

## THE BATTLEGROUND OVER DUAL PURPOSE DOCUMENTS: IS WORK PRODUCT PROTECTION APPROPRIATE UNDER RULE 26(B)(3)?

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*Many business decisions require consideration of regulatory risks and the potential of future litigation. Consideration of these business decisions often produces documents that serve a dual purpose—the business purpose of appropriating litigation and regulatory risks into the company’s budget and the litigation purpose of analyzing anticipated lawsuits. The work product doctrine, codified in the Federal Rules of Civil Procedure Rule 26(b)(3), protects those documents “prepared in anticipation of litigation” from discovery by an adversary in order to protect the mental impressions and litigation strategy retained by a party’s attorney. The work product doctrine, however, is problematic when applied to dual-purpose documents, for they serve both litigation and business purposes. The federal Circuit Courts of Appeals are split concerning the application of the work product doctrine to dual-purpose documents, with some adopting a broad approach that is inconsistently applied, while others employ a narrow test that fails to capture the underlying rationale of the work product doctrine. This Note analyzes the different approaches federal courts use when determining what constitutes documents “prepared in anticipation of litigation” and argues that the phrase should be broadly construed in a consistent manner in order to preserve the policy considerations that justify the work product doctrine. Furthermore, this Note argues that the “ordinary course of business” exception to the work product doctrine should not subsume dual-purpose documents that would otherwise be protected.*

### I. INTRODUCTION

Business decisions often implicate legal issues—in fact most business decisions (to the dismay of most nonlawyers) require consideration of litigation or regulatory risks. As a result, it is common, if not necessary, for a business to rely on its attorneys for preventative legal advice

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evaluating potential litigation or regulatory risks of business decisions. A secondary concern for these businesses is whether or not the documents prepared by their attorneys containing legal analysis and advice will be subject to discovery by the opposing party if the litigation risk materializes. Often, these documents include an attorney's evaluation of a business decision's likelihood to lead to litigation, the strength of potential claims and defenses, trial strategy, the likelihood of prevailing in the lawsuit, and the dollar amount of reserves needed in the situation where the legal position is unsuccessful. Obviously, disclosing documents containing this type of information to an opposing party is a significant concern due to the potential prejudice of such documents to the party's litigation prospects.

One important limitation on the ability of opposing parties to obtain documents containing attorneys' mental impressions is the federal work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3), which provides limited immunity from discovery of documents that are "prepared in anticipation of litigation."<sup>1</sup> The appropriate interpretation of the phrase, "prepared in anticipation of litigation," however, has led to a federal circuit court split, creating uncertainty for businesses evaluating whether documents prepared to consider legal implications of business decisions will be protected under Rule 26(b)(3).<sup>2</sup> The majority of federal circuit courts consider a document eligible for work product protection if the document was prepared "because of" the prospect of litigation, while two minority approaches respectively require that the "primary purpose" behind creation of the document was to assist in litigation or that the document was prepared "for use in possible litigation." Interpreting the phrase "prepared in anticipation of litigation" broadly under the "because of" test or narrowly under the "primary purpose" or "for use in possible litigation" tests has significant implications for whether a document will be protected under Rule 26(b)(3) or, alternatively, will be discoverable by adverse parties. In fact, the type of test used is often determinative for documents that have both a business purpose and an underlying litigation purpose, which are commonly referred to as "dual-purpose documents."

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1. FED. R. CIV. P. 26(b)(3). The attorney-client privilege is an additional limitation on the ability of opposing parties to obtain materials prepared by their adversaries; however, the focus of this Note is whether the work product doctrine alone provides adequate protection for dual-purpose documents. A key limitation of the attorney-client privilege's ability to protect certain types of dual-purpose documents is that any voluntary disclosure of the document results in waiver of the privilege. See Matthew J. Barrett, *Opportunities for Obtaining and Using Litigation Reserves and Disclosures*, 63 OHIO ST. L.J. 1017, 1088 (2002); Martin J. McMahon, Jr. & Ira B. Shepard, *Privilege and the Work Product Doctrine in Tax Cases*, 58 TAX LAW. 405, 431 (2005).

2. See Claudine Pease-Wingenter, *Prophetic or Misguided?: The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 REV. LITIG. 121, 145-47 (2009).

Dual-purpose documents are very common in the business world, as many documents have both business and litigation-related purposes.<sup>3</sup> For example, when a company prepares financial statements for a specific business purpose, such as compliance with federal law or assisting prospective investors in analyzing the company, the company estimates potential liabilities, which are reflected as reserves on its financial statements.<sup>4</sup> Workpapers supporting these reserve amounts have dual purposes—the business purpose of estimating the appropriate amount to set aside as a reserve for litigation and the litigation purpose of analyzing anticipated litigation.<sup>5</sup> Similarly, business and litigation purposes are closely related in accident reports and witness statements completed by an insurance company after an accident.<sup>6</sup> It is the everyday business of an insurance company to conduct this type of investigation in anticipation of probable litigation.<sup>7</sup> Another example of a common dual-purpose document is a memorandum analyzing the potential legal implications of a proposed business merger undertaken in part to obtain a significant tax refund.<sup>8</sup> Although the primary purpose of this analysis is to inform a business decision—whether and how to complete the merger—it also has an underlying litigation purpose of examining likely Internal Revenue Service (IRS) challenges to the tax refund resulting from the contemplated reorganization.<sup>9</sup> Existing doctrinal ambiguity of work product protection for these documents creates uncertainty that undermines the value of this protection for businesses using dual-purpose documents.

This Note analyzes the three approaches that courts have used when answering the question of whether dual-purpose documents are entitled to work product protection. Part II presents a background of the work product doctrine and examines the impact of this controversy on dual-purpose documents, with a specific example in the context of litigation reserve workpapers. Part III examines the various approaches to analyzing whether a document is prepared in anticipation of litigation and each approach's respective purpose, advantages, and limitations. Finally, Part IV recommends a test that provides the most appropriate guide to determining when a dual-purpose document should be protected under Rule 26(b)(3).

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3. See 2 EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 885–87 (5th ed. 2007).

4. See Philip N. Jones, *First Circuit in Textron Gives IRS Access to Tax Accrual Workpapers*, 111 J. TAX'N 199, 201 (2009); Claudine Pease-Wingenter, *The Application of the Attorney-Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron*, 8 HOUS. BUS. & TAX L.J. 337, 338–39 (2008).

5. Michelle M. Henkel, *Textron Eviscerates the 60-Year-Old Work Product Privilege*, 125 TAX NOTES 237, 239 (2009); see also Jones, *supra* note 4, at 201.

6. EPSTEIN, *supra* note 3, at 887.

7. *Id.*

8. See *United States v. Adlman*, 134 F.3d 1194, 1195–97 (2d Cir. 1998) (addressing a claim of work product protection for a memorandum considering the tax consequences of a proposed corporate reorganization).

9. See *id.* at 1204.

## II. BACKGROUND

Litigation risks are an ever-present aspect of conducting business in today's markets.<sup>10</sup> As more businesses have attorneys provide analysis on a regular basis while operating across various federal circuit court jurisdictions, it is increasingly important for courts to adopt a consistent interpretation of the application of the work product doctrine to dual-purpose documents. To better understand the underlying rationale for the work product doctrine, Section A examines the seminal case *Hickman v. Taylor* and the codification of the work product doctrine in the Federal Rules of Civil Procedure 26(b)(3). Section B then reviews the varying tests that courts have used when determining if a document is "prepared in anticipation of litigation." Next, Section C considers the ordinary business exception and its impact on the analysis of work product protection for dual-purpose documents. Finally, Section D introduces litigation reserve workpapers—a type of dual-purpose document that highlights the impact of a court's interpretation of the phrase "in anticipation of litigation" on the level of protection a document receives under the work product doctrine.

### A. Work Product Overview

The recognition of attorney work product protection was first formulated by the Supreme Court of the United States in *Hickman v. Taylor*.<sup>11</sup> In *Hickman*, a tugboat sank and five of the nine crewmen aboard died, including Hickman.<sup>12</sup> Three days after this accident, the tugboat owner, Taylor, employed a law firm to defend him against any subsequent litigation arising from the accident.<sup>13</sup> Less than one month after the incident, Fortenbaugh, one of the attorneys of the law firm representing Taylor, privately interviewed and took statements from the four survivors as well as other people thought to have information relating to the accident.<sup>14</sup> He took interview notes and prepared memoranda relating to these interviews.<sup>15</sup> The litigation at issue in this case, filed by Hickman's estate, was not initiated until nine months after the incident.<sup>16</sup> During discovery, Hickman's counsel requested copies of all of the statements and any written materials relating to these interviews by Fortenbaugh, which Taylor denied, arguing that these materials were privi-

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10. Charles M. Yablon & Steven S. Sparling, *United States v. Adlman: Protection for Corporate Work Product?*, 64 *BROOK. L. REV.* 627, 635 (1998) ("Concerns about litigation underlie most of the work that lawyers perform. . . . Much of the work of lawyers in advising clients and negotiating with respect to transactions is conducted against the background that if things go wrong, the matter will wind up in litigation.").

11. 329 U.S. 495 (1947).

