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## The Anticipation Misconception

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## **The Anticipation Misconception**

Colin P. Marks<sup>1</sup>

### I. 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 it is protected by both the attorney client privilege and work product doctrine. Though 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 virtue of the fact that they may not be deemed to have been prepared in "anticipation of litigation," as that term is often

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interpreted as litigation being more than a remote possibility.<sup>2</sup> Adding to this confusion is disagreement upon 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.”<sup>3</sup> 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.<sup>4</sup> This

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<sup>2</sup>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).

<sup>3</sup>See, e.g., Liesa L. Richter, *The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America has Everyone Excite About the Emperor’s New Clothes*, 43 WAKE FOREST L. REV. 979, 1031 (2008) (citing to the *Hickman* decision as support that “the work-product doctrine provides additional protection for the work product of an attorney made in anticipation of litigation.”); Latieke M. Lyles, *Cooperation or Coercion?: Why Selective Waiver is Needed in Government Investigations*, 52 ST. LOUIS U. L.J. 1291, 1297 (2008); Keith Paul Bishop, *The McNulty Memo – Continuing the Disappointment*, 10 CHAP. L. REV. 729, 731 n.10; Thomas C. Pearson, *Investigations, Inspections, and Audits in the Post-Sox Environment*, 86 NEB. L. REV. 43, 96 n.348 (2007); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1295 (2006); *Pacific Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008); *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1263 (11th Cir. 2008); *Dairyland Power Co-op 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); *Regional Airport Authority 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); *Cabot v. United States*, 35 Fed.Cl. 442, 445 (Fed. Cl. 1996).

<sup>4</sup>See, e.g., *Pacific Gas and Elec. Co. v. U.S.*, 69 Fed.Cl. 784, 789 (Fed. Cl. 2006) (asserting that the work product doctrine is intended to preserve a zone of

justification supports limiting protection to only work generated “in anticipation of litigation,” because, presumably, outside of this context there is no need for the “zone of privacy.” However, a closer reading of *Hickman* reveals that, though 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,”<sup>5</sup> known as “core” work product. 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.”<sup>6</sup> Furthermore, though the “zone of privacy” justification was used by the Court, a much broader concern for the effect discovery of such materials would have on the attorney-client relationship was also articulated.

This policy concern shares much in common with the instrumental 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 that 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

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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 their case free from interference by an adversary); *Hanson v. U.S. Agency for Intern. Development*, 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); *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 their case); *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

<sup>5</sup>FED. R. CIV. P. 26(b)(3).

<sup>6</sup>*In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986).

limited the scope of coverage given to the attorney's "core" work product causing problems with knowing what 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 protection of "core" work product from discovery. Part II examines the current state of the work product doctrine through Federal Rule of Civil Procedure 26(b)(3) and case law and compares the doctrine with the attorney-client privilege. Part II concludes by demonstrating how "core" work product can be discovered despite the protection of these two doctrines. Part III 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 IV discusses the subsequent interpretations of *Hickman v. Taylor*, and how the "anticipation of litigation" requirement, or anticipation misconception, got its start through, of all things, a student note in the Harvard Law Review. Part IV concludes with a discussion of the Supreme Court's interpretations of Rule 26(b) as it currently exists.

Finally, Part V 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 V, therefore, proposes that, with regard to core work product, a new exception be established, 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 it was created by an attorney 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.”

## II. 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.<sup>7</sup> 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

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<sup>7</sup>*Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 514 n.2 (5th Cir. 1993); *United States v. Armstrong*, 517 U.S. 456, 474 (1996); *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1494 (9th Cir. 1989); *Westinghouse Elec. Corp. v. Republic of Phillipines*, 951 F.2d 1414 (3d Cir. 1991); Charles M. Yablon & Steven S. Sparling, *United States v. Adlman: Protection for Corporate Work Product?*, 64 BROOK. L. REV. 627, 633 (1998); Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 762 (1983).

*Hickman* decision has been partially codified in Federal Rule of Civil Procedure 26(b)(3).<sup>8</sup> Rule 26(b)(3) provides:

(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.<sup>9</sup>

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, (3) by or for another party or by or for that other party’s representative.”<sup>10</sup> Though the first of these elements only speaks in terms of

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<sup>8</sup>FED. R. CIV. PRO. 26(b)(3); EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT AND WORK PRODUCT DOCTRINE* 795 (5<sup>th</sup> ed. ABA 2007). The Federal Rules of Criminal Procedure offer a similar protection through Rule 16(b)(2). Fed. R. Crim. Pro. 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 criminal context.

<sup>9</sup>FED. R. CIV. PRO. 26(b)(3).

<sup>10</sup>EPSTEIN, *supra* n. 8, at 797; Anderson, *supra* n. 7, at 792.

“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.<sup>11</sup>

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 criteria.<sup>12</sup> As one commentator has noted, there appears to be, 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.”<sup>13</sup> 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.”<sup>14</sup> Thus, documents prepared for compliance with federal securities laws have not been

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<sup>11</sup>EPSTEIN, *supra* n. 8, at 815; RICHARD L. MARCUS, *The Story of Hickman: Preserving Adversarial Incentives While Embracing Broad Discovery*, in CIVIL PROCEDURE STORIES, at 349 (2d ed. Foundation Press 2008, Kevin M. Clermont editor); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2024 (West 1994); *In re Cendant Securities Litig.* 343 F.3d 658, 662-63 (3d Cir. 2003); *In re Grand Jury*, 473 F.2d 840, 845-46 (8th Cir. 1973); 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, 762 (2009).

<sup>12</sup>6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE - CIVIL § 26.70 (3d ed. 2007) (section authored by Patrick E. Higginbotham) (“Courts have devised various formulations regarding just how concrete the prospect of litigation must be before protection will attach to a given document.”); Anderson, *supra* n 7, at 845.

<sup>13</sup>EPSTEIN, *supra* n. 8, at 825 (citing *Marten v. Yellow Freight Sys.*, 1998 WL 13244, at \*10 (D. Kan. 1998)).

<sup>14</sup>EPSTEIN, *supra* n. 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*, 797 PLI/Lit 225, 491 (2009); *Willingham v. Ashcroft*, 228 F.R.D. 1 (D.D.C. 2005); *Deseret Mgmt. Corp. v. United States*, 76 Fed.Cl. 88, 92-93 (Fed.Cl. 2007).



afforded work product protection,<sup>15</sup> 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, and thus the documents were not prepared for “litigation.”<sup>16</sup> Similarly, documents prepared in anticipation of a governmental investigation have not been granted work product protection,<sup>17</sup> but once a governmental investigation has actually commenced, the work product doctrine may apply as the prospect of litigation is no longer remote.<sup>18</sup>

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 to again apply various standards. Analyzing whether work product was produced in anticipation of litigation often requires an inquiry into both the temporality of the threatened adversarial proceeding as well as an inquiry into the second motivational factor cited by above.<sup>19</sup> As to the temporality of the litigation, where a proceeding has actually been initiated, the requirement is met, but the doctrine does not require that a suit be filed for the

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<sup>15</sup>Biddison v. Chicago, 1989 U.S. Dist. Lexis 3991, at \*2 (N.D. Ill. 1989); EPSTEIN, *supra* n. 8, at 829-30 (citing same).

<sup>16</sup>*In re Grand Jury Subpoena*, 220 F.R.D. 130, 156 (D. Mass. 2004); EPSTEIN, *supra* n. 8, at 830 (citing same).

<sup>17</sup>*In re Grand Jury Subpoena*, 220 F.R.D. 130, 147 (D. Mass. 2004); Guzzino v. Felerman, 174 F.R.D. 59, 63 (W.D. La. 1997); WRIGHT ET AL., *supra* n. 10, § 2024; EPSTEIN, *supra* n. 8, at 831.

<sup>18</sup>*Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 513 (D.N.H. 1996); EPSTEIN, *supra* n. 8, at 831-32 (citing same). *See also In re Int’l Sys. & Controls Corp. Securities Litig.*, 693 F.2d 1235, 1239 and n.4 (5th Cir. 1982); *United States v. Amerada Hess Corp.* 619 F.2d 980, 987 (3d Cir. 1980); *Garrett v. Metropolitan Life Ins. Co.*, 1996 WL 325725, at \*3 (S.D. N.Y. 1996) (citing *Martin v. Bally’s Park Place Hotel and Casino*, 983 F.2d 1252, 1261 (3d Cir. 1993)).

<sup>19</sup>EPSTEIN, *supra* n. 8, at 836; *Equal Rights Center v. Post Properties, Inc.*, 247 F.R.D. 208, 210 (D. D.C. 2008); *Fago v. M&T Mortgage Corp.*, 242 FRD 16, 23 (D. D.C. 2007); *Amway Corp. v. The Procter & Gamble Co.*, 2001 WL 1818698, at \*6 (W.D. Mich. 2001); *Evans v. Atwood*, 177 F.R.D. 1, 6 (D. D.C. 1997).

protection to apply.<sup>20</sup> 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.<sup>21</sup> “In general . . . a party must show more than a remote prospect, an inchoate possibility, or a likely chance of litigation.”<sup>22</sup> 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 of imminence.<sup>23</sup> 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.”<sup>24</sup> However, other courts have quoted a more liberal standard, requiring that there exists “a subjective belief that litigation was a real possibility, and that belief must [be] objectively reasonable,”<sup>25</sup> or an even less demanding standard that the alleged work product was prepared “with an eye toward litigation.”<sup>26</sup> This variance in the stringency of what qualifies as work product, due to when litigation is “anticipated,” has created a lack of uniformity across

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<sup>20</sup>Epstein, *supra* n. 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); *Collins v. Mullins*, 170 F.R.D. 132, 135-36 (W.D. Pa. 1996).

<sup>21</sup>Solovy et al., *supra* n. 14, at 492; John M. Burman, *The Work Product Doctrine*, WYOMING LAWYER 38, 41, April 2006; *Diversified Indus., Inc. v. Meredith* 572 F.2d 596, 604 (8th Cir. 1978); *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D. N.Y. 1974).

<sup>22</sup>*In re Gabapentin Patent Litig.*, 214 F.R.D. 178, 183 (D.N.J. 2003).

<sup>23</sup>Epstein, *supra* n. 8, at 850-51; Anderson, *supra* n. 7, at 845-46.

