ Kirst, *supra* note 67, at 274 (citations omitted).

next year in *Colton v. United States*.¹⁸⁴ *Colton*, based on the “Developments Note” and the *Rediker* opinion, held that for work product protection to apply the materials must be produced in anticipation of litigation.¹⁸⁵ In *Colton*, Herbert and Mercedes Matters engaged Edward Colton, an attorney, to assist them with their taxes. The Internal Revenue Service (IRS) subsequently investigated the Matters and issued Colton a summons to testify and produce “copies of income tax returns, workpapers, correspondence files, memoranda and all other data relating to the preparation and the filing of Federal Income Tax Returns for or on the behalf of the Matters”¹⁸⁶ At an initial interview in response to the summons, Colton gave little information and refused to hand over documents, claiming protection under the attorney–client privilege.¹⁸⁷ Eventually, Colton agreed to answer some questions but still refused to answer others or hand over materials based upon the privilege.¹⁸⁸ The court considered first the claim of attorney–client privilege and held that it did not protect many of the communications that pertained merely to the time period of representation and other matters that did not reflect legal advice.¹⁸⁹ The court then turned to the documents that Colton claimed were protected as work product under *Hickman*. Citing simply to *Rediker* and the “Developments Note,” the court held that such materials must be shown to be “collected or prepared in anticipation of litigation . . . to justify invocation of this rule.”¹⁹⁰

Although the Second Circuit adopted “anticipation of litigation” as a threshold requirement, no other circuit courts appear to have adopted this standard prior to 1970, when the Federal Rules of Civil Procedure were amended to explicitly incorporate the work product doctrine and the “anticipation of litigation” requirement into Rule 26(b)(3). However, at least one circuit recognized that “anticipation of litigation” was not a formal requirement under *Hickman*. In *Natta v. Hogan*, a number of parties, including Phillips Petroleum Company, challenged the priority date of a patent held by Montecatini.¹⁹¹ Montecatini sought to discover documents that Phillips claimed were protected under the attorney–client privilege and work product doctrine.¹⁹² The trial court denied protection under the work product doctrine because the documents were not prepared for

184 *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962).

185 *Id.* at 640.

186 *Id.* at 634 (alteration in original) (internal quotation marks omitted).

187 *Id.* at 635.

188 *Id.* at 636.

189 *Id.* at 636–38.

190 *Id.* at 640 (citing *Rediker v. Warfield*, 11 F.R.D. 125 (S.D.N.Y. 1951)); Developments Note, *supra* note 179, at 1030).

191 *Natta v. Hogan*, 392 F.2d 686, 688 (10th Cir. 1968).

192 *Id.* at 691, 693.

possible litigation.¹⁹³ The Court of Appeals for the Tenth Circuit rejected the trial court's premise that litigation was an essential element of work product protection:

Nothing in *Hickman v. Taylor* suggests that the work product rule is limited to preparation for proceedings in a court of record. The rationale for the work product doctrine is the prevention of unnecessary interference with the work of an attorney. An attorney's work in the patent law field should be as much his own as it is in other areas of the law. The work product claim cannot be brushed aside on the theory that the documents were not prepared for use in litigation.¹⁹⁴

The court held that although many of the tests and experiments that were conducted in connection with the patent application would be discoverable, the hand-written notes of attorneys were not. The court found that "[s]uch materials prepared by an attorney during his consideration of a legal problem are within the work product doctrine."¹⁹⁵

Although the Tenth Circuit appeared to approve of a standard for work product that took into account whether the material reflected an attorney's consideration of a legal problem regardless of whether it was in anticipation of litigation, it could also be read to have simply not constrained work product to "proceedings in a court of record."¹⁹⁶ In other words, *Natta* may have done nothing more than expand work product to other adversarial proceedings. The tone and wording of its interpretation seem to suggest otherwise, but in subsequent cases, such as the previously discussed *Hercules* opinion, courts distinguished *Natta* on the basis that it involved an interference proceeding, which was adversarial, and not simply the prosecution of a patent.¹⁹⁷ If the *Natta* decision created a circuit split, it seems to have gone unnoticed and courts have not questioned the origin of the "anticipation of litigation" standard.

Indeed, by the time the Advisory Committee on the amendments to the Federal Rules of Civil Procedure was ready to re-examine the work product doctrine, it was not due to disagreement over the "anticipation of litigation" requirement. Rather, the issue was over whose work product was protected and the scope of Rule 34, which subjected discovery to a "good cause" requirement,¹⁹⁸ and how this applied, if at all, to the work product

¹⁹³ *Id.* at 693.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 693-94 (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). Of the four hand written documents the court considered, it only extended protection to one as the others were not identified as being written by any particular attorney. *Id.* at 694.

¹⁹⁶ *Id.* at 693.

¹⁹⁷ *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 151-52 (D. Del. 1977) (citing *In re Natta*, 48 F.R.D. 319, 321 (D. Del. 1969)).

¹⁹⁸ FED. R. CIV. P. 34 (1966) (amended 1970). Rule 34 read, in relevant part:

doctrine.¹⁹⁹ Though the Advisory Committee had made some failed efforts in the 1950s to address the issues raised by *Hickman*, it was not until 1967 that the amendments that led to the current rule began to develop.²⁰⁰ An initial draft of the Committee’s amendment attempted to solve the recognized problems, in part, by making clear that work product protection extended beyond simply the work of the attorney.²⁰¹ But curiously, the Committee’s solution to the “good cause” problem was to simply lump all work product together and subject it to the same standard—a “good cause” standard.²⁰² The amendment read:

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor, except that a statement concerning the action or its subject matter previously given by the party seeking the statement may be

Upon motion of any party showing good cause therefor and upon notice to all other parties . . . the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control

Id.

199 Advisory Committee, *Discovery*, *supra* note 150, at 499-500. In developing a new rule to clarify the work product doctrine, the Advisory Committee recognized the problems that had arisen regarding the coverage of the work product doctrine:

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether “good cause” is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the “good cause” required by Rule 34 and the “necessity or justification” of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Id.

200 Anderson et al., *supra* note 7, at 782–83 (noting that the amendments were rejected).

201 Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery*, 43 F.R.D. 211, 225 (1967).

202 *Id.*

obtained without such a showing.²⁰³

This solution was odd in that it seemingly ignored the Supreme Court's statement in *Hickman* that such materials could only be discovered upon a showing of necessity and prejudice.²⁰⁴ Furthermore, the one-size-fits-all approach to work product materials failed to recognize the special protection that the *Hickman* Court recognized should be afforded to an attorney's core work product.²⁰⁵ As one critic of the rule recognized, "[t]he source of error . . . is in formulating flexible language to cover *all* such materials, rather than in dealing directly and specifically with what experience has taught—that certain materials deserve more protection than others."²⁰⁶

In response to criticisms that the "good cause" standard would create confusion based on the various meanings the courts had given the term, the Advisory Committee altered the standard in Rule 26(b) to reflect the trend in case law to require "more than relevance."²⁰⁷ Thus, in keeping with the factors stated in *Hickman* as to when trial preparation material could be discovered, the Committee added that such material could only be discovered upon a showing of "substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means."²⁰⁸ The Committee also added language to protect the "[m]ental [i]mpressions, [c]onclusions, [o]pinions, and [l]egal [t]heories [c]oncerning the [l]itigation" of an attorney or other representative of a party.²⁰⁹ In doing so, the Committee cited again to *Hickman*, however, the Committee failed to clarify the extent of such protection.²¹⁰ The final language also failed to provide guidance

203 *Id.* It is perhaps worth noting that the 1946 Amendment also contained an "anticipation of litigation" requirement, which may have simply been carried forward when it became time to amend the Rules. See *supra* Part III.C.

