RETHINKING WORK PRODUCT

Elizabeth Thornburg*

The work product doctrine is the result of a monumental clash in the values underlying modern civil litigation.¹ On the one hand, we cling to an adversarial model. Thus envisioned, the lawsuit is a battle between opposing armies, each side preparing independently and each attorney having no duty but to represent zealously his or her own client.² This model stresses individual initiative, discourages cooperation, and does nothing to modify within the litigation process the inequities in wealth and information that exist outside the litigation process.

On the other hand, since the advent of modern pretrial discovery, we also have embraced a different vision of civil litigation. Discovery is a nonadversarial element injected into an adversarial system.³ Discovery acts to correct an inherent flaw in an adversarial system—the unequal distribution of information relevant to the dispute⁴—by

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² In the prediscovery, purely adversarial system,
   [t]he conception of justice has always been subordinate to the conception of the law suit as a game between opposing counsel. . . . [B]oth sides conduct their operations with as great a measure of secrecy as possible. . . . The bar has viewed with suspicion any attempts to destroy this secrecy . . . . An open consideration of the facts has not seemed to be a primary aim of the game.

³ See Sward, supra note 2, at 328 (noting that discovery involves loss of party control and more active involvement of the decisionmaker than the traditional adversarial model).
⁴ "For anyone who is concerned with justice, the most salient feature of contemporary American society is the wildly unequal distribution of wealth and power. Only the complacent or the ideologically blinded can avoid the issue of the complicity of rules of procedure in fostering inequality." Kenneth W. Graham, The Persistence of Progressive Proceduralism, 61
requiring a sharing of all such relevant information prior to trial.\(^5\)

This nonadversarial model stresses a joint effort at arriving at a correct result, requires cooperation in the information-gathering process, and modifies within the litigation process some of the inequities in information that exist outside the litigation process. To the extent that it is costly for one of the parties to develop information that must be turned over to its adversary, the discovery process also leads to some shift in wealth.

Faced with the clash between these models and their underlying values, courts and rulemakers had to decide what to do with “work product”—material generated in connection with the process of investigating and resolving disputes, material generated by attorneys, attorneys’ agents, the parties, and the parties’ agents, with litigation at least a glimmer in their minds. Parties, accustomed to acting as adversaries, did not want to turn over to their opponents either harmful information or information that had been expensive to compile. The system resolved this problem by creating work product immunity. Generally speaking, the work product doctrine protects—allows opponents to hide during discovery—tangible and intangible information generated in anticipation of litigation. Only an adversarial model can explain the work product doctrine: it promotes individual, uncooperative action,\(^6\) it values secrecy and surprise,\(^7\) and it refuses to allow a transfer of information or wealth between the parties.

\(^5\) Sunderland wrote at the time that discovery was intended as an information redistribution device. Edson R. Sunderland, Discovery Before Trial Under the New Federal Rules, 15 Tenn. L. Rev. 737, 739 (1939) (“Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game.”); see also Arthur B. LaFrance, Work-Product Discovery: A Critique, 68 Dick. L. Rev. 351, 351 (1964) (stating that the discovery rules of the Federal Rules of Civil Procedure were an attempt to put “unequal opponents on a more equal footing”); Sward, supra note 2, at 329 (arguing that discovery is an attempt to “overcome the . . . inequality of information—that undermines adversarial fact-finding”).


\(^7\) See, e.g., City of Long Beach v. Superior Ct., 134 Cal. Rptr. 468, 474 (Ct. App. 1976) (“We are not convinced that the sporting theory of litigation must be so entirely eliminated.”).
Earlier commentators have noted that particular facets of work product immunity are unnecessary, such as the protection of ordinary trial preparation materials, witness statements, and materials used in subsequent litigation. Work product protection also has recent advocates, most notably a new defense from the law and economics perspective.

This Article, however, takes a different approach, arguing that work product immunity should be eliminated entirely. Neither the traditional utilitarian justifications for work product immunity nor their modern-day law and economics counterparts are theoretically or empirically sound. Work product immunity is not needed to protect the adversary system or the legal profession. Rather, it results in the suppression of relevant information and in the imposition of gigantic transaction costs on the parties and the judicial system.

Worse, work product protection has an uneven effect on litigants. In theory, the work product doctrine is an evenhanded doctrine. After all, by the time a dispute results in litigation, everyone has an attorney, so everyone has work product. In operation, however, the work product doctrine is not evenhanded. It works to benefit institutional litigants at the expense of individual litigants and to benefit frequent litigants at the expense of "one-shot" litigants.

Work product immunity is unsound in theory, unfair in operation, and immensely costly to litigants and society. Legitimate concerns about the timing of litigation, cost-sharing, or attorney behavior can be addressed directly, but the current draconian work product doctrine must go.

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12 For the first use of this terminology, see Marc Galanter, Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc'y Rev. 95 (1974).
I. OVERVIEW: HISTORY AND COVERAGE

Before the 1939 Federal Rules of Civil Procedure, there was virtually no discovery in actions at law and little discovery in equity. The general unavailability of discovery procedures obviated the need to raise the specific issue of whether an attorney's trial preparations were discoverable. Moreover, in their original form, the Federal Rules offered no protection to the material collected by an attorney, to the attorney's mental impressions developed in the course of preparation for trial, or to other trial preparation materials. In the decade following the enactment of the Federal Rules, the courts disagreed as to whether such material should be discoverable. One line of cases allowed discovery. Other cases allowed discovery of attorney investigations, communications between counsel and other parties, and accident reports.


14 See LaFrance, supra note 5, at 356.


Then, in 1947, the United States Supreme Court decided *Hickman v. Taylor.* In *Hickman,* the Court created a qualified immunity from discovery for attorney work product prepared in anticipation of litigation. *Hickman* was decided at a time when discovery looked quite different than it looks now. For example, many changes broadening discovery that litigators now take for granted had not yet occurred. Developments in discovery practices since *Hickman,* then, have changed the environment in which discovery occurs and have greatly expanded the scope of exchange of nonprivileged information that is now commonplace in civil litigation. One might question whether the Court, if faced with the work product question for the first time in 1992, would have the same fears that it had in 1947. Nevertheless,

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21 Because *Hickman* was decided at a time when the discovery rules were quite new and still controversial, one commentator has suggested that the recognition of work product immunity was a political compromise to gain the cooperation of the bar in accepting the new discovery machinery. Cooper, supra note 8, at 1273.

22 The year before *Hickman,* in 1946, the rules of procedure had only just been amended to: (1) eliminate the need for leave of court before a deposition could be taken; (2) make clear that discovery could be had not only of evidence to be used at trial but also of matters that could lead to the discovery of such evidence; (3) make clear that interrogatories had the same broad scope as depositions and could be used after depositions were taken; and (4) make clear that admissions could be used for facts other than those set forth in relevant documents described in and exhibited with the request for admission. Fed. R. Civ. P. 26 advisory committee's notes (1946 amendments).

23 At the time *Hickman* was decided, all requests for document production required court approval and a showing of good cause. The plaintiff's attorney in *Hickman* had tried instead to secure copies of witness statements by using interrogatories. The Supreme Court did not rest its decision on this procedural irregularity. *Hickman,* 329 U.S. at 505. It seems likely, however, that counsel's attempt to obtain documents without meeting the then-current good cause requirement made the Court even more skeptical of the discovery request. Discovery from organizational litigants also was more limited, because there was no procedure for naming a corporation or other form of organization as a deponent in the notice of examination and for requiring the deponent to produce witnesses who possessed the relevant information. Also, significant lines of case law existed limiting both interrogatories and requests for admissions to "facts," prohibiting questions of mixed law and fact. See Fed. R. Civ. P. 26, advisory committee's notes (1970 amendments). Pretrial procedures requiring disclosure of contentions, trial witnesses, and exhibits were also unheard of. Small wonder, then, that the request in *Hickman* for witness statements drafted by an attorney, unaccompanied by any claim of good cause, seemed out of line to the Court. See *Hickman,* 329 U.S. at 504-05.

24 Changes in discovery practice weaken arguments about the negative effects of discovery of trial preparation materials. See infra Part II.A. Yet the Court's recent decisions, relying on *Hickman,* have continued to endorse work product immunity. See, e.g., *Upjohn v. United States,* 449 U.S. 383 (1981). By contrast, in the criminal context the Court has begun to
following twenty-three years of often-conflicting case law and several abortive attempts at rule drafting, the Court in 1970 amended the Federal Rules of Civil Procedure to include a specific discovery exemption for trial preparation materials.

Rule 26(b)(3) protects from discovery relevant "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). Both Hickman and Rule 26(b)(3) envision a hierarchy of protection: (1) facts contained in work product, which are discoverable if a litigant can figure out the right question to ask; (2) ordinary work product, which is discoverable on a showing of substantial need and undue hardship; and (3) opinion work product, which is rarely, if ever, discoverable.

This expansive federal model has had a strong influence on state discovery rules. Thirty-four states have work product exemptions that are verbatim copies of Rule 26(b)(3). The work product rules of ten more states vary slightly in wording from the federal rule but emphasize the importance of truth-seeking. See, e.g., Huddleston v. United States, 485 U.S. 681 (1988); United States v. Inadi, 475 U.S. 387 (1986).

For a description of the cases between Hickman and the adoption of Fed. R. Civ. P. 26(b)(3), see Special Project, supra note 16, at 780-84.


Id. The rule is only a partial codification because it explicitly covers only tangible work product. Kevin M. Clermont, Surveying Work Product, 68 Cornell L. Rev. 755, 757-58 (1983). The contours of Rule 26(b)(3) also differ from Hickman regarding issues such as the range of persons whose work can constitute work product and the strictness of the anticipation of litigation requirement. The rationales offered by cases and commentators, however, for Rule 26(b)(3) and the Hickman rule are the same, so that this Article's critique of the work product doctrine is applicable to both.

For an extremely thorough discussion of the parameters of existing work product doctrine, see Special Project, supra note 16, at 788-893.

appear to be functionally the same as the federal rule. The result is that a very protective work product rule applies to almost all civil litigation.

More important than the technical contours of the doctrine is its impact on the information flow. Before we can reach a conclusion about the desirability of the immunity, we need to know what information is being shielded from discovery. Reported cases from state and federal courts reveal that work product disputes tend to center on a predictable array of ordinary and opinion work product. In the


31 Six other states have opted for either more or less protection. For example, California protects work product that is not generated in anticipation of litigation—the so-called "counselor work product." See Rumac, Inc. v. Bottomley, 192 Cal. Rptr. 104 (Ct. App. 1983). Pennsylvania and Texas, on the other hand, are less protective of work product than the federal rules. See Pa. R. Civ. P. 4003.3 (protecting only pure opinion work product); Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 554 (Tex. 1990) (interpreting Tex. R. Civ. P. Ann. r. 166k(3) (West Supp. 1991) as protecting only pure opinion work product and finding anticipation of litigation only after an objective manifestation of intent to sue by the potential plaintiff); Flores v. Fourth Ct. App., 777 S.W.2d 38, 41 (Tex. 1989) (same). Other states having different models for work product rules are Illinois, New York, and Ohio. See Ill. S. Ct. R. 201(b)(2); N.Y. Civ. Prac. L. & R. 3101 (McKinney 1990); Ohio R. Civ. P. 26(b)(3).

32 Even within the common framework, there are variations at the edges. For example, courts disagree about the parameters of the anticipation of litigation requirement, about work product in subsequent litigation, about agency issues, about the showing required to overcome the qualified work product immunity, and about waiver issues. See generally James P. Garrity, Discovery of an Insurer's Files: Now You See It, Now You Don't, 20 Forum 20, 22-30 (1984) (discussing state and federal cases regarding the anticipation of litigation, substantial need, and undue hardship requirements); Special Project, supra note 16 (discerning court variations).

33 See infra Part III for a discussion of the impact of allowing work product protection of certain kinds of information.

34 Opinion work product includes "an attorney's strategy, including his intended lines of proof and cross-examination plans. 'Opinion work product' also encompasses an attorney's evaluation of the strengths and weaknesses of his case and the inferences he has drawn from interviews of witnesses." Note, supra note 6, at 333 (footnotes omitted). Ordinary work product includes work product that does not disclose such attorney thought processes. See Special Project, supra note 16, at 791 n.196.
category of ordinary work product, courts have given work product immunity for witness statements,\textsuperscript{35} investigators' reports,\textsuperscript{36} insurance files,\textsuperscript{37} surveillance videotapes,\textsuperscript{38} communications other than between attorney and client,\textsuperscript{39} photographs of relevant locations or objects,\textsuperscript{40} sketches and diagrams,\textsuperscript{41} and, less frequently, computerized litigation support systems.\textsuperscript{42} There is less case law on opinion work product, perhaps because it is less often requested.\textsuperscript{43} Courts have given work product immunity, however, for attorney notes reflecting witness


\textsuperscript{37} See, e.g., Basinger v. Glacier Carriers, Inc., 107 F.R.D. 771, 774-75 (M.D. Pa. 1985); McAlpine, 391 A.2d at 90.


\textsuperscript{40} See, e.g., Rosado v. Mercedes-Benz of N. Am., 454 N.Y.S.2d 759, 760 (App. Div. 1982) (protecting defendant's photographs of car); cf. Crull v. Preferred Risk Mut. Ins. Co., 153 N.W.2d 591, 594 (Wis. 1967) (holding that photographs and negatives of accident scene were work product, but protection overcome because defendant had no opportunity to duplicate).


\textsuperscript{43} Commentators, however, have raised the issue of opinion work product and have expressed concern about the discovery of the authorities supporting a legal position, attorney opinion regarding the veracity or effectiveness of witnesses, and broad questions about a party's position on mixed questions of law and fact. See, e.g., Special Project, supra note 16; Developments, supra note 13.
statements or meetings, attorney opinion regarding the settlement value of a case or the client’s chances of prevailing, trial strategy generally, lists of trial witnesses and their expected testimony, lists or copies of trial exhibits, deposition preparation, attitudinal surveys done on behalf of a litigant, and material such as might be found in a trial notebook.

As even this summary list reveals, the material protected by the work product doctrine is likely to be extremely relevant to any lawsuit. Part II of this Article examines whether the suppression of such crucial information is necessary to the functioning of the adversary system.

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44 See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 401 (1981); Horn & Hardart Co. v. Pillsbury Co., 888 F.2d 8, 12 (2d Cir. 1989). Attorneys' notes actually fall in a gray area between ordinary and opinion work product, depending on whether the notes merely recite facts or contain the attorney's thought processes. Compare Hickman, 329 U.S. at 508 (attorney notes found to be work product) with Leede Oil & Gas v. McCorkle, 789 S.W.2d 686 (Tex. Ct. App. 1990) (factual portions of attorney's notes not work product).


47 See, e.g., City of Long Beach v. Superior Ct., 134 Cal. Rptr. 468, 476-78 (Cal. Ct. App. 1976) (protecting list of witnesses to be called at trial and summary of their testimony).

48 See Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure § 5.10 (3d ed. 1985) (unwarranted disclosure of matters marshaled for trial can reveal attorney's intended lines of proof); see also Cooper, supra note 8, at 1296 ("It is generally accepted that a party may not seek a statement of the evidence which will be offered at trial to prove each of his opponent's points . . . .").

49 See, e.g., Sporck v. Peil, 759 F.2d 312 (3d Cir.) (protecting defense counsel's selection of documents used to prepare deponent because disclosure would reveal attorney's mental impressions), cert. denied, 474 U.S. 903 (1985).


II. THEORETICAL JUSTIFICATIONS

From the beginning, the arguments in favor of protecting work product have been primarily utilitarian, rather than a defense of work product protection as something inherently good. And like all discovery privileges, the work product doctrine subordinates a policy of liberal discovery to other societal interests. Thus work product immunity can be justified only to the extent to which it is necessary to achieve some higher societal goal.

Most of the traditional arguments in favor of work product immunity stem from the Supreme Court's rationale in Hickman. More recently, the law and economics school has put its own spin on the work product debate. Both schools of thought tend to make arguments that fall into two categories: work product is necessary to protect the functioning of the adversary system; or work product is necessary to protect attorneys.

A. The Traditional Arguments for Work Product Immunity

1. Protection of the Adversary System

The dominant argument for work product immunity focuses on the requirements of the adversary system. The argument thus assumes that the adversary system is desirable. This is certainly a debatable conclusion. Nonetheless, proponents of the work product doctrine both assume that an adversarial presentation of facts at trial is good or necessary and believe that adversarial gathering of facts helps to

52 Charles T. McCormick notes:

[Privileges] do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.