<sup>24</sup>*Williams v. Sprint/United Mgmt. Co.*, 2006 WL 266599 at \*10 (D. Kan. 2006); *Banks v. United States*, 2005 WL 974723 at \*3 (W.D. Wash. 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.”).

<sup>25</sup>*In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *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).

<sup>26</sup>*United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (citing to *Hickman*); *In re Sealed Case*, 676 F.2d 793, 809 (D. D.C. 1982).

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. Such dual-purpose documents raise doubts as to whether the documents were truly created in anticipation of litigation.<sup>27</sup> 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.”<sup>28</sup> The Second Circuit, in *United States v. Adlman*, has 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.”<sup>29</sup> The standard adopted by the Second Circuit is a direct adoption of the standard advanced by Charles Wright and

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<sup>27</sup>*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.”).

<sup>28</sup>*United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981). *But see In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *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).

<sup>29</sup>*Adlman*, 134 F.3d at 1202-03 (internal quotations omitted) (emphasis in original) (citing CHARLES ALAN WRIGHT ET AL., 8 FEDERAL PRACTICE & PROCEDURE § 2024, at 343 (1994)).

Arthur Miller in their treatise *Federal Practice and Procedure*.<sup>30</sup> 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 be fairly said to have been prepared or obtained because of the prospect of litigation.”<sup>31</sup> Indeed, a number of circuits have joined the Second Circuit in adopting this approach in varying contexts, including the First,<sup>32</sup> Third,<sup>33</sup> Seventh,<sup>34</sup> Eighth,<sup>35</sup> Ninth<sup>36</sup> and D.C. Circuits.<sup>37</sup> The standard itself could be open to multiple interpretations, however, and has not created a uniform standard.

## 2. Production of work product under 26(b)(3)(ii)

As has already been noted, the work product doctrine is not a true privilege but a qualified privilege. Thus, even if a party has carried its burden and shown 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 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.<sup>38</sup>

In applying this rule, courts make a distinction between ordinary or “fact” work product and “opinion” or “core” work product.<sup>39</sup> Ordinary work product has been defined as the “written

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<sup>30</sup>WRIGHT ET AL., *supra* n. 11, at § 2024.

<sup>31</sup>*Id.*

<sup>32</sup>*State of Maine v. U.S. Dep’t of Interior*, 298 F.3d 60, 68 (1st Cir. 2002).

<sup>33</sup>*Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 305 (3d Cir. 1999).

<sup>34</sup>*Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996).

<sup>35</sup>*PepsiCo, Inc. v. Baird, Kurtz & Dobson L.L.P.*, 305 F.3d 813, 817 (8th Cir. 2002).

<sup>36</sup>*In re Grand Jury Subpoena (Mark Torf/ Torf Environ. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004).

<sup>37</sup>*E.E.O.C. v. Lutheran Social Serv.*, 186 F.3d 959, 968 (D.C. Cir. 1999).

<sup>38</sup>FED. R. CIV. PRO. 26(b)(3)(ii); Epstein, *supra* n. 8, at 811.

<sup>39</sup>*In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002).

or oral information transmitted to the attorney and recorded as conveyed by the client.”<sup>40</sup> Such ordinary work product may be obtained, despite the privilege, by meeting the above test, *i.e.* upon a showing of substantial need and an inability to otherwise obtain the privileged work product without material hardship.<sup>41</sup> 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.’”<sup>42</sup> Thus, core work product enjoys a greater level of protection than fact or 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 United States Supreme Court, have stopped short of affording it such status.<sup>43</sup>

## 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.<sup>44</sup> However, if the court’s jurisdiction is premised upon a federal question, the attorney-client privilege is defined by federal common law.<sup>45</sup> The elements of the attorney-client privilege are satisfied: “(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his

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<sup>40</sup>*In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986).

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

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

<sup>43</sup>EPSTEIN, *supra* n. 8, at 947-50.

<sup>44</sup>FED. R. EVID. 501.

<sup>45</sup>*See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Jaffee v. Redmond*, 518 U.S. 1, 6-7 (1996).

capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or the legal advisor, (8) unless the protection is waived.”<sup>46</sup> 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.”<sup>47</sup>

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<sup>46</sup>*Banner v. Hamilton*, 99 Fed.Appx. 29, 36 (6th Cir. 2004) (citing to *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 nearly identical standard).

<sup>47</sup>EPSTEIN, *supra* n. 8, at 65 (citing *Restatement, The Law Governing Lawyers* § 118 (Tentative Draft No.1, 1988)); *Wilson v. Foti*, 2004 WL 744874 at \* 2 (E.D. La. 2004) (citing EPSTEIN); *see also Upjohn Co.*, 449 U.S. at 395 (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); Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE 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*, 599 F.2d 1224 (3d Cir. 1979) 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 the member of the bar of 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 of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the propose of committing a crime or tort; and
- (4) the privilege has been
  - (a) claimed and
  - (b) not waived by the client.

*Id.* at 1233. 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. *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 618 (D. Kan. 2001) (citing *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370-71 (10th Cir.1997)).

There are a few notable exceptions to the privilege. Disclosure of communications to third parties can lead to a waiver of the privilege.<sup>48</sup> Also the communication must be for the purpose of securing *legal* advice as opposed to securing general business advice.<sup>49</sup> Where an in-house counsel also serves in a business role, the inquiry can be difficult, requiring a hard look into whether the communication was made for a business as opposed to a legal purpose. “Business communications 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.”<sup>50</sup> Thus, in cases where in-house counsel serve 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.<sup>51</sup>

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<sup>48</sup>Marks, *supra* n. 47, at 159.

<sup>49</sup>*Id.*

<sup>50</sup>Kramer v. Raymond Corp., 1992 WL 122856 at \* 1 (E.D. Pa. 1992). 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 privileged. See *Lipshy*, 492 F. Supp. at 42-43. 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 he was an authorized member of a body or group which had the authority, such that he, in effect, personified the corporation.” Marks, *supra*, n. 47, at 162. However, this approach was squarely rejected by the Supreme Court in 1981 in *Upjohn Company v. United States*. 449 U.S. 383, 391-92 (1981); *National 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 communications are made to the attorney to assist him in giving legal advice to the client corporation.” Marks, *supra* n. 47, at 163; *Painewebber Group, Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988, 991-92 (8th Cir. 1999); *United States v. El Paso Co.*, 682 F.2d 530, 538 n.8 (5th Cir. 1982) (citing *Upjohn*, 449 U.S. at 391-92).

<sup>51</sup>Kramer v. Raymond Corp., 1992 WL 122856 at \* 1 (E.D. Pa. 1992); *MSF Holding, Ltd. v. Fiduciary Trust Co. Int’l*, 2005 WL 3338510 at \*1 (S.D. N.Y. 2005); *Avianca, Inc. v. Corriea*, 705 F.Supp. 666, 676 (D.C. Cir. 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. 1999); *Rhone-*

## 2. Policy justifications for the attorney-client privilege

The attorney-client privilege has been said to be 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.<sup>52</sup> 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 facilitates compliance with the law.<sup>53</sup> Thus, the privilege exists to promote full disclosure by the client and to foster a relationship of trust between the attorney and the client.<sup>54</sup> 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.<sup>55</sup> At its heart, this justification is based upon an assumption that without the

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*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. See JOHN WILLIAM GERGACZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* § 4.03 (3d ed. 2001).

<sup>52</sup>JOHN WILLIAM GERGACZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* § 1.04 at 1-3 - 1-4 (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.'" CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, *FEDERAL PRACTICE & PROCEDURE, FEDERAL RULES OF EVIDENCE* § 5472 (2d ed. West 2005) (1977).

<sup>53</sup>Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978) ("The privilege is also considered necessary to the lawyer's function as confidential counselor in law or 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.").

<sup>54</sup>*Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985); *Palmer v. Farmers Ins. Exchange*, 861 P.2d 895, 904-05 (Mont. 1993).

<sup>55</sup>EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 5.1.1 at 257 (Aspen 2002).



privilege, clients will not disclose necessary facts to the attorney.<sup>56</sup> 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.<sup>57</sup>

Not surprisingly, because the attorney-client privilege is based upon an assumed benefit, it has been criticized as speculative and its benefits called into question.<sup>58</sup> This has caused some commentators to offer up alternative, “non-instrumental” justifications for the privilege, such as a humanistic privacy justification.<sup>59</sup> Imwinkelried distinguishes this justification from Wigmore’s noting that, “[u]nlike Wigmore’s theory, 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.”<sup>60</sup> This privacy concern mirrors a primary justification that is often cited to when explaining the work product doctrine – the benefits of having a “zone of privacy” within which an attorney can work. Nonetheless, this humanistic policy justification has not overtaken the instrumental justification

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<sup>56</sup>*Id.* at § 5.1.1 at 258; *Swindler & Berlin v. United States*, 524 U.S. 399, 408 (1998).

<sup>57</sup>IMWINKELRIED, *supra* n. 55, at §5.1.1, at 258. 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* n. 52, at § 5472; 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’.”); 8 J. WIGMORE, EVIDENCE, § 2294 (McNaughton rev.ed.1961).

<sup>58</sup>WRIGHT & GRAHAM, *supra* n. 52, at § 5472; IMWINKELRIED, *supra* n. 55, at §5.2.1, at 266-67.

<sup>59</sup>WRIGHT & GRAHAM, *supra* n. 52, at § 5472; IMWINKELRIED, *supra* n. 55, at §5.1.2.

<sup>60</sup>IMWINKELRIED, *supra* n. 55, at §5.1.2, at 259.

and the Supreme Court has continued to cite approvingly to the instrumental justification in recognizing new privileges.<sup>61</sup>

### 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 than and narrower than the attorney-client privilege.<sup>62</sup> It is broader in that it extends to materials beyond just communications.<sup>63</sup> However, it is narrower in that it only extends to materials created “in anticipation of litigation.”<sup>64</sup> In some

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<sup>61</sup>*Id.* at § 5.1.1, at 258; *Jafee v. Redmond*, 518 U.S. 1, 11-12 (1996); *United States v. Zolin*, 491 U.S. 554, 562-63 (1989).