204 *Hickman v. Taylor*, 329 U.S. 495, 509, 511–12 (1947); Fred A. Freund, Work Product, Changes Ahead in Federal Pretrial Discovery, Address at the Ninth Annual Postgraduate Conference of the Columbia Law School Alumni Association (Mar. 23, 1968), in 45 F.R.D. 493, 494.

205 *Hickman*, 329 U.S. at 511–12.

206 Freund, *supra* note 204, at 494.

207 Advisory Committee, *Discovery*, *supra* note 150, at 500; COMM. ON PRACTICE & PROCEDURE, FED. JUDICIAL CONFERENCE, MINUTES OF THE JULY 17-19, 1969 MEETING OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 3 (July 1969) [hereinafter COMMITTEE ON PRACTICE & PROCEDURE, JULY 1969], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST07-1969-min.pdf>.

208 Advisory Committee, *Discovery*, *supra* note 150, at 500.

209 *Id.* at 501.

210 *Id.* It was noted in the meeting minutes of the Standing Committee that a question regarding this provision was raised, though it is unclear whether the question was with regard to the scope of the protection or some other matter. COMMITTEE ON PRACTICE & PROCEDURE, JULY 1969, *supra* note 207.

as to the meaning of the term “anticipation of litigation.”²¹¹ This term, as previously discussed, has led to splits among district and appellate courts as to its meaning.²¹² Furthermore, a review of the documents explaining the Committee’s reasoning regarding the amendments reveals that the work product doctrine was often simply assumed to be relevant only when in “anticipation of litigation,” but no discussion of the standard or why such a limitation should apply also to core work product appears.²¹³

B. *The Supreme Court’s Interpretations of the Work Product Doctrine*

The Supreme Court has seldom discussed the scope or limits of the work product doctrine since the passage of amended Rule 26. There are, however, at least three post-amendment opinions that merit discussion: *United States v. Nobles*,²¹⁴ *Federal Trade Commission v. Grolier Inc.*,²¹⁵ and *Upjohn Co. v. United States*.²¹⁶ The first two offer insight into the Court’s view of the doctrine; however, it is the *Upjohn* decision that is the most instructive, both in the Court’s language and also in the way in which it deals with core work product.

In *Nobles*, a defendant accused of armed robbery sought to impeach the prosecution’s two key eye-witnesses through statements they had previously made to a defense investigator.²¹⁷ The statements were written down by the

211 See *Fed. Trade Comm’n v. Grolier Inc.*, 462 U.S. 19, 25 (1983) (“Rule 26(b)(3) does not in so many words address the temporal scope of the work-product immunity, and a review of the Advisory Committee’s comments reveals no express concern for that issue.”).

212 See *supra* Part II.A.1.

213 See, e.g., Advisory Committee, *Discovery*, *supra* note 150, at 499-500 (noting the major difficulties with existing law but omitting any mention of core work product); ADVISORY COMM. ON CIVIL RULES, *Excerpts from the Tape of the May 1966 Meeting* 30-31 (May 1966), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1966-min.pdf>. The following excerpt is an example of the assumption that core work product is only an issue when litigation is pending:

Mr. Acheson: I thought Mr. Jenner was merely talking about preparation in anticipation of trial and he said a lot of this is done before there is any trial at all.

Mr. Jenner: Yes, there would be *no counsel* at that particular point.

Id. at 30 (emphasis added). See also COMMITTEE ON PRACTICE & PROCEDURE, JULY 1969, *supra* note 207, at 3; ADVISORY COMM. ON CIVIL RULES, *Excerpts from the March 1967 Meeting* 6-7, 11-12 (Mar. 1967), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-1967-min.pdf>.

214 *United States v. Nobles*, 422 U.S. 225 (1975).

215 *Fed. Trade Comm’n v. Grolier Inc.*, 462 U.S. 19 (1983).

216 *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Professor Roger Kirst also discusses these three cases in his article which advocates for expanded protection for the work of the transactional attorney. See Kirst, *supra* note 67, at 268-73.

217 *Nobles*, 422 U.S. at 227.

investigator and made part of a written report.²¹⁸ The prosecution sought to inspect the report and the court denied the request.²¹⁹ However, the court told defense counsel that if the defense called the investigator to the stand to testify the court would order production of those portions of the report relevant to the impeachment.²²⁰ Defense counsel later sought to call the investigator for purposes of impeachment but refused to share the report; so, the court ruled that the investigator could not testify.²²¹ The Ninth Circuit reversed, finding that compelling discovery of the report violated both the Fifth Amendment and Federal Rule of Criminal Procedure 16 (the criminal analog to the Federal Rule of Civil Procedure 26(b)).²²² The Supreme Court reversed, finding that neither the Fifth Amendment nor Rule 16 was implicated.²²³ The Court considered the implication of the work product doctrine under *Hickman* separately from Rule 16 and held that the defendant had waived his protection when he sought to introduce the testimony of the investigator.²²⁴

At first glance, the Court's discussion of the work product doctrine appears rather unremarkable as far as its impact on civil litigation. Nevertheless, there are at least two aspects of the opinion that are worth discussing. First, the Court felt compelled to discuss the work product doctrine under *Hickman* separate from application of Rule 16, thus recognizing that *Hickman* has continued validity apart from the rules.²²⁵ Second, the Court, in its discussion of *Hickman*, stated, "the [*Hickman*] Court therefore recognized a qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'"²²⁶ Some courts have taken this as an endorsement that the work product doctrine *only* applies to materials produced in "anticipation of litigation."²²⁷ The Court's statement makes

218 *Id.* at 227–28.

219 *Id.* at 228–29.

220 *Id.* at 228 & n.3.

221 *Id.* at 229.

222 *Id.* at 229–30.

223 *Id.* at 234–35.

224 *Id.* at 239–40.

225 *Id.* at 238–39. The Court was compelled to do so as it found that Rule 16 only applied to pre-trial discovery but that *Hickman* applied to both pre-trial discovery and discovery after trial has begun. *Id.* at 235, 238–39. This was the subject of Justice White's concurrence, as he took issue with limiting a trial court's discretion on evidentiary matters under *Hickman*. *Id.* at 243 (White, J., concurring).

226 *Id.* at 237–38 (quoting *Hickman v. Taylor*, 329 U.S. 495, 508 (1947)). After making this statement, the Court makes a string cite to, among other sources, the Harvard student note discussed *supra* Part IV.A. *Nobles*, 422 U.S. at 238.

