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SURVEYING WORK PRODUCT*

Kevin M. Clermont†

Work product is the legal doctrine that central casting would send over. First, it boasts profundities, arising as it does from the colliding thrusts of our discovery and trial processes and from conflicting currents in our modified adversary system. Second, it will surface frequently, because the protected materials are commonly created by each side but uncommonly useful to the opponent. Third, it has generated a small mountain of lower-court case law, with the foothills forming a labyrinth of rules and wrinkles. In short, work product has for a couple of generations dramatically bewitched academics, bothered practitioners, and bewildered students.

As proof of its fascination, I offer—without need of citation—the glacial expanse of commentary on work-product immunity from civil discovery. As proof of its difficulty, I note—without insult by citation—the serious shortcomings of almost all of that commentary. Work product is one of those subjects that require the initiate to spend inordinate time stumbling through the moraine of cases and up to a sufficient height to view the whole unified doctrine. Yet this subject is so remarkably important in theory and practice that countless souls have volunteered for the mission. Significant intellectual challenge and truly compelling importance compose the formula for disorder. So many commentators (and judges) wander into the moraine, focus hard but myopically on some tiny facet of the work-product doctrine, and leave a deposit of fresh confusion.

One of the contributing causes of this disorder is the questionable legal process that produced the work-product doctrine. In the forties, the Supreme Court passed up the rulemaking route for the pointillist case method, kicking off the process of clarification with the great case of *Hickman v. Taylor*.¹ In 1970, from the welter of conflicting decisions the rulemakers attempted to codify workable sensibleness, adopting the poorly executed rule 26(b)(3).² Today we thus enjoy intensified confu-

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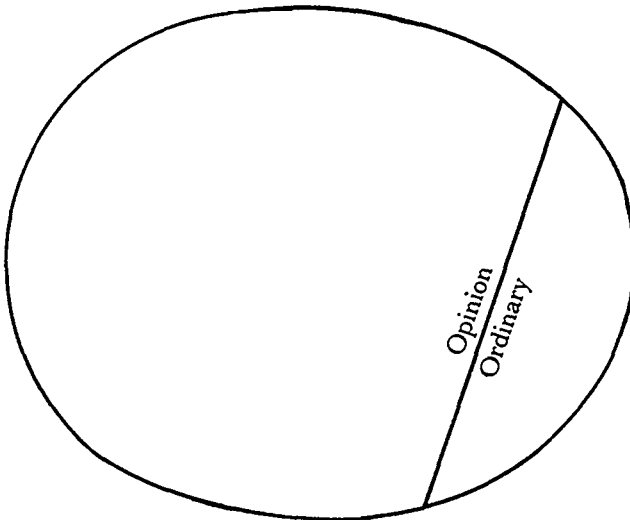
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¹ 329 U.S. 495 (1947). For background, including the Advisory Committee's proposed rule that the Supreme Court rejected in 1946, see R. FIELD, B. KAPLAN & K. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 445-47 (4th ed. 1978).

² FED. R. CIV. P. 26(b)(3). For criticism of that rule, see Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 *STAN. L. REV.* 673, 677-82 (1975).

sion. Nevertheless, several years of trying to teach work product have left me believing that the path to higher understanding departs from a chronologic study of that legal process.

Hickman soundly divided the subject into "ordinary" and "opinion" work product. An example of ordinary work product is the signed witness statement prepared in anticipation of litigation. It generally receives a qualified immunity, which the discovering party can overcome by a sufficient showing of need. An example of opinion work product is the unrecorded mental impression of the attorney concerning the litigation. It merits virtually absolute immunity.



