
A Third Option: Regulating Discovery of Transaction Work Product Without Distorting the Attorney-Client Privilege

Roger W. Kirst *

INTRODUCTION

Lawyers expect the tools of discovery in the Federal Rules of Civil Procedure will extract relevant information from almost every source they can find. At the same time they hope their own files will be protected from discovery by at least one of two familiar rules. Many documents can be protected by asserting the attorney-client privilege, since Rule 26(b)(1) authorizes discovery only of “any matter, not privileged.”¹ Other documents in counsel’s file will be litigation work product that can be withheld from routine discovery under Rule 26(b)(3) until there has been “a showing of substantial need . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.”² As a result, in most cases an objection to discovery of a document in counsel’s files will not be challenged and judges will rarely be asked to decide whether some documents must be produced.

Discovery disputes over documents in counsel’s file are not so rare in cases in which counsel represented the client during the transaction that led to the lawsuit. Earlier representation makes it likely there will be a variety of confidential documents counsel created or edited with the expectation of a successful transaction, not litigation. Some of these earlier documents may fit within the attorney-client privilege protection for a client’s confidential disclosures to counsel. Other documents can best be described as transaction work product. This latter category may include letters from

* Henry M. Grether Professor of Law, University of Nebraska College of Law. B.S., Massachusetts Institute of Technology; J.D., Stanford University. Research for this article was supported by a grant from the McCollum Research Fund at the University Nebraska College of Law.

¹ FED. R. CIV. P. 26(b)(1).

² FED. R. CIV. P. 26(b)(3).

counsel to the client reporting facts counsel learned from the other party or facts learned from third parties through due diligence research about a planned deal, memoranda and drafts counsel sent to the client suggesting changes in documents for the proposed deal, or counsel's memos or working papers that do not reveal what the client told counsel. Transaction work product will not always be relevant, but in some cases it may be at the heart of the dispute. For example, if the issue is when a party first had knowledge of a fact or received notice of an event, the critical information may have been revealed in a letter from the party's own counsel. This material may resemble Rule 26(b)(3) work product but differ because it was prepared before litigation was anticipated.

There is a substantial body of federal caselaw that examines whether transaction work product can be protected from discovery. The caselaw will not be found under the topic "transaction work product" because no opinion uses that label, a simple fact that itself provides an important clue. As lawyers sort documents to determine which to produce and which to withhold, they apparently think only of the two familiar rules. In fact, by limiting their analysis to the two familiar rules they are left with no choice. It seems unlikely that a transaction document will be found to have been created in anticipation of litigation as required by Rule 26(b)(3) to meet the definition of litigation work product. That leaves the attorney-client privilege as the obvious ground, so lawyers regularly rely on that privilege and assert that the transaction documents they wrote or edited are protected from discovery by the attorney-client privilege. Thus, the issue in the federal caselaw on discovery of transaction work product has been whether such material is privileged. The federal courts have almost always held that the federal law of the attorney-client privilege does not protect documents that do not reveal the client's confidential communications.

The persistence with which lawyers continue to assert the attorney-client privilege in the face of almost certain rejection of that ground by federal courts might appear at first to be just stubbornness, ineptitude, or dilatory avoidance of discovery obligations. The working hypothesis explored in this Article is that none of those is the correct explanation, and that instead it is important to recognize this is an issue where both lawyers and judges have been misled from the start by the assumption that the two familiar rules are the only rules. The familiar rules that regulate discovery of privileged documents and litigation work product do not provide correct answers for transaction work product. Lawyers would be better able to recognize which transaction work product documents can be protected from discovery, and would be more successful in arguing that they are protected, if they recognized that transaction work product is a separate category of material not covered by the two familiar rules. In the same

manner, judges could create more coherent and accurate doctrine if they developed a separate rule to regulate the discovery of transaction work product.

As a theoretical question, this third option of a separate body of doctrine for the category of transaction work product has always been possible. It is uncodified doctrine, so it does not require a new statute or an amendment to the Federal Rules. It is solidly grounded on the United States Supreme Court's 1947 decision in *Hickman v. Taylor*³ that first recognized a work product doctrine. It remained viable after the partial codification of the doctrine in 1970 provided a textual basis for protecting litigation work product under Rule 26(b)(3). As a practical question, however, the third option is not viable. The possibility has been ignored for so long that the assumption that privilege and litigation work product are the only two options is solidly entrenched. Even suggesting a third option appears almost heretical. For that reason, it is important to sketch how the various doctrines are interrelated and to describe how this topic might be examined from a different perspective.

The foundation for privilege law on this issue can begin with *Hickman*, an opinion which started from the premise that the attorney-client privilege did not protect either the statements counsel obtained from non-client witnesses or the memoranda and writings prepared by counsel that did not reveal the client's disclosures.⁴ In *Upjohn Co. v. United States*⁵ the Court held that the attorney-client privilege protected factual disclosures from employees of a corporate client to counsel, but assumed that counsel's notes and memoranda would not be privileged if they contained material other than factual disclosures from the client. A solid body of federal court decisions has filled out the framework of *Hickman* and *Upjohn* by holding that the attorney-client privilege protects both the confidential documents in which a client disclosed facts to counsel and confidential documents written by counsel that reveal the client's factual disclosures.⁶ Under this traditional definition of the scope of the privilege, a typical transaction file will contain many documents that are privileged and not discoverable because they reveal the client's disclosures to counsel. If, however, the

³ 329 U.S. 495 (1947).

⁴ See *id.* at 508.

⁵ 449 U.S. 383, 397 (1981).

⁶ See, e.g., *In re Six Grand Jury Witnesses*, 979 F.2d 939, 944 (2d Cir. 1992); *In re Sealed Case*, 877 F.2d 976, 979 (D.C. Cir. 1989); *United States v. Under Seal*, 748 F.2d 871, 874 (4th Cir. 1984); *In re Fischel*, 557 F.2d 209, 211-12 (9th Cir. 1977); *United States v. United Techs. Corp.*, 979 F. Supp. 108, 110-11 (D. Conn. 1997); *Guzzino v. Felteman*, 174 F.R.D. 59, 60-61 (W.D. La. 1997); *Johnson v. Rauland Borg*, 961 F. Supp. 208, 211 n.5 (N.D. Ill. 1997); *Montgomery v. Leftwich, Moore & Douglas*, 161 F.R.D. 224, 227 (D.D.C. 1995).

transaction document does not directly or indirectly reveal the client's disclosures to counsel, a discovery objection on the basis of the attorney-client privilege will not succeed.⁷

A smaller set of federal court decisions appears to provide greater protection for material in the transaction file. These opinions have stated or held that the attorney-client privilege covers all advice to the client or any confidential communication to the client in the course of providing legal services.⁸ While many of these lower federal court decisions on closer reading turn out to be dictum or applications of state law in a diversity case,⁹ there are enough to create an impression of a split among federal courts between the traditional scope of the privilege that protects confidential documents only if they reveal the client's disclosures, and a "broader" scope that protects most or all communications from counsel to client.¹⁰

Some commentators label the traditional scope a "narrow" view and describe the federal courts as split between the narrower and broader scopes¹¹ or among variations on them.¹² The commentators tend to prefer the broader scope, but most devote little space to the issue. One offers the unhelpful advice that the ruling on the issue will depend on whether "a particular court views the privilege as a benefit or burden."¹³ The *Restatement of The Law Governing Lawyers* declares the broader scope is preferable but does not examine whether that is the federal rule; it also

⁷ See, e.g., *Am. Standard v. Pfizer*, 828 F.2d 734, 745 (Fed. Cir. 1987); *Christman v. Brauvin Realty Advisors, Inc.*, 185 F.R.D. 251, 255-56 (N.D. Ill. 1999); *Midwestern Univ. v. HBO & Co.*, No. 96 C 2826, 1999 WL 32928, at *2-*4 (N.D. Ill. Jan. 4, 1999); *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 200, 204, 209 (D.D.C. 1998); *Overseas Private Inv. Corp. v. Mandelbaum*, No. CIV.A.97-1138CKK/JMF, 1998 WL 647208, at *2 (D.D.C. Aug. 19, 1998); *Federal Election Comm. v. Christian Coalition*, 178 F.R.D. 61, 66 (E.D. Va. 1998); *Evans v. Atwood*, 177 F.R.D. 1, 3 (D.D.C. 1997); *Salgado v. Club Quarters, Inc.*, No. 96 CV.383(LMM)(HBP), 1997 WL 227598, at *1-*2 (S.D.N.Y. May 5, 1997); *Ziemack v. Centel Corp.*, No. 92 C 3551, 1995 WL 314526, at *4 (N.D. Ill. May 19, 1995); *United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994); *In re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 518 (N.D. Ill. 1990).

⁸ See, e.g., *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370 (10th Cir. 1997); *United States v. Ramirez*, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979); *Muller v. Walt Disney Prods.*, 871 F. Supp. 678, 682 (S.D.N.Y. 1994); *Arcuri v. Trump Taj Mahal Assocs.*, 154 F.R.D. 97, 102 (D.N.J. 1994); *United States v. Mobil Corp.*, 149 F.R.D. 533, 536 (N.D. Tex. 1993); *Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 444 (S.D.N.Y. 1990); *Pitney-Bowes v. Mestre*, 86 F.R.D. 444, 446 (S.D. Fla. 1980).

⁹ See *infra* notes 100-36 and accompanying text.

¹⁰ See *In re LTV Sec. Litig.*, 89 F.R.D. 595, 602-03 (N.D. Tex. 1981).

¹¹ See, e.g., EDNA EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 40-46 (1997).

¹² See generally 24 CHARLES WRIGHT & KENNETH GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5491 (1994).

¹³ *Id.* § 5491, at 454.

suggests that the differences between the two definitions of scope will not matter most of the time.¹⁴ These descriptions and preferences offer little help to a lawyer who must decide if the attorney-client privilege will actually protect a specific document, or to a federal judge who must decide whether to sustain a claim that a document is privileged. For both lawyers and judges the practical questions are: which caselaw most accurately states the federal rule, how to determine whether a document meets the correct test, and whether there are any other limits on discovery of material that is not privileged.

Both the extent of division in the federal courts over the scope of the attorney-client privilege and the actual support in the cases for the broader scope of the privilege have been much overstated by the commentators. The traditional scope may be labeled as the narrow view by some but it is still the more accurate definition of the scope of the privilege under federal law. What has been labeled as the broader view should instead be called a distortion of the traditional scope of the privilege. Only the traditional view provides the correct analysis when the attorney-client privilege is the ground for objecting to discovery of transaction documents that do not directly or indirectly reveal the client's confidential disclosures to counsel. That, however, does not explain why lawyers keep invoking the privilege ground, nor does it explain why some judges and so many commentators encourage lawyers to continue to do so by questioning the viability of the traditional scope of the privilege.

The support of judges and commentators for expanding the traditional scope of the privilege seems to be a product of the assumption that there are only two possible limits on discovery and the assumption that the only protection for non-privileged material is the codified language in Rule 26(b)(3) for litigation work product. These assumptions rest on a narrow and inaccurate reading of *Hickman*. The work product doctrine became part of discovery law in *Hickman* after the Supreme Court held that confidential material created by counsel was not privileged if it did not reveal the client's disclosures. In the second part of *Hickman*, the Court held that some non-privileged but confidential material created by counsel should be protected from routine discovery, that some material might be discoverable on adequate grounds, and that discovery of the mental impressions or memoranda of counsel should be allowed only in "a rare situation."¹⁵ The doctrine was "substantially incorporated"¹⁶ into Federal Rule 26(b)(3) in the 1970 amendments.

¹⁴ RESTATEMENT OF THE LAW GOVERNING LAWYERS § 119 cmt i. and Reporter's Note cmt. i Proposed Final Draft No. 1, 1996.

¹⁵ 329 U.S. at 512-13.

¹⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981).

The birth of the doctrine in a case in which the facts involved litigation work product, and the doctrine's partial codification in a rule for litigation work product, may make it appear to protect only litigation work product. That appearance may have fostered a belief that privilege law was the only way to protect transaction work product, or at least an assumption that the uncodified law of attorney-client privilege was more open to revision than the interpretation of Rule 26(b)(3). Those arguing for expanding the privilege have not mentioned that this effort to fill a perceived gap in the work product rule by changing the law of privilege would completely invert what the Court did in *Hickman*. They also have not examined the anomaly of providing complete protection under a privilege for documents that do not meet the standards for qualified protection as work product.