12. *Id.* at 498.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

leged.<sup>17</sup> Although the district court ordered production of the statements, the Third Circuit reversed on appeal, determining that these documents were in fact privileged.<sup>18</sup> The Supreme Court granted certiorari and affirmed the decision, recognizing a qualified immunity from discovery of an attorney's work product.<sup>19</sup> In affording qualified immunity for the documents at issue in *Hickman* that had been prepared over six months prior to the filing of the underlying lawsuit, the Court made it clear that information obtained prior to the initiation of a lawsuit could be considered as being prepared "in anticipation of litigation."<sup>20</sup>

In recognizing this qualified immunity from discovery, the Court reasoned that protecting certain work performed by an attorney from opposing parties was essential to "promote justice and to protect their clients' interests."<sup>21</sup> Specifically, the Court was concerned that failing to protect an attorney's work product would cause attorneys to abstain from writing down their ideas, leading to diminished quality of service provided by attorneys to their clients.<sup>22</sup> In addition to this consideration, the Court also wanted to ensure that one party could not piggy-back on the product of its adversaries' efforts.<sup>23</sup>

Additionally, in *Hickman* the Court created a distinction between ordinary work product and opinion work product.<sup>24</sup> In describing ordinary work product, the Court emphasized that where relevant facts might potentially remain hidden in an attorney's file and are essential to the preparation of the opposing party's case and no longer available without undue burden, "discovery may properly be had."<sup>25</sup> Alternatively, for opinion work product, which are materials that would reveal an attorney's thought processes, the protection is almost absolute.<sup>26</sup> In summary,

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17. *See id.* at 498–99.

18. *Id.* at 500.

19. 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2022 (3d ed. 2010).

20. *Hickman*, 329 U.S. at 498; Yablon & Sparling, *supra* note 10, at 635 ("[E]ven the earliest . . . cases recognized that work-product protection extends to documents where litigation is in prospect but has not yet actually occurred.").

21. *Hickman*, 329 U.S. at 510–11 ("In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.").

22. *Id.* at 511.

23. *See id.* ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."); *see also* Jeremy C. Scanlan, Note, *The Battle over the Scope of Work Product: The Status of "In Anticipation of Litigation" After United States v. Roxworthy*, 60 TAX LAW. 551, 556 (2007).

24. *See Hickman*, 329 U.S. at 511–12.

25. *Id.* at 511 ("Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.").

26. EPSTEIN, *supra* note 3, at 795. This distinction between ordinary work product and opinion work product has been fully adopted by Rule 26(b)(3). *Id.*

*Hickman* established that material an attorney collects in preparation for possible litigation is presumptively protected from discovery by an adversary. The adversary may obtain ordinary work product, however, based on sufficient need for the material.<sup>27</sup> Furthermore, the work product doctrine specifically excludes the underlying facts from protection from discovery—in other words, although the work itself is protected, the underlying facts are specifically excluded from work product protection and are, therefore, discoverable.<sup>28</sup>

The work product doctrine adopted in *Hickman* remained the sole source of work product protection until over twenty years later when it was codified in substantially the same form as Rule 26(b)(3) of the Federal Rules of Civil Procedure.<sup>29</sup> The current version of Rule 26(b)(3) provides qualified immunity from discovery when the materials satisfy each of the following requirements: the materials must be “(1) documents and tangible things otherwise discoverable, (2) prepared in anticipation of litigation or for trial, and (3) by or for another party or by or for that other party’s representative.”<sup>30</sup> The element at issue when considering dual-purpose workpapers is the requirement that the documents have been “prepared in anticipation of litigation or for trial.”<sup>31</sup>

Although Rule 26(b)(3) was intended to accurately codify the work product doctrine adopted by the Supreme Court in *Hickman* and subsequently interpreted by lower courts, there are several key differences.<sup>32</sup> First, *Hickman* appeared to limit work product protection to attorney’s work, whereas Rule 26(b)(3) broadened the scope of the doctrine by providing protection for both attorneys and non-attorneys such as insurers, indemnitors, consultants, and agents.<sup>33</sup> Next, Rule 26(b)(3)’s protection is limited to tangible work product, whereas *Hickman* protected both tangible and intangible work product.<sup>34</sup> Finally, and most pertinent to determining the appropriate scope of the anticipation of litigation re-

27. *Id.*

28. *Id.* at 802.

29. FED. R. CIV. P. 26(b)(3). Rule 26(b)(3) provides:

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if . . . they are otherwise discoverable under Rule 26(b)(1); and the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. . . . If the court orders discovery of those materials, it must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

*Id.*; see also WRIGHT ET AL., *supra* note 19, § 2023.

30. EPSTEIN, *supra* note 3, at 797; see also WRIGHT ET AL., *supra* note 19, § 2024.

31. See, e.g., Henkel, *supra* note 5, at 237–38; Yablon & Sparling, *supra* note 10, at 635–36.

32. WRIGHT ET AL., *supra* note 19, § 2023 (“The adoption of the rule was not intended to cause any drastic change in practice in the federal courts. Instead, it was designed as a largely accurate codification of the doctrine announced in the *Hickman* case and developed in later cases in the lower courts.”).

33. FED. R. CIV. P. 26(b)(3); see also Pease-Wingenter, *supra* note 2, at 134–35.

34. Pease-Wingenter, *supra* note 2, at 135 (“[D]espite the limitation of Rule 26(b)(3) to tangible items, *Hickman* is understood to continue to provide protection of intangible work product . . .”).

quirement, is that *Hickman*, unlike Rule 26(b)(3), did not expressly require that work product be prepared in anticipation of litigation, but rather “expressed only a cursory concern that the materials be prepared ‘with an eye toward litigation.’”<sup>35</sup> These differences continue in importance when interpreting Rule 26(b)(3) because the adoption of the Rule was intended to codify *Hickman* and its progeny rather than to change the doctrine.<sup>36</sup> Perhaps the most commonly disputed aspect of Rule 26(b)(3) is exactly how the requirement that the document must be prepared “in anticipation of litigation” to be eligible for work product protection should be interpreted.

*B. Differing Interpretations of “In Anticipation of Litigation”*

The work product doctrine only protects those documents that are prepared “in anticipation of litigation or for trial.”<sup>37</sup> This requirement follows logically from the policy justifications supporting work product protection. First, encouraging effective representation within an adversary system is only necessary if counsel actually anticipates litigation.<sup>38</sup> Second, the need to encourage full consideration of a client’s problem without concern of disclosure to an adverse party is diminished if there is no anticipation of potential discovery requests.<sup>39</sup> Limiting work product protection to only those documents “prepared in anticipation of litigation” ensures the appropriate balance between the legitimate need for disclosure and the need to maintain the adversarial nature of the legal system.<sup>40</sup>

Courts have struggled to define exactly how close or certain the prospect of litigation must be in order for documents to be considered “in anticipation of litigation.”<sup>41</sup> Moreover, in addition to considering how imminent or likely litigation is, courts also must determine if the creation of the documents was motivated by the prospective litigation.<sup>42</sup> Courts employ three different tests in their attempt to determine the motivation for the creation of a document.<sup>43</sup> The majority of federal circuit courts consider whether the documents were prepared “because of” expected or existing litigation.<sup>44</sup> The Fifth Circuit applies a different test

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35. See, e.g., *id.* at 134 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

36. See WRIGHT ET AL., *supra* note 19, § 2023 (explaining that the Rule was a codification rather than a change in the work product doctrine, and thus some pre-1970 cases remain instructive); see also Pease-Wingenter, *supra* note 2, at 135–36.

37. EPSTEIN, *supra* note 3, at 824.

38. *Id.* at 825 (quoting *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 151 (D. Del. 1977)).

39. *Id.* (quoting *Hercules Inc.*, 434 F. Supp. at 151).

40. See Scanlan, *supra* note 23, at 556–57 (explaining that despite the compelling interest of protecting the privacy of attorney’s legal opinions, disclosure is also compelling, specifically in the tax context).

41. Yablon & Sparling, *supra* note 10, at 637.

42. *Id.* at 636–37.

43. See, e.g., EPSTEIN, *supra* note 3, at 854–55.

44. See, e.g., *id.*; Pease-Wingenter, *supra* note 2, at 145.

and considers whether the “primary motivating purpose behind the creation of the document was to aid in possible future litigation.”<sup>45</sup> Finally, the First Circuit in *United States v. Textron Inc.* recently applied a test focusing on whether the document in question was “prepared for use in litigation.”<sup>46</sup>

The test a court applies has a significant impact on whether dual-purpose documents are protected under Rule 26(b)(3). In practice, almost by definition, the “primary purpose” approach denies dual-purpose documents work product protection because dual-purpose documents are usually prepared primarily for a business purpose, with underlying litigation aspects. Similarly, the “prepared for use in litigation” test will rarely provide protection for dual-purpose documents because a document utilized for business purposes will likely have little practical *use* in litigation.<sup>47</sup> Alternatively, the “because of” test was adopted in *United States v. Adlman* primarily because the approach allowed protection for dual-purpose documents.<sup>48</sup> In addition to the debate over the proper interpretation of the “in anticipation of litigation” requirement, the question of work product protection for dual-purpose documents often is directly affected by the “ordinary course of business” exception.