227 *See, e.g.*, *United States v. Margolis (In re Fischel)*, 557 F.2d 209, 212–13 (9th Cir. 1977) ("The limited work product immunity extends only to certain materials prepared by an attorney in anticipation of litigation." (citing *Nobles*, 422 U.S. 225)); *In re Grand Jury Proceedings of June 16, 1981*, 519 F. Supp. 791, 793 (E.D. Wis. 1981) ("[T]he work-product rule only applies

no such limitation, however, and could be read as nothing more than a description of the context in which *Hickman* was decided.²²⁸

The *Grolier* case involved a request by Grolier Inc. under the Freedom of Information Act (FOIA) for documents the government generated during an investigation of a subsidiary of Grolier that was subsequently ended.²²⁹ Grolier's request was based on Exemption 5 of FOIA, which protected from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . ." ²³⁰ The district court agreed that all of the documents were protected under Exemption 5, some of which were due to the work product doctrine.²³¹ The Court of Appeals for the District of Columbia reversed, finding that the work product doctrine only protected documents in an existing or potentially existing related litigation.²³² Thus, the issue before the Supreme Court was not one related to discussing whether core work product could be protected in a non-litigation context, but rather whether *Hickman* and Rule 26(b) allowed the work product doctrine to extend to subsequent disputes, even if unrelated to the original litigation.²³³ The Court noted the lack of any clear guidance on the issue of a temporal scope for the work product rule, but expressed its view that "the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation."²³⁴ Thus, the Court would seem to have expanded the protection of the Rule, but the authority of this precedent was weakened by the Court's decision to base its ruling on an independent construction of Exemption 5 to FOIA.²³⁵ Though there is some inkling that the Court favored a broader rather than narrower view of the work product doctrine, the *Grolier* case does not answer the question of whether core work product can enjoy protection when not generated in "anticipation of litigation."

The most instructive Supreme Court opinion issued since the adoption of the 1970 amendment to Rule 26 is the *Upjohn* opinion. Though *Upjohn* is most often known for the Supreme Court's interpretation of the scope

to documents prepared "in anticipation of litigation." (citing *Nobles*, 422 U.S. at 238)); see also Kirst, *supra* note 67, at 272 & n.212. As Professor Kirst correctly notes, these cases add the word "only" which is not found in the *Nobles* statement. *Id.* at 272.

²²⁸ See Kirst, *supra* note 67, at 272 (noting also that the statement was dictum in that the Court's decision rested upon waiver and not whether the report was created in anticipation of litigation).

²²⁹ Fed. Trade Comm'n v. Grolier Inc., 462 U.S. 19, 20–21 (1983).

²³⁰ *Id.* at 22 n.3 (citation omitted).

²³¹ *Id.* at 22.

²³² *Id.* at 23.

²³³ *Id.* at 24–25.

²³⁴ *Id.* at 25 (citations omitted).

²³⁵ *Id.* at 26; Kirst, *supra* note 67, at 272–73.

of the attorney–client privilege in the corporate context,²³⁶ the decision is also relevant in interpreting the work product doctrine.²³⁷ In *Upjohn*, the petitioner, Upjohn Company, maintained that questionnaires its attorneys sent to Upjohn employees were privileged.²³⁸ The questionnaires were part of an internal investigation that began in January of 1976 to discover whether subsidiaries had made payments directly to or for the benefit of foreign government officials in order to secure government business.²³⁹ Upjohn’s attorneys “also interviewed the recipients of the questionnaire and . . . [thirty-three] other Upjohn officers or employees as part of the investigation.”²⁴⁰ Upjohn’s in–house counsel described the interview notes as follows:

My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere. They were more than just a verbatim report of my conversation with the—a report of my conversation in the interviews.²⁴¹

In March of 1976, after the initial investigation was made, Upjohn made a preliminary report to the Securities and Exchange Commission (SEC) on its Form 8–K disclosing that Upjohn had made questionable payments.²⁴² Subsequently, the IRS issued a summons demanding production of these materials.²⁴³ Upjohn declined to produce the documents on the ground that the attorney–client privilege protected them from disclosure and that they also constituted the work product of an attorney prepared in “anticipation of litigation.”²⁴⁴ The United States filed a petition to enforce the summons in the United States District Court for the Western District of Michigan, and upon the recommendation of the magistrate, the court or-

²³⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981); ABA Task Force on the Attorney–Client Privilege, *Report of the American Bar Association’s Task Force on the Attorney–Client Privilege* (2005), reprinted in 60 BUS. LAW. 1029, 1035 (2005); Marks, *supra* note 47, at 162; Anthony B. Joyce, Note, *The Massachusetts Approach to the Intersection of Governmental Attorney–Client Privilege and Open Government Laws*, 42 SUFFOLK U. L. REV. 957, 957 n.5 (2009).

²³⁷ See Kirst, *supra* note 67, at 268–71 (discussing the relevance of *Upjohn* to the work product doctrine).

²³⁸ *Upjohn*, 449 U.S. at 386–88.

²³⁹ *Id.* at 386.

²⁴⁰ *Id.* at 387.

²⁴¹ *United States v. Upjohn Co.*, No. K77–7 Misc. CA–4, 1978 WL 1163, at *3 (W.D. Mich. Feb. 23, 1978), *rev’d*, 449 U.S. 383 (1981) (citation omitted). It should be noted that the in–house general counsel was also the vice president and secretary of the company as well as a member of the board of directors. *Id.* at *2.

²⁴² *Id.* at *3; *Upjohn*, 449 U.S. at 387.

²⁴³ *Upjohn*, 449 U.S. at 387–88 (citation omitted).

²⁴⁴ *Id.* at 388.

dered the production of the disputed materials.²⁴⁵ With regard to the claims of work product protection, the magistrate expressed some doubt as to whether the work product doctrine applied at all to a tax summons; but even if it did, the magistrate found that the government had met its burden of proving “substantial need and an inability without undue hardship to obtain the information by other means.”²⁴⁶ The Court of Appeals for the Sixth Circuit upheld the magistrate’s ruling with regard to the work product doctrine, stating in a footnote that the work product doctrine did not apply to an IRS summons and made no further analysis on the topic.²⁴⁷

On appeal, the Supreme Court quickly dismissed the Sixth Circuit’s notion that the work product doctrine did not apply to a tax summons.²⁴⁸ As the magistrate had premised his ruling on a finding of “substantial need” and “undue hardship,” the Court continued its analysis, citing to both Rule 26 and *Hickman*.²⁴⁹ The Court began its analysis by quoting *Hickman*’s policy reasons for establishing the work product doctrine, citing both the “zone of privacy” language as well as the language deriding the effect disclosure would have on the profession and the relationship with clients.²⁵⁰ It then rejected the government’s argument that even under *Hickman* necessity could compel disclosure of core work product. The Court did so by distinguishing between ordinary work product and core work product, noting that the caveat to disclosure in *Hickman*, “did not apply to ‘oral statements made by witnesses . . . whether presently in the form of [the attorney’s] mental impressions or memoranda.’”²⁵¹ The Court recognized that some courts, applying *Hickman* and Rule 26, afforded absolute immunity to such materials, a standard the Court was unwilling to adopt or reject because it was sufficient to merely remand on the basis that the Magistrate had applied the wrong standard in requiring “substantial need” and “undue hardship.”²⁵²

The *Upjohn* opinion is instructive both for its semantics and for how it treated the core work product issue. Semantically, it is instructive that the Court cited to both the *Hickman* opinion as well as Rule 26 in explaining the work product doctrine.²⁵³ The court also noted that *Hickman*’s policies had been “substantially incorporated” into Rule 26: a recognition

245 *Id.* The magistrate also concluded that *Upjohn* had waived the attorney–client privilege, but the Sixth Circuit rejected this finding. *Id.*

246 *Upjohn*, 1978 WL 1163, at *11–13 (citations and internal quotation marks omitted).