While the facts of *Hickman*, the *Hickman* doctrine, and Rule 26(b)(3) seem to blend together in the law of work product, the caselaw doctrine and language of the rule differ. For example, in *Hickman* the material in dispute was created by counsel, but under Rule 26(b)(3) the work product may also be created by a party or a party's representatives. The expansion of the work product category in the Rule was limited by requiring the documents be prepared in anticipation of litigation and by a comment that it does not cover documents prepared "in the ordinary course of business."¹⁷ That does not mean the same limit was part of the *Hickman* doctrine for documents created by counsel. Anticipation of litigation might provide a useful dividing line if the facts involve accident reports in a tort case such as *Hickman*, but that does not mean that it will necessarily be the best dividing line if the facts of the litigation involve a transaction in which counsel created documents.

There are a few opinions that do not regulate discovery of transaction work product under the privilege; instead they suggest expanding the other familiar rule that protects counsel's files. These opinions do no more than suggest an expansive interpretation of Rule 26(b)(3) by reading the "anticipation of litigation" language to include documents prepared in advance of any lawsuit, which analyzed the likely outcome of litigation that might arise from a transaction, or were "prepared . . . because of the prospect of litigation."¹⁸ While this interpretation could in time expand the codified part of the doctrine to include some transaction documents, this is an uncertain possibility at best because it goes far beyond the conventional reading of the language used in the Federal Rules.

A third option of separate uncodified doctrine for transaction work

¹⁷ Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 501 (1970) [hereinafter 1970 Advisory Committee's Note].

¹⁸ *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

product would allow the courts to develop more specific regulations for discovery of confidential documents in counsel's transaction file. Under this third option, confidential transaction documents written by counsel that do not reveal a client's disclosures to counsel would remain outside the scope of the attorney-client privilege, but they still could be protected from routine discovery. This option recognizes that there may be good reasons why an attorney's transaction file should not be routinely discoverable. Furthermore, it provides a framework for examining that issue in a manner that does not distort the law of attorney-client privilege and does not overextend the language of the discovery rules.

This Article will examine the proper scope of the attorney-client privilege, and consider how discovery of counsel's transaction work product could be regulated under an uncodified branch of work product doctrine. Part I of this Article will examine the foundation of the traditional scope of the attorney-client privilege established in *Hickman* and *Upjohn*. Part II will examine the two lines of federal cases on the scope of the attorney-client privilege. Part III will examine the commentary and the policy arguments that have been advanced for expanding the traditional scope of the privilege. Part IV will describe the parameters of the uncodified-work-product policy that can be derived from *Hickman* and *Upjohn*. The conclusion in Part V will consider how this third option might affect the law of privilege and discovery practice.

I. THE ATTORNEY-CLIENT PRIVILEGE IN THE SUPREME COURT

Before the adoption of the Federal Rules in 1938 there was little reason to consider whether confidential transaction documents authored by counsel should be protected from discovery. While lawyers created documents and wrote letters to clients before then, the Reporter for the Restatement notes that “[t]he question was largely irrelevant in an earlier legal culture that did not provide for pretrial discovery and in which calling a lawyer to the witness stand was very rare.”¹⁹ The classic treatment of the issue in Wigmore’s *Evidence* was entirely contained in a brief paragraph within discussion of the attorney-client privilege:

§ 2320. Communications by the attorney to the client. That the attorney’s communications to the client are also within the privilege was always assumed in the earlier cases and has seldom been brought into question. The reason for it is not any design of securing the attorney’s freedom of expression, but the necessity of preventing the use of his statements as admissions of the client . . . or as leading to inferences of the tenor of the client’s communications—although in this latter aspect, being hearsay statements, they could seldom be available at all²⁰

The fact that Wigmore emphasized protecting the client’s communications strongly suggests that the rule he described incorporates a further unstated assumption that the lawyer’s advice was based only on the client’s description of the facts or the client’s statement of goals for a transaction. Since that unstated assumption would mean the lawyer did not learn any facts from others, the only relevant information that could be gleaned from counsel’s confidential documents would very likely provide clues about the client’s disclosures to counsel. The rationale of protecting the client’s confidential disclosures, however, does not support the same scope for the privilege if counsel has acquired information in the course of investigating and gathering facts from sources other than the client. For half a century the Supreme Court has consistently drawn a distinction between protecting information disclosed by the client and protecting information the lawyer obtained from some other source.

A. *The Foundation of Hickman*

When the Federal Rules of Civil Procedure were adopted in 1938, they permitted discovery of all relevant non-privileged information from opposing litigants and third parties; the Rules did not expressly exclude

¹⁹ RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 14, at 359.

²⁰ 8 JAMES WIGMORE, *EVIDENCE* § 2320 (John T. McNaughton ed., rev. 1961).

discovery of material contained within the files of opposing counsel. A substantial disagreement arose very quickly among the lower federal courts about whether they should allow discovery of the material in opposing counsel's files that had been prepared for litigation.²¹ As a result, in 1946 the Advisory Committee proposed an amendment to Rule 30 that would limit discovery of such material:

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or except as provided in Rule 35, the conclusions of an expert.²²

The Advisory Committee's Note accompanying the proposed amendment summarized the holdings of the substantial body of caselaw; they ranged from a rule that such material was generally subject to discovery to a rule it was not subject to discovery at all.²³ The Note gave specific attention to the pending case of *Hickman v. Taylor* in which the Supreme Court had just granted certiorari.²⁴ It described the Third Circuit's *en banc* holding that material prepared for trial was not discoverable, because it was within the scope of privileged documents, and noted that all but one member of the Advisory Committee questioned that view.²⁵ The Note suggested that the privilege exception to discovery was limited to the traditional evidence privileges. While the Supreme Court did not approve the amendment to Rule 30 proposed by the Advisory Committee,²⁶ it did use *Hickman v. Taylor* both to adopt a limitation along the lines recommended by the Advisory Committee and to reject the resolution that had been adopted by the Third Circuit.

Hickman v. Taylor involved a suit for damages by the estate of Norman Hickman, a crewmember of the tug *John M. Taylor* that sank in

²¹ See generally 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2021 (1994).

²² Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 456-57 (1946) [hereinafter 1946 Advisory Committee's Note].

²³ See *id.* at 458-60.

²⁴ See *Hickman v. Taylor*, 153 F.2d 212 (3d Cir. 1945), *cert. granted*, 328 U.S. 876 (1946).

²⁵ See 1946 Advisory Committee's Note, 5 F.R.D. at 460.

²⁶ See Order Amending Rules of Civil Procedure, 329 U.S. 843 (1946).

the Delaware River from unknown causes. The tug owners hired counsel almost immediately to represent them in the anticipated litigation. During the next two months counsel for the owners obtained statements from the surviving crew members, interviewed other witnesses, and wrote memoranda of what they told him. The discovery dispute arose a year later after Hickman sued and demanded production of those written statements of witnesses, counsel's memoranda, and a summary of any oral statements of witnesses. The defendant objected on the ground the material was "privileged matter obtained in preparation for litigation."²⁷ The trial court held the material was not privileged and ordered production of the material, allowing defense counsel the option to first submit counsel's own memoranda to the court for review.²⁸ The Third Circuit reversed and held the material was the "work product of the lawyer" and, therefore, privileged from discovery.²⁹

The Supreme Court rejected the privilege argument in a single paragraph:

We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.³⁰

The remainder of the majority opinion and the concurring opinion are the well-known foundation for the protection of the lawyer's file as work product. The scope of the work product policy will be explored in this Article in Part IV. The present issue is whether anything more can be learned from the Court's declaration that the material was not covered by the attorney-client privilege.

While the Court noted it would not provide a full discussion of the attorney-client privilege, it is still possible to draw some additional insight from what the Court did and did not say, and from the surrounding circumstances. Some elements of the privilege were not mentioned as

²⁷ *Hickman v. Taylor*, 4 F.R.D. 479, 480 (E.D. Pa. 1945).

²⁸ *See id.* at 482-83.

²⁹ *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1945).

³⁰ *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

reasons for finding the material was not privileged, such as whether the documents were confidential or whether the attorney was providing legal services when he obtained the statements from the witnesses or summarized the information supplied by the witnesses. The Court did set out the plaintiff's argument that the witnesses were "third persons rather than . . . his clients,"³¹ and seemed to endorse that distinction when it noted that the privilege did not cover information "from a witness."³² Similarly, when the Court stated that counsel's own notes and other writings were not privileged, it did not provide any additional explanation. The Court's factual descriptions focused on counsel's notes and writings about what he had learned from witnesses and not what he had been told by the tug owners, his clients.³³ The Court's approach to these topics further confirms it was applying a rule that a client's disclosures to counsel could be within the privilege, but that information counsel learned elsewhere was not privileged.

The proposed amendment to Rule 30 that was before the Court at the same time as *Hickman* was accompanied by an Advisory Committee description of the attorney-client privilege that was consistent with Wigmore's broad formulation of its scope:

Of course, it has been held that communications to an attorney by his client or advice given to a client by his attorney are privileged within the well settled meaning³⁴ of that term in evidence and hence not the proper subject of inquiry.

Since the Court rejected the amendment to Rule 30 in favor of the caselaw approach in *Hickman* it did not have to expressly affirm, modify, or disavow this description of the privilege as including advice to the client in general. It is clear that the Court did not follow this description of the privilege when it considered the facts of *Hickman*. The Court never mentioned whether counsel's notes and memoranda had been prepared for the client, seen by the client, or sent to the client as part of counsel's advice regarding the progress of the litigation. If any of those facts were thought sufficient to include counsel's material within the privilege, the Court could have decided the case on that ground. However, the Court did not do so, since it concluded that the information from a witness is not privileged without discussing whether a lawyer's later inclusion of the non-privileged information in advice to the client would convert it into privileged information.

Each of the three kinds of non-privileged material in the litigation file

³¹ *Id.* at 506.

³² *See id.* at 508.

³³ *See id.* at 498, 508.

³⁴ 1946 Advisory Committee's Note, 5 F.R.D. at 458.

in *Hickman* might resemble material in a transaction file. For example, the “information which an attorney secures from a witness”³⁵ might resemble the facts about the transaction that counsel learns from third parties. The “memoranda, briefs, communications and other writings prepared by counsel”³⁶ might be similar to preliminary drafts of transaction documents and editorial changes to documents by counsel. The attorney’s “mental impressions, conclusions, opinions, or legal theories”³⁷ might be comparable to counsel’s internal memoranda that describe how and when the documents must be drafted or edited for the transaction in order to protect the client against various problems that might arise in the future.

There are two reasons to remember that *Hickman* provides a foundation for defining the scope of the attorney-client privilege. The first is that comparing a transaction document against the documents in *Hickman* provides a gauge of the kind of material that falls outside the privilege even though it was prepared by counsel in the course of providing legal services to a client and maintained with the same confidentiality as the client’s factual disclosures to counsel. The second is that *Hickman* did not hold that all documents created by counsel are routinely discoverable just because they do not reveal the client’s confidential disclosures. The Court recognized that there were strong policy arguments against discovery of counsel’s work product, but distinguished between absolute protection under the privilege and protection against routine disclosure under the work product doctrine. This point calls for emphasis and repetition, because the arguments in the caselaw and commentary for expanding the scope of the privilege often seem to rest on a tacit assumption that there is only a stark choice between the privilege and no protection.

B. *The Court’s Version of the Evidence Rules*

The Supreme Court’s definition in *Hickman* of the scope of the attorney-client privilege remained in effect through the adoption of the Federal Rules of Evidence. The Court’s adoption of the 1973 Rules had no permanent effect, because Congress suspended them before they took effect.³⁸ Nevertheless, some commentators suggest that a trend toward a broader scope of the privilege includes the Court’s approval of a version of the attorney-client privilege that would “adopt the broader view and make the lawyer’s communications to the client privileged as well as the client’s

³⁵ *Hickman*, 329 U.S. at 508.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See 1 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN’S FEDERAL EVIDENCE, at xix-xxi (J. McLaughlin ed., 2d ed. 1999).

communications to the lawyer.”³⁹ While the Court in other areas has not felt bound to continue with positions it adopted in the 1973 Rules,⁴⁰ those Rules could be considered somewhat persuasive authority if the commentators are correct. Therefore, it is necessary to examine the 1973 Rules to see if they can be described as part of this broadening trend.

The 1973 Rules defined the privilege with language that could be read to cover all communications in both directions:

Rule 503. Lawyer-Client Privilege

...

