Prophetic or Misguided? The Fifth Circuit’s (Increasingly) Unpopular Approach to the Work Product Doctrine

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Abstract

Codified in Federal Rule of Civil Procedure 26(b)(3), the federal work product doctrine's "anticipation of litigation" requirement has been the source of a long-standing circuit split. For almost three decades, the Fifth Circuit has applied a narrow "primary purpose" test in interpreting the requirement. No other federal

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circuit court has ever adopted that standard. Instead, most have applied a more permissive "because of" test. The circuit split results in an abbreviated scope of work product doctrine protection for federal court litigants in Texas, Louisiana, and Mississippi. As evidenced by the case law, the impact has been greatest on taxpayers litigating federal tax issues. However, corporate litigants have also been widely affected even when tax is not implicated.

Although the Supreme Court has not been inclined to resolve the circuit split in the past, the visibility of this issue has been raised recently by the high profile case, United States v. Textron, Inc. in which the "because of" test was applied to determine whether the work product doctrine protected a taxpayer's sensitive tax pool analysis documents from an I.R.S. summons. The First Circuit's original panel opinion determined that the "because of" test did protect such documents. By contrast, prior Fifth Circuit precedent had already applied the narrow "primary purpose" test to deny work product protection to the same type of documents. Nonetheless, the First Circuit eventually vacated its original panel opinion and recently issued an en banc opinion that applied a novel and much more restrictive version of the "because of" test to deny protection to the tax pool analysis documents. As a result, there is now uncertainty as to the basic requirements of the federal work product doctrine. Textron is currently appealing the case and there is speculation that the Supreme Court will grant certiorari to resolve the uncertainty.

In an effort to assess the propriety of the Fifth Circuit's "primary purpose" test, this article traces the history of the federal work product doctrine, analyzes the text of Rule 26(b)(3), and reflects on the underlying policy goals the doctrine is intended to serve. This article concludes that the "primary purpose" test is at odds with the plain meaning of Rule 26(b)(3) and severely undercuts the policy aims of the work product doctrine. By contrast, the traditional formulation of the "because of" test is both doctrinally correct and appropriate from a policy perspective. It is suggested that the Supreme Court should explicitly reject the "primary purpose" test if the high court grants certiorari in the Textron case. In the alternative, the Fifth Circuit is urged to abandon its misguided work product precedent and follow the approach of the majority of its sister circuits.
I. INTRODUCTION

As currently codified in Federal Rule of Civil Procedure 26(b)(3), the federal work product doctrine provides a limited immunity from discovery for materials that are "prepared in anticipation of litigation." For decades, the courts and practitioners have grappled with issues associated with the task of identifying when items are prepared in a manner such that the doctrine's immunity is available. One of the most difficult issues arises when a document is prepared because of two or more motivations. In such instances, it can be unclear whether the requirement is met.

Since the early 1980s, the Fifth Circuit has taken a narrow approach to this issue; the court has opined that the "anticipation of litigation" requirement is satisfied only when the "primary motivating purpose" of a document is to "aid in possible future litigation." The Fifth Circuit is the only federal circuit that has adopted this approach. Indeed, the majority of the other circuits have adopted a much less restrictive standard—the "because of" test, which protects documents that are prepared because of existing or expected litigation. When the broader "because of" test has been

1. The work product doctrine is known by various names. See EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 478 (4th ed. 2001) (noting that the terms "doctrine," "immunity," and "privilege" have been used to describe the protection in question); see also Varuzza by Zarrillo v. Bulk Materials, Inc., 169 F.R.D. 254, 257 (N.D.N.Y. 1996) (stating that the work product doctrine is more accurately described as a qualified immunity than a privilege); Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55, 58 (N.D. Ohio 1953) (observing that the rule has been termed a "privilege," an "exemption," and an "immunity"). For the sake of simplicity and consistency in this article, it will consistently be referred to as the "work product doctrine" or more succinctly as the "doctrine."

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


5. See, e.g., Maine v. United States, 298 F.3d 60, 67 (1st Cir. 2002) ("[D]ocuments should be deemed prepared for litigation and within the scope of Rule 26 if, 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." (quoting United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998))).
applied, it has been much easier for litigants to garner work product doctrine protection for documents prepared with more than one motivation.\textsuperscript{6} The Supreme Court has not yet had occasion to address this circuit split.

In various contexts, documents might be prepared with more than one motivation such that difficulty can arise in discerning whether the “anticipation of litigation” requirement is satisfied. However, as evidenced by published case law, the question is most frequently encountered when tax law is implicated, as well as in the broader corporate world even when tax is not at issue.\textsuperscript{7} In both settings, documents often serve multiple purposes because the potential for litigation is constant and ubiquitous. As a result, litigation concerns are implicated in many different types of documents, which raises the question as to whether the “anticipation of litigation” standard is met. The impact of the question is particularly great in the tax setting because of the frequent unavailability of the attorney-client privilege (or the derivative I.R.C. section 7525 privilege) due to the return preparation exception\textsuperscript{8} and waiver. Indeed, the work product doctrine can sometimes be the only viable privilege available to tax advisors. As a result of the circuit split, the clients of both tax advisors and corporate lawyers advising on non-tax matters are particularly disadvantaged in the

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\item \textsuperscript{6} See, e.g., \textit{Adlman}, 134 F.3d at 1202 (“Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision.”).
\item \textsuperscript{7} See, e.g., \textit{United States v. Roxworthy}, 457 F.3d 590 (6th Cir. 2006) (discussing the “in anticipation of litigation” criterion of the rule governing work product doctrine); \textit{United States v. El Paso Co.}, 682 F.2d 530 (5th Cir. 1982) (holding that the taxpayer’s tax pool analysis documents were not protected as work product materials); \textit{United States v. Davis}, 636 F.2d 1028 (5th Cir. 1981) (holding that summoned tax documents were not within the scope of the work product doctrine); \textit{United States v. Textron Inc.}, 507 F. Supp. 2d 138, 155 (D.R.I. 2007) (holding tax accrual workpapers were protected by the work product privilege), vacated, 557 F.3d 21 (1st Cir. 2009).
\item \textsuperscript{8} See Claudia V. Pease-Wingenter, \textit{Does the Attorney-Client Privilege Apply to Tax Lawyers?: An Examination of the Return Preparation Exception to Define the Parameters of Privilege in the Tax Context}, 47 WASHBURN L.J. 699 (2008) (explaining the return preparation exception and noting that it covers three distinct types of communications—preexisting documents, workpapers, and client communication of factual information).
\end{itemize}
Fifth Circuit where the scope of the work product doctrine is sharply curtailed.

This article examines the circuit split in an effort to identify the approach that is most compatible with the text and purpose of the federal work product doctrine. Section II of this article traces the history of the federal work product doctrine from Supreme Court precedent to codification in the Federal Rules of Civil Procedure. Section III of the article describes the application of the "primary purpose" test in the Fifth Circuit and the "because of" test in other circuits. Section IV provides analysis of the competing tests in light of the text and purpose of the federal work product doctrine. Section V states the author's conclusion.

II. HISTORY OF THE FEDERAL WORK PRODUCT DOCTRINE

A. Hickman v. Taylor

Although the work product doctrine is presently codified,9 it originated in case law. In 1947, the Supreme Court recognized the protection in its landmark case, Hickman v. Taylor.10 However, to understand the case and the impact of its holding, it is first important to appreciate the legal and historical context of the Court's decision.

In 1937, the Federal Rules of Civil Procedure ("Rules") were adopted and had the effect of greatly expanding the role of discovery.11 Prior to that time, there was not a need for work product doctrine protection because discovery devices were of

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11. Jeff A. Anderson et al., Special Project, The Work Product Doctrine, 68 CORNELL L. REV. 760, 766 (1983); see also Stephen N. Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. REV. 691, 698 (1998) (explaining that until 1935, when Federal Rules of Civil Procedure 26 through 37 were drafted, discovery was provided for in two federal statutes dealing with depositions); Elizabeth Thornburg, Rethinking Work Product, 77 VA. L. REV. 1515, 1518 (1991) ("Before the 1939 Federal Rules of Civil Procedure, there was virtually no discovery in actions of law and little discovery in equity. The general unavailability of discovery procedures obviated the need to raise the specific issue of whether an attorney's trial preparations were discoverable.")
limited use, and even when they applied, they did not permit the disclosure of an adversary's case. After the adoption of the Rules, however, the courts encountered numerous challenges when a party sought to prevent the discovery of her trial preparation materials.

At the time, the Rules contained no explicit protection to shield such trial preparation materials. However, to many there was an intuitive sense that such protection should be extended. To achieve this result, lower courts relied upon a number of legal justifications including a finding that there was unfairness, a lack of materiality, or that the sought materials were hearsay. Some courts achieved the desired protection by expanding the traditional scope of attorney-client privilege. However, not all courts provided protection. Because of the lack of explicit protection in the Rules, some courts held that materials prepared in anticipation of litigation or for trial were generally subject to discovery.

Because the case law was in disarray, the Advisory Committee worked in the mid-1940s to draft an amendment to the Rules. However, by the time the Advisory Committee had proposed an amendment, the Supreme Court had granted certiorari in *Hickman*. The Court opted to articulate the rule for protecting trial preparation materials in its opinion instead of adopting the Advisory Committee's amendment.

