**6.6: The Work Product Doctrine**

*Let's make some plans ‘cause they can’t go wrong. Getting there may be times three maybe not. To loosen your lips and you’re talking rubbish. To loosen your whole mistaken tenfold*.[[1]](#footnote-0)

*Andy said a lot of things, I stored them all away in my head. Sometimes, when I can't decide what I should do, I think, “What would Andy have said?” He’d probably say, “You think too much, that’s ‘cause there's work that you don't want to do.” It’s work. The most important thing is work.*[[2]](#footnote-1)

The “Work Product Doctrine” is an evidentiary privilege providing that attorneys ordinarily cannot be required to produce documents they created in the course of preparing for litigation. It applies to the notes, records, and other documents created by attorneys in gathering information in preparation for litigation and in the course of preparing litigation documents.

The work product doctrine differs from the attorney-client privilege in several respects. First, it applies to different subject matter. The attorney-client privilege applies to confidential communications with clients for the purpose of providing legal advice, but the work product doctrine applies to certain documents created by attorneys, whether or not those documents are communicated to the client. Second, it belongs to a different party. The attorney-client privilege belongs to the client, so the client is the only person who can waive the privilege, but the privilege provided by the work product doctrine belongs to the attorney. Third, it is not as strong. The attorney-client privilege is sacrosanct and abrogated only if abused, but the work product doctrine can give way to necessity.

Notably, the work product doctrine may cover any documents created by or for an attorney in anticipation of litigation. This requirement is generally interpreted liberally. A document is created “in anticipation of litigation” if litigation is conceivable, even if no actual litigation has commenced. In addition, the document need not be created by an attorney. A document created for an attorney in anticipation of litigation may be protected by the work product doctrine.

However, while the protection provided by the work product doctrine is broader than the protection provided by the attorney-client privilege, it is also weaker. Unlike the attorney-client privilege, the work product doctrine can be overcome by a showing of necessity. Specifically, courts distinguish between “fact” and “opinion” work product. Fact work product is factual documents created in anticipation of litigation, and opinion work product is documents that reflect the mental impressions, conclusions, opinions or legal theories of an attorney. Fact work product is discoverable if the opposing party can show a substantial need for the document, and it cannot obtain the relevant information by other means, without undue hardship. But opinion work product generally is not discoverable, unless one of the exceptions to the attorney-client privilege applies.

For example, if an attorney records an interview with a non-client witness and takes notes, the recording and notes will be protected by the work product doctrine, but not the attorney-client privilege. Under the work product doctrine, neither the recording nor the notes would normally be discoverable, as opposing counsel can interview the witness independently. But if the witness is unavailable, then opposing counsel may be entitled to limited discovery, to the extent necessary to obtain material information. Typically, the interview would be discoverable because it is fact work product, but the attorney’s notes would not be discoverable because they are opinion work product. If fact work product and opinion work product are combined in the same document, then the opinion work product would be redacted before the document is produced.

[**Federal Rule of Civil Procedure 26: General Provisions Governing Discovery**](https://www.law.cornell.edu/rules/frcp/rule_26)

1. Discovery Scope and Limits.
   1. Trial Preparation: Materials.
      1. 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:
         1. they are otherwise discoverable under Rule 26(b)(1); and
         2. the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
      2. 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.
      3. 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:
         1. a written statement that the person has signed or otherwise adopted or approved; or
         2. a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.



[The J.M. Taylor](http://www.tugboatinformation.com/tug.cfm?id=6539), Philadelphia, Pa. (~1940)

[***Hickman v. Taylor*, 329 U.S. 495 (1947)**](https://scholar.google.com/scholar_case?case=16022612956787466965)

**Summary:** A tugboat sank and five crewmen died. The owners and insurers were represented by Fortenbaugh, who interviewed the surviving crewmen and memorialized the interviews. The estates of the dead crewmen filed wrongful death actions against the owners, all of which settled but one. Plaintiff’s counsel asked Fortenbaugh to produce any information related to the interviews. Fortenbaugh refused, the district court ordered him to produce the information, and the circuit court reversed, under the work product doctrine. The Supreme Court affirmed, holding that work product is discoverable only with a sufficient showing of necessity.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case presents an important problem under the Federal Rules of Civil Procedure as to the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party’s counsel in the course of preparation for possible litigation after a claim has arisen. Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man’s work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.

On February 7, 1943, the tug “J.M. Taylor” sank while engaged in helping to tow a car float of the Baltimore & Ohio Railroad across the Delaware River at Philadelphia. The accident was apparently unusual in nature, the cause of it still being unknown. Five of the nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm, of which respondent Fortenbaugh is a member, to defend them against potential suits by representatives of the deceased crew members and to sue the railroad for damages to the tug.

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. At the time when Fortenbaugh secured the statements of the survivors, representatives of two of the deceased crew members had been in communication with him. Ultimately claims were presented by representatives of all five of the deceased; four of the claims, however, were settled without litigation. The fifth claimant, petitioner herein, brought suit in a federal court under the Jones Act on November 26, 1943, naming as defendants the two tug owners, individually and as partners, and the railroad.

One year later, petitioner filed 39 interrogatories directed to the tug owners. The 38th interrogatory read: “State whether any statements of the members of the crews of the Tugs ‘J.M. Taylor’ and ‘Philadelphia’ or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug ‘John M. Taylor.’ Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.”

Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made 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. If the answer was in the affirmative, the tug owners were then requested to set forth the nature of all such records, reports, statements or other memoranda.

The tug owners, through Fortenbaugh, answered all of the interrogatories except No. 38 and the supplemental ones just described. While admitting that statements of the survivors had been taken, they declined to summarize or set forth the contents. They did so on the ground that such requests called “for privileged matter obtained in preparation for litigation” and constituted “an attempt to obtain indirectly counsel’s private files.” It was claimed that answering these requests “would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel.”

In connection with the hearing on these objections, Fortenbaugh made a written statement and gave an informal oral deposition explaining the circumstances under which he had taken the statements. But he was not expressly asked in the deposition to produce the statements. The District Court for the Eastern District of Pennsylvania, sitting en banc, held that the requested matters were not privileged. The court then decreed that the tug owners and Fortenbaugh, as counsel and agent for the tug owners, forthwith “answer Plaintiff’s 38th interrogatory and supplementary interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh’s memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff.” Upon their refusal, the court adjudged them in contempt and ordered them imprisoned until they complied.

The Third Circuit Court of Appeals, also sitting en banc, reversed the judgment of the District Court. It held that the information here sought was part of the “work product of the lawyer” and hence privileged from discovery under the Federal Rules of Civil Procedure. The importance of the problem, which has engendered a great divergence of views among district courts, led us to grant certiorari.