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer’s representative⁴¹

If that language extended the privilege to all documents authored by counsel and sent to the client, including documents that do not reveal the client’s confidential disclosures, it would negate the premise in *Hickman*. On its face the language is ambiguous, as one of the Court’s major opinions on the attorney-client privilege illustrates. In *Upjohn Co. v. United States*⁴² the Court used the broader phrase “communications between an employee and counsel” as a substitute in the very same paragraph for the narrower phrase, “communications by Upjohn employees to counsel,” that described its actual holding.⁴³ Ambiguous language is not persuasive authority that the Court understood and intended that the 1973 language would reject *Hickman*, especially since neither that effect nor *Hickman* itself were mentioned anywhere in the Advisory Committee’s Note to Rule 503. Nonetheless, neither that effect nor *Hickman* itself were mentioned anywhere in the Advisory Committee’s Note to Rule 503.

In any event, the Court’s 1973 Rules never became effective because they were suspended by Congress for further study.⁴⁴ In the subsequent Congressional enactment of the Rules, the governing language for each specific privilege was replaced with a short statement that privileges “shall be governed by the principles of the common law as they may be

³⁹ 2 CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, FEDERAL EVIDENCE 324 (2d ed. 1994).

⁴⁰ Compare FED. R. EVID. 505(a), reprinted in 56 F.R.D. 183, 245 (Proposed Official Draft 1972), with *Trammel v. United States*, 445 U.S. 40 (1980).

⁴¹ FED. R. EVID. 503, reprinted in 56 F.R.D. 183, 235-36 (Proposed Official Draft 1972).

⁴² 449 U.S. 383 (1981).

⁴³ 449 U.S. at 397.

⁴⁴ See Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1974).

interpreted by the courts of the United States in the light of reason and experience."⁴⁵ That language left *Hickman* as the Court's authoritative statement of the scope of the privilege under the common law.

In the Supreme Court's next discussion of the attorney-client privilege, decided shortly after the adoption of the final version of Rule 501, the Court still described the privilege as protecting only disclosures by clients to their attorneys. The issue in *Fisher v. United States*⁴⁶ was whether the attorney-client privilege protected tax records the client had transferred to the attorney in the course of seeking legal advice.⁴⁷ The Court held that transferring the records to the attorney did not give them any more or less protection from a government summons than if the client had retained them.⁴⁸ The opinion described the privilege in a manner fully consistent with *Hickman*:

Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged The purpose of the privilege is to encourage clients to make full disclosure to their attorneys As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.⁴⁹

The consistent emphasis on protecting the client's disclosures and applying the privilege only where it will protect the client's disclosures does not support an argument that the Court intended to broaden the protection of the attorney-client privilege to include all communications from the attorney to the client. The same emphasis also reaffirms that the entirety of an attorney's file is not necessarily protected by the attorney-client privilege. If the purpose of providing legal services is not a sufficient ground for including documents a lawyer obtained from the lawyer's own client within the privilege, that purpose alone will likewise not be a sufficient ground for including documents obtained from third parties within the privilege.

⁴⁵ FED. R. EVID. 501.

⁴⁶ 425 U.S. 391 (1976).

⁴⁷ *See id.* at 403.

⁴⁸ *See id.* at 396, 402.

⁴⁹ *Id.* at 403.

C. *Adding to the Foundation in Upjohn*

The Supreme Court reaffirmed that *Hickman* still provided a foundation for the scope of the attorney-client privilege when it addressed the privilege in the corporate context in *Upjohn Co. v. United States*.⁵⁰ The most prominent issue in *Upjohn* was whether the attorney-client privilege should include factual information disclosed to the corporate attorney by all employees of the corporate client or just factual information disclosed to the corporate attorney by members of the “control group” for the corporation. The Court’s holding, that the privilege included factual disclosures to the attorney by all employees of the client,⁵¹ resolved the question of discovery for most of the disputed material. The Court, however, also had to consider whether there was any other protection for material that was not covered by the privilege.

One category of other material consisted of factual disclosures to the corporate attorney by former employees of the corporate client about their activities when they had been employed.⁵² The Court declined to decide whether that material was privileged, because the issue had not been addressed by the lower courts. While the Court’s brief footnote⁵³ did not explore the issue, the best explanation assumes the continued validity of the premise of *Hickman*. If a former employee is considered a representative of the corporate client when they discuss what they did while employed, the factual disclosure is privileged. The factual disclosure is not privileged if the former employees are considered to be third party witnesses, which is how the employees of the noncorporate defendant in *Hickman* were viewed.

The second category of other material in *Upjohn* was notes and memoranda that corporate counsel described as containing “what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions.”⁵⁴ The Court concluded that the attorney-client privilege covered material that corporate counsel described as “any notes reflecting responses to interview questions”⁵⁵ by employees of the corporate client, but the Court explained that it was still necessary to consider the work product doctrine because the privilege would not cover “notes and memoranda of interviews [that] go beyond recording responses to his

⁵⁰ 449 U.S. 383 (1981).

⁵¹ *See id.* at 394-95.

⁵² *See id.* at 394 n.3.

⁵³ *See id.* at 397 n.6.

⁵⁴ *Id.* at 400 n.8.

⁵⁵ *Id.* at 397.

questions.”⁵⁶ Again, the distinguishing feature between the material that was privileged and the material that was not privileged was the source of the content of the material. Even though the Court expressed no doubt that the attorney made the notes in order to provide legal services, and expressed no doubt that the notes were confidential, this was not enough to make them privileged. The critical element was the source of the information for the notes, since the notes that needed some protection other than the privilege were the notes that did not record the responses of the corporate employees.

There is some language in *Upjohn* that can be used in support of a broader scope for the attorney-client privilege,⁵⁷ but the context indicates that the Court did not intend to modify the foundation set out in *Hickman*. While the Court noted that the privilege exists to protect both “the giving of professional advice” and “the giving of information to the lawyer,”⁵⁸ the Court did not hold that all fact gathering by a lawyer is covered by the privilege. That statement was made in discussing whether the privilege covered disclosures by all corporate employees or disclosures by just the control group. The Court’s holding was limited to fact gathering from employees of a client.

Similarly, while the Court at one point summarized its holding on the scope of the privilege by broadly describing “communications between an employee and counsel,”⁵⁹ that phrase was used only as the equivalent in the same paragraph for the narrower description of “communications by Upjohn employees to counsel.”⁶⁰ The facts of the case never raised an issue about when a communication from counsel to an employee would be privileged. The actual holding stated only that communications by Upjohn employees to counsel would be privileged, a holding fully consistent with *Hickman*’s premise that communications in the other direction from counsel will not always be privileged.

D. *The Privilege after Swidler & Berlin*

The Court’s most recent opinion on the attorney-client privilege was the well-publicized case, *Swidler & Berlin v. United States*.⁶¹ While the facts of this case did not raise the specific issue of interest here, the Court’s approach reaffirms that the lessons learned from the earlier cases are still

⁵⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981).

⁵⁷ *See, e.g., In re LTV Sec. Litig.*, 89 F.R.D. 595, 601-03 (1981); 1 SCOTT STONE & ROBERT TAYLOR, TESTIMONIAL PRIVILEGES 1-80 n.307 (2d ed. 1995).

⁵⁸ *Upjohn*, 449 U.S. at 390.

⁵⁹ *Id.* at 397.

⁶⁰ *Id.*

⁶¹ 524 U.S. 399 (1998).

correct. The case arose out of the Special Prosecutor's investigation of certain White House actions.⁶² In the course of the investigation a federal grand jury focused on the actions of former Deputy White House Counsel Vincent Foster, who had died nine days after meeting with an attorney to obtain legal representation.⁶³ During the two hours they met, Foster's attorney made three pages of handwritten notes.⁶⁴ When the grand jury issued a subpoena for the notes, the law firm moved to quash it on the grounds of the attorney-client privilege and the work product doctrine.⁶⁵ After examining the notes, the district judge quashed the subpoena.⁶⁶ The court of appeals held that the attorney-client privilege did not always survive the death of the client and that the privilege could be set aside under a balancing test.⁶⁷

The Supreme Court ruled that the notes could be withheld from the grand jury because the attorney-client privilege survived the death of the client.⁶⁸ This holding was based on the unquestioned proposition that the notes, although written by the attorney, would have been privileged if the client still had been alive, because the attorney made them during the client interview and discovery of the notes would have revealed the content of the client's confidential disclosures.⁶⁹ The Court's holding is consistent with *Hickman* and *Upjohn*, even though there was no need to revisit the issues raised in those cases. In addition, the Court's proposition that the "common law rule embodied in the prevailing caselaw"⁷⁰ should not be overturned without a sufficient showing of the wisdom of the change affirms that *Hickman* and *Upjohn* still provide the foundation.

II. THE ATTORNEY-CLIENT PRIVILEGE IN FEDERAL CASELAW

The lower federal courts have generally applied the attorney-client privilege to material within the scope defined by the Supreme Court, but the caselaw must be read with care. Opinions may not distinguish between different ways of phrasing a rule when the facts or the arguments of the parties do not suggest the difference will really matter, so it is of little help to count how many opinions may describe the privilege as protecting a lawyer's advice or a client's disclosures. Just summarizing the cases may

⁶² See *id.* at 401.

⁶³ See *id.* at 401-02.

⁶⁴ See *id.*

⁶⁵ See *id.* at 402.

⁶⁶ See *id.*

⁶⁷ See *Swidler & Berlin*, 524 U.S. at 402; see also *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997).

⁶⁸ See *Swidler & Berlin*, 524 U.S. at 410-11.

⁶⁹ See *id.* at 408.

⁷⁰ *Id.* at 411.

give a false impression that there is more disagreement than actually exists or suggest that an interpretation is supported by more authority than can be actually marshaled. It is important, therefore, to survey the cases in sufficient depth to identify the mainstream body of authority and at least account for the major variations.

A. *The Traditional Scope of the Privilege*

For half a century one of the most influential federal court opinions on this topic has been the district court opinion of Judge Wyzanski in *United States v. United Shoe Machine Corporation*.⁷¹ In this civil antitrust action the government proposed to introduce a number of letters that were legal opinions United Shoe had received from independent lawyers.⁷² While United Shoe had surrendered the letters in response to a subpoena, the parties had stipulated that this would not waive the privilege. Although United Shoe argued that all letters from counsel to their client were privileged, Judge Wyzanski drew a distinction.⁷³ He agreed that all the letters were from lawyers giving legal advice, but that did not mean that all the letters were privileged.⁷⁴ The important distinction was the relationship between the client's privileged disclosures to counsel and the content of each letter, with the privilege protecting letters based on the client's disclosures:

[I]n so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, information furnished by an officer or employee of the defendant in confidence⁷⁵

In contrast, Judge Wyzanski held that a letter would not be privileged if the advice was based on facts the attorney learned from someone other than the client and cited the then recent decision of the Supreme Court in *Hickman*.⁷⁶

Thus, for example, there is no privilege for so much of a lawyer's letter, report, or opinion as relates to a fact gleaned from a witness, . . . or a person with whom defendant has business relations, . . . or a public document such as a patent . . . or a judicial opinion.⁷⁷

Judge Wyzanski's opinion was rather brief, but in succeeding decades

⁷¹ 89 F. Supp. 357 (D. Mass. 1950).

⁷² *See id.* at 359.

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *United Shoe v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

his general outline of the attorney-client privilege became a “much quoted formulation”⁷⁸ and his exclusion from the privilege of documents that did not reveal the client’s disclosures was followed in many opinions. For example, the Second Circuit relied on *United Shoe* in concluding that the privilege “protects only those papers prepared by the client for the purpose of confidential communication to the attorney or by the attorney to record confidential communications,”⁷⁹ and that “a communication from an attorney is not privileged unless it has the effect of revealing a confidential communication from the client to the attorney.”⁸⁰ District judges, likewise, relied on *United Shoe* to conclude that the privilege “extends to the attorney’s legal advice and opinions which encompass the thoughts and confidences of the client,”⁸¹ but that it “does not cover an attorney’s communications . . . which are based upon conversations with third parties”⁸² and “does not extend to opinions of counsel which are unrelated to any [confidential] communication by the client.”⁸³

As other courts applied and rephrased the *United Shoe* distinctions or applied them to other questions, there came opinions that described the privilege more broadly as covering all confidential communications from a lawyer to a client. Whether the scope of the privilege was this extensive was discussed at length in two mid-1970s district court opinions. In *United States v. IBM*,⁸⁴ Chief Judge Edelstein began with an analysis of *United Shoe* and concluded:

[T]he focus of the privilege must be on protecting confidential information revealed to the lawyer by the client And in resolving the question of the extent to which the lawyer’s communications to the client are privileged, the courts have focused on the need to protect the confidentiality of what the client revealed to the lawyer.

. . . .