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12. See Anderson et al., *supra* note 11, at 765 ("The discovery devices at law were narrowly defined and of limited use, and the primary equitable discovery device, the bill of discovery, did not permit disclosure of an adversary's case"); Subrin, *supra* note 11, at 698 (describing the limited vehicles for discovery prior to 1937); Thornburg, *supra* note 11, at 1518 (explaining that, prior to the 1939 rules, "[t]he general unavailability of discovery procedures obviated the need to raise the specific issue of whether an attorney's trial preparations were discoverable").

13. See Anderson et al., *supra* note 11, at 767 ("In the first years after enactment of the Federal Rules, the district courts frequently faced situations in which a party sought to prevent discovery of his trial preparation materials by invoking one or more provisions of the Rules.").


15. *Id.*

16. *Id.*

17. *Id.*


20. *Id.*
The *Hickman* case arose out of the sinking of a tugboat while it was helping to tow a car float of the Baltimore & Ohio Railroad across the Delaware River.\(^{21}\) The accident was unusual, and its cause was unknown.\(^{22}\) The human toll was tragic—five of the nine crew members were drowned.\(^{23}\) Three days after the accident, the tug boat owners and the underwriters hired a law firm to defend against potential lawsuits and to sue the railroad.\(^{24}\) A member of the law firm, Samuel Fortenbaugh, interviewed survivors and other persons "with an eye toward the anticipated litigation."\(^{25}\)

Representatives of all five of the deceased crew members sued the tug boat owners, but only one ultimately failed to settle.\(^{26}\) That outstanding suit was brought by Hickman, whose counsel filed numerous interrogatories including one that requested copies of all written statements of witnesses and detailed summaries of any such oral statements.\(^{27}\) Even more demanding supplemental interrogatories later requested "any oral or written statements, records, reports or other memoranda . . . concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and repair of the tug, and the death of the deceased."\(^{28}\) Through Fortenbaugh, the tug owners admitted that statements of the survivors had been taken but declined to summarize the statements or state the contents.\(^{29}\) In refusing to answer these interrogatories, they asserted that Hickman was requesting privileged material "obtained in preparation for litigation" and was attempting "to obtain indirectly counsel’s private files."\(^{30}\) It was asserted that answering the interrogatories "would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."\(^{31}\)

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22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 498–99.
28. *Id.* at 499.
29. *Id.*
30. *Id.*
31. *Id.*
Sitting en banc, the District Court for the Eastern District of Pennsylvania held that the requested materials were not privileged. When the tug boat owners and Fortenbaugh refused to comply with the interrogatories, the court adjudged them in contempt and ordered them imprisoned until they complied. Also sitting en banc, the Third Circuit Court of Appeals reversed the District Court and held the materials were privileged “work product of the lawyer.”

When the case came before the Supreme Court, Justice Murphy wrote the opinion, which affirmed the holding but not the reasoning of the Third Circuit. Justice Jackson offered a concurring opinion, but none of the justices dissented.

Justice Murphy noted the expanded discovery provisions in the Federal Rules of Civil Procedure had two purposes: (1) “to narrow and clarify the basic issues between the parties” and (2) to provide “a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues.” He observed the parties were now able to “obtain the fullest possible knowledge of the issues and facts before trial.” The Court agreed with Hickman that the discovery rules were to be accorded a “broad and liberal treatment.” Noting that the materials in question involved statements from non-client third parties to Fortenbaugh, the Court also rejected the Third Circuit’s conclusion that they were protected by the attorney-client privilege.

Nonetheless, the Court rejected Hickman’s attempt to discover the materials in question due to a lack of “purported necessity or justification” to access the “written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties.” Justice Murphy wrote that such attempted discovery was “outside the arena of discovery and contravenes the public policy underlying the

32. Id.
33. Id. at 500.
34. Id.
35. Id. at 509, 514.
36. Id. at 514 (Jackson, J., concurring).
37. Id. at 501 (majority opinion).
38. Id.
39. Id. at 507.
40. Id. at 506.
41. Id. at 510.
orderly prosecution and defense of legal claims."\(^{42}\) The Court stated that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."\(^{43}\) The Court explained:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. 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. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." 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.\(^{44}\)

\(^{42}\) \textit{Id.}\n\(^{43}\) \textit{Id.}\n\(^{44}\) \textit{Id.} at 510–11 (internal citation omitted).
Justice Murphy went on to caution that not all materials prepared by an adversary’s counsel “with an eye toward litigation” were exempt from discovery in all cases.\textsuperscript{45} He expressed that when “relevant and non-privileged facts” were in an attorney’s files and those facts were “essential” to the preparation of one’s case, discovery may be appropriate.\textsuperscript{46} Hickman’s counsel had admitted wanting to access opposing counsel’s files “to help prepare himself to examine witnesses and to make sure that he has overlooked nothing.”\textsuperscript{47} The Court noted this was “insufficient” to permit an “exception to the policy underlying the privacy of Fortenbaugh’s professional activities.”\textsuperscript{48} Only a “rare situation” would justify the production of such materials.\textsuperscript{49} Justice Murphy emphasized:

\textbf{[T]he general policy against invading the privacy of an attorney’s course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted.}\textsuperscript{50}

The Court concluded by stating:

\textbf{[U]ntil some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at

\begin{itemize}
\item \textsuperscript{45} \textit{Id.} at 511.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 513.
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.} at 512.
\end{itemize}
this time so as to reach so harsh and unwarranted a result.\textsuperscript{51}

For over two decades after the opinion was issued, \textit{Hickman} was the primary authority for the federal work product doctrine. In that time, a significant amount of case law was generated to interpret the principles announced in \textit{Hickman}.\textsuperscript{52}

\textbf{B. Federal Rule of Civil Procedure 26(b)(3)}

Although earlier drafts were proposed in the 1950s and 1960s,\textsuperscript{53} the protection recognized in \textit{Hickman} was finally codified in the Federal Rules of Civil Procedure in 1970.\textsuperscript{54} The Notes of the Advisory Committee on the 1970 amendments to the Rules ("Notes") express that some of the "most controversial and vexing problems" to emerge from the discovery rules arose from requests for materials prepared "in anticipation of litigation or for trial."\textsuperscript{55} The Notes observed that in deciding \textit{Hickman}, the Supreme Court appeared to have initially expressed a preference for a case law solution to the problem, but "[s]ufficient experience . . . with lower court applications of the \textit{Hickman} decision" had warranted a reappraisal of the original case law approach.\textsuperscript{56} The Notes identified

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\textsuperscript{51. Id. at 514.}
\textsuperscript{52. See, e.g., S. Ry. Co. v. Lanham, 403 F.2d 119, 132–33 (5th Cir. 1968) (discussing \textit{Hickman}'s requirement of a "showing of necessity" or claim that "denial of . . . production would unduly prejudice the preparation of [the document-seeker's] case or cause him any hardship or injustice" to overcome protection); United States v. Aviles, 315 F.2d 186, 191 (2d Cir. 1963) (noting that \textit{Hickman} "was concerned solely with discovery in civil proceedings"); Allmont v. United States, 177 F.2d 971, 975–77 (3d Cir. 1949) (holding that \textit{Hickman}'s rationale applies broadly "to all statements of prospective witnesses which a party has obtained for his trial counsel's use").}
\textsuperscript{53. See 8 WRIGHT ET AL., supra note , § 2023 (describing the evolution of the drafts leading to the 1970 amendments to the discovery rules); Thornburg, supra note , at 1520 (describing the "several aborted attempts at rule drafting" prior to the 1970 amendments).}
\textsuperscript{55. FED. R. CIV. P. 26 advisory committee's note (Notes of Advisory Committee on 1970 Amendments to Rules, Subdivision (b)(3)—Trial Preparation: Materials).}
\textsuperscript{56. Id.}
three main problems in the case law approach: (1) confusion and
disagreement in establishing "good cause" pursuant to Rule 34; (2)
confusion and difficulty as to the scope of the Hickman work product
doctrine (especially where it extends beyond work actually
performed by lawyers); and (3) the resulting difficulty of relating the
Rule 34 "good cause" requirement and the Hickman "necessity or
justification" rule so that the respective roles and distinctions of
these two standards are understood.\textsuperscript{57} The Notes also described the
purposes of the work product doctrine: "each side's informal
evaluation of its case should be protected ... each side should be
couraged to prepare independently, and ... one side should not
automatically have the benefit of the detailed preparatory work of the
other side."\textsuperscript{58}

The text of the work product doctrine codification appears in
Rule 26(b)(3).\textsuperscript{59} Rule 26 is entitled "Duty to Disclose; General
Provisions Governing Discovery."\textsuperscript{60} Rule 26(a) first describes
"Required Disclosures," and Rule 26(b) addresses "Discovery Scope
and Limits."\textsuperscript{61} Subsequently, Rule 26(b)(3), which is entitled "Trial
Preparation: Materials," provides:

(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

\begin{footnotes}
\item[57] Id.
\item[58] Id.
\item[59] FED. R. CIV. P. 26(b)(3).
\item[60] FED. R. CIV. P. 26.
\item[61] Id.
\end{footnotes}
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.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person’s own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person’s oral statement.62