247 *United States v. Upjohn Co.*, 600 F.2d 1223, 1228 n.13 (6th Cir. 1979), *rev’d* 449 U.S. 383 (1981).

248 *Upjohn*, 449 U.S. at 398.

249 *Id.* at 398–99.

250 *Id.* at 397–98.

251 *Id.* at 399 (quoting *Hickman v. Taylor*, 329 U.S. 495, 512 (1947)) (alteration in original).

252 *Id.* at 401–02.

253 *Id.* at 397–400.

that *Hickman* was not fully incorporated into the Rule.²⁵⁴ Indeed, this is consistent with the view that *Hickman* continues to have validity in covering intangible work product, while Rule 26, by its terms, only applies to tangible work product.²⁵⁵ It is also worth noting that, in articulating the policies supporting the work product doctrine, the Court did not stop with the commonly cited “zone of privacy” justification, but also went on to articulate the beneficial effect the doctrine would have on the legal profession and the attorney–client relationship.²⁵⁶ Finally, the Court’s distinction that ordinary work product, prepared “with an eye toward litigation,” should be treated differently from core work product emphasizes the special protection the Court felt core work product should receive.²⁵⁷

With regard to this last point, the *Upjohn* opinion is as insightful for what it does not say as for what it does—namely, the complete lack of discussion of whether the work product at issue was prepared in “anticipation of litigation.” Consider the time period during which the interview notes were created—from January 1976 to March 1976. This was prior to *Upjohn* reporting to the SEC or IRS and was merely part of the company’s own internal investigation.²⁵⁸ In other contexts, lower courts have found such material to be beyond the protection of the work product doctrine because it was not prepared “in anticipation of litigation.”²⁵⁹ Yet, the Supreme Court did not discuss this as a requirement in its analysis but instead moved forward on the assumption that the material in question was work product. It may be that this omission is simply because the parties did not raise the issue nor did the magistrate address it. Given the timeline of events, however, it seems odd that the Court would remand when it could have simply

254 *Id.* at 398; Kirst, *supra* note 67, at 233 (quoting *Upjohn*, 449 U.S. at 398).

255 *In re Cendant Corp. Secs. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003); *Whitlow v. Martin*, 259 F.R.D. 349, 354 (C.D. Ill. 2009); *see Abdell v. City of New York*, No. 05 Civ. 8453 KMK JCF, 2006 WL 2664313, at *3 (S.D.N.Y. Sept. 14, 2006); *Am. Fed. Bank, FSB v. United States*, 60 Fed. Cl. 493, 497 (Fed. Cl. 2004); 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, 658 (2003); EPSTEIN, *supra* note 8, at 815; Marcus, *supra* note 11, at 349–50; WRIGHT ET AL., *supra* note 11, § 2024.

256 *Upjohn*, 449 U.S. at 397–98, 400.

257 *Id.* at 399 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

258 *See* 2 LESLIE WHARTON ET AL., SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 33:32 (“The work product at issue had been created long before the contested tax summons was issued, and even before *Upjohn* had filed the report with the government that instigated the IRS’s investigation.” (citation omitted)).

259 *See In re Grand Jury Subpoena*, 220 F.R.D. 130, 156 (D. Mass. 2004); *Guzzino v. Felterman*, 174 F.R.D. 59, 63 (W.D. La. 1997); EPSTEIN, *supra* note 8, at 831; *see also Imperato*, *supra* note 65, at 216 (“The key to this protection is that the work must be performed in anticipation of litigation.”); Smith, *supra* note 63, at 35 (“Because the work product doctrine is narrower in scope than the attorney–client privilege in that it only applies when litigation is ongoing or pending, an entity must next determine whether the investigation is being conducted as a result of pending litigation.”) (citation omitted).

upheld the magistrate's ruling on the ground that the core work product at issue was still subject to the "anticipation of litigation" requirement. Perhaps what can be taken from this is that the Supreme Court was not terribly concerned with the temporal scope of the doctrine, at least where core work product was at issue.²⁶⁰

IV. THE ANTICIPATION MISCONCEPTION

After reviewing opinions subsequent to *Hickman* as well as the discussions regarding the formulation of Rule 26(b), it is clear that a number of courts and commentators have assumed that *Hickman* intended work product protection to apply *only* to material generated in "anticipation of litigation."²⁶¹ However, as has been shown, a careful review of *Hickman* reveals no such requirement. Indeed, quite to the contrary, the Court's discussion of core work product as well as the policy discussion justifying the doctrine would seem to indicate that protection should be afforded to core work product, regardless of any temporal or motivational link to litigation. Indeed, much of the confusion surrounding this issue seems to stem from the Harvard student's "Developments Note," which offered scant support for its conclusion.²⁶² Thus, it could be said that courts and commentators alike have been operating under an anticipation misconception in that they have viewed the "anticipation of litigation" standard as a bar to protection of core work product that does not meet this requirement.

This misconception may be understandable when the role of the

²⁶⁰ The Supreme Court recently denied certiorari in a case that could have clarified this portion of its ruling. In *United States v. Textron Inc. & Subsidiaries*, a very recent case decided by an en banc panel of the Court of Appeals for the First Circuit, the court held that "tax accrual work papers" prepared by Textron's lawyers and others within Textron's tax department, were not protected by the work product doctrine. *United States v. Textron, Inc. & Subsidiaries*, 577 F.3d 21, 30–32 (1st Cir. 2009) (en banc). The "tax accrual work papers" at issue were created to help Textron create a tax reserve from which to draw money should some of its positions on its tax liability be incorrect. *Id.* at 23. The court recognized that such papers could reveal the "soft spots" on Textron's tax return should the tax return be litigated. *Id.* (quoting *United States v. Arthur Young & Co.*, 465 U.S. 805, 813 (1984)). However, looking to the motivational component of the "anticipation of litigation" requirement, the court held that the creation of the work papers was motivated by financial and business concerns rather than for use in future litigation. *Id.* at 27–28, 31–32. Textron filed a Motion to Stay the Mandate Pending the Filing of a Petition for a Writ of Certiorari, *see Textron, Inc.'s Motion to Stay the Mandate Pending the Filing of a Petition for a Writ of Certiorari*, *United States v. Textron, Inc. & Subsidiaries*, 577 F.3d 21 (1st Cir. 2009) (No. 07–2631) (on file with author), however, on May 24, 2010, the Supreme Court denied the petition. *Textron, Inc. & Subsidiaries v. United States*, No. 09–750, 2010 WL 2025148 (May 24, 2010). For an excellent review of the *Textron* district court opinion, see Claudine Pease–Wingenter, *The Application of the Attorney–Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron*, 8 Hous. Bus. & Tax L.J. 337, 342–54 (2008).

²⁶¹ *See supra* note 3.

²⁶² *See supra* notes 179–83.

lawyer is viewed historically. At the time of the *Hickman* decision, in-house counsel only made up roughly three percent of all attorneys, and the work performed by these attorneys was rather routine.²⁶³ Litigation and trial work were more closely associated with the work of an attorney than transactional or prophylactic legal work.²⁶⁴ Indeed, up until the mid-1800s the attorney-client privilege was limited to trial work.²⁶⁵ However, the number of in-house counsel had grown to 10.3 percent by 1970,²⁶⁶ and by then “anticipation of litigation” as a requirement had already taken hold. Today, it is commonly understood that the role of the attorney expands beyond just trial work into complex transactional work, which may or may not ultimately require litigation.