. . . IBM has cited a series of cases which assertedly stand for the proposition that all communications made by the attorney to the client are privileged. However, a careful reading of these cases suggests that any more expansive protection is based on the desire⁸⁵ to protect confidential communications made by the client to the lawyer.

⁷⁸ Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962).

⁷⁹ *Id.* at 639.

⁸⁰ United States v. Silverman, 430 F.2d 106, 122 (2d Cir. 1970).

⁸¹ Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974).

⁸² Foley v. Vanderbilt, 65 F.R.D. 523, 526 (S.D.N.Y. 1974).

⁸³ Congoleum Indus. v. GAF Corp., 49 F.R.D. 82, 86 (E.D. Pa. 1969).

⁸⁴ 66 F.R.D. 206 (S.D.N.Y. 1974).

⁸⁵ *Id.* at 211-12.

In *SCM Corp. v. Xerox Corp.*,⁸⁶ then-District Judge Newman framed one issue as whether “the privilege protects all advice from attorney to client, or only advice that reveals (by adoption or implication) a fact communicated in confidence by the client to the attorney.”⁸⁷ Judge Newman concluded that the privilege category did not include all advice from counsel, because the caselaw from *United Shoe* to *IBM* that had applied the traditional scope of the privilege had not been superseded by the smaller number of cases that suggested the privilege could cover all legal advice.⁸⁸ Judge Newman did acknowledge the argument that the proposed Federal Rules of Evidence would have protected all communications from the attorney, but did not find the argument persuasive because the Advisory Committee’s Note neither mentioned the issue nor explained why the proposed rule adopted the broader position.⁸⁹ Judge Newman concluded there was “no reason to broaden the privilege beyond the narrow standard as set forth in *United Shoe*.”⁹⁰

Judge Newman also considered the related issue of whether the privilege protected the memoranda in counsel’s files that had not been sent to the client. He applied both *Hickman* and *United Shoe* to hold that the memoranda would be privileged “if they reveal information supplied in confidence by the client” but that memoranda that did not do so would not be protected by the privilege.⁹¹

In the following years the D.C. Circuit generated much of the caselaw because the scope of the attorney-client privilege was often an issue in cases in which an agency asserted the privilege as a ground for resisting demands for documents under the Freedom of Information Act.⁹² In the first case in this series, *Mead Data Central, Inc. v. United States Department of the Air Force*,⁹³ the issue was whether the Air Force had to disclose documents that dealt with negotiations between the Air Force and West Publishing over the use of the copyrighted West key number system.⁹⁴ Some of the documents were legal opinions from Air Force attorneys that provided advice about both the law and possible courses of action. The D.C. Circuit agreed with the district court that privileged material could be withheld from disclosure but disagreed with the lower court’s conclusion that the privilege covered all confidential

⁸⁶ 70 F.R.D. 508 (D. Conn. 1976).

⁸⁷ *Id.* at 520.

⁸⁸ *See id.* at 520-22.

⁸⁹ *See id.* at 522.

⁹⁰ *Id.*

⁹¹ *Id.* at 523.

⁹² 5 U.S.C. § 552 (1996).

⁹³ 566 F.2d 242 (D.C. Cir. 1977).

⁹⁴ *See id.* at 247-48.

communications between attorney and client.⁹⁵ The court stressed the importance of identifying the source of the information in the lawyer's opinion letter by noting that:

[i]n the federal courts the attorney-client privilege does extend to a confidential communication from an attorney to a client, but only if that communication is based on confidential information provided by the client.⁹⁶

In subsequent Freedom of Information Act cases, the D.C. Circuit adhered to the holding in *Mead Data* that the privilege applies to letters from the attorney to the client only if the attorney's letter is based on confidential information provided by the client.⁹⁷ The D.C. Circuit continued to build on that foundation when it applied the same rule on the scope of the attorney-client privilege to criminal investigations in which witnesses resisted grand jury demands for documents:

Communications from attorney to client are shielded if they rest on confidential information obtained from the client. Correlatively, "when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged."⁹⁸

Discovery disputes about the scope of the attorney-client privilege still continue to produce a solid body of current caselaw from federal appellate courts and federal trial courts in which the opinions start with the proposition that communications from an attorney to a client are protected by the attorney-client privilege only to the extent that they reveal a client's confidential communications.⁹⁹ As the authority cited in support of this proposition is traced back, sometimes in several steps through the caselaw described above, it is clear that the foundation is still *Hickman* and the Supreme Court's definition of the scope of the attorney-client privilege. The next questions are why there is a body of federal caselaw that seems to suggest the privilege is broader and whether the privilege should be broader than the traditional scope.

⁹⁵ *See id.* at 248.

⁹⁶ *Id.* at 254.

⁹⁷ *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862-64 (D.C. Cir. 1980); *Brinton v. Dep't of State*, 636 F.2d 600, 603-04 (D.C. Cir. 1980).

⁹⁸ *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984).

⁹⁹ *See, e.g., United States v. Under Seal*, 748 F.2d 871, 874 (4th Cir. 1984); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1995 WL 663684, at *3 (N.D. Ill. Nov. 6, 1995); *In re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 518 (N.D. Ill. 1990).

B. Indicia of a Broader Privilege in Federal Court

The federal court opinions that seem to suggest a broader scope for the attorney-client privilege can be sorted into at least three major categories, with each category defined by the reason for rejecting the opinion as persuasive authority on the scope of the privilege under federal law. One category, which might be labeled “dicta,” contains cases in which a court made a generalized statement that the privilege includes legal advice but did not focus on the specific question of interest here.¹⁰⁰ A second category, which might be labeled “unsupported,” contains cases in which the conclusion depends on a combination of misinterpretation of Supreme Court opinions and failure to recognize the applicability of those opinions.¹⁰¹ A third category, which might be labeled “diversity,” contains cases that are applying the privilege law of a state in a diversity case as required by Federal Rule 501 and, therefore, do not provide guidance on the scope of the federal privilege.¹⁰²

An important example of the first category is *United States v. Amerada Hess Corp.*,¹⁰³ a Third Circuit opinion from 1980 that seems to suggest that the privilege should cover all advice from counsel to client, even if the advice does not reveal any confidential disclosures made by the client. The issue arose when Amerada resisted an Internal Revenue Service summons that was part of an investigation of possible bribes to foreign officials and the way those bribes were treated on tax returns.¹⁰⁴ Amerada had ordered an internal investigation by a committee of four outside directors, with outside counsel interviewing fifty officers and employees in order to obtain information for the committee.¹⁰⁵ Amerada had turned over the committee report, but refused to turn over the report by counsel to the committee or the list of persons the lawyers had interviewed.¹⁰⁶ The IRS did not seek the lawyer’s report, but it did seek the list of fifty interviewees.¹⁰⁷ Amerada’s contention that the list was protected by the

¹⁰⁰ See, e.g., *United States v. Neal*, 27 F.3d 1035, 1048 (5th Cir. 1994); *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992); *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990); *Wells v. Rushing*, 755 F.2d 376, 379 n.2 (5th Cir. 1985); *United States v. Amerada Hess Corp.*, 619 F.2d 980, 985-87 (3d Cir. 1980).

¹⁰¹ See, e.g., *In re LTV Sec. Litig.*, 89 F.R.D. 595, 601-03 (N.D. Tex. 1981).

¹⁰² See, e.g., *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1368-69 (10th Cir. 1997); *In re Ford Motor Co.*, 110 F.3d 954, 965 (3d Cir. 1997); *Nat’l Educ. Training Group, Inc. v. Skillsoft Corp.*, No. M8-85 (WHP), 1999 WL 378337, at *2 (S.D.N.Y. June 10, 1999); *Robertson v. Yamaha Motor Corp.*, 143 F.R.D. 194, 197 (S.D. Ill. 1992).

¹⁰³ 619 F.2d 980 (3d Cir. 1980).

¹⁰⁴ See *id.* at 982.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 982-83.

¹⁰⁷ See *id.* at 983.

attorney-client privilege was rejected by the district court on two grounds.¹⁰⁸ First, the court determined the privilege did not apply to communications from an attorney to a client.¹⁰⁹ Second, the court decided, even if the privilege did apply, the list was not privileged.¹¹⁰

The Third Circuit rejected the trial court's first ground, because it was clearly wrong to exclude all legal advice or all communications by counsel to client from the protection of the privilege.¹¹¹ The circuit court still affirmed the trial court because the list of witnesses was not legal advice at all nor did it disclose the contents of a confidential communication from the client to its attorneys.¹¹² The opinion must be read carefully because, at the time, the Third Circuit was applying its "control group" test for determining which disclosures by corporate employees were covered by the privilege. In its holding on the scope of the privilege the Third Circuit cited *Hickman* and drew the distinction that is still critical between documents that might reveal the attorney's investigation and documents that might reveal a client's confidential disclosures to the attorney.¹¹³ While this pre-*Upjohn* opinion said that the list did not reveal what anyone "in the control group" for Amerada told counsel about any potential witness, the list itself is described as a list of names which did not reveal what anyone at Amerada had told counsel. The court's holding that an attorney's investigative work is not within the privilege is a direct application of *Hickman*.

The *Amerada* opinion, on the other hand, also seems to support the position that the privilege protects all confidential communications in both directions between client and counsel:

Two reasons have been advanced in support of the two-way application of the privilege. The first is the necessity of preventing the use of an attorney's advice to support inferences as to the content of confidential communications by the client to the attorney [8 Wigmore on Evidence § 2320 (McNaughton Rev. 1961)]. The second is that, independent of the content of any client communication, legal advice given to the client should remain confidential [*United States v. Bartone*].¹¹⁴

This quotation is not a particularly strong precedent in support of applying the privilege to communications in both directions. Besides being dictum that does not support the actual holding, it is expressly only a

¹⁰⁸ See *id.* at 984.

¹⁰⁹ See *United States v. Amerada Hess Corp.*, 619 F.2d 980, 985 (3d Cir. 1980).

¹¹⁰ See *supra* note 20 and accompanying text.

¹¹¹ See *id.* at 986.

¹¹² See *id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

description of two reasons that have been “advanced” and not a declaration that the second reason is sufficient to support the asserted proposition. The quotation from Wigmore was examined earlier.¹¹⁵ The citation to *Bartone* adds almost nothing because the issue was never raised in that case and it is discussed there only in the most oblique way.¹¹⁶ While the listing of the two reasons provides a useful quotation or citation for the proposition that the federal courts apply the broader scope of the privilege, the opinion itself points to no additional supporting authority. For example, one state court opinion suggested that the Third Circuit’s opinion shows that “[n]ot all decisions of the Federal Courts have followed” *Hickman* but did not examine whether that was the actual holding of *Amerada*.¹¹⁷

An example of both the first and second categories, because it combines dictum and unsupported assertion, is the district court opinion in the case of *In re LTV Securities Litigation*.¹¹⁸ In this case the discovery dispute concerned documents generated by outside counsel in the course of investigating accounting problems at LTV; LTV resisted disclosing the documents to stockholders who had brought a securities fraud class action.¹¹⁹ The court describes the documents as reports and communications from counsel to senior management at LTV that disclosed information outside counsel had learned from interviewing LTV employees.¹²⁰ As the court itself noted, *Upjohn* had held that all factual disclosures from LTV employees to counsel, not just factual disclosures by the control group, were covered by the privilege.¹²¹ Since those disclosures were apparently what the plaintiffs were demanding in discovery, and would be covered by the traditional scope of the privilege, there was no need to consider whether the privilege would have a broader scope in a different setting.

Nevertheless, the court discussed whether there is a difference in the application of the privilege for communications from the attorney to the client.¹²² After noting several of the decisions that had developed the traditional rule, the court declared that the rule fails to protect client disclosures adequately and that it does not recognize the fact-gathering role of the attorney.¹²³ The court then asserted that the federal courts do not follow the traditional rule:

¹¹⁵ *See id.*

¹¹⁶ *See* United States v. Bartone, 400 F.2d 459, 461 (6th Cir. 1968).

¹¹⁷ Ramada Inns, Inc. v. Dow Jones & Co., 523 A.2d 968, 970 (Del. Super. Ct. 1986).

¹¹⁸ 89 F.R.D. 595 (N.D. Tex. 1981).

¹¹⁹ *See id.* at 598.

¹²⁰ *See id.* at 600-01.

¹²¹ *See id.* at 602.

¹²² *See id.* at 602-03.