Although Rule 26(b)(3) was adopted due to the continuing confusion about the contours of the Hickman standard, even after codification, the work product doctrine has continued to be a source of confusion and frequent litigation.63 Uncertainty as to the meaning and scope of the key term “anticipation of litigation” is but one source of such litigation.64

62. FED. R. CIV. P. 26(b)(3) (emphasis added).
63. See 8 WRIGHT ET AL., supra note , § 2023 (“Neither, however, have all the problems of application of work product been solved by adoption of the rule. To the contrary, a comprehensive study in 1983 reported that ‘work product protection is the most frequently litigated discovery issue.’” (quoting Anderson et al., supra note , at 763)).
64. See, e.g., United States v. Ary, 518 F.3d 775, 783 (10th Cir. 2008) (discussing whether compelled production of documents waived the work product doctrine); In re Grand Jury Subpoena, 510 F.3d 180, 184 (2d Cir. 2007) (involving
Rule 26(b)(3) is considered by commentators to be only a "partial codification" of the protection recognized in *Hickman* because there are several differences between the protection initially recognized by the Supreme Court and that offered by the Rule. In some respects, the Rule provides less protection than *Hickman*. For example, Rule 26(b)(3) applies only to "tangible" work product, whereas *Hickman* protected both tangible and intangible work product. However, this difference appears to merely be a reflection of the fact that the underlying standard of Rule 26(b)(1) permits discovery of "books, documents, or other tangible things." As the underlying Rule permitting discovery does not extend to intangible things, it would not make sense for the exception in Rule 26(b)(3) to do so.

Also illustrative of the narrower scope of Rule 26(b)(3), *Hickman* applied protection broadly to counsel's materials prepared "in the course of his legal duties" (which could extend to materials prepared in a transactional practice); the Court expressed only a cursory concern that the materials be prepared "with an eye toward litigation." Apparently codifying a case law-developed rule subsequent to *Hickman*, however, Rule 26(b)(3) contains an explicit and more demanding requirement that protection only be provided when materials are prepared "in anticipation of litigation or for trial."

Nonetheless, in another context, Rule 26(b)(3) may have broadened the scope of the protection by applying it to the work product of both attorneys and non-attorneys alike. By contrast, *Hickman* appeared to be primarily concerned with protecting the
work product of attorneys.\textsuperscript{72} Despite these differences between \textit{Hickman} and Rule 26(b)(3), the partial codification was not intended by the drafters as a drastic change in practice, but was instead aimed at accurately codifying the rules announced by the Supreme Court in 1947 and further developed in subsequent lower court case law.\textsuperscript{73}

The incomplete codification of \textit{Hickman} has led to some ambiguity as to the continuing pertinence of the Supreme Court’s opinion, as well as the viability of the significant volume of case law issued between 1947 and 1970 (i.e., opinions written to interpret \textit{Hickman} prior to enactment of Rule 26(b)(3)). It is well-settled that the codification in the Federal Rules of Civil Procedure currently governs and trumps any case law principles derived prior to 1970.\textsuperscript{74} Nonetheless, that fact has not in the least made \textit{Hickman} and its progeny irrelevant. First, despite the limitation of Rule 26(b)(3) to tangible items, \textit{Hickman} is understood to continue to provide protection of intangible work product such as an attorney’s recollection of witness statements.\textsuperscript{75} Moreover, the Court’s opinion continues to be cited frequently and relied upon heavily to interpret Rule 26(b)(3) in many other contexts.\textsuperscript{76} Further, as the adoption of Rule 26(b)(3) was intended as a codification rather than a change in

\begin{thebibliography}{76}
\item 72. Anderson et al., \textit{supra} note \textit{71}, at 763.
\item 73. 8 \textsc{Wright et al.}, \textit{supra} note \textit{71}, § 2023.
\item 74. \textit{See} \textsc{Epstein}, \textit{supra} note \textit{71}, at 481–82 ("The codification of the work-product protection governs all cases tried in the federal courts. It is to the rules and the interpretations given to the rules by the courts that one must now look for guidance with respect to the contours and scope of the work-product protection.").
\item 75. 8 \textsc{Wright et al.}, \textit{supra} note \textit{71}, § 2024, at 337–38; Anderson et al., \textit{supra} note \textit{71}, at 841. \textit{But see In re} Pfohl Bros. Landfill Litig., 175 F.R.D. 13, 26 (W.D.N.Y. 1997) (holding that, in federal actions, to be protected as work product, information must be “a document or a tangible thing”).
doctrine, even the pre-1970 case law is largely viewed as having continued relevance.\textsuperscript{77}

The Notes of the Advisory Committee on the 1970 amendments to the Rules provide insightful commentary on several aspects of the codified work product doctrine. The Notes discuss the types of materials that could overcome the protections of the work product doctrine, and could be discoverable by opposing counsel.\textsuperscript{78}

In that context, the Notes state:

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 [Rule 26(b)(3)]. No change is made in the existing doctrine, noted in the \textit{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.\textsuperscript{79}

The Notes cited two post-\textit{Hickman} cases in support of the rule against protecting "materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation."\textsuperscript{80} However, they do not provide much insight as to the rationale for the rule. One case does not even involve the work product doctrine,\textsuperscript{81} and the other merely mentions in passing that the \textit{Hickman} protection does not apply to reports made pursuant to Interstate Commerce Commission regulations.\textsuperscript{82}

\textsuperscript{77} See 8 \textsc{Wright et al.}, \textit{supra} note , \S 2023 ("[P]re-1970 cases must be evaluated with discrimination and care, but on the whole the rule was codification of doctrine rather than a change in doctrine.").

\textsuperscript{78} \textsc{Fed. R. Civ. P. 26} advisory committee's note (Notes of Advisory Committee on 1970 Amendments to Rules, Subdivision (b)(3)—Trial preparation: Materials).

\textsuperscript{79} \textit{ld.} (internal citation omitted).

\textsuperscript{80} \textit{ld.}

\textsuperscript{81} United States v. N.Y. Foreign Trade Zone Operators, Inc., 304 F.2d 792 (2d Cir. 1962).

\textsuperscript{82} See Goosman v. A. Duie Pyle, Inc., 320 F.2d 45, 52 (4th Cir. 1963) ("[The Reports] were made in the ordinary course of business under ICC regulations and do not represent the lawyer's work product within the holding in \textit{Hickman}.").
Nonetheless, this two-sentence paragraph in the Notes links the concepts of materials prepared for “nonlitigation purposes,” and the ability to discover “relevant facts” even though the facts are contained in undiscoverable documents.\(^8\) Due to the grouping of these sentences in one brief paragraph, the latter sentence appears to modify the former. This linking appears to emphasize the point that facts are never privileged or immune from discovery. Presumably, materials prepared “in the ordinary course of business” and “unrelated to litigation” will merely reflect factual information and not divulge each side’s “evaluation of its case.”

This two-sentence paragraph also suggests that this approach to the work product doctrine merely continues the Hickman approach without modification. Indeed, Hickman distinguished between documents that a party assembled and facts the party learns from those documents,\(^8\) and pre-1970 case law continued to emphasize that documents could be protected by the work product doctrine although mere facts could not.\(^5\)

The Notes subsequently address the confusion as to whether the Hickman work product doctrine applied only to materials prepared by an attorney or to materials prepared by non-attorneys as well.\(^6\) Observing that cases had gone both ways, the Notes indicated the codified Rule “reflects the trend of the cases” that required a special showing, not merely as to “materials prepared by an attorney, but also to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.”\(^7\)

Although there is no explicit crime–fraud exception in the Rules, such an exception has developed through case law.\(^8\) The exception was borrowed from the jurisprudence of the attorney–
client privilege, and is nearly identical in the context of the work product doctrine.\footnote{Id.} The purpose of the crime–fraud exception in both settings “is to ensure that the otherwise protected secrecy of attorney–client communications does not extend to communications that are made for the purpose of continuing or contemplating criminal or fraudulent activity.”\footnote{Id.} Such misconduct is understood to be “fundamentally inconsistent with the basic premises of the adversary system,” which the work product doctrine was crafted to protect.\footnote{Id.}

Subsequent to the 1970 amendment to the Rules, it is interesting to note that in applying the “anticipation of litigation or for trial” requirement of Rule 26(b)(3), courts have not interpreted the key terms “litigation” and “trial” in a literal or strict manner. For example, these concepts have been applied broadly to incorporate both arbitration,\footnote{See, e.g., Samuels v. Mitchell, 155 F.R.D. 195, 200 (N.D. Cal. 1994) (describing arbitration as “adversarial in nature” and therefore characterized as “litigation” and applying the work product doctrine).} and proceedings before administrative tribunals.\footnote{See 8 WRIGHT ET AL., supra note, § 2024 n.10.1 (“The work product privilege applies not only to litigation in courts, but also to litigation before administrative tribunals.” (citing S. Union Co. v. Sw. Gas Corp., 205 F.R.D. 542 (D. Ariz. 2002))).} Specifically, materials prepared in anticipation of I.R.S. Appeals\footnote{See Peter A. Lowy & Juan F. Vasquez, Jr., When is the Work of a Tax Professional Done in Anticipation of Litigation and Thus “Work Product”? , 98 J. TAX’N 155, 157 (2003) (“IRS Appeals is a quasi-adjudicative process that is characteristically adversarial” and therefore should be considered “litigation.”).} or the enforcement of an I.R.S. summons\footnote{See, e.g., United States v. Brown, 478 F.2d 1038, 1041 (7th Cir. 1973) (“We think the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons.”).} are protected from discovery. Moreover, materials prepared in anticipation of patent interference proceedings are also protected.\footnote{See, e.g., Natta v. Zletz, 418 F.2d 633, 638 (7th Cir. 1969) (holding letter prepared by attorney in patent interference proceeding protected as work product); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 143 (D. Del. 1977) (calling the question of whether communications with respect to patent prosecutions may be protected as work product “well settled”).} The key requirement seems to be that the materials are prepared in anticipation of an
adversarial setting. Even though privileges and the work product doctrine are generally interpreted narrowly, the courts have interpreted the “litigation” requirement liberally. This appears to be consistent with the purpose of the work product doctrine, which is to provide space for “each side’s informal evaluation of its case,” and to encourage each side “to prepare independently, and ... not automatically have the benefit of the detailed preparatory work of the other side.” The authors of Rule 26(b)(3), as well as the Hickman Court, seemed most concerned with implementing an anti-freeloader rule, and not with the particular context of the potential freeloding.