### C. *The Ordinary Course of Business Exception*

An important limitation to the work product doctrine is the ordinary course of business exception.<sup>49</sup> This exception finds its source from the Advisory Committee Note to Rule 26(b)(3), which provides: “[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by [Rule 26(b)(3)].”<sup>50</sup> The Second Circuit, which applies the “because of” test, has explained this exception as withholding work product protection for “documents that are prepared in the ordinary course of business or that

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45. *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981).

46. 577 F.3d 21, 29 (1st Cir. 2009).

47. *See id.* at 43. (Torruella, J., dissenting) (“Now this court has proceeded to further the split by . . . rejecting . . . protection for dual purpose documents. In reality, the majority applied a new test that requires that documents be actually ‘prepared for’ use in litigation.”).

48. *See* 134 F.3d 1194, 1202 (2d Cir. 1998).

49. *See, e.g., id.*; EPSTEIN, *supra* note 3, at 881–82 (“It is clear that documents which are prepared in the ordinary course of business, even if some litigation then results concerning that business practice, are not work-product protected.”).

50. FED. R. CIV. P. 26(b)(3) advisory committee’s note. The Advisory Committee’s Note regarding the ordinary business exception provides in full:

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. . . . No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

*Id.*



would have been created in essentially similar form irrespective of the litigation.”<sup>51</sup>

Courts recognizing this limitation, however, do not apply it consistently. For instance, in *In re Grand Jury Subpoena*, the Ninth Circuit addressed a situation in which the documents at issue were clearly produced in anticipation of litigation—the documents, however, were created in response to an information request by the government requiring the completion of the documents.<sup>52</sup> The government argued that because these documents were required to be completed irrespective of litigation, they should not be considered work product as they fall under the exception to the “because of” test.<sup>53</sup> Nonetheless, the Ninth Circuit granted work product protection to the dual-purpose document in question under the “because of” standard by considering the facts surrounding the creation of the document and determining that the litigation purpose of the document was inseparable from the non-litigation purpose of the document.<sup>54</sup> The court explained that although work product protection is not as likely when a “true independent purpose” for the document’s creation is apparent, if the two purposes are “profoundly interconnected” the analysis must consider all of the surrounding facts, avoiding a bright-line determination.<sup>55</sup>

The appropriate interpretation of the ordinary business exception and its effect on dual-purpose documents is not free from disagreement.<sup>56</sup> For instance, some commentators argue that based on a textual interpretation of the Advisory Committee’s Note to Rule 26(b)(3), the phrase “pursuant to public requirements unrelated to litigation” indicates that if a document is prepared in response to a public requirement relating to litigation, the document would be entitled to protection under the work product doctrine.<sup>57</sup> This interpretation of Rule 26(b)(3) would directly implicate workpapers supporting reserve amounts on financial state-

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51. *Adlman*, 134 F.3d at 1202. Worded differently, the Second Circuit interpreted this exception to indicate that a document is eligible for work product protection under Rule 26(b)(3) if it “would not have been prepared in substantially similar form but for the prospect of that litigation . . . .” *Id.* at 1195.

52. *United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 908 (9th Cir. 2004) (explaining that although there was “no question” that the documents were produced in anticipation of litigation, the documents would have been “created in substantially similar form in any event to comply with the Information Request and Consent Order”).

53. *Id.*

54. *Id.* at 910 (“The documents are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole.”).

55. *Id.* at 908.

56. See Thomas Wilson, Note, *The Work Product Doctrine: Why Have an Ordinary Course of Business Exception?*, 1988 COLUM. BUS. L. REV. 587, 605 (arguing that the ordinary course of business exception should not be used by courts as it interferes with Rule 26(b)(3)’s intended function).

57. *Id.* at 600–01 (“The Notes specifically mention exclusion of materials prepared ‘pursuant to public requirements unrelated to litigation.’ This indicates by implication that materials prepared pursuant to public requirements but related to litigation are protected.” (emphasis omitted) (footnote omitted)).

ments because although financial statements are required by public securities law, by their nature, reserve amounts directly relate to litigation.<sup>58</sup> Commentators also question whether the Advisory Committee Notes' limitation on materials assembled in the ordinary course of business was intended solely to emphasize that factual information is never privileged or immune from discovery.<sup>59</sup>

Furthermore, the source of this exception is legislative history, rather than the text of the Rule, and it could, therefore, be argued that it should not be recognized as an express limit on the protection afforded by Rule 26(b)(3).<sup>60</sup> One key example in which the ordinary course of business exception, as well as the test utilized to interpret the phrase "in anticipation of litigation," is likely determinative, and therefore, heavily debated, is whether litigation reserve workpapers should be protected under the work product doctrine.

#### *D. Application to Financial Statement Litigation Reserves: A Test Case*

Recently, in *United States v. Textron, Inc.*, the First Circuit was presented with the question of whether workpapers supporting litigation reserves—dual-purpose documents—were entitled to work product protection.<sup>61</sup> The court's decision to withhold protection from these documents has led to significant debate regarding the appropriate treatment of litigation reserve workpapers.<sup>62</sup> Publicly traded companies are required by federal securities law to have financial statements audited and certified by an independent auditor.<sup>63</sup> These financial statements, filed with the Securities and Exchange Commission, serve as a primary source of information for investment decisions of the investing public.<sup>64</sup> As one element of these financial statements, companies are required to calculate

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58. See Barrett, *supra* note 1, at 1085 ("Because litigation contingencies represent accruals or disclosures related to a specific claim in a lawsuit, the supporting materials related to litigation contingencies almost by definition represent materials 'relevant to the claim or defense.'").

59. Pease-Wingenter, *supra* note 2, at 136–37 ("This linking appears to emphasize the point that facts are never privileged or immune from discovery. Presumably, materials prepared 'in the ordinary course of business' and 'unrelated to litigation' will merely reflect factual information and not divulge each side's 'evaluation of its case.'").

60. See *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring) ("It is the words of the Rules [not the advisory committee notes] that have been authoritatively adopted—by this Court, or by Congress . . .").

61. 577 F.3d 21, 22 (1st Cir. 2009).

62. See, e.g., Ronald L. Buch, *The Touch and Feel of Work Product*, 124 TAX NOTES 915, 915; John O. Everett et al., *The Reversal in Textron: Anatomy of a Bad Decision*, TAXES, Feb. 2010, at 85, 85; Henkel, *supra* note 5, at 237; Jones, *supra* note 4, at 199; Lee A. Sheppard, *Textron Case Not a Game*, 124 TAX NOTES 1163, 1163.

63. See 15 U.S.C. § 78m (2006); 17 C.F.R. §§ 210.1–01 to 210.12–29 (2009).

64. E.g., *United States v. Arthur Young & Co.*, 465 U.S. 805, 810–11 (1984) ("In an effort to control the accuracy of the financial data available to investors in the securities markets, various provisions of the federal securities laws require publicly held corporations to file their financial statements with the Securities and Exchange Commission.").

reserves to account for contingent tax liabilities.<sup>65</sup> The contingent tax liability represents management's estimate of the company's exposure to potential tax liability if the IRS decides to challenge a debatable tax position on its tax return.<sup>66</sup> These liabilities are represented on the company's financial statements in aggregate as a total tax reserve number; instead of identifying each specific tax item that creates potential liability.<sup>67</sup>

Commonly, a corporation's tax accrual workpapers, which support the aggregate number represented on its financial statements, are prepared by in-house tax attorneys.<sup>68</sup> These attorneys examine the tax return, identifying positions where the law is unclear and that potentially will be examined by the IRS, possibly resulting in significant tax liabilities.<sup>69</sup> After identifying these uncertain tax positions, the attorneys estimate the likelihood of an IRS challenge on each position, as well as the likely outcome of the challenge.<sup>70</sup> The attorneys' estimate regarding the likelihood and outcome of potential challenges will often be supported by workpapers, including consideration of relevant case law, Internal Revenue Code provisions, Treasury Regulations, and Revenue Rulings.<sup>71</sup> These workpapers do not include any underlying factual information that is not available elsewhere; they are based on the information contained in the tax return and in the supporting workpapers, which are never entitled to work product protection.<sup>72</sup> In summary, these workpapers highlight the areas in which the corporation's in-house attorneys believe that its tax return positions are sensitive and also provide the exact amount the company has set aside in their financial statements for potential tax liability from these positions.<sup>73</sup> Because tax accrual workpapers highlight the "soft spots" of a corporate taxpayer's tax return, they are a very useful tool for the IRS.<sup>74</sup>

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65. See, e.g., *id.* at 812 (explaining that the corporations reserve account for contingent tax liabilities is also referred to as a "tax accrual account," the "noncurrent tax account," or the "tax pool"); *Textron*, 577 F.3d at 22.

66. See, e.g., *Textron*, 577 F.3d at 22–23.

67. E.g., *id.* at 23.

68. See Buch, *supra* note 62, at 915.

69. See *id.*; see also *Arthur Young & Co.*, 465 U.S. at 812–14.

70. See, e.g., *Textron*, 577 F.3d at 23 ("The final spreadsheets list each debatable item, including in each instance the dollar amount subject to possible dispute and a percentage estimate of the IRS' chance of success.").

71. See, e.g., *Arthur Young & Co.*, 465 U.S. at 812; Jones, *supra* note 4, at 199; William Robert Pope, Jr. & J. Leigh Griffith, *Disclosure Decisions: Two Recent Opinions Shape IRS Access to Work Product*, TENN. B.J., Mar. 2008, at 12, 14.