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

In urging that he has a right to inquire into the materials secured and prepared by Fortenbaugh, petitioner emphasizes that the deposition-discovery portions of the Federal Rules of Civil Procedure are designed to enable the parties to discover the true facts and to compel their disclosure wherever they may be found. It is said that inquiry may be made under these rules, epitomized by Rule 26, as to any relevant matter which is not privileged; and since the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds. On the premise that the attorney-client privilege is the one involved in this case, petitioner argues that it must be strictly confined to confidential communications made by a client to his attorney. And since the materials here in issue were secured by Fortenbaugh from third persons rather than from his clients, the tug owners, the conclusion is reached that these materials are proper subjects for discovery under Rule 26.

As additional support for this result, petitioner claims that to prohibit discovery under these circumstances would give a corporate defendant a tremendous advantage in a suit by an individual plaintiff. Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents. At the same time, the individual plaintiff, who often has direct knowledge of the matter in issue and has no counsel until some time after his claim arises could be compelled to disclose all the intimate details of his case. By endowing with immunity from disclosure all that a lawyer discovers in the course of his duties, it is said, the rights of individual litigants in such cases are drained of vitality and the lawsuit becomes more of a battle of deception than a search for truth.

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of “fishing expedition” serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30(b) and (d) and 31(d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

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

But the impropriety of invoking that privilege does not provide an answer to the problem before us. Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. He has sought production of these matters after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident, which inquiries were sworn to have been answered to the best of their information and belief. Interrogatories were directed toward all the events prior to, during and subsequent to the sinking of the tug. Full and honest answers to such broad inquiries would necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses. Petitioner makes no suggestion, and we cannot assume, that the tug owners or Fortenbaugh were incomplete or dishonest in the framing of their answers. In addition, petitioner was free to examine the public testimony of the witnesses taken before the United States Steamboat Inspectors. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking.

The District Court, after hearing objections to petitioner's request, commanded Fortenbaugh to produce all written statements of witnesses and to state in substance any facts learned through oral statements of witnesses to him. Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules.[[3]](#footnote-2) Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

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.

We do not mean to say that all written materials obtained or prepared by an adversary’s counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the 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.

Rule 30(b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. But in the instant case there was no room for that discretion to operate in favor of the petitioner. No attempt was made to establish any reason why Fortenbaugh should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses’ remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Denial of production of this nature does not mean that any material, non-privileged facts can be hidden from the petitioner in this case. He need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponents’ position. Searching interrogatories directed to Fortenbaugh and the tug owners, production of written documents and statements upon a proper showing and direct interviews with the witnesses themselves all serve to reveal the facts in Fortenbaugh’s possession to the fullest possible extent consistent with public policy. Petitioner’s counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh’s professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

We fully appreciate the wide-spread controversy among the members of the legal profession over the problem raised by this case. It is a problem that rests on what has been one of the most hazy frontiers of the discovery process. But until 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 this time so as to reach so harsh and unwarranted a result.

We therefore affirm the judgment of the Circuit Court of Appeals.

MR. JUSTICE JACKSON, concurring.

The narrow question in this case concerns only one of thirty-nine interrogatories which defendants and their counsel refused to answer. As there was persistence in refusal after the court ordered them to answer it, counsel and clients were committed to jail by the district court until they should purge themselves of contempt.

The interrogatory asked whether statements were taken from the crews of the tugs involved in the accident, or of any other vessel, and demanded “Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.” The question is simply whether such a demand is authorized by the rules relating to various aspects of “discovery.”

The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

“Discovery” is one of the working tools of the legal profession. It traces back to the equity bill of discovery in English Chancery practice and seems to have had a forerunner in Continental practice. Since 1848 when the draftsmen of New York’s Code of Procedure recognized the importance of a better system of discovery the impetus to extend and expand discovery, as well as the opposition to it, has come from within the Bar itself. It happens in this case that it is the plaintiff’s attorney who demands such unprecedented latitude of discovery and, strangely enough, amicus briefs in his support have been filed by several labor unions representing plaintiffs as a class. It is the history of the movement for broader discovery, however, that in actual experience the chief opposition to its extension has come from lawyers who specialize in representing plaintiffs, because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance. Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants.

It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. It seems equally clear that discovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client.

To consider first the most extreme aspect of the requirement in litigation here, we find it calls upon counsel, if he has had any conversations with any of the crews of the vessels in question or of any other, to “set forth in detail the exact provision of any such oral statements or reports.” Thus the demand is not for the production of a transcript in existence but calls for the creation of a written statement not in being. But the statement by counsel of what a witness told him is not evidence when written. Plaintiff could not introduce it to prove his case. What, then, is the purpose sought to be served by demanding this of adverse counsel?

Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into “a battle of wits between counsel.” But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a “battle of wits.” I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language, permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the “exact” statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's “inexact” statement could lose nothing by saying, “Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not.” Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness’s conversation with him, or else he will have to go on the stand to defend his own credibility — perhaps against that of his chief witness, or possibly even his client.

Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses’ stories, and not because he wants to do so but in self-defense.

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Having been supplied the names of the witnesses, petitioner’s lawyer gives no reason why he cannot interview them himself. If an employee-witness refuses to tell his story, he, too, may be examined under the Rules. He may be compelled on discovery, as fully as on the trial, to disclose his version of the facts. But that is his own disclosure — it can be used to impeach him if he contradicts it and such a deposition is not useful to promote an unseemly disagreement between the witness and the counsel in the case.

