The Denial of IRS Access to Its Adversary's Playbook

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THE DENIAL OF IRS ACCESS TO ITS ADVERSARY’S PLAYBOOK

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I. INTRODUCTION

The Supreme Court had the opportunity to resolve a three-way split in the federal circuit courts of appeals regarding the work product protection but refused to do so.1 That refusal has caused confusion in the lower courts as to

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1. See United States v. Textron (Textron III), 577 F.3d 21 (1st Cir. 2009), cert. denied, 560 U.S. 924 (2010). The Supreme Court denied certiorari in Textron III, which ultimately provided the IRS access to the taxpayer’s tax accrual workpapers. Id. Perhaps coincidentally, Justice Elena Kagan, as the
whether certain documents are subject to protection from disclosure to adversaries as work product. At its next opportunity, the Supreme Court should sort out the confused state of the law.

The confusion in the case law leaves the appropriate protections for tax accrual workpapers especially uncertain.\(^2\) A set of tax accrual workpapers is a special group of accounting documents that the IRS often seeks during an examination of a corporate taxpayer’s income tax return. These workpapers exist to document transactions on which the IRS might dispute the tax result. The IRS pursues the workpapers while the taxpayers want to withhold them from the IRS. The reasoning for withholding is because workpapers often contain assessments of the taxpayer’s litigating position should the IRS challenge the transaction in court.

Work product protection derives from the Federal Rules of Civil Procedure and Supreme Court case law. Rule 26(b)(3) and Hickman v. Taylor\(^3\) protect from disclosure “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative . . . .”\(^4\) The rule and the case law provide even greater protection for “the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”\(^5\)

The split in the circuits concerns three interpretive tests. Courts rely on these tests to determine whether certain tax accrual workpapers deserve work product protection. First, some circuits protect documents from disclosure to the IRS where the taxpayer’s primary motivating purpose for preparing the document was potential litigation—the “purpose” test.\(^6\) Under the purpose test, United States v. El Paso Co. permitted the IRS access to the to taxpayer’s tax accrual workpapers.\(^7\) Second, other circuits permit taxpayers to withhold documents created because of the prospect of litigation—the “because of” test.\(^8\) Under the because of test, United States v. Deloitte L.L.P. protected the taxpayer’s tax accrual workpapers from the IRS. Third, the First Circuit protects

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2. See infra Part II and accompanying text.
4. Fed. R. Civ. P. 26(b)(3)(A). See Hickman, 329 U.S. at 511 (noting that the court below termed these types of documents “as the ‘Work product of the lawyer’”); see also infra Part III.
7. See El Paso, 682 F.2d at 542.
taxpayer documents from disclosure to the IRS only if they were prepared for use in litigation—the “use” test.9 Under the use test, United States v. Textron Inc. held that the IRS was entitled to the taxpayer’s tax accrual workpapers.

This article argues that none of these interpretive tests is satisfactory because the courts use them to essentially change the language of Rule 26(b)(3) or limit the rule’s application.10 Instead, courts should simply apply the unaltered language of Rule 26(b)(3). Applying the unaltered language of the rule protects taxpayer’s litigation assessments—essentially their playbooks—from the IRS despite their appearance in the taxpayer’s tax accrual workpapers.

Part II of this article describes tax accrual workpapers and why the IRS aggressively pursues them.11 Part III sets forth the parameters of work product protection and how it limits the IRS’s authority to obtain tax accrual workpapers.12 Part IV discusses in more detail the current split among the circuits, the correct application of work product protection to tax accrual workpapers, and addresses the arguments against protecting documents from the IRS raised by the IRS and writers.13 Part V concludes that the Supreme Court should afford taxpayer’s protection of the work product in tax accrual workpapers because providing the IRS access to its adversary’s playbook violates Rule 26(b)(3), Hickman, and common fairness.14

II. TAX ACCRUAL WORKPAPERS

The public financial statements of a corporation subject to regulation by the Securities Exchange Commission (“SEC”) must undergo audit by a certified public accounting firm (“CPA firm”) using Generally Accepted Accounting Principles (“GAAP”).15 The CPA firm verifies that the company’s financial statements accurately reflect the corporation’s financial condition.16 Corporations enter into many transactions—large and small. A corporate taxpayer will often enter into transactions where the potential tax consequences are uncertain.17 The uncertainty makes sense because the corporate taxpayer and the IRS have opposing goals. The taxpayer wants to incur as little tax as possible without breaking the law, and the tax collectors want to collect as much

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9. See Textron III, 577 F.3d 21, 27 (1st Cir. 2009) (en banc); infra Part IV.A.3.
10. See infra Part IV.A.4.
11. See infra Part II.
12. See infra Part III.
13. See infra Part IV.
14. See infra Part V.
tax as possible without breaking the law. The law, however, is not always clear.

A taxpayer corporation often sits at a vantage point; it can see a potential dispute on the horizon with the IRS over the tax consequences of a particular transaction or set of transactions. Where a potential dispute approaches, the taxpayer’s tax liabilities for such a transaction become uncertain. Prudence suggests two things. First, from a legal standpoint, it may be prudent for a taxpayer to understand the legal underpinnings of a complex transaction (or set of complex transactions) so it can assess whether the taxpayer would be willing to take the case to court. Perhaps the taxpayer will have an attorney prepare a legal memorandum explaining the law behind the transaction or transactions as well as the strengths and weaknesses of a potential case. Such memoranda are commonplace for corporations facing potential litigation in any area of the law. Second, prudence may also require setting aside funds to cover the uncertain tax liabilities in the event the IRS prevails in a dispute over the tax consequences of the transaction. In accounting terms, the taxpayer would put the set aside funds in a reserve or similar account. CPA firms review tax reserve accounts to determine whether the reserves are sufficient such that the financial statements continue to reflect the corporation’s financial condition.

Under GAAP, CPA firms review the corporate taxpayer’s tax reserves. The documents generated or collected in the CPA firm’s review constitute the “tax accrual workpapers.” These tax accrual workpapers of a large corporate taxpayer are extremely valuable to the IRS. The value to the IRS is in litigation. The tax accrual workpapers document the taxpayer’s uncertain positions—i.e., the analysis and conclusions of the taxpayer and its representatives regarding whether to litigate against the IRS, how to conduct such litigation, and the likelihood of success of litigating against the IRS on a particular tax position.

The CPA firm relies on the tax accrual workpapers in forming its opinion as to whether the financial statements in which the tax reserve amounts ultimately appear fairly reflect the corporation’s financial condition. To determine

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18. See Arthur Young, 465 U.S. at 815; El Paso, 682 F.2d at 534; Wells Fargo, 2013 WL 2444639, at *17.
19. See El Paso, 682 F.2d at 534.
21. See id. at *12.
22. See Arthur Young, 465 U.S. at 812.
23. See id.
27. See, e.g., Wells Fargo, 2013 WL 2444639, at *8.
28. See id. at *8, *21.
whether the tax reserves accurately reflect the corporation’s financial condition, the CPA firm has to assess how uncertain the tax positions are. Perhaps a CPA firm would not need heavy documentation of uncertain return positions where the amount at issue is small or the uncertainty is only slight. Where amounts at issue are larger or there is more uncertainty, the CPA firm is likely to want more documentation. Although many CPA firms have some expertise to assess the uncertainty, one would expect that the CPA firm and the taxpayer might sometimes disagree over whether the taxpayer has provided proper support. As a result, there are times when the CPA firm might ask the taxpayer to provide substantiation to the CPA firm of the level of uncertainty associated with a return position or that the return position was even justified.