<sup>62</sup>*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 *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 304 (6th Cir. 2002) and *In re Martin Marietta Corp.*, 856 F.2d 619, 624 (4th Cir. 1988) with *In re OM Sec. Litig.*, 226 F.R.D. 579, 587 (N.D. Ohio 2005) (noting, inversely, that the attorney-client privilege is broader 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.”); Kevin Mark Smith, *Preventing Discovery of Internal Investigation Materials: Protecting Oneself From One’s Own Petard*, 69 J. KAN. B. ASSOC. 28, 35 (2000) (“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.”); 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.”).

<sup>63</sup>*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.’”).

<sup>64</sup>Gabriel L. Imperato, *Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Health Care*

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 attorneys' 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, and possibly even research trails created by the attorney could all be subject to discovery. Though 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, though 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."<sup>65</sup>

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

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*Organization*, 51 ALA. L. REV. 205, 216 (1999) ("The key to this protection is that the work must be performed in anticipation of litigation.").

<sup>65</sup>CHARLES ALAN WRIGHT, ET AL, FEDERAL PRACTICE & PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE §2026 (2009) ("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 of other objectives, such as negotiation of a transaction, are not protected."); 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); Ettie Ward, *The Litigator's Dilemma: Waiver of Core Work Product Used in Trial Preparation*, 62 ST. JOHN'S L. REV. 515, 516-17 (1988); Anderson et al., *supra* n. 7, at 820; Robert D. Stokes, *Discovering Investigative Reports Under the Work Product Doctrine*, 34 BAYLOR L. REV. 156, 159-60 (1982).

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.<sup>66</sup>

The case of *Hercules Inc. v. Exxon Corp.*<sup>67</sup> illustrates the difficulty of protecting attorney work product in a patent prosecution context. In *Hercules*, Hercules sued Exxon for infringement of a patent that disclosed a type of artificial rubber.<sup>68</sup> During discovery, Hercules refused to produce 255 requested documents claiming that the documents were protected by either the attorney-client privilege or work product doctrine.<sup>69</sup> The district court began its inquiry by classifying the documents into categories such as “Documents relating to the prosecution of the application for the patent in suit,” or documents relating to a particular interference suit.<sup>70</sup> The court then analyzed the documents under

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<sup>66</sup>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. Naegele*, 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.”); *In re Keeper of the Records*, 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.”); *Santrade, Ltd. v. G.E. Co.*, 150 F.R.D. 539, 542 (E.D. N.Car. 1993) (noting same); *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 713 F.2d 1032, 1037 (2d Cir. 1984) (“[The attorney-client] privilege does not impede disclosure of information except to the extent that the disclosure would reveal confidential communications.”).

<sup>67</sup>434 F. Supp. 136 (D. Del. 1977).

<sup>68</sup>*Id.* at 141-42.

<sup>69</sup>*Id.* at 142.

<sup>70</sup>*Id.*

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.<sup>71</sup> The court then turned to the work product doctrine, analyzing the documents in light of the “anticipation of litigation” requirement.<sup>72</sup> Though 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.<sup>73</sup>

The scope of that privilege is still limited, however, by the requirement that the document be prepared “with an eye toward 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.<sup>74</sup>

Thus, the court held that a number of the documents, including drafts with attorneys’ handwritten notes, were subject to discovery.<sup>75</sup>

*Hercules* demonstrates how documents, even ones that record the mental impressions of attorneys acting in their legal capacity, will fail to garner protection under the work product doctrine if litigation is not anticipated. However, transactional

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<sup>71</sup>*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 “[o]n the basis of the foregoing, the following documents are not protected by the attorney-client privilege: . . .” *Id.* at 147-48.

<sup>72</sup>*Id.* at 150-51.

<sup>73</sup>*Id.* at 151-52.

<sup>74</sup>*Id.*

<sup>75</sup>*Id.* at 152.

attorneys are not the only ones who face 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.<sup>76</sup> Indeed, even when a problem has arisen, documents may not be said to be prepared in anticipation of litigation if the prospect is still deemed remote.

For instance, in the case of *In re Grand Jury Subpoena*,<sup>77</sup> a case which 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”).<sup>78</sup> The device at issue had initially been approved by the Food and Drug Administration (“FDA”) in 1998 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.<sup>79</sup> After a series of calls involving the corporation’s officers, attorney and the FDA, among others, the corporation decided to withdraw production of the

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<sup>76</sup>*In re Grand Jury Subpoena*, 220 F.R.D. 130, 158-59 (D. Mass. 2004); *Guzzino v. Felerman*, 174 F.R.D. 59, 63 (W.D. La. 1997); Epstein, *supra* n. 8, at 831 (citing *Guzzino*). See also *In re Bank One Securities Litig.*, 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 The Leslie Fay Cos. Securities 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 . . .”) (emphasis in original).

<sup>77</sup>220 F.R.D. 130 (D. Mass. 2004).

<sup>78</sup>*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, n.1.

<sup>79</sup>*Id.* at 134.

device.<sup>80</sup> The grand jury sought to compel the corporation's attorney to produce the notes he took during these calls with the FDA.<sup>81</sup> The corporation and attorney resisted and sought a protective order claiming the notes were protected under the work product doctrine.<sup>82</sup>

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.<sup>83</sup> 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 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."<sup>84</sup>

But despite the fact that the notes were clearly taken by the attorney 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

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<sup>80</sup>*Id.* at 136-40.

<sup>81</sup>*Id.* at 133.

<sup>82</sup>*Id.*

<sup>83</sup>*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.

<sup>84</sup>*Id.* at 155-56 (quoting *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000)).

had not actually begun an investigation and the prospect of private litigation was not likely at the time the documents were created.<sup>85</sup>

What is striking about both *Hercules* and *In re Grand Jury Subpoena* is that in each case, 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 doctrine on an assumption that work product, even core work product, can only be protected if it was generated “in anticipation of litigation.”<sup>86</sup> 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 core work product.

### III. 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. 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.

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<sup>85</sup>*Id.* at 157-62 (stating that “the possibility of litigation must be more than inchoate”).

<sup>86</sup>*Id.* at 155-62; *Hercules, Inc. v. Exxon Corp.* 434 F. Supp. 136, 151-52 (D.C. Del 1977). *See also Diversified Indus.*, 572 F.2d 596, 603-04 (“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 was obvious that the 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 the years past might ultimately result in litigation of some sort in the future.”).



## A. The first Rules of Federal Civil Procedure and their purpose

The first Rules of Civil Procedure were adopted in 1938.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> This speech apparently helped initiate efforts which led to the adoption of the Rules Enabling Act of 1934.<sup>91</sup>

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,

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<sup>87</sup>Martin v. Bally’s Park Place Hotel & Casino, 983 F.2d 1252, 1265 (3d Cir. 1993); Furman v. Cirrito, 782 F.2d 353, 355 (2d Cir. 1986); Henley v. F.M.C. Corp., 189 F.R.D. 340, n. 8 (S.D. W.Va. 1999); Naragon v. Dayton Power & Light Co., 934 F. Supp. 899, 903 (S.D. Ohio 1996); Montalvo v. Hutchinson, 837 F. Supp. 576, 577 (S.D. N.Y. 1993); *In re Watford*, 192 B.R. 276, 279 (Bank. M.D. Ga. 1996).

<sup>88</sup>Marcus, *supra* n. 11, at 326-27; Hickman v. Taylor, 329 U.S. 495, 500-501 (1947) (noting the cumbersome methods of obtaining discovery prior to the Federal Rules).

<sup>89</sup>Marcus, *supra* n. 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) (noting that “before the new rules, federal discovery was virtually nonexistent . . .”).

<sup>90</sup>Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 404-05 (1906); Marcus, *supra* n. 11, at 326 (quoting Pound); 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).

<sup>91</sup>Marcus, *supra* n. 11, at 328 (quoting John H. Wigmore, *Roscoe Pound’s St. Paul Address of 1906*, 20 *Judicature* 176, 176 (1938)).

it appears there were a number of courts that were wary of them.<sup>92</sup> With regard to discovery, the rules formally provided for when depositions could be taken and their scope,<sup>93</sup> interrogatories to be served<sup>94</sup> and for the production of documents and things.<sup>95</sup>

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<sup>92</sup>Symposium, *Discovery Procedure* 5 F.R.D. 403, 418-19 (“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.”) (1946); Marcus, *supra* n. 11, at 329 (quoting *Hickman v. Taylor*, 153 F.2d 212, 217 n.6 (1945)).

<sup>93</sup>FED. R. CIV. P. 26(a) (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.*

<sup>94</sup>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

Though these rules made exceptions for privileged materials,<sup>96</sup> meaning documents revealing attorney-client communications would remain protected under the attorney-client privilege, the rules made no exception for documents prepared in the course of preparing for litigation. In the absence of a rule on point, courts

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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.*

<sup>95</sup>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, 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.*

<sup>96</sup>See FED. R. CIV. P. 26(b) (“...the 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 (“the 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).

soon began to adopt a variety of approaches on how to deal with such materials.

Though 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.<sup>97</sup> 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 produced by an attorney or by a third party employed by the party claiming protection.<sup>98</sup> The Advisory Committee noted that a number of cases, however, had protected such materials from discovery, though the reasons were hardly uniform.<sup>99</sup> As the Committee noted,

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

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<sup>97</sup>Marcus, *supra* n. 11, at 329; Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 5 F.R.D. 339, 354-55 (1946).

<sup>98</sup>*Bowles v. Ackerman*, 4 F.R.D. 260 (S.D.N.Y. 1945); *Blank v. Great Northern Ry. Co.*, 4 F.R.D. 213 (D.Minn. 1943); *In re Matter of The Examination of Citizens Casualty Co. of New York*, 3 F.R.D. 171 (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 (S.D.N.Y. 1941); *Matthies v. Peter F. Connolly Co.*, 2 F.R.D. 277 (E.D.N.Y. 1941); *Colpak v. Hetterick*, 40 F.Supp. 350 (E.D.N.Y. 1941); *Kane v. News Syndicate Co., Inc.*, 1 F.R.D. 738 (S.D.N.Y. 1941); *Price v. Levitt*, 29 F.Supp. 164 (E.D.N.Y. 1939); *Bough v. Lee*, 29 F.Supp. 498 (S.D.N.Y. 1939); *Kulich v. Murray*, 28 F.Supp. 675 (S.D.N.Y. 1939); *Bough v. Lee*, 28 F.Supp. 673 (S.D.N.Y. 1939). *See also* Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 457 (1946) (listing above cases as supporting discovery of work product materials); *Hickman v. Taylor*, 153 F.2d 212, n.8 (3d Cir. 1946) (summarizing cases where discovery was permitted).