Although the meaning of the term “litigation” has not spawned significant controversy and has been interpreted permissively, the courts have had much more difficulty in discerning what it means to “anticipate” litigation. It is not controversial that materials prepared to assist in ongoing litigation satisfy the requirement, but the protection can be available well before any litigation actually ensues, and can be available even if no litigation ever arises. Similarly, the protection can also extend to documents

97. See Epstein, supra note , at 504–06 (listing cases in support of the proposition that “[t]he proceeding for which documents are prepared need not actually take place in a court of record, as long as the proceeding is adversarial in nature”); Restatement (Third) of the Law Governing Lawyers § 87 cmt. h (2000) (addressing the scope of the “litigation” limitation within work product immunity).

98. See, e.g., Cooper Hosp./Univ. Med. Ctr. v. Sullivan, 183 F.R.D. 119, 128 (D.N.J. 1998) (stating that the work product privilege is to be “strictly construed”); United States v. 22.80 Acres of Land, 107 F.R.D. 20, 22 (N.D. Cal. 1985) (“The work product doctrine ... is to be narrowly construed because its application can derogate from the search for truth.”).

99. See supra notes 92–96 and accompanying text.


101. See 8 Wright et al., supra note , § 2024 (“Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced.” (citing In re Sealed Case, 146 F.3d 881, 886 (D.C. Cir. 1998) (noting that work product protection was applicable even though no specific claim had arisen at the time the document was created))); see also In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979) (noting that work product doctrine “extends to material prepared or collected before litigation actually commences”); Conn. Indem. Co. v. Carrier Haulers, Inc., 197 F.R.D. 564, 571 (W.D.N.C. 2000) (considering whether the documents in question were created prior to the “resolve
created for both litigation and non-litigation purposes. However, in both types of situations, the claimant of the protection must demonstrate that the materials in question were prepared in anticipation of litigation. As discussed in Section III of this article, there are two approaches to determining satisfaction of that requirement.

III. THE CIRCUIT SPLIT WITH REGARD TO THE "ANTICIPATION" REQUIREMENT

A. Fifth Circuit Case Law

The Fifth Circuit appears to have initially mentioned Rule 26(b)(3) in its 1980 opinion, Hoover v. United States. In resolving a dispute as to the application of Rule 26(b)(4) to extend a qualified privilege to an expert witness, the court noted briefly in a footnote that an appraisal report prepared by the expert witness was intended for two purposes: (1) providing a basis for an offer and (2) supporting a claim of just compensation at a subsequent condemnation suit. Despite the explicit recognition of the dual purpose nature of the appraisal report, the Fifth Circuit concluded that it was "clear" the report was prepared in anticipation of litigation such that it merited work product protection. Significantly, the court did not elaborate on how it determined the

to litigate"); Broadnax v. ABF Freight Sys., 180 F.R.D. 343, 346 (N.D. Ill. 1998) ("The fact that litigation actually ensues or that a party retains an attorney . . . is not dispositive on the issue as to whether litigation was anticipated."); Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 457 (N.D. Ill. 1974) (holding documents protected by the work product doctrine though prepared years prior to start of litigation because they were "prepared with an eye toward litigation").

102. See Regions Fin. Corp., 2008 WL 2139008, at *4 (applying the work product doctrine to documents created for non-litigation purposes); United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998) (same); In re Grand Jury Subpoena, 357 F.3d 900, 909-910 (8th Cir. 1987) (applying the work product doctrine to documents created for litigation purposes).

103. 611 F.2d 1132, 1139 n.8 (5th Cir. 1980).

104. Id.

105. Id.
“anticipation of litigation” test was satisfied.\textsuperscript{106} Further, in \textit{Hoover}, there was no mention of a “primary purpose” requirement.\textsuperscript{107}

The year after \textit{Hoover}, the Fifth Circuit first used the “primary purpose” test in its 1981 opinion, \textit{United States v. Davis}.\textsuperscript{108} The case involved the attempt by the Internal Revenue Service (“I.R.S.”) to enforce summons on the attorneys of Robert Howard, a taxpayer who was being investigated for having substantially unreported income associated with narcotics traffic.\textsuperscript{109} The summons sought various financial records and documents used in preparing Howard’s tax returns.\textsuperscript{110} The attorneys (Craig Davis and Stephen Orr) resisted the summons on multiple theories including application of the work product doctrine.\textsuperscript{111}

The Fifth Circuit summarily rejected the work product defense and devoted only a paragraph of the opinion to its analysis of that issue.\textsuperscript{112} Of the summoned documents, the court observed that only one genre even presented a colorable claim of work product application—the workpapers created by Davis in preparing Howard’s tax returns.\textsuperscript{113} However, the court stated that work product protection was not available due to the mere “possibility that the IRS might challenge a given return.”\textsuperscript{114} The court explained its rationale:

It is admittedly difficult to reduce to a neat general formula the relationship between preparation of a document and possible litigation necessary to trigger the protection of the work product doctrine. We conclude that litigation need not necessarily be imminent, as some courts have suggested, as long as the \textit{primary motivating purpose} behind the creation of the document was to aid in possible future litigation. But there is no evidence that Davis had reason to

\begin{itemize}
  \item \textsuperscript{106} \textit{Id.}
  \item \textsuperscript{107} \textit{Id.}
  \item \textsuperscript{108} 636 F.2d 1028, 1040 (5th Cir. 1981).
  \item \textsuperscript{109} \textit{Id.} at 1032.
  \item \textsuperscript{110} \textit{Id.} at 1032–34.
  \item \textsuperscript{111} \textit{Id.} at 1038.
  \item \textsuperscript{112} \textit{Id.} at 1039–40.
  \item \textsuperscript{113} \textit{Id.} at 1040.
  \item \textsuperscript{114} \textit{Id.}
\end{itemize}
expect future trouble with the IRS. Davis’s workpapers were in aid in preparing tax returns, not primarily to help litigate over those returns. They are therefore outside the scope of the work product doctrine.\textsuperscript{115}

The term “primary” has several meanings that are potentially relevant in the Fifth Circuit’s\textit{Davis} explanation.\textsuperscript{116} In some contexts, “primary” has a temporal definition: “first in order of time or development.”\textsuperscript{117} However, a separate non-temporal definition of “primary” is “of first rank, importance, or value.”\textsuperscript{118} In that context, “primary” is equivalent to the term “principal.”\textsuperscript{119} It is not clear which definition the Fifth Circuit intended in\textit{Davis}, but it is important to note that the scope of the work product doctrine may depend on which definition is used and the specific facts at hand. The former definition would limit application of the work product doctrine to only situations when the initial reason for creating the document was to “aid in possible future litigation.” By contrast, the latter definition could apply the work product doctrine to documents that were originally created for non-litigation reasons but subsequently had more relevance in aiding litigation. For example, one could envision that an attorney originally begins a legal memorandum to analyze a purely hypothetical issue concerning the attorney or her client. If that hypothetical issue eventually comes to fruition, that memorandum could ultimately serve its most important purpose in assisting the attorney to prepare for actual litigation.

Particularly after its application of the work product doctrine in\textit{Hoover}, the Fifth Circuit’s “primary motivating purpose” statement in\textit{Davis} might have initially been dismissed as mere dictum.\textsuperscript{120} However, the year after deciding\textit{Davis}, the Fifth Circuit

\begin{itemize}
  \item \textsuperscript{115} \textit{Id.} at 1040 (emphasis added) (internal citations omitted).
  \item \textsuperscript{116} \textit{MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY} 986 (Frederick C. Mish ed., 11th ed. 2004).
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{See} United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998) (characterizing the Fifth Circuit’s formulation as “dictum, or in any event a statement going far beyond the issues raised in the case”).
\end{itemize}
issued another opinion elaborating on its “primary motivating purpose” language, and treating it as established law. In *United States v. El Paso Co.*, a corporate taxpayer asserted several theories including the work product doctrine in its attempt to defeat an I.R.S. summons of its tax pool analysis. The Fifth Circuit began its analysis of the work product claim by discussing the Supreme Court’s rationale for providing protection in *Hickman*. The court summarized: “The accent in *Hickman* was on a lawyer’s need for a sphere of privacy in preparing a lawsuit.” The court referenced its opinion in *Davis*, and summarized that the work product doctrine had not been applicable because “the work was not primarily motivated to assist in future litigation over the return.” The court applied a similar analysis to El Paso Company’s tax pool analysis:

The primary motivating force behind the tax pool analysis... is not to ready 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. El Paso thus creates the tax pool analysis with an eye on its business needs, not on its legal ones.