There are a number of different types of documents that can appear in tax accrual workpapers. Documents a taxpayer might have that would be unrelated to future litigation may include e-mail messages, computations of amounts, charts, or graphs. In addition, there may be documents related to preparation for litigation against the IRS such as legal analysis, legal opinions concerning the transactions, or legal assessments of the strength of the taxpayer’s case.

To a party that is responsible for enforcing the tax laws the tax accrual workpapers can be valuable. According to the Supreme Court in United States v. Arthur Young & Co., “tax accrual workpapers pinpoint the ‘soft spots’ on a corporation’s tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes.” The workpapers provide “an item-by-item analysis of the corporation’s potential exposure to additional liability.” Thus, both sides have strong motivations regarding tax accrual workpapers. The IRS, on the one hand, wants the tax accrual workpapers because anyone involved in a lawsuit would want to know the potential adversary’s impression of the strengths and weaknesses of the case. On the other hand, taxpayers try to keep the workpapers from the IRS because of the value the IRS would gain from seeing their litigation assessments. No one facing potential litigation would want their impressions of the case in the hands of a would-be adversary, just as no coach would want the opponents to have the team’s playbook.

29. See id. at *3, *6.
30. See, e.g., id. *6 n.13 (the taxpayer assessed only its uncertain tax positions (“UTPs”) for level of uncertainty rather than all ongoing tax positions).
31. See, e.g., United States v. Deloitte L.L.P., 610 F.3d 129, 133-34 (D.C. Cir. 2010) (Dow’s CPA firm required the company to provide a tax opinion to the firm “so that it could ‘review the adequacy of Dow’s contingency reserves’”); Wells Fargo, 2013 WL 2444639, at *8 (“A company’s auditor would most likely require documentation from the company regarding specific UTPs in order to certify that the company had accurately computed its tax reserve.”).
32. See Wells Fargo, 2013 WL 2444639, at *3.
33. See, e.g., Deloitte, 610 F.3d at 129.
35. Id.
36. See, e.g., OBSERVER-REPORTER, Karl Sweetan is Accused of Attempt to Sell Los Angeles Club Playbook, at B-5 (July 8, 1972), available at
The corporation might turn over some documents to the CPA firm’s possession for inclusion in the firm’s tax accrual workpapers. With respect to other documents, the corporation might simply show the documents to the CPA firm rather than place them in the firm’s possession. Such caution is called for in light of Arthur Young, where the Supreme Court permitted the IRS access to tax accrual workpapers held by a CPA firm.  

The literature discussing the application of the work product rule to tax accrual workpapers often refers to tax accrual workpapers as a well-defined or categorical set of papers prepared by every corporation, but such is not the case. For example, in Arthur Young, dealing with tax years in the 1970s, the IRS summons at issue did not define tax accrual workpapers. Rather, the summons merely required Arthur Young to disclose, among other things, “[t]ax pool analysis file(s).” Although the Supreme Court opinion provided a definition, it is apparent the definition did not originate from the IRS’s summons. In another case, El Paso, also dealing with tax years in the 1970s, the IRS sought the taxpayer’s tax accrual workpapers in its summons by describing them as “documents concerning ‘potential tax liabilities and tax problems.’” The summons described them this way because the IRS did not know how El Paso referred to tax accrual workpapers internally. During the summons enforcement proceeding, El Paso revealed to the IRS that they referred to these documents as their non-current tax account. Then, in 1980, the IRS defined tax accrual workpapers, at least in part, as “a memorandum discussing items reflected in the


39. See Wells Fargo & Co. v. United States, Nos. 10-57 (JRT/JJG), 10-95 (JRT/JJG), 2013 WL 2444639, at *8-11 (D. Minn. June 4, (discussing the various types of documents that can be but are not required to be included in tax accrual workpapers); see also Textron III, 577 F.3d 21, 40 (1st Cir. 2009) (en banc) (Torruella, J., dissenting) (noting that there is no set definition for tax accrual workpapers and the content varies case-by-case).
40. See generally Arthur Young, 465 U.S. at 805. Nontax readers might be interested to learn that it is not uncommon in tax cases for old tax years (in this case 1972-1974) to be resolved a decade or so later (in this case 1984).
41. See United States v. Arthur Young & Co., 677 F.2d 211, 215 n.4 (2d Cir. 1982), aff’d in part, rev’d in part, 465 U.S. 805 (1984). Although the term “tax pool analysis files” is a reference to tax accrual workpapers, the IRS often provides its own detailed definition of tax accrual workpapers along with the request. See infra note 47 and accompanying text.
42. See Arthur Young, 465 U.S. at 808.
44. Id.
45. Id.
financial statements as income or expense where the ultimate tax treatment is unclear.”

In newer cases, the courts occasionally include the IRS’s definition as to what it meant by “tax accrual workpapers.” For example, in Textron, the IRS summoned tax accrual workpapers defined as the following:

[A]ll accrual and other financial workpapers or documents created or assembled by the Taxpayer, an accountant for the Taxpayer, or the Taxpayer’s independent auditor relating to any tax reserve for current, deferred, and potential or contingent tax liabilities, however classified or reported on audited financial statements, and to any footnotes disclosing reserves or contingent liabilities on audited financial statements. They include, but are not limited to, any and all analyses, computations, opinions, notes, summaries, discussions, and other documents relating to such reserves and any footnotes.[47]

In Wells Fargo, the IRS summoned tax accrual workpapers from auditor KPMG using the same definition as in Textron.[48] As noted in Textron, however, the IRS may define tax accrual workpapers however it pleases.[49]

The IRS initially had a policy of restraining its auditors from attempting to obtain tax accrual workpapers from taxpayers,[50] but this policy has changed over time. Prior to 2002, the IRS would only request tax accrual workpapers in “‘unusual circumstances.’”[51] Although these unusual circumstances were not well defined, they typically involved occasions where the agent determined that more information was necessary to make a determination.[52] The IRS’s procedures required an agent desiring to request tax accrual workpapers from a taxpayer to first obtain permission from the IRS’s head of the audit division. Perhaps the IRS had this policy of restraint out of respect for the openness between accountants and their clients, as well as to protect the integrity of the process of financial reporting.[53] Or perhaps the IRS perceived that courts would recognize the unfairness in the adversary process of obtaining access to its adversary’s playbook. It is conceivable that the IRS contemplated unfairness.

46. Id. at 535 n.4 (quotation omitted).
47. See United States v. Textron Inc. (Textron I), 507 F. Supp. 2d 138, 142 (D.R.I. 2007), rev’d in part, aff’d in part, 553 F.3d 138 (1st Cir. 2009), vacated, 577 F.3d 21 (1st Cir. 2009) (en banc).
49. See Textron III, 577 F.3d 21, 40 (1st Cir. 2009) (en banc) (Torruella, J., dissenting) (noting that there is no set definition for tax accrual workpapers and the content varies case-by-case).
51. See SALTZMAN & BOOK, supra note 50, ¶ 8.07[3][a] & n.166 (quoting I.R.M. 4.10.2.9.4(3) (May 14, 1999) (repealed in 2007)).
52. See id.
53. See id. (“The Service . . . adopted self-imposed restrictions on access to these workpapers, presumably because of the adverse consequences unrestricted access to this information would have on both the openness of the accountant-client relationship and the integrity of financial reporting.”).
thus, the restraint policy may be aimed at mitigating any potential problems which in turn would allow the IRS to gain occasional access to its adversary’s playbook. If the IRS hoped that a policy of restraint would gain the IRS occasional access, this hope was realized in Arthur Young. Regardless, the IRS modified its policy of restraint in 2002. The new policy permits agents to request tax accrual workpapers where the taxpayer has engaged in listed transactions, i.e., transactions the IRS finds questionable.