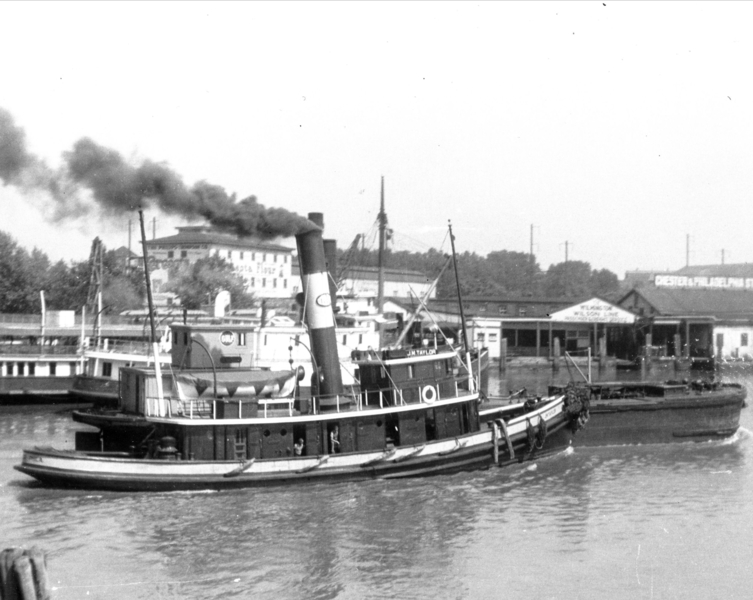
It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court’s order. So the literal language of the Act of Congress which makes “any writing or record made as a memorandum or record of any occurrence, or event” admissible as evidence, would have allowed the railroad company to put its engineer's accident statements in evidence. But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them. We reviewed the background of the Act and the consequences on the trial of negligence cases of allowing railroads and others to put in their statements and thus to shield the crew from cross-examination. We said, “Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication.” We pointed out that there, as here, the “several hundred years of history behind the Act indicate the nature of the reforms which it was designed to effect.” We refused to apply it beyond that point. We should follow the same course of reasoning here. Certainly nothing in the tradition or practice of discovery up to the time of these Rules would have suggested that they would authorize such a practice as here proposed.

The question remains as to signed statements or those written by witnesses. Such statements are not evidence for the defendant. Nor should I think they ordinarily could be evidence for the plaintiff. But such a statement might be useful for impeachment of the witness who signed it, if he is called and if he departs from the statement. There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements be made available. Production of such statements are governed by Rule 34 and on “showing good cause therefor” the court may order their inspection, copying or photographing. No such application has here been made; the demand is made on the basis of right, not on showing of cause.

I agree to the affirmance of the judgment of the Circuit Court of Appeals which reversed the district court.

**Questions:**

1. Why did the Supreme Court find that the work product doctrine is justified?
2. How does the justification for the work product doctrine differ from the justification for the attorney-client privilege?
3. How does the protection provided by the work product doctrine differ from the protection provided by the attorney-client privilege?
4. Why didn’t plaintiff’s counsel make a sufficient showing of necessity in this case?



[The J.M. Taylor](http://www.tugboatinformation.com/tug.cfm?id=6539), Philadelphia, Pa. (~1940)

[***Upjohn Co. v. United States*, 449 U.S. 383 (1981)**](https://scholar.google.com/scholar_case?case=5153750416071396937)

**Summary:** The Supreme Court held that notes and memoranda generated by Upjohn’s attorneys that were not protected by the attorney-client privilege could still be protected by the work product doctrine. Specifically, it found that necessity alone was not enough to require production of opinion work product.

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply.

While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found. The Government relies on the following language in *Hickman*:

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman*, however, did not apply to “oral statements made by witnesses whether presently in the form of the attorney’s mental impressions or memoranda.” As to such material the Court did “not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.” Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes.

Rule 26 accords special protection to work product revealing the attorney’s mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate. Rule 26 goes on, however, to state that “in ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney’s mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection.

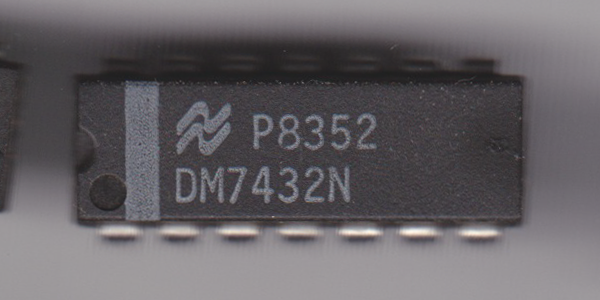
Based on the foregoing, some courts have concluded that no showing of necessity can overcome protection of work product which is based on oral statements from witnesses. Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection.

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the “substantial need” and “without undue hardship” standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys’ mental processes in evaluating the communications. As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

**Questions:**

1. How does the Court distinguish between fact work product and opinion work product?
2. Why is the standard for discovery of fact work product lower than the standard for opinion work product?
3. Should opinion work product ever be discoverable? What if it is inextricable from fact work product?
4. How would discoverability of fact or opinion work product affect the incentives of attorneys?



National Semiconductor DM7432N Quad 2-Input OR Gates

[***Sporck v. Peil*, 759 F. 2d 312 (3d Cir. 1985)**](https://scholar.google.com/scholar_case?case=15421565945967371325)

**Summary:** Peil filed an action against Sporck and Sprague, alleging that they conspired to inflate the value of National Semiconductor stock. Among other things, defendants produced more than 100,000 documents. Counsel for defendants showed Sporck documents while preparing him for a deposition. Plaintiff asked Sporck to identify all of the documents he reviewed in preparation for the deposition. Sporck refused, the district court ordered production, and the circuit court reversed, holding that the attorney’s choice of which documents to show Sporck was opinion work product.

JAMES HUNTER, III, Circuit Judge.

This case arises on a Petition for Writ of Mandamus involving a discovery dispute between the parties to a securities fraud class action suit. The underlying action involves an allegation by plaintiff-respondent Raymond K. Peil that defendant National Semiconductor Corporation, defendant-petitioner Charles F. Sporck, NSC’s president, and defendant Peter J. Sprague, NSC’s chairman, conspired to inflate artificially the value of NSC stock, in order to enable Sporck and Sprague to sell their own shares at the inflated level. The wrongful conduct alleged includes various misrepresentations and nondisclosures of material facts during an eight-month period continuing from July 1, 1976, until March 1, 1977.

During pretrial discovery, attorneys for Peil served numerous sets of combined interrogatory and document requests on defendants. In response, defendants produced hundreds of thousands of documents, from which Peil's attorneys selected more than 100,000 for copying. There is no allegation in this case that defendants have improperly concealed or refused to produce requested documents.

The issue presently before this court arose on May 16, 1983, at the deposition of defendant-petitioner Sporck. Prior to the deposition, counsel for defendants had prepared Sporck for his expected week-long deposition by showing him an unknown quantity of the numerous documents produced by defendants in response to plaintiff’s discovery requests. Defense counsel selected and compiled these documents in a folder in Philadelphia, and transported them to California solely for the deposition. According to defense counsel, the selected documents represented, as a group, counsel’s legal opinion as to the evidence relevant both to the allegations in the case and the possible legal defenses. It is conceded that none of the individual documents, in their redacted form, contained work product of defense counsel.