The court acknowledged that the tax pool analysis involved legal work, but characterized it as “only a means to a business end.” The opinion stated that “[b]usiness imperatives, not the press of litigation, call these documents into being.” The Fifth Circuit also found it significant that there was no evidence that the tax pool analysis or its underlying memoranda were referred to outside counsel who took the lead on the company’s tax lawsuits, or used by the in-house attorneys who served as co-counsel in

122. *Adlman*, 134 F.3d at 1198 (citing *El Paso*, 682 F.2d at 543).
124. *Id.* at 542.
125. *Id.*
126. *Id.* at 542-43.
127. *Id.* at 543.
128. *Id.*
129. *Id.*
litigation. The court concluded that the tax pool analysis was "not designed to prepare a specific case for trial or negotiation," but served to "back up a figure on a financial balance sheet."  

*El Paso* reiterated two key points suggested briefly in *Davis*. First, if there are multiple reasons for creating a document, the "primary" reason must be the anticipated litigation. Unfortunately, the *El Paso* opinion did not clarify which definition of "primary" the court was applying. At times, the opinion focused on the initial rationale for creating the tax pool analysis, but elsewhere the court focused on whether the documents are ultimately ever used in litigation. *El Paso* did not clarify whether the Fifth Circuit was applying a temporal or non-temporal "primary purpose" test.

The second point suggested in *Davis* and reiterated in *El Paso* is that the document must serve a supportive role with respect to the anticipated litigation. By contrast, the work product doctrine would not apply if the document is created in anticipation of litigation but the document does not actually assist those preparing for the litigation, and is not used by the litigating attorneys.

Since 1982, the Fifth Circuit has referenced the "primary purpose" test just twice. In a 1985 opinion, *United States v. Gulf Oil Corp.*, the court rejected an assertion of work product by citing

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130. *Id.*
131. *Id.* at 544.
132. *Id.* at 542–43.
133. *See id.* at 543 ("Business imperatives, not the press of litigation, call these documents into being.").
134. *See id.* ("There is no evidence in the record that the tax pool analysis or underlying memoranda are referred to outside counsel or used by El Paso's attorneys to prepare for trial or negotiations.").
137. Search of Lexis, Cases-US Library, 5th Circuit File (Oct. 3, 2008). Author's search consisted of multiple searches with various broad terms (e.g., work product, Hickman, FRCP 26, etc.) to pull up any and all cases in the 5th Circuit that potentially involved the federal work product doctrine. Author then reviewed cases looking for analysis of the "anticipation of litigation" requirement.
More recently, in its 2000 opinion, In re Kaiser Aluminum & Chemical Co., the Fifth Circuit summarily rejected a litigant’s assertion that a district court had erred in applying the “primary purpose” test, and stated the lower court had correctly followed its precedent.\textsuperscript{139} Citing both Davis and El Paso, the court confirmed “[t]he law of our circuit is that the [work product doctrine] can apply where litigation is not imminent, ‘as long as the primary motivating purpose behind creation of the document was to aid in possible future litigation.’”\textsuperscript{140} The court’s opinion did not elaborate on the requirements of the “primary purpose” test.\textsuperscript{141} Nonetheless, it is significant to note that in the past decade, the Fifth Circuit has had occasion to reconsider the use of the “primary purpose” test, and has confirmed the vitality of that test in construing the work product doctrine. The court has left open lingering ambiguities as to how the test should be applied.

\textbf{B. Other Jurisdictions}

The Fifth Circuit’s “primary purpose” test has not been embraced by the other federal circuit courts. Instead, most of the other circuits have applied an alternative approach that is commonly referred to as the “because of” test.\textsuperscript{142} Pursuant to that test, the work product doctrine protects materials that are prepared “because of” litigation regardless of the primary motivating purpose in preparing the materials.\textsuperscript{143} The issue is still open in the Tenth, Eleventh, and Federal Circuits, which have not yet explicitly adopted or rejected either of the two tests.\textsuperscript{144} Nonetheless, lower courts in both the

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\item \textsuperscript{138} 760 F.2d 292, 296–97 (Temp. Emer. Ct. App. 1985).
\item \textsuperscript{139} 214 F.3d 586, 593 (5th Cir. 2000).
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} See Edna Selan Epstein, The Attorney-Client Privilege and the Work Product Doctrine 126 (4th ed. Supp. 2004) (observing the trend of courts following the Second Circuit’s practice of providing work product protection only to those documents prepared because of litigation).
\item \textsuperscript{143} Id.
\end{enumerate}
\end{footnotesize}
Tenth and Federal Circuits have applied the "because of" test.\textsuperscript{145} Further, a lower court in the Eleventh Circuit has not yet adopted the "because of" test, but has explicitly rejected the holding of \textit{El Paso} on very similar facts in a case involving the I.R.S.'s attempt to access documents associated with another corporation's tax pool analysis.\textsuperscript{146}

Of the circuits that have adopted the "because of" test, the Third and Eighth Circuits did so within the first ten years of the promulgation of Rule 26(b)(3).\textsuperscript{147} The Seventh and D.C. Circuits adopted the test in the 1980s,\textsuperscript{148} and the Second and Fourth Circuits followed suit in the 1990s.\textsuperscript{149} Relative latecomers, the First, Sixth, and Ninth Circuits first adopted the "because of" test in the twenty-first century.\textsuperscript{150} Significantly, the circuits that adopted the "because

\textsuperscript{145} See \textit{Sanchez v. Matta}, 229 F.R.D. 649, 655 (D.N.M. 2004) ("[A]n assertion of intangible work-product privilege is viable when . . . the information can fairly be said to have been prepared or obtained because of the prospect of litigation."); \textit{Evergreen Trading}, LLC v. United States, 80 Fed. Cl. 122, 133 (Ct. Fed. Cl. 2007) ("[T]his court finds that the 'because of' test is the proper way to determine whether a document was prepared 'in anticipation of litigation.'").


\textsuperscript{147} \textit{Diversified Indus. v. Meredith}, 572 F.2d 596, 604 (8th Cir. 1977); \textit{In re Grand Jury Proceedings}, 604 F.2d 798, 803 (3d Cir. 1979); \textit{In re Grand Jury Investigation}, 599 F.2d 1224, 1229 (3d Cir. 1979).


\textsuperscript{150} \textit{United States v. Roxworthy}, 457 F.3d 590, 593 (6th Cir. 2006); \textit{In re Grand Jury Subpoena}, 357 F.3d 900, 907 (9th Cir. 2003); \textit{In re Grand Jury Subpoena}, 350 F.3d 1010, 1016 (9th Cir. 2003); \textit{Maine v. United States}, 298 F.3d 60, 68 (1st Cir. 2002). The Sixth Circuit actually applied the "because of" test in
of" test more than a decade ago have all had occasion to reconsider and reconfirm applicability of the test in more recent cases.\textsuperscript{151}

The "because of" test was originally suggested by the authors of a well-regarded treatise—Wright & Miller's \textit{Federal Practice and Procedure}.\textsuperscript{152} The treatise briefly describes the test:

Some pre-1970 cases attributed significance to whether a document was created or obtained before or after litigation was commenced, but this cannot be sound. Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.\textsuperscript{153}

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152. \textit{See} 8 \textsc{Charles Alan Wright} & \textsc{Arthur R. Miller}, \textit{Federal Practice and Procedure} § 2024 at 198 (1970) (setting forth "because of" test).
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153. 8 \textsc{Wright et al.}, \textit{supra} note 1, § 2024.
\end{flushright}
Several courts adopting the test have explicitly cited this passage from the Wright & Miller treatise. However, the treatise did not elaborate on the requirements of its proposed “because of” test, or explain the types of factual situations when it would be satisfied.

Indeed, it is interesting to note that some courts purporting to apply the “because of” test have interpreted the standard quite differently. For example, unpublished opinions by the District Court for the District of Columbia have described the test as protecting only documents that are “created for use at trial,” or to “advance the client’s interests in the [anticipated] litigation.” Without such an explicit statement of the “because of” test, other courts have rejected assertions of the work product doctrine when the documents in question do not serve any supportive function with respect to the anticipated litigation.

By contrast, other courts applying the “because of” test have done so in a much more liberal manner, and do not require the materials to be in any way potentially useful in the anticipated litigation. Illustrative of this point is United States v. Textron, a 2007 case, in which the District of Rhode Island determined the work product doctrine applied to protect from I.R.S. summons the taxpayer’s tax pool analysis. The documents in question

154. E.g., United States v. Roxworthy, 457 F.3d 590, 593 (6th Cir. 2006); In re Grand Jury Subpoena, 357 F.3d 900, 907 (9th Cir. 2003); Binks Mfg. Co. v. Nat’l Presto Indus., Inc., 709 F.2d 1109, 1118–19 (7th Cir. 1983); In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979); Diversified Indus. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1977).