The IRS now takes the position under its investigative authority that it is entitled to all tax accrual workpapers whether or not they contain protected work product. Conversely, corporate taxpayers claim that work product protection shields such workpapers from the IRS’s broad investigative powers. The truth is more likely somewhere in between—work product protection does not depend on whether the documents were in the tax accrual workpapers. Therefore, some, but not all, tax accrual workpapers are protected.

III. WORK PRODUCT PROTECTION

The IRS’s civil investigative power is broad. The IRS is entitled to examine all books and records that can assist the IRS in determining a taxpayer’s liability. If a taxpayer refuses to produce a document the IRS has requested informally, the IRS may compel production by issuing an administrative summons and filing an action in federal district court to enforce the summons.

Broad as the IRS’s investigative power is, this power is not absolute. The IRS’s authority does not extend to requiring a taxpayer to create new evidence. Thus, the IRS may not require a taxpayer to create a spreadsheet, summarize a transaction, or provide the taxpayer’s assessment of a transaction.

There are further limits on this investigatory power, however, including tax laws that do not permit the IRS to issue a summons for illegitimate purposes

54. See Arthur Young, 465 U.S. at 820-21 & n.17 (apparently considering the policy of restraint in granting IRS access to tax accrual workpapers of CPA firm).
55. See SALTZMAN & BOOK, supra note 50, ¶ 8.07[3][b].
56. See id.
57. See id. at ¶ 8.07[3][a] (“The Service believes it is entitled to examine tax accrual workpapers.”).
58. See infra Part III.
62. See 26 U.S.C.A. § 7602(a) (providing the IRS the authority to obtain by summons “any books, papers, records, or other data[,]” the testimony of the person responsible for such records, and nothing more); United States v. Davey, 543 F.2d 996, 1000 (2nd Cir.) (1976) (“[Section] 7602 does not require preparation or production of records not yet in existence”).
63. See Davey, 543 F.2d at 1000.
under *United States v. Powell*. On many occasions, a taxpayer has challenged an IRS summons on the basis of *Powell* with virtually no success. Courts have generally accepted the IRS’s usual prima facie showing of a legitimate purpose, to “ascertain the correctness of the tax returns filed by the taxpayer...” It is hard to see, however, how the documents in the tax accrual workpapers aid in ascertaining the correctness of the taxpayers’ returns from whom the IRS seeks them. The IRS can obtain the documents showing the facts of the transactions without asking for the tax accrual workpapers, and these documents are sufficient to help the IRS ascertain the correctness of a tax return. Conversely, the tax accrual workpapers the IRS pursues the most aggressively are those that relate to the taxpayer’s litigation assessments and analyses. These litigation assessments reflect legal analysis rather than facts useful to ascertaining the correctness of a return. Instead of asking for the taxpayer’s tax accrual workpapers, the IRS might as well just ask for the taxpayer’s protected work product to which the IRS is not entitled anyway.

Although taxpayers rarely succeed in invalidating a summons on the basis that it did not have a legitimate purpose under *Powell*, there are some that prevail. For example, in 2013 the Federal District Court of Minnesota declined to enforce a summons under *Powell* with respect to the IRS’s requests for state and local tax accrual workpapers. The IRS claimed it sought these workpapers to identify inconsistencies in the taxpayer’s position. This reason, the court held, did not provide prima facie evidence of a legitimate purpose. The IRS was unable to show how the state and local tax accrual workpapers would assist the IRS in ascertaining the correctness of the taxpayer’s federal tax return.

Another limit on the IRS’s summons authority is a valid privilege claim. The most common privilege claim in the IRS summons context is likely the common law attorney-client privilege. The attorney-client privilege permits

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65. See, e.g., id.; Textron III, 577 F.3d at 31-32 (1st Cir. 2009) (en banc); cf. Wells Fargo & Co. v. United States, Nos. 10-57 (JRT/JJG), 10-95 (JRT/JJG), 2013 WL 2444639, at *4-5 (D. Minn. June 4, 2013) (finding the IRS established a legitimate purpose under *Powell* for tax accrual workpapers related to taxpayer’s federal income tax positions, but failed to establish a legitimate purpose for the tax accrual workpapers related to state and local income tax positions as well as the tax accrual workpapers of a subsidiary acquired after the years under examination).
67. See 26 U.S.C.A. § 7602(a)(1) (granting the IRS summons authority to “ascertain the correctness of any return”); SALTZMAN & BOOK, supra note 50, ¶ 8.07[3][b].
68. See United States v. El Paso Co., 682 F.2d 530, 545-46, 549 (5th Cir. 1982) (Garwood, J., dissenting) (suggesting that the IRS does not have a legitimate purpose for seeking tax accrual workpapers, that the IRS’s requests focus on protected work product opinion, and that the requests are merely for the IRS’s convenience of having the taxpayer’s work product in hand—which is unacceptable).
70. Id. at *25.
71. Id. at *43.
72. Id.
someone who has obtained legal advice from a lawyer to keep private the confidential communications between the client and the attorney. As with Powell, however, attorney-client privilege claims are often unsuccessful. These claims fail because the taxpayer waives the attorney-client privilege when tax accrual workpapers are disclosed to the CPA firm performing the audit. The taxpayer, however, may still successfully claim the attorney-client privilege to documents not disclosed to the CPA firm.

Although the IRS may not compel the production of a privileged document using its summons enforcement procedures, there is no legal impediment to the IRS informally requesting privileged documents. The taxpayers and their representatives may turn over the documents with no objection, which operates as a waiver of the relevant privilege’s application. Essentially one must claim the privilege or it is waived.

Another common privilege claim in the IRS summons context is protection from disclosure under the work product rule. The Federal Rules of Civil Procedure protect from disclosure “documents and tangible things . . . prepared in anticipation of litigation or for trial . . . .” Although this protection provided by Rule 26 (b)(3) is frequently referred to as a privilege, it differs from traditional privileges; it is not an absolute protection from disclosure, but rather a qualified protection. If protecting the confidentiality would cause undue hardship on the opposing party—i.e., the opposing party has a “substantial need” for the materials in preparing its case—the opposing party may compel disclosure of such documents or tangible things as long as they are otherwise subject to discovery and unrelated to expert testimony. The IRS often makes the “substantial need” argument in cases involving tax accrual workpapers but has not yet succeeded.

Even if a court compels disclosure under the “substantial need” language, it may not compel the “disclosure of the mental impressions, conclusions,
opinions, or legal theories of a party’s attorney or other representative” with respect to the controversy. 81 These types of work product are referred to as opinion work product. 82 Although the term “work product” does not appear in the federal rules, Rule 26(b)(3)(A) protections are frequently referred to as work product protection or the work product privilege. 83

The general parameters of work product protection set forth in Rule 26(b)(3) originated in a line of cases culminating in the Supreme Court opinion of Hickman v. Taylor, which deals with protection of attorney work product. 84 Hickman v. Taylor makes clear that courts protect work product from opposing litigants “to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy ‘with an eye toward litigation,’ free from unnecessary intrusion by his adversaries.” 85

Although writers have suggested that Rule 26(b)(3) codifies the work product doctrine as introduced in Hickman, 86 the rule and the case are not coextensive. 87 Rule 26(b)(3) applies to tangible materials 88 while Hickman protects work product that is intangible as well. 89 Thus, even if a document is not protected under the work product rule, Hickman may protect some of the contents. 90

IV. ANALYSIS

Some documents in tax accrual workpapers could provide the IRS insight into a taxpayer’s litigation assessments and strategies. It is unfair, however, for the IRS to always obtain these documents over a taxpayer’s objection. It is nonsensical to make a blanket claim regarding tax accrual workpapers. This is because they may contain some documents that are not subject to work product protection and others that are subject to protection.