At the inception of the Sporck deposition, Peil’s attorney asked: “Mr. Sporck, in preparation for this deposition, did you have occasion to examine any documents?” Sporck answered affirmatively, and Peil’s attorney first orally, and then by written motion pursuant to Federal Rule of Civil Procedure 34, requested identification and production of “all documents examined, reviewed or referred to by Charles E. Sporck in preparation for the session of his deposition commencing May 16, 1983.” Defense counsel refused to identify the documents, arguing first that all the documents had previously been produced, and second, that the select grouping of the documents was attorney work product protected from discovery by Federal Rule of Civil Procedure 26(b)(3). Defense counsel agreed, however, to allow Peil’s counsel to ask Sporck about his reliance on individual documents in the context of specific factual questions, and Sporck’s deposition continued on this basis.

Peil filed a motion to compel identification and production of the selected documents, on the ground that all documents used in preparing a witness for a deposition are properly discoverable under Federal Rule of Evidence 612. Judge John B. Hannum granted Peil’s motion, and ordered that defendant produce or identify all documents reviewed by Sporck in preparation for his deposition. Upon petitioner’s motion for reconsideration, Judge Hannum reaffirmed his order, holding that although the select grouping of documents constituted attorney work product, it was not “opinion” work product entitled to absolute protection, and that the principles behind Federal Rule of Evidence 612 supported Peil’s claim to identification of the documents. Sporck now asks this court to issue a writ of mandamus directing the trial court to vacate both orders.

The threshold issue in this case is whether the selection process of defense counsel in grouping certain documents together out of the thousands produced in this litigation is work product entitled to protection under Federal Rule of Civil Procedure 26(b)(3) and the principles of *Hickman v. Taylor*. Petitioner concedes that the individual documents that comprise the grouping are not attorney work product, but argues that the selection process itself represents defense counsel’s mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation. Because identification of the documents as a group will reveal defense counsel’s selection process, and thus his mental impressions, petitioner argues that identification of the documents as a group must be prevented to protect defense counsel's work product. We agree.

The work product doctrine had its modern genesis in the seminal opinion in *Hickman v. Taylor*. In *Hickman*, the Court rejected “an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties.” Preserving the privacy of preparation that is essential to the attorney's adversary role is the central justification for the work product doctrine. Without this zone of privacy:

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.

The work product doctrine as articulated in Hickman has been partially codified in Federal Rule of Civil Procedure 26(b)(3). That rule conditions the production of “documents and tangible things” prepared in anticipation of litigation by or for an opposing party on the moving party's showing of substantial need and undue hardship. Even where such a showing is made, however, the trial court, in ordering the production of such materials, “shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Thus, Rule 26(b)(3) recognizes the distinction between “ordinary” and “opinion” work product first articulated by the Supreme Court.

Opinion work product includes such items as an attorney’s legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses. Such material is accorded an almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system’s interest in maintaining the privacy of an attorney’s thought processes and in ensuring that each side relies on its own wit in preparing their respective cases.

We believe that the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product. As the court succinctly stated in *James Julian, Inc. v. Raytheon Co.*:

In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.

Further, in selecting the documents that he thought relevant to Sporck’s deposition, defense counsel engaged in proper and necessary preparation of his client's case. As the Supreme Court noted in *Hickman*:

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 client's interest.

In the instant case, without the protection that the work product doctrine accords his preparation, defense counsel may have foregone a sifting of the documents, or at the very least chosen not to show the documents to petitioner. As a result, petitioner may not have been as well-prepared for his deposition, and neither plaintiff nor defendant would have realized the full benefit of a well-prepared deponent's testimony. For these reasons, Rule 26(b)(3) placed an obligation on the trial court to protect against unjustified disclosure of defense counsel's selection process.

This conclusion, however, does not end the issue. Respondent argues, and the trial court agreed, that operation of Federal Rule of Evidence 612 removed any protection that defense counsel’s selection process would ordinarily enjoy. Because we find that Federal Rule of Evidence 612 does not apply to the facts of this case, we disagree.

Federal Rule of Evidence 612 provides in relevant part:

If a witness uses a writing to refresh his memory for the purpose of testifying, (2) before testifying, if the court in its discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

This rule is applicable to depositions and deposition testimony. Although applicable to depositions, Rule 612 is a rule of evidence, and not a rule of discovery. Its sole purpose is evidentiary in function - “to promote the search of credibility and memory.”

By its very language, Rule 612 requires that a party meet three conditions before it may obtain documents used by a witness prior to testifying: 1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice. The first requirement is consistent with the purposes of the rule, for if the witness is not using the document to refresh his memory, that document has no relevance to any attempt to test the credibility and memory of the witness.

The second requirement — that the witness use the document for the purpose of testifying — was designed “to safeguard against using the rule as a pretext for wholesale exploration of an opposing party’s files and to insure that access is limited only to those writings which may fairly be said in part to have an impact upon the testimony of the witness.” As with the first requirement, the second requirement recognizes that the document is of little utility for impeachment and cross-examination without a showing that the document actually influenced the witness’ testimony. Finally, the third requirement codifies the Supreme Court’s holding in *Goldman v. United States*, that even though a witness may review notes prior to testifying, a trial court should exercise discretion to guard against “fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.”

In the case before us, the apparent conflict between the protected status of defense counsel's document selection process under Rule 26(b)(3) and the asserted need, for cross-examination purposes, of the identification of the documents actually selected resulted from the failure to establish the first two requirements under Rule 612. In seeking identification of all documents reviewed by petitioner prior to asking petitioner any questions concerning the subject matter of the deposition, respondent’s counsel failed to establish either that petitioner relied on any documents in giving his testimony, or that those documents influenced his testimony. Without first eliciting the testimony, there existed no basis for asking petitioner the source of that testimony. We conclude, therefore, that deposing counsel failed to lay a proper foundation under Rule 612 for production of the documents selected by counsel.

Indeed, if respondent’s counsel had first elicited specific testimony from petitioner, and then questioned petitioner as to which, if any, documents informed that testimony, the work product petitioner seeks to protect — counsel’s opinion of the strengths and weaknesses of the case as represented by the group identification of documents selected by counsel — would not have been implicated. Rather, because identification of such documents would relate to specific substantive areas raised by respondent's counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on. The fear that counsel for petitioner's work product would be revealed would thus become groundless.

Rule 612, therefore, when properly applied, does not conflict with the protection of attorney work product of the type involved in this case. Because the trial court did not properly condition its application of Rule 612 on a showing that petitioner relied upon the requested documents for his testimony and that those documents impacted on his testimony, the court committed legal error. This error became prejudicial when it implicated work product of petitioner’s counsel. Proper application of Rule 612 should never implicate an attorney's selection, in preparation for a witness’ deposition, of a group of documents that he believes critical to a case. Instead, identification of such documents under Rule 612 should only result from opposing counsel’s own selection of relevant areas of questioning, and from the witness’ subsequent admission that his answers to those specific areas of questioning were informed by documents he had reviewed. In such a case, deposing counsel would discover the documents through his own wit, and not through the wit of his adversary.