53 See infra Part II.A for a discussion of the arguments stemming from the Court's analysis in Hickman.

arrive at "truth" in resolving disputes.\textsuperscript{55} Operationally, many believe that the adversary system works only when each of the parties single-mindedly and thoroughly pursues its own self-interest throughout the litigation process, culminating in an adversarial presentation of evidence and arguments. Work product immunity, they argue, is necessary to make this happen.\textsuperscript{56}

One problem with this vision of the litigation process is its focus on the trial. Assuming a full-blown adversarial trial to be the norm, proponents of work product immunity claim that immunity really conceals nothing because facts are discoverable before trial, and trial strategy (opinion work product) will be disclosed at the trial itself. Thus, at least in theory, the trier of fact is deprived of neither fact nor legal theory in making its decision.\textsuperscript{57} In modern America, however, an overwhelming majority of civil cases are resolved prior to trial.\textsuperscript{58} Cases settled during discovery risk a lopsided settlement based on incomplete information because of work product protection.\textsuperscript{59} Even assuming that an adversary trial is necessary, arguments in support of

\textsuperscript{55} Historically, the belief that an adversarial competition of equally prepared opponents would best arrive at truth developed some time after the recognition that magic could not determine victors. "If God does not decide who wins, the system must do so . . . . In other words, the adversary system itself is the magic that replaces God's intervention." Sward, supra note 2, at 329; see also Robert F. Kane, The Work-Product Doctrine—Cornerstone of the Adversary System, 31 Ins. Couns. J. 130 (1964) (arguing that work product protection is a necessary element of our adversarial system).

\textsuperscript{56} See, e.g., Note, supra note 6, at 334-35.

\textsuperscript{57} In practice, however, some facts are neither discovered before trial nor introduced into evidence during trial. See infra Part III.A.1 & 2.

\textsuperscript{58} See Albert W. Alschuler, Foreword: The Vanishing Civil Jury, 1990 U. Chi. Legal F. 1, 2-4.

\textsuperscript{59} See Wayne D. Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 789, 811-12 (discussing American Bar Foundation survey finding that 96% of the attorneys surveyed had settled a case when the attorney or client "still had arguably significant information (including information protected by privilege) which, to the best of [the attorney's] knowledge, another party had not discovered," particularly in large cases, federal court cases, and cases involving corporate clients).
work product immunity also must account for the needs of the discovery, settlement, and alternative dispute resolution processes.

Nevertheless, proponents of work product immunity envision the trial as the normal end-point of litigation and believe that discovery of work product would significantly undermine the process of preparing adequately for the adversarial trial. Work product immunity, its supporters believe, protects the adversary system in five, related ways. First, it encourages the most complete possible investigation. Second, it allows the advocate to commit the results of that investigation and other litigation-related thought processes to writing. Third, it discourages "sharp practices." Fourth, it allows surprise as a vehicle for encouraging truthful testimony. Fifth, it avoids forcing litigants to freeze their内容ions too early in a lawsuit. These assertions, however, are not supported by empirical data. Rather, when carefully analyzed, these alleged threats to the adversary system are unlikely to occur and can be cured in much more limited ways.

a. Work Product Immunity and Adequate Preparation

In Hickman, the majority opinion states only that:

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.\(^6\)

Although the Supreme Court did not articulate a reason why attorneys need privacy for proper preparation, subsequent commentators have filled in the gap. Disclosure of work product, some say, would discourage attorneys from using their fullest efforts to develop their clients' cases.\(^6\)

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\(^6\) See infra Part II.A.1(c) for a definition and discussion of "sharp practices."

\(^6\) Hickman, 329 U.S. at 510-11. The Hickman Court did not claim that empirical data supported its fears but "merely assumed that certain undesirable effects would, in fact, occur." Neal E. Tackabery, Note, Discovery of an Attorney's Work Product on Subsequent Litigation, 1974 Duke L.J. 799, 807.

This rationale fears two scenarios. First, attorneys may fail to prepare their clients' cases thoroughly, believing that they can instead merely appropriate their opponents' cases full-blown and avoid doing any personal preparation (the "lazy lawyer" model). Second, attorneys may incompletely prepare their cases for fear of developing adverse information in the process of investigating and preparing cases for trial and may terminate avenues of investigation that seem likely to expose information helpful to the adversary (the "bad facts" model). This rationale is plausible only if we believe that, absent work product protection, attorneys actually will fail to prepare their cases adequately. Both the lazy lawyer model and the bad facts model, however, are unpersuasive.

Obviously work product immunity is not the inducement for attorney preparation. Rather, the adversary system, with its demand for competition and winning cases, supplies the motivation for preparation. The work product doctrine, however, is said to be necessary to keep discovery from discouraging the preparation that ordinarily would occur. We assume, therefore, that the system already contains incentives for adequate preparation. The question is whether open discovery, including discovery of trial preparation materials, would exert such a strong pull that it would overcome the otherwise powerful forces encouraging preparation already existing within the adversary system.

There are a number of forces, within the larger context of the adversary system, that would compel adequate preparation even if work product were discoverable. First, attorneys' livelihoods depend in large part on their reputations for success and integrity, both with their peers and within the universe of potential clients. The lazy

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63 See Gardner, supra note 62, at 270; Wells, supra note 10, at 684; see also Ohio R. Civ. P. 26(A) (work product designed to prevent attorneys from taking undue advantage of adversary's efforts); Kagan v. Langer Transp. Corp., 43 F.R.D. 404, 405 (S.D.N.Y. 1967) ("[R]equiring production of such attorney's work product would . . . destroy counsel's incentive diligently to prepare for trial . . . since otherwise he could, merely by sitting back and doing nothing, avail himself of the work product and professional diligence of counsel for the other side.").

64 See Cooper, supra note 8, at 1279; Special Project, supra note 16, at 785; Developments, supra note 13, at 1029; see also Cal. Civ. Proc. Code § 2016(g) (West 1983) (observing that state policy underlying work product doctrine is to encourage attorneys to prepare thoroughly and to investigate both the favorable and unfavorable aspects of their case); Ohio R. Civ. P. 26(A) (same).

65 Wells, supra note 10, at 687.
lawyer model of behavior would emerge only if it would lead to equivalent professional success and esteem. But the notion that a person simply can take her opponent's preparation and effectively try a case is ludicrous. Although knowledge of an opponent's strategies may be helpful, it is no substitute for independent development of a theory of the case, investigation of relevant facts, and structuring of proof. An attorney who has prepared her own case thoroughly will, over time, be more successful than one who has merely appropriated an opponent's work product. In addition, it seems likely that an attorney who habitually uses and is known to use derivative work product risks being held in low esteem by her peers.

The bad facts model of attorney behavior also is unlikely to emerge. Work product immunity does not protect the litigant from supplying her adversary with the underlying or harmful facts. Therefore, if a litigant uncovers harmful information in preparing a case for trial, and her opponent successfully asks for that information by interrogatory or by deposition question, the information must be disclosed. Thus work product immunity cannot provide an incentive for the litigant to go forward with a totally thorough investigation into both helpful and harmful facts any more than the adversary system itself can encourage such investigation.

Also, the discoverability of work product will deter adequate preparation only if the preparer is certain that the immunity would have applied. But because the work product doctrine is an unpredictable one, involving balancing tests and susceptibility to overrides based on subsequent events, an attorney simply cannot be certain when work product is generated that it will be protected from discovery—even with the existence of work product immunity. Work has to be done with the knowledge that under some circumstances the information will be discoverable. If work product immunity has any effect on trial

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66 Waits, supra note 9, at 331.
67 See id. at 329.
68 Often, of course, the adversary may not be able to ask the magic question that unlocks the harmful information. In that case, the work product doctrine may operate to conceal from the trier of fact important information that may even skew the results of the trial. See infra Part III.A.1. Not even the proponents of work product immunity, however, openly advocate its use to prevent discovery of relevant facts.
69 Cf. Tackabery, supra note 61, at 810 (arguing that harmful consequences of work product discovery occur because of what the lawyer anticipates at the time of preparation rather than from the discovery itself).
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preparation, the effect stems from the attorney's belief about discoverability and confidence that information will be protected, and it is those feelings that will control her actions and encourage her to prepare, rather than a court's later decision about the protection afforded a particular piece of work product. Therefore, it seems even less likely that changing the rule to make work product discoverable would have a significant effect on a litigant's actions in preparing for trial.\footnote{See Mitchell, supra note 15, at 438-39.}

Some have argued that the discoverability of work product actually would produce better preparation. If trial preparation were freely discoverable by both sides, attorneys would not be able to rely on their opponents' ignorance of gaps in preparation. If defects persist, the opponent will be able to take advantage of the defects. Both sides therefore must prepare thoroughly, knowing that the opponent can discover their omissions.\footnote{Cooper, supra note 8, at 1280-81; LaFrance, supra note 5, at 368.}

Other pressures within the legal system also encourage thorough preparation. Assuming that an attorney who relies on borrowed or incomplete preparation will be less successful over time, client pressure will force thorough preparation. Although one-time litigants may not be able to determine the parameters of thorough preparation, it seems likely that sophisticated litigants will insist on complete preparation and will abandon counsel who lose cases from inadequate effort.\footnote{The ability of the sophisticated client to require thorough preparation is a significant factor to consider because a sophisticated litigant who provides repeat business and can evaluate its attorneys' efforts is most likely to create work product. See infra Part III.B.1 & 2 for further discussion of this point.}

At the same time, law firm financial pressures encourage thorough preparation, at least in firms that bill their clients by the hour.\footnote{The discovery process has provided a financial bonanza for many large firms: Litigation may have fueled the extraordinary growth of firms in the 1960s and 1970s. It was the ideal producer of the cash flow needed to support one- or two-hundred-person law firms. Enormous demands for billable hours were generated by enormous documentary discovery and depositions. Preparation for discovery, review and analysis of what it produced, and endless motion practice could be easily divided perfectly among squadrons of young lawyers and used to indoctrinate them into the ways of the firm. Each operation was comparatively insignificant, yet each demanded considerable skill and intellectual acuity. There were equally large overhead demands for secretarial assistance, duplicating, and computerized facilities. These requirements matched the}
thorough discovery in their own economic interest. Furthermore, attorneys have an independent ethical obligation to adequately represent their clients based on the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. 74

In short, the pressures of the adversary system compel thorough preparation. Even if work product were discoverable, litigants and their attorneys still would investigate the facts of their cases because there is no clear line between learning helpful facts and harmful facts. Some litigants, such as insurance companies, are in the business of investigating claims and do so whether or not litigation is imminent. These litigants certainly would investigate even without work product protection. Other litigants still would take witness statements, hire expert witnesses, do legal research, formulate trial strategy, prepare witnesses for trial, and plan voir dire, direct examination, cross examination, and opening and closing statements. They would do these things because they cannot omit these activities and have any hope of winning a lawsuit. Although they would prefer to carry on these activities in secret, they would not stop if the secrecy is removed because there simply are too many forces that require such activities.

b. Work Product Immunity and Adequate Writing

In Hickman, the Supreme Court was concerned that if work product were discoverable “on mere demand, much of what is now put down in writing would remain unwritten.” 75 The fear was that even if attorneys still did an adequate amount of preparation, they would not adequately document that preparation: interviews would remain untranscribed, facts would remain unrecorded, legal research would not be reduced to writing, and trial plans would remain an idea in the

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74 See Model Code of Professional Responsibility DR 6-101(A)(2) (1980) (“A lawyer shall not . . . [h]andle a legal matter without preparation adequate in the circumstances.”); Model Rules of Professional Conduct Rule 1.1 (1983) (requiring lawyer to provide competent representation). One commentator has noted that “[t]o place so much emphasis on the efficacy of the work product immunity in encouraging adequate preparation is very close to arguing that the professionalism demanded by the Code of Professional Responsibility is observed only so long as the work product immunity forces lawyers to do their own work.” Wells, supra note 10, at 688.

75 Hickman, 329 U.S. at 511.
mind of the litigator. Writing things down, however, already is encouraged by powerful forces in the litigation process. Thus the problem again is whether an opponent's ability to discover work product would be a strong enough force to counteract the natural tendency to commit things to writing. An analysis of the realities of modern litigation shows that the forces impelling attorneys to write things down are much stronger than any deterrent effect of discovery.  

Attorneys memorialize information and mental impressions for a number of reasons. First, attorneys record some information so that if a witness later changes his testimony, the witness' prior statement can be used to impeach. Witness statements are crucial to case preparation because they bind witnesses to a particular version of the facts. Second, attorneys will record even a bad statement for damage control. Statements containing both helpful and unhelpful information also will be recorded in their entirety because omission of any unfavorable aspects destroys the usefulness of statements for impeachment purposes. Moreover, at early stages of investigation, it will not always be entirely clear which information is helpful and which is not, so censorship on such grounds seems unlikely. Second, attorneys record information because they simply cannot remember all of the important facts and legal points about all of their cases. A busy litigator cannot try cases without committing to writing at least an outline of voir dire plans, opening statement, and witness questions. Third, attorneys record information because the nature of modern law practice means that the person taking a statement, doing legal research, or strategizing for trial often is only one among many and may not be the person who calls the shots or who will try the case. Important information and strategy must be recorded in order to survive personnel changes and hierarchical decisionmaking structures. Fourth, some of this writing also will be protected by the attorney-client privi-

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76 See, e.g., Frank H. Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information, 1981 Sup. Ct. Rev. 309, 362 ("It is unlikely that Upjohn's general counsel would have abandoned note-taking in the future if Upjohn had lost its case.").
77 Fleming James, Jr., Civil Procedure § 6.9, at 206 (1965); Cooper, supra note 8, at 1277-78; LaFrance, supra note 5, at 367; Waits, supra note 9, at 333; Wells, supra note 10, at 690.
78 James, supra note 77, § 6.9, at 206; Tackabery, supra note 61, at 808; Wells, supra note 10, at 690.
79 Waits, supra note 9, at 333.
80 Id.
lege and needs no additional blanket of work product immunity to prevent discovery.

c. Work Product Immunity and Sharp Practices

The Supreme Court in *Hickman* also predicted that if work product were discoverable "sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." The Court did not describe the behavior it feared, but commentators have suggested some possibilities. Attorneys may remove unfavorable material from their files and fail to produce the documents. Alternatively, attorneys may stuff their files with irrelevant or misleading documents, hoping that their adversaries will be unable to find the truly useful information or will rely on misinformation.

Few commentators have taken the sharp practices claim seriously. Although there may be some reason to fear that attorneys will lie or will evade requests in order to avoid discovery of work product, this is true of all discovery. Attorneys already must produce for opponents reams of material, some of which is helpful to the opponent and much of which is expensive to compile. And discovery of work product would not create the first incentive to engage in deceptive practices—certainly clients have always resisted turning over valuable information to litigation opponents.

Are attorneys more likely to lie with respect to work product than with respect to other discovery? To answer this question, we need to examine the forces that might lead an attorney to adopt sharp practices solely with regard to work product. We are dealing with three types of hypothetical misbehavior: failing to produce relevant information, producing large quantities of unnecessary data in order to

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81 *Hickman*, 329 U.S. at 511.
82 Gardner, supra note 62, at 269; Mitchell, supra note 15, at 426.
83 Mitchell, supra note 15, at 426; see also Edward W. Cleary, *Hickman v. Jencks:* Jurisprudence of the Adversary System, 14 Vand. L. Rev. 865, 869 (1961) (stating that "false statements or misleading briefs or memoranda might be inserted in the file [to mislead] the opposition"); Cooper, supra note 8, at 1276 (also noting the use of misleading and false documents).
84 See, e.g., Cooper, supra note 8, at 1276; Developments, supra note 13, at 1028.
85 Special Project, supra note 16, at 787.
86 Attorneys produce enormous amounts of material as they are required to disclose relevant facts and law. Unlike lawyers, whose work product is protected, clients must cooperate with "all manner of intrusions by the opposing side." Wells, supra note 10, at 692.
hide important information, and producing false information in order to mislead an opponent.\textsuperscript{87} Both of the latter two practices are as tempting with the work product immunity as without it. Counsel and client who so desire can either "overproduce" or include red herring documents. Attorneys can mislead opponents through conversation, pleadings,\textsuperscript{88} or manufactured documents. The current rules do not deter a party from producing more than is required, so a party wishing to deluge or to mislead an opponent can do so under the current rules.\textsuperscript{89} The need to disclose work product would not appear to increase the incentive to overproduce or to mislead, unless it is easier for an attorney to manufacture misleading work product than to manufacture misleading client documents.

The temptation to fail to produce discoverable work product may be stronger.\textsuperscript{90} Even though the temptation already exists with regard to any harmful information, and clients are not happy with producing harmful information for the opponent, it is conceivable that clients may be even more unhappy with producing harmful information that was created by their attorney and paid for by the client. Whether this incremental increase in disinclination to produce unfavorable information is a significant one is ultimately an empirical question that cannot be answered under the present system. There is nothing unique, however, about work product unless two things are true: (1) attorneys are less honest with regard to discovery of their own work product than with regard to other discoverable information; and (2) attorneys as a group are less honest than their clients.\textsuperscript{91} In the absence of these two conditions, nothing justifies a rule stifling the information flow in order to prevent attorneys from being dishonest—even if attorneys are, in fact, less enthusiastic about turning over their work product.