72. See, e.g., *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999) (holding that work product protection does not protect documents used to prepare tax returns); see also Pope & Griffith, *supra* note 71, at 14.

73. See *Arthur Young & Co.*, 465 U.S. at 813 ("Tax accrual workpapers also contain an overall evaluation of the sufficiency of the corporation's reserve for contingent tax liabilities . . ."); see also Jones, *supra* note 4, at 199.

74. E.g., *Arthur Young & Co.*, 465 U.S. at 813 ("[T]ax accrual workpapers pinpoint the 'soft spots' on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes."); William

Liability reserve workpapers are dual-purpose documents, as their immediate purpose is to inform independent auditors that a company's financial statements are in compliance with generally accepted accounting principles (GAAP), and the long-term purpose is to ensure that a company has in reserve an amount needed for potential tax liability arising from a future tax controversy with the IRS.<sup>75</sup> A major determination in the application of the work product rule is whether tax accrual workpapers would have to be prepared even if the company was not reporting a reserve for tax liabilities.<sup>76</sup> Some commentators argue that liability reserves would not be necessary if the prospect of litigation was not anticipated.<sup>77</sup> Others argue that even if a company determined to make no reserve in its financial statements for tax liabilities, they would require workpapers supporting this position.<sup>78</sup>

These financial statements prepared by public corporations are required to be audited by independent auditors "in accordance with generally accepted auditing standards."<sup>79</sup> The independent auditor ensures that the financial statements have been prepared in accordance with GAAP.<sup>80</sup> As the end result, the auditor issues an opinion as to whether the financial statements as a whole represent the financial position and operations of the corporation for that specific time period fairly.<sup>81</sup> As part of this audit, the auditor must evaluate the sufficiency of the reserve for contingent liabilities.<sup>82</sup> Auditors prepare their own workpapers regarding these reserve accounts, determining a "worst-case" analysis to ensure that the company has a reserve sufficient to cover exposure to additional tax liability.<sup>83</sup>

The Supreme Court, in *United States v. Arthur Young & Co.*, held that these tax accrual workpapers prepared by the independent auditor

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Fullmer, Comment, *Protecting an Independent Accountant's Tax Accrual Workpapers from an Internal Revenue Service Summons*, 44 OHIO ST. L.J. 743, 748 (1983).

75. See Henkel, *supra* note 5, at 239–40 ("[A] corporation's tax accrual workpapers are prepared to evaluate its litigation risks. These litigation risk assessments also are used to establish tax reserves for the financial statements. The fact that the workpapers support the tax reserves does not make the workpapers a single-purpose, mandatory document . . ."); Jones, *supra* note 4, at 201.

76. Sheppard, *supra* note 62, at 1166.

77. Jones, *supra* note 4, at 201 ("If tax litigation with the IRS were not anticipated, the reserves would not be necessary.").

78. Sheppard, *supra* note 62, at 1166 ("Workpapers have to be prepared anyway, regardless of whether the reporting company's transactions are listed, whenever there is uncertainty about a tax position.").

79. 17 C.F.R. § 210.1-02(d) (2009).

80. AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, STATEMENT ON AUDITING STANDARDS NO. 1 § 110.01 (1972).

81. AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, PROFESSIONAL STANDARDS NO. 1 § 508 (1989).

82. Katherine Pryor Burgeson, Note, *IRS Access to Tax Accrual Workpapers: Legal Considerations and Policy Concerns*, 51 FORDHAM L. REV. 468, 470 (1982).

83. *United States v. Arthur Young & Co.*, 465 U.S. 805, 812–13 (1984) ("The auditor's tax accrual workpapers record this process of examination and analysis. Such workpapers may document the auditor's interviews with corporate personnel, judgments on questions of potential tax liability, and suggestions for alternative treatments of certain transactions for tax purposes.").

were not entitled to work product protection.<sup>84</sup> The Court reasoned that there was a clear congressional design to favor disclosure of documents to the IRS, therefore, it was inappropriate to restrict this disclosure with the imposition of a new restriction upon the summons power.<sup>85</sup> The Court did make clear, however, that even the expansive summons power granted to the IRS remains subject to traditionally recognized privileges, such as work product protection for documents prepared by the corporation's attorney.<sup>86</sup>

Even when work product protection is found to apply to a liability reserve workpaper, waiver of this protection is an issue because the company's workpapers are generally provided to the independent auditor for their review.<sup>87</sup> In fact, waiver is one of the primary reasons the attorney-client privilege fails to provide protection for this type of dual-purpose document. Waiver applies differently in relation to work product protection as opposed to when the attorney-client privilege is being asserted.<sup>88</sup> Specifically, although voluntary disclosure generally waives the attorney-client privilege, "only disclosures that are 'inconsistent with the adversary system' are deemed to waive work-product protection."<sup>89</sup> This is based upon the difference in purpose behind each privilege: whereas the attorney-client privilege exists to protect confidentiality, work product protection is concerned not primarily with confidentiality, but instead is focused on protecting the adversarial process.<sup>90</sup>

In addressing the waiver of work product protection, courts consider whether the disclosure to another party substantially increases the possibility that an adverse party might potentially obtain the information.<sup>91</sup> As the key to waiver of work product protection remains keeping the material from an adversary, protection is retained when the material is disclosed to parties with a common interest, persons with a business relationship, and even the government.<sup>92</sup> The appropriate focus when analyzing the disclosure of material to a third party is the "extent to which the relationship is an adversarial one" and the claimant's "efforts made to keep adversaries from obtaining the material."<sup>93</sup>

Applying the general rules for waiver of work product protection does not yield a clear answer as to whether disclosure to an independent

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84. *Id.* at 817.

85. *Id.* at 816–17 ("In light of this explicit statement by the Legislative Branch, courts should be chary in recognizing exceptions to the broad summons authority of the IRS or in fashioning new privileges that would curtail disclosure under § 7602.")

86. *Id.* at 816 (citing *United States v. Bisceglia*, 420 U.S. 141, 150 (1975)).

87. Andrew Golodny, Note, *Lawyers Versus Auditors: Disclosure to Auditors and Potential Waiver of Work-Product Privilege in United States v. Textron*, 61 TAX LAW 621, 629 (2008).

88. *E.g.*, Sheppard, *supra* note 62, at 1167 ("Waiver under the work product standard applies only to the document disclosed. This is called limited implied waiver.")

89. EPSTEIN, *supra* note 3, at 1030.

90. *Id.* at 1031.

91. *E.g.*, Golodny, *supra* note 87, at 629.

92. EPSTEIN, *supra* note 3, at 1033.

93. *Id.*

auditor during the course of a financial statement audit constitutes disclosure “inconsistent with the adversarial system.”<sup>94</sup> One commentator argues that anything disclosed to an auditor regarding financial statements, which will be broadly disseminated to shareholders and the investing public, should constitute waiver in all circumstances because it constitutes a sufficiently broad dissemination of information to require waiver.<sup>95</sup> Similarly, the IRS argues consistently that when companies share work product with their independent auditor, the privilege is waived.<sup>96</sup>

On the other hand, the only federal circuit court and the majority of lower courts that have ruled on this issue have concluded that disclosure to an independent auditor does not constitute waiver of the work product privilege.<sup>97</sup> Courts have explained that although there is a need for auditors to remain independent from their clients, “any tension between an auditor and a corporation that arises from an auditor’s need to scrutinize and investigate a corporation’s records . . . is not the equivalent of an adversarial relationship contemplated by the work product doctrine.”<sup>98</sup> Therefore, if the auditor is not considered to be an adverse party and is required by ethical and professional obligations to keep these materials confidential unless required by law or accounting standards, the disclosure to the auditors would not result in disclosure to adverse parties.<sup>99</sup>

To summarize, work product protection has significant implications for many of today’s business entities that commonly use dual-purpose documents. This Part has outlined the background of the work product doctrine, the ordinary business exception, and highlighted one area in which dual-purpose documents are heavily debated. The following Part will discuss the three tests that courts utilize to determine whether dual-purpose documents were prepared “in anticipation of litigation” and thus eligible for work product protection.

### III. ANALYSIS

There are three main tests used to determine when a party has created a document “in anticipation of litigation.”<sup>100</sup> First, Section A examines the test used by a majority of federal circuit courts with a broad view of the phrase “in anticipation of litigation,” which is the “because

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94. *See id.* at 1060–63.

95. *Id.* at 1062–63 (“Would it not speed adjudication to simply make a bright-line test? We would propose the following: Anything disclosed to a public accountant in conjunction with the preparation of financial statements to be made available to shareholders and the investing public necessarily implies a sufficiently broad dissemination to require a waiver of any work-product protection.”).

96. *See* Sheppard, *supra* note 62, at 1166.

97. *See* United States v. Deloitte LLP, 610 F.3d 129, 139–42 (D.C. Cir. 2010).

98. *See* Merrill Lynch & Co. v. Allegheny Energy, Inc., 229 F.R.D. 441, 448 (S.D.N.Y. 2004).