We conclude, therefore, that the trial court committed clear error of law in ordering the identification of the documents selected by counsel. Because we are confident that the district court will proceed in accordance with our opinion without formal issuance of the writ, we will remand to the district court.

SEITZ, Circuit Judge, dissenting.

The majority approves in effect the use of the work product doctrine to prevent an identification of documents reviewed by a witness in preparation for his deposition. I dissent because I am convinced that such a ruling is an impermissible expansion of the work product doctrine at the expense of legitimate discovery.

The plaintiffs-respondents sought in the district court the discovery of relevant objective facts: the identities of the documents that the deponent reviewed prior to testifying. These facts are not, in themselves, the opinion or thought processes of an attorney. Nor were the contents of the documents, all of which had already been produced by the defendants, created by defendants’ attorney in anticipation of litigation.

Yet, the defendant-petitioner claims that the mere identification of the documents examined prior to his deposition would reveal his attorney’s litigation strategy. Presumably, the petitioner’s argument must be that if the respondents knew which documents were reviewed, they could, upon examination of the documents identified, draw conclusions as to why each document was chosen.

The problem with the petitioner's theory is that it assumes that one can extrapolate backwards from the results of a selection process to determine the reason a document was selected for review by the deponent. There are many reasons for showing a document or selected portions of a document to a witness. The most that can be said from the fact that the witness looked at a document is that someone thought that the document, or some portion of the document, might be useful for the preparation of the witness for his deposition. This is a far cry from the disclosure of the lawyer’s opinion work product. Even assuming that the documents were selected by the petitioner’s attorney, the subject matter is so undifferentiated that its potential for invasion of work product is miniscule at best.

Every act by a litigant or his attorney gives rise to similar vague inferences. For example, a typical interrogatory from a leading treatise would permit questions of the following form: “Identify each writing which relates or refers directly or indirectly to a transaction in question.” It cannot seriously be contended that an answer is not required because it would reveal the fact that the attorney thought that certain documents were relevant to the transaction.

Moreover, in order to claim the shield of opinion work product, it must be established that it is the attorney’s thought processes that are revealed. The respondents’ request did not require the identification of the person who selected the documents. The only disclosed connection to the petitioner’s attorney in our situation is that the petitioner gratuitously volunteered the fact that his attorney selected the documents. To permit this volunteered information to provide a necessary link to attorney’s thought processes, as the majority has done, is to permit the petitioner to cloak the non-work product aspects of the information sought with work product protection. Certainly an attorney cannot cloak a document under the mantle of work product by simply reviewing it. It is difficult to see how an attorney or his witness may insulate the discoverable fact that the witness reviewed a particular document by volunteering that the attorney selected the document for deposition preparation purposes.

Finally, the petitioner contends that the information sought was “fact” work product, and that the respondents have made an insufficient showing of need to require its production. Assuming without deciding that the information sought was fact work product, I would not decide this issue on a petition for a writ of mandamus. To reach this issue would require us to review a decision committed to the discretion of the district court, and such decisions do not constitute “clear and indisputable” legal error. Further, revelation of fact work product does not constitute the same sort of irreparable harm that would come from the revelation of opinion work product.

Because I find no disclosure of the attorney's work product that would provide a basis for granting the writ, I would not reach the issue of whether a proper foundation had been established for the requested information under Federal Rule of Evidence 612 or the provision covering relevant evidence found in Federal Rule of Civil Procedure 26(b)(1). Decisions on such matters are not independently reviewable on a petition seeking the extraordinary remedy of mandamus.

Based on the record presented by the petitioner, I fail to see how any conclusions may be drawn as to what his attorney may or may not have thought about this litigation. The mere identification of documents used to prepare a witness for his deposition does not convey any meaningful information of the type entitled to protection under the work product doctrine. I would deny the petition.

**Questions:**

1. Why did the majority hold that the attorney’s choice of which documents to show Sporck in preparation for the deposition was opinion work product?
2. Why did the dissent argue that it was not work product at all?

[***United States v. Deloitte LLP*, 610 F. 3d 129 (D.C. Cir. 2010)**](https://scholar.google.com/scholar_case?case=3310515267694915424)

**Summary:** Dow Chemicals filed an action disputing a tax adjustment. Among other things, the IRS subpoenaed documents from Deloitte & Touche, Dow’s auditor. Deloitte refused to produce three documents, under the work product doctrine. The district court denied the IRS’s motion to compel, finding that the documents were created in anticipation of litigation and reflected attorney thoughts, and therefore were protected by the work product doctrine. The circuit court vacated in part and affirmed in part, holding that the district court lacked sufficient information to determine whether some of the documents were work product, but did not abuse its discretion with respect to other documents.

SENTELLE, Chief Judge:

The United States appeals from a district court order denying its motion to compel Dow Chemical Company’s independent auditor, Deloitte & Touche USA, LLP, to produce three documents in connection with ongoing tax litigation between Dow and the government. The district court ruled that all three documents were protected from discovery under the work-product doctrine. On appeal, the government contends that one of the documents is not work product because it was prepared by Deloitte during the audit process. In addition, while it concedes that the other two documents are work product, it argues that Dow waived work-product protection when it disclosed them to Deloitte. We vacate the district court's decision that the document prepared by Deloitte is work product and remand for in camera review to determine whether it is entirely work product. With respect to the other two documents, we affirm the district court’s decision that Dow did not waive work-product protection when it disclosed them to Deloitte.

I. Background

This discovery dispute arises from ongoing tax litigation in the U.S. District Court for the Middle District of Louisiana. The litigation concerns the tax treatment of two partnerships owned by Dow Chemical Company and two of its wholly-owned subsidiaries. The first of these partnerships was Chemtech I; it was succeeded by Chemtech II. In 2005, Dow filed a civil suit challenging IRS adjustments to partnership returns filed by Chemtech I and Chemtech II. During discovery, the government subpoenaed documents from Dow’s independent auditor, Deloitte & Touche USA, LLP. Since the subpoena sought production in Washington, D.C., it issued from the U.S. District Court for the District of Columbia. Deloitte produced a number of documents, but refused to produce three documents Dow identified as attorney work product. In response, the government filed a motion to compel production.