Moreover, there are some institutional forces that counteract whatever increased tendency toward dishonesty a rule allowing dis-

\textsuperscript{87} Id.
\textsuperscript{88} For example, a litigant may plead claims or defenses that she does not intend to pursue (within the limits of Fed. R. Civ. P. 11), or, in a jurisdiction that allows liberal amendments to pleadings, may defer pleading a claim or defense until the last moment in order to cut down on an opponent's preparation time.
\textsuperscript{89} See Brazil, supra note 59, at 854 ("Discovery is trial by avalanche of documents. . . . I bombard opponents with mounds of information and see if they will wade through it.").
\textsuperscript{90} Wells, supra note 10, at 692.
\textsuperscript{91} Id.
covery of work product would create. One is the availability of discovery sanctions.92 Another is the possibility of disciplinary action if the attorney violates the professional codes.93 If these sanctions work to compel attorneys to produce non-work product, they should compel attorneys to produce work product.

Even assuming some attorneys will be dishonest and withhold work product, the total information available to the trier of fact still will be greater without work product immunity. Work product immunity guarantees a denial of information in order to prevent speculative behavior; we allow all work product to be hidden because some people might wrongfully refuse to produce it. I suspect that most litigants would prefer to risk the sharp practices and gain at least a possibility of acquiring the information.

Finally, the sharp practices argument somewhat assumes that attorneys have privacy interests more important than those of their clients. The attorney claims, however, are legitimate only to the extent that they further the needs of the client and the judicial system. “A plumber may also have a desire to have some of his work done in private, without a fear that others may discover the fruits of his efforts. However, the interest of the homeowner in unclogged drains is not sufficiently powerful to create a plumbing ‘work product.’”94 A rule that protects attorney lying and evasion at the expense of the search for truth is a rule that protects plumbers, and dishonest ones at that.

d. Work Product Immunity and Surprise

In Hickman, neither the majority opinion nor Justice Robert Jackson’s concurring opinion argues that the work product doctrine is necessary to preserve a litigant’s opportunity to surprise witnesses or opponents. On the contrary, the majority notes that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. . . . The deposition-discovery procedure . . . reduc[es] the possibility of surprise.”95 Some commentators, however, see the preservation of surprise as essential to the proper func-

95 Hickman, 329 U.S. at 507.
tioning of the adversary system, and work product immunity as essential to surprise.\(^\text{96}\) In considering the surprise factor, it is important to distinguish between ordinary work product, such as witness statements, and opinion work product, such as trial strategy.

In advocating surprise in connection with ordinary work product, commentators generally envision the use of prior statements or other impeaching information to force a witness to testify truthfully:

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\text{[S]ecrecy permits surprise, and surprise is a potent weapon for separating truth from falsehood. The honest person, so the reasoning runs, has no fear of surprise, since he knows the truth. The dishonest may be discredited by sudden and unexpected confrontation. If, however, the dishonest witness knows the truth in advance, he will lie. Thus, full discovery, by dispelling secrecy, serves only to insulate dishonesty from exposure.}^\text{97}
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This belief, however, overlooks several important points. First, surprise confrontation may discredit the truthful as well as the untruthful witness. Witnesses’ memories are rarely perfect, and surprising a witness with a small discrepancy from an earlier statement may make even a truthful witness appear to be untruthful.\(^\text{98}\) Second, under the current Federal Rules the witness herself is entitled to a copy of her statement,\(^\text{99}\) so that a witness who wishes to shape dishonest testimony in a way that matches or explains an earlier statement already can do so simply by requesting a copy of that statement. This rule also means that litigants have access to their own statements and to the statements of friendly witnesses who will cooperate. Litigants are denied access, however, to those statements most likely to be helpful—prior statements of the opponent and unfriendly witnesses. Third, there are techniques other than surprise for ensuring witness truthfulness. The most important is cross-examination, which gener-

\(^{96}\) See, e.g., Cooper, supra note 8, at 1275 ("[T]he adversary system of litigation cannot function in an atmosphere of complete candor ... "); see also Kane, supra note 55, at 130-31 (explaining how work product immunity is essential to the preservation of the adversary system).

\(^{97}\) LaFrance, supra note 5, at 369.

\(^{98}\) Or, the earlier statement may have been transcribed inaccurately, making the witness who was unfairly surprised by the statement look dishonest on the witness stand. Id.; Wells, supra note 10, at 701-02.

ally does not rely on surprise for success. Rather, cross-examination works because the attorney leads the witness down a path of true answers that, in turn, require the answer the questioner desires. A witness' knowledge of his or her own prior statements and other relevant facts will not impede this process.

The discovery of opinion work product would undermine a different kind of surprise, according to some commentators. The fear is that it would warp the adversary presentation of evidence necessary to truth-seeking. This argument overlooks two realities of modern litigation. First, a truly effective strategy, one that relies on credible evidence and arguments about reasonable inferences to be drawn from that evidence, would not lose its force because an opponent knew about it ahead of time. Moreover, discovery also would mean that an attorney would learn the strategy of her opponent. If there are weaknesses in the strategy that the opponent can discern, the truth-seeking process is not served by allowing the weak strategy to escape rebuttal because it comes as a surprise. Second, much trial strategy already is disclosed to the adversary as part of the pretrial process. Increasingly, federal and state judges order parties to summarize their factual and legal contentions, agree to undisputed facts, list witnesses and summarize their testimony, and list exhibits—all as part of a pretrial conference procedure. New procedures such as summary jury trials also encourage the early revelation of traditional work product. These developments change the issue from one of surprise to one of timing and degree of detail of disclosure. These issues can be

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100 See Wells, supra note 10, at 702. See generally Kenney F. Hegland, Trial and Practice Skills in a Nutshell 50-82 (1978) (explaining various methods of cross-examination, none of which requires surprise as an element).
101 See Wells, supra note 10, at 702.
102 See Cooper, supra note 8, at 1275.
103 See LaFrance, supra note 5, at 360-61 (“Both sides have a reciprocal right to the other's trial preparations. Thus the only item lost through discovery is the benefit of surprise. But while surprise may cause one side to emerge victorious, it hardly seems essential or valuable in a system which seeks, not victors, but the truth.”) (footnote omitted).
104 See id. at 368.
106 See Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1988).
107 As one commentator argues: it would be surprising in the extreme if a party were ordered to prepare a verbatim statement of the questions to be put to each witness and the anticipated replies, or to
addressed with specific rules—they do not, however, justify the current expansive ban on the discovery of work product.

e. Work Product Immunity and Issue Freezing

"Some commentators view Hickman and the work product immunity as a way to avoid issue freezing . . . ."108 Arguably, discovery of work product might lock an attorney into a particular position with regard to the facts or law of the case. The concern is that once a legal theory has been discovered, the attorney might be reluctant to modify or retreat from it for fear of appearing uncertain or bringing about impeachment with the earlier answers.109

It seems unlikely, however, that the disclosure of work product really would cause much harmful issue freezing. Attorneys, faced with such discovery requests, would "almost certainly err on the side of caution by disclosing even the most remotely applicable theories."110 And the bench and bar would recognize the need for a litigant to change her position as discovery progressed and would most likely liberally allow amendments to pleadings and discovery responses until a reasonable time before trial.111

As long as flexibility is built into the system, the discovery of pure legal theories and of contentions mingling fact and law can serve to narrow the issues in the lawsuit and to shape the controversy between the parties.

[T]he fact that discovery of legal theories may often accomplish nothing does not justify its prohibition. The possibly small measure of accomplishment must be weighed against the ordinarily slight burden imposed. . . . As long as a great deal of flexibility is allowed in deviat-

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108 Wells, supra note 10, at 697.
109 Gardner, supra note 62, at 272 n.301; Wells, supra note 10, at 697-98; see also James & Hazard, supra note 48, § 5.12, at 258 (explaining undesirability of tying attorneys down to particular theories at an early stage).
110 Wells, supra note 10, at 699; see also Cooper, supra note 8, at 1291 (explaining increased preparation by attorneys to meet anticipated issues); Warren H. Smith, Comment, The Potential for Discovery of Opinion Work Product Under Rule 26(b)(3), 64 Iowa L. Rev. 103, 116 (1978) (noting that even "conscientious" attorneys will need to change their positions as facts develop and should not be bound by initial statements).
111 See sources cited supra note 110.
ing from the issues developed in discovery—and probably the only appropriate limitation is one of willful bad faith—the benefits of obtaining a preliminary, even though tentative, specification of issues weigh in favor of allowing discovery.\textsuperscript{112}

Thus the concern about issue freezing reveals itself to be primarily a timing issue. The feared vice is not that issues will be frozen, but that they will be frozen too soon, deterring parties from adapting their legal theories to fit their evolving understanding of the underlying facts. These timing issues can be resolved with a timing rule, one that allows responses to be modified and allows trial courts discretion to postpone the need to answer certain discovery requests until a later stage of the proceedings.\textsuperscript{113} Timing issues alone cannot justify a total prohibition of discovery of work product.

2. \textit{Protection of Attorneys}

The arguments discussed above claim that work product immunity ensures the proper functioning of the adversary system. A second group of arguments claims that work product immunity is necessary to protect attorneys.\textsuperscript{114} This group of arguments divides into three kinds of claims: first, work product immunity is necessary to protect attorney reputation or the "tone" of the legal profession; second, work product immunity is necessary to avoid attorneys testifying during discovery or trial; and third, attorneys have a proprietary interest in their work that is infringed by discovery of work product. For some, all of these arguments are categorically unpersuasive because they put the selfish interests of attorneys above the truth-seeking function of the adversary system.\textsuperscript{115} In addition, each is inherently flawed.

\begin{itemize}
  \item \textsuperscript{112} Cooper, supra note 8, at 1293.
  \item \textsuperscript{113} See id. at 1290; see also infra text accompanying notes 279-87 for a discussion of rules addressing timing concerns.
  \item \textsuperscript{114} \textit{Hickman}, 329 U.S. at 515 (Jackson, J., concurring).
  \item \textsuperscript{115} Arguably, anytime such a claim is made by a attorney it should be viewed with suspicion:
    The extent to which the profession's personal or economic interests have influenced the scope of confidentiality rules can never be known. Yet their mere existence leads one to wonder whether the attorney-drafters of the strict codes—perhaps even unintentionally—have overemphasized the systemic justifications for confidentiality or undervalued the social benefits of less restrictive rules.

Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 361 (1989) (footnote omitted) (discussing attorney-client privilege); see supra Part II.A.1 for arguments tying attorney self-interests to the adversary system's search for truth.
\end{itemize}
a. Work Product Immunity and the Legal Profession

The majority opinion in Hickman spoke of work product disclosure having a "demoralizing" effect on the legal profession. Similarly, Justice Jackson's concurring opinion expressed great concern for the "welfare and tone of the legal profession." Unspoken, but underlying both opinions, is a suggestion that the discoverability of work product might have unfortunate consequences for the legal profession because it would damage the legal profession's reputation with outsiders.

Perhaps in 1947 the legal profession was held in high public esteem. Today, with public opinion of attorneys very low and attorney jokes rampant, the legal profession's reputation is not likely to be significantly damaged by making work product discoverable. Moreover, even if at the time of Hickman the legal profession conformed to the model of the "gentleman's club," in which certain behavior (such as prying into the private thoughts of another member of the bar) simply was not done, that "tone" of the profession

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116 Hickman, 329 U.S. at 511.
117 Id. at 515 (Jackson, J., concurring). Justice Jackson seemed concerned primarily with the problem of the attorney forced to become an impeaching witness, discussed below. His comments about "tone and morale," however, have caused some courts to focus on these concerns. See, e.g., Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 483 (4th Cir. 1973) ("Hickman's overriding concern is that the lawyer's morale be protected as he performs his professional functions ... "); In re Doe, 662 F.2d 1073, 1078 (4th Cir. 1981) (quoting Duplan for its concern with attorney morale).
118 Glenna Whitley, Why We Love to Hate Lawyers, D Magazine, May 1991, at 47, 48 (suggesting that in the past "our natural abhorrence of attorneys was tempered somewhat by those images of lawyers who stood for noble, high-minded causes").
119 A few examples:
   (1) Q: "How do you know when a lawyer is lying?"
       A: "His lips are moving."
   (2) Q: "What do you call a busload of lawyers at the bottom of the ocean?"
       A: "A good start."
   (3) Q: "What's the difference between a dead skunk on the road and a dead lawyer on the road?"
       A: "There are skid marks in front of the skunk."
   (4) "A lawyer was informed by St. Peter that it was time for him to die. 'But St. Peter,' said the lawyer, 'I'm only 38 years old!' 'That's strange,' replied St. Peter, 'according to your time sheets you're 72.'"
120 Wells, supra note 10, at 695.
already has disappeared.121 Today, "Rambo" tactics affect litigators’ lives daily.122 Finally, even if discovery of work product would harm attorney reputation, the needs of the legal system are more important. The self-perceived needs of the legal profession cannot survive when they are detrimental to society as a whole.123 The "unseemliness" argument is mere rhetoric and should be ignored.124

b. Work Product Immunity and Attorney Witnesses

In Hickman, Justice Jackson expressed great concern that the disclosure of work product would force the attorney to become a witness.125 More specifically, Justice Jackson feared this scenario: (1) the attorney interviews a witness and reduces his recollection of the witness’ statement to writing; (2) the attorney is forced to supply opposing counsel with a copy of his interview notes during discovery; (3) at trial, the witness testifies in a way that differs from the attorney notes; (4) the witness is impeached with the attorney’s version of the witness’ statement; and so (5) the attorney may need to testify, either to restore his own credibility (disagree with the witness’ version and impeach the witness) or to rehabilitate the witness (explain how both versions are really consistent, or how inaccuracies crept into his written account).126

Although this scenario is undesirable, it is a problem more imaginary than real. First, the chance of the situation arising can be decreased dramatically by having non-attorneys, or attorneys who will not act as trial counsel, interview the witness and record the notes. Alternatively, the attorney can tape-record conversations with

123 A good example of this phenomenon is found in the now-defunct ban on attorney advertising. See Wells, supra note 10, at 695-96; see also Bates v. State Bar, 433 U.S. 350 (1977) (striking down an attorney advertising ban); ABA Canons of Professional Ethics Canon 27 (1936) (banning attorney advertising).
124 Cooper, supra note 8, at 1275; Wells, supra note 10, at 696.
125 Hickman, 329 U.S. at 517 (Jackson, J., concurring).
126 See id. (Jackson, J., concurring).
A third possibility is to depose important witnesses. Any of these approaches will keep the attorney off the stand if impeachment becomes necessary.

More important than these devices, adequate trial preparation should remove the risk of a witness testifying differently from his previous statement. Justice Jackson’s scenario imagines the situation in which an attorney interviews a friendly witness, turns his attorney notes over to opposing counsel, and then puts the witness on the stand and is surprised by different testimony. In preparing that friendly witness for deposition or trial, however, the attorney who took the notes still has those notes and, furthermore, knows that the opponent has the notes. The attorney can go over his notes with the witness, and the witness will be familiar with its contents. It seems extremely unlikely that in this situation the witness will testify in a way that differs from the attorney’s version of the witness’ statement. If the witness does testify differently, but, upon being shown the attorney notes, agrees that the original statement is correct, there still is no need for the attorney to testify. It is only if the witness persists in testifying differently from the statement recorded in the attorney’s notes that the attorney might need to testify.

If the witness whose statement was taken by the attorney is a hostile witness, opposing counsel most likely will prepare the witness to testify. Again, that attorney will have a copy of the statement as will the attorney who took the statement originally, so it remains unlikely that the witness’ testimony will deviate from the statement. If the testimony becomes more favorable to the attorney who took the statement, that attorney will have no desire to impeach the witness. Opposing counsel may impeach, but she probably will do so using the statement, not by calling as a witness the attorney who took the statement. If the testimony becomes less favorable to the attorney who took the statement, the attorney who took the statement can impeach the witness with the statement without taking the witness stand. It is in this situation, further, that it is best to have either a deposition, a tape-recorded statement, or a statement taken by another attorney or investigator in the event the discrepancy is important enough to war-

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127 This option may not have been feasible in 1947, but with easy access today to small but technologically advanced recording devices, it is an option that must be recognized.
rant impeaching. Proper advance planning can eliminate almost entirely the attorney testimony problem.

In addition, it must be noted that the legal community is not as worried about attorney witnesses as it once was. Originally, the rule against attorney testimony was an evidentiary matter. Because a party could not testify on his own behalf, the party’s agent, the attorney, could not do so either. Many modern courts and evidentiary codes reject the idea that a party or an attorney is not a competent witness. Instead, an attorney’s ability to serve as a witness is analyzed in light of professional ethics. As an ethical issue, the attorney witness prohibitions derive from the interests of the client, the interests of the opposing party, and the interests of the public. Today, a modern evaluation of these concerns has led to an attorney witness rule that permits attorney testimony more frequently than before.