¹²³ *See id.*

A broader rule prevails in the federal courts, a rule that protects from forced disclosure any communication from an attorney to his client when made in the course of giving legal advice.¹²⁴

The authorities cited in support of this conclusion do not include *Hickman* nor the caselaw that applied *Hickman*. Instead, the policy grounds rested on then the recent decision in *Upjohn* and its emphasis on the importance of factual investigation to providing legal advice:

[A]n attorney can be asked directly about the substance of unprivileged communications received from third parties and cannot resist disclosure on grounds that such information was later conveyed to the client unless, of course, this information was obtained by the attorney as part of an investigation necessary to give legal advice. To the extent prior decisions have denied privilege to such data they must give way to *Upjohn*. The linchpin of privilege then is not necessarily whether the facts were relayed from attorney to client because they can be privileged under *Upjohn* even if they were not. Instead, the focal point is the purpose of the lawyer in gathering the data.¹²⁵

The fault in this analysis is the assertion that *Upjohn* replaced *Hickman*'s test of the source of the information in counsel's communication with a test based on the purpose for which counsel obtained that information. *Upjohn* assumed only that the purpose was an essential element, since the privilege does not cover exclusively nonlegal or business advice; *Upjohn* did not treat that purpose as a sufficient element.¹²⁶ In retrospect it is clear that on the specific facts of *In re LTV Securities* the Court's discussion is dictum because the source for all the information is described as being various employees of LTV. Since the reports by counsel to LTV were setting out privileged information learned in confidential disclosures from LTV's employees, it would have been protected by the traditional scope of the privilege. Similarly, *Upjohn* emphasized that factual disclosures to counsel could be covered by the privilege because fact-gathering was an important part of a lawyer's function, but it did not hold that all fact-gathering by counsel was protected by the privilege. If it had, there would have been no reason in Part III of *Upjohn* to discuss the lesser protection of work product for such non-privileged information.

An example of all three categories, because it includes dictum, unsupported assertion, and state evidence law, is provided by a recent opinion from the Tenth Circuit in *Sprague v. Thorn Americas, Inc.*¹²⁷ In

¹²⁴ *In re LTV Sec. Litig.*, 89 F.R.D. 595, 602-03 (N.D. Tex. 1981).

¹²⁵ *Id.* at 603.

¹²⁶ See *supra* notes 57-60 and accompanying text.

¹²⁷ 129 F.3d 1355 (10th Cir. 1997).

this employment discrimination case the former employee sought a memorandum that had been prepared by a staff attorney for the employer and sent to senior management. The attorney had mentioned the memorandum to another employee, but the trial court did not order the employer to disclose it. On appeal the court held that it was protected from discovery by the attorney-client privilege.¹²⁸ Once again this result might well be supported by a straightforward application of *Upjohn*. From the facts mentioned in the opinion it appears that the staff attorney based his advice on what he was told by corporate employees and what he learned from corporate personnel data.¹²⁹ Since the staff attorney was responsible for the human resources department, reading the advice would necessarily disclose what the lawyer learned in confidential disclosures protected by *Upjohn*.

Again the court did not stop with *Upjohn*, but instead offered its own view on whether the privilege protects communications from counsel that do not reveal the client's confidential communications. With citations to *Amerada* and *In re LTV Securities*, the court concluded that the Tenth Circuit had adopted the broader rule two decades earlier, even though the earlier case had actually done no more than reject the argument that the privilege did not cover any communication from an attorney.¹³⁰ Instead of examining the issue in any greater depth this time, the court turned for further support to Kansas law, which the court interpreted as following the broader rule.¹³¹ Since the case involved both claims under federal law and Kansas law the case presented the complicated issue of how to apply Federal Rule of Evidence 501 when the same evidence may be privileged under one body of law but not privileged under the other.¹³² Rather than address that issue, the court concluded that the law was the same and relied heavily on Kansas law.¹³³

There is a substantial body of similar federal caselaw on the scope of the attorney-client privilege that is actually based on state law.¹³⁴ Sometimes the court is explicit that it is following state law, but that fact is not always apparent. As a result, it is easy to overlook the issue and assume that an opinion in a diversity case is persuasive on the scope of the

¹²⁸ *See id.* at 1369-71.

¹²⁹ *See id.* at 1369-70.

¹³⁰ *See id.* at 1370-71.

¹³¹ *See id.*

¹³² *See id.* at 1369.

¹³³ *See Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1369 (10th Cir. 1997).

¹³⁴ *See, e.g.*, *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481 (D. Kan. 1997); *Loftis v. Amica Mut. Ins. Co.*, 175 F.R.D. 5 (D. Conn. 1997); *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994); *Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439 (S.D.N.Y. 1990).

privilege in federal court, when Federal Rule of Evidence 501 instead commands the federal court to apply state law.¹³⁵ This is an issue on which the states may follow a different rule, and several important states clearly do that.¹³⁶ The variation among the states can provide relevant evidence in any search for the best rule, but it is still important to differentiate between diversity cases and those cases that establish the federal law of the privilege.

There is no need to catalog every federal court opinion on this issue. It is sufficient to note the need to read the federal caselaw with care when addressing the specific question of the scope of the privilege under federal law. An attorney seeking to protect transaction documents under the attorney-client privilege must temper the strongly held hope that there is a solid body of caselaw in support of the broader scope of the privilege with the disappointing reality that the authority of the precedent for the broader scope will evaporate upon careful analysis.

III. THE POLICY ARGUMENTS ON THE SCOPE OF THE PRIVILEGE

The variety in the caselaw raises important questions for both attorneys and federal judges. If the traditional scope still defines the federal privilege, lawyers should not assert the privilege as a basis for withholding documents that do not reveal a client's confidential disclosures. When lawyers do withhold documents from discovery and invoke the privilege as the basis for doing so, they should assert that the document reveals a client's confidential disclosures and be prepared to support that assertion. Federal judges applying the privilege within its traditional scope should continue to reject claims of privilege for documents that are described only as "providing legal services" or "legal advice to client," because those labels are not an assertion that a document will reveal a client's confidential disclosures. On the other hand, if the federal rule includes all communications from a lawyer to a client, then those labels will be sufficient to support the privilege and federal judges should sustain the claim of privilege. By themselves the lower court opinions cited in support of the broader scope seem insufficient to outweigh the caselaw from the Supreme Court and other federal courts that supports the traditional scope of the privilege, particularly since the opinions do not examine why the federal courts should abandon the traditional scope. So why is there an issue?

On this topic the secondary literature tends to support a broader scope for the privilege under federal law even though the federal court cases do

¹³⁵ See FED. R. EVID. 501.

¹³⁶ See *infra* notes 166-69 and accompanying text.

not, and does so in a way that may provide lawyers or judges with less guidance than they have come to expect. Many authors give this topic little attention at all, and for lawyers in particular a brief discussion can easily be misleading. Lawyers have an ethical obligation to preserve a client's confidences and secrets.¹³⁷ Even though the ethical duty is broader, the privilege can readily be invoked to protect all documents found in a lawyer's files from casual or unauthorized inquiries. A proper discovery request can be resisted only on a ground such as privilege, and at that point the lawyer resisting discovery may turn to the treatises for authority to support an instinctive response to withhold the document. For that audience a description of the caselaw can make the broader rule appear to be more accepted than it is, and a description of lower court opinions alone can make them seem more authoritative than they are. As a result the lawyers who rely on the literature for a short summary of the law may be unprepared to assert the privilege correctly and will find they must eventually produce documents that do not fall within the traditional scope of the privilege.

In addition, both lawyers and judges will find limited help for arguing or deciding whether the privilege should continue to be defined by its traditional scope or expanded to provide broader protection. While the policy prescriptions that are offered by many commentators clearly prefer less discovery of a lawyer's files and more protection for documents such as transaction work product, the reasons have not been examined in any depth in the literature. This section will first review the discussions in the literature and then examine the arguments the commentators present for expanding the attorney-client privilege to protect documents that do not reveal a client's confidential communications.

A. *How the Treatises Describe the Caselaw*

The new editors of *Weinstein's Federal Evidence* state in a heading that the "Privilege Protects Both Communications From Client to Counsel and Communications From Counsel to Client."¹³⁸ That description of the law will appear supportive to a reader trying to withhold a document such as a letter from counsel to the client, especially if the reader gives less attention to the end of the first sentence of the text which declares that this is true if the requirements of the privilege are met.¹³⁹ That misreading is all too likely because there is no immediate reminder that those requirements exclude from the privilege "information obtained by the attorney from third

¹³⁷ See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY EC 4-2, 4-4, DR 4-101 (1981).

¹³⁸ 3 WEINSTEIN & BERGER, *supra* note 38, § 503.14[2].

¹³⁹ See *id.*

parties . . . or from public documents or other public sources,” an explanation that comes three pages later.¹⁴⁰ Instead, the footnote to the main statement summarizes several lower court opinions, including the opinions in *Amerada* and *In re LTV Securities* that are so frequently cited in support of the broader scope for the privilege.¹⁴¹ There is no caution that the language quoted from *Amerada* may be no more than dictum, no explanation of why the district court opinion in *In re LTV Securities* would be more authoritative than the opinions of the Supreme Court, and no mention at all of *Hickman* and *Upjohn*. While the footnote also cites and summarizes some of the cases that applied the traditional scope of the privilege, the reader is given no warning that the cited cases are inconsistent and the treatise offers no explanation for resolving the inconsistency.

Mueller and Kirkpatrick’s *Federal Evidence*¹⁴² discusses the topic with similar brevity, but with more than description. These authors briefly set out the traditional scope and the broader view, and declare the “trend of modern authority is toward recognition of a two-way privilege covering all confidential communications between the attorney and the client in the course of legal representation.”¹⁴³ Their declaration of a trend is not well documented. The first court of appeals opinion they cite is from the District of Columbia Circuit, which still applies the traditional scope of the privilege and does not protect all communications.¹⁴⁴ The second court of appeals opinion they cite is actually only dictum on this issue, and a reader consulting the opinion itself will find that the snippet quoted in the treatise does not accurately summarize the full discussion.¹⁴⁵ The authors also cite, as a comparison, a quotation from Part I of the *Upjohn* opinion about the purpose of the privilege to encourage communication between attorneys and clients.¹⁴⁶ That is a misleading quotation in this context because *Upjohn* did not hold that this purpose made all communications from counsel privileged; Part II of *Upjohn* made explicit that the Court did not accept what these commentators describe as the trend.¹⁴⁷ They also declare that the proposed Federal Rules adopted the broader view¹⁴⁸ but cite no

¹⁴⁰ *Id.* § 503.14[4][b].

¹⁴¹ *See id.* § 503.14[2] n.4.

¹⁴² MUELLER & KIRKPATRICK, *supra* note 39.

¹⁴³ *Id.* at 323-24.

¹⁴⁴ *See id.* at 324 n.26 (citing *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862-64 (D.C. Cir. 1980)).

¹⁴⁵ *See id.* at 324 n.26 (citing *United States v. Ramirez*, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979)).

¹⁴⁶ *See id.* at 324 n.26 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

¹⁴⁷ *See supra* notes 57-58 and accompanying text.

¹⁴⁸ *See* MUELLER & KIRKPATRICK, *supra* note 39, at 324.

authority for that statement and do not discuss the cases that have questioned that position. Finally, they list two policy arguments: A broader rule will be more efficient because there will not be factual disputes, and it will allow attorneys to “speak more freely with their clients without concern” of compelled disclosure.¹⁴⁹ They present no further support for these policy arguments.

The commentary in Wright and Graham’s volume on the Federal Rules of Evidence¹⁵⁰ is quite critical of the other treatises. It describes *Weinstein’s Federal Evidence* as “non-committal” with footnotes that “give a quite distorted view of the federal caselaw”¹⁵¹ and describes the first edition of Mueller and Kirkpatrick’s *Federal Evidence* as “an equally skewed presentation of the precedents.”¹⁵² A similar criticism might be directed to this treatise as well, since it cites no authority in asserting that the “[r]ejected Rules [made] all attorney communications privileged.”¹⁵³ and does not document its conclusion that the Advisory Committee proposal was “rejecting narrower formulations of the privilege.”¹⁵⁴ The treatise does arrange the various versions of the scope of the privilege for an attorney’s communications to the client in order: Those that reveal the client’s confidences, those just based on the client’s confidences, any that contain a lawyer’s advice, and finally, any legal communication from a lawyer.¹⁵⁵ While many of the usual courts of appeal cases are cited, the issue is not examined, there is no attempt to reconcile the different cases, and the Supreme Court goes unmentioned. Instead, the reader is told that California follows the broader view. There is a brief mention of policy arguments suggesting that the traditional scope may require nice distinctions and factual inquiries, while the broad rule may not be necessary to an effective privilege, but there is no effort to defend either. The lawyer seeking guidance on the federal law is left with little more than commiseration and good wishes:

The choice is by no means clear cut and decisions may turn on the degree to which a particular court views the privilege as a benefit or a burden to the legal system.¹⁵⁶

Wright and Graham’s discussion points out how the commentary in *McCormick on Evidence* has changed over the years. The original 1954

¹⁴⁹ *Id.*

¹⁵⁰ See WRIGHT & GRAHAM, *supra* note 12, at 450-52.