<sup>99</sup>Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 457-59 (1946).

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.<sup>100</sup>

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 killing five of the seamen on board including Norman Hickman.<sup>101</sup> 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*.<sup>102</sup> On March 4, 1943, a steamboat inspector's hearing was held where the four surviving members of the crew testified and immediately after the hearing, Fortenbaugh interviewed these witnesses himself and obtained written statements from them.<sup>103</sup> Fortenbaugh also interviewed other relevant witnesses “and in

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<sup>100</sup> *Id.* at 458-59 (internal citations omitted).

<sup>101</sup> *Hickman*, 4 F.R.D. at 480-81; Marcus, *supra* n. 11, at 332-33

<sup>102</sup> *Hickman*, 4 F.R.D. at 481; Marcus, *supra* n. 11, at 333.

<sup>103</sup> *Id.*

some cases made memoranda of what they told him.”<sup>104</sup>

Thereafter, settlements were reached with representatives of three of the five dead seamen.<sup>105</sup>

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.<sup>106</sup> Pursuant to Rule 33, the plaintiff requested that Taylor & Anderson produce copies of any statements made by members of the crew taken after the accident.<sup>107</sup> Taylor & Anderson refused claiming that the interrogatory called for ““privileged matter obtained in preparation of litigation.””<sup>108</sup> The district court subsequently held a hearing where Fortenbaugh testified by deposition on how and why the statements were made.<sup>109</sup>

In defending its refusal to produce the statements, the defendants cited to *Stark v. American Dredging Co.*,<sup>110</sup> where the district court denied production of statements of witnesses made in preparation for trial.<sup>111</sup> Judge Kirkpatrick, sitting with an en banc panel of the entire Eastern District, refused to recognize a broad

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<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

<sup>106</sup>*Id.* at 480; Marcus, *supra* n. 11, at 334. Curiously, the district court referred to Hickman as the plaintiff’s wife, which Richard Marcus points out is incorrect. Marcus, *supra* n. 11, at 334, n.43. As Marcus also points out, suit was also filed against Baltimore & Ohio Railroad (“B&O”). *Id.* at 332. B&O were the owners of a sunken car float which the *J.M. Taylor* had been hired to tow across the Delaware River the night of the accident. *Id.*

<sup>107</sup>*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 #38).

<sup>108</sup>*Id.*

<sup>109</sup>*Id.*

<sup>110</sup>3 F.R.D. 300, 302 (E.D. Pa. 1943).

<sup>111</sup>*Hickman*, 4 F.R.D. at 481-82.

sweeping protection from discovery of all things produced in anticipation of litigation.<sup>112</sup> In doing so the court first noted the liberal scope of discovery under the Rules, stating “[t]he 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.”<sup>113</sup> The court then went on to distinguish the *Stark* decision as simply recognizing that the Rules granted the court discretion to limit production but then disapproved *Stark* in that it placed a burden on the party seeking production to show “good cause.”<sup>114</sup> The court then reformulated the rule as “[u]nless, under the circumstances of any particular case, the Court is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked.”<sup>115</sup>

Turning to the statements at issue, the court first noted that any firm would conduct an investigation to determine its own ship’s seaworthiness and whether its employees were responsible.<sup>116</sup> Though 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 nonetheless 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.<sup>117</sup> Without the protection of this privilege, the court found that the

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<sup>112</sup>*Id.* at 481-82 (“We do not regard that [*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.”).

<sup>113</sup>*Id.* at 481.

<sup>114</sup>*Id.* at 482.

<sup>115</sup>*Id.* (internal quotations omitted).

<sup>116</sup>*Id.*

<sup>117</sup>*Id.* The court gives little explanation on this point but it is worth noting that 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*. Under the *Upjohn* formulation of the rule, it is very possible that the statements made to Fortenbaugh would be privileged. See part II.B.1., n.46, *supra*.

statements should be produced under the broad scope of discovery under the Rules.<sup>118</sup> Interestingly, the court did place 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 the produced materials and only produce those portions "containing facts obtained from witnesses which it considers to be within the proper scope of discovery."<sup>119</sup> The court thus ordered production of the witness statements to the court for such a determination to be made.<sup>120</sup> Taylor & Anderson and Fortenbaugh refused to produce the statements and were found in contempt of court by the assigned judge.<sup>121</sup>

The district court's ruling was appealed to the Third Circuit and was heard en banc.<sup>122</sup> 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.<sup>123</sup> 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 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.<sup>124</sup>

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<sup>118</sup>*Hickman*, 4 F.R.D. at 482.

<sup>119</sup>*Id.* at 483.

<sup>120</sup>*Id.*

<sup>121</sup>Marcus, *supra* n. 11, at 336; *Hickman*, 153 F.2d at 214. 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. Marcus, *supra* n. 11, at 336; *Hickman*, 153 F.2d at 214.

<sup>122</sup>*Hickman*, 153 F.2d at 214.

<sup>123</sup>*Id.* at 216-17.

<sup>124</sup>*Id.* (internal footnotes omitted).



But despite the broad purpose of the 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.<sup>125</sup> 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.<sup>126</sup> Though such a situation was frowned upon by the Canons of Ethics, the appellate court noted that the Rules' "privilege" exceptions (which prevented the discovery of privileged material) did not cover the statements at hand as the statements were made by third parties and not by clients.<sup>127</sup> 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.<sup>128</sup> 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 which the court termed "work product of the lawyer," were covered by the exception to privileged material under the Rules.<sup>129</sup> The Third Circuit justified this extension of the term "privileged" on public policy grounds, stating,

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.<sup>130</sup>

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<sup>125</sup>*Id.* at 219-220.

<sup>126</sup>*Id.*

<sup>127</sup>*Id.* at 220 and 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* n. 117.

<sup>128</sup>*Id.* at 220. The appellate court, in a lengthy footnote, summarized the varying decisions and their reasoning. *Id.* at n.13.

<sup>129</sup>*Id.* at 223.

<sup>130</sup>*Id.* (internal footnotes omitted) (citing Wigmore (3d ed.) § 2291 (advocating that the policy of the attorney client privilege necessarily involves full disclosure; "[i]n order to promote freedom of consultation of legal advisors by

### 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 a resolution via rule-making to the “work product” problem.<sup>131</sup> 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.<sup>132</sup> 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.”<sup>133</sup> The burden, however, of seeking the protective order was on the adverse party that was resisting the discovery request.<sup>134</sup> 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.<sup>135</sup> 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 that such materials were not privileged, but that the district courts would retain

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clients, the apprehension of compelled disclosure by the legal advisors must be removed; and hence the law must prohibit such disclosure except on the client’s consent.”)).

<sup>131</sup> Anderson et al., *supra* n. 7, at 771-72.

<sup>132</sup> Marcus, *supra* n. 11, at 330.

<sup>133</sup> 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); Marcus, *supra* n.11, at 330; Anderson, *supra* n.6, at 772.

<sup>134</sup> 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); Marcus, *supra* n.11, at 330.

<sup>135</sup> 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 38-40 (1945); Marcus, *supra* n.11, at 331; Anderson, *supra* n.7, at 772.

discretion to deny discovery into such materials via the protective order.<sup>136</sup> 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 recognized by the Committee without resolution at that time.<sup>137</sup>

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.<sup>138</sup> The new proposal amending 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 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

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<sup>136</sup>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 38-40 (1945); Marcus, *supra* n.11, at 331; Anderson, *supra* n.7, at 772.

<sup>137</sup>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 39-40 (1945); Anderson, *supra* n.7, at 772.

<sup>138</sup>Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 5 F.R.D. 339, 356 (1946) (“There is no Amendment about which there is a greater or stronger division of opinion among members of the Bar.”).

theories, or, except as provided in Rule 35, the conclusions of an expert.<sup>139</sup>

This amendment was put forth without the opportunity for comment from the bar,<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> 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.”<sup>143</sup> 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,<sup>144</sup> as well as the

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<sup>139</sup>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); Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 5 F.R.D. 339, 356 (1946).

<sup>140</sup>Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 5 F.R.D. 339, 340 and 356 (1946).

<sup>141</sup>*See, e.g.*, Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 5 F.R.D. 339, 356 (1946) (“[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.”).

<sup>142</sup>Symposium, *Discovery Procedure*, 5 F.R.D. 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.

<sup>143</sup>*Id.* at 407.

<sup>144</sup>*See* Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 458-59 (1946) (noting that a number of cases had denied discovery “because no reason or cause therefor was

*Hickman* decisions themselves.<sup>145</sup> The language in the amendment may also have been influenced by English law which did not permit the discovery of trial preparation materials.<sup>146</sup> Regardless of how it struck the balance in its proposal, the Committee had come to what it felt was a fair compromise and the decision was now left to the Supreme Court whether to either adopt the rule or deal with the problem through judicial decision-making via the *Hickman* case, which was on appeal before the Supreme Court.<sup>147</sup> The Court apparently chose the latter.<sup>148</sup> The Supreme Court granted certiorari based upon the divergence of views in the district courts on how to deal with trial preparation

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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).

<sup>145</sup>*Id.* at 459-60 (discussing *Hickman*). In fact, the Committee expressed its doubts as to the result in 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."); Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 5 F.R.D. 339, 356 (1946).

<sup>146</sup>Symposium, *Discovery Procedure*, 5 F.R.D. at 414-418 (1946) (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 that the "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 \*\*\*\*'" but criticized the qualification permitting the judge the discretion to allow discovery. *Id.* at 418.

<sup>147</sup>Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 459-60 (1946); Marcus, *supra* n.11, at 331.