99. *See id.*

100. *See* Everett et al., *supra* note 62, at 87–88.

of” potential litigation test.<sup>101</sup> Next, Section B considers the “primary purpose” test in which the document is only considered to be prepared “in anticipation of litigation” if the primary motivating purpose behind creation of the document was to aid in possible future litigation.<sup>102</sup> Section C then examines an approach used by the First Circuit that considers whether the materials were created “for use in possible litigation.”<sup>103</sup> Finally, Section D considers the underlying policy concerns justifying the work product doctrine in order to determine the appropriateness of affording dual-purpose documents work product protection.

#### A. *The “Because of” Potential Litigation Test*

The most common test to determine if a document falls under work product protection is the “because of” test.<sup>104</sup> A document is considered to be prepared in anticipation of litigation if “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”<sup>105</sup> The Second Circuit’s decision in *United States v. Adlman* to adopt the “because of” test has influenced the broad acceptance of the “because of” test.<sup>106</sup> In *Adlman*, the court was considering a document prepared by the taxpayer’s attorney examining potential litigation regarding the tax consequences of a proposed corporate reorganization.<sup>107</sup> The document was a fifty-eight page detailed memorandum and analysis of likely IRS challenges to the proposed reorganization, including discussion of legislative history, IRS regulations and rulings, case law, and possible legal theories and strategies for the company to advance in the anticipated litigation.<sup>108</sup> Also, the memorandum recommended the preferred method of restructuring based on this analysis and made predictions of the likely outcome of the potential litigation with the IRS.<sup>109</sup> Litigation was virtually certain to result from the reorganization because the company’s tax returns had been audited annually for the past thirty years, and a federal law required the IRS Commissioner to submit a re-

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101. See, e.g., *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (adopting the “because of” test in the Second Circuit); Pease-Wingenter, *supra* note 2, at 145–46.

102. See, e.g., *United States v. El Paso Co.*, 682 F.2d 530, 542–43 (5th Cir. 1982) (applying the “primary purpose” test in the Fifth Circuit); Pease-Wingenter, *supra* note 2, at 140–45 (discussing the adoption of the “primary purpose” test).

103. See *United States v. Textron Inc.*, 577 F.3d 21, 29 (1st Cir. 2009); Everett et al., *supra* note 62, at 87 (“In a recent decision, the First Circuit in *Textron* abandoned both tests and adopted a new test that is even more restrictive than the Fifth Circuit’s ‘primary purpose’ test.”).

104. The “because of” test is utilized by the Second, Third, Fourth, Seventh, Eighth, and D.C. Circuits. Everett et al., *supra* note 62, at 87.

105. WRIGHT ET AL., *supra* note 19, § 2024.

106. See, e.g., *United States v. Roxworthy*, 457 F.3d 590, 593–94 (6th Cir. 2006) (adopting the “because of” test); *United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 907–09 (9th Cir. 2004) (adopting the “because of” test after a thorough analysis of the *Adlman* test).

107. *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998).

108. See *id.*

109. *Id.*

port to the Joint Congressional Committee on Taxation when a refund was claimed in this amount.<sup>110</sup> When the IRS served a summons for production of the memorandum, the company argued that it should be protected from discovery because it included legal opinions drafted in reasonable anticipation of litigation.<sup>111</sup>

As a result, on appeal, the Second Circuit had to determine the appropriate meaning of the phrase “in anticipation of litigation” in Rule 26(b)(3).<sup>112</sup> The court granted work product protection to this dual-purpose document, reasoning that if a document was created due to the prospect of litigation, that document should not lose work product classification solely because it also served to assist in business decision making.<sup>113</sup> The court clarified that “[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3).”<sup>114</sup> The court reasoned that this broader interpretation of “in anticipation of litigation” was appropriate due to a literal analysis of the text as well as the purposes supporting Rule 26(b)(3).<sup>115</sup> Specifically, the court emphasized that there was “no basis for adopting a test under which an attorney’s assessment of the likely outcome of litigation is freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance.”<sup>116</sup> Therefore, a key aspect of the “because of” standard adopted in *Adlman* is that it does not consider the document’s primary or secondary motive, thus allowing dual-purpose documents to fall under the protection of the work product doctrine.<sup>117</sup>

In the Sixth Circuit, the court adopted the “because of” standard as a two-part test in *United States v. Roxworthy*.<sup>118</sup> This version of the test focuses on the following factors: “(1) whether a document was created because of a party’s subjective anticipation of litigation, as contrasted with an ordinary business purpose, and (2) whether that subjective anticipation of litigation was objectively reasonable.”<sup>119</sup> The subjective aspect of this test focuses on the function that the documents serve, examining both the document itself and the circumstances leading to a document’s creation.<sup>120</sup> The objective aspect of the test generally focuses on whether the party claiming work product protection can set forth facts that would

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110. *Id.* at 1196.

111. *Id.*

112. *See* Yablon & Sparling, *supra* note 10, at 628–31.

113. *Adlman*, 134 F.3d at 1202.

114. *Id.* at 1195.

115. *Id.* at 1202.

116. *Id.* at 1200.

117. *E.g.*, *United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 908 (9th Cir. 2004) (“The ‘because of’ standard does not consider whether litigation was a primary or secondary motive behind the creation of a document.”).

118. 457 F.3d 590, 593–94 (6th Cir. 2006).

119. *Id.* at 594.

120. *See id.* at 595; *see also* Scanlan, *supra* note 23, at 553.



lead a reasonable person to conclude that litigation was a possibility.<sup>121</sup> The court emphasized that documents are not protected, no matter the content, if they were not created with any litigation purpose.<sup>122</sup> Thus, a document must be created with at least one of its purposes being preparation for reasonably expected litigation; however, it need not be the primary purpose of the document in order to be protected work product.<sup>123</sup>

The Seventh Circuit also uses a version of the “because of” test; however, the scope of the test is limited by considering the likelihood and imminence of litigation.<sup>124</sup> For instance, in *Binks Manufacturing Co. v. National Presto Industries*, the court denied work product protection to memoranda prepared by an attorney because the party claiming protection was only able to demonstrate that there was a “remote prospect of litigation” at the time the notes were created.<sup>125</sup> The court explained that the party must prove either that the documents were prepared because of the prospect of litigation or “that ‘some articulable claim, likely to lead to litigation, had arisen.’”<sup>126</sup> This approach focused on distinguishing between documents prepared where there were only possible claims in the ordinary course of business and those prepared where litigation was likely.<sup>127</sup>

The Fourth Circuit similarly, but perhaps more clearly, requires that the litigation is likely and imminent in order to receive protection under the “because of” standard.<sup>128</sup> Specifically, in *National Union Fire Insurance Co. v. Murray Sheet Metal Co.*, the court limited the “because of” test by stating that “[t]he document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.”<sup>129</sup> This application of the “because of” test specifically requires that the actual underlying event leading to the future litigation have had already occurred in order for a document to be considered “in anticipation of litigation.”<sup>130</sup> This limitation applied by the Fourth Circuit is clearly demonstrated by comparison with the *Adlman*

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121. *Roxworthy*, 457 F.3d at 599–600 (explaining various other tests used in other circuits to determine if the taxpayer’s facts constitute “objectively reasonable anticipation of litigation” and concluding that under each test the taxpayer’s belief was objectively reasonable, thus a specific test was not adopted).

122. *Id.* at 595.

123. *See id.* at 599 (“As other courts have noted, a document can be created both for use in the ordinary course of business and in anticipation of litigation without losing its work-product privilege.”).

124. *See, e.g., Yablon & Sparling, supra* note 10, at 642.

125. 709 F.2d 1109, 1120 (7th Cir. 1983).

126. *See id.*

127. *Yablon & Sparling, supra* note 10, at 642 (“The court sought to distinguish between routine investigations of possible claims conducted in the ordinary course of business and those in which there is a clear intent to litigate.”).

128. *Id.* at 644.

129. 967 F.2d 980, 984 (4th Cir. 1992).

130. *See Yablon & Sparling, supra* note 10, at 641–42.

“because of” standard—because the Fourth Circuit application of the test would preclude work product protection for the documents at issue in *Adlman* that related to a proposed merger which had not yet been undertaken.<sup>131</sup>

Proponents of the “because of” test emphasize that it is the appropriate interpretation of Rule 26(b)(3) because the text of the Rule does not limit work product protection to documents used solely in preparation for litigation, and therefore, the test courts apply similarly should not limit application of the rule.<sup>132</sup> Further, use of this test allows businesses to plan effectively for future litigation without fear of losing work product protection solely because the documents have a dual purpose.<sup>133</sup> Accordingly, proponents emphasize that the “because of” test best advances the purposes behind the work product rule originally developed in *Hickman* of encouraging attorneys to fully and carefully consider a client’s case and preventing “piggy-backing” on the work of the opposing counsel.<sup>134</sup>

On the other hand, commentators criticize the “because of” test because of its potential to protect documents well in advance of the possibility of litigation, frustrating the legitimate interest in disclosure, specifically in the tax context.<sup>135</sup> Similarly, the expansiveness of the *Adlman* standard is criticized because it provides incentive for corporate attorneys to creatively attempt to protect more work from disclosure, well beyond the original justification for the work product protection.<sup>136</sup> The next Section presents the “primary purpose” test, which examines a significant departure in application from the “because of” test.