A second, related misconception is also worth noting with regard to *Hickman*. It is often written that the policy justification for the work product doctrine is that the attorney requires a “zone of privacy” within which to work.²⁶⁷ This justification is a nod to the benefits viewed to result from a robust adversarial system. To cite only to this adversarial justification, however, ignores the *Hickman* court’s further statements concerning the detrimental effect the disclosure of work product materials would have on the legal profession as well as the attorney-client relationship.²⁶⁸ In this regard, the work product doctrine’s justification has much in common with the justification that is the foundation of the attorney-client privilege, which is not tied to any litigation requirement.²⁶⁹ Indeed, even the cost-free nature of the privilege may apply to the work product doctrine. Instead

263 THE OXFORD COMPANION TO AMERICAN LAW 500 (Kermit L. Hall et al. eds., 2002) (stating that “[i]n 1948, only [three] percent of all lawyers were employed in private industry,” and the role of the “in-house” attorney, up until the 1960s, was traditionally to handle routine legal issues while leaving more complex legal issues for outside counsel).

264 *See id.* (“Corporate counsel traditionally acted as business counselors and advisors to their employers concerning routine legal issues; more complex legal issues were handled by the corporation’s outside counsel.”).

265 Alexander, *supra* note 57.

266 VERN COUNTRYMAN ET AL., THE LAWYER IN MODERN SOCIETY 4 tbl.2 (2d ed. 1976). This growth appears to have been a steady incline growing from 5.5 percent in 1951 to 8.9 percent in 1960. *Id.*

267 *See, e.g.*, *Pac. Gas & Elec. Co. v. United States*, 69 Fed. Cl. 784, 789 (Fed. Cl. 2006) (asserting that the work product doctrine is intended to preserve a “zone of privacy” where an attorney “can prepare and develop [his] legal strategy”); *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) (identifying the purpose of the work product doctrine as establishing a “zone of privacy in which lawyers can analyze and prepare their client’s case free from scrutiny or interference by an adversary” (citations omitted)); *Hanson v. U.S. Agency for Int’l Dev.*, 372 F.3d 286, 292 (4th Cir. 2004) (indicating that the work product doctrine “serves to provide a ‘zone of privacy’ within which to . . . plan . . . [for a] case” (quoting *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980))); *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (stating the purpose of the work product doctrine is to preserve a zone of privacy in which an attorney can prepare his or her case).

268 *Hickman v. Taylor*, 329 U.S. 495, 510–13 (1947).

269 *See supra* Part II.B.2.

of communications not existing absent the privilege, the cost-free nature is present in the Supreme Court's statement that "much of what is now put down in writing would remain unwritten."²⁷⁰

A. *Correcting the Anticipation Misconception*

In light of these misconceptions, a simple fix is possible: eliminate the "anticipation of litigation" requirement for core work product. This can be accomplished by simply extending *Hickman*, which continues to have validity today despite Rule 26(b), and recognizing that core work product should retain a residuum of protection even outside of the litigation context.²⁷¹ This would require a complete elimination of the temporal analysis and a modification of the motivational analysis. Instead of looking to whether the motivation for creating the work product is litigation, the test should be whether the work product sought was generated by the attorney to provide legal assistance. This admittedly would mimic the test for whether a communication is protected under the attorney-client privilege, but given the similar purposes of the doctrines, this is a logical test.²⁷² Though this may seem like a rather drastic proposal, a similar expansion already exists under California state law²⁷³ and at least one commentator has advocated for recognition of such an expansion to protect the work of transactional attorneys.²⁷⁴

²⁷⁰ *Hickman*, 329 U.S. at 511.

²⁷¹ EPSTEIN, *supra* note 8, at 815; Marcus, *supra* note 11, at 349–50; see Cercone, *supra* note 255, at 658; WRIGHT ET AL., *supra* note 11, § 2024.

²⁷² See *MSF Holding, Ltd. v. Fiduciary Trust Co. Int'l*, No. 03 Civ. 1818PKLJCF, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 7, 2005) (citations omitted); *Kramer v. Raymond Corp.*, Civ. No. 90–5026, 1992 WL 122856, at *1 (E.D. Pa. May 29, 1992) (citations omitted); *Avianca, Inc. v. Corriea*, 705 F. Supp. 666, 676 (D.D.C. 1989) (citations omitted); Cercone, *supra* note 255, at 658; EPSTEIN, *supra* note 8, at 815; Marcus, *supra* note 11, at 349–50; WRIGHT ET AL., *supra* note 11, § 2024.

²⁷³ CAL. CIV. PROC. CODE § 2018.030(a) (West, Westlaw through 2009 Sess.) ("A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances."); *Cnty. of Los Angeles v. Superior Court*, 82 Cal. App. 4th 819, 833 (Ct. App. 2000) (citation omitted) (interpreting California's work product rule); *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 120 (Ct. App. 1997) (citations omitted); *Rumac, Inc. v. Bottomley*, 143 Cal. App. 3d 810, 815–16 & n.7 (Ct. App. 1983) (citation omitted) (contrasting the California rule with the federal rule).

²⁷⁴ See KIRST, *supra* note 67, at 230–35. Though Professor KIRST's article is equally critical of the "anticipation of litigation" requirement, and shares a similar line of reasoning as to its analyses of *Hickman* and *Upjohn*, the KIRST article focuses much more on a recognition of a transactional privilege based on a more extensive review of the attorney-client privilege. KIRST, *supra* note 67. This article does not limit the scope of protection to a transactional privilege and is based more on the historical and philosophical development of the work product doctrine. For a contrary view of the work product doctrine, see Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1517 (1991), in which Thornburg argues that the work product doctrine should be eliminated entirely.

Such recognition of a residuum of protection would be in line with the policy justifications of *Hickman* on both instrumental and adversarial policy grounds. With regard to the instrumental justification as to core or “opinion” work product, if the reasons for granting a qualified privilege within the litigation context holds true, then those reasons should apply equally to such materials outside the litigation context. As the Supreme Court noted in *Hickman*, there could be a chilling effect on the attorney–client relationship and “much of what is now put down in writing would remain unwritten.”²⁷⁵ Furthermore, clients come to attorneys for help both inside and outside of the litigation context, and the lawyer’s role outside of the litigation context is no less important. As one California appellate court articulated in explaining its legislature’s own decision to expand the scope of coverage:

[P]rotecting attorneys’ work product when they act in a nonlitigation legal capacity furthers the important goal of reducing the likelihood of litigation. Although all litigators are attorneys, the converse is not true. Nevertheless, “[t]he lawyer, when acting as a *counselor*, performs a function that is extremely beneficial to society, in that effective legal counseling minimizes the likelihood of conflict between parties by stabilizing relationships and promoting understanding and cooperation. Effective legal counselors provide the ‘solvents and lubricants which reduce the frictions of our complex society.’ In the role of counselor, the lawyer serves as an instrument of peace.”²⁷⁶

To limit the protection of core work product only to the litigation context ignores this important policy justification for the rule as enunciated in *Hickman*.²⁷⁷

The expansion is also in line with the adversarial justification given in *Hickman*. The “zone of privacy,” which recognized that attorneys must work without fear that the opponent would gain important insight into his or her strategy decisions is applicable even at stages when litigation is only a remote possibility. Indeed, the core work product of an attorney who is engaged to avoid litigation, even at an early stage when no litigation is on the horizon, can still give helpful insight into how a party will prepare its

²⁷⁵ *Hickman*, 329 U.S. at 511.