¹⁵¹ *Id.* at 451 n.35.

¹⁵² *Id.*

¹⁵³ *Id.* at 451.

¹⁵⁴ *Id.*

¹⁵⁵ See *id.* at 451-52.

¹⁵⁶ WRIGHT & GRAHAM, *supra* note 12, at 454.

edition endorsed the traditional scope of the privilege, with no more than a grudging concession that a communication from counsel might also be protected if it would reveal the client's own communication or be an implied communication of the client, and expressed hostility to extending the privilege to other communications.¹⁵⁷ In 1972 the revisers of *McCormick's Handbook of the Law of Evidence* softened that position with a caution that "the matter is not free from difficulty,"¹⁵⁸ and in the later editions there was further change. *McCormick on Evidence* now declares that the "simpler and preferable rule, adopted by . . . the better reasoned cases, extends the protection of the privilege also to communications by the lawyer to the client."¹⁵⁹ The text neither expressly includes nor excludes the federal law of the privilege within this conclusion, but the footnote presents the federal cases of *Amerada* and *In re LTV Securities* as the primary authority.¹⁶⁰

The full meaning of the advice in the 1999 version of *McCormick on Evidence* is unclear, because the following paragraph declares that the privilege should not include "information obtained from sources other than the client,"¹⁶¹ but neither that paragraph nor the preceding one discusses which rule should be paramount if both situations exist. Transaction work product often involves a confidential document in which the attorney told the client what counsel learned from a third party or gave advice to the client based on information counsel learned from a third party on a specific issue. The reader may well interpret the discussion as meaning that if both situations exist, the transaction work product should be covered by the privilege, because that is how the text summarizes what it labels the "better reasoned" cases. The only federal cases cited are *Amerada* and *In re LTV Securities*, but the discussion provides no explanation of why these two cases should be considered better reasoned than all the cases that support the traditional scope originally endorsed by Dean McCormick, nor any mention of the cases that do support his original position. The only other reason for changing Dean McCormick's endorsement of the traditional scope is that the broader rule is "simpler."¹⁶² Whether it is simpler is not examined in the current edition, but it will be considered here shortly.

The lawyer or judge who looks beyond these treatises will find authors who provide other surveys, both longer and shorter, of the caselaw

¹⁵⁷ See CHARLES MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 186-87 (1954).

¹⁵⁸ MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 183 (Edward W. Cleary 2d ed. 1972).

¹⁵⁹ 1 MCCORMICK ON EVIDENCE 357 (John W. Strong 5th ed. 1999). See also 1 MCCORMICK ON EVIDENCE 327 (John W. Strong 4th ed. 1992).

¹⁶⁰ See MCCORMICK ON EVIDENCE 357 (John W. Strong 5th ed. 1999).

¹⁶¹ *Id.*

¹⁶² See *id.*

from the lower federal courts¹⁶³ or practicing lawyers who present arguments for protecting their files from discovery.¹⁶⁴ While this commentary provides more material to read, it may still be more misleading than helpful. Creating the impression that there are equally authoritative cases supporting either the traditional scope or a broader scope does not help a lawyer identify the correct rule. Listing various cases without trying to reconcile and explain them will leave lawyers wondering how to support the privilege if they do invoke it to protect transaction documents. Similarly, noting an array of decisions is not enough to prepare a judge to interpret the precedent correctly. By ignoring the Supreme Court's decisions and generally declining to examine the debate over the scope of the privilege, these authors suggest that this is a topic the Supreme Court has left to the lower courts without guidance. The issue that is left virtually unexplored is whether there is any authority or any compelling reasons for the lower federal courts to abandon the traditional scope of the privilege that was endorsed by the Supreme Court in *Hickman* and *Upjohn*.

The lawyer or judge who takes Wright and Graham's endorsement of the California position¹⁶⁵ as a suggestion to seek more guidance from state law will be unlikely to find much help in evaluating the policy arguments. The state law that applies the broader scope of the privilege is likely to depend on specific statutory language. For example, in California a confidential communication is defined as including "a legal opinion formed and the advice given by the lawyer."¹⁶⁶ That language was proposed by the California Law Revision Commission three decades ago with this comment:

The lawyer-client, physician-patient, and psychotherapist-patient privileges all protect "information transmitted" between the parties In addition, the physician-patient and psycho-therapist-patient privileges protect "information obtained by an examination of the patient." It has been suggested that the quoted language [of the present statutes] may not protect a professional opinion or diagnosis that has been formed on the basis of the protected communications. If these sections were construed to leave such opinions and diagnoses

¹⁶³ See EPSTEIN, *supra* note 11, at 40-46; MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES 2-67 to 2-75 (1997); PAUL RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 35-67 (1999); 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 713 (7th ed. 1998).

¹⁶⁴ See generally Gerald Sobel, *The Confidential Communication Element of the Attorney-Client Privilege*, 4 CARDOZO L. REV. 649 (1983).

¹⁶⁵ See WRIGHT & GRAHAM, *supra* note 12, at 452-53.

¹⁶⁶ CAL. EVID. CODE § 952.

unprotected, the privileges would be virtually destroyed. Therefore, [the three statutes] should be amended to make it clear that such opinions and diagnoses are protected by these privileges.¹⁶⁷

Because the comment lumps all three privileges together for a common solution of the potential problem it describes, it is hard to view the California position on this issue as being based on any unique feature of the relationship between lawyer and client. It also creates a remedy that exceeds the stated rationale by protecting all opinions of the three kinds of professionals, because some of those opinions might not be based on a protected communication. In a similar fashion, the statute in Washington includes the “advice given” by an attorney as within the privilege,¹⁶⁸ but there is little supporting analysis of any policy in the caselaw. A Tenth Circuit opinion recognized that Kansas law provides that a privileged communication includes “advice given by the lawyer” and quickly asserted that the circuit followed the same rule without attempting to fully account for all federal caselaw.¹⁶⁹ Even if the opinion was correct about Kansas law, it did not present any arguments that lawyers could use to convince other federal judges about the proper scope of the privilege under federal law.

B. Assessing the Arguments for the Broader Scope

The arguments for applying the broader scope of the privilege have been sketched so briefly in the literature that they provide little except assertions. Because the caselaw offers even less analysis, these arguments should be canvassed to see how much support they might provide. The first is a policy argument: That a broader scope furthers the objective of the privilege by encouraging the client to seek advice from counsel and to inform counsel of all relevant information.¹⁷⁰ This argument suggests that counsel should be able to assure the client that all disclosures are privileged and that they will be protected from being revealed even indirectly. The second is an efficiency argument: That a broader scope will reduce the number or complexity of discovery disputes over the issue.¹⁷¹ The third is an argument about effect: That a broader scope will make so little difference in what is discoverable that there is no reason to jeopardize

¹⁶⁷ CAL. L. REVISION COMM'N, RECOMMENDATION RELATING TO THE EVIDENCE CODE 110 (1966).

¹⁶⁸ WASH. REV. CODE ANN. § 5.60.060(2)(a) (West Cum. Supp. 1999).

¹⁶⁹ *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1370-71 (10th Cir. 1997).

¹⁷⁰ *See, e.g.*, EPSTEIN, *supra* note 11, at 44; WRIGHT & GRAHAM, *supra* note 12, at 383; RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 14, at 351-52.

¹⁷¹ *See, e.g.*, MUELLER & KIRKPATRICK, *supra* note 39, at 324; RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 14, at 351-52; *see also* WRIGHT & GRAHAM, *supra* note 12, at 453.

client confidence in the protection afforded by the privilege and no reason to waste judicial resources on parsing the distinction between the client's disclosures and the attorney's advice.¹⁷² While each argument might support limits on routine discovery of some documents on specific facts, the primary and more difficult question is whether they support the proposition that the scope of the privilege should include all communications from a lawyer to a client.

The first argument starts with the propositions that a lawyer should be able to assure the client that the client's disclosures are protected and that the lack of assurances will affect a lawyer's ability to provide legal services. The propositions, however, seem to be employed for a broader conclusion. Even under the traditional scope of the privilege, the lawyer can assure the client that most of their exchanges will be protected, because the privilege clearly protects both the client's confidential disclosures and any advice or response by the lawyer if it directly or indirectly reveals the client's disclosures. If the lawyer does not perform any factual investigation of outside sources, then any advice or response based on the client's description of the facts will be privileged, because it would reveal directly or indirectly what the client disclosed to the lawyer. A lawyer may have to invest extra time and care to separate advice based only on the client's disclosures and reports of counsel's factual investigations, but a lawyer who assures the client that this will be done can likewise guarantee confidentiality for the client's factual disclosures under the traditional scope of the privilege.

The first argument also depends on an implicit assumption that this issue about the scope of the privilege is the only exception that would prevent a lawyer from providing solid assurance about the scope of the privilege. If the lawyer will become actively involved in setting up the transaction with the client, the issue of whether the lawyer's legal advice is protected by the privilege is not always going to be the only question, or even the most important question, about the scope of the privilege. Under federal law the privilege at most protects legal advice and does not protect business advice or nonlegal services that are wholly separable from the legal advice.¹⁷³ As a result, there is also a risk that a document in the transaction file will be considered business advice and not protected by the attorney-client privilege, or that an inquiry from the client will be found to be a request for business services and not a privileged communication seeking legal advice. Even if assurances to the client about the privilege are important, broadening the scope of the privilege to include the lawyer's

¹⁷² See, e.g., RESTATEMENT OF THE LAW GOVERNING LAWYERS, *supra* note 14, at 360; see also MCCORMICK ON EVIDENCE, *supra* note 160, at 356-57.

¹⁷³ See generally 3 WEINSTEIN & BERGER, *supra* note 38, § 503.13.

non-litigation work product does not mean that the lawyer will be able to assure the client of complete confidentiality under the privilege.

The second argument also depends on an implicit assumption, in this case that there is a version of the privilege that will require significantly less judicial fact-finding. Although it will often seem that a different rule could be more easily applied in the case in which the dispute has arisen, changing the rule will still require judicial fact-finding in cases affected by the new rule. A rule that avoids the need for any fact-finding might seem reasonably fair if it could be applied to facts that cannot easily be altered by the parties, but that is not the setting in which this privilege rule is applied. Attorneys will know the parameters of the rule and will have strong incentives to create facts that maximize the protection provided by the privilege.¹⁷⁴ A rule that protected every document in a lawyer's file could be easily applied, but it would make the lawyer's file a sanctuary for third party documents and non-legal business advice. A rule that protected every document that included any legal advice could also be easily applied, but it would also protect summaries of third party information. Unless counsel's own conduct or assertions are going to be considered sufficient to establish the scope of the privilege, there will always be factual disputes at the margin of any rule.

The third argument, that the broader scope of the privilege will not have much effect, is most powerful under an assumption that lawyers are not very involved in factual investigations of transactions for their clients. It loses its power if the privilege issue concerns documents in which a lawyer did report on factual investigations. The lawyer's report to the client about public information or third person statements may be very significant, even if it does not indirectly reveal anything about the client's own disclosures to counsel. Although in many cases the information in the lawyer's report may also be obtainable directly from the client by deposition or document discovery, that may not be as powerful or accurate. For example, the disputed issues might be when a party learned about a certain fact and whether the party should have realized the importance of that fact. If the party learned that fact when their counsel reported on the results of an investigation into public information or third party interviews, that report will be very relevant even though it does not reveal what the client told counsel. Similarly, if the party learned that fact when their own counsel reported on facts they had been told by the other party to the transaction, that report will be relevant even though it does not disclose what the client told counsel.

¹⁷⁴ See Jack Auspitz & Daniel W. Levy, *Litigators View of Due Diligence*, in CONDUCTING DUE DILIGENCE, 265-67 (Practicing Law Institute 2000).

These arguments, sketched in the literature without any supporting empirical data, add little support to the case for the broader scope of the privilege. As for any issue for which there is little hard data, who wins this argument may depend on who has the burden of persuasion. These arguments might serve as a starting point if the issue was unsettled with conflicting lines of precedent of equal authority, but they are not sufficient to negate the long history behind the traditional scope of the privilege or the precedential value of the Supreme Court opinions.