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128 See 6 John H. Wigmore, Evidence in Trial At Common Law § 1911, at 774 (James H. Chadbourne rev. ed. 1976) (as early as 1846, attorney disqualified because he was too closely identified with his client); American Bar Association/The Bureau of National Affairs, Lawyers’ Manual on Professional Conduct § 61:503 (1984) [hereinafter Manual on Conduct] (“The rule originated in the law of evidence as a corollary to the general principle that neither a party nor one aligned in interest with a party is competent as a witness on the party’s behalf.”); see also Will v. Comprehensive Accounting Corp., 776 F.2d 665, 676 (7th Cir. 1985) (attorney cannot be both witness and counsel unless attorney withdraws as counsel before testifying), cert. denied, 475 U.S. 1129 (1986).

129 See, e.g., Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp., 546 F.2d 530, 539 (3d Cir. 1976) (stating that it is well-settled that a lawyer is competent to testify on behalf of his client).

130 In more genteel times, concern for the opponent centered on the gentleman attorney’s reluctance to cross-examine opposing counsel, preferring to defer to one another as a matter of professional courtesy. Wise, supra note 121, at 660 n.27. But see supra Part II.A.2(a), discussing the demise of the “gentlemen’s era” and the change in the “tone” of the legal profession.

131 See Wise, supra note 121, at 659-61.

132 Contrast, for example, DR 5-102 and DR 5-101 of the Model Code of Professional Conduct with Rule 3.7 of the more recently created Model Rules of Professional Conduct. The Model Code allowed attorney testimony on contested issues only if refusal “would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.” Model Code of Professional Responsibility DR 5-101(B)(4) (1981). The newer Model Rule deletes the “distinctive value” requirement and invokes a balancing test between the interests of the client and the interests of the opposing party, resulting in fewer disqualifications. See Model Rules of Professional Conduct Rule 3.7(a)(3) & cmt. (1983).

Further, the new Model Rule allows one attorney in a firm to act as advocate and another attorney in the same firm to be a witness in the same case unless doing so creates a substantial conflict of interest between attorney and client. Model Rules of Professional Conduct Rule
Under modern codes of ethics, therefore, an attorney may sometimes both serve as advocate and testify to impeach a witness without violating any ethical rules. If the attorney’s testimony would be helpful to the client, it will be subjected to a balancing test to determine whether the attorney should be disqualified. If on balance the prejudice from disqualification would outweigh the prejudice to the opponent, representation and testimony will be allowed. If the attorney’s testimony would be harmful to the client, the extent of the conflict becomes the key issue. The attorney may be allowed to testify, and the client can waive the conflict. In some jurisdictions, the disqualification is personal to the attorney witness, and other attorneys in the firm may continue to represent the client. All of this goes on even with the existence of the work product immunity. Thus the discoverability of work product may create new instances in which attorney testimony would be desired, but it will not create a new phenomenon—attorneys already can testify.

Because attorneys do have the right to testify under certain circumstances, the current work product rule produces uneven results. If discrepancies exist between witness statements and trial testimony, they will be brought to light only occasionally. If the statement rather than the trial testimony favors the attorney who took the statement, the attorney, having a copy of the statement, may use it to impeach the witness. If the testimony rather than the earlier statement favors the attorney who took the statement, it never will be mentioned. Opposing counsel, deprived of the statement by the work

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3.7(b) cmt. (1983). Some jurisdictions go even further, permitting the disqualified attorney to participate in pretrial preparation of the case so long as the attorney witness does not take an active role at trial. See Tex. Sup. Ct. St. B.R. 3.08(c) & cmt. 8. The attorney witness thus can engage in activities such as drafting pleadings, motions, and briefs, formulating strategy, and preparing written discovery.

133 See Model Rules of Professional Conduct Rule 3.7 cmt. 4 (1983); see also Keosian v. Von Kauback, 707 F. Supp. 150, 155 (S.D.N.Y. 1989) (discussing standard used to disqualify an attorney charged with conflict of interest); Wise, supra note 121, at 670 (similar discussion).


136 This kind of impeachment of a witness called by a party may have been impermissible at the time *Hickman* was decided. Under the then-existing doctrine of “vouching,” a party generally was prohibited from impeaching its own witnesses unless it could show that the testimony was a surprise. This scenario, therefore, is probably not the one contemplated by Justice Jackson. Today, however, in most jurisdictions a witness may be impeached by any party, including the party who called the witness. See, e.g., Fed. R. Evid. 607; Tex. R. Civ. Evid. 607.
product doctrine, will not have the statement and will not be able to impeach the witness with its contents. The current rule therefore makes it more likely that self-serving, improved witness testimony will be offered without any controls whatsoever.

c. Work Product Immunity and Proprietary Interest

In *Hickman*, the Supreme Court expressed concern that an attorney’s thoughts “would not be his own” if discovery of work product were allowed.\(^\text{137}\) This argument views work product materials as the attorney’s property. This property notion depends on two questionable assumptions. First, it assumes that work product information originates with the attorney whose work product will be discovered. This is unlikely, however. Facts are much more likely to originate with the client, nonparty witnesses, and various tangible evidence than with the attorney. The application of legal theories to these facts, although more likely to come from the attorney, often stems from publicly available statutes and case law. In addition, legal theories generally are not protected by existing work product doctrine.

Second, the property notion assumes that the attorney has an economic interest in the work product. This assumption conflicts with the adversary system’s goal of the disclosure of truth. As Professor Edward H. Cooper notes:

> Clearly no one would argue today that a court should be forced to determine a lawsuit on the basis of inadequate information in order to preserve for one party the advantages gained by luck, skill, or wealth. Discovery itself rests on an impatient rejection of any assertion of a proprietary privilege to prevail because of unilateral ignorance.\(^\text{138}\)

The attorney’s argument that she has an economic interest in the information must be rejected.

In addition, the attorney *has* been paid for producing this work product. The attorney is free to negotiate whatever fee arrangements the market will bear and is paid accordingly for the work. No extra compensation is due because the work is shared with someone else. Although clients may have some interest in reimbursement for their

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\(^\text{137}\) *Hickman*, 329 U.S. at 511.

\(^\text{138}\) Cooper, supra note 8, at 1274.
payment for the work product, the attorney has negotiated a fee arrangement that provided sufficient incentive for the work to be done and has received that fee. The attorney is due no additional compensation.

B. The Law and Economics Argument for Work Product Immunity

Two recent articles have analyzed the work product doctrine from the perspective of law and economics. Both articles treat work product immunity as a kind of property right belonging to the attorney, and both assume that work product immunity causes more preparation to be done. One article finds this to be unfortunate, whereas the other finds it to be desirable. Both articles, when closely analyzed, depend on the unverified assumptions about adequate trial preparation discussed above.

The first article, written by Judge Frank Easterbrook, analyzes evidentiary privileges as intellectual property rights and finds an inherent tension: a rule allowing information to be used freely, once in existence, may maximize the wealth of both the users and society. Such a rule, however, would reduce the ability of those who create information to benefit from it. Easterbrook argues that people would therefore "create less information and take costly precautions to keep secret what they do create." This, then, is a law and economics version of the "adequate preparation" model discussed above, which argues that work product protection is necessary to prevent open discovery from discouraging attorney preparation.

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139 See, e.g., Ill. S. Ct. R. 201(b) (allowing cost-shifting); cf. Fed. R. Civ. P. 26(b)(4)(C) (allowing fee-shifting for discovery done by expert witnesses).
140 For additional authorities questioning the proprietary interest claim, see Dale G. Wills, Note, Waiver of the Work Product Immunity, 1981 U. Ill. L. Rev. 953, 961; Smith, supra note 110, at 115.
141 Easterbrook, supra note 76; Positive Theory, supra note 11.
142 Easterbrook, supra note 76, at 313 (discussing Upjohn Corp. v. United States, 449 U.S. 383 (1981)).
143 Id.
144 See supra Part I.A.1(a); see also Richard A. Posner, The Economics of Justice 244 (1981) ("[T]he attorney-work product doctrine is, I think, best understood as the use of secrecy to protect the lawyer's (and hence client's) investment in research and analysis of a case."); Richard A. Posner, Privacy, Secrecy, and Reputation, 28 Buff. L. Rev. 1, 11 (1979) (same).
Furthermore, Easterbrook believes that discouraging preparation would be on the whole beneficial. The bulk of litigation neither creates legal rules nor influences future behavior; it merely divides the stakes among the parties. Efforts expended by the parties to influence the stakes division, however, generally are not of benefit to society.\textsuperscript{145} Easterbrook and others posit that parties tend to overinvest in the stakes-dividing function of litigation,\textsuperscript{146} and evidentiary privileges further encourage the overinvestment.

Making it easier for parties to litigation to keep secret the information they generate will induce them to invest more in this activity. If information creation in litigation is useful principally to divide the stakes, then a stronger evidentiary privilege may exacerbate the problem of overinvestment while simultaneously—by denying the tribunal access to evidence—making the outcome of cases less accurate and reducing the rule-enforcement value of litigation.\textsuperscript{147}

The second article also analyzes work product as a property right,\textsuperscript{148} although its authors believe that work product immunity encourages not overinvestment but perseverance. The problem, they say, is that attorneys investigating a case cannot develop only helpful legal theories or facts. Rather, the process of preparing a case for trial requires that attorneys engage in activities that may produce "bad" information as easily as "good" information. The authors argue that because the value of producing bad information is negative,\textsuperscript{149} the net value to the party of certain kinds of preparation may be very low, although the value to society of that preparation being done is very high. Work product immunity, they argue, is necessary to provide adequate private incentive to investigate.\textsuperscript{150} Again, this theory is very

\begin{itemize}
\item\textsuperscript{145} Easterbrook, supra note 76, at 359-60.
\item\textsuperscript{146} Id.
\item\textsuperscript{147} Id. at 360-61; see also Gordon Tullock, Trials on Trial: The Pure Theory of Legal Procedure 154-58, 359 (1980) (demonstrating the costs of overinvestment).
\item\textsuperscript{148} Positive Theory, supra note 11.
\item\textsuperscript{149} This argument overlooks or minimizes the value to a litigant of learning both good and bad information. Unless the litigant has sole access to bad facts, there is always the danger that the opponent will, on her own, discover those bad facts and use them at trial. These bad facts can be minimized or manipulated effectively only to the extent the litigant is aware of them. Therefore, there is value in trial preparation leading to awareness of bad as well as good facts.
\item\textsuperscript{150} Positive Theory, supra note 11, at 385-97.
\end{itemize}
much like the traditional argument that work product immunity is necessary to encourage attorney diligence.\(^{151}\)

This argument assumes that, with work product immunity, trial preparation activities have some benefit to the party investigating in addition to the inherent value of the information. This additional value can have two sources: (1) the value of having the information when the opponent does not have the information ("secrecy value"); and (2) the value of forcing the opponent to spend more time and money to acquire the information ("opponent cost value"). By arguing that work product immunity will encourage additional trial preparation, law and economics theorists are claiming that the secrecy value and/or the opponent cost value can make investigation worthwhile when, without them, the cost of investigation would have exceeded the information's inherent value.

For purposes of illustrating the point, consider the following example. Plaintiff has sued defendant, and defendant is considering whether to undertake certain trial preparations.

\[
\begin{align*}
\text{Investigation Cost} &= A \\
\text{Inherent Value of Preparation} &= X \\
\text{Opponent Cost Value} &= Y \\
\text{Secrecy Value} &= Z
\end{align*}
\]

If the inherent value of the preparation \(X\) is greater than the investigation cost \(A\), defendant will undertake the trial preparations regardless of the existence or nonexistence of work product immunity. There already is sufficient incentive for the preparations to be done. If the total of the inherent value, the opponent cost value, and the secrecy value \([X + Y + Z]\) is less than the investigation cost \(A\), defendant will not do the trial preparations, even with the work product immunity, because the costs exceed the benefits. The theoretical benefit of work product protection, then, exists only in a narrow band of cases in which the inherent value of the preparation is less than the cost of investigation, but the addition of the opponent cost value or the secrecy value makes the benefit of the preparation exceed its cost \([X < A < (X + Y + Z)]\). This will be true only when the opponent cost and secrecy values are greater than the amount by which the

\(^{151}\) See supra Part II.A.1(a).
investigation cost exceeds the inherent value of the information \([(Y + Z) > (A - X)]\).

This possibility is comprehensible as a theoretical construct, but, as argued above,\(^{152}\) it is inconsistent with the nature of modern litigation. First, the inherent incentive to prepare for trial is very strong. Second, as work product immunity exists in theory, it does not allow the suppression of information. Therefore, although secrecy may well exist in practice,\(^{153}\) in theory the work product rule does not protect bad facts, so the secrecy value does not even exist in most cases. This means that the opponent cost value alone must provide sufficient additional incentive for increased trial preparation activity.

When will increasing an opponent’s cost be sufficiently valuable to a litigant that it might motivate additional trial preparation? Increasing an opponent’s cost is the most valuable when it affects either settlement or an opponent’s ability to prepare for trial, which in turn is most likely to be possible when there is a marked disparity in resources between the opponents. If the cost of investigating the information for plaintiff is \(B\), that cost will be the same whoever plaintiff is, but the value to defendant of imposing that cost on plaintiff varies depending on the effect of that cost on plaintiff. If the cost is sufficient to pressure plaintiff into a less desirable settlement, or if it is sufficient to detract from plaintiff’s trial preparation in other areas, \(Y\) will be large, and the defendant will benefit substantially. \(Y\) therefore is most likely to be an important factor in cases where one of the litigants has limited resources compared to the cost of thorough preparation. This most likely will be the case when defendant has either greater resources or significantly lower cost, because defendant must be able to afford to invest \(A\) in the preparation. If the cost of the trial preparation is roughly the same for plaintiff and defendant \([A = B]\), defendant derives more benefit from spending \(A\) and forcing plaintiff to spend \(A\) if defendant more easily can afford the expenditure. Alternatively, if the cost of the preparation is much lower for defendant (as, for example, when defendant can informally interview employees, and plaintiff must undertake formal discovery to secure the same information), so that \(B > A\), defendant is more likely to be able to

\(^{152}\) See supra text accompanying notes 61-74.

\(^{153}\) See infra text accompanying notes Part III.A.1.
benefit by spending \( A \) and forcing plaintiff to spend \( B \) for the same information.

When work product immunity does permit the protection of secrets, (as, for example, where \( B \) is so high that plaintiff cannot undertake the discovery), the question becomes when this secrecy value will be sufficiently large to motivate additional trial preparation. Secrecy is of the greatest value when the information to be kept secret is very important and very helpful to the party who does not have the information. In other words, \( Z \) will be high in cases in which defendant has the power to hide bad facts from plaintiff, facts that either would hurt defendant or would help plaintiff. The more central the fact, and the more harmful to the party wishing to keep it secret, the higher the value of \( Z \).

From the perspective of the party deciding whether to undertake trial preparation, then, there may be a limited number of situations in which work product immunity will produce at least an incremental increase in trial preparation. Work product immunity is most likely to encourage further trial preparation in cases where a disparity in resources can be exploited or where important facts can be kept from the opponent and, therefore, from the trier of fact. But this analysis looks at the problem solely from the litigant’s perspective. Is this in society’s best interest?

Some law and economics theorists, like conventional defenders of work product immunity, assume that the additional preparation is always valuable to society, as opposed to merely valuable to the litigant doing the preparation.\textsuperscript{154} This is debatable.\textsuperscript{155} Even if the adversary system for trying cases is accepted without question, the two situations in which additional preparation is encouraged do not result in a more adversarial presentation of evidence. In the opponent cost

\textsuperscript{154} See Positive Theory, supra note 11, at 385, 388, 393. The authors argue that work product protection is necessary to provide sufficient private incentive to investigate bad facts and admit that work product protection suppresses information (and therefore encourages the investigation). But they claim that somehow this suppressed information leads to the socially desirable result of more accurate case outcomes. They therefore apparently assume that although both sides are allowed to hide relevant facts, both sides do ultimately learn all relevant facts, albeit at greater expense. It seems, as discussed in the text, that this final assumption is inconsistent with the remainder of their theory, for the ability to hide bad facts is of very little value if we must assume that the adversary ultimately will learn those bad facts.

\textsuperscript{155} See Easterbrook, supra note 76, at 359-61; see also infra Part III.C for a discussion of the burden imposed on society by additional preparation in anticipation of litigation.
scenario, the cost of discovery leads either to a warped settlement or to damage to one party's ability to prepare for trial. In the secrecy scenario, the trier of fact never gains access to the bad facts. In neither case is the truth-seeking function of the adversary system furthered by the litigant's increased trial preparation.