83. See generally 8 WRIGHT ET AL., supra note 5, § 2022.
84. See id. (providing the historical background leading up to Hickman).
85. See Adlman, 134 F.3d at 1196 (citing Hickman, 329 U.S. at 510-11).
86. See Johnson, supra note 38, at 158.
87. See Deloitte, 610 F.3d at 134-35 (discussing Hickman’s extension of Rule 26 to intangibles, such as attorney’s mental impressions); 8 WRIGHT ET AL., supra note 5, § 2024, 494-95 nn.1, 3.
88. FED. R. CIV. P. 26(b)(3)(A); 8 WRIGHT ET AL., supra note 5, § 2024, 494 n.1 (“Rule 26(b)(3) itself provides protection only for documents and tangible things . . . .”).
89. Hickman, 329 U.S. at 514; 8 WRIGHT ET AL., supra note 5, § 2024, 495 n.3 (“Hickman v. Taylor continues to furnish protection for work product within its definition that is not embodied in tangible form, such as the attorney’s recollection . . . .”).
90. See, e.g., Deloitte, 610 F.3d at 136.
A. PROTECTION OF “TAX ACCRUAL WORKPAPERS” FROM THE IRS

The work product rule and Hickman v. Taylor protect a taxpayer’s litigation strategy. The work product rule first denies the IRS access to a taxpayer’s “documents and tangible things” that the taxpayer or the taxpayer’s representative “prepared in anticipation of litigation or for trial.” Then, the work product rule protects the mental impressions, conclusions, opinions, or legal theories of the taxpayer’s representatives as they appear in tangible form. Finally, Hickman protects the intangible work product of attorneys as it may appear in otherwise unprivileged documents.

Courts have applied three interpretive tests to Rule 26(b)(3). Two of the interpretive tests—the “use” test and the “purpose” test—severely limit work product protection of tax accrual work product from the IRS. The third test—the “because of” test does not limit the application of Rule 26(b)(3), but it is still unnecessary. The unaltered language of Rule 26(b)(3) protects some tax accrual workpapers and does not need any interpretive tests to apply it.

1. The “Use” Test

The First Circuit applies the “use” test to determine whether documents were prepared in anticipation of litigation. This interpretive test protects documents from an adversary where the documents were “prepared for use in possible litigation.” The wording of this test significantly narrows the actual language of Rule 26. Rule 26(b)(3) provides protection for materials “prepared in anticipation of litigation or for trial.” It is sufficient that the litigant anticipated litigation and the document was prepared in anticipation of it. There is no requirement that a document must be prepared “for use” in litigation. It is as if the en banc panel rested its opinion of the latter part of the rule, “prepared . . . for trial,” and ignored the “prepared in anticipation of litigation” part of the rule.

The only court that has applied this test is the en banc panel in Textron. The Rhode Island Federal District Court that heard the original proceeding applied work product protection to tax accrual workpapers and permitted Textron to retain certain documents the IRS sought in an audit. On appeal, the First Circuit Federal Appellate Court initially affirmed the decision of the district

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93. See Hickman, 329 U.S. at 509.
94. See Textron III, 577 F.3d 21, 27 (1st Cir. 2009) (en banc).
95. See id.
97. See Textron III, 577 F.3d at 29.
court with one dissent. An en banc panel of all the First Circuit judges issued an opinion effectively reversing the original appellate panel and the district court on the basis of the “use” test. Not surprisingly, the judge that drafted the original First Circuit opinion dissented in the en banc panel opinion, and the dissenting judge in the original panel drafted the en banc opinion. In the end, the First Circuit required Textron to turn the tax accrual workpapers over to the IRS because it found the workpapers were not prepared for use in potential litigation.

It is not clear how a document with an attorney’s mental impressions about the strength of a case—clearly protected as work product—could be used at trial. The court gave no examples to shed light on the issue. As discussed above, determinations on whether to litigate, litigation assessments, and opinion letters would likely be considered in anticipation of litigation and protected under the work product rule, but these documents would likely have no use at trial.

Coming up with the “use” test—a nearly insurmountable barrier to finding a document was prepared in anticipation of litigation—gave the court the opportunity to deny nearly any document work product protection. In this light, the “use” test appears result oriented. In concluding, the court rested its decision on protecting the IRS’s ability to obtain documents from taxpayers.

2. The “Purpose” Test

The Third and the Fifth Circuits determine whether a document was prepared in anticipation of litigation by applying a “purpose” test. This test is stated as follows: “[L]itigation need not be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.”

99. See generally United States v. Textron (Textron II), 553 F.3d 87 (1st Cir. 2009), vacated, 577 F.3d 21 (1st Cir. 2009).
100. See Textron III, 577 F.3d at 29, 32.
101. See generally Textron II, 553 F.3d at 87 (majority opinion drafted by Judge Torruella, and dissent drafted by Judge Boudin); Textron III, 577 F.3d at 21 (majority opinion drafted by Judge Boudin, and dissent drafted by Judge Torruella).
102. See Textron III, 577 F.3d at 29, 32.
103. See Hickman v. Taylor, 329 U.S. 495, 510 (1947) (“Not even the most liberal of discovery theories can justify the unwarranted inquiries into the files and mental impressions of an attorney.”).
104. See generally Textron III, 577 F.3d at 32 (“IRS access [to tax accrual workpapers] serves the legitimate, and important, function of detecting and disallowing abusive tax shelters.”).
105. See United States v. Rockwell Int’l, 897 F.2d 1255, 1266 (3d Cir. 1990); United States v. El Paso Co., 682 F.2d 530, 542-43 (5th Cir. 1982); United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981). Although the Eleventh Circuit has not had occasion to apply this test, it would be bound to do so because it follows Fifth Circuit law prior to October 1981. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (indicating that the Eleventh Circuit will adopt the precedent of the Fifth Circuit).
106. See El Paso, 682 F.2d at 542 (alteration in original) (quoting Davis, 636 F.2d at 1040).
As with the “use” test, the “purpose” test narrows the work product rule’s language significantly. Again, Rule 26(b)(3) provides protection for materials “prepared in anticipation of litigation.”\textsuperscript{107} It is sufficient that the litigant anticipated litigation and the document was prepared in anticipation of it. The rule does not limit the document’s creation to any particular motivating purpose for the rule to apply let alone a primary motivating purpose. The rule is also written so broadly that it contemplates protecting dual-purpose documents from disclosure to an adversary.

In \textit{El Paso}, the Fifth Circuit applied the “purpose” test to tax accrual workpapers.\textsuperscript{108} \textit{El Paso} held that litigants are entitled to work product protection if the primary motivating purpose of creating the document was potential litigation.\textsuperscript{109} The court’s analysis involved quite a stretch:

\begin{quote}
El Paso establishes its non-current tax account to bring its financial books into conformity with generally accepted auditing principles. The desire to please the accountants, in turn, is compelled by the securities laws. The primary motivating force behind the tax pool analysis, therefore, is not to ready \textit{El Paso} for litigation over its tax returns. Rather, the primary motivation is to anticipate, for financial reporting purposes, what the impact of litigation might be on the company’s tax liability. \textit{El Paso} thus creates the tax pool analysis with an eye on its business needs, not on its legal ones.\textsuperscript{110}
\end{quote}

Accordingly, the court gave the IRS access to all the documents among the tax accrual workpapers.