156. See, e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987) (holding that the “because of” test was not satisfied because the documents’ creators were not involved in “giving legal advice or in mapping litigation strategy in any individual case,” and the documents did not “enhance[] the defense of any particular lawsuit”); see also In re Grand Jury Subpoena, 357 F.3d 900, 909–10 (9th Cir. 2003) (sustaining work product claims with respect to dual purpose documents because they were prepared in part with a “litigation purpose,” i.e., to help the lead attorney “advise and defend” the client against anticipated litigation).

157. United States v. Textron Inc., 507 F. Supp. 2d 138, 141 (D.R.I. 2007), vacated, 577 F.3d 21 (1st Cir. 2009). The District of Rhode Island in Textron used the term “tax accrual workpapers” instead of the term “tax pool analysis,” which was used by the Fifth Circuit in El Paso. Id. Indeed, these types of documents
contained "opinions of Textron's counsel and accountants regarding items that might be challenged by the IRS, their estimated hazards of litigation percentages and their calculation of tax reserve amounts." The tax pool analysis identified potential issues for future "litigation," but by their nature it is highly improbable that such documents would have had any utility in defending against subsequent I.R.S. challenges. This point was not explored by the court, which simply concluded the "because of" test was satisfied since there would never have been a need for Textron to create the tax pool analysis if the corporation had not anticipated litigation with the I.R.S., and it was clear that that anticipation was objectively reasonable.

Subsequent to the District of Rhode Island's opinion in Textron, several courts followed its permissive approach to construing the "anticipation of litigation" requirement. Indeed, in Regions Financial Corp. v. United States, the Northern District of Alabama explicitly considered—and rejected—an interpretation of the "anticipation of litigation" requirement, which would have extended work product protection only to documents created for use in anticipated litigation. Notably, like El Paso and Textron, Regions Financial involved the application of the work product doctrine to documents associated with a tax pool analysis.

In early 2009, the First Circuit's panel opinion in Textron affirmed the District of Rhode Island's application of the work

have several different aliases. See, e.g., United States v. El Paso Co., 682 F.2d 530, 533 (5th Cir. 1982) ("This appeal is centrally concerned with documents known to the accounting profession under various names—the noncurrent tax account, the accrual work papers, and the tax pool analysis."). For consistency and simplicity in this article, the term "tax pool analysis" will be used regardless of the term used in various court opinions.

158. Textron, 507 F. Supp. 2d at 150.
159. Id. at 142.
160. Id.
163. Id.
product doctrine but remanded the case to develop other issues. Because the same type of documents were at issue in both *El Paso* and *Textron*, the broader circuit split with regard to the “primary purpose” and “because of” standards appeared to have evolved into a more acute circuit split on the critical question of whether the I.R.S. can access a corporation’s tax pool analysis. Because the resolution of that question had important repercussions to the I.R.S.’s ability to fight tax shelters, there was a strong possibility the case would be appealed to and heard by the Supreme Court.

Perhaps because of the high stakes involved, the First Circuit later vacated its initial *Textron* panel opinion and agreed to an en banc rehearing. With a narrow 3-to-2 majority, the First Circuit’s en banc opinion denied work product protection. The en banc holding resolved the immediate circuit split as to whether the I.R.S. could summons a corporate taxpayer’s tax pool analysis. However, the reasoning in the majority’s opinion created tremendous uncertainty by purporting to apply the “because of” test but explicitly requiring that documents be “prepared for potential use in litigation” in order to be protected. Judge Torruella’s more thorough dissent decimated the majority’s reasoning as ignoring “a tome of precedents,” contravening “much of the principles underlying the work-product doctrine,” and brushing aside the “actual text of Rule 26(b)(3).”

As this article is being finalized for publication, Textron is currently preparing to appeal the case to the

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166. United States v. Textron, Inc., 577 F.3d 21, 26 (1st Cir. 2009).
167. See, e.g., Michelle M. Henkel, *Textron Eviscerates the 60-Year-Old Work Product Privilege*, 125 TAX NOTES TODAY 237, 242 (Oct. 12, 2009) (explaining that the majority’s reasoning has left the legal profession in a state of disbelief and the en banc opinion will “foster uncertainty” if not overturned by the Supreme Court); Ron Buch, *The Touch and Feel of Work Product*, 124 TAX NOTES TODAY 915, 916–17 (Aug. 31, 2009) (criticizing the ambiguity of the majority’s “touch and feel test”); David E. Frank, *Attorneys Predicting “Upheaval” in Wake of Work-Product Ruling by U.S. District Circuit Court of Appeals*, MASSACHUSETTS LAWYERS WEEKLY (Aug. 24, 2009) (citing practitioners’ concerns that the majority’s reasoning has discarded “so much of what we have previously understood the law to be”).
169. *Id.* at 32.
Supreme Court, and seems to have a strong chance of prevailing. Indeed, commentators have criticized the en banc majority for issuing a weak “results-driven opinion” that was concerned more with the I.R.S.’s difficult job of combating abusive tax shelters and less with the actual law of the work product doctrine.

Like the opinion of the District of Rhode Island and the initial First Circuit panel opinion in *Textron*, the Second Circuit’s highly influential 1998 opinion in *Adlman* took a similarly permissive approach in applying the “because of” test. *Adlman* involved an assertion of the work product doctrine to a lawyer’s memorandum evaluating the tax implications of a proposed corporate restructuring. The memorandum contained a fifty-eight-page detailed legal analysis, and proposed possible “legal theories or strategies” that the taxpayer could assert if the I.R.S. challenged the proposed restructuring. Nonetheless, the main reason the taxpayer sought the advice in the memorandum was to aid in the decision of whether or not to effect the proposed restructuring. In the court’s words, the “litigation analysis” was prepared “in order to inform a business decision which turned[ed] on the [lawyer’s] assessment of the likely outcome of litigation expected to result from the transaction.”

In *Adlman*, the court provided a thoughtful comparative analysis of the “primary purpose” test and the “because of” test. Interestingly, the Second Circuit focused particularly on the Fifth Circuit’s requirement that documents be produced “to assist in litigation,” and devoted little attention to the term “primary.” The
court concluded that requiring documents be produced “to assist in litigation” is “at odds with the text and the policies” of Rule 26(b)(3).\textsuperscript{178} The court stated that the Rule “clearly sweeps more broadly” because it expressly applies to documents “‘prepared . . . for trial’ but also to those prepared ‘in anticipation of litigation.’”\textsuperscript{179} As the court observed, “[i]f the drafters of the Rule intended to limit its protection to documents made to assist in preparation for litigation, this would have been adequately conveyed by the phrase ‘prepared . . . for trial.’”\textsuperscript{180} The court viewed the use of both terms as indicative that the term “in anticipation of litigation” was intended to be a “different, and broader category.”\textsuperscript{181}

The Second Circuit’s thorough discussion in support of the “because of” test in United States v. Adlman has been influential on other courts applying that test.\textsuperscript{182} As a result, the narrower formulation of the “because of” test, which requires documents to have been “prepared for use in litigation,” “created for use at trial,” or to “advance the client’s interests in the [anticipated] litigation,”\textsuperscript{183} appears to be disfavored. Nonetheless, even under the more lenient version of the “because of” test, documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of litigation are still denied work product protection.\textsuperscript{184} However, it is interesting to note that cogent arguments have been made that the exception is based on a misreading of the Advisory Committee Notes to proposed Rule

\begin{flushleft}
\textsuperscript{178} \textit{Id}.
\textsuperscript{179} \textit{Id}.
\textsuperscript{180} \textit{Id}.
\textsuperscript{181} \textit{Id}.
\textsuperscript{182} \textit{See, e.g., United States v. Roxworthy, 457 F.3d 590, 594 (6th Cir. 2006) (citing Adlman); In re Grand Jury Subpoena, 357 F.3d 900, 908 (9th Cir. 2003) (citing Adlman, 134 F.3d at 1202); United States v. Textron Inc., 507 F. Supp. 2d 138, 148 (D.R.I. 2007) (citing Adlman), vacated, 577 F.3d 21 (1st Cir. 2009).}
\textsuperscript{184} \textit{See Golodny, supra note , at 622–23 (citing United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999) and United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998)).}
\end{flushleft}
26(b)(3),\textsuperscript{185} and that policy concerns may favor abolition of the ordinary course of business exception.\textsuperscript{186}

IV. MISGUIDED OR PROPHETIC?

To determine if the Fifth Circuit is correct on this issue, one can examine the issue from various perspectives. Part IV.A focuses on identifying the doctrinally correct approach. Part IV.B considers the issue by examining compatibility with the underlying policy goals of the work product doctrine.

A. Doctrinal Analysis

A doctrinal analysis of the "primary purpose" test must begin with the primary authority for the modern work product doctrine: Rule 26(b)(3). Although the "primary purpose" and "because of" tests focus on the "anticipation of litigation" phrase in Rule 26(b)(3), it is important to look at the full text where that phrase appears. The first sentence of Rule 26(b)(3)(A) states the general rule: "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)."\textsuperscript{187} At first blush, one might assume that the terms "in anticipation of litigation" and "for trial" are synonymous. However, upon closer scrutiny, that does not appear to be an accurate assumption.