### B. The “Primary Purpose” Test

The Fifth Circuit is the only federal circuit court that expressly applies the “primary purpose” test to determine if documents were prepared “in anticipation of litigation.”<sup>137</sup> Under this test, documents will be protected by the work product doctrine only if the “primary motivating purpose behind the creation of the document was to aid in possible future litigation.”<sup>138</sup> This test requires the court to determine the single,

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131. See *id.* at 647–48.

132. See, e.g., Eric C. McNamar, Note, *Business Planning As It Should Be: Why Adlman Should Be the Standard When Interpreting the Work Product Doctrine*, 34 VAL. U. L. REV. 201, 203–04 (1999); see also Everett et al., *supra* note 62, at 90–91.

133. E.g., McNamar, *supra* note 132, at 204 (“The *Adlman* standard allows companies to make business decisions and effectively plan for future litigation simultaneously without offending the purpose of the work product doctrine.”).

134. See, e.g., Pease-Wingenter, *supra* note 2, at 156–59.

135. Scanlan, *supra* note 23, at 558.

136. See Yablon & Sparling, *supra* note 10, at 658; Golodny, *supra* note 87, at 623.

137. See Everett et al., *supra* note 62, at 87.

138. *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981).

primary purpose for the document's creation.<sup>139</sup> If the court determines that the primary purpose was to aid in an anticipated, specific claim, then the documents are entitled to work product protection.<sup>140</sup> Alternatively, if the documents were prepared primarily to comply with regulatory requirements, or to inform a business decision, or for any other non-litigation purpose, they are not entitled to work product protection.<sup>141</sup>

The Fifth Circuit applied this test in *United States v. El Paso Co.* when considering a claim for work product protection for tax accrual workpapers.<sup>142</sup> El Paso claimed work product protection for its tax pool analysis, or tax accrual workpapers, that it used to calculate the impact of potential litigation with the IRS on its tax liability as well as financial statements.<sup>143</sup> Applying the "primary purpose" standard to the claim for work product protection by El Paso, the court found that its tax pool analysis workpapers were not prepared primarily for litigation, but rather that the primary motivation behind the preparation of the tax pool analysis was "to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability."<sup>144</sup> The court further explained that the tax accrual workpapers only concocted theories about results of possible litigation instead of providing a blueprint for preparation of a specific case or negotiation.<sup>145</sup> Ultimately, the court stated that the sole function of the tax workpapers was to "back up a figure on a financial balance sheet."<sup>146</sup> This analysis of the primary purpose of tax accrual workpapers is difficult to dispute—therefore under a "primary purpose" test, there is little question that a document is not protected by the work product doctrine if it is created primarily to comply with regulatory requirements or for an independent business purpose.

Proponents of the "primary purpose" test argue that it provides a more clearly defined analytical framework to apply.<sup>147</sup> As a result, proponents argue that this clear framework aids in the interpretation of work product by courts that must administer the rule consistently.<sup>148</sup> Additionally, in the context of tax, the "primary purpose" test furthers the IRS's interest in complete disclosure.<sup>149</sup> Furthermore, commentators

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139. Yablon & Sparling, *supra* note 10, at 640–41 ("[T]he *El Paso* primary purpose test mandates that the court determine the single, primary purpose for which a document has been created and protect only those documents created primarily to aid in a particular, anticipated litigation.").

140. *See id.*

141. *See id.*; Everett et al., *supra* note 62, at 87.

142. 682 F.2d 530, 542–43 (5th Cir. 1982).

143. *Id.* at 543.

144. *Id.*

145. *Id.* at 543–44.

146. *Id.* at 544.

147. Scanlan, *supra* note 23, at 562 ("[T]he narrower standard employed by the Fifth Circuit makes the issue analytically simpler and better furthers the Service's interest in assuring complete disclosure.").

148. *Id.* at 566.

149. *Id.* at 562.

have argued that because this test is more predictable, companies will be able to plan for disclosure requirements.<sup>150</sup>

Nevertheless, this test has been criticized by courts and commentators because this interpretation is not supported by the text of Rule 26(b)(3) and because it fails to accommodate dual-purpose documents.<sup>151</sup> For instance, in *Adlman*, the court explicitly rejected the “primary purpose” test because it stands at odds with the language of the statute and policy goals of Rule 26(b)(3).<sup>152</sup> Specifically, the language of Rule 26(b)(3) does not require that documents be created with the intent to aid or assist in litigation or to be used primarily to aid in litigation.<sup>153</sup> Other courts have interpreted the text as clearly intending to protect a broader category of documents than those prepared with the intent to “primarily or exclusively aid in litigation.”<sup>154</sup>

Furthermore, the *Adlman* court explained that failing to provide work product protection for documents that were prepared to assist in a business decision through analysis of expected litigation defeats policies underlying the work product doctrine.<sup>155</sup> The *Adlman* court provided scenarios in which the “primary purpose” test would require a company to make a choice between detailed analysis of prospective litigation, allowing for an informed business decision, and alternatively prejudicing its prospects in litigation.<sup>156</sup> Also, the “primary purpose” test has been criticized for failing to appropriately address one of the policy goals of the work product doctrine, which was to deter free riding.<sup>157</sup> This result is apparent because many dual-purpose documents are prepared primarily for business purposes but simultaneously evaluate their prospects in litigation and often go so far as estimating their potential liability—which provides the adverse party with strong bargaining power over the dispute.<sup>158</sup> Many of these same concerns that accompany the “primary purpose” test are present in the “for use in possible litigation” test.

### C. *The “For Use in Possible Litigation” Test*

The First Circuit recently held in *Unites States v. Textron, Inc.* that tax accrual workpapers were not protected as work product because they

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150. *Id.* at 565 (“Because of its internal consistency and ease of application, it is less manipulable than the because of test. The resultant predictability would mean that corporations . . . could better plan for their disclosure requirements.”).

151. *See, e.g.*, *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998).

152. *Id.* (“We believe that a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule.”).

153. *See* FED. R. CIV. P. 26(b)(3); *Adlman*, 134 F.3d at 1198.

154. *See, e.g.*, *United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 908 (9th Cir. 2004).

155. *Adlman*, 134 F.3d at 1199.

156. *See id.* at 1199–1200 (“The interpretation of Rule 26(b)(3) advocated by the IRS imposes an untenable choice upon a company in these circumstances.”).

157. *See* Pease-Wingenter, *supra* note 2, at 159.

158. *See* McNamar, *supra* note 132, at 221.

were prepared for financial statements, not “prepared for use in litigation.”<sup>159</sup> Prior to this case, the First Circuit had adopted a modified version of the “because of” test in *Maine v. United States Department of the Interior*.<sup>160</sup> Although the court adopted the “because of” test formulated in *Adlman*, the court in *Maine* emphasized that “specifically identified litigation” was still required in order for a document to be eligible for work product protection.<sup>161</sup> The district court reached the factual determination that Textron’s preparation of the tax reserve was the result of anticipation of a dispute with the IRS.<sup>162</sup> The district court acknowledged that the tax accrual workpapers were useful in obtaining an unqualified audit opinion from their independent auditor but emphasized that there would have been no need to create the reserve if not for Textron’s expectation of a dispute with the IRS.<sup>163</sup>

Although the en banc court did not expressly overrule *Maine*, the court focused primarily on determining if Textron’s tax accrual workpapers were prepared for use in litigation as opposed to considering whether they were prepared “because of the prospect of litigation.”<sup>164</sup> Specifically, the court explained that in “debatable cases” involving work product classification, the documents that were protected were “unquestionably prepared for potential use in litigation if and when it should arise.”<sup>165</sup> Further, the court explained that “the focus of work product protection has been on materials prepared for use in litigation, whether the litigation was underway or merely anticipated.”<sup>166</sup>

In order to fall in line with precedent and avoid overruling the adoption of the “because of” test, the court found that the tax accrual workpapers in this case were prepared in the ordinary course of business and, therefore, were not work product under the *Maine* “because of” test or, for that matter, any of the varying definitions of “in anticipation of litigation.”<sup>167</sup> In so holding, the court implicitly made the determination that these documents were prepared in the ordinary course of business and “would have been created in essentially similar form irrespective of litigation.”<sup>168</sup> Further, the court seemed to look to the “primary purpose” test as well to justify its holding when it concluded “the only purpose of Textron’s papers was to prepare financial statements.”<sup>169</sup>

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159. 577 F.3d 21, 31 (1st Cir. 2009).

160. 298 F.3d 60, 68 (1st Cir. 2002).

161. Sheppard, *supra* note 62, at 1168.

162. *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 150 (D.R.I. 2007), *rev’d*, 577 F.3d 21 (1st Cir. 2009).

163. *See id.*

164. Sheppard, *supra* note 62, at 1165 (“The phrase in the federal rules ‘in anticipation’ means ‘for’ or ‘in assistance of’ litigation, in the majority’s view.”).

165. *Textron*, 577 F.3d at 30.

166. *Id.* at 29.

167. *Id.* at 30 (“*Maine* applies straightforwardly to Textron’s tax audit work papers—which were prepared in the ordinary course of business—and it supports the IRS position.”).