Even if the additional preparation has some redeeming social value, that value must be weighed against the cost to society of allowing the protection. Those costs include the duplication of effort in the production of information and the suppression of information from litigants and the trier of fact. Part III of this Article explores the nature of those costs and argues that the costs are both substantial and unequally distributed.

III. THE COST OF WORK PRODUCT IMMUNITY

Part II of this Article demonstrated that work product immunity is not necessary to accomplish the goals sought by its proponents. More importantly, work product immunity imposes significant costs on the legal system and on litigants. First, work product immunity hides some information, makes other information available only in a less useful form or at greater cost, and increases costs generally by rewarding early and extensive attorney involvement in the process of dispute resolution. Further, work product immunity aids repeat institutional defendants at the expense of individual plaintiffs. Institutional defendants can structure their business so as to create work product, and they benefit from complexity and discovery fights. By

156 See Easterbrook, supra note 76, at 360-61.
157 To continue the analysis suppose that:
   Value to society of the increased preparation = D
   Cost to society of duplicative investigation = B
   Cost to society of decreased information to trier of fact = E
   Cost to society of accuracy of case outcome = F
Despite the value of work product immunity to defendant, from the standpoint of the judicial system, work product should be continued only if $D > [B + E + F]$.

Note that this determination is wholly different from a determination of whether the additional preparation is worthwhile for defendant. Neither defendant's cost of investigation $A$ nor the benefit to defendant of the additional preparation $X$ (or $[X + Y + Z]$) is a relevant variable in calculating the social benefit of the work product doctrine. Too many analysts of work product, however, simply equate the benefit to defendant with the benefit to the judicial system.

158 Law and economics writers acknowledge that these costs exist. See, e.g., Easterbrook, supra note 76, at 362; Positive Theory, supra note 11, at 393.
contrast, the suppression of information caused by work product immunity is more damaging to plaintiffs who usually bear the burden of proof. In instances in which protection would work more evenhandedly, work product immunity tends to disappear. Finally, work product immunity costs society in duplicated efforts, repeated disputes, skewed case outcomes, and overuse of attorneys. The combination of these costs indicates that the work product doctrine needs serious reconsideration.

A. The Costs of Work Product Immunity to the Parties

In theory, the work product immunity does not hide facts. Rather, it protects attorney thought processes while still requiring that facts be disclosed. In operation, however, the result of work product immunity is that information never reaches the party seeking discovery or the trier of fact, or, alternatively, that the information the party receives is in less useful form or at a higher cost.

I. Work Product Immunity and the Suppression of Relevant Information

Despite some claims to the contrary, many commentators believe that the work product doctrine results in the suppression of relevant information. These intuitions are supported by empirical data.

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159 See, e.g., Developments, supra note 13, at 1033-37 (explaining that, by conducting an independent inquiry, an attorney should be able to learn all of the facts the opposing side possesses). Furthermore, “[w]hen one party is in a better position to know the source from which relevant facts may be derived, moreover, the Federal Rules appear to afford alternative means to redress the balance without offending the work-product doctrine.” Id. at 1034.

160 See, e.g., Cooper, supra note 8, at 1282 (“[T]he price of protecting lawyers against the folly of reliance on the other side . . . is a rule which denies discovery of factual information . . . .”); John J. Kennelly, Discovery—From the Standpoint of Plaintiffs, 18 Forum 150, 163 (1982) (“It is increasingly apparent that in some instances the high-sounding cliches pertaining to ‘work product’ and ‘attorney-client privilege,’ when analyzed, are employed to cover up relevant evidence.”).

161 See Wayne D. Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 Am. B. Found. Res. J. 219; see also Brazil, supra note 59, at 833 (An American Bar Foundation study of 180 Chicago area attorneys from many different kinds of practices and sizes of firms asked whether privileges or statutory protections, including work product, but excluding attorney-client privilege, had ever made their discovery more difficult or caused them not to uncover or pursue information. The study found that these privileges, of which work product was the most common, had impeded discovery in 10% of all the attorneys’ cases, and that more dramatically, the privileges impeded discovery in 50% of the cases handled by attorneys whose median case size was $1,000,000 or more.).
There are a number of reasons that work product protection might result in the suppression of relevant information. A party seeking discovery may be unaware of the existence of information embodied in work product.\textsuperscript{162} Sometimes, this may be due in part to the "silent assertion" of the privilege.\textsuperscript{163} Thus the holder of information makes and rules on its own objection to discovery, and the party seeking discovery may never know that the information exists in order to pursue it in nonprotected form. A discovering party's lack of awareness of information also may be attributable to opposing counsel's evasiveness coupled with a work product claim.\textsuperscript{164} When a holder of information uses work product immunity to protect information in one form, and then evades attempts to discover the information in nonprivileged form, the result easily may be that the information will never be discovered.\textsuperscript{165} The combination of the work product claim and less than completely candid answers may be misleading at best.\textsuperscript{166} Sixty-one percent of the attorneys surveyed by the American Bar

\textsuperscript{162} Wells, supra note 10, at 685.

\textsuperscript{163} See Brazil, supra note 161, at 224 (defining "silent assertion" as "withholding information in response to discovery requests . . . without informing the discovering party either that additional information exists or that the party responding to the discovery is claiming that the information is protected against disclosure by a privilege.").

\textsuperscript{164} See David L. Shapiro, Some Problems of Discovery in an Adversary System, 63 Minn. L. Rev. 1055 (1979) (providing examples of the difficulty of learning facts and the existence of unarticulated work product claims).

\textsuperscript{165} Indeed, another finding of the American Bar Foundation study was that many lawsuits are terminated with serious information gaps. The study found that 25% of smaller, less complicated lawsuits are terminated (by settlement or trial) with at least one party believing it knows something of significance about the case that other parties have not discovered. More than half of the larger, more complex cases are closed with at least one party believing it knows something of significance that opposing parties do not know. One of the reasons for the knowledge gap is the effect of discovery privileges. Brazil, supra note 161, at 234.

\textsuperscript{166} For example, in a case arising out of a car wreck, in answering interrogatories, defendant stated that he had given a statement to the investigator for his insurance company and quoted the statement as:

"The driver in front of me appeared to be slowing down so I was trying to pull into the right lane. As I was fully over into the other lane the car ahead of me suddenly stopped and the left front of my car contacted the rear of the car that was stopped in front of me."

A. Harold Frost, The Ascertainment of Truth by Discovery, 28 F.R.D. 89, 94 (1960). When plaintiffs later got a copy of the actual statement, they learned that the statement actually said:

"The driver in my lane in front of me appeared to be slowing down so I was trying to pull into the right hand lane. As I was pulling over into this other lane, I misjudged the car in front of me and the left front of my car struck the right rear of that car stopped in the left hand lane in front of me."

Id. at 94-95.
Foundation complained about evasive tactics.\textsuperscript{167} One remarkably frank attorney noted that "[t]he purpose of discovery is to give as little as possible so [your opponents] will have to come back and back and maybe will go away or give up."\textsuperscript{168} Every attorney surveyed said that, at some point in time, evasive responses had impeded his discovery.\textsuperscript{169} A discovering party, failing to ask exactly the right question in exactly the right words to force a revelation of the information, may never manage to gain access to the relevant information.\textsuperscript{170}

Work product immunity also may result in one-sided access to information when the party seeking discovery lacks the money to duplicate its opponent's work product. In this situation, the party may be completely aware of its opponent's trial preparation but cannot afford access to that information on its own.\textsuperscript{171} For example, a plaintiff may not be able to afford to interview numerous far-flung witnesses or to depose each witness individually if the witnesses are the defendant's employees who refuse to give informal statements voluntarily.

Work product immunity also may hide another kind of information: the processes by which an opponent's facts have been developed. Knowledge of these processes may be crucial to evaluating the credibility of the opponent's "facts." Professor D. Christopher Wells gives a dramatic example: "In proving that monkeys can be taught to speak English, for example, the fact that the scientist rehearsed a particular script with them may be of no great relevance. In proving that monkeys unvaryingly speak the truth, however, such a fact may be crucial."\textsuperscript{172} Work product protection, however, makes the scientist's rehearsal undisclosable, and the reliability of our witness-monkeys cannot be assessed thoroughly. To take a more "legal" example, consider the deponent who has given a prior statement about a case to one of the parties, or to that party's insurer or investigator. The fact

\textsuperscript{167} Brazil, supra note 59, at 829.
\textsuperscript{168} Id. at 829.
\textsuperscript{169} Id. at 835.
\textsuperscript{170} See, e.g., David A. Binder & Paul Bergman, Fact Investigation 341-42 (1984) ("[O]pposing counsel who are perfectly adept at surviving in a complex world may be suddenly overwhelmed by purported ambiguities in the simplest of questions. For example, in one notorious case an attorney did not produce a 'letter' from an expert because he did not consider it an 'interim report.'").
\textsuperscript{171} Waits, supra note 9, at 314.
\textsuperscript{172} Wells, supra note 10, at 686 n.45.
that a deposition can be taken and questions asked will be used as an indication that no facts are hidden by withholding the earlier statement. Without access to that statement, however, the discovering party cannot tell whether the deposition testimony differs from the earlier statement.\textsuperscript{173} The discovering party also may miss relevant areas of questioning that would have been suggested by the statement.

The same problem arises when a discovering party tries to learn information about the witness’ preparation for the deposition. Opposing counsel may have selected certain documents for the deponent to study in preparation for the deposition. This selection easily may help shape the deponent’s testimony.\textsuperscript{174} Nevertheless, discovery of this selection process has been denied on the basis that the selection process reflects the attorney’s mental processes, even though none of the documents themselves contain work product.\textsuperscript{175}

Work product immunity could be used even to prevent a discovering party from learning whether its opponent has fully complied with existing discovery requests. In \textit{Shelton v. American Motors Corp.},\textsuperscript{176} the defendants used the work product doctrine to prevent the plaintiff’s attorney from asking the defendant’s in-house counsel whether everything responsive to the plaintiff’s discovery requests had been produced.\textsuperscript{177} Again, the work product doctrine kept the discovering party in the dark, allowing suppression of information that might have led to the discovery of other potentially relevant documents.

When information is suppressed during discovery, its ultimate fate depends on whether it is helpful to the party holding the information or harmful to the party holding the information. If the case is settled,

\textsuperscript{173} See Waits, supra note 9, at 315-16. Nor can the litigant discover the earlier statement because of the possibility of a discrepancy unless the litigant has some other evidence of the discrepancy. Id. at 316 n.64.

\textsuperscript{174} Other kinds of witness preparation also may shape a deponent’s testimony. In the American Bar Foundation study, 95% of the responding attorneys said that the way they had prepared a client or witness to be deposed had resulted in other parties not learning something of arguable significance during the deposition. Brazil, supra note 59, at 819.


\textsuperscript{176} 805 F.2d 1323 (8th Cir. 1986).

\textsuperscript{177} Id. at 1329. The court in \textit{Shelton} used the work product doctrine to prevent the plaintiff’s attorney from compelling the defendant’s in-house counsel to answer questions concerning the existence of specific documents relevant to the litigation because the court believed that the attorney’s selective recollections of specific documents would reveal her thought processes. Id.; see also James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982) (same).
the information probably never will be disclosed. If the information is helpful to the party claiming work product immunity, that party can wait until trial and produce the information (perhaps with suitable dramatic flourish) as a surprise to its opponent. Trial by ambush is resurrected by virtue of work product protection. If the information is harmful to the party holding the information, it will never see the light of day. The party with the information will not present it to the trier of fact, and the adversary system will not function effectively because the fact-finder is deprived of relevant information.

2. Work Product Immunity and the Disclosure of Information in Less Useful Form

The work product doctrine admittedly denies parties access to certain documents. Its proponents claim, however, that the substantial equivalent of the information contained in these documents is discoverable if a party properly frames its discovery request. Sometimes, however, even a carefully worded request can retrieve only information that is less useful.

One common example is the witness statement. In many cases, one party (generally the defendant) takes statements from the witnesses to an incident soon after the incident occurs. These statements are taken when the events are fresh in the witnesses' minds. They may be taken from potential plaintiffs, from neutral witnesses, and from witnesses allied with the potential defendant. In many cases, these statements will be held protected as work product because they are taken by a representative of a party in anticipation of litigation. Other parties to the lawsuit will be denied access to these statements on the theory that the "substantial equivalent" of the statement is available by interviewing or deposing the witnesses. Such interviews and depositions, however, are often taken weeks, months, or even years after the incident. The witnesses' recollections may have weakened over time or may have been enhanced or shaped by intervening conversations.

178 See cases cited supra note 35, holding that witness' statements can be work product.

with opposing counsel. Yet the original statements may remain unavailable to discovering parties.\textsuperscript{180}

The notion of the substantial equivalent of information also can result in information that is less helpful substituting for the original, more helpful source. Even if a party demonstrates that she is unable to obtain the same information from the same person, a court will deny a discovery request if it decides that another source provides substantially equivalent information.\textsuperscript{181} For example, if the plaintiff is seeking information regarding a traffic accident that gave rise to plaintiff’s lawsuit, the police report of the accident may be considered the substantial equivalent of reliable eyewitness testimony.\textsuperscript{182} Thus a report, filtered through an intermediary scrivener and made for the purpose of criminal investigation, substitutes for a witness statement—a statement that is essentially a verbatim account, probably more comprehensive in scope, and taken for purposes of the lawsuit in question.

Another common situation in which information is available only in less useful form arises when one party to the lawsuit has some kind of computerized litigation support system, such as a computerized data base or computerized index to relevant documents.\textsuperscript{183} This may involve full-text storage of documents or may include only document summaries or indexes.\textsuperscript{184}

An example can illustrate the way in which the work product doctrine serves to make more useful computer data unavailable to the

\textsuperscript{180} Some courts find that a later interview is not the substantial equivalent of a contemporaneous statement and allow discovery. Others allow discovery only if the discovering party shows that the witness in question was unavailable to the discovering party for a substantial time after the incident. Others treat only statements given within one or two weeks of the incident as contemporaneous. See Special Project, supra note 16, at 804-06.

\textsuperscript{181} Id. at 802-03.

\textsuperscript{182} See id. at 803.


discovering party when less useful hard copy can be produced. In an antitrust suit, *In re IBM Peripherals*, the plaintiffs filed interrogatories asking whether IBM had recorded in a computer system the documents plaintiffs had demanded in other written discovery. IBM responded that its attorneys had developed a computerized trial support system and contended that the system contained documents as well as summaries of some of the requested documents. The trial court found that the system reflected IBM attorney mental impressions and thought processes in a way that would not lend itself to segregation of the protected information and so denied access to the computer system.

Assuming that plaintiffs did have access to all of the data contained in the IBM computer system, plaintiffs were not denied "facts." The facts they were given, however, were in much less useful form. In the interest of protecting attorney thought processes in selecting or abstracting the documents, or in the interest of protecting the money a party spent in creating the data base, the discovering party is left with information that is available in theory, but unavailable in fact (or available only after a long and costly search) because of the difficulty of finding relevant data in a huge volume of documents.