The result in \textit{El Paso}—awarding the IRS access to all the documents among the tax accrual workpapers—also seems result oriented. The court did not appear to consider that some of the documents turned over to the IRS might not have existed without the threat of litigation. In these documents, assessing the threat of litigation was the original motivating purpose. One would think that any subsequent purposes, such as financial reporting, would be secondary. It appears that the court was merely trying to help the IRS. The “purpose” test and the “use” test represent two minority views, and perhaps for a good reason.

\section*{3. The “Because of” Test}

Courts in the majority of circuits determine whether a document was prepared in anticipation of litigation by applying the “because of” test.\textsuperscript{111} This

\textsuperscript{107} \textit{Fed. R. Civ. P. 26(b)(3)(A).} \\
\textsuperscript{108} \textit{See generally El Paso, 682 F.2d at 538.} \\
\textsuperscript{109} \textit{See id. (quoting Davis, 636 F.2d at 1040).} \\
\textsuperscript{110} \textit{Id. at 543.} \\
\textsuperscript{111} \textit{See United States v. Deloitte L.L.P., 610 F.3d 129, 136-37 (D.C. Cir. 2010); United States v. Richey, 632 F.3d 559, 568 (9th Cir. 2011); United States v. Roxworthy, 457 F.3d 590, 593 (6th Cir. 2006); PepsiCo, Inc. v. Baird, Kurtz & Dobson L.L.P., 305 F.3d 813, 817 (8th Cir. 2002); United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998); Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co.,}
interpretive test permits a litigant to protect documents and materials from an adversary where “‘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.’”\(^{112}\) The “because of” language originates in the Wright & Miller treatise from 1970.\(^{113}\) Courts began adopting it in 1975.\(^{114}\)

*Deloitte* and *Wells Fargo* applied this test, and in both cases the court protected some, but not all, documents in the tax accrual workpapers from the IRS.\(^{115}\) The district court and the original appellate panel in *Textron* also applied this test and protected tax accrual workpapers containing opinion work product.\(^{116}\) On reconsideration of *Textron* on appeal, however, the en banc panel purported to apply this test, but changed it into the “use” test. This change permitted the IRS access to the taxpayer’s opinion work product in its tax accrual workpapers.\(^{117}\) As discussed above, it seems like the en banc panel held as it did to strengthen the IRS’s access to information even though the law did not support it.

Of the three interpretive tests used to apply Rule 26(b)(3), the “because of” test is the most consistent with the language of the rule in that applying either the “because of” test or the unaltered language of the rule yields the same results. Consider a court presiding over a summons of tax accrual workpapers in which the taxpayer had placed a legal memorandum opining that the taxpayer would prevail in litigation with the IRS over a transaction not yet begun. Under the “because of” test, Rule 26(b)(3) protects documents “prepared because of litigation” from an adversary’s grasp. In this scenario, it is clear that the document was prepared “because of” litigation because the subject matter is the litigation.

The results would be the same applying the unaltered language of the rule. Rule 26(b)(3) protects documents prepared in anticipation of litigation. As with

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967 F.2d 980, 984 (4th Cir. 1992); Binks Mfg. Co. v. Nat’l Presto Indus., 709 F.2d 1109, 1119 (7th Cir. 1983); In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979).

112. See *Deloitte*, 610 F.3d at 137 (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (quoting 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2024 at 198 (1970)); accord Richey, 632 F.3d at 568; Roxworthy, 457 F.3d at 593; PepsiCo, 305 F.3d at 817; Adlman, 134 F.3d at 1202; Nat’l Union Fire Ins. Co., 967 F.2d at 984; Binks Mfg. Co., 709 F.2d at 1119; In re Grand Jury Proceedings, 604 F.2d at 803.

113. See Roxworthy, 457 F.3d at 593 (noting that the “because of” language was “first articulated in Wright & Miller’s Federal Practice & Procedures”).


116. See *Textron I*, 507 F. Supp. 2d 138, 142-43, 149-50, 155 (D.R.I. 2007), aff’d in part, rev’d in part, 553 F.3d 87 (1st Cir. 2009), vacated, 577 F.3d 21 (1st Cir. 2009) (en banc) (the tax accrual workpapers contained a spreadsheet reflecting a list of uncertain tax positions, litigation assessments, and the amounts reserved for the uncertain tax positions, while the backup workpapers included memoranda assessing litigation hazards).

117. See *Textron III*, 577 F.3d 21, 32 (1st Cir. 2009) (en banc) (Torruella, J., dissenting).
the “because of” test, it is clear that the document was prepared “in anticipation of litigation” because the subject matter is the litigation.

The reason this consistency likely exists is that the “because of” test was probably not intended to be an interpretive test. When Wright & Miller presented the “because of” language, it was to explain that prior to the 1970 amendments to the federal rules of civil procedure some courts applied work product protection to documents created only after the commencement of litigation. The language, “in anticipation of litigation,” clarified that litigants may withhold documents prepared before commencement of litigation as protected work product. The “because of” test is unnecessary because it yields the same results as the unaltered language of Rule 26(b)(3), and it was not intended to be an interpretive test anyway.

4. The Unaltered Language of Rule 26(b)(3)

The language of Rule 26(b)(3) alone, without interpretive tests, supports protecting certain documents in tax accrual workpapers from disclosure to the IRS. Rule 26(b)(3) provides protection from disclosure to “documents and tangible things that are prepared in anticipation of litigation or for trial . . . .” In the case of tax accrual workpapers, there are usually two types of documents at issue—legal documents and factual documents. The legal documents may analyze whether to litigate a tax position, analyze the strength of the taxpayer’s and the IRS’s arguments, or set forth a legal opinion on the tax consequences of a particular transaction. These documents are nearly always prepared in anticipation of litigation. If the taxpayer had not anticipated litigation then it would have no need for documents containing these types of legal analysis.

The factual documents—those that support the factual aspects of the transaction—require further inquiry. Some factual documents might very well have been created prior to the taxpayer realizing the IRS would challenge a particular position or transaction. For example, assume a credible tax advisor approaches the taxpayer with a way to structure a business to make it more tax efficient. If the taxpayer is interested, the taxpayer’s employees will likely document the opportunity. They may determine such variables as how much money or which assets would be involved in the transaction, how long it will take to complete, the parties involved, how it would be reflected in the financial statements, and the overall impact on the tax return. These documents may or may not be prepared in anticipation of litigation.

The language of Rule 26 calls for a factual determination of whether the taxpayer anticipated litigation at the time the taxpayer created the document. Documents prepared before a taxpayer has any reason to suspect the IRS would

118. See 8 WRIGHT ET AL., supra note 5, § 2024, 498-503 & n.16.
challenge a particular transaction would likely not be prepared in anticipation of litigation. Later, however, the taxpayer might conclude after further research that the IRS opposes the transaction or learn the IRS issued a notice declaring the intent to litigate against any taxpayer who enters into such a transaction. The research conclusion or the IRS’s declaration of its intent to litigate would make the taxpayer aware of the IRS’s strong opposition to the transaction. Although there is not always a clear dividing line as to when the taxpayer became aware of the IRS’s opposition, documents prepared after this point, even if of the factual type, should be considered prepared in anticipation of litigation.

There is no need to append the rule with a “because of” test, a “use” test, or a “purpose” test. The language of the rule is sufficient to come to a result when applied to a set of facts involving tax accrual workpapers. Although the “because of” test may not change the result of the bare language of the rule, the “use” test and the “purpose” test drastically change the result when applied to tax accrual workpapers. The holding in Textron—applying the “use” test—appears to ignore the language of the rule. Textron held that Rule 26(b)(3) protects only documents prepared for use in litigation or trial. Numerical litigation assessments and legal opinion letters are prepared in anticipation of litigation even though they may have little or no use in litigation or trial. Yet, Textron handed the taxpayer’s litigation assessments to the IRS on a silver platter.