\textsuperscript{185} Thomas Wilson, The Work Product Doctrine: Why Have an Ordinary Course of Business Exception?, 1988 COLUM. BUS. L. REV. 587, 601 (1988) (noting that the Advisory Committee Notes exclude from protection materials prepared "pursuant to public requirements unrelated to litigation," but do not proscribe protection for materials prepared pursuant to public requirements as long as they were created for litigation purposes).

\textsuperscript{186} See id. at 596–97, 98 (arguing (1) that the exception penalizes and creates a disincentive for businesses to prudently investigate after an incident occurs, insofar as the exception may cause future liability; and (2) stating that the exception limits predictability, a factor essential to proper operation of the work product doctrine).

\textsuperscript{187} FED. R. CIV. P. 26(b)(3) (emphasis added).
First, the term "litigation" has a much broader meaning than "trial." "Litigation" is defined as "[t]he process of carrying on a lawsuit" or as "[a] lawsuit itself." By contrast, a "trial" is defined as a "formal judicial examination of evidence and determination of legal claims in an adversary proceeding." Thus, a "trial" is one single component of the larger concept of "litigation."

Moreover, the terms "in anticipation of" and "for" also denote distinct meanings. The word "for" indicates "purpose" or an "intended goal." However, the term "anticipation" has a much broader definition. "Anticipation" refers to "a prior action that takes into account or forestalls a later action" or "the act of looking forward." Although "for" denotes a purpose or goal with respect to a trial, "anticipation" insinuates a potentially much looser affiliation with respect to litigation.

In light of the foregoing, the phrase "documents and tangible things that are prepared . . . for trial" should be understood as describing documents or things that are prepared with the purpose or goal of being helpful or used at an "adversary proceeding" that is a component of "litigation." By contrast, the phrase "documents and tangible things that are prepared . . . in anticipation of litigation" more generally describes documents or things that are prepared prior to a lawsuit or while looking forward to a lawsuit. However, the term does not necessarily indicate an intention to assist in the lawsuit.

This construction is reinforced by the sequence of the terms in Rule 26(b)(3). One can anticipate litigation at a much earlier point in time than one is likely to begin preparing materials for use at trial. This timing is reflected in the text of the Rule—the term "anticipation of litigation" precedes the term "for trial."

Moreover, this textualist construction of Rule 26(b)(3) is also in accord with Hickman, which the Rule was intended to codify. The Court did not indicate that the work product doctrine applied

188. BLACK'S LAW DICTIONARY 944 (7th ed. 1999).
189. Id. at 1510.
190. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 488 (Frederick C. Mish ed., 11th ed. 2004) (defining the word "for" as "used as a function word to indicate purpose" and "used as a function word to indicate an intended goal").
191. Id. at 54.
192. FED. R. CIV. P. 26(b)(3).
193. 8 WRIGHT ET AL., supra note, § 2023.
only to materials prepared for use in a trial. Indeed, the Court expressed a much broader concern for a lawyers' materials prepared "in the course of his legal duties."\(^{194}\) Not all lawyers are litigators, and even those who litigate have many significant legal duties with no relation to trials. As a result, this language in *Hickman* supports application of the work product doctrine in contexts far removed from trial preparation.

Furthermore, at a separate point in *Hickman*, the Court does mention a concern for materials prepared "with an eye towards litigation."\(^{195}\) However, this colloquial term denotes only a loose affiliation between the prepared materials and the litigation. It appears to be equivalent to the term "in anticipation of litigation," and quite different from the narrower term "for trial."

The "primary purpose" test purports to be a tool to interpret the phrase "in anticipation of litigation." In actuality, the test only gives effect to the plain meaning of the term "for trial." The Fifth Circuit's "primary purpose" test gives effect only to the latter, narrow term and not the former, much broader one. This fact suggests that the Fifth Circuit may understand the two terms to be synonymous. However, as explained above, such an understanding would contravene the plain meaning of these terms. By contrast, the "because of" test as exemplified by the Second Circuit's *Adlman* opinion explicitly gives effect to both terms and does so in a manner reflecting a very reasonable construction of those terms. In light of the foregoing, the Fifth Circuit's "primary purpose" test does not appear to be correct from a doctrinal perspective.

**B. Compatibility with Underlying Policy Goals**

The policy goals of the work product doctrine were originally enunciated in *Hickman*. The Supreme Court explained that the purposes of the newly established Federal Rules of Civil Procedure were (1) "to narrow and clarify the basic issues between the parties," and (2) to provide "a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues."\(^{196}\) However, the Court emphasized that "[n]ot even the most


\(^{195}\) *Id.* at 511.

\(^{196}\) *Id.* at 501.
liberal of discovery theories can justify unwarranted inquiries into
the files and the mental impressions of an attorney." 197 The Court
expressed concern for the preservation of an attorney’s “privacy, free
from unnecessary intrusion by opposing parties and their counsel.” 198
Such privacy was stated to be necessary for an attorney to properly
prepare her client’s case in our adversarial legal system. 199 This
same concern for privacy in the adversary system has been reiterated
in subsequent case law. 200

Hickman predicted that if such privacy was not preserved,
attorneys would cease writing down their thoughts with respect to
case preparation. 201 The Court was worried about repercussions such as “[i]nefficiency, unfairness[,] and sharp practices.” 202 The Court

197. Id. at 510.
198. Id.
199. Id. at 511.

the application of the work product doctrine to materials prepared by attorneys and
non-attorneys alike, and observing that the work product doctrine is an “intensely
practical” rule “grounded in the realities of litigation in our adversary system”);
Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557 (2d Cir. 1967) (“The
broad purpose of the rule . . . is . . . to encourage effective legal representation by
removing counsel’s fear that his thoughts and information will be invaded by his
adversary if he records them . . . .”); Maldonado v. New Jersey, 225 F.R.D. 120,
132 (D.N.J. 2004) (“[T]he purpose of the work product doctrine is to encourage
attorneys to prepare effectively for litigation.”); Calvin Klein Trademark Trust v.
Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (“[T]he purpose of the rule is to
provide a zone of privacy for strategizing about the conduct of litigation itself, not
for strategizing about the effects of the litigation on the client’s customers . . . .”);
Cornelius v. Conrail, 169 F.R.D. 250, 253 (N.D.N.Y. 1996) (noting that the work
product doctrine permits counsel “to prepare for trial without fear that its thought
processes will be disclosed to another party”); New York v. Solvent Chem. Co.,
166 F.R.D. 284, 288 (W.D.N.Y. 1996) (“The purpose of the [work product]
document is to establish a zone of privacy for strategic litigation planning . . . .”);
(observing that the purpose of the work product doctrine is to protect the
“effectiveness of a lawyer’s trial preparations”); Manning v. State Farm Mut.
Auto. Ins. Co., 235 F. Supp. 615, 617 (W.D.N.C. 1964) (noting that a lack of
protection of attorney work product would “interfere seriously with vital function
performed by counsel”); see also, e.g., Epstein, supra note , at 477 (stating that
the purpose of the work product doctrine is to encourage “careful and thorough
preparation by an attorney”).

201. Hickman, 329 U.S. at 511.
202. Id. Although undefined by Hickman, “sharp practices” have been
understood by scholars to include removing unfavorable material from files,
warned that these repercussions would be demoralizing to the legal profession, and would not serve the interests of clients or the cause of justice.\textsuperscript{203}

In addition to ensuring that a lawyer's privacy was not disturbed in preparing her client's case, Hickman implicated another policy goal. Although the Court stated the work product doctrine was not absolute, it rejected as "insufficient" the desire of Hickman's counsel to access Fortenbaugh's files "to help prepare himself to examine witnesses and to make sure that he ha[d] overlooked nothing."\textsuperscript{204} This characterization suggests a concern that Hickman's counsel was attempting to gain a tactical advantage by reviewing opposing counsel's case files to piggyback off of his opponent's trial preparations. Indeed, in explaining the purpose of the codified work product doctrine, the drafters of Rule 26(b)(3) raised the same anti-freeloader concern in the Notes of the Advisory Committee on the 1970 amendments to the Rules: "each side's informal evaluation of its case should be protected[,]... each side should be encouraged to prepare independently, and... one side should not automatically have the benefit of the detailed preparatory work of the other side."\textsuperscript{205} Moreover, since 1970, this same anti-freeloader emphasis has also been repeatedly reiterated in subsequent case law.\textsuperscript{206}