The three disputed documents are described in Dow’s privilege log and in a declaration by William Curry, Dow’s Director of Taxes. The first document is a 1993 draft memorandum prepared by Deloitte that summarizes a meeting between Dow employees, Dow’s outside counsel, and Deloitte employees about the possibility of litigation over the Chemtech I partnership, and the necessity of accounting for such a possibility in an ongoing audit. This meeting took place after Dow informed Deloitte about the likelihood of litigation over the Chemtech I transaction. The second is a 1998 memorandum and flow chart prepared by two Dow employees — an accountant and an in-house attorney. The third is a 2005 tax opinion prepared by Dow’s outside counsel. Curry’s declaration explains that the second and third documents were disclosed to Deloitte so that it could “review the adequacy of Dow’s contingency reserves for the Chemtech transactions. According to Curry, Deloitte “compelled Dow’s production of these documents by informing the company that access to these documents was required in order to provide Dow with an unqualified audit opinion for its public financial statements.” The privilege log describes the subject matter of these documents as “tax issues related to the Chemtech partnership” and states that each one is a “document prepared in anticipation of litigation.” We will refer to the first document, which was prepared by Deloitte, as the “Deloitte Memorandum,” and the second and third documents, which were created by Dow, as the “Dow Documents.”

The district court denied the government’s motion to compel without reviewing the disputed documents in camera. It concluded that the Deloitte Memorandum was work product because it was “prepared because of the prospect of litigation with the IRS over the tax treatment of Chemtech.” The court further concluded that, although the document was created by Deloitte, it was nonetheless Dow’s work product because “its contents record the thoughts of Dow’s counsel regarding the prospect of litigation.” In addition, the court rejected the government’s contention that Dow had waived work-product protection for the three documents. The court acknowledged that disclosing work product to a third party can waive protection if that disclosure is “inconsistent with the maintenance of secrecy from the disclosing party’s adversary,” but concluded that Dow’s disclosure to Deloitte was not inconsistent with maintaining secrecy because (1) Deloitte was not a potential adversary and (2) nothing suggested that it was unreasonable for Dow to expect Deloitte to maintain confidentiality. The government appeals this ruling, and Dow has intervened to assert work-product protection.

II. Analysis

The government contends that the Deloitte Memorandum is not attorney work product. Alternatively, it argues that even if the Deloitte Memorandum is work product, Dow waived work-product protection when it orally disclosed the information recorded therein to Deloitte. Turning to the Dow Documents, the government concedes they are attorney work product, but argues that Dow waived work-product protection when it gave them to Deloitte.

A. The Work-Product Doctrine

The Supreme Court established the work-product doctrine in *Hickman v. Taylor*, which held that an attorney's notes recording his interviews with witnesses to the litigation-prompting incident were protected from discovery. The Court recognized that to prepare for litigation, an attorney must “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.” This preparation “is reflected in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.” The Court reasoned that giving opposing counsel access to such work product would cause significant problems:

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.

Consequently, the Court concluded that attorney work product is protected from discovery unless “the one who would invade that privacy” carries the burden of “establishing adequate reasons to justify production through a subpoena or court order.”

The work-product doctrine announced in Hickman was subsequently partially codified in Federal Rule of Civil Procedure 26(b)(3), which states:

(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).

Rule 26(b)(3) allows a court to order disclosure when the requesting party can show a “substantial need” for the material and an inability to procure equivalent information “without undue hardship.” When a court orders disclosure under this exception, however, it must still “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” This type of work product, which is often described as opinion work product, “is virtually undiscoverable.”

B. The Deloitte Memorandum

The government makes two categorical arguments that the Deloitte Memorandum cannot be work product. First, it argues that the Deloitte Memorandum cannot be work product because it was created by Deloitte, not Dow or its representative. Second, it argues that the Deloitte Memorandum cannot be work product because it was generated as part of the routine audit process, not in anticipation of litigation. If either argument is correct, the Deloitte Memorandum cannot be work product, regardless of its contents. We reject both arguments, but nevertheless conclude that the district court lacked sufficient information to determine that the entire Deloitte Memorandum is work product.

1

The government first contends that Dow cannot claim work-product protection for the Deloitte Memorandum because it was prepared by Deloitte. Rule 26(b)(3) only protects “documents and tangible things that are prepared by or for another party or its representative.” Given this language, the government argues that the Deloitte Memorandum is not work product because Deloitte is not Dow’s representative. It relies principally on *United States v. Arthur Young & Co.*, in which the Supreme Court refused to recognize an accountant work-product privilege. In *Arthur Young*, the Court contrasted the role of an attorney with that of an accountant, explaining that an attorney is “a loyal representative whose duty it is to present the client’s case in the most favorable possible light,” whereas an independent certified public accountant has a “public responsibility” and “owes ultimate allegiance to the corporation’s creditors and stockholders, as well as to the investing public.” In the government’s view, *Arthur Young* demonstrates that Deloitte cannot be Dow’s representative, which in turn means that the Deloitte Memorandum cannot be work product under the plain language of Rule 26(b)(3). Dow counters that the “representative” for purposes of Rule 26(b)(3) is its counsel, whose thoughts and opinions are recorded in the document. In addition, it argues that the Deloitte Memorandum is work product because it contains the same type of opinion work product that is found in the Dow Documents, which the government concedes are work product.

Even if the government is correct in asserting that the Deloitte Memorandum falls outside the definition given by Rule 26(b)(3), this does not conclusively establish that it is not work product. The government mistakenly assumes that Rule 26(b)(3) provides an exhaustive definition of what constitutes work product. On the contrary, Rule 26(b)(3) only partially codifies the work-product doctrine announced in *Hickman*. Rule 26(b)(3) addresses only “documents and tangible things,” but *Hickman*'s definition of work product extends to “intangible” things. Moreover, in *Hickman*, the Court explained that the attorney’s “mental impressions” were protected from discovery, so that he could not be forced to “repeat or write out” that information in discovery. Thus *Hickman* provides work-product protection for intangible work product independent of Rule 26(b)(3).

The government focuses on Deloitte’s role in creating the document and on its relationship to Dow. Under *Hickman*, however, the question is not who created the document or how they are related to the party asserting work-product protection, but whether the document contains work product — the thoughts and opinions of counsel developed in anticipation of litigation. The district court found that the memorandum records those thoughts, even though Deloitte and not Dow or its attorney committed them to paper. The work product privilege does not depend on whether the thoughts and opinions were communicated orally or in writing, but on whether they were prepared in anticipation of litigation. Thus Deloitte’s preparation of the document does not exclude the possibility that it contains Dow’s work product.

2

The government next contends that the Deloitte Memorandum cannot be work product because it was generated during an annual audit, not prepared in anticipation of litigation. The courts are not unanimous on the proper test for determining whether a document was prepared “in anticipation of litigation.” Under the test adopted by most circuits, the question is whether the document was created “because of” the anticipated litigation. The Fifth Circuit, however, requires that anticipation of litigation be the “primary motivating purpose” behind the document’s creation.