168. *Id.*

169. *Id.*

The application of this test in *Textron* has been sharply criticized for its potential to eliminate work product protection for many corporate documents, such as litigation reserves that have historically been protected.<sup>170</sup> It is also criticized for its disregard of the actual text of Rule 26(b)(3), which imposes no requirement that the documents be used to aid in litigation.<sup>171</sup> Additionally, the test is criticized for its failure to recognize that the policy concerns supporting the work product doctrine generally apply equally to those documents that are prepared in anticipation of litigation but are not expected to be used at trial.<sup>172</sup> The *Textron* opinion has also been criticized for redefining the “because of” test by requiring that the documents be prepared for use in possible litigation based largely upon the fact that the adverse party was the IRS.<sup>173</sup> In considering which test is the most appropriate approach in spite of its limitations, the question remains whether the policy underlying the work product doctrine justifies protection for dual-purpose documents.

*D. Is Protection Appropriate for Dual-Purpose Documents?*

The debate regarding the protection of dual-purpose documents has significant implications for publicly traded companies.<sup>174</sup> In the context of a request for a corporation’s internal tax accrual workpapers, there are strong policy considerations to balance between a narrow or broad interpretation of the work product doctrine. First, the Supreme Court has emphasized the importance of the disclosure of relevant information to taxing authorities considering the nature of the system of federal taxation, which relies on the taxpayer’s self assessment and reporting.<sup>175</sup> The failure of corporations to fully and accurately disclose their tax liability would result in ineffective tax investigations and an inequitable distribution of the national tax burden.<sup>176</sup> On the other hand, commentators argue that denying work product protection to tax accrual workpapers threatens the ability of corporate counsel to prepare detailed and com-

170. See, e.g., Henkel, *supra* note 5, at 237; see also Everett et al., *supra* note 62, at 85.

171. *Textron*, 577 F.3d at 34 (citing *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998) (“The text of Rule 26(b)(3) does not limit its protection to materials prepared to assist at trial. To the contrary, the text of the Rule clearly sweeps more broadly. It expressly states that work-product privilege applies not only to documents ‘prepared . . . for trial’ but also to those prepared ‘in anticipation of litigation.’”)).

172. *Id.* at 36 (“Thus . . . it is clear that the rationales underlying the work-product doctrine apply to documents prepared in anticipation of litigation, even if they are not also for use at trial.”).

173. Henkel, *supra* note 5, at 241 (“In reality . . . the majority wrote a results-driven opinion that appears to be based solely on the fact that the IRS was the party seeking the documents.”); see also Everett et al., *supra* note 62, at 92 (“The majority opinion . . . emphasizes that its decision is based in large part on public policy: the need for the IRS to detect under-reporting of corporate taxes.”).

174. Publicly traded companies are required by federal securities law to file financial statements with the Securities and Exchange Commission. E.g., *United States v. Arthur Young & Co.*, 465 U.S. 805, 810–11 (1984). As a result, when these companies estimate their liability for financial reporting purposes, the level of protection afforded “may open these estimates to discovery.” See Buch, *supra* note 62, at 917.

175. See *Arthur Young*, 465 U.S. at 815.

176. *Id.* at 815–16.

plete assessments of the corporation's litigation risks.<sup>177</sup> Furthermore, when a company calculates its potential liability by a thorough analysis of its tax position's strengths and weaknesses, as well as an estimate of the amount it should set aside for such liability, disclosure of this information to an adverse party causes "serious prejudice" to the company's prospects in the ensuing litigation.<sup>178</sup>

The Supreme Court, in the related context of the *independent auditor's* tax accrual workpapers, resoundingly expressed that an "independent auditor's obligation to serve the public interest assures that the integrity of the securities markets will be preserved, without the need for a work-product immunity for accountants' tax accrual workpapers."<sup>179</sup> The Court reasoned that if an auditor was aware that a company had been reluctant to disclose all information regarding the tax accrual reserve, the auditor would be required to issue a qualified or adverse opinion, sending a message to the investing public that would not be in the interest of corporate management.<sup>180</sup> Similarly, the Court explained that corporate management would not risk a qualified opinion on their financial statements by limiting disclosure of their tax accrual reserves.<sup>181</sup> Nevertheless, despite this clear guidance by the Court regarding the *independent auditor's* tax accrual workpapers, this does not resolve the question regarding the corporation's workpapers prepared by in-house attorneys calculating the reserve amounts.

A key determination in resolving the issue of whether or not tax accrual workpapers prepared by a corporation is in support of its financial statements is whether these workpapers would be required in the absence of expected litigation with the IRS.<sup>182</sup> Although there are documentation requirements imposed on the independent auditor to support its opinion with audit documentation, the company itself is not required to maintain workpapers to support these figures.<sup>183</sup> Theoretically, if a public company did not expect litigation regarding its tax liability, they

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177. *E.g.*, Jones, *supra* note 4, at 201.

178. *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998) ("The interpretation of Rule 26(b)(3) advocated by the IRS imposes an untenable choice upon a company in these circumstances. If the company declines to make such analysis or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decisionmaking [sic]. On the other hand, a study reflecting the company's litigation strategy . . . cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.").

179. *Arthur Young*, 465 U.S. at 819.

180. *Id.* at 818.

181. *Id.* at 818–19.

182. *See Henkel, supra* note 5, at 239 (explaining that the majority's conclusion in *Textron* relied on the assumption that the in-house tax accrual workpapers were required by statutory and audit requirements).

183. *Id.* ("These documentation requirements, however, are imposed only on the accounting firms. In other words, neither the securities laws nor the accounting rules impose any documentation requirements on a public corporation.").

would not be required to produce workpapers to support that position by federal securities law.<sup>184</sup>

If the work product doctrine fails to protect tax accrual workpapers required by federal securities laws for publicly traded corporations, then an unintended disparity exists between private and public corporations. Specifically, because private companies are not required by securities law to have their financial statements audited,<sup>185</sup> a private company's tax accrual workpapers, even if identical in form, will likely be protected under the "primary purpose" test because the primary purpose of complying with federal securities regulation for public companies does not apply for private companies.<sup>186</sup>

#### IV. RESOLUTION

This Note recommends that the "in anticipation of litigation" prong of the work product doctrine should be consistently applied utilizing the "because of" test. In the majority of federal circuit court jurisdictions that currently apply the "because of" test, the application is not uniform and leads to differing treatment of similar dual-purpose documents. One of the original purposes behind codification of the work product doctrine in Rule 26(b)(3) was to provide uniformity in applications and utilizing a consistent interpretation of the "in anticipation of litigation" prong is necessary in order to achieve that goal.<sup>187</sup> Finally, this Note recommends that courts reconsider the interpretation of the "ordinary business exception" to Rule 26(b)(3), as it is not included in the text of the Rule and should be used simply as a guide for applying the test as opposed to its common use as a bright-line exclusionary test.

##### A. *Rejecting the "Primary Purpose" and "For Use in Litigation" Tests*

The principal motivation for providing work product protection is "encouraging careful and thorough preparation by the attorney" by protecting mental impressions.<sup>188</sup> The "primary purpose" and "for use in possible litigation" tests fail to provide protection for dual-purpose documents even when the justification for protection remains equally applicable.<sup>189</sup> For example, it is essential for a corporation to consider the legal and regulatory risks of many business decisions prior to actually

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184. *See id.* ("But for the prospect of litigation . . . there would be no need for a corporation to establish reserves.").

185. *Cf. Arthur Young*, 465 U.S. at 810–11 (explaining the applicable federal securities laws for publically held corporations).

186. Only publically traded companies are subject to federal securities regulations—thus workpapers supporting a *private company's* litigation reserves would not have the arguable "primary purpose" of compliance with securities regulations, resulting in a different analysis under the "primary purpose" test.

187. WRIGHT ET AL., *supra* note 19, § 2023.

188. *See supra* notes 21–23 and accompanying text.

189. *See supra* notes 151–58, 170–73 and accompanying text.



undertaking the action. An attorney preparing this prospective type of analysis should be encouraged to provide careful and thorough advice to the corporation. In these situations, the primary purpose of the document is to advise a business decision and thus would not be protected under the “primary purpose” test. Further, the document would not be useful in litigation and thus would similarly fail the “for use in possible litigation” test.

It is difficult to argue that a document prepared primarily to inform a business decision that contains detailed legal analysis and an attorney’s opinion regarding the likely outcome in potential litigation resulting from the business decision is any less important to protect than a document prepared directly for use in litigation. In both situations, an attorney would be equally deterred from careful and thoughtful consideration of the legal issue if that analysis could later be discovered by a litigation adversary. Thus, because the “primary purpose” and “for use in possible litigation” tests fail to provide protection for a document—even when the justification for protection is equally strong—these tests should be abandoned in favor of the “because of” test, which does provide appropriate protection in these circumstances.

### *B. Adopting a Consistent “Because of” Test*

Although the “because of” test is currently the majority test, its application in different federal circuit courts produces differing results that frustrate the legitimate needs of businesses operating across various jurisdictions.<sup>190</sup> As the Supreme Court explained in *Upjohn v. United States*, “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”<sup>191</sup> Therefore, it is necessary to compare the various applications of the “because of” test and determine which application is most appropriate in consideration of the text of Rule 26(b)(3) as well as the underlying policies supporting the work product doctrine.