\footnotesize{\textsuperscript{203} Thomburg, supra note , at 1532.}
\footnotesize{\textsuperscript{204} Hickman, 329 U.S. at 513; see also, e.g., FTC v. Grolier, Inc., 462 U.S. 19, 30–31 (1983) (expressing concern about protecting against an "invasion of [a]n attorney's thoughts" because of the "resulting demoralizing effect on the profession" that such invasion would cause).}
\footnotesize{\textsuperscript{205} FED. R. CIV. P. 26 advisory committee's note (Notes of Advisory Committee on 1970 Amendments to Rules, Subdivision (b)(3)—Trial preparation: Materials).}
\footnotesize{\textsuperscript{206} See, e.g., United States v. Nobles, 422 U.S. 225, 254 n.16 (1975) ("Where the purpose of the rule protecting work product is to remove the incentive a party might otherwise have to rely solely on his opponent's preparation, it is sensible to treat preparation by an attorney and an investigator alike."); United States v. Roxworthy, 457 F.3d 590, 595 (6th Cir. 2006) (expressing concern with the ability of the I.R.S. to obtain an "unfair advantage" by gaining access to the taxpayer's "detailed legal analysis of the strength and weaknesses" of its position); In re EchoStar Commc'ns Corp., 448 F.3d 1294, 1301 (Fed. Cir. 2006) ("The purpose of the doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's
If the thrust of the work product doctrine is to ensure an attorney’s privacy in preparing her client’s case and to prevent lawyers from freeloading off the efforts of opposing counsel, then the narrow approach of the Fifth Circuit does not appear warranted. In the current litigious environment, lawyers and clients anticipate litigation much earlier than may have been the norm in past eras. In an effort to be efficient with time and human resources, it is very common (particularly in business and tax contexts) for a document to be prepared for both litigation and non-litigation reasons, and to avoid creating separate documents for related reasons. The “primary purpose” test runs contra to this tendency, and has the effect of helping to ensure an attorney’s privacy in preparing her preparation.” (quoting United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995)); Rockwell Int’l Corp. v. Dep’t of Justice, 235 F.3d 598, 605 (D.C. Cir. 2001) (“The purpose of the privilege, however, is not to protect any interest of the attorney . . . but to protect the adversary trial process itself. It is believed that the integrity of our system would suffer if adversaries were entitled to probe each other’s thoughts and plans concerning the case.” (quoting Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980)); United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999) (“The work-product privilege is intended to prevent a litigant from taking a free ride on the research and thinking of his opponent’s lawyer and to avoid the resulting deterrent to a lawyer’s committing his thoughts to paper.”); In re 3dfx Interactive, Inc., 347 B.R. 394 (N.D. Cal. 2006) (“The primary purpose of the work product doctrine is to prevent the exploitation of a party’s efforts in preparing for litigation.”); Cornelius v. Conrail, 169 F.R.D. 250, 253 (N.D.N.Y. 1996) (noting that the work product doctrine prevents exploitation of the efforts of one party in preparing for litigation); New York v. Solvent Chem. Co., 166 F.R.D. 284, 288 (W.D.N.Y. 1996) (noting that the purpose of the work product doctrine is to prevent one party from piggybacking on adversary’s preparation); In re Imperial Corp. of Am., 167 F.R.D. 447, 454 (S.D. Cal. 1995) (“One of the primary functions of the work product doctrine is to prevent a current or potential adversary in litigation from gaining access to the fruits of counsel’s investigative and analytical effort, and strategies for developing and presenting the client’s case.”).

207. In a modern business or tax practice, the purposes behind creating documents are often interwoven and difficult to separate in any meaningful way. For example, “in the case of tax contingency reserves, the prospect of future litigation and the business need for the documents are so intertwined that the prospect of future litigation itself creates the business need for the document.” Golodny, supra note , at 629 (citing Terrence G. Perris, Court Applies Work Product Privilege to Tax Accrual Workpapers, 80 PRAC. TAX STRATEGIES 4 (2008)).
client's case only when that preparation is done less efficiently in a segregated, siloed manner.

Further, freeloading is enabled—not prevented or discouraged—when restricting work product protection only to situations where the "primary" purpose of preparing materials is to aid in possible future litigation. To the extent that an attorney works in an efficient, integrated manner, and does not silo her litigation-related work, opposing counsel is able to gain a tactical advantage in the Fifth Circuit by accessing unprotected work product materials that fail to satisfy the "primary purpose" test.

Indeed, freeloader concerns influenced the Adlman decision, which applied work product protection to documents that were prepared for reasons other than use in subsequent litigation.\footnote{United States v. Adlman, 134 F.3d 1194, 1199 (2d Cir. 1998) ("We see no basis for adopting a test under which an attorney's assessment of the likely outcome of litigation is freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance.").} If that case had been decided in the Fifth Circuit, the "primary purpose" test would not have permitted application of the work product doctrine, and the I.R.S. attorneys in Adlman would have been able to freeload off the efforts of opposing counsel. In issuing its El Paso opinion, the Fifth Circuit expressed no awareness of or concern for the anti-freeloader policy goal of the work product doctrine.

Even though the "primary purpose" test is at odds with the policy goals expressed in Hickman and the Notes, some commentators are hostile to the work product doctrine due to a disagreement with those stated policy goals. Perhaps most notably, in an influential 1991 article, Professor Elizabeth Thornburg advocated outright elimination of the work product doctrine.\footnote{Thornburg, supra note ; see also Dennis J. Ventry, Jr., Protecting Abusive Tax Avoidance, 120 TAX NOTES 857 (2008) (citing Professor Thornburg's proposal and noting the shortcomings of the work product doctrine).} Such scholarly hostility seems to be largely focused on ordinary work product,\footnote{Edward H. Cooper, Work Product of the Rulemakers, 53 MINN. L. REV. 1269, 1270–71 (1969) (suggesting that the then-proposed Rule 26(b)(3) be rejected); Arthur B. LaFrance, Work Product Discovery: A Critique, 68 DICK. L. REV. 351, 352 (1964) (critiquing work product doctrine as a step backwards from the liberal policy underlying the creation of the Federal Rules of Civil Procedure); Kathleen Waits, Work Product Protection for Witness} and to a lesser degree on opinion work product.\footnote{See, e.g., Kathleen Waits, Work Product Protection for Witness}
also important to note that the low esteem of the work product doctrine among some scholars appears to be a reflection of the doctrine’s underlying goal of protecting the adversary system—a system which some scholars view as undesirable for a number of reasons.212

Nonetheless, even if one is hostile to the protection of ordinary work product, or one views the adversary system as undesirable, such perspectives do not necessarily support a curtailed approach to the current formulation of the work product doctrine. If the Supreme Court and the drafters of the Rules have formulated the work product doctrine in order to ensure attorney privacy to prepare a client’s case and to prevent freeloaders off opposing counsel, then it is not within the purview of lower courts to second guess the doctrine or its underlying policy goals. Instead, the lower courts are obliged to give effect to Rule 26(b)(3) in light of the plain meaning of its text and the intended purpose of the Rule. If one disagrees with the wisdom of the underlying policy goals or maintenance of the adversary system, then those are much larger policy issues that should be taken up with the drafters of the Rules.

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211. Thornburg, supra note 1, at 1522. Although she ultimately advocates elimination of protection for all types of work product, Thornburg notes that most reported work product disputes involve ordinary work product, and theorizes this is because opinion work product may be less often requested. Id. at 1522.

V. CONCLUSION

The Fifth Circuit's "primary purpose" test is clearly at odds with the plain meaning of the text of Rule 26(b)(3) and undercuts the policy goals of the work product doctrine. The test results in an insufficient scope of work product protection in the Fifth Circuit. Ultimately, that insufficiency disadvantages parties who have occasion to litigate in federal courts in Texas, Louisiana, and Mississippi. The greatest impact of this curtailed work product protection is felt by taxpayers litigating federal tax matters. However, corporate litigants are also widely affected even when tax is not at issue.

Because its jurisprudence is incompatible with the text and policy of the work product doctrine, the Fifth Circuit should reconsider and reject its past precedent. Specifically, the court should adopt the "because of" test as it is applied in the majority of its sister circuits. For several reasons, however, it seems unlikely that the Fifth Circuit will take such action any time soon. First, the "primary purpose" test seems to be very deeply entrenched. The Fifth Circuit has been applying that standard for almost thirty years. The court last affirmed the applicability of the "primary purpose" test less than a decade ago, after many other circuits had already considered and rejected that test. Moreover, because the deeply entrenched approach to the work product doctrine is so narrow and excludes so much, it seems probable that many litigants in the Fifth Circuit simply no longer assert the work product doctrine in cases where protection would only be available by applying the more permissive "because of" test. Litigation is just too expensive for fruitless battles. As a result, the Fifth Circuit may not have an opportunity to reconsider its work product doctrine jurisprudence in the near term. Because of the confluence of these factors, it would be quite surprising if the Fifth Court changed course at this point in time without a clear mandate from the Supreme Court.

Until recently, however, it did not seem likely that the Supreme Court would consider the issue any time in the near future.

213. See United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981) (adopting the "primary purpose" test).
After all, the circuit split with regard to the "primary purpose" and "because of" standards has existed for almost three decades. This is not a new issue. In the past, the Court has not seemed inclined to address it. However, there may now be greater impetus. With the First Circuit's recent *Textron* opinion, significant uncertainty has arisen as to the proper interpretation of the "anticipation of litigation" requirement of Rule 26(b)(3). On the surface, the uncertainty seems to be the longstanding issue of whether the Fifth Circuit's "primary purpose" test is appropriate or whether the "because of" test used by most other circuits is a better gauge of work product applicability. However, the *Textron* majority's unusual description of the "because of" test as requiring materials to be "prepared for use in litigation"\(^{215}\) has now created chaos as to what the "because of" test itself actually mandates. Consequently, the Supreme Court may decide to grant certiorari in the *Textron* case.\(^{216}\) If that comes to pass, the Court should take the opportunity to clearly reject the Fifth Circuit's misguided "primary purpose" test in favor of the more appropriate "because of" test. Moreover, the Court should clarify that the traditional formulation of the "because of" test (as exemplified by the Second Circuit's seminal *Adlman* case) is the most appropriate means of testing the "anticipation of litigation" requirement.

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216. See Letter, supra note 170.