<sup>148</sup>Marcus, *supra* n. 11, at 338; Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 499 (1969) ("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.").

materials and noted the Advisory Committee’s Report on the problem.<sup>149</sup> After initially dealing with the procedural irregularity of how the case came before it,<sup>150</sup> 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.<sup>151</sup> The Court noted, however, that discovery was not without limits, and that privileged materials would not be subject to discovery.<sup>152</sup> But, the Court found that the materials at issue before them, the witness statements and Fortenbaugh’s recollections of those interviews, were not protected by the attorney-client privilege and that the word “privilege,” as used in the Rules, did not extend to material produced in anticipation of litigation.<sup>153</sup> 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

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<sup>149</sup>*Hickman*, 329 U.S. at 500 and n.1.

<sup>150</sup>There was some question as to whether the case was even properly before the Court as the plaintiff had not properly attempted to depose Fortenbough 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.* at 504-05.

<sup>151</sup>*Id.* at 507 (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

<sup>152</sup>*Id.* at 508.

<sup>153</sup>*Id.*

mental impressions, conclusions, opinions or legal theories.<sup>154</sup>

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

Though the materials were not privileged, the Supreme Court still found in favor of Taylor (and Fortenbaugh)<sup>155</sup> based on its concern over the plaintiff’s attempts to delve into the files of the opposing attorney without any showing of necessity.<sup>156</sup> The Court noted 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.<sup>157</sup> 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.”<sup>158</sup> 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.<sup>159</sup> The Court did not stop there, however, and went on to make a distinction between what it termed “non-

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<sup>154</sup>*Id.*

<sup>155</sup>*Id.* at 514.

<sup>156</sup>*Id.* at 508-09.

<sup>157</sup>*Id.*

<sup>158</sup>*Id.* at 513.

<sup>159</sup>*Id.* at 509, 511-512;

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.

*Id.* at 509. 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) (same). 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.

privileged facts” and production of “oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda,” which would, in today’s parlance, most likely be deemed “core” work product.<sup>160</sup> As to the latter materials, the Court expressed its doubt as to whether any showing of necessity could be made to justify production but stopped short of giving such materials an unqualified immunity.<sup>161</sup>

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 expressing concern over, would be termed “core” work product in modern parlance. It also bears pointing out that though the materials at issue in *Hickman* were prepared in anticipation of litigation, the Court nowhere made this a set requirement for the protection afforded. Indeed, the Court, if it so chose, could have easily recognized this requirement as it was before the Court as a proposed amendment to the Rules, and yet chose instead to address the issue through the *Hickman* decision which made no such qualification.<sup>162</sup> 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 “client’s interests” and “the giving of legal advice” as well as speaking in terms of preparing the client’s case.<sup>163</sup>

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

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<sup>160</sup>*Id.* at 511-12.

<sup>161</sup>*Id.* at 512.

<sup>162</sup>The Court did note that the English courts had developed a privilege covering “documents prepared by or for counsel with a view to litigation.” *Id.* at 510, n.9. However, though the Court noted this qualification in the English courts, the Supreme Court did not make such a qualification in its own opinion.

<sup>163</sup>*Id.* at 510-11.



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.<sup>164</sup>

This justification is based on a balancing of the merits of having a well-functioning adversarial system with open discovery. This “adversarial” justification is apparent also in the Court’s concern over plaintiff’s counsel’s admission that he only wanted to obtain the materials in question to make sure he hadn’t missed something; in other words, so he could reap the benefits of Fortenbaugh’s insight and ability as a lawyer.<sup>165</sup> This aligns with the concerns articulated by the Advisory Committee about achieving a proper balance between the two opposing views (complete exclusion versus complete discovery) of how such materials should be treated,<sup>166</sup> 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.<sup>167</sup>

A second justification, that is often overlooked, however, is a concern over the effect on the legal profession itself and upon

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<sup>164</sup>*Id.*

<sup>165</sup>*Id.* at 513.

<sup>166</sup>Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 5 F.R.D. 339, 356 (1946).

<sup>167</sup>Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 458, 460 (1946). The Advisory Committee, in formulating its proposed amendment, rejected these as tests for whether production should be denied. *Id.* at 460.

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.<sup>168</sup>

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.<sup>169</sup>

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 points out a further instrumental concern that production of such material could have the undesirable effect of forcing attorneys to take the witness stand in the case in which they are an advocate;<sup>170</sup> a concern that also is mirrored in the policies underlying the attorney-client privilege.

#### IV. Post *Hickman* Development of the Work Product Doctrine

##### A. The road to rule 26(b)(3) and the anticipation misconception

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<sup>168</sup>*Hickman*, 329 U.S. at 511.

<sup>169</sup>See *Upjohn*, 449 U.S. at 389; *Commodity Futures Trading Commission 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*); Marks, *supra* n. 47, at 157.

<sup>170</sup>*Hickman v. Taylor*, 329 U.S. 495, 517 (1947) (Jackson, J., concurring).

Though 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*,<sup>171</sup> a 1951 District of New York opinion appears to be one of the earliest articulations of this requirement. In *Rediker*, the plaintiff, an attorney, brought suit against Warfield and Scott, who were also attorneys, and also 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.<sup>172</sup> The plaintiff issued interrogatories regarding communications Warfield and Scott, as legal counsel for Ulen, had with International Bank.<sup>173</sup> Warfield and Scott resisted, in part, on the basis that the interrogatories would delve into material protected under the work-product doctrine.<sup>174</sup> The court, citing to little more than the *Hickman* decision, denied affording work product protection, noting that the communications at issue “were not in the course of preparation for trial [nor] does it appear that they were in anticipation of prospective litigation.”<sup>175</sup> The court went on to distinguish the case before it from *Hickman* on the basis that in *Rediker*, the attorneys were also the defendants.<sup>176</sup> 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 its 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*

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<sup>171</sup>11 F.R.D. 125 (S.D.N.Y. 1951).

<sup>172</sup>*Id.* at 126-27.

<sup>173</sup>*Id.* at 127-28.

<sup>174</sup>*Id.*

<sup>175</sup>*Id.* at 128.

<sup>176</sup>*Id.*

*anticipation of litigation.*”<sup>177</sup> 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 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.<sup>178</sup>

This reasoning, however, is flawed. At best the justification 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.<sup>179</sup> Indeed, the reasoning seems to ignore the Supreme Courts 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.”<sup>180</sup>

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<sup>177</sup>*Developments in the Law – Discovery*, 74 Harv. L. Rev. 940, 1030 (1960-61) [hereinafter “Developments Note”] (emphasis added) (citing to the *Rediker* opinion as its only support for the statement).

<sup>178</sup>*Id.*

<sup>179</sup>Anderson, *supra* n. 7, at 788, n.175.

<sup>180</sup>*Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

The reasoning could also 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 tasks assigned by the client, 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.<sup>181</sup>

Despite the fact that the Developments Note cites to no case to support its reasoning, it was cited the very next year in *Colton v. United States*<sup>182</sup> by the Second Circuit which, based on the note and the *Rediker* opinion, held that for work product protection to apply, the materials must be produced in anticipation of litigation.<sup>183</sup> In *Colton*, Edward Colton was an attorney engaged by Herbert and Mercedes Matters to assist them with their taxes. The Matters were subsequently investigated by the Internal Revenue Service (“IRS”) and Colton was issued a summons by the IRS to testify and to 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

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<sup>181</sup>Kirst, *supra* n.66, at 274.

<sup>182</sup>306 F.2d 633 (2d Cir. 1962).

<sup>183</sup>*Id.* at 640.

Returns for or on the behalf of [the Matters].”<sup>184</sup> 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.<sup>185</sup> Eventually, Colton agreed to answer some questions but still refused to answer others or hand over materials based upon the privilege.<sup>186</sup> 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.<sup>187</sup> The court then turned to the documents which 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.”<sup>188</sup>

Though 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 did recognize that “anticipation of litigation” was not a formal requirement under *Hickman*. In *Natta v. Hogan*,<sup>189</sup> a number of parties, including Phillips Petroleum Company, challenged the priority date of a patent held by Montecatini.<sup>190</sup> Montecatini sought to discover documents which Phillips claimed were protected under the attorney-client privilege and work product doctrine.<sup>191</sup> The trial court denied protection under the work product doctrine as the documents were not prepared for

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<sup>184</sup>*Id.* at 634.

<sup>185</sup>*Id.* at 635.

<sup>186</sup>*Id.* at 636.

<sup>187</sup>*Id.* at 637-38.

<sup>188</sup>*Id.* at 640.

<sup>189</sup>392 F.2d 686 (10th Cir. 1968).

<sup>190</sup>*Id.* at 688.

<sup>191</sup>*Id.* at 691, 693.

possible litigation.<sup>192</sup> The Tenth Circuit rejected the trial court’s premise that litigation was an essential element of work product protection stating,

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.<sup>193</sup>

The court went on to hold that though 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, finding that “such materials prepared by an attorney during his consideration of a legal problem are within the work product doctrine.”<sup>194</sup>

Though 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.”<sup>195</sup> In other words, *Natta* may have done nothing more but 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

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<sup>192</sup>*Id.* at 693.

<sup>193</sup>*Id.*

<sup>194</sup>*Id.* at 693-94 (citing *Hickman*). 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.

<sup>195</sup>*Id.* at 693.

of a patent.<sup>196</sup> If the *Natta* decision did create a circuit split, it seems to have gone unnoticed and the origin of the “anticipation of litigation” standard has not been questioned by the courts.

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 but rather over whose work product was protected and the scope of Rule 34, which subjected discovery to a “good cause” requirement<sup>197</sup> and how this applied, if at all, to the work product doctrine.<sup>198</sup> Though the Advisory Committee had made some

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<sup>196</sup>*Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 151-52 (D.C. Del. 1977 (citing *In re Natta*, 48 F.R.D. 319, 321 (D. Del. 1969)).

<sup>197</sup>Rule 34 read, in relevant part:

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 . . .

FED. R. CIV. P. 34 (1968) (amended 1970).

<sup>198</sup>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 stating,

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.

Advisory Committee’s Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 499-500 (1969).



failed efforts in the 1950s to address the issues raised by *Hickman*,<sup>199</sup> it was not until 1967 that the amendments that led to the current rule began to develop. 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.<sup>200</sup> 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.<sup>201</sup> 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 obtained without such a showing.<sup>202</sup>

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.<sup>203</sup> 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.<sup>204</sup> As one critic of the rule recognized,

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<sup>199</sup> Anderson, *supra* n. 7, at 782-83 (noting that the amendments were rejected).