Perhaps the arguments set out in the literature should be viewed from a somewhat different perspective, as assertions that such products of the lawyer's work should not be routinely discoverable. Excluding transaction work product from routine discovery would not provide the absolute protection of a privilege, but it would still respond to the main thrust of each argument. Clients could be given assurances about the privilege, because any complete assurance always would have to acknowledge the various limits and exceptions of privilege doctrine. There would be good reason to expect that discovery demands would not often create disputes for the court to resolve if the rule started with the proposition that such material is not routinely discoverable. The concern about the balance between the need for discovery and the long term effect on the role of lawyers would not be ignored, because it would be a factor in defining the situations where nonroutine discovery would be permitted.

The structure of the attorney-client privilege under federal law does not provide any readily available body of rules for doing the kind of balancing that would exclude routine discovery of the lawyer's work and advice found in the transaction file, but permit discovery where it was needed and appropriate. Such rules could be developed, but they may not be necessary if another body of doctrine could be developed from the dormant principles that the Supreme Court has already established for non-litigation work product.

IV. THE EVOLUTION OF WORK PRODUCT DOCTRINE

There are two related reasons to ask whether confidential documents a lawyer generates while representing a client in a transaction could be protected from discovery by an uncodified branch of work product doctrine instead of by the attorney-client privilege. If these documents have at least work product protection, then they would not be routinely discoverable and there would be less reason to protect them by expanding the scope of the attorney-client privilege. If these documents do not get even this limited protection, then the reasons for that conclusion might also be relevant to defining the scope of the attorney-client privilege. This question has not been asked often, so there is not an extensive body of caselaw that might

provide a direct answer. Instead, it is valuable to examine how the law might evolve from the foundation already set in place.

A. *A Second Look at Supreme Court Precedent*

At its origin in *Hickman* the work product doctrine was described in terms that can be read in more than one way. From one perspective it might appear that the Court was invoking an implicit limitation on what could be demanded under the discovery rules it had recently adopted, while from another perspective it might appear that the Court was adopting a rule to protect the litigation process. Perhaps the Court was doing both and even more. If the doctrine is a limitation on the reach of the discovery rules, then litigation may be a necessary condition to create the duty to comply with a discovery demand but not a necessary element of what is protected. If the doctrine protects only the litigation process, then litigation will be both a necessary condition for that duty and a necessary element of what is protected.

Considering the possibility of protecting non-litigation work product five decades after *Hickman* and three decades after the adoption of Rule 26(b)(3) is difficult, because both the case and the rule focus attention on the work product doctrine as a discovery rule that is applied in a litigation setting. As a result, there is a tendency to think of work product as a doctrine invoked by litigators during litigation to protect only their work as litigators and not to protect legal work performed during the underlying transaction. There is typically little occasion to think about the doctrine outside the setting of litigation, because without litigation there is usually no compulsion to disclose confidential material. That still leaves open the possibility that the work product doctrine could be invoked in litigation to protect the work of lawyers who worked on the transaction before there was any expectation of litigation. A survey of the language of *Hickman* will help illustrate what is at least a possible alternative reading of this precedent.

Some language in *Hickman* describes a general limit on the discovery rules, and does so in a way that could apply to any kind of material. For instance, the Court states that “discovery, like all matters of procedure, has ultimate and necessary boundaries”¹⁷⁵ The Court continues: “In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances [The material] falls outside the arena of discovery”¹⁷⁶

Other language in the opinion describes a limit on discovery of the

¹⁷⁵ 329 U.S. at 507.

¹⁷⁶ *Id.* at 509-10.

work of lawyers with language that could equally apply to the files of litigators in particular or of all attorneys in general:

Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.

....

. . . When Rule 26 and other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.¹⁷⁷

A third selection of quotations from the opinion can be presented to show the Court's focus on the work of litigators and protecting the litigation process:

[The demand] contravenes the public policy underlying the orderly prosecution and defense of legal claims.

....

. . . [T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production . . .¹⁷⁸

The opinion began by defining the problem as discovery of material prepared "in the course of preparation for possible litigation"¹⁷⁹ and clearly remained focused on "written materials obtained or prepared by an adversary's counsel with an eye toward litigation . . ."¹⁸⁰ The policy arguments sketched in the opinion, however, could apply equally to litigators or all lawyers:

Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work.

....

Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

....

¹⁷⁷ *Id.* at 510-14.

¹⁷⁸ *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947).

¹⁷⁹ *Id.* at 497.

¹⁸⁰ *Id.* at 511.

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

...

This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case. . . as the “work product of the lawyer.” Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.¹⁸¹

When the *Hickman* opinion discussed whether the defendants could be required to produce counsel's memoranda that recorded the oral statements of witnesses or whether the defendants could be required to repeat what counsel learned in oral interviews and did not write down, the language described a policy argument that could apply broadly to the work of all lawyers:

Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness The standards of the profession would thereby suffer.

....

. . . [Petitioner's reason] is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities.¹⁸²

There may not be a single interpretation that can be claimed to capture the only true meaning of *Hickman*, because there is support in its language for more than one conclusion about the extent of work product protection. It is also important to recognize that this opinion did not bind the work product doctrine to any fixed standard or any single policy argument. The Court was not interpreting a statute nor eliciting an interpretation of a well-developed body of caselaw. Instead, the opinion was imposing a limiting

¹⁸¹ *Id.* at 497-511.

¹⁸² *Id.* at 512-13.

interpretation on the discovery rules the Court itself had recently adopted.

When the Court applied *Hickman* in *Upjohn*,¹⁸³ the litigation setting was substantially different. *Upjohn* involved an attempt by the IRS to enforce a summons to obtain certain records from the company and certain information from its counsel, but neither the records nor the information were the product of any litigation at the time they were created.¹⁸⁴ Instead, the materials were created before there was any litigation but after *Upjohn* had learned about “questionable payments” during an audit of a foreign subsidiary.¹⁸⁵ In response, *Upjohn*’s chairman of the board had directed *Upjohn*’s general counsel to conduct an investigation and had ordered its employees to cooperate.¹⁸⁶ There was no litigation at the time, and no litigation until after *Upjohn* submitted a report about the payments to the Securities and Exchange Commission and the Internal Revenue Service.¹⁸⁷ Even then, there was no litigation about *Upjohn*’s taxes or securities filings.¹⁸⁸ The only litigation was the suit by the IRS to enforce the summons.¹⁸⁹ *Upjohn* appealed from the district court’s order to produce the material and asserted that the materials were both privileged and work product.¹⁹⁰ In its opinion on appeal, the court of appeals considered the work product argument only in a concluding footnote that stated that the work product doctrine did not apply to an IRS administrative summons.¹⁹¹

What the Supreme Court did in *Upjohn* had the effect of applying the work product doctrine to protect material that had been created before there was any litigation. Perhaps the company should have anticipated that the corporate conduct they asked counsel to investigate would inevitably lead to some kind of litigation, but the Court’s opinion did not even discuss whether the materials were prepared in anticipation of litigation. That result is clear on the facts of the case, but it is also a result that has been almost ignored in the evolution of work product doctrine. The important question is why.

The *Upjohn* opinion did not have to extensively discuss whether the work product doctrine could protect confidential material created by counsel outside of litigation, because the government conceded that the doctrine did apply and chose to argue that it had made a sufficient showing

¹⁸³ *Upjohn Co. v. United States*, 449 U.S. 383, 397-98 (1981).

¹⁸⁴ *See id.* at 386-88.

¹⁸⁵ *See id.* at 386.

¹⁸⁶ *See id.* at 387.

¹⁸⁷ *See id.* at 387-88.

¹⁸⁸ *See id.*

¹⁸⁹ *See Upjohn Co. v. United States*, 449 U.S. 383, 388 (1981).

¹⁹⁰ *See id.*

¹⁹¹ *United States v. Upjohn Co.*, 600 F.2d 1223, 1228 n. 13 (6th Cir. 1979).

to support the discovery ordered by the lower courts.¹⁹² The government's concession may have been the wisest tactic, because the statement by the court of appeals that work product was not applicable at all was supported only by a string citation to six cases. Of these six cases, five were opinions that did not directly discuss work product,¹⁹³ and one was an opinion that assumed work product might be applicable but which found the particular document in that case was not work product.¹⁹⁴ The Supreme Court's discussion, however, appears to accept the government's concession as covering not only the question of whether the work product doctrine generally applied to IRS summonses, but also to the further question of whether it applied to the specific facts of *Upjohn*.

The *Upjohn* opinion did not examine whether the material was work product under any specific language of Rule 26(b)(3); it also did not articulate a test or explain why the actual material could be described as having been created in anticipation of litigation. In addition, the Court did not find it necessary to specify whether it was invoking the work product rule of Rule 26(b)(3), the doctrine of *Hickman*, or both. Rather, the *Upjohn* Court declared broadly that the tax summons was "subject to the traditional privileges and limitations"¹⁹⁵ including the work product doctrine, which it noted was both "substantially incorporated"¹⁹⁶ and "codifie[d]"¹⁹⁷ in Rule 26(b)(3).

The Court's discussion of the work product issue focused on the government's argument that it had made a sufficient showing to obtain work product and that the magistrate had properly ordered production of the memoranda and notes created by Upjohn's general counsel.¹⁹⁸ The Court specifically held that the Magistrate's ruling was error and held that discovery of counsel's material should not be governed by the "substantial need" and "without undue hardship" standards listed in the first part of Rule 26(b)(3).¹⁹⁹ The Supreme Court likewise made clear that it was not going to define precisely the standard of protection for material that did not

¹⁹² See *Upjohn*, 449 U.S. at 397.

¹⁹³ See *Upjohn*, 600 F.2d at 1228 n.13 (citing *United States v. Powell*, 379 U.S. 48, 57-58); *United States v. Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977); *United States v. Davey*, 543 F.2d 996 (2d Cir. 1976); *United States v. Matras*, 487 F.2d 1271 (8th Cir. 1973); *United States v. Theodore*, 479 F.2d 749 (4th Cir. 1973).

¹⁹⁴ See *Upjohn*, 600 F.2d at 1228 n.13, (citing *United States v. McKay*, 372 F.2d 174 (5th Cir. 1967)).

¹⁹⁵ *Upjohn*, 449 U.S. at 398.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *id.* at 389-95.

¹⁹⁹ See *id.* at 401.

fall into that category of the rule.²⁰⁰ Instead, the Court remanded the case because the court of appeals had thought there was no protection at all and the Magistrate had given the material too little protection.²⁰¹ The Court did not base this resolution on any specific language of the Rule but, rather, invoked both the Rule generally and the uncodified work product doctrine based on *Hickman*:

The notes and memoranda sought by the Government here, however, are work product based on oral statements To the extent they do not reveal communications, they reveal the attorney's mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.²⁰²

The Court's reasoning for providing a higher level of protection to the specific work product in *Upjohn* did not focus on the litigation process alone:

Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes

. . . .

. . . [T]he *Hickman* court stressed the danger that compelled disclosure of such memoranda [based on oral statements of witnesses] would reveal the attorney's mental processes.²⁰³

Equally important as what the Court did in *Upjohn* may be what it did not do, particularly the omission of certain language of the Advisory Committee's Note from the 1970 amendments. At that time the committee included this sentence about the extent of Rule 26(b)(3):

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.²⁰⁴

Although a quick reading of this sentence may suggest that it negates any limitation on discovery of material that is unrelated to litigation, that interpretation is contrary to what the Court held in *Upjohn*. Part III of the *Upjohn* opinion is an important reminder that it is equally plausible to read the Advisory Committee's Note describing Rule 26(b)(3) as no more than a partial codification of work product doctrine, with language that governs

²⁰⁰ See *id.* at 401.

²⁰¹ See *Upjohn Co. v. United States*, 449 U.S. 383, 402 (1981).

²⁰² *Id.* at 401.

²⁰³ *Id.* at 399-400.

²⁰⁴ 1970 Advisory Committee's Note, *supra* note 17.

only material related to litigation. That would mean the federal courts should look beyond the language of the rule if the issue is whether there is any protection for material unrelated to litigation. That would be consistent with the structure of the *Upjohn* result, where the Court invoked the language of the rule to describe the trial judge's duty to limit discovery of "the mental impressions, conclusions, opinions or legal theories of an attorney"²⁰⁵ but left the extent of the protection to further evolution by caselaw.