²⁷⁶ *Rumac*, 143 Cal. App. 3d at 816 (quoting Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 690–691 (1982)); see also LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 461 (2002) (“Lawyers, in the main, service business. They help form corporations, they advise on corporate affairs, they maneuver through tangles of red tape; they cope with federal, state, and local government; they help put deals together.”).

²⁷⁷ This instrumental justification is important as it continues to have validity, at least in the Supreme Court’s view, in modern times. See *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998); *Jaffee v. Redmond*, 518 U.S. 1, 11–12 (1996); *United States v. Zolin*, 491 U.S. 554, 562 (1989); IMWINKELRIED, *supra* note 55, § 5.1.1 (citing *Swidler & Berlin*, 524 U.S. 399; *Jaffee*, 518 U.S. 1; *Zolin*, 491 U.S. 554).

case or into the strategy that will be used at trial. The following example is illuminating:

For instance, an attorney who prepares a memorandum on the strengths and weaknesses of a contract he has drawn up for a client might modify his handling of future memoranda if he knew such documents were routinely discoverable. The memorandum, if discovered, could provide some unforeseen adversary with insights into weaknesses that he had not detected on his own.²⁷⁸

A recognition that a residuum of protection remains under *Hickman* would help alleviate this concern.

B. Justifications for Retaining the “Anticipation” Requirement

Despite the strengths of the arguments favoring the expansion of work product protection, there are a number of countervailing arguments that should be addressed. The first is the argument that an attorney working in a non-litigation context will have no fear of discovery and thus no chilling effect on his work product will occur. This was the reasoning put forth in the previously discussed “Developments Note” that appears to have helped establish the “anticipation of litigation” requirement.²⁷⁹ As has already been explained, the “Developments Note’s” reasoning seems naïve at best, particularly in light of modern legal practices. Attorneys engaged in any arena of modern day transactional work, such as negotiating and reviewing contracts, drafting wills, administering tax advice, or working on patent prosecution, are aware that litigation may ensue. Indeed, given the relative permanence an attorney’s work has in modern times thanks to electronic storage, this justification for retaining the requirement as to core work product has little bite.

Another, more compelling argument against removing the requirement is that it cuts against the purposes of the Federal Rules of Civil Procedure. The original Federal Rules were enacted to open discovery up so that cases were won or lost based on justice rather than gamesmanship. To cut back on discovery in such a way could open up opportunities for abuses by parties and a return to the gamesmanship that marked the pre-Rules era. This argument would be more persuasive if what was being proposed was a complete abandonment of the “anticipation of litigation” requirement. The expansion argued for is only with regard to the core work product of the attorney. The “anticipation of litigation” requirement makes sense

²⁷⁸ Anderson et al., *supra* note 7, at 788 n.175. The footnote prefaces that “[a]lthough Rule 26(b)(3) focuses on litigation, there is no reason to believe that the *Hickman* rationale is so limited. Arguably, the courts should protect a broader range of attorney work product.” *Id.* The footnote concludes, however, that protection could be available through the attorney-client privilege or a protective order. *Id.*

²⁷⁹ See *supra* notes 179–83.

as to “ordinary” work product and is in line with the balance struck as to the adversarial nature of the work product exception. Placing a burden for discovery on a party seeking “ordinary” work product outside of the litigation context would be overly burdensome and potentially could heighten the gamesmanship that was inherent in the system prior to enactment of the Federal Rules. However, as to core or “opinion” work product, if the justifications for granting a qualified privilege articulated in *Hickman* are believed, then the benefits of protection outweigh the negative effects feared.²⁸⁰

This leads, however, to possibly the strongest argument against such a change. If the expansion of the work product doctrine is to rely upon the instrumental policy justification that is shared with the attorney–client privilege, then it must also suffer from the weakness of this justification, i.e., that the perceived benefits of the protection are speculative at best. Indeed, the work product doctrine may be more susceptible to such an attack in light of our legal system’s continued survival without such an expansion. It is difficult to say that much of what is written down would not be, and that the expansion is necessary to avoid a detrimental effect on the attorney–client relationship when no such expanded protection has been afforded to core work product for approximately the last eighty years.²⁸¹

To this, there are a number of responses that can be offered. First,

²⁸⁰ *Hickman*, 329 U.S. at 510–13. It should be noted that even under such an expansion of the work product doctrine, the exceptions of waiver and the crime–fraud exception could still apply, further limiting the perceived damaging effects such protection would have on an open discovery system. *Contra* *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 120 (Ct. App. 1997) (citing *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1249 (Ct. App. 1988), and noting that, under California law, though waiver applied to the work product rule, the crime–fraud exception did not).

²⁸¹ A corollary to this argument would be that protective orders are available under Rule 26(c) to protect work product that is not covered under 26(b). *See* FED. R. CIV. P. 26(c); *cf.* Alexander, *supra* note 57, at 408 (“If a claim of corporate privilege is overridden because of the particular evidentiary needs of the litigants, the court should be receptive to the corporation’s request for a protective order to minimize the risk of dissemination of the attorney–client communications to the public or to parties in other proceedings.”). However, as has already been demonstrated, despite the availability of such a measure, problems have persisted as to the discovery of core work product. Indeed, the Rule itself speaks in terms that do not lead the reader to think that simply by virtue of having core work product status, that protection should be granted. The Rule states, “[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending The court may, for good cause, issue an order to protect a party or person from *annoyance, embarrassment, oppression, or undue burden or expense*, including one or more of the following: (A) forbidding the disclosure or discovery” FED. R. CIV. P. 26(c) (emphasis added). Also, the presence of a “good cause” justification is problematic as this was the precise language the Advisory Committee rejected as unacceptable with regard to protecting work product due to confusion as to the meaning of the language. *See supra* Part III.C. In fact, a court could simply return to the “anticipation of litigation” analysis to determine if a protective order was justified. *See, e.g., In re Grand Jury Subpoena*, 220 F.R.D. 130, 133, 146–51 (D. Mass. 2004) (denying request for protective order as the material at issue was not produced in anticipation of litigation).

though the instrumental justification is one justification for expansion of the doctrine, it is not the only one. The expansion of the doctrine is also in line with the adversarial justification articulated in *Hickman*, as has been noted above. Indeed, it is interesting to note that although the attorney–client privilege has long stood upon the speculative instrumental justification, one of the primary alternative justifications that has been offered for its continued existence is a humanistic privacy justification, which would seem to mirror the adversarial justification given for the work product doctrine.²⁸²

Furthermore, while there has been no protection for such materials in the past, today’s legal environment is much different from the one in which *Hickman* was decided, or the one in which the current version of Rule 26(b) was effected, or even the legal environment of ten years ago. This is due to both the growth of the legal profession as a whole and in the in–house sector, as well as the advent of electronic discovery (“e–discovery”). In 1948, the time of the *Hickman* decision and when the Federal Rules were under consideration for amendment, in–house counsel accounted for 3% of all attorneys,²⁸³ of which there were approximately 200,000 (placing the number of in–house at approximately 6,000).²⁸⁴ The work of these in–house attorneys was relatively routine but through the years grew to encompass increasingly complex matters.²⁸⁵ By 1970, the year in which the work product doctrine became a part of the Federal Rules, the total number of attorneys had grown to 355,242 of which 11% worked in–house (placing the number of in–house counsel at approximately 39,076).²⁸⁶ This percentage leveled out over the next few decades, with in–house representing 10% of the total number of attorneys in 1980, of which there were 542,205 (placing the number of in–house at approximately 54,000),²⁸⁷ 8% in 1995 (with a total number of approximately 71,349 in–house)²⁸⁸ and 8.4% in 2000 (for a total number of in–house counsel of 75,954).²⁸⁹ In 2008, the total number of attorneys in the U.S. had reached 1,014,000 and although no percentage of

282 See *supra* notes 166–73 and accompanying text.

283 THE OXFORD COMPANION TO AMERICAN LAW, *supra* note 263.

284 See GLENN GREENWOOD, AM. BAR FOUND., THE 1961 LAWYER STATISTICAL REPORT 88 (1961) (placing the total number of attorneys in the U.S. in 1952 at 221,605).