<sup>200</sup> Preliminary Draft of Proposed Amendments to Rules of Civil Procedure Relating to Deposition and Discovery (Nov. 1967), 43 F.R.D. 211, 225 (1968).

<sup>201</sup> *Id.*

<sup>202</sup> *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 part III.C., *supra*.

<sup>203</sup> *Hickman*, 329 U.S. at 509, 511-12; Address by Fred A. Freund, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 479, 494 (1968).

<sup>204</sup> *Hickman*, 329 U.S. at 511-12.

“[t]he source of error . . . is in formulating flexible language to cover *all* such materials, rather than dealing directly and specifically with what experience has taught – that certain materials deserve more protection than others.”<sup>205</sup>

In response to criticisms that the “good cause” standard would create confusion based on the various meanings the term had been given by courts, the Advisory Committee altered the standard in Rule 26(b) to reflect the trend in case law to require “more than mere relevance.”<sup>206</sup> 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 his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”<sup>207</sup> The Committee also added language to protect the “mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party.” In doing so, the Committee cited again to *Hickman*, however, the Committee failed to clarify the extent of such protection.<sup>208</sup> The final language also failed to provide guidance as to the meaning of the term “anticipation of litigation.”<sup>209</sup> This

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<sup>205</sup> Address by Fred A. Freund, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 494 (1968) (emphasis in original).

<sup>206</sup> Advisory Committee’s Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 500; Minutes of the July 17-19, 1969 Meeting of the Standing Committee on Rules of Practice and Procedure p. 3, available at <http://www.uscourts.gov/rules/minutes.htm>.

<sup>207</sup> Advisory Committee’s Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 494, 501 (1969).

<sup>208</sup> 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. Minutes of the July 17-19, 1969 Meeting of the Standing Committee on Rules of Practice and Procedure p. 3, available at <http://www.uscourts.gov/rules/minutes.htm>.

<sup>209</sup> See *FTC v. Grolier, Inc.*, 462 U.S. 19, 25 (1983) (noting that “Rule 26(b)(3) does not address in so many words the temporal scope of the work product immunity and a review of the Advisory Committee’s comments reveals no express concern for that issue.”).

term, as previously discussed, has led to splits among district and appellate courts as to its meaning.<sup>210</sup> 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.<sup>211</sup>

## 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 passage of amended Rule 26 other than fleeting mentions of the Rule. There are, however, at least three post-amendment opinions that merit discussion: *United States v. Nobles*,<sup>212</sup> *FTC v. Grolier, Inc.*,<sup>213</sup> and *Upjohn Co. v. United States*.<sup>214</sup> The first two add some insight into the Court’s

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<sup>210</sup>See part II.A.1., *supra*.

<sup>211</sup>See, e.g., Advisory Committee’s Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 499-500 (noting the major difficulties with existing law but omitting any mention of “core” work product); Minutes of the May 20-21, 1966 Meeting of the Advisory Committee on Civil pp. 30-31, available at <http://www.uscourts.gov/rules/minutes.htm>. 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.* (emphasis added). See also Minutes of the July 17-19, 1969 Meeting of the Standing Committee on Rules of Practice and Procedure p. 3, available at <http://www.uscourts.gov/rules/minutes.htm>; Minutes of the March 9-10, 1967 Meeting of the Advisory Committee on Civil pp. 6-7, 11-12, available at <http://www.uscourts.gov/rules/minutes.htm>.

<sup>212</sup>422 U.S. 225 (1975).

<sup>213</sup>462 U.S. 19 (1983).

<sup>214</sup>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* n.66, at 268-73.

view of the doctrine, however it is the *Upjohn* decision that is the most instructive, both in the language used by the Court and also by 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.<sup>215</sup> The statements were written down by the investigator and made part of a written report.<sup>216</sup> The prosecution sought to inspect the report and the court denied the request.<sup>217</sup> However, the court told defense counsel that if the investigator were called to the stand to testify by the defense, the court would order production of those portions of the report relevant to the impeachment.<sup>218</sup> Defense counsel later did seek to call the investigator for purposes of impeachment but refused to share the report and so the court ruled that the investigator could not testify.<sup>219</sup> The Ninth Circuit reversed finding that compelling discovery of the report violated both the Fifth Amendment as well as Federal Rule of Criminal Procedure 16 (the criminal analog to the Federal Rule 26(b)).<sup>220</sup> The Supreme Court reversed finding that neither the Fifth Amendment nor Rule 16 were implicated.<sup>221</sup> The Court considered implication of the work product doctrine under *Hickman* separately from Rule 16 and held that the defendant had waived its protection when he sought to introduce the testimony of the investigator.<sup>222</sup>

The Court’s discussion of the work product doctrine, at first glance, appears rather unremarkable as far as its impact on civil litigation. However, there are at least two interesting 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

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<sup>215</sup>United States v. Nobles, 422 U.S. 222, 227 (1975).

<sup>216</sup>*Id.* at 227-28.

<sup>217</sup>*Id.* at 228-29.

<sup>218</sup>*Id.* at 229 and n.3.

<sup>219</sup>*Id.* at 229.

<sup>220</sup>*Id.* at 229-30.

<sup>221</sup>*Id.* at 234-35.

<sup>222</sup>*Id.* at 239-40.

*Hickman* has continued validity apart from the rules.<sup>223</sup> 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.’”<sup>224</sup> Some courts have taken this as an endorsement that the work product doctrine *only* applies to materials produced in “anticipation of litigation.”<sup>225</sup> The Court’s statement makes no such limitation, however, and could be read as nothing more than a description of the context in which *Hickman* was decided.<sup>226</sup>

The *Grolier* case involved a request by Grolier Inc. under the Freedom of Information Act (“FOIA”) for documents generated by the Government during an investigation of a subsidiary of Grolier which was subsequently dismissed.<sup>227</sup> The Commission for disclosure of documents denied the request claiming they were exempt under Exemption 5 of FOIA, which

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<sup>223</sup>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 limiting a trial court’s discretion on evidentiary matter under *Hickman*. *Id.* at 243 (White, J., concurring).

<sup>224</sup>*Id.* at 237-38 (quoting *Hickman*). After making this statement, the Court makes a string cite to, among other things, the Harvard student note discussed in part IV.A., *supra*. *Id.* at 238.

<sup>225</sup>*See, e.g., In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 61 (7th Cir. 1980) (failing to dispel the Government’s assertion that *Nobles* requires a document be prepared in anticipation of litigation for work product protection); *Matter of Fischel*, 557 F.2d 209, 212-13 (9th Cir. 1977) (holding, on the work product issue, that “[t]he limited work product immunity extends only to certain materials prepared by an attorney in anticipation of litigation” and citing generally to *Nobles*); *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 to documents prepared in ‘anticipation of litigation,’” citing *Nobles*, 422 U.S. at 238). *See also* Kirst, *supra* n. 66, at 272 and n.213. As Professor Kirst correctly notes, these cases add the word “only” which is not found in the *Nobles* statement. *Id.* at 272.

<sup>226</sup>*See* Kirst, *supra* n. 66, 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).

<sup>227</sup>*F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 21(1983).

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 . . . .”<sup>228</sup> The district court agreed that all of the documents were protected under Exemption 5, some of which due to the work product doctrine.<sup>229</sup> 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.<sup>230</sup> 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 other subsequent disputes, even if unrelated to the original litigation.<sup>231</sup> The Court noted the lack of any clear guidance on the issue of a temporal scope for the work product rule, but did express 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.”<sup>232</sup> 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.<sup>233</sup> 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 to be issued since the adoption of the 1970 amendment to Rule 26 is the *Upjohn* opinion. Though *Upjohn Company v. United States*<sup>234</sup> is most often known for the Supreme Court’s interpretation of the

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<sup>228</sup>*Id.* at 22, n.3 (citing 5 U.S.C. § 522(b)(5)).

<sup>229</sup>*Id.*

<sup>230</sup>*Id.* at 23.

<sup>231</sup>*Id.* at 24-25.

<sup>232</sup>*Id.* at 25.

<sup>233</sup>*Id.* at 26; Kirst, *supra* n.66, at 272-73.

<sup>234</sup>449 U.S. 283 (1981).

scope of the attorney-client privilege in the corporate context,<sup>235</sup> the decision also is relevant in interpreting the work product doctrine.<sup>236</sup> In *Upjohn*, the petitioner, Upjohn Company, maintained that questionnaires sent by its attorneys to Upjohn employees were privileged.<sup>237</sup> The questionnaires were part of an internal investigation that began in January of 1976 to discover whether subsidiaries had made payments directly to or to the benefit of foreign government officials in order to secure government business.<sup>238</sup> Upjohn's attorneys also interviewed the recipients of the questionnaire and 33 other Upjohn officers or employees as part of the investigation.<sup>239</sup> The interview notes were described by Upjohn's in-house counsel 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.<sup>240</sup>

In March of 1976, after the initial investigation was made, Upjohn made a preliminary report to the Securities and Exchange

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<sup>235</sup> *Id.* at 386; Anthony B. Joyce, *The Massachusetts Approach to the Intersection of Governmental Attorney-Client Privilege and Open Government Laws*, 42 SUFFOLK L. REV. 957, n. 5 (2009); Marks, *supra* n.47, at 162; The ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 BUS. LAW 1029, 1035 (2005).

<sup>236</sup> See Kirst, *supra* n.66, at 268-71 (discussing the relevance of *Upjohn* to the work product doctrine).

<sup>237</sup> *Upjohn v. United States*, 449 U.S. 383, 386-87(1981).

<sup>238</sup> *Id.* at 386.

<sup>239</sup> *Id.* at 387.

<sup>240</sup> *Upjohn v. United States*, 1978 WL 1163, \*3 (W.D. Mich. Feb. 23, 1978). 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.

Commission (“SEC”) on its Form 8-K disclosing that Upjohn had made questionable payments.<sup>241</sup> Subsequently, the IRS issued a summons demanding production of these materials.<sup>242</sup> Upjohn declined to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and also constituted the work product of an attorney prepared in “anticipation of litigation.”<sup>243</sup> The United States filed a petition to enforce the summons in the Western District of Michigan, and upon the recommendation of the Magistrate, the court ordered the production of the disputed materials.<sup>244</sup> 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, 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.<sup>245</sup> 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.<sup>246</sup>

On appeal, the Supreme Court quickly dismissed the Sixth Circuit’s notion that the work product doctrine did not apply to a tax summons.<sup>247</sup> 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*.<sup>248</sup> 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

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<sup>241</sup>*Id.*; *Upjohn*, 449 U.S. at 386-87.