Work product after *Hickman*, with protected materials divided into opinion and ordinary work product

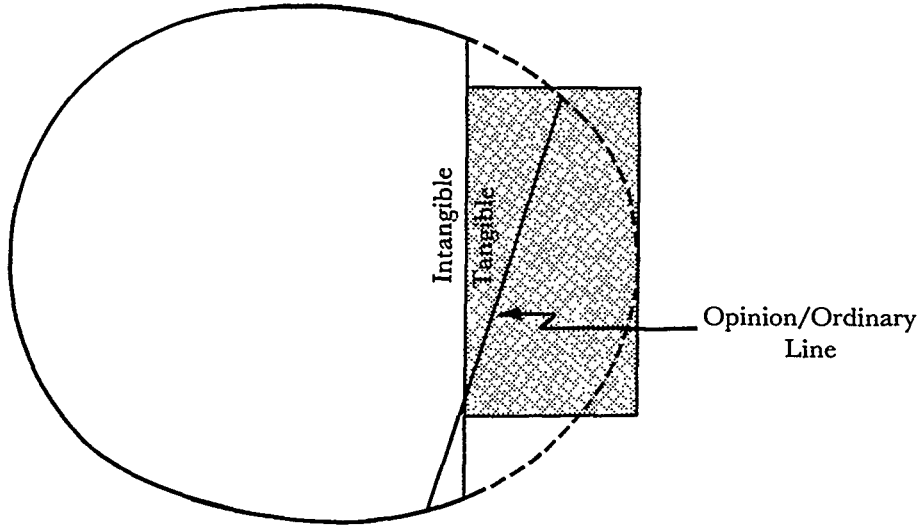
Rule 26(b)(3) surprisingly, irrelevantly, and apparently inadvertently³ divided the same world into "tangible" and "intangible" work product. The rule implicitly recognized that both ordinary and opinion work product, deserving different degrees of protection, could appear in documents and tangible things. The rule left intangible work product on its own.

So what should happen when a party seeks by interrogatory only the substance of a witness statement, as opposed to seeking a copy of the statement itself?⁴ On the one hand, if rule 26(b)(3) is approached as an

³ See Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145, 1163 n.108 (1971).

⁴ This question causes considerable confusion in the trenches. See Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1058-73 (1979).

“accurate codification” of the work-product doctrine,⁵ we run into a sizable conceptual barrier. On the other hand, if rule 26(b)(3) is seen as having “no application” to intangible work product,⁶ we have a handle on solving the problem. The critical insight, then, is *partial codification*. By this I mean that the rule neither spans the whole subject of work product nor supplants all of the prior case law. As a codification, the rule provides some answers, but only for questions arising from part of the doctrine. When a question arises outside the scope of the rule, an approach that looks to the rule for an answer is at best misleading.



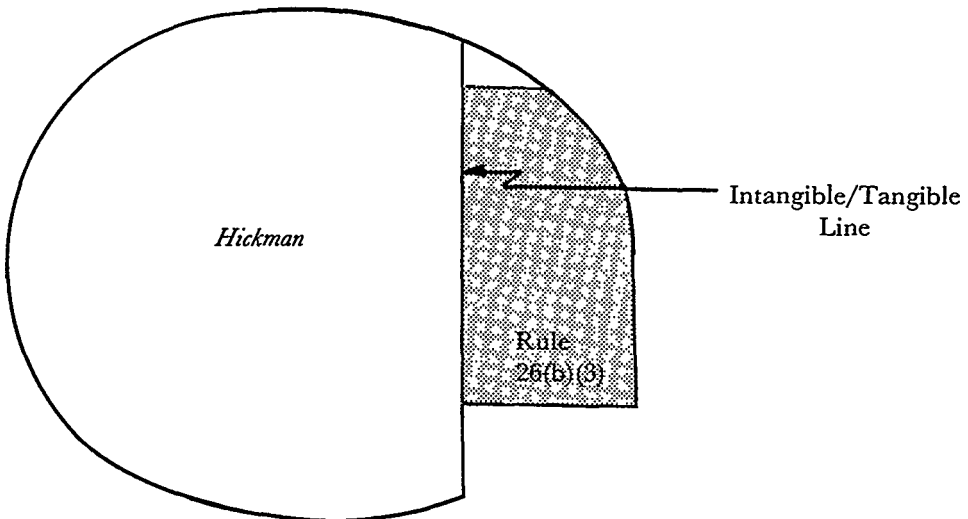
Work product after first-level effect of rule 26(b)(3), which is represented by shaded area