285 THE OXFORD COMPANION TO AMERICAN LAW, *supra* note 263, at 500, 505; VERN COUNTRYMAN ET AL., *supra* note 266, at 41, 44.

286 BARBARA A. CURRAN ET AL., AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S 12 (1985); VERN COUNTRYMAN ET AL., *supra* note 266 (placing the percentage at 10.3 percent).

287 CURRAN ET AL., *supra* note 286, at 12; FRIEDMAN, *supra* note 276, at 461.

288 CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995 7 (1999).

289 CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 28 (2004). The total number of attorneys in the U.S. had grown to over 1 million. *Id.* at 27.

in-house counsel number appears available yet,²⁹⁰ if the percentage remains in the 8–10% range, this would place the number of in-house counsel somewhere between 81,120 and 101,400. Even going by a conservative estimate, this growth represents a significant increase in the raw numbers from 1948, and over a doubling of the number of in-house counsel since 1970. When the advent of e-discovery is coupled with this growth in the numbers and use of in-house counsel, there is a great likelihood that, as a practical matter, materials exist today that simply would not have been discovered at the time of *Hickman*.

The advent and regular use of computers and electronic storage of materials has created an environment in which every key stroke is recorded and recoverable. Notes, drafts, and other material, which may very well have disappeared in hard copy, particularly after a few years, either through a document destruction program or simply by accident (we all know how unorganized some attorneys can be), are now discoverable through e-discovery measures. This has led to a large increase in the amount of discoverable information.²⁹¹ It has also led to an increase in the ability to easily search through vast amounts of information to discover previously difficult to locate documents and information.²⁹² As one commentator has characterized it, “[t]he data mountain is no longer an impossible height to scale, but a vast database to be mined for secrets and insights that were previously unavailable.”²⁹³ Based on the above, two significant changes have occurred since *Hickman*; first is the increase in proportion and sheer number of lawyers used in-house (and for increasingly complex matters). Second, although the proportion of attorneys may have steadied by the time the work-product doctrine was recognized in Rule 26(b), the nature of discovery has changed dramatically since that time. Thus, if discovery of core work product was not a concern as a practical matter at the time of *Hickman* or in 1970, the same certainly cannot be said today.²⁹⁴

290 BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY 2008 tbl.6, http://www.bls.gov/cps/race_ethnicity_2008_6.htm (last modified Dec. 4, 2009).

291 Tracey L. Boyd, *The Information Black Hole: Managing the Issues Arising from the Increase in Electronic Data Discovery in Litigation*, 7 VAND. J. ENT. L. & PRAC. 323, 323–25 (2005) (“Without question, the amount of [electronically] discoverable information greatly exceeds the quantity that is available through traditional discovery.” (citation omitted)); Steven C. Bennett & Thomas M. Niccum, *Two Views from the Data Mountain*, 36 CREIGHTON L. REV. 607, 607–08 (2003); Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?* 41 B.C. L. REV. 327, 349 (2000).

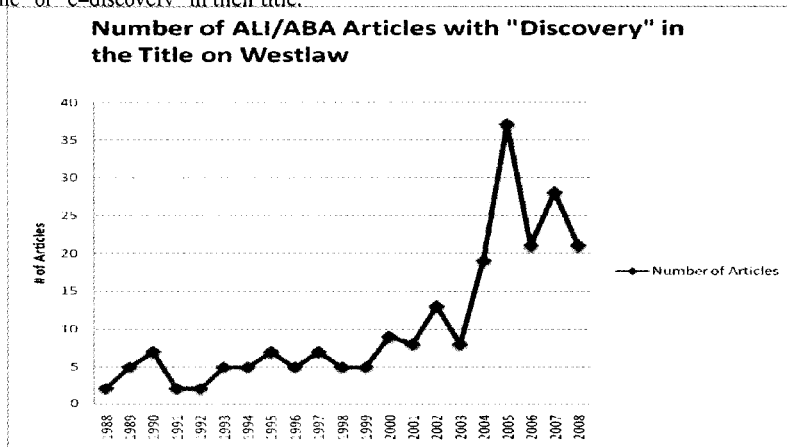
292 Bennett & Niccum, *supra* note 291, at 610–11.

293 *Id.* at 611.

294 For example, a review of the number of ALI/ABA published CLEs regarding discovery reveals a substantial increase since 1988, with the largest increase coming since 2004. See www.westlaw.com (search “American Law Institute–American Bar Association Continuing Legal Education (ALI–ABA)” database by inputting “ti(Discovery) & da(1988)” to find the number of ALI/ABA articles with the word “discovery” in the title; repeat for every year up

Finally, although it can be argued that the benefit is speculative, there is evidence, both anecdotally and by analogy, from studies done in the attorney–client privilege context that suggests otherwise. Anecdotally, it is not difficult to find attorneys with war stories about discovery battles and guarding against what was said or written down to avoid a paper trail that an adversary could later discover.²⁹⁵ Empirically, there is some support that the attorney–client privilege provides more than “speculative” benefits. In 2005, the Association of Corporate Counsel (ACC) conducted a survey of its members to determine whether the attorney–client privilege was under attack by governmental agencies.²⁹⁶ Of the 363 respondents to the ACC

to 2009). As the chart below demonstrates, the results of this search show that the number of articles with “discovery” in the title greatly increased starting in 2004—illustrating that more emphasis is being put on issues of discovery in the legal community. This increase may very well be related to the 2006 amendments to the Federal Rules of Civil Procedure involving electronic discovery, which were being discussed prior to their effective date. Indeed, a review of the titles from 2004 onward reveals that a number of the CLEs included the words “electronic” or “e-discovery” in their title.



²⁹⁵ JOHN WILLIAM GERGAZ, *ATTORNEY–CLIENT PRIVILEGE* 7–10 (2d ed. 1990) (noting that without the protection, in the litigation context, counsel would “be forced to balance the benefit of creating work product with the risk that his adversary can readily obtain it”).