Like most circuits, we apply the “because of” test, asking “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.” In addition, while this standard addresses a “document,” it applies equally to work product in other forms. Thus for the Deloitte Memorandum, the question is whether it records information prepared by Dow or its representatives because of the prospect of litigation.

In the government’s view, the Deloitte Memorandum was prepared not “because of the prospect of litigation,” but as part of the routine audit process. The government asserts that a document’s function, not its content, determines whether it is work product. For this proposition the government relies on *Delaney, Migdail & Young, Chartered v. IRS*. In *Delaney*, a law firm sought to obtain under the Freedom of Information Act memoranda and supporting documents relating to the government’s legal analysis of an Internal Revenue Service program concerning the use of statistical sampling in auditing large accounts. In that case it was the IRS that asserted work-product protection. The court held that the documents were work product because they “advised the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome.” In its reasoning, the court noted that a previous work-product decision had identified “the function of the documents as the critical issue.” The government seizes on this language, arguing that the Deloitte Memorandum is not work product because its function was to facilitate Deloitte’s audit, not to prepare Dow for litigation.

We think the government misreads *Delaney*. While *Delaney* used the term “function,” it was not considering any distinction between function and content in determining whether a document constituted work product. On the contrary, the court evaluated the function of the IRS documents at issue by examining their contents. It contrasted the documents at issue in the *Coastal States* case, which were like “an agency manual, fleshing out the meaning of the statute it was authorized to enforce,” with the documents at issue in *Delaney*, which were memoranda describing potential legal challenges, possible defenses, and likely outcomes. *Delaney* does not support the proposition that we should look solely to a document's function divorced from its contents in determining its status as work product.

In short, a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation.

3

Rejecting the government's categorical arguments establishes only that the Deloitte Memorandum may be protected work product under the law; we must now determine whether it is. On examination of the record, we conclude that the district court did not have a sufficient evidentiary foundation for its holding that the memorandum was purely work product. According to the record, the document was created during Deloitte’s preparation of an audit report which in Deloitte’s view required consideration of potential litigation. The meeting generating the document included both Deloitte and Dow employees, as well as Dow's outside counsel. The document itself was prepared by a third party. While none of this negates the possibility of work-product privilege, it could make it likely that the document includes other information that is not work product. According to Dow’s privilege log and the Curry declaration, the memorandum does contain thoughts and analyses by legal counsel, but this does not rule out or even render unlikely the possibility that it also includes other facts, other thoughts, other analyses by non-attorneys which may not be so intertwined with the legal analysis as to warrant protection under the work-product doctrine. We will therefore remand this question to the district court for the purpose of independently assessing whether the document was entirely work product, or whether a partial or redacted version of the document could have been disclosed. Accordingly, we vacate the district court's decision that the Deloitte Memorandum was work product and remand so that the district court can examine the document in camera to determine whether it is entirely work product.

C. The Dow Documents

Although the government concedes that the Dow Documents are work product, it contends that Dow waived work-product protection by disclosing them to Deloitte. To the best of our knowledge, no circuit has addressed whether disclosing work product to an independent auditor constitutes waiver. Among the district courts that have addressed this issue, most have found no waiver.

While voluntary disclosure waives the attorney-client privilege, it does not necessarily waive work-product protection. The attorney-client privilege and the work-product doctrine serve different purposes: the former protects the attorney-client relationship by safeguarding confidential communications, whereas the latter promotes the adversary process by insulating an attorney’s litigation preparation from discovery. Voluntary disclosure waives the attorney-client privilege because it is inconsistent with the confidential attorney-client relationship. Voluntary disclosure does not necessarily waive work-product protection, however, because it does not necessarily undercut the adversary process. Nevertheless, disclosing work product to a third party can waive protection if “such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.” Under this standard, the voluntary disclosure of attorney work product to an adversary or a conduit to an adversary waives work-product protection for that material.

Applying this standard, the government contends that Dow has waived work-product protection for the Dow Documents because Deloitte is (1) a potential adversary and (2) a conduit to other adversaries. We reject both contentions and conclude that Dow has not waived the protection.

1

The government contends that Deloitte is a potential adversary of Dow because disputes sometimes arise between independent auditors and their clients and because independent auditors have the power to issue opinions that adversely affect their clients. Neither argument demonstrates that Deloitte is a potential adversary for purposes of waiver analysis. First, as an independent auditor, Deloitte cannot be Dow’s adversary. Even the threat of litigation between an independent auditor and its client can compromise the auditor's independence and necessitate withdrawal. Further, Deloitte’s power to issue an adverse opinion, while significant, does not make it the sort of litigation adversary contemplated by the waiver standard. Similarly, “any tension between an auditor and a corporation that arises from an auditor’s need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine.” Second, the possibility of a future dispute between Deloitte and Dow does not render Deloitte a potential adversary for the present purpose. If it did, any voluntary disclosure would constitute waiver. Yet the work-product doctrine allows disclosures as long as they do not undercut the adversary process.

Here, the question is not whether Deloitte could be Dow’s adversary in any conceivable future litigation, but whether Deloitte could be Dow’s adversary in the sort of litigation the Dow Documents address. We conclude that the answer must be no. In preparing the Dow Documents, Dow anticipated a dispute with the IRS, not a dispute with Deloitte. The documents, which concern the tax implications of the Chemtech partnerships, would not likely be relevant in any dispute Dow might have with Deloitte. Thus Deloitte cannot be considered a potential adversary with respect to the Dow Documents.

2

The government also asserts that Deloitte is a conduit to Dow’s adversaries. It claims the district court failed to address this question, but this ignores the district court's explicit statement that “no evidence suggests that it was unreasonable for Dow to expect Deloitte USA to maintain confidentiality.” Like the district court, we conclude that Deloitte is not a conduit to Dow’s adversaries.

Our prior decisions applying the “maintenance of secrecy” standard, while fact-intensive, have generally made two discrete inquiries in assessing whether disclosure constitutes waiver. First, we have considered whether the disclosing party has engaged in self-interested selective disclosure by revealing its work product to some adversaries but not to others. Such conduct militates in favor of waiver, for it is “inconsistent and unfair to allow parties to select according to their own self-interest to which adversaries they will allow access to the materials.”