5. Fairness

Some of the opinions providing the IRS access to tax accrual workpapers appear to rest on policy grounds and a weak application of the language of Rule 26. But it seems unfair for the IRS to obtain a corporate taxpayer’s tax accrual workpapers with litigation assessments over the taxpayer’s objection. The IRS has not disputed that the tax accrual workpapers they seek contain the type of mental impressions that are protected under the work product rule and Hickman when prepared in anticipation of litigation or trial. Rather, the IRS argues that it is entitled to the workpapers under Arthur Young, that the taxpayer’s purpose for creating the workpapers was not for litigation and that the workpapers were created in the ordinary course of business. These mental impressions are what the IRS has sought most aggressively. Obtaining its adversary’s attorney work product can give the IRS an advantage; it can see how the taxpayer has

120. See supra Part IV.A.3.
121. See supra Part IV.A.1.
122. See supra Part IV.A.2.
123. See United States v. El Paso Co., 682 F.2d 530, 545-46 (5th Cir. 1982) (Garwood, J., dissenting) (suggesting that the IRS does not have a legitimate purpose for seeking tax accrual workpapers, that the IRS’s requests for them focus on protected opinion work product, and that the requests are merely for the IRS’s convenience of having the taxpayer’s work product in hand—which is unacceptable).
preparing to litigate against the IRS and at what amount the taxpayer may settle. It is unfair for the IRS to get inside the mind of the taxpayer’s attorney and litigate its case “either without wits or on wits borrowed from the adversary.”  

Obtaining this attorney work product is likely the main motivation for the IRS to seek the workpapers. The IRS does not say that, of course, but the evidence supports it—the IRS has even created a schedule, schedule UTP, for corporate taxpayers to report their uncertain tax positions on their corporate tax returns. The IRS’s official position is that it seeks tax accrual workpapers so that it can more effectively allocate its limited resources. The IRS has not publicly provided any more detail about its motives. Judge Garwood, dissenting in El Paso, put it succinctly:

[T]he taxpayer’s theories and opinions are sought merely because they may “focus and concentrate the Service’s energy,” “may be useful to the IRS as a ‘road map’ through a company’s tax return,” and will enhance “the efficiency” of the “IRS audit.” Accordingly, here the bottom line is not figures or facts or even opinions; it is, rather, the convenience of the Service. That will not suffice.

Although Judge Garwood looked on the IRS’s reasoning unfavorably, it is likely the reality is even worse. It appears that the documents the IRS seeks the most aggressively in an audit—litigation assessments—are of no use to the IRS for the audit. An auditor investigates the facts of the taxpayer’s tax return positions and does not assess litigation hazards. By process of elimination, the only IRS personnel that have a use for the litigation assessments are the IRS’s trial attorneys, who can use this information in the development of their own litigation strategy against the taxpayer. It appears that the policy of seeking tax accrual workpapers when a taxpayer has engaged in listed transactions is a proxy for asking for the taxpayer’s protected work product. It seems wholly unfair for the IRS to argue that the taxpayer should not be entitled to protect documents prepared in anticipation of litigation when it is also clear that the IRS is asking for the documents because the IRS itself anticipates litigation.

B. REFUTING THE COUNTERARGUMENTS TO PROTECTION

Many oppose giving corporate taxpayers any kind of immunity under the work product doctrine to protect tax accrual workpapers from the investigative

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126. See El Paso, 682 F.2d at 546 (Garwood, J., dissenting) (citations omitted).
127. See SALZMAN & BOOK, supra note 50, ¶ 8.11[3] (“The agent also cannot take into account the hazards of litigation.”).
authority of the IRS. The arguments against denying the IRS access to tax accrual workpapers appear to be aimed at protecting the fisc. The work product rule exists, however, to protect the adversarial process. Although it is important for the IRS to collect revenue, it is also important for attorneys, taxpayers, and tax advisors to be able to prepare their cases in litigating against the vast resources of the sovereign acting through the IRS. Taxpayers have to be able to stand up to the IRS the same way that an individual needs to be able to stand up against an automotive company that has violated its duty of care or an individual inventor who needs to be able to stand up to a conglomerate patent infringer. Adversarial litigation makes this all possible. The rules of fair litigation apply to all litigants. Congress has not granted the IRS any special advantage in civil litigation. The IRS should live by the same rules as any other litigant, which means it should not be able to invade the private files of an attorney and its client in preparing a claim against the IRS.

Those that appear to believe the IRS should have an advantaged status over other litigants have made a number of arguments countering the work product rule. Perhaps if one starts with the premise that these corporate taxpayers are bad actors and the IRS should be given special powers to deal with them, the arguments make sense. Otherwise, these arguments appear invalid and incorrect on the basis of the work product rule, Hickman, and basic notions of fairness.

1. Supreme Court Precedent

The IRS often argues that Arthur Young entitles the IRS to tax accrual workpapers. Arthur Young held that the IRS was entitled to tax accrual workpapers prepared and held by a CPA firm for the purpose of its audit of corporate taxpayers. This holding, however, does not apply to all tax accrual workpapers. It applies only to tax accrual workpapers created by a CPA firm in an audit. The Court explicitly rejected the argument that the work product doctrine should extend to tax accrual workpapers prepared by the CPA firm, but it did so on the basis that the CPA has a duty to the public rather than a duty to the client as would an attorney. Arthur Young does not dispel the notion that the work product rule protects documents prepared by a party or a party’s


130. See, e.g., United States v. Deloitte L.L.P., 610 F.3d 129, 135-36 (D.C. Cir. 2010) (IRS arguing that Arthur Young’s holding regarding tax accrual workpapers ought to apply to any audit documents like the one at issue); United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1087 (N.D. Cal. 2002) (arguing that the court should follow Arthur Young in holding that there is no accountant work product privilege to protect tax accrual workpapers).


132. See id. at 817.
representative in anticipation of litigation even if they are tax accrual workpapers.\textsuperscript{133}

It also appears that the result in Arthur Young was ill advised from a policy standpoint. Since that case, the playing field has changed.\textsuperscript{134} Taxpayers permit fewer CPA firms reviewing reserves for uncertain tax positions to hold on to sensitive documents as it did before Arthur Young.\textsuperscript{135} Although the CPA firms are not representatives, they would not want the taxpayers they are auditing to be harmed because of their retention of sensitive documents. It appears that Arthur Young made taxpayers unwilling to let a CPA firm create or keep harmful tax accrual workpapers.

The IRS takes the position that the Supreme Court provided the IRS access to all tax accrual workpapers in Arthur Young. That case, however, provides scant help for the IRS. Attorney work product was considered in Arthur Young and distinguished because the tax accrual workpapers were held by a CPA firm so the case does not apply where the taxpayer’s attorneys create the documents to assess litigation against the IRS for their clients—even if the documents find their way to the tax accrual workpapers. Moreover, Arthur Young had a negative effect from a policy perspective in that CPA firms have less access to documents needed to review reserve accounts for financial statements.

2. Differences in Tax Cases

Another argument presented by some writers is that tax cases are different from other cases.\textsuperscript{136} According to this argument, the IRS should have access to all tax accrual workpapers in order to permit the IRS to find and negate questionable tax planning.\textsuperscript{137} But the competing interests of the litigants are not different in tax cases. Some suggest that tax accrual workpapers are not prepared in anticipation of litigation. In reality, however, some documents in the

\textsuperscript{133} See Deloitte, 610 F.3d at 136-39 (holding that a document prepared during a CPA’s annual audit could have been prepared in anticipation of litigation thus remanding for in camera review by the district court).