<sup>242</sup>*Id.* at 387-88.

<sup>243</sup>*Id.* at 388.

<sup>244</sup>*Id.* at 387. The magistrate also concluded that Upjohn had waived the attorney-client privilege, but the Sixth Circuit rejected this finding. *Id.*

<sup>245</sup>*Upjohn*, 1978 WL 1163, at \*11-13.

<sup>246</sup>*Upjohn v. United States*, 600 F.2d 1223, 1227-28, n.13 (6th Cir. 1979).

<sup>247</sup>*Upjohn v. United States*, 449 U.S. 383, 398 (1981).

<sup>248</sup>*Id.* at 398-99.



clients.<sup>249</sup> 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.’”<sup>250</sup> The Court recognized that some courts, applying *Hickman* and Rule 26, had 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.”<sup>251</sup>

The *Upjohn* opinion is instructive both for its semantics and for how it treated the “core” work product at 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.<sup>252</sup> The court also noted that *Hickman*’s policies had been “substantially incorporated” into Rule 26; a recognition that *Hickman* was not fully incorporated into the Rule.<sup>253</sup> Indeed, this is consistent with the view that *Hickman* does continue to have validity in covering intangible work product, while Rule 26, by its terms, only applies to tangible work product.<sup>254</sup> It is also worth noting that, in articulating the policies supporting the work product doctrine, the court did not stop with the “zone of privacy” justification that is commonly cited, but also went on to articulate

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<sup>249</sup>*Id.* at 397-98.

<sup>250</sup>*Id.* at 399 (quoting *Hickman*, 329 U.S. at 512).

<sup>251</sup>*Id.* at 401-02.

<sup>252</sup>*Id.* at 397-399.

<sup>253</sup>*Id.* at 398; Kirst, *supra* n. 66, at 233.

<sup>254</sup>*In re Cedant Corp. Securities Litig.*, 343 F.3d 658, 662 (3d Cir. 2003); *Whitlow v. Martin*, 2009 WL 2241152 at \*3 (Fed. Cl. 2009); *Abdell v. City of New York*, 2006 WL 2664313 at \*3 (S.D. N.Y. 2006); *Am. Fed. Bank v. United States*, 60 Fed.Cl. 493, 497 (Fed. Cl. 2003); Epstein, *supra* n.8, at 815; Marcus, *supra* n.11, at 349-50; WRIGHT ET AL., *supra* n.11, § 2024; 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).

the beneficial effect the doctrine would have on the legal profession and the attorney-client relationship. Finally, the Court's distinction of how "ordinary" work product prepared "with an eye toward litigation" is to be treated differently from "core" work product emphasizes the special protection the Court felt core work product should receive.<sup>255</sup>

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.<sup>256</sup> 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."<sup>257</sup> 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 issue was not raised by the parties nor addressed by the Magistrate. But given the timeline of events, it seems odd that the Court would remand when it could have just as easily 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

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<sup>255</sup>*Upjohn v. United States*, 449 U.S. 383, 399 (1981).

<sup>256</sup>*See Leslie Wharton et al.*, 2 *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.").

<sup>257</sup>*See In re Grand Jury Subpoena*, 220 F.R.D. at 156; *Guzzino*, 174 F.R.D. at 63; Epstein, *supra* n.8, at 831 (citing same). *See also* Smith, *supra* n.64, 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."); Imperato, *supra* n.64, at 216 ("The key to this protection is that the work must be performed in anticipation of litigation.").

concerned with the temporal scope of the doctrine, at least where “core” work product was at issue.<sup>258</sup>

#### 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.” 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 Developments Note, which offered scant support for its conclusion. Thus it could be said that courts

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<sup>258</sup>The Supreme Court may soon have a chance to clarify this portion of its ruling. In *United States v. Textron, Inc.*, a very recent case decided by an en banc panel of 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.*, 577 F.3d 21, 31-32 (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.* at 23 (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 for use in future litigation. *Id.* at 27-28. As of this writing, Textron has filed a Motion to Stay the Mandate Pending the Filing of a Petition for a Writ of Certiorari, meaning this issue could be before the Supreme Court in the near future. *See Textron, Inc.’s Motion to Stay the Mandate Pending the Filing of a Petition for a Writ of Certiorari*, filed August 21, 2009 (on file with author). For an excellent review of the *Textron* district court opinion, *see generally* Claudine Pease-Wingenter, *The Application of the Attorney-Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron*, 8 HOUSTON BUS. & TAX L.J. 337 (2008).

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 lawyer is viewed historically. At the time of the *Hickman* decision, in-house counsel only made up roughly 3 percent of all attorneys and the work performed by these attorneys was rather routine.<sup>259</sup> Litigation and trial work were more heavily associated with the work of an attorney than transactional or prophylactic legal work.<sup>260</sup> Indeed, up until the mid-1800s the attorney-client privilege was also limited to trial work.<sup>261</sup> Though the number of in-house counsel had grown to 10.3 percent by 1970,<sup>262</sup> by then “anticipation of litigation” as a requirement had already taken hold. However, today the role of the attorney is understood to expand 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.<sup>263</sup> This justification is a nod to

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<sup>259</sup>THE OXFORD COMPANION TO AMERICAN LAW 500, 505 (Kermit L. Hall, et al. eds., Oxford 2002) (noting that “[i]n 1948, only 3 percent of all lawyers were employed in private industry” and the role of the attorney, up until the 1960s, was traditionally to handle routine legal issues while leaving more complex legal issues for outside counsel).

<sup>260</sup>*See id.* at 500 (“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.”).

<sup>261</sup>*See note 57, supra.*

<sup>262</sup>Vern Countryman et al., THE LAWYER IN MODERN SOCIETY 4 (2d ed., Little Brown and Co. 1976). This growth appears to have been a steady incline growing from 5.5 percent in 1951 to 8.9 percent in 1960. *Id.*

<sup>263</sup>*See, e.g.,* Pacific Gas and 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 their case free from interference by an adversary); *Hanson v. U.S.*

the benefits that are viewed to result in a robust adversarial system. However, to cite only to this adversarial justification ignores the *Hickman* Court's further statements with regards to the detrimental effect disclosure of work product materials would have on the legal profession as well as the attorney-client relationship.<sup>264</sup> In this regard, the work product doctrine's justification bears much in common with the instrumental justification that is the foundation of the attorney-client privilege, which is not tied to any litigation requirement.<sup>265</sup> Indeed, even the cost-free nature of the privilege could be found to apply to the work product doctrine; instead of communications not existing absent the privilege, the cost free nature is found in the Supreme Court's statement that "much of what is now put down in writing would remain unwritten."<sup>266</sup>

#### A. Correcting the anticipation misconception

In light of these misconceptions, a simple fix is possible: eliminating the "anticipation of litigation" requirement for "core" work product. This could be accomplished by simply extending *Hickman*, which already continues to have validity today despite Rule 26(b), and recognizing that "core" work product continues to retain a residuum of protection even outside of the litigation context.<sup>267</sup> 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.

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Agency for Intern. Development, 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); *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 their case).

<sup>264</sup>*Hickman*, 329 U.S. at 510-13.

<sup>265</sup>See Part II.B.2 *supra*.

<sup>266</sup>*Hickman*, 329 U.S. at 511.

<sup>267</sup>Epstein, *supra* n.8, at 815; Marcus, *supra* n. 11, at 349-50; Cercone, *supra* n.254, at 658; WRIGHT ET AL., *supra* n. 11, § 2024.

This admittedly would mimic the test for whether a communication is protected under the attorney-client privilege,<sup>268</sup> but given the similar purposes of the doctrines, this is a logical test. Though this may seem like a rather drastic proposal, a similar expansion already exists under California state law<sup>269</sup> and at least one commentator has advocated for recognition of such an expansion to protect the work of transactional attorneys.<sup>270</sup>

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 justifications for granting a qualified privilege within the litigation context holds true, then those justifications should apply equally to such materials outside the litigation context as well. 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

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<sup>268</sup>See *Kramer v. Raymond Corp.*, 1992 WL 122856 at \* 1 (E.D. Pa. 1992); *MSF Holding, Ltd. v. Fiduciary Trust Co. Int’l*, 2005 WL 3338510 at \*1 (S.D. N.Y. 2005); *Avianca*, 705 F.Supp. at 676. Epstein, *supra* n.8, at 815; Marcus, *supra* n.11, at 349-50; WRIGHT ET AL., *supra* n.11, § 2024; Cercone, *supra* n.254, at 658.

<sup>269</sup>Calif. Code of Civil Procedure § 2018.030(a) (West 2005) (“A writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.”); *County of Los Angeles v. Superior Court of Los Angeles County*, 98 Cal.Rptr.2d 564, 574 (Cal. Ct. App. 2000) (interpreting California’s work product rule); *Wellpoint Health Networks, Inc. v. The Superior Court of Los Angeles County*, 59 Cal.App.4th 110, 120 (Cal. Ct. App. 1997); *Rumac, Inc. v. Bottomley*, 143 Cal.App.3d 810, 815 (Cal. Ct. App. 1983) (contrasting the California rule with the Federal Rule).

<sup>270</sup>See Kirst, *supra* n.66, 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 analysis 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. 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 G. Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1517 (1991), in which Thornburg argues that the work product doctrine should be eliminated entirely.

down in writing would remain unwritten.”<sup>271</sup> Yet 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.”<sup>272</sup>

To limit the protection of core work product to only the litigation context ignores this important policy justification for the rule as enunciated in *Hickman*.<sup>273</sup>

The expansion is also in line with the adversarial justification given in *Hickman*. The “zone of privacy,” which

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<sup>271</sup>*Hickman*, 329 U.S. at 511.

<sup>272</sup>*Rumac, Inc.*, 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 20<sup>TH</sup> CENTURY 461 (Yale Univ. Press 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.”).