Second, we have examined whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential. A reasonable expectation of confidentiality may derive from common litigation interests between the disclosing party and the recipient. “The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege.” This is true because when common litigation interests are present, “the transferee is not at all likely to disclose the work product material to the adversary.” Alternately, a reasonable expectation of confidentiality may be rooted in a confidentiality agreement or similar arrangement between the disclosing party and the recipient. Nevertheless, a confidentiality agreement must be relatively strong and sufficiently unqualified to avoid waiver. In *Williams*, for example, we concluded that the government’s assurance that it would maintain confidentiality “to the extent possible” was not sufficiently strong or sufficiently unqualified to prevent the government from disclosing the information to a criminal defendant under *Brady v. Maryland*. Likewise, we have determined that a mere promise to give the disclosing party notice before releasing documents does not support a reasonable expectation of confidentiality.

The selective disclosure inquiry is straightforward. Selective disclosure involves disclosing work product to at least one adversary. As we have explained, Deloitte is not an adversary, so Dow’s disclosure to Deloitte was not selective disclosure. The “reasonable expectation of confidentiality” inquiry is more complicated. As to common interests, Dow and Deloitte do not have common litigation interests in the Dow Documents — Dow has a litigation interest in the documents because of its interest in the Chemtech partnerships, but Deloitte has no similar interest in the documents. Absent common interests, the question is whether a confidentiality agreement or similar assurance gave Dow a reasonable expectation that Deloitte would keep its work product confidential.

We conclude that Dow had a reasonable expectation of confidentiality because Deloitte, as an independent auditor, has an obligation to refrain from disclosing confidential client information. Rule 301 of the American Institute of Certified Public Accountants Code of Professional Conduct provides: “A member in public practice shall not disclose any confidential client information without the specific consent of the client.” William Curry's declaration explains that “Dow furnished these documents to Deloitte with the expectation that Deloitte would retain the confidentiality of the two documents.” Given the obligation imposed by Rule 301, we think this expectation was reasonable.

The government responds that this is a “‘qualified assurance’ that does not suffice to prevent waiver because Rule 301 also explains that it “shall not be construed to affect in any way the member’s obligation to comply with a validly issued and enforceable subpoena or summons.” But an assertion of work-product protection challenges the enforceability of a subpoena with respect to those materials. Thus Deloitte could refuse to produce the documents, thereby allowing Dow to intervene and assert work-product protection, without violating its obligation to comply with enforceable subpoenas. Indeed, this is exactly what Deloitte did. Accordingly, this caveat does not significantly diminish the reasonableness of Dow's expectation of confidentiality.

The government also attempts to bolster its waiver argument by identifying instances in which an independent auditor might disclose information obtained from a company whose finances it audits. For example, it asserts that Deloitte could make Dow disclose its confidential tax analysis in footnotes to its public financial statements. Likewise, Deloitte could testify about confidential information obtained from Dow in proceedings brought by the SEC or private parties. Or Deloitte might report illegal acts it detects during its audit. Finally, the government returns to *Arthur Young*, arguing that as an independent auditor, Deloitte is a “public watchdog” whose ultimate allegiance is to Dow's creditors, stockholders, and the investing public — all potential adversaries of Dow. In sum, the government contends that Dow could not reasonably expect confidentiality from Deloitte after giving it the Dow Documents, given the myriad ways Deloitte could reveal that information.

Of course Deloitte might disclose some information relevant to Dow’s finances. But the government has neither pointed to any regulatory provision nor posited any specific circumstance under which Deloitte would be required to disclose attorney work product like that contained in the Dow Documents. An independent auditor can fulfill its duties and render an opinion concerning a company’s public financial statements without revealing every piece of information it reviews during the audit process. In short, Deloitte’s independent auditor obligations do not make it a conduit to Dow’s adversaries.

Likewise, the government's reliance on *Arthur Young* is misplaced. In *Arthur Young*, the Court considered whether accountant work-product should be granted the same protection attorney work product receives. The government quotes the Court's statement that “To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.” All well and good. In this case, however, the government attempts to discover not an independent auditor's “interpretations of the client's financial statements,” which *Arthur Young* would permit, but an attorney’s thoughts and opinions developed in anticipation of litigation, which the work-product doctrine forbids.

Furthermore, we are mindful that independent auditors have significant leverage over the companies whose finances they audit. An auditor can essentially compel disclosure by refusing to provide an unqualified opinion otherwise. Finding waiver based on such disclosures could well encourage the sort of “inefficiency, unfairness and sharp practices” that *Hickman* sought to avoid. For example, it might discourage companies from seeking legal advice and candidly disclosing that information to independent auditors. Moreover, the government has not proffered any good reason for wanting the Dow Documents other than its desire to know what Dow's counsel thought about the Chemtech partnerships. Granting discovery under these circumstances would undercut the adversary process and let the government litigate “on wits borrowed from the adversary,” We conclude that the district court applied the correct legal standard and acted within its discretion in determining that Dow had not waived work-product protection. Consequently, we affirm the district court's decision denying the government's motion to compel with respect to the Dow Documents.

**Questions:**

1. Why did the court hold that a document disclosed to a third-party can be protected by the work product doctrine? Do you agree with its conclusion?
2. When would a document disclosed to a third-party not be protected by the work product doctrine?

**Further Reading:**

* [Sean Grammel, Comment, *Protecting Search Terms as Opinion Work Product: Applying the Work Product Doctrine to Electronic Discovery*, 161 U. Pa. L. Rev. 2063 (2013)](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1034&context=penn_law_review)
* [Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 Geo. L.J. 917 (1984)](https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2610&context=facpub)
* [Vivian K. Yamaguchi, *Discovery and the Work Product Doctrine*, 11 Loy. U. Chi. L. J. 863 (1980)](https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=2093&context=luclj)

1. Close Lobsters, *Let’s Make Some Plans*, What Is There To Smile About (1988). [↑](#footnote-ref-0)
2. Lou Reed & John Cale, *Work*, Songs for Drella (1990). [↑](#footnote-ref-1)
3. The English courts have developed the concept of privilege to include all documents prepared by or for counsel with a view to litigation. “All documents which are called into existence for the purpose — but not necessarily the sole purpose — of assisting the deponent or his legal advisers in any actual or anticipated litigation are privileged from production. Thus all proofs, briefs, draft pleadings, etc., are privileged; but not counsel’s indorsement on the outside of his brief, nor any deposition or notes of evidence given publicly party *bona fide* for the use of his solicitor for the purposes of the action, whether in fact so used or not. Reports by a company’s servant, if made in the ordinary course of routine, are not privileged, even though it is desirable that the solicitor should have them and they are subsequently sent to him; but if the solicitor has requested that such documents shall always be prepared for his use and this was one of the reasons why they were prepared, they need not be disclosed.” [↑](#footnote-ref-2)