\textsuperscript{134} See e.g., Wells Fargo & Co. v. United States, Nos. 10-57 (JRT/JJG), 10-95 (JRT/JJG), 2013 WL 2444639, at *43 (D. Minn. June 4, 2013) (discussing the role of an auditor and whether tax accrual work papers should be considered work product); Textron III, 577 F.3d 21, 27 (1st Cir. 2009) (en banc) (exploring whether tax accrual work papers are protected under work product doctrine when they are held by the company and merely shown to the auditors in compliance with securities laws).

\textsuperscript{135} See, e.g., Textron III, 577 F.3d at 32 (the taxpayer had shown sensitive documents in its tax accrual workpapers to its CPA firm rather than allowing the CPA firm possess them).

\textsuperscript{136} See id. at 32; Henry J. Lischer, Jr., Work Product Immunity for Attorney-Created Tax Accrual Workpapers?: The Aftermath of United States v. Textron, 10 FLA. TAX REV. 503, 505 (2011) (arguing that the broad authority provided in the Internal Revenue Code supports providing IRS access to all tax accrual workpapers); Ventry, Protecting Abusive Tax Avoidance, supra note 38, at 859 (discussing the different mandated requirements involved in tax accrual workpapers).

\textsuperscript{137} See Textron III, 577 F.3d at 32 (“IRS access [to tax accrual workpapers] serves the legitimate, and important, function of detecting and disallowing abusive tax shelters.”); Ventry, Protecting Abusive Tax Avoidance, supra note 38, at 859 (suggesting that the work product doctrine should be narrowly construed because of Congress’s policy choice to give the IRS broad access to all relevant information).
tax accrual workpapers are prepared in anticipation of litigation and some are not.  

Some writers suggest the IRS should have the authority to gain access to all tax accrual workpapers—apparently without regard to whether they were prepared in anticipation of litigation or contain attorney opinion work product—because our tax revenues depend on it.\(^\text{138}\) But there is no reason or statutory authority to treat the IRS differently. Litigants in nontax cases are subject to the work product rule. Nontax government agencies are limited as to what they can get from those they regulate because they are subject to the work product rule. Litigation is an important way to resolve disputes. There is no reason to provide the IRS special authority. Congress could make the IRS a super-litigant with special powers, but it has not. Congress has not provided the IRS with powers beyond any other investigative agency, as it should be.

There are differences in tax cases, but the differences support providing work product protection to qualifying tax accrual workpapers. In tax cases there are reasons to anticipate litigation before a precipitating event has occurred. In other types of cases, such as a car collision case, there is no reason to anticipate litigation before the collision occurs. Documents assessing the aspects of a potential lawsuit after the car wreck, but before a lawsuit is filed, would be protected under the work product rule. Conversely, the potential plaintiff in tax litigation has to determine whether to sue, and the research and assessment he does before the claim show he is anticipating litigation. If a car collision plaintiff could research and assess a claim before it occurred, it would be done in anticipation of litigation. It would be impossible to begin preparation of such a case before the collision occurred, however, because there would be no facts to research and no specific claim to be made.

Tax cases are different in that a taxpayer or tax advisor might develop an idea for a transaction that could result in favorable tax consequences. In planning the transaction, a taxpayer or tax advisor may have to look for a way to succeed in litigation with the IRS before the event—the filing of the tax return—occurs. Whether to enter into a particular transaction may depend on if a taxpayer or tax advisor believes litigation with the IRS would result in a favorable outcome. In addition, the IRS publishes lists of transactions it finds questionable and litigates those transactions. For example, in 2000, the IRS publicly identified a transaction known as “son of BOSS” as one it considered invalid.\(^\text{139}\) Taxpayers who entered into such transactions after the IRS identified it had good reason to anticipate litigation before entering into the transaction and filing an income tax return reflecting the transaction. In 2004, the IRS published


a settlement initiative where it would settle with taxpayers who came forward and disclosed their son of BOSS transactions.\(^{140}\) Those who did not come forward eventually faced litigation.

The phrase “in anticipation of litigation” does not by its terms preclude protection of litigation assessments before an event occurs. Indeed, the language of the rule does not temporally restrict protection to documents prepared after a transaction or occurrence. There is no reason to impose such a restriction. The rule protects the adversarial process. The adversarial process can take place before an event occurs that could give rise to litigation, which is just as important to protect as the adversarial process after an event occurs that could give rise to litigation.

3. Remoteness

The IRS and some commentators have argued that tax accrual workpapers are prepared too remote in time to constitute protected work product.\(^{141}\) Nevertheless, the work product rule imposes no temporal restrictions on when a document was created in anticipation of litigation.\(^{142}\) It is hard to imagine the Supreme Court providing access to work product on the basis that the anticipation of litigation is too remote because it has held that a litigant can make a valid work product claim in subsequent litigation unrelated to the originally anticipated case.\(^{143}\)

Even an argument that there must be more than a mere remote possibility of litigation cannot be supported.\(^{144}\) The argument might withstand the challenge where a potential defendant has claimed anticipation of litigation,\(^{145}\) but in tax cases, however, it is the taxpayer that sues the government. Thus, it is in the


\(^{141}\) See Ventry, Primer on Tax Work Product, supra note 128, at 880 (“In creating tax accrual workpapers, an applicant can never possess an objectively reasonable belief that litigation is likely. The temporal connection between preparation of the documents and the commencement of litigation is too attenuated and fraught with uncertainty to support immunizing documents from discovery under the work product doctrine.”).

\(^{142}\) See generally Fed. R. CIV. P. 26(b)(3) (lacking mention of any temporal requirement). The Supreme Court has provided that:

26(b)(3) does not in so many words address the temporal scope of the work-product immunity and a review of the Advisory Committee’s comments reveals no express concern for that issue. But 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.


\(^{143}\) See Grolier, 462 U.S. at 25-27.

\(^{144}\) Contra Ventry, Protecting Abusive Tax Avoidance, supra note 38, at 866.

\(^{145}\) See, e.g., In re Grand Jury Subpoena, 220 F.R.D. 130, 162 (D. Mass. 2004) (“[T]here is nothing to suggest that potential products liability litigation was even an important motivating factor in Attorney’s decision to take notes.”); Garfinkle v. Arcata Nat’l Corp., 64 F.R.D. 688, 690 (1974) (“Defendants have not argued or demonstrated that the requested documents were prepared in contemplation of litigation and thus the claim of work product must be overruled.”).
taxpayer’s control as to whether it will litigate against the IRS, which makes anticipation of litigation nearly always reasonable. Perhaps it is the taxpayer’s control over whether litigation takes place that causes the IRS to seek out tax accrual workpapers when the taxpayer has engaged in a listed transaction as in \textit{Textron}.^{146}

4. Ordinary Course of Business

Commentators have argued that tax accrual workpapers do not deserve protection from the IRS under the work product rule because taxpayers prepare them in the ordinary course of business. This argument is partially correct. This argument stems from the Advisory Committee Notes from the amendment to Rule 26 which added the work product rule. The Notes provide that “[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision.”^{147} As noted by the Court of Federal Claims, “this advisory committee note also ‘indicates by implication that materials prepared pursuant to public requirements but related to litigation are protected.’”^{148}

Some tax accrual workpapers do not deserve work product protection because they were prepared in the ordinary course of business and unrelated to litigation. Yet, others do deserve protection because they were not prepared in the ordinary course of business but were related to litigation, or were prepared in anticipation of litigation. Even if a document is prepared in the ordinary course of business unrelated to litigation, \textit{Hickman} may still protect attorney opinion work product in the content of the document.