²⁹⁶ ASS’N OF CORPORATE COUNSEL, *ASSOCIATION OF CORPORATE COUNSEL SURVEY: IS THE ATTORNEY–CLIENT PRIVILEGE UNDER ATTACK?* 1 available at <http://www.acc.com/legal-resource.cfm?show=16315>. Additionally, in his 1989 survey concerning the effects, if any, of the attorney–client privilege, Professor Vincent Alexander found that with respect to corporate representatives, 62% of in–house counsel, 88.5% of outside counsel, and 75% of executives said that the attorney–client privilege encourages candor. Alexander, *supra* note 57, at 246 tbl.4. While this survey is over twenty years old, and therefore not necessarily a representation of circumstances today, the conclusions it draws, along with the conclusions promulgated by the Association of Corporate Counsel in their 2005 survey, provide a strong basis of support for the contention that the attorney–client privilege provides more than speculative benefits. Compare Alexander, *supra* note 57, at 414 (stating that the evidence gathered in Alexander’s study contained more evidence than any other study to date that the attorney–client privi-

survey, 93% believed that senior-level employees of corporate clients were aware of the attorney-client privilege and relied upon it when consulting corporate counsel.²⁹⁷ This number dropped to 68% for mid and lower-tier employees.²⁹⁸ Significantly, however, 95% of the respondents believed that absent the attorney-client privilege, there would be a chilling effect on the flow of information from clients.²⁹⁹ The National Association of Criminal Defense Lawyers conducted a similar study around the same time, which also found that 95% of its respondents felt that if the attorney-client privilege did not protect its communications or work product, there would be a chilling effect on the candid flow of information.³⁰⁰ Furthermore, 94% of respondents believed that the privilege enhanced the likelihood that company employees would discuss difficult issues of legal compliance with the attorney and 97% believed that the privilege enhanced the “lawyer’s ability to monitor, enforce, and/or improve company compliance initiatives.”³⁰¹ These surveys, however, were of the attorneys and not of clients and could themselves be attacked as speculative (in that the attorneys are speculating upon what their clients would or would not reveal) and self-serving.³⁰² It may be, on this front, that until a convincing empirical study is completed the benefits derived from the attorney-client privilege remain “speculative;” but, given the above justifications for expanding the coverage as to core work product, this flaw should not be fatal. This is particularly true given that the attorney-client privilege has existed on this same speculative benefit for many decades.

A final argument that could be made against the adoption of recognizing a residuum of protection for core work product is that it will be subject to abuse—that attorneys will become mere tools by which powerful clients, such as corporations, can protect documents from exposure simply by having attorneys work on matters, be they related to the attorney’s legal expertise or not. As an initial response, I would again point out that

lege encourages candor in communications between an attorney and his client), *with* ASS’N OF CORPORATE COUNSEL, *supra*, at 2–3 (finding, just as Professor Alexander did twenty years ago, that a vast majority of attorneys believe there would be a chilling effect on candid communication without the attorney client privilege).

297 ASS’N OF CORPORATE COUNSEL, *supra* note 296, at 2–3.

298 *Id.*

299 *Id.*

300 NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SURVEY: THE ATTORNEY-CLIENT PRIVILEGE IS UNDER ATTACK 1–3, *available at* [http://www.nacdl.org/public.nsf/0/60ad77fc8d473b7885256fe100742727/\\$FILE/Atty-Client_Priv.doc](http://www.nacdl.org/public.nsf/0/60ad77fc8d473b7885256fe100742727/$FILE/Atty-Client_Priv.doc).

301 ASS’N OF CORPORATE COUNSEL, *supra* note 296, at 2–4.

302 This possibility was recognized by Professor Vincent in his 1989 survey in which he noted that the “bias of the participants must be taken into account in weighing the accuracy of the results. . . . One may reasonably suspect . . . that the role of the privilege as an incentive to candor was exaggerated by the participants.” Alexander, *supra* note 57, at 263.

recognizing a residuum of protection would not mean an abandonment of exceptions to the work product doctrine such as the crime–fraud exception or waiver. A corporation or client that wishes to utilize an attorney to commit a fraud would still be subject to producing the resultant work product. Furthermore, just as is true with the attorney–client privilege, simply using an attorney would not lead to protection under the work product doctrine. An attorney would still need to generate the work while providing legal assistance (and the privilege could still be qualified). Thus, involving an attorney in routine business matters would not lead to protection. While it is true that recognition of a residuum of protection could lead to the expanded protection of certain documents, this proposal is not intended to completely displace the balance struck with a system of open discovery. Instead, recognition of a residuum of protection would strike a proper balance, within the dictates of the *Hickman* decision, between having a system of open discovery and retaining a level of protection for documents under both a humanistic privacy justification and also an instrumental justification. While some may take issue with such an expansion and re-balancing, citing the need for more rather than less discovery, many of the criticisms that could be levied against such an approach could easily be levied against the *Hickman* decision itself. However, as valid as such criticisms may be, the battle to do away with any level of protection for work product has been fought and lost long ago. Recognition of a residuum of protection would merely do away with the arbitrary lines that are currently being drawn regarding “anticipation of litigation.”

CONCLUSION

The anticipation misconception has lingered for far too long. Rather than attempt to stretch the existing attorney–client privilege to include core work product or broaden “anticipation of litigation” to encompass any work the attorney created, however speculative the litigation may be, a sounder approach would be to simply recognize that a residuum of protection exists under *Hickman* that provides a separate protection for core work product. This is possible through the original *Hickman* decision itself, which even today has validity despite the existence of Rule 26(b). The recognition that core work product is protected, even if that protection is not absolute, despite the absence of potential litigation, is more in line with the dual policy justifications the Court articulated in *Hickman*. The first of these policy justifications, to provide a “zone of privacy” to promote the adversarial system, is advanced by a rule that protects core work product. Without this rule, even when litigation may be remote, the attorney’s mental impressions could just as easily be used against the attorney’s clients in a litigation context as documents produced explicitly in anticipation of litigation. Removing the “anticipation of litigation” requirement for core

work product will also promote the second, instrumental justification given by the Supreme Court. This justification, rooted in concerns that without protection there would be a detrimental effect on the attorney–client relationship and much of what is written down would not be written down, shares much in common with its cousin, the attorney–client privilege. Just as the attorney–client privilege is not tied to litigation, neither should the protection of core work product. While the benefits may appear speculative, on balance this benefit has been sufficient to justify the existence of other privileges. The work product doctrine has the added benefit of having a dual reasoning in its first adversarial justification, which is similar to the humanistic privacy justification that has been offered for the attorney–client privilege.

Furthermore, the term “anticipation of litigation” has failed to yield a uniform or satisfactory definition—a problem that should concern both practitioners and academics alike. To demonstrate, imagine that fictional company ABC Corp., prior to any formal governmental investigation, assigns in–house counsel to investigate possible accounting irregularities. In–house counsel begins researching cases and statutes and makes notes regarding how such authorities could affect the company’s liability. While doing this, in–house counsel also sets up a schedule to interview employees and third parties over a four–week period. Two weeks into the interviews and while research is still being done on the legal issues, the SEC and Department of Justice begin a formal investigation. In some jurisdictions, the work product from the first two weeks, including the attorney’s notes from the interviews, would not be protected, as the possibility of litigation was remote. However, work completed during the second two–week period, after the formal investigations had begun, would be covered as in “anticipation of litigation.” Such a distinction makes little sense and creates an incentive for in–house counsel to avoid writing down his or her mental impressions. Thus, eliminating the “anticipation of litigation” requirement for core work product in favor of a rule that simply protects such documents will help promote uniformity and provide attorneys with a degree of certainty about whether their work will be protected. The inconsistent opinions that have resulted from the “anticipation of litigation” requirement have led to results that make distinctions without any true meaning. Simply recognizing that core work product is deserving of protection regardless of the prospect of litigation, so long as it is truly part of an attorney’s provision of legal services, should, at the very least, provide courts with the ability to grant or deny protection in a more rational manner.