#### *1. Versions of the “Because of” Test That Miss the Mark*

The Fourth and Seventh Circuits’ requirement that the actual underlying event leading to the future litigation must have already occurred in order for a document to be protected work product should not be used because it fails to advance the underlying policies of the doctrine. Although these tests correctly remove protection from documents analyzing hypothetical unspecified litigation, they also deny protection to documents relating to clearly identified and anticipated litigation occurring after an event within the preparer’s control—such as a business decision

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190. EPSTEIN, *supra* note 3, at 854–55; Pease-Wingenter, *supra* note 2, at 145.

191. *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

to undertake a merger.<sup>192</sup> Informed business decisions should be encouraged, and thus these versions of the “because of” test that fail to protect careful preparation by an attorney should not be used.

Other courts that apply the “because of” test interpret the standard narrowly, requiring the documents to serve at least some supporting function in the anticipated litigation.<sup>193</sup> The text of Rule 26(b)(3) does not include a requirement that the documents be used to aid in litigation, support litigation, or serve any purpose related to the litigation in order to be considered “in anticipation of litigation.”<sup>194</sup> Rather, the focus of Rule 26(b)(3) should be on whether the party claiming work product protection for a document actually prepared or obtained the document because of the prospect of litigation. The use of the document—whether for use in trial, to avoid trial, or simply to contemplate whether a business transaction certain to result in litigation should be undertaken—should simply be one of the facts and circumstances the court considers under the broad “because of” test. Any requirement that a document must have any purpose relating to the trial is contrary to the text of Rule 26(b)(3) and should therefore not be considered under the “because of” test.

## 2. *Appropriate Formulation of the “Because of” Test*

In contrast to these standards, which are not supported by the text of Rule 26(b)(3) and do not reflect the policy justifications for the work product doctrine, the application of the “because of” test by the Second and Sixth Circuits appropriately reflects both the text and purpose of Rule 26(b)(3). Although the Sixth Circuit expressly applies a two-part test that considers both whether the document “was created because of a party’s subjective anticipation of litigation, as contrasted with an ordinary business purpose” and whether the “subjective anticipation was objectively reasonable,” this two-part test is implicitly included in the *Adlman* application of the “because of” test. The *Adlman* standard requires that “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.”<sup>195</sup> Subjective anticipation of litigation by the party is logically required in order for a document to be prepared “because of the prospect of litigation.”<sup>196</sup> Addi-

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192. See *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002) (“The expectation of litigation is either real or it is not. Whether the party prepared for that litigation before conducting a transaction (to inform its business affairs) or implemented the transaction ‘in the dark’ and then prepared for the litigation that would surely arise from it does not alter the imminence or ‘realness’ of the expectation of litigation.”).

193. See Pease-Wingenter, *supra* note 2, at 148.

194. See *supra* notes 132–34 and accompanying text.

195. See *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (quoting WRIGHT ET AL., *supra* note 19, § 2024).

196. See *id.* at 1195 (explaining that *Adlman* expected litigation as a result of the contemplated merger when producing the memorandum at issue).

tionally, the term “fairly” reflects that the party’s belief is objectively reasonable in light of the nature of the document and surrounding facts.<sup>197</sup>

The Second and Sixth Circuits’ approach to the “because of” test appropriately furthers the underlying justifications for the work product doctrine while limiting extension of protection to documents that are both subjectively and objectively prepared “in anticipation of litigation.” This approach allows businesses to plan effectively for future litigation without the fear of losing work product protection solely due to the document’s dual purpose. Protecting such dual-purpose documents encourages attorneys to fully and carefully consider a client’s case and prevents “piggy-backing” on the work of opposing counsel.<sup>198</sup> Furthermore, despite concerns that the “because of” test protects too many documents from disclosure, it is key to emphasize that the *facts* themselves are not protected from disclosure.<sup>199</sup>

### 3. *The Ordinary Course of Business Exception*

Although this version of the “because of” test allows protection for dual-purpose documents, courts often find that the ordinary course of business exception precludes work product protection for dual-purpose documents.<sup>200</sup> The purpose of this exception is clear—documents that are prepared in the ordinary course of business and would be prepared in substantially similar form even if litigation were not expected are not created “because of” anticipation of litigation or for trial.<sup>201</sup> When a document is prepared in the ordinary course of business, however, the analysis should not end without considering the nature of the underlying document and factual situation to determine if protection is still justified under the text of Rule 26(b)(3). The source of the “course of business exception” is the Advisory Committee Notes and, therefore, should not be used to the extent that it defeats the clear language of Rule 26(b)(3).<sup>202</sup>

Rather, courts must still inquire into whether the document would have been prepared in substantially similar form irrespective of anticipation of litigation. The Ninth Circuit adopted an approach in *In re Grand Jury Subpoena* that asked whether the litigation purpose was inseparable from the interrelated business purpose of the document.<sup>203</sup> If the litigation was inseparable, then the document would be entitled to work product protection despite its business purpose.<sup>204</sup> Therefore, although courts

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197. See generally *id.* at 1199–1200 (providing examples where documents prepared in the reasonable anticipation of litigation should be eligible for work product protection).

198. Pease-Wingenter, *supra* note 2, at 156–59.

199. See *supra* note 28 and accompanying text.

200. See *supra* notes 51–55 and accompanying text.

201. See *supra* notes 50–51 and accompanying text.

202. FED. R. CIV. P. 26(b)(3) advisory committee’s note.

203. See *supra* notes 52–55 and accompanying text.

204. See *supra* notes 52–55 and accompanying text.

should consider whether a document was prepared in the ordinary course of business, that determination should not be treated as a bright-line test, but rather should be considered as one of the factors indicating whether the party subjectively anticipated litigation.

*C. Recommended Test As Applied to Tax Accrual Workpapers*

Application of this recommendation to tax accrual workpapers will often result in eligibility for work product protection. In order to be eligible, the company claiming protection for the documents must first demonstrate that the accrual workpapers were created “because of the prospect of litigation,” considering both the subjective motivation for their creation as well as whether the anticipation of litigation was objectively reasonable. Next, because these documents are prepared on a regular basis in order to support financial statements required by federal security regulations,<sup>205</sup> a court should consider whether the litigation aspect of the workpapers is inseparable from the ordinary business aspect of the workpapers.

In the case of tax accrual workpapers, the litigation aspect is inseparable from the business purpose—which is demonstrated by considering what the company would prepare if it did not anticipate any of its tax positions to be subject to potential IRS scrutiny. Although financial statements are required, tax accrual workpapers themselves are not required by law.<sup>206</sup> Thus, if a company did not expect litigation, it likely would not prepare tax accrual workpapers, and even if it prepared the workpapers to support the belief that it did not expect litigation, they would be substantially different from the typical tax accrual workpaper. In this case, the document would not include similar litigation strategies or likelihood of payment—as the company’s belief would be that there was no potential litigation relating to its tax filing position. This approach to tax accrual workpapers produces a result that requires reasonable anticipation of litigation but does not withhold protection from documents that implicate the crucial policy concerns justifying the work product doctrine.

## V. CONCLUSION

The critical question that courts must ask when determining if a dual-purpose document is entitled to work product protection is whether the document was prepared “in anticipation of litigation.” Courts have interpreted this phrase using three primary approaches, each of which results in a different outcome for certain dual-purpose documents. The Fifth Circuit uses a test that considers whether the “primary motivating

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205. See *supra* note 74 and accompanying text.

206. See *supra* notes 182–84 and accompanying text.

purpose” in creating the document was to aid in possible future litigation. This test requires a court to determine the primary purpose for creation of the document and denies protection if the court determines that the document was prepared primarily for any purpose other than to aid in an anticipated, specific claim, such as to inform a business decision. Alternatively, the First Circuit has adopted an approach requiring that the document be “prepared for use in possible litigation” in order to be eligible for work product protection. This approach requires that the court consider whether a document was prepared for use in litigation or whether the document, although prepared in anticipation of litigation, served no purpose in potential litigation. Finally, the majority of federal circuit courts employ the “because of” test under which a document is eligible for work product protection if “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”<sup>207</sup>

Considering the nature of many of today’s businesses, which operate across multiple jurisdictions, it is important that courts adopt a single approach which is most consistent with the text of Rule 26(b)(3) and the underlying rationale for the work product doctrine. The “because of” test allows courts to provide dual-purpose documents with work product protection, whereas both of the other tests deny protection even when the concern that an attorney’s mental impressions will be discoverable and thereby threaten the careful and thoughtful consideration of the legal issue is equally applicable. Courts should adopt the “because of” test and require that the party claiming protection for a document demonstrate that it was created because of the party’s subjective anticipation of litigation and that the anticipation was objectively reasonable.

Finally, courts commonly apply the ordinary course of business exception, which denies work product protection for a document assembled in the ordinary course of business. Although the exception is useful to help courts consider whether a document was actually created in anticipation of litigation, it should not be treated as a bright-line exclusion. Rather, where the litigation purpose of the document is inseparable from the ordinary business purpose for the document, the court’s analysis should consider all of the surrounding facts to determine if the document was created “because of” anticipated litigation. Utilizing this approach ensures that dual-purpose documents will not be categorically denied work product protection when the justifications for the doctrine apply equally, and the text of Rule 26(b)(3) makes no indication that they should be denied protection.

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207. See, e.g., WRIGHT ET AL., *supra* note 19, § 2024.