The insight of partial codification is but the first step. Then come fixing the realm of the rule’s coverage and concluding that within that realm the rule preempts *Hickman*. At a first-level glance, the rule treats only tangible work product. Within that realm, the rule’s protection might expand *Hickman* (perhaps, for example, regarding the range of persons whose efforts can constitute work product) or might contract *Hickman* (perhaps, for example, regarding the strictness of the anticipation-of-litigation requirement). Let me explain this role of rule 26(b)(3) more fully. For certain questions involving tangible work product, authoritative answers derive from the rule and not from *Hickman*. Obviously, a knowledge of *Hickman*’s policies and principles will inform a reading of the rule. Nevertheless, interpreting a rule presents a task jurisprudentially distinct from elaborating a case-law doctrine.

⁵ 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2023, at 193 (1970).

⁶ 4 J. MOORE & J. LUCAS, MOORE’S FEDERAL PRACTICE ¶ 26.64[4], at 26-451 (2d ed. 1983).

Outside the rule, *Hickman* survives to govern. The initial challenge of resort to that case's policies and principles confronts the decisionmaker.⁷ Next come the challenge of recognizing that those aspects of *Hickman* that the rule fails to cover apply even to tangible work product (like assertion at trial or loss by waiver) and the challenge of meshing *Hickman* with contiguous doctrines (like the attorney-client privilege or the newly recognized auditor's work-product immunity⁸). Let me explain this role of *Hickman* more fully too. First, for a question outside the scope of the rule—such as when a party seeks by interrogatory only the substance of a witness statement—it is *Hickman* that is still authoritative. Of course, the rule will exert some influence as an existing, parallel reading of *Hickman*. Nevertheless, elaborating work product on a sensitive case-by-case basis yields a doctrine without the “squared-off corners” of rulemaking. Second, *Hickman* does not fall within neat boundaries. For instance, it spills over to tangible work product and thus expands or contracts the first-impression thrust of rule 26(b)(3), with the protection extending to trial but disappearing by waiver.⁹



Work product today, suggesting *Hickman*'s continuing impact on tangible work product

⁷ The most recent available publication on work product nicely extracts and analyzes the policies of *Hickman*. Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412, 424-32 (1983).

⁸ See *United States v. Arthur Young & Co.*, 677 F.2d 211, 219-21 (2d Cir. 1982), cert. granted, 103 S. Ct. 1180 (1983) (No. 82-687).

⁹ Perhaps a wholly different example would help here. A serious question concerns the bounds of work-product protection in subsequent litigation. See *Grolier Inc. v. FTC*, 671 F.2d 553, 554-56 (D.C. Cir. 1982), rev'd, 103 S. Ct. 2209 (1983). A recent Note, *supra* note 7, approaches this question by explaining that rule 26(b)(3) codifies the doctrine, *id.* at 419-20, and

This is not a pretty picture, nor a self-explanatory one. The prevailing scheme induces totally misguided decisions. Even optimal decisions can yield only an imperfect doctrine because of discontinuities between tangible and intangible work product. Uncertainties unavoidably abound, calling unheededly for reform.

Indeed, the obscure ugliness of this scheme repels commentators, who therefore rush to address their direct concern: the bounds of work-product protection. That is, which kinds of items are protected, and how protected are they? And what are the temporal dimensions of the doctrine? And who can create work product, assert the protection, or waive it?

My thesis, in summary, is that without divining at the threshold the scheme here suggested, commentators inevitably misdraw the map of the doctrine. But taking that threshold step allows one to make sense of all of those difficult questions and to provide sound answers for most.

The student authors of the following Special Project have climbed to take in the vista before addressing those specific questions. I commend their effort to you.

then confusingly jumping back to *Hickman*, *id.* at 424 & n.92. A better approach would expressly establish that the rule does not cover this matter and that therefore *Hickman*'s policies and principles provide the answer for intangible and tangible work product alike.