One commentator gives the following example of the disadvantage to a litigant denied access to a computerized litigation support system:

During the discovery phase in an antitrust action, the defendant converts all of its business records, including pricing announcements, from its Midwest marketing department into the database of a computer support system. The plaintiff has alleged that the defendant maintains its market position by lowering prices below cost (predatory pricing) and needs documentary support for the allegation. The plaintiff asks for all pricing announcements from the defendant's Midwest marketing department. The defendant responds by produc-

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186 Id. at 878-79.
187 Id. at 859. This finding was despite plaintiffs' statement to the trial court that "we don't want their work product. We want them to use their work product, though . . . and to the extent that would facilitate their production of documents responsive to our requests, it should be used." Friedman, supra note 42, at 1475 n.49 (1981) (citing the Pretrial Hearing Transcript of *In re IBM Peripherals*); see also Manual for Complex Litigation Second § 21.446, at 60 n.79 (1986) [hereinafter Manual] (suggesting that computer systems that will not be introduced into evidence will be protected as work product). But see also United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1300-01 (D.C. Cir. 1980) (allowing intervention to raise work product claim for computerized litigation support system).
ing one million documents, while only one hundred of them indicate predatory pricing.\textsuperscript{188}

It will take the plaintiff months or years and a substantial amount of money to sift manually through the voluminous materials. If, however, the plaintiff could discover the defendant’s computer support system, it might take only minutes to locate the needed documents.\textsuperscript{189}

Under current law, the computer support system undoubtedly will be considered work product.\textsuperscript{190} The discovering party can try to get access to the computer system by claiming that it has substantial need of the system and cannot, without undue hardship, obtain its substantial equivalent. Many courts, however, hold that financial inability of the discovering party to obtain manually the needed information does not show undue hardship, nor does the fact that the computer system will expedite proceedings show substantial need.\textsuperscript{191} To the extent that a computer system is considered opinion work product, even a showing of substantial need and undue hardship will be insufficient to allow production to opposing counsel.\textsuperscript{192} The work product immunity, under these circumstances, leaves the discovering party with access to the information only in less helpful form.\textsuperscript{193}

\section*{3. Work Product Immunity and Information Available Only at Greater Cost}

Sometimes information in documents protected by work product immunity can be obtained only at greater cost in time and money. Work product immunity raises costs for at least three reasons. First,

\begin{footnotes}
\item[188] Rigbaum, supra note 183, at 285-86.
\item[189] Id. at 286. For a discussion of the advantages of computerized support systems generally, see Steven J. Olson & Leon R. Goodrich, Litigation Support Systems—Present Status and Future Use, 11 Forum 832 (1976).
\item[190] Manual, supra note 187, § 21.446, at 60 n.79; Long, supra note 184, at 409-10.
\item[191] See Friedman, supra note 42, at 1485-86.
\item[192] See id. at 1487.
\item[193] Some commentators have suggested that litigation support systems should be discoverable in at least certain circumstances, especially when one litigant is financially unable to duplicate its opponent’s system. See, e.g., Edward F. Sherman & Stephen O. Kinnard, The Development, Discovery, and Use of Computer Support Systems in Achieving Efficiency in Litigation, 79 Colum. L. Rev. 267 (1979). These suggestions, although motivated by considerations of policy, are not consistent with the courts’ work product decisions in other areas and so might require an amendment of the federal rules to achieve even the limited discoverability of computer systems advocated by the authors. See Friedman, supra note 42, at 1488-89.
\end{footnotes}
when a document is protected by work product immunity, the discovering party must undertake its own duplicative discovery to learn the same information. Even supporters of the work product doctrine admit that work product immunity results in duplication of efforts. Examples of these added costs are numerous. A party denied a witness statement must instead undertake its own independent interview of the witness. If the witness will not voluntarily make a statement, the party must resort to the vastly more expensive procedure of taking the witness' deposition. A party denied the use of an opponent's litigation support system must spend (if it can afford to do so) the time and money to develop its own independent system. A party denied access to a document often must use multiple waves of discovery, including interrogatories, depositions, requests for admission, and document production requests to ferret out the information contained in that protected document. In these situations, and in others, the information ultimately may be available to the discovering party, but it clearly is available only at a higher cost.

Second, in order to discover information protected as ordinary work product, a discovering party must show that she has substantial need for the information and that she is unable to obtain the substantial equivalent of the information without undue hardship. Courts require the discovering party to go to great lengths to make this showing. It is not enough for a party to allege substantial need and undue hardship. The party actually must try, but fail, to obtain the information contained in requested documents. A party seeking work product to impeach a witness must "show a strong possibility that the materials requested will in fact impeach the witness;" this, too, imposes costs on the discovering party. This need for unsuccessful

194 See, e.g., Positive Theory, supra note 11, at 393 ("A party must often incur duplicative costs to produce the same information that the opponent is normally entitled to suppress.").
195 A deposition requires, at minimum, filing a notice of deposition with the court and serving it on other parties to the lawsuit. If the witness is not a party or under the control of a party, the witness will have to be subpoenaed. Taking a deposition also requires paying a court reporter, a cost that will run easily into the hundreds of dollars. Furthermore, if the witness chooses to fight the subpoena, the cost of getting the information also will include the costs of litigating the motion to quash.
196 See supra text accompanying notes 188-93.
198 Special Project, supra note 16, at 801.
199 Id. at 802.
efforts at duplication or for proof of discrepancies imposes a cost in both time and money on the party seeking discovery.200

Third, disputes about what should be classified as work product increase the parties’ cost of discovery. When litigants claim that material is protected by the work product rule, a party will be able to discover that material only by filing a motion to compel discovery, frequently accompanied by a brief and frequently requiring an evidentiary hearing. Even if the document ultimately is provided, erroneous claims of work product immunity increase the discovering party’s cost of obtaining the information. The vagueness of the work product doctrine itself exacerbates this third problem. The application of the work product doctrine requires a balancing of values as well as adjudication of disputed facts. This in turn has resulted in a work product doctrine of great complexity, and complex doctrines tend to engender more fights.201 The lack of clarity about the parameters of work product immunity and its exceptions encourages litigation, making the doctrine one of the most litigated discovery exemptions.202

The problem also is exacerbated by many attorneys’ willingness to use discovery for tactical purposes. For example, eighty percent of the attorneys surveyed in the American Bar Foundation poll stated that gaining time or slowing down part or all of an action had been a factor affecting their use of discovery tools, including asserting technical or questionable objections to discovery.203 Seventy-seven percent of the attorneys also indicated that their desire to impose “work burdens or economic pressure” on another party or attorney affected

200 This higher cost will not provide the key to unlock the suppressed information. Most courts hold that the cost to the discovering party of obtaining information is not a sufficient showing of substantial need or undue hardship. See Gergacz, supra note 94, at 7-47 to -48; Special Project, supra note 16, at 810; Developments, supra note 13, at 1036. For cases adopting this approach, see, e.g., In re LTV Sec. Litig., 89 F.R.D. 595, 616 (N.D. Tex. 1981) (finding that even if cost to discovering party, unless prohibitive, is very high, this alone is not showing of substantial need or undue hardship).

201 See Waits, supra note 9, at 322. Complexity also tends to favor wealthier litigants. “[A]s the process becomes more complex, increasingly it can be used effectively only by players who can deploy the resources to play on the requisite scale.” Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 45-46 (1983).

202 4 James W. Moore, Jo D. Lucas & George J. Grotheer, Jr., Moore’s Federal Practice § 26.63[1], at 26-310 (2d ed. 1991); see also Cooper, supra note 8, at 1318 (stating that litigation over witness statements wanted for purposes of impeachment forms “the largest body of [discovery] case law”).

203 Brazil, supra note 59, at 852 & n.99.
their discovery behavior,\textsuperscript{204} such as asserting objections to discovery.\textsuperscript{205} One attorney commented that "by being an obstructionist you can avoid providing about 80 percent of the information because it's expensive for [an] opponent to go to court to compel discovery."\textsuperscript{206}

The combination of an amorphous doctrine, adversarial attorney behavior, and the potential importance of work product materials make disputes about work product protection inevitable. And the mere fact of having to litigate the discoverability of the information, even if the information ultimately is held to be discoverable, increases the cost of that information to the discovering party.

\textbf{B. The Comparative Impact of Work Product Immunity}

The preceding Section of this Article demonstrated that the work product doctrine imposes costs on the litigants: (1) the cost of making some information unavailable; (2) the cost of making other information available only in less useful form; and (3) the cost in time as well as in money of requiring duplicative investigation and preparation and of litigating work product issues. These costs are substantial, especially when balanced against the insignificant benefits of the work product doctrine.\textsuperscript{207} The problem, however, is even worse because these costs are not distributed evenly across litigant groups. Protection of work product tends to favor institutional litigants,\textsuperscript{208} especially repeat litigants, at the expense of individual litigants, and it tends to favor defendants at the expense of plaintiffs.\textsuperscript{209}

\begin{footnotesize}
\textsuperscript{204} Id. at 856-57.
\textsuperscript{205} Id. at 856.
\textsuperscript{206} Id.
\textsuperscript{207} See supra Part II, demonstrating the insignificant benefits of protecting work product.
\textsuperscript{208} By the term "institutional litigants," I include private organizations such as corporations and partnerships as well as government entities. I also include litigants who are nominally individuals, such as doctors in medical malpractice claims, but who are actually represented by insurance companies and their attorneys. The involvement of the insurance company carries with it the benefits of the insurance company's experience as a repeat litigant.
\textsuperscript{209} In the context of major commercial litigation with large, equally wealthy institutions on both sides of the docket, the impact of work product may be more even. Institutional commercial litigation plaintiffs may not be as disadvantaged by work product immunity, although the fact that they carry the burden of proof still may cause them to be more disadvantaged than institutional defendants. In many other kinds of litigation, however, such as personal injury, professional malpractice, products liability, consumer fraud, civil rights, employment discrimination, and even certain kinds of antitrust and securities claims, a smaller
\end{footnotesize}
This proposition seems intuitively true because institutional defendants have a superior ability to structure their dealings so as to create more work product, and they benefit more from delay. In addition, because plaintiffs have the burden of proof, they are more likely to be harmed by a denial of access to information. Various empirical data support these intuitions. Finally, this uneven effect is exaggerated by the parameters of the work product doctrine and particularly by recent developments that compel the disclosure of certain "work product-type" information as part of a pretrial conference or pretrial order.

I. The Theory of the Benefits of Work Product Immunity to Institutional Defendants

For purposes of analyzing the comparative impact of work product protection, it is helpful to divide litigants into two groups: "one-shotters," claimants who have only occasional recourse to the courts, and "repeat players," parties who are engaged in many similar litigations over time. Typically, repeat players have a number of advantages as litigants. First, repeat players have greater ability to structure future transactions so as to build an appropriate record. Second, repeat players tend to have advantages of expertise, greater access to specialists, economies of scale, and lower start-up costs for any given case. Finally, repeat players can litigate for rules as well as for immediate gains. In other words, they can benefit by spending an amount of money disproportionate to the value of a particular lawsuit because they stand to gain in future lawsuits from the rules made in the first suit.

Take an example: In a personal injury case involving an allegedly defective product, the individual plaintiff has been involved unexpectedly in a litigation-creating event. She may be a person of limited means, and she has no established machinery for investigating or resolving the problem. If seriously injured, she may be medically

one-shot litigant plaintiff will be facing a larger repeat litigant defendant (including insurers of nominally one-shot defendants) and thus will be at a significant disadvantage.

210 Galanter, supra note 12, at 97.

211 See id. at 98-100.

212 See id. at 100. Also, the larger number of cases in which repeat players are involved makes it possible for them to adjudicate and to appeal (as opposed to settling) only those cases that they regard as most likely to produce favorable rules.
unable to pursue her claim for some time after the injury. When the
litigation begins, she has little or no knowledge of the facts other than
her own use of the product and her own injuries. On the other hand,
the institutional defendant who manufactured the product already
may have a staff or insurer trained in investigating consumer com-
plaints and problems with its products. The manufacturer (or its
insurance company) need only assign an existing employee to investi-
gate the case, thus keeping its start-up costs low. It also benefits from
existing in-house expertise with regard to the product and detailed
knowledge about the development, design, and manufacture of the
product, before it even begins an individual investigation of the plain-
tiff’s case. Whatever the costs of the investigation, the repeat litigant
can spread those costs over multiple cases of multiple plaintiffs
injured by the same product. All of this provides an advantage and
means that the manufacturer will have a potentially invaluable wealth
of information about the case.

An institutional defendant who can plan for the occurrence of
claims such as the plaintiff’s has still another advantage. It can struc-
ture its investigation to maximize the chances that its investigations
will be held to be work product and thus shielded from discovery.
For example, the manufacturer may have a policy of always calling its
attorneys immediately on learning of an injury, so that any ensuing
investigation can be said to have been done under the attorney’s direc-
tion. This makes it more likely that a court will find the investigation
to have been done in anticipation of litigation. Further, the manu-
facturer can leave a paper trail intended to demonstrate that it meets
all the requirements of the work product rule. The manufacturer also

\[\text{\footnotesize 213 A manufacturer of a product that may injure a large number of persons in the same or similar ways can benefit from this kind of cost-spreading. For example, the manufacturer of a car that unexpectedly shifts gears, the manufacturer of a birth control device that injures its users, or the manufacturer of a punch press that injures a number of workers all can anticipate multiple lawsuits raising the same legal and factual issues. Although the facts of a particular plaintiff’s injuries may vary, certain issues such as the defectiveness of the product and the adequacy of any warnings given will remain largely the same from case to case.}\]

\[\text{\footnotesize 214 Institutional defendants also have a greater ability to structure their affairs so as to shield information through the attorney-client privilege, especially in a jurisdiction taking a “subject matter” approach to privilege in the corporate setting. The impact of corporate attorney-client privilege, however, is beyond the scope of this Article.}\]

can choose to litigate the work product issue whatever its expense, again able to spread that cost over multiple lawsuits. It also can choose to litigate cases that are most likely to produce pro-work product rules. As a class of litigants that is most likely to do early, extensive investigation, repeat litigants are the primary beneficiaries of that portion of the work product doctrine that protects the embodiment of such investigations from discovery.216

Defendants can benefit not only from actual work product protection, but also from the ability to fight about work product protection and thus delay the ultimate resolution of the lawsuit. Defendants can benefit from delay both by postponing the necessity to pay the plaintiff and by increasing the chances that the passage of time will impair the quality of evidence and make it more difficult for the plaintiff to meet her burden of proof.217

Finally, those with established power in society tend to appear, in many cases, in court as defendants.218 At the outset of a lawsuit, these same defendants mostly likely have the bulk of relevant information without the need to do discovery, while plaintiffs tend not to have such information. Furthermore, defendants also are less likely to find themselves in a position of having to extract evidence from opponents to prove any affirmative defenses.219 When work product immunity results in the plaintiffs' inability to secure information, however, it has a disproportionate impact on plaintiffs because plaintiffs usually have the burden of proof.

216 See Waits, supra note 9, at 324-25.
219 See id. Even when an institutional litigant appears as a plaintiff suing an individual defendant as, for example, when a corporation sues an individual on a debt, the institutional litigant already tends to have the information needed to prove its case. Contrast this with the situation of an individual injured by a defective product who needs to discover extensive information about the way in which the product was designed, manufactured, and distributed in order to prove her case.
2. Evidence Supporting the Theory that Institutional Defendants Benefit from Work Product Immunity

The theoretical analysis of the structure of American lawsuits in the previous Section suggests that the costs of the work product doctrine are borne primarily by individual plaintiffs. There is evidence to support this belief. Some evidence comes from defendants' behavior, some from empirical studies of discovery and discovery abuse, and some from a survey of work product case law.

First, it appears that institutional defendants and their attorneys believe that they benefit from work product protection. Defendants and defense attorneys as a group have been vocal in their defense of the work product doctrine. Some insurance-oriented journals, for example, represent the work product doctrine to be virtually essential to the maintenance of civilization as we know it. Companies with the potential to be repeat defendants also figure prominently as amici curiae in cases defending or expanding work product protection. In Shelton v. American Motors Corp., which defined an attorney's selection of relevant documents as work product, the parties filing amici briefs included the Motor Vehicle Manufacturers Association of the United States, the Defense Research Institute, Inc., and thirty-one of the largest corporations in the United States.

Empirical research regarding discovery behavior also supports a belief that defendants benefit from disputes regarding the work product doctrine. Although the studies do not tie certain behaviors exclusively to work product, they do provide evidence that institutional

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220 See, e.g., Cooper, supra note 8, at 1325 ("It may not be unduly cynical to surmise that lawyers who believe that they or their clients typically have superior means of obtaining witness statements will tend to oppose discovery... ").

221 See, e.g., Kane, supra note 55, at 130 (author, whose biographical sketch notes that his "entire practice has been in the field of insurance law," stating that "the real bulwark and strongest hope for the preservation of the adversary legal system lies in the concept of the attorney's work product").

222 Shelton v. American Motors Corp, 805 F.2d 1323, 1329 (8th Cir. 1986).

litigants and defendants are more apt to use doctrines such as the work product doctrine to strategic advantage\textsuperscript{224} and are more likely to benefit from delay and from discovery disputes.\textsuperscript{225} The Civil Litigation Research Project found that the amount of time parties were forced to spend on discovery fights correlated directly with their success ratio\textsuperscript{226} and that the impact on plaintiffs was different from the impact on defendants.\textsuperscript{227} For plaintiffs, the longer a case lasts, the lower the ratio of recovery to fees.\textsuperscript{228} In cases in which an above average amount of time must be spent on discovery and discovery disputes, the plaintiff also recovers less in relation to the amount at stake in the lawsuit.\textsuperscript{229} For defendants, however, if a defense attorney spends a greater than average amount of time on discovery, the defendant’s success ratio increases.\textsuperscript{230} Furthermore, one study found that plaintiffs tend to suffer not only financially but emotionally the longer the duration of a lawsuit, although institutional defendants do not.\textsuperscript{231}

\textsuperscript{224} A different study demonstrates that some defendants’ resistance to discovery often is unfounded, either because of a mistaken belief in the existence of a privilege or because objections are being used for strategic purposes such as delay and harassment. The Federal Judicial Center studied cases in which discovery had been a problem. They learned that in cases in which the discovery disputes stemmed from resistance to discovery, 54% of the plaintiffs’ motions to compel discovery were granted, although only slightly more than 7% of the defendants’ motions for protective order were granted. Joseph L. Ebersole & Barlow Burke, Discovery Problems in Civil Cases 44-47 (1980).