<sup>273</sup>This instrumental justification is important as it continues to have validity, at least in the Supreme Court’s view, in modern times. *United States v. Zolin*, 491 U.S. 554, 562-63 (1989); *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996); *Swindler & Berlin v. United States*, 524 U.S. 399, 408 (1998); IMWINKELRIED, *supra* n.55, at 258-59 (citing *Zolin*, *Jafee*, and *Swindler & Berlin*).

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 case or give helpful insight 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.<sup>274</sup>

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 in favor of recognition of expansion of the coverage 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 would occur. This was the reasoning put forth in the previously discussed Developments Note that appears to have helped establish the “anticipation of litigation” requirement. As has already been explained, the Developments Note’s reasoning seems naïve at

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<sup>274</sup>Anderson, *supra* n.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.*



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 thanks to electronic storage, in modern times, 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 Rules. The original 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 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 of such materials 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 Rules. However, as to "core" or "opinion" work product, if the justifications for granting a qualified privilege articulated in *Hickman* are to be believed, then the benefits of protection outweigh the negative effects feared.<sup>275</sup>

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<sup>275</sup>*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. *Contrast Wellpoint*, 59 Cal.App.4th at 120 (citing *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal.App.3d 1240, 1249 (Cal. App. Ct. 1988) and noting that, under California law, though waiver applied to the work product rule, the crime-fraud exception did not).

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 how long we have lived 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 80 years.<sup>276</sup>

To this there are a number of responses that can be offered. First, though the instrumental justification is one justification for

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<sup>276</sup>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 (b). *See* Fed. R. Civ. P. 26(c). *Cf.* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 408 (1989) (“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 lend the reader to think that simply by virtue of having “core” work product status, that protection should be granted as it 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 that was rejected by the Advisory Committee as being unacceptable with regard to protecting work product due to confusion as to its meaning. *See* part III.C., *supra*. 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. at 133 (denying request for protective order as the material at issue was not produced in anticipation of litigation).

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 though the attorney-client privilege has long stood upon the speculative instrumental justification, one of the primary alternative justifications that has been offered up for its continued existence is a humanistic privacy justification, which would seem to mirror the adversarial justification given for the work product doctrine.<sup>277</sup>

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 legal profession as a whole and in the in-house sector, as well as the advent of electronic discovery. In 1948, the time *Hickman* was decided and when the Rules were under consideration for amendment, in-house counsel accounted for 3 percent of all attorneys,<sup>278</sup> of which there were approximately 200,000 (placing the number of in-house at approximately 6,000).<sup>279</sup> The work of these in-house attorneys was relatively routine, but through the years grew to encompass increasingly complex matters.<sup>280</sup> By 1970, the year in which the work product doctrine became a part of the Rules of Civil Procedure, the total number of attorneys had grown to 355,242 of which 11 percent worked in-house (placing the number of in-house counsel at approximately 39,076).<sup>281</sup> This

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<sup>277</sup> See notes 166-173, *supra* and accompanying text.

<sup>278</sup> THE OXFORD COMPANION TO AMERICAN LAW 500, 504-505 (Kermit L. Hall, et al. eds., Oxford 2002).

<sup>279</sup> See GLENN GREENWOOD, THE 1961 LAWYER STATISTICAL REPORT 88 (American Bar Foundation 1962) (placing the total number of attorneys in the U.S. in 1951 at 221,605).

<sup>280</sup> THE OXFORD COMPANION TO AMERICAN LAW 500, 505 (Kermit L. Hall, et al. eds., Oxford 2002); VERN COUNTRYMAN, ET AL., THE LAWYER IN MODERN SOCIETY 41, 44 (Little, Brown and Co. 1976).

<sup>281</sup> BARBARA A. CURAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s 12 (American Bar Foundation 1985); VERN COUNTRYMAN, ET AL., THE LAWYER IN

percentage leveled out over the next few decades, with in-house representing 10 percent of the total number of attorneys in 1980, of which there were 542,205 (placing the number of in-house at approximately 54,000),<sup>282</sup> 8 percent in 1995 (with a total number of approximately 71,349 in-house)<sup>283</sup> and 8.4 percent in 2000 (for a total number of in-house counsel of 75,954).<sup>284</sup> In 2008, the total number of attorneys in the U.S. had reached 1,014,000 and though no percentage of in-house counsel number appears available yet, if the percentage remains in the 8-10 percent 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.<sup>285</sup> It has also led to an

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MODERN SOCIETY 4 (Little, Brown and Co. 1976) (placing the percentage at 10.3 percent).

<sup>282</sup>CURAN, *supra* n.281, at 12; FRIEDMAN, *supra* n.272, at 461.

<sup>283</sup>CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995 7 (American Bar Foundation 1999).

<sup>284</sup>CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 28 (American Bar Foundation 2004). The total number of attorneys in the U.S. had grown to over 1 million. *Id.* at 27.

<sup>285</sup>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

increase in the ability to easily search through the vast amount of information to discover previously difficult to locate documents and information.<sup>286</sup> As one commentator as 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.”<sup>287</sup> Based on the above, there are two significant changes that have occurred since *Hickman*; first is the increase in proportion and sheer number of lawyers used in-house (and for increasingly complex matters). Second, though 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.<sup>288</sup>

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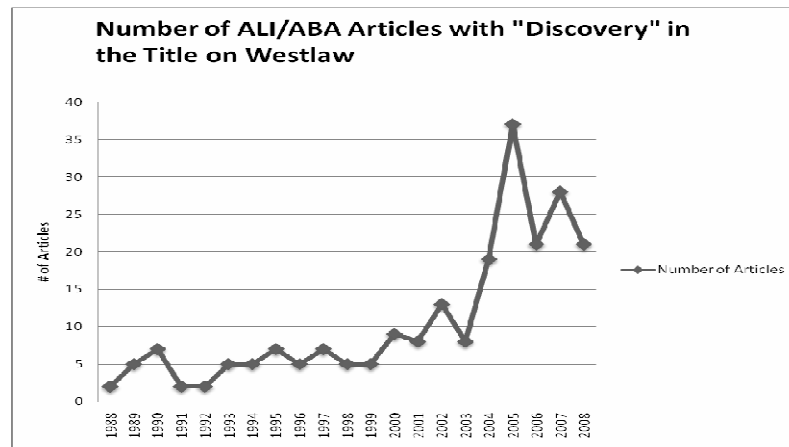
[electronically] discoverable information greatly exceeds the quantity that is available through traditional discovery.”); Steven C. Bennett & Thomas M. Niccum, *Two Views From the Data Mountain*, 36 CREIGHTON L. REV. 607, 607-08 (2003); Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?* 41 B.C. L. REV. 327, 349 (2000).

<sup>286</sup>Bennett, *supra* n.272, at 610-11.

<sup>287</sup>*Id.*

<sup>288</sup>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](http://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 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.

Finally, though it can be argued that the benefit is speculative, there is evidence, both anecdotally and by analogy to studies done in the attorney-client privilege context that would suggest 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 could be discovered later by an adversary.<sup>289</sup> 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.<sup>290</sup> Of the 363 respondents to the ACC



<sup>289</sup> Cf. JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE 7-10 (2d ed. Garland Law Publ'g 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”).

<sup>290</sup> Association of Corporate Counsel Executive Summary, *Association of Corporate Counsel: Is the Attorney-Client Privilege Under Attack?*, at 1 (Apr. 6, 2005), available at <http://www.acca.com/Surveys/attyclient.pdf>. 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 in their opinion the attorney-client privilege encourages candor. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 246, 261 (1989). While this survey is twenty years old, and therefore not necessarily a

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.<sup>291</sup> This number dropped to 68% for mid and lower-tier employees.<sup>292</sup> Significantly, however, 95% of the respondents believed that absent the attorney-client privilege, there would be a chilling effect of the flow of information from clients.<sup>293</sup> The National Association of Defense Counsel conducted a similar study around the same time period which similarly 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.<sup>294</sup> 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/improve compliance

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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 Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN’S L. REV. 191, 414 (1989) (stating that the evidence gathered in this study contains more evidence than any other study to date that the attorney-client privilege encourages candor in communications between an attorney and his client) with Association of Corporate Counsel Executive Summary, *Association of Corporate Counsel: Is the Attorney-Client Privilege Under Attack?*, at 2-3 (Apr. 6, 2005), available at <http://www.acca.com/Surveys/attyclient.pdf> (finding, just as Professor Alexander did twenty years ago, that a vast majority of attorney’s believe there would be a chilling effect on candid communication without the attorney client privilege).

<sup>291</sup> Association of Corporate Counsel Executive Summary, *Association of Corporate Counsel: Is the Attorney-Client Privilege Under Attack?*, at 2-3 (Apr. 6, 2005), available at <http://www.acca.com/Surveys/attyclient.pdf>.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Executive Summary, *NACDL Survey: The Attorney-Client Privilege is Under Attack*, at 1-3, available at <http://www.nacdl.org/public.nsf/freeform/attorneyclient?OpenDocument>.

initiatives.”<sup>295</sup> 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.<sup>296</sup> It may be, on this front, until a convincing empirical study is completed, that the benefits derived from the attorney-client privilege may have to 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 adoption of recognizing a residuum of protection for core work product is that it will be subject to abuse – that attorney’s 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 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. The work would still need to be generated by the attorney to provide legal assistance (and would still be a qualified privilege). 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 expanded protection of certain documents, this proposal is by no means intended to completely displace the

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<sup>295</sup> Association of Corporate Counsel Executive Summary, *Association of Corporate Counsel: Is the Attorney-Client Privilege Under Attack?*, at 4 (Apr. 6, 2005) available at <http://www.acca.com/Surveys/attyclient.pdf>.

<sup>296</sup> 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.” Vincent, *supra* n.57, at 263.



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. And 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.”

## V. 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 created by the attorney, 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). A 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 articulated by the Court in *Hickman*. The first of these policy justifications, to promote the adversarial system by providing a “zone of privacy,” is advanced by a rule that protects “core” work product as, 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 a concern 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. And 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, and the work product doctrine has the added benefit of having a dual justification in its first adversarial justification, which is also 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 time frame. 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, 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 some degree of 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. By simply recognizing that “core” work product is deserving of protection regardless of the prospect of litigation, so long as it is truly provided as 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.