The relevant dividing line between a document prepared in the ordinary course of business and a document prepared in anticipation of litigation is whether the document would have been prepared regardless of the litigation.^{149} If the document would have been prepared regardless of whether litigation was anticipated, it is fair to say it was prepared in the ordinary course of business unrelated to litigation and therefore not protected work product. If the document

\begin{itemize}
\item See \textit{Textron III}, 577 F.3d 21, 23 (1st Cir. 2009) (en banc).
\item See United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998) (stating the work-product privilege does not apply to “documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.”); Ventry, Primer on Tax \textit{Work Product}, supra note 128, at 879 (“If a court determines that a document was prepared... irrespective of the prospect of litigation... the court cannot award work product immunity under the traditional parameters of the work product doctrine...”).
\end{itemize}
would not have been prepared absent anticipated litigation, it is fair to say it is work product protected by the work product rule.

Tax accrual workpapers often include various types of documents such as e-mail messages and memoranda documenting the amount of the transaction, the parties involved, the entities involved, and the responsibilities of various employees working on the transaction. These are documents that would likely have been prepared prior to the transaction and would have been prepared for any transaction as a matter of course. In other words, despite finding these documents in the tax accrual workpapers, they would have been prepared in the ordinary course of business and were later gathered into the workpapers. They would be unprotected because they were not prepared in anticipation of litigation.

Another type of document that could appear in tax accrual workpapers is the legal opinion written before a transaction assessing the legal theories as to how the transaction would fare in court. A legal opinion such as this is not one that would have been prepared irrespective of anticipated litigation. Rather, it would have been prepared precisely because of anticipated litigation. These documents should be protected under the work product rule.

One type of document created to put in the tax accrual workpapers is one that contains the taxpayer’s assessment of the likelihood that the IRS will disallow claimed benefits and prevail in court. This type of document would not exist absent the litigation and, therefore, should be protected. The Textron majority missed this distinction, and instead stated as follows:

In [Maine v. United States Department of Interior], we said that work product protection does not extend to “‘documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.’” Maine applies straightforwardly to Textron’s tax audit work papers—which were prepared in the ordinary course of business—and it supports the IRS position.

The dissent persuasively pointed out the error of the majority’s reasoning, though focused on different nuances. It is clear that the workpapers at issue were not documents establishing the facts of the transaction prepared in the ordinary course of business. Rather, at issue were documents that assessed litigation hazards so they would not have been prepared absent the litigation. If

150.  See United States v. Deloitte L.L.P., 610 F.3d 129, 134-37 (D.C. Cir. 2010) (discussing legal memorandum created prior to litigation with legal theories concerning meetings, charts, and tax issues for a partnership); Adlman, 134 F.3d at 1195 (discussing the memorandum created prior to litigation containing legal theories of an accountant and attorney evaluating tax implications of a transaction).
151.  See Deloitte, 610 F.3d at 133, 139 (discussing legal opinion of outside counsel that was at issue, with the IRS conceding that it was work product).
152.  Textron III, 577 F.3d 21, 30 (1st Cir. 2009) (en banc) (citing Maine v. U.S. Dep’t of Interior, 298 F.3d 60, 70 (1st Cir. 2002)).
153.  See id. at 32-34 (Torruella, J., dissenting).
Textron had not anticipated litigation, the company would not have found it necessary to assess the litigation hazards. To the extent in camera review would have confirmed the documents were assessments of litigation hazards, the court should have permitted Textron to withhold them from the IRS.

5. Function

Finally, some writers have argued that tax accrual workpapers serve an accounting or regulatory function rather than a litigation function, but this assertion is irrelevant and inaccurate. Work product protection applies to documents prepared in anticipation of litigation. Each document in the tax accrual workpapers is potentially an analysis of the litigation hazards of a return position. That is why the IRS wants them. If a document was prepared in anticipation of litigation, the original function for which the document was prepared is litigation. If the original function of a document among the tax accrual workpapers was for one employee to inform another employee of the value and cost basis of assets transferred to another party, in a transaction with an uncertain tax liability, then perhaps the document was not prepared in anticipation of litigation.

Commentary on the Textron case suggests function is important, but Rule 26(b)(3) has no language about function. The Advisory Committee Notes suggest that documents made in the ordinary course of business are not subject to work product protection, yet the notes also say that the rule does not change Hickman. It appears that the notes are just providing an example of a situation where the documents in question were not prepared in anticipation of litigation rather than using the “ordinary course of business” term as the dividing line. In addition, the cases the notes summarize do not involve attorney opinion work product.

It is hard to imagine that the Committee that authored Rule 26(b)(3) contemplated that an agency in the executive branch of the government (such as the IRS) would be able to get its hands on documents otherwise protected under

154. See Deloitte, 610 F.3d at 137. The IRS argued function is important rather than content. Id.

155. See Ventry, Protecting Abusive Tax Avoidance, supra note 38, at 859 (“On the facts, the court confused why corporate taxpayers generate tax accrual workpapers, focusing on the documents’ content rather than their function.”).

156. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 501 (1970) (citations omitted) (“Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision.”).

157. See id. (“No change is made in the existing doctrine, noted in the Hickman case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.”).

158. In one case, the issue involved “written reports” the defendant “made to the owners and lessee of the tractor-trailer within a short time after the accident.” See Goosman v. A. Duie Pyle, Inc., 320 F.2d 45, 47 (4th Cir. 1963).
the work product doctrine (such as tax accrual workpapers) because another part of the executive branch (such as the SEC) requires a third party (such as a CPA firm) to be persuaded of the accuracy of other public documents (such as financial statements).

V. CONCLUSION

The IRS is entitled to tax accrual workpapers so long as they are neither privileged nor contain protected work product. The IRS seems desperate in its pursuit of the litigation assessments of uncertain tax positions that invariably come with the tax accrual workpapers. Perhaps the IRS is not confident it will always be able to get them during an examination of a taxpayer.

The IRS appears so desperate for these assessments of uncertain tax positions that it created a schedule—schedule UTP—for corporate taxpayers to report their uncertain tax positions on their corporate tax returns.\textsuperscript{159} It seems like requesting these assessments on a tax return is outside the scope of what a tax return is. Absent the litigation assessments, tax returns do not ask for privileged information. On a previous occasion where the IRS requested privileged information on a tax form, the idea fell through.\textsuperscript{160}

Perhaps it is hard to fault the IRS for asking for tax accrual workpapers in examinations when some courts and writers support it. The adversary process, however, is worth protecting. The law has not and should not grant the IRS special authority beyond that of other parties in litigation. Doing so threatens the legitimacy of the government in tax disputes.

Some taxpayers are willing to turn over tax accrual workpapers without challenging the IRS. If the taxpayer is happy to turn them over, everyone wins whether the taxpayer could have made a work product claim or not. For the IRS to persist in its pursuit of documents (documents it would not turn over if the tables were reversed) because they are subject to work product protection seems underhanded and unfair. The IRS should discontinue this practice. Moreover, the Supreme Court should clarify that the IRS is not entitled to obtain a taxpayer’s protected work product in its tax accrual workpapers.

\textsuperscript{159} See SALTZMAN & BOOK, supra note 50, ¶ 8.07[3][c].

\textsuperscript{160} See Marchetti v. United States, 390 U.S. 39, 48 (1968) (conviction for gambling and tax evasion reversed because tax form required disclosure of information protected by the Fifth Amendment privilege).