\textsuperscript{225} For example, the American Bar Foundation study found that “attorneys who spent 50 percent or more of their time representing large corporate clients . . . were likely to have used discovery to ‘gain time’ in 30 percent (median) to 46 percent (mean) of their cases,” although attorneys who got most of their work from individual clients “used discovery for purposes of delay in only 10 percent (median) to 26 percent (mean) of their cases.” See Brazil, supra note 59, at 852-53. Similarly, “attorneys who committed 75 percent or more of their time to defendants’ matters” said the hope “to ‘gain time’ had affected their discovery in 28 percent (median) to 39 percent (mean) of their cases; those figures were 15 percent (median) and 27 percent (mean) for the group of predominantly plaintiffs’ lawyers.” Id. at 853.


\textsuperscript{227} Id. at 112-19.

\textsuperscript{228} Id. at 112.

\textsuperscript{229} Id. at 113, 116.

\textsuperscript{230} Id. at 119. The large law firms representing institutional defendants also benefit from discovery disputes. See Chayes & Chayes, supra note 73, at 295-96.

These statistics support an inference that defendants are in a position to benefit from disputes about work product. Not surprisingly, therefore, the statistics also indicate that defense attorneys are more likely than plaintiffs' attorneys to use discovery disputes to gain an advantage over their opponents. A survey of reported work product case law, in both federal and state courts, shows that a clear majority of work product disputes arise out of defendants' resistance to providing information to plaintiffs. A noticeable percentage of these cases stems from the work product claims of insurance companies. These statistics, because they are incomplete, are impressionistic rather than scientific, but they appear to be consistent across jurisdictional lines and to occur both in jurisdictions following the

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232 Studies have found significant differences between plaintiffs and defendants in the deliberate use of delay. See Pretrial Delay, supra note 217, at 12 (concluding that "[p]arties to a lawsuit do not suffer equally from delay. In fact . . . civil . . . defendants may have considerable [advantage] to gain from protracted court processing.").

233 Data from reported cases, of course, can represent only a small portion of the disputes about work product. Many jurisdictions do not report trial court decisions where most of the day-to-day decisions about work product are made. Even those jurisdictions, such as the federal courts, that do report trial court opinions report only some disputes about work product. To a large extent, then, the appellate case law represents only those disputes that were important enough to one of the parties to generate an appeal or interlocutory review through some kind of discretionary writ. Nevertheless, these reported cases do indicate some interesting trends in the use of work product claims.

234 For example, of the 69 cases cited by Moore's Federal Practice to illustrate work product issues arising after the 1970 amendments to the Federal Rules of Civil Procedure, 52 arise out of defendants' work product claims, and only 17 arise out of plaintiffs' work product claims. The same trend appears at the state level. For example, of 12 reported work product cases in Louisiana decided under its current work product statute, 11 involved defendants claiming work product; 7 of those cases involved insurance companies. In Rhode Island, of 6 reported cases involving work product, 5 involved defendants claiming work product; and at least 4 of those cases involved insurance companies. In Pennsylvania, following the adoption of its new work product rule, of 9 reported work product cases, 7 involved work product claims by defendants and 2 by plaintiffs; 3 of the cases involved work product claims by insurance companies. In Texas, there are 23 reported cases from 1987 through June of 1989 involving work product claims. Of these, 22 involved work product claims made by defendants; at least 13 of these involved work product claims by insurance companies.

The data discussed above come from an original survey, and the results are on file with the author and the Virginia Law Review Association. Because of the large volume of work product cases, both in the federal courts and at the state level, I do not claim to have read all of the existing cases. Rather, the results noted here represent an incomplete informal survey generated by reading treatises, case annotations to the relevant discovery rules, and by searching LEXIS for cases referring to work product, trial preparation, or the discovery rule in issue. The data are sufficiently consistent to convince me that, at least at the level of reported cases, work product claims by defendants will outnumber work product claims by plaintiffs in any American jurisdiction.
federal model and in states adopting a variant approach to work product protection.

These data support the theory, described in Section 1 above, that repeat institutional litigants and defendants are in a better position to create work product, to benefit more from the substantive application of the work product doctrine, and to benefit more from litigating work product issues than plaintiffs and individual litigants.

3. The Disappearance of Post-Filing Work Product Immunity

Before information can be protected as work product, it must have been developed in anticipation of litigation. Once an actual lawsuit is under way, all parties usually will be represented by counsel, all of whom will busily generate work product. One would think, therefore, that work product protection would operate evenhandedly at least in the area of post-filing opinion work product. The parameters of the work product doctrine, changes in discovery practice, and the advent of the modern pretrial order, however, have limited much of the evenhanded portions of work product protection. Where the work product doctrine would tend to provide similar protection for all litigants, it is nonexistent or diluted. Further, its dilution has come in ways that tend to benefit defendants more than plaintiffs.

Proponents of work product immunity argue that the doctrine is necessary to protect the attorney’s thought processes, yet much of an attorney’s thought process is now discoverable. First, work product has been defined so that it does not protect a party’s legal theories. Thus a form of attorney thought process in which work product protection would operate evenhandedly is not even protected by the work product doctrine. Further, parties must reveal, at least to some extent, their legal and factual contentions in pleadings. In many jurisdictions, plaintiffs’ pleadings must contain more detail than defendants’, thereby revealing more of the plaintiffs’ attorneys’ thought processes.

235 See Special Project, supra note 16, at 837 (“Legal theories upon which a party intends to rely are not protected as work product.”). See generally Cooper, supra note 8, at 1284-93 (discussing the reasons for and against allowing discovery of legal theories).

236 In Texas, for example, plaintiffs must plead a “cause of action,” giving defendant fair notice of both legal theories and their factual support. Tex. R. Civ. P. Ann. r. 45 op. of Subcommittee on Interpretation of Rules (West 1979). Defendants, on the other hand, need only plead a general denial, unless they want to raise certain disfavored defenses such as usury.
Moreover, parties can now use interrogatories and requests for admission to ask for facts supporting legal theories and the application of law to facts. This eliminates what would have been a source of work product protection for attorneys on both sides. Again, though, the rule tends to operate so as to favor defendants: the questions cannot be too broad in scope, and a defendant with the advantage of plaintiff's specific pleading of her legal theory will be better equipped to draft a discovery request that will be enforced by the court.

Finally, although decisions about trial strategy—who will be called as witnesses, what documents or other demonstrative evidence will be introduced, what legal and fact issues really will be contested at trial—still are held to be work product in some jurisdictions, courts more and more frequently require attorneys to reveal trial strategy as part of a pretrial order. Increasingly, many trial courts routinely provide for the disclosure of the identity of trial witnesses, frequently with a brief summary of the facts or issues as to which each will testify, as well as for disclosure of all trial exhibits, statements of legal theories upon which attorneys will rely, and detailed statements of factual contentions. Judge J. Skelly Wright, in a discussion of pretrial conferences, notes that judges in routine cases often "make each side disgorge completely and absolutely everything about its case." In complex cases, Judge Wright indicates that the courts require as to each proposed finding of fact:

or capacity. See Tex. R. Civ. P. Ann. r. 92-94 (West 1979). Thus the pleadings provide defendant with far more information about the plaintiff's attorney's thought process than they give the plaintiff about the defendant's attorney's thought process. Even under the federal system, the plaintiff must plead its claim, and the defendant need only admit or deny those claims and plead affirmative defenses in a conclusory manner. Fed. R. Civ. P. 8.

See, e.g., Fed. R. Civ. P. 33(b) & 36(a).

See generally Special Project, supra note 16, at 837-38 (regarding the courts' preference for focused rather than broad inquiries about legal theories and facts supporting legal theories).

See sources cited supra notes 47-48.

See Cooper, supra note 8, at 1328-29.

a list of the witnesses who are going to establish that proposal, together with a summation of their testimony, together with a list of the documents and an attachment to the proposal of those documents.

Now, that would be as to each and every proposed stipulation of fact; and, of course, with reference to the conclusions of law, they would be supported by the citations of authority.242

Thus this kind of trial-strategy opinion work product, which affects different kinds of litigants evenly, essentially is not protected anymore. Contrast this with ordinary work product arising out of fact investigation, which is more likely to be held by defendants and still is very much protected. Pro-defendant work product protection is alive and well; evenhanded work product protection is dying fast. This accentuates the tendency of the work product doctrine to benefit defendants and institutional litigants at the expense of plaintiffs and individual litigants.

A relatively new development in pretrial procedure also tends to force the revelation of plaintiff work product. Rule 11 of the Federal Rules of Civil Procedure requires that an attorney signing pleadings "has read the pleading ... [and] that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."243 An opponent who questions whether pleadings are supported by facts or law may file a motion seeking sanctions under Rule 11. Empirical research on the application of Rule 11 indicates that it is used most often by defendants challenging plaintiffs' claims.244 A plaintiff's attorney, in defending his or her decision to file and pursue the lawsuit, must reveal the facts known to the attorney, the nature of the attorney's "reasonable inquiry," and the attorney's legal theories in order to avoid Rule 11 sanctions. All of these matters ordinarily would be protected by the work product doctrine, but the benefit of


the protection is overcome by the need to protect the attorney and the attorney's client from potentially gigantic sanctions.\footnote{See, e.g., Chapman & Cole v. Itel Container Int'l, 865 F.2d 676 (5th Cir. 1989) (sanctions against third-party plaintiff); Smith v. Our Lady of the Lake Hosp., 135 F.R.D. 139 (M.D. La. 1991) (sanctions against plaintiffs and attorneys totalling $323,532.92).}\footnote{Because taxpayers rather than litigants pay the costs of operating the courts, the social and private costs, even when measured solely in terms of dollars, will diverge. Trubek, Sarat, Felstiner, Kritzer & Grossman, supra note 226, at 78-79.} Once again, procedural rules operate to eliminate work product immunity in a way that tends to hurt plaintiffs more than defendants.

\section{C. The Cost of Work Product Immunity to Society}

Sections A and B discussed the cost that the work product doctrine imposes on the parties to litigation. The doctrine also imposes costs on society.\footnote{See Easterbrook, supra note 76, at 362; Positive Theory, supra note 11, at 393.}\footnote{See Garrity, supra note 32, at 27.} First, work product immunity encourages each litigant to prepare for trial completely and independently. This results in duplication of effort, which imposes costs not only on the litigants who must pay for the preparation, but also on society.\footnote{See Moore, Lucas & Grotheer, supra note 202, \$ 26.63[1]; Developments, supra note 13, at 1027.} This duplicative expenditure of time and money means that resources are being wasted on preparation for litigation.\footnote{An in camera inspection allows the court to examine the disputed documents to determine issues such as the identity of the writer, the identity of the recipients, the subject matter of the document, and the document's date in order to determine whether the persons who produced the documents were agents of the parties and whether the document was created in anticipation of litigation.}\footnote{An evidentiary hearing allows the court to hear evidence about issues such as the degree of anticipation of litigation of the document's preparers and the substantial need/undue hardship claims of the party seeking discovery.}

Second, work product immunity tends to generate disputes separate from the merits of the case. Empirical data indicates that work product claims are the most litigated discovery disputes.\footnote{An in camera inspection allows the court to examine the disputed documents to determine issues such as the identity of the writer, the identity of the recipients, the subject matter of the document, and the document's date in order to determine whether the persons who produced the documents were agents of the parties and whether the document was created in anticipation of litigation.}\footnote{An evidentiary hearing allows the court to hear evidence about issues such as the degree of anticipation of litigation of the document's preparers and the substantial need/undue hardship claims of the party seeking discovery.} Forcing the courts to referee these disputes increases the problems of delay and docket backlog in the trial courts. When a decision about a work product issue requires that the court conduct an in camera inspection of the disputed documents,\footnote{See Moore, Lucas & Grotheer, supra note 202, \$ 26.63[1]; Developments, supra note 13, at 1027.} or an evidentiary hearing,\footnote{An evidentiary hearing allows the court to hear evidence about issues such as the degree of anticipation of litigation of the document's preparers and the substantial need/undue hardship claims of the party seeking discovery.} even greater costs arise. All these costs are passed on at least partially to the public both in terms of delayed case outcomes and in terms of increased costs of administering the judicial system.
Third, as noted above, certain institutional defendants have the ability to structure their behavior in a way that maximizes work product protection.\textsuperscript{252} This behavior often will include the increased use of attorneys (including use of attorneys to do work that could be done just as well by lay persons), making attorneys central to the dispute resolution process even before a case is filed.\textsuperscript{253} The cost of additional attorneys is a direct cost for the litigants, but it also can be passed on to shareholders and to consumers, thus becoming a cost to society.

Fourth, enhanced protection for attorney work product also may impose a psychic harm on society. To the extent that work product immunity serves only to protect attorneys as a special class,\textsuperscript{254} whose interests are more important than those of other groups, the work product doctrine undercuts the egalitarian ambitions of American society.\textsuperscript{255} The work product doctrine means that attorney thought processes and documents are protected although client thought processes and documents are not. This line makes it seem as though work product immunity is a vehicle for benefiting the attorneys themselves rather than society as a whole.\textsuperscript{256} If this is all that can be said of work product immunity, it harms the structure of a society that has chosen to be governed by law even to recognize the doctrine.

Finally, the work product doctrine imposes another kind of non-monetary cost on society. Work product protection sometimes results in cases being settled or tried with parties to the cases missing relevant information.\textsuperscript{257} This in turn can lead to inaccurate outcomes. In part, this will lead merely to errors in the division of the stakes among

\textsuperscript{252} See supra text accompanying notes 214-16.
\textsuperscript{254} Arguments that work product is necessary to protect the morale or “tone” of the legal profession explicitly adopt this view. See supra Part II.A.2.
\textsuperscript{255} See Wright & Graham, supra note 218, § 5422, at 673-74 (“In a society with egalitarian pretensions, the creation and justification of a privilege to refuse to respond to a judicial inquiry is essentially a political question; i.e., it is an allocation of power as between the various components of the society.”) (footnote omitted).
\textsuperscript{256} See Wells, supra note 10, at 695-96.
\textsuperscript{257} See supra Part III.A.1.
the parties to a particular lawsuit. Lawsuits, however, also serve to take existing rules and to apply them accurately in a way that influences future behavior. This might be called the “general deterrence function” of litigation: “The more accurate the application of the rules in particular cases, the more effect the rule itself will have in influencing behavior.” Therefore, when the work product doctrine skews case outcomes by allowing information imbalance, it also decreases the general deterrent value of litigation in society.

IV. LEGITIMATE WORK PRODUCT CONCERNS AND THE SOLUTION

The work product doctrine, in its current form, is not necessary to accomplish the outcomes sought by its Supreme Court creators in *Hickman*. The necessary adversarial nature of the presentation of evidence at trial can be achieved with a less combative model of information gathering. Further, the cost to the litigants and to society of the current work product doctrine far outweighs the benefit of any increased preparation that it may produce.

A. Legitimate Concerns

There still are some legitimate concerns that would arise were the work product doctrine to be eliminated entirely: issues of cost allocation, of timing, and of attorney harassment. Part of our concern about eliminating work product immunity is not about adversary preparation, morale, or any of the usual claims; it is about money. Courts, legislatures, and litigants are unwilling to let the discovery system function as a wealth-reallocation device. Thus they resist allowing one party to benefit from work for which the other party has paid. This adverseness to wealth-reallocation underlies, in part, the courts’ reluctance to give one party access to another party’s computerized litigation system, or to its insurer’s investigation, or to its

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258 See Easterbrook, supra note 76, at 359-60.
259 Id. at 359.
261 See, e.g., Maryland ex rel. Montvila v. Pan-American Bus Lines, 1 F.R.D. 213, 215 (D. Md. 1940) (stating that it is unreasonable to allow the discovery process to require defendant’s insurer to furnish investigation “free of cost” to plaintiff).
experts' reports. Although we are in theory willing to redistribute information relevant to a dispute, we are not always willing to make one party bear the entire cost of that informational distribution, especially when the parties have roughly equal resources. A system that eliminates the work product doctrine will have to address these issues of cost allocation, either allowing disclosure despite the fact that an opponent has borne the cost of preparation or ordering some payment for the data, as the equities of the situation may require.

Another concern centers on issues of timing. At what point should certain disclosures, for example, disclosures about a party's legal and factual contentions, trial witnesses, or exhibits, have to be made during the course of a lawsuit? As the system works now, we protect parties from early disclosure of this information but find disclosure entirely appropriate shortly before trial. Concerns about issues such as issue freezing and litigation support systems really mask timing questions. One commentator, discussing a trial court's decision to protect IBM's computerized data, notes:

The judge accepted IBM's argument and denied plaintiffs' request because he failed to realize that the real issue in the case was how soon IBM would produce the documents. Plaintiffs had no interest in discovering privileged information such as how IBM's system worked. Plaintiffs only wanted IBM to use its computer so that it could obtain the requested documents—documents that plaintiffs clearly were entitled to see—more quickly than if plaintiffs searched for them manually.262

A system that eliminates the work product doctrine, then, will have to make some decisions about the proper timing of disclosures.

Another concern with eliminating work product immunity is that attorneys will harass opposing counsel during discovery. For example, if even intangible opinion work product (that is, strategic attorney thoughts that exist only in the attorney's brain) is discoverable, attorneys will be able to take opposing counsel's deposition and ask for all of that information. The same will be true of intangible ordinary work product: the attorney can be asked what he or she knows. Our concerns about lack of professionalism and fears of "Rambo" litigation lead us to fear that such depositions could be exploited and used

262 Friedman, supra note 42, at 1475 (footnotes omitted).
as a tool for harassment. These concerns also will need to be addressed in a system that eliminates the work product doctrine.

B. The Solution

The ideal system will minimize the costs of any protection that is required, spread the costs evenly among the parties, and address the real remaining concerns directly. This requires the elimination of both ordinary and opinion work product protections, replacing them with cost-allocation rules, timing rules, and rules about relevance and appropriate behavior. These rules, in turn, must be drafted so that the protections provided benefit all groups of litigants equally and, where appropriate, allocate resources so that no party is deprived of relevant information due to lack of resources.

1. Elimination of Ordinary Work Product Immunity

Some commentators already have called for the abolition of the protection given to ordinary work product. These commentators are correct. Ordinary work product immunity is not needed to protect the functioning of the adversary system. It tends to result in a net loss of information rather than a net gain of information to the trial process. And it is the type of work product most likely to benefit certain classes of litigants at the expense of others.

There is some evidence that ordinary work product immunity can be eliminated without causing the adversary system to come crashing down. Pennsylvania, for example, has gone a long way in that direction. In 1978, Pennsylvania's work product rule was changed to greatly restrict the scope of protected information. Parties may discover relevant information:

even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his mental impressions, conclusions or opin-

263 See Cooper, supra note 8; LaFrance, supra note 5; Waits, supra note 9.
ions respecting the value or merit of a claim or defense or respecting strategy or tactics.\textsuperscript{264}

This rule represents an attempt to protect only opinion work product of attorneys and opinions of party representatives regarding value, merit, strategy, or tactics.\textsuperscript{265} Ordinary work product is not protected.\textsuperscript{266} More than a decade of practice under this rule does not appear to have damaged the quality of trials in Pennsylvania.\textsuperscript{267}

2. \textit{Elimination of Opinion Work Product Immunity}

Leaving opinion work product immunity intact, however, undermines the Pennsylvania solution of eliminating ordinary work product immunity. First, even if only opinion work product receives protection, the problem of extensive litigation of work product issues continues. The Pennsylvania courts, for example, have had to decide numerous cases attempting to draw the line between ordinary and opinion work product.\textsuperscript{268} It is reasonable to believe that the Pennsylvania experience is not unique. A change that eliminates only ordi-

\textsuperscript{264} Pa. R. Civ. P. 4003.3 (emphasis added).

\textsuperscript{265} See also Tate v. Philadelphia Sav. Fund Soc'y, No. 2124, 1987 Phila. County Rptr. LEXIS 28 (C.P. Ct. Phila. County Sept., 22, 1987) (rejecting a claim that a memorandum written by a party's representative, noting that the stairs on which plaintiff fell were a "safety hazard," disclosed the value or merit of a claim, defense, strategy, or tactic—the only type of impressions protected by Pa. R. Civ. P. 4003.3).

\textsuperscript{266} Although a signed statement of a witness is always discoverable, an attorney's notes or memoranda of an interview of a witness are protected. Pa. R. Civ. P. 4003.3 explanatory note (1978 amendments). Like the current work product doctrine, this distinction tends to encourage overuse of attorneys.

\textsuperscript{267} Texas courts have approached the problem differently by adopting an extremely restrictive view of what qualifies as "in anticipation of litigation." Under Texas case law, work done before a particular plaintiff has outwardly manifested an intention to file suit, such as by sending a demand letter, is not "in anticipation of litigation." See Flores v. Fourth Ct. App., 777 S.W.2d 38, 41 (Tex. 1989); Texas Dep't of Mental Health & Mental Retardation v. Davis, 775 S.W.2d 467, 471 (Tex. Ct. App. 1989). This usually means that the defendant cannot create work product until the plaintiff has an attorney. It does not, however, solve the problem of unequal resources leading to an unequal ability to investigate and to prepare a case for trial after attorneys are hired, the problem of uneven impact of disputes about work product, or the problem of the impact on the court system of work product disputes.

\textsuperscript{268} One Pennsylvania court described some of the litigation following the 1978 changes: Despite [the rule's] clear directive, some litigants continued to be reluctant to surrender information obtained by their own initiative. In many instances this was understandable since the information sought was damaging to their claim or defense. . . . This reluctance spawned a series of reported decisions" that the court characterizes as "exotic" or "obtuse."

\textit{Tate}, 1987 Phila. County Rptr. LEXIS, at *3.
nary work product immunity solves some of the problem of hidden facts but does not solve the problem of extensive litigation over the parameters of work product protection.

Second, much opinion work product already is unprotected. Legal theories and contentions applying law to fact must be revealed in pleadings and discovery responses. Witness lists, exhibit lists, and contentions must be revealed in pretrial conferences. The question is what is wrong with allowing discovery of what is left.

What opinion work product is left? Some will be opinion work product intertwined with ordinary work product, such as a memo written by an attorney not only summarizing a conversation with a witness, but also discussing the attorney’s evaluation of the witness’ story. Most of what is contained in such memos are facts that should be available to all litigants. The fact that attorney thought processes were involved in choosing what to write down does not make those facts any less relevant or less important. Although some jurisdictions might want to allow the excision of purely evaluative comments (e.g. “bad witness” or “forgetful” or “appears to be lying”) such efforts are ill-advised for two reasons. First, excision would again lead to voluminous litigation attempting to draw the line between facts and opinions. Second, those opinions are really shorthand summaries of less tangible facts that are relevant to the credibility of the underlying facts or to the possibility that the person interviewed knows other, less helpful information. For example, “bad witness” may mean that the person’s testimony is not inherently believable; it may mean the person’s body language projects a lack of truthfulness; it may mean the person is sympathetic to the opponent. Whatever information these evaluative comments reflect is relevant and should be discoverable.

Some opinion work product will be legal memoranda reflecting the attorney’s research of substantive or procedural issues raised by the case. Although some kind of cost allocation might be appropriate here, there is no value in hiding relevant legal theories or authorities. Some opinion work product will be trial preparation that goes beyond what must now be included in pretrial orders, such as outlines of opening statements, witness examinations, and closing arguments. Some will be intangible work product such as an attorney’s opinion as

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269 Memoranda addressed to a client raise issues of attorney-client privilege that are beyond the scope of this Article.
to the settlement value of a case or the veracity of a witness. Some of
this may need protection; most does not. The discoverability of this
information would not undermine the viability of a traditional adver-
sary trial, or of the settlement process. I do not, therefore, advocate
protecting it. A jurisdiction that finds discovery of particular items
too distasteful to stomach, or more likely to lead to disputes than to
helpful information, however, may want to bar the discovery of cer-
tain specific types of pure opinion work product. But the desire to
withhold some of this information from opposing counsel does not
justify a discovery exemption as broad as our current concepts of
opinion work product.

In addition, some opinion work product should be discoverable on
principle. For example, the process by which witnesses are prepared
for trial or deposition testimony has potential to mold those witnesses’
testimony in ways that will be hard to impeach without information
about the preparation.\textsuperscript{270} For example, expert consultants now pro-
vide advice about wardrobe and body language; witnesses practice
their testimony for the video camera and review their performances;
rehearsals before mock juries allow attorneys to adjust their cases to
"what sells;"\textsuperscript{271} attorneys talk to the witnesses about ways to answer
certain kinds of questions.\textsuperscript{272} Yet the process of preparing these wit-
tnesses undoubtedly reflects attorney strategy to at least some
extent,\textsuperscript{273} and the work product doctrine will prevent the discovering
party from being able to test adequately the credibility of these wit-
tnesses. This portion of work product protection also should be
abolished.

\textsuperscript{270} See supra text accompanying notes 172-75.
\textsuperscript{272} The American Bar Foundation study, for example, asked the attorneys surveyed
whether

"the way you have prepared a client or witness to be deposed ever resulted in other
parties not learning something of arguable significance from your client or witness
during his deposition? . . .

Ninety-five percent of the responding attorneys (163 of 171) said that on one or more
occasions opposing counsel had failed to learn something arguably significant during
the deposition of a witness they had prepared."

Brazil, supra note 59, at 819.

(stating that videotape of practice deposition not per se work product; trial court should review
it to determine whether the tape revealed attorney strategy).
If we eliminate both ordinary and opinion work product immunity, what should we substitute? Rather than use broad rules that presumptively protect certain kinds of documents, we should substitute rules that directly address our concerns. Some problems could be addressed by a relevance rule. Others would require rules directed at the problem itself. If, for example, a jurisdiction were worried about fair allocation of the costs of discovery, it could adopt a cost-allocation rule. If a jurisdiction were concerned about timing rules, it could use timing rules. If a jurisdiction were concerned about harassment, it could prohibit certain behaviors.

Discovery relevance is very broad, allowing a discovering party access to any nonprivileged information that is "reasonably calculated to lead to the discovery of admissible evidence." Yet some of the work product that a system might want to protect is arguably not relevant even under this definition, or could be specifically defined as nondiscoverable. For example, an attorney's trial notebook, containing outlines of witness testimony or opening statements, could be said not to lead to the discovery of admissible evidence. Similarly, an attorney's opinion about the settlement value of a case might not be relevant in the discovery sense, although the facts underlying the attorney's opinion might be relevant and discoverable. In other words, if a jurisdiction could identify specific kinds of attorney preparation that it believed should not be discoverable, it could define them as not relevant (or, alternatively, could create a narrow and specific privilege for them) rather than use the "loose canon of work product immunity" to protect those few items. The kind of information protected, such as those noted above, should be the kind apt to be held equally by plaintiffs and defendants, by individual litigants and by institutional litigants, by one-shot litigants and by repeat litigants.

275 Timing rules may eliminate the discoverability of trial notebooks as well, as many attorneys do not even compile their trial notebooks until immediately before the trial begins. A case that is unexpectedly continued to a later date, however, might raise the issue of trial notebook discovery.
276 See Wells, supra note 10, at 690-91.
277 Id. at 691.
Some jurisdictions already have explicit rules about cost allocation.\textsuperscript{278} Under an approach that looks directly at cost allocation, the question is not whether information is available but to what extent the discovering party must share the opponent’s cost of having developed the information. Such a rule, like all rules that require the balancing of competing interests, would create problems of consistency and line drawing. It therefore would allow discovery disputes to continue. I believe, however, it would lead to fewer disputes than the current work product rule, and those disputes would be aimed directly at the issue that concerns the court. The more specific the rule could be about the factors to be considered and the weight to be given them, the more consistency and the less litigation would result. Further, the rules would have to take into consideration the relative resources of the parties when making decisions about cost allocation.

When the real issue is timing, the courts should recognize that they are making decisions about timing. Whether we are concerned about issue freezing or about allowing the parties sufficient time to compile and to analyze information, a timing rule would address those concerns more directly than a rule that purports to decide whether information will be available at all.

Some such timing rules are already in place. For example, the Federal Courts Study Committee reported that many federal courts already use case management techniques for discovery issues, including decisions about the proper timing of various kinds of discovery.\textsuperscript{279} Also, many courts have treated work product questions as timing issues\textsuperscript{280} in the area of pretrial orders by providing that a party will not be compelled to identify trial witnesses early in the lawsuit but will be compelled to identify those trial witnesses a reasonable time before trial.\textsuperscript{281} Similarly, some courts have required parties taking depositions to identify a few days beforehand those exhibits they

\textsuperscript{278} Illinois, for example, provides in its work product rule that the court “may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney’s fee, in such manner as is just.” Ill. S. Ct. R. 201(b)(2); cf. Fed. R. Civ. P. 26(b)(4) (allocating expert witness costs).


\textsuperscript{280} Cf. Developments, supra note 13, at 1040-43 (recognizing the interaction between the discovery rules and the pretrial conference rules).

\textsuperscript{281} See, e.g., City of Long Beach v. Superior Ct., 134 Cal. Rptr. 468, 476 n.5 (Ct. App. 1976) (‘‘Where pretrial rules provide for the exchange of witness lists, the objection to . . .
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intend to use in the deposition proceedings, characterizing the decision as a "case management" technique rather than as a discovery order. Greater recognition that work product disputes are often merely timing disputes would allow these decisions to be made more clearly.

Some proposed changes in the federal discovery rules embody timing concepts for work product issues (although without explicitly changing the scope of work product immunity). The Federal Rules Advisory Committee's most recent working draft of amendments to Rule 26(a) approaches certain work product issues by ordering different disclosures at different times. For example, the rule as drafted would require all parties to identify automatically all persons likely to have significant information, to describe all significant documents, and to explain their computation of damage claims within thirty days of defendant's answer. At least thirty days before trial, parties also must identify trial witnesses and trial exhibits. Timing rules, then, are already a part of our discovery scheme. Thinking about work product issues in terms of timing instead of in terms of discoverability would cause little dislocation.

What is not acceptable is a timing rule that preserves surprise at trial. Modern procedural systems purport to have eliminated surprise as a virtue, and so timing rules should take care not to let surprise return through the back door. The rules should provide flexibility of disclosure within the pretrial period, but not flexibility to keep information secret forever, or secret until it emerges as evidence at trial.

interrogatories [seeking a list of witnesses and summary of their testimony] becomes merely an objection to the timing of the disclosure.

In re San Juan DuPont Plaza Hotel Fire Litig., 859 F.2d 1007, 1017 (1st Cir. 1988) ("Requiring preidentification merely moves up the schedule, accelerating disclosures which would inevitably take place.").


Id. at 431.

Permitting the parties to use discovery devices tends to ensure that all evidence will be unearthed and that concealment of relevant information and materials will be minimized. Such full disclosure will tend both to prevent unfair surprise at trial and to reduce the number of judgments which do not accurately reflect the actual state of the facts. Developments, supra note 13, at 945 (footnote omitted).

There may be a limited number of occasions in which a party could convince the trial court that a real possibility of dishonesty exists if impeaching evidence must be revealed before trial. This situation, however, would be the exception rather than the rule and would require a strong showing on the part of the party resisting discovery.
As one commentator notes, arguments that evidence "should be secret so that it can be sprung upon the witness without prior warning at trial . . . are very near to being arguments against the general theory of discovery itself, in favor of an element of surprise at trial—an argument, which . . . was lost a long time ago."\(^{287}\)

Concerns about harassment also should be dealt with directly rather than indirectly. As noted above, some opportunities to examine opposing counsel could be eliminated by defining manifestations of pure strategy as irrelevant. If relevance concepts leave open the possibility of harassment, narrow rules governing attorney behavior could be drafted.\(^{288}\) These rules would apply evenly to all parties and their attorneys. In addition, the ability of opposing counsel to "repay" a harassing deposition would be a deterrent to this kind of discovery abuse. Again, rules about harassment, if that is the concern, would be preferable to rules prohibiting discovery in the name of preventing harassment.

Rules prohibiting taking the deposition of opposing counsel would be clearer and easier to enforce. Such rules, however, could result in the loss of relevant information when counsel is the only party with knowledge of certain facts. A "no deposition of counsel" rule also could favor parties able to employ multiple attorneys and would tend to motivate parties who could afford to do so to overutilize attorneys as investigators in order to protect information from discovery. Therefore, although a "no harassment" rule would be harder to enforce, I prefer it to a "no deposition of counsel" rule. In order to avoid numerous disputes in this area, however, the rule should strictly limit a party's ability to depose opposing counsel, hence limiting the tendency of this situation to provoke litigation.

**CONCLUSION**

The discovery process was designed to correct unequal distribution of information and to ensure that the trier of fact has access to all relevant information. The work product doctrine prevents the discovery process from functioning as it was designed to function. Instead,
work product protection hides relevant information, increases costs, and exaggerates the inequality of wealth and information of the parties to a lawsuit. Further, the work product doctrine fails to achieve its own objectives of assuring the best and most complete possible adversarial presentation of evidence at trial. These objectives would be better served by much narrower rules that would address real concerns and would have an equal impact on the parties.

The work product doctrine was created by the Supreme Court in 1947. We are fast approaching the half-century mark of allowing trials with lopsided access to information in the name of attorney diligence. The courts' project over the next five years should be elimination, not celebration, of work product immunity.