The result in *Upjohn* can also be read as evidence that litigation is no more than a necessary condition to the applicability of work product doctrine, because the client did not need a ground to resist the IRS demand for its counsel's confidential documents until the Government filed the action to enforce the administrative summons. Certainly the Court did not make any effort to define litigation as a necessary element of what is protected. While litigation may always be in prospect any time a taxpayer does anything affecting tax liability, the Court did not mention whether that, or similar facts, would be enough to find that the documents were assembled by counsel in anticipation of litigation. This silence is tacit confirmation that an uncodified work product doctrine that protected transaction documents would not be inconsistent with the framework established by *Hickman* and *Upjohn*.

There have been other Supreme Court opinions on issues related closely enough to require a brief mention, but none of the opinions clearly limit the doctrine to litigation work product alone. In *United States v. Nobles*,²⁰⁶ an armed robbery case, the Court considered whether a criminal defendant could rely on work product to defeat an order by the trial court to provide a defense investigator's report to the prosecutor after the investigator testified for the defense to impeach an earlier prosecution witness.²⁰⁷ After the Supreme Court rejected the Ninth Circuit's reasoning that the order was barred by the Fifth Amendment, it addressed the defendant's alternative argument that the report was protected as work product.²⁰⁸ The Court accepted the proposition that the work product doctrine applied in criminal cases, citing *Hickman* as authority.²⁰⁹ Not surprisingly, since the case involved a document created for litigation, the discussion focused on protecting work product in litigation.²¹⁰ The Court then noted it was not necessary "to delineate the scope of the doctrine"

²⁰⁵ FED. R. CIV. P. 26(b)(3).

²⁰⁶ 422 U.S. 225 (1975).

²⁰⁷ *See id.* at 227.

²⁰⁸ *See id.* at 230-40.

²⁰⁹ *See id.* at 236.

²¹⁰ *See id.* at 238.

because the defense had waived any protection.²¹¹

While some lower courts have cited the discussion in *Nobles* for the proposition that work product protects “only” material prepared in anticipation of litigation, in each instance the citing court itself has added the “only” to the actual language of *Nobles*.²¹² The most the Court actually said was that the work product doctrine was “grounded in the realities of litigation [one of which is] that attorneys often must rely on the assistance of investigators and other agents”²¹³ That language explained that an investigator’s report could be protected, but even on that subject the statement was dictum because the defense had waived any protection. There was no need to even consider whether work product doctrine could apply outside of litigation in a criminal case, because there is no obvious analog to transaction work product in an armed robbery case such as *Nobles*. *Nobles*, therefore, should not be considered dispositive of the issue.

In *Federal Trade Commission v. Grolier*²¹⁴ the Supreme Court similarly discussed work product as a litigation doctrine but the facts did not require defining its outer limits. The case involved a demand for documents under the Freedom of Information Act (FOIA).²¹⁵ The Federal Trade Commission refused to provide the documents on the ground that they were work product in litigation, even though the litigation was over.²¹⁶ Rule 26(b)(3) applied indirectly, because the agency invoked Exemption 5 under the statute, which excludes material that would not be available “in litigation with the agency.”²¹⁷ The Supreme Court stated that Rule 26(b)(3) did not expressly address whether work product from one case retained work product status forever, that the Advisory Committee Notes did not expressly mention the issue, and that a literal reading of the rule would protect material as long as it was prepared for any litigation.²¹⁸ The Court did not resolve which particular construction of Rule 26(b)(3) would control in a discovery dispute. The Court did not need to do so, because the case could be decided under FOIA policies.²¹⁹ Even though the facts of the case involved material that had been prepared for litigation, and the

²¹¹ *Id.* at 239.

²¹² *See, e.g., In re* Special September 1978 Grand Jury (II), 640 F.2d 49, 61 (7th Cir. 1980); *Matter of Fischel*, 557 F.2d 209, 212-13 (9th Cir. 1977); *In re* Grand Jury Proceedings of June 16, 1981, 519 F. Supp. 791, 793 (E.D. Wis. 1981).

²¹³ *Nobles*, 422 U.S. at 238.

²¹⁴ 462 U.S. 19 (1983).

²¹⁵ *See id.* at 20.

²¹⁶ *See id.* at 21-22.

²¹⁷ 5 U.S.C. § 552(b)(5) (1996).

²¹⁸ *See Grolier*, 462 U.S. at 25.

²¹⁹ *See id.* at 26.

opinion discussed litigation work product, the Court did not have to decide whether litigation work product was the only material that could be protected from discovery.

B. Non-litigation Work Product in the Federal Courts

In the years immediately after *Hickman*, many of the lower federal court opinions that discussed work product did so briefly and in discussions about materials such as accident reports or preexisting documents that were different from the attorney's work product in *Hickman* itself.²²⁰ One opinion noted the absence of prospective litigation at the time of a transaction as a ground for finding discovery was not limited by the work product doctrine, but the discovery concerned only what the lawyers had done as emissaries of the client and did not concern anything like the work product in *Hickman*.²²¹ The issue might have remained for gradual evolution under the caselaw, but the early cases led the student authors of the *Harvard Law Review's* extensive review of discovery in its *Developments Note*²²² to affirmatively endorse the requirement of prospective litigation and to provide a policy justification that was not directly grounded in the language of *Hickman*:

Since a lawyer who does not envision litigation will not anticipate discovery requests, the fear of disclosure should not affect the way in which the material is prepared. For example, if the owner of real property employs an attorney to investigate the marketability of his title preparatory to offering it for sale, it seems that the fruits of the lawyer's search should be fully discoverable if litigation relating to a subsequent sale contract eventuate. In such circumstances, as in all those in which a lawyer is asked to assist in planning future conduct, even though he might recognize the ever present possibility of litigation, he is prompted chiefly by his responsibility to avoid embroiling his client in controversy Thereafter, the purchaser who declines to perform on the ground of breach of an implied warranty of title should, it seems, be granted access to the lawyer's materials disclosing the encumbrance.²²³

While normally a policy prescription in a student note might not warrant attention, this *Developments Note* should be examined because it was followed and cited by the lower courts²²⁴ and on some other discovery

²²⁰ See, e.g., *United States v. Gates*, 35 F.R.D. 524 (D. Colo. 1964); *Park & Tilford Distillers Corp. v. United States*, 20 F.R.D. 404 (S.D.N.Y. 1957); *McManus v. Harkness*, 11 F.R.D. 402 (S.D.N.Y. 1951).

²²¹ See *Rediker v. Warfield*, 11 F.R.D. 125, 128 (S.D.N.Y. 1951).

²²² See Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961).

²²³ *Id.* at 1030.

²²⁴ See, e.g., *Colton v. United States*, 306 F.2d 633, 640 (2d Cir. 1962); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150 (D. Del. 1977); *American Optical Corp. v. Madtronic*,

issues by the Advisory Committee in its Note to the 1970 amendments.²²⁵ The statement in the *Developments Note* of the policy supporting the doctrine is both a good illustration of the strongly held view that litigation is an essential element of work product, and an example of how that view leads to the conclusion that a document cannot be work product if the author was not anticipating imminent litigation. The logic of the *Developments Note* is flawed at a fundamental level, because it depends on combining two ideas the Supreme Court had carefully separated in *Hickman*—whether the information is discoverable and whether the information can be discovered from the lawyer's materials. In *Hickman* the Court stressed that the information was routinely discoverable as a matter of course from the client.²²⁶ The work product doctrine of *Hickman* was a limitation on routinely discovering the information from the lawyer's materials.²²⁷ That distinction, however, tended to get overlooked as various cases and the leading commentators continued to assert that work product protection was limited to material prepared for litigation and that the purpose of the doctrine was to protect the adversary system.

Recent opinions illustrate that the requirement to show the documents were created in anticipation of litigation is still well-entrenched in the minds of both lawyers and judges. For example, in one of the cases in which Independent Counsel Kenneth Starr sought to enforce a grand jury subpoena for documents created by White House attorneys, the Eighth Circuit held that the material was not work product.²²⁸ The Eighth Circuit so held because the client for whom they were working, the White House, did not anticipate litigation even though other non-clients might have anticipated various investigations.²²⁹ The tenor of the opinion suggests that both counsel and the court were completely focused on that issue. The White House lawyers argued that an anticipated congressional hearing could suffice for litigation, but the court quickly rejected that as insufficient.²³⁰ In this case, as in courts of appeal cases that have found that material is work product,²³¹ the court's analysis is always tied directly to the rule's requirement that litigation must have been anticipated.

If the strongly held tendency to envision work product doctrine as protecting only the work of litigators can be suspended, it may be possible

Inc., 56 F.R.D. 426, 431 (D. Mass. 1972).

²²⁵ See 1970 Advisory Committee Note, *supra* note 17, at 506.

²²⁶ *Hickman v. Taylor*, 329 U.S. 495, 513 (1947).

²²⁷ See *id.* at 514.

²²⁸ See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 925 (8th Cir. 1997).

²²⁹ See *id.* at 924.

²³⁰ See *id.*

²³¹ See, e.g., *In re Ford Motor Co.*, 110 F.3d 954, 966-68 (3d Cir. 1997); *In re Allen*, 106 F.3d 582 (4th Cir. 1997).

to look at an emerging body of caselaw from a different perspective. Some recent opinions have extended the protection of Rule 26(b)(3) to material prepared well in advance of any litigation. While some commentators have endorsed these cases,²³² others have questioned this expansion because it seems to go beyond protecting the process of litigation.²³³ There is also an apparent awkwardness in making the results fit within the language of the rule, because both courts and commentators appear unable to visualize a work product doctrine not tied to the language of Rule 26(b)(3) and its requirement that a document be prepared in anticipation of litigation. Two recent opinions provide noteworthy examples. Even though they show no interest in exploring the uncodified branches of work product doctrine, they provide a factual setting for contrasting that approach with their efforts to extend the language of the rule.

In *United States v. Adlman*,²³⁴ the document in dispute was a fifty-eight page detailed legal analysis that had been prepared for a corporate attorney to evaluate the tax implications of a proposed corporate restructuring. The study, written by a person who was both an accountant and lawyer, considered likely IRS challenges to the reorganization and a claim for a tax refund that would result from it.²³⁵ After the reorganization and the request for the tax refund, the IRS began an audit, demanded the document, and filed suit to enforce a subpoena for it.²³⁶ After one round of appeals established that the document was not protected by the attorney-client privilege,²³⁷ the district court then denied work product protection for it on the ground the document was not prepared in anticipation of litigation.²³⁸ On a second appeal a divided panel of the Second Circuit reversed and remanded the case with instructions about the appropriate test required by Rule 26(b)(3). The majority concluded that the trial judge might have applied a narrow test that would protect only documents prepared “primarily” to aid in litigation. The majority recognized that this test had support in federal caselaw, but found it too limited.²³⁹ The majority held that a document could be protected even if the party had a business purpose for the document, if the document analyzed the likely outcome of litigation and it was not prepared in the ordinary course of

²³² See, e.g., WRIGHT, MILLER & MARCUS, *supra* note 21, § 2024, at 343 n.10 (1994).

²³³ See, e.g., Charles M. Yablon & Steven S. Sparling, *United States v. Adlman: Protection for Corporate Work Product?*, 64 BROOK. L. REV. 627, 658 (1998).

²³⁴ *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998).

²³⁵ *See id.*

²³⁶ *See id.* at 1195-96.

²³⁷ *United States v. Adlman*, 68 F.3d 1495, 1497 (2d Cir. 1995).

²³⁸ *United States v. Adlman*, No. M-18-304 (WK), 1996 WL 84502, at *1 (S.D.N.Y. Feb. 27, 1996).

²³⁹ *See Adlman*, 134 F.3d at 1198.

business.²⁴⁰ The majority directed the trial judge to use a test endorsed by the Wright and Miller *Federal Practice* treatise that protects a document created “because of” the prospect of litigation.²⁴¹ The dissenting judge argued that this test would expand work product protection to documents prepared for reviewing a planned transaction.²⁴²

The potential application of the test prescribed in *Adlman* can be illustrated by the contrast between an example in the opinion and the actual facts of the case. The example described a publisher who was considering publication of a book for which a competitor asserted exclusive rights; it also assumed the competitor was threatening suit, so the publisher obtained legal advice about the likely outcome of the suit.²⁴³ The majority concluded that the document containing the lawyer’s advice should be protected as work product, a result that would not occur if litigation had to be the principal purpose for the document. The opinion, therefore, held that it was only necessary to find that it was prepared “because of” litigation.²⁴⁴ There was no similar threat of litigation on the facts of *Adlman*, only the reality that tax liability can be disputed and that disputes can lead to litigation. The litigation more likely in prospect when the document was prepared may have been a dispute over disclosure of the document itself, but it would be circular to use the prospect of that litigation to invoke Rule 26(b)(3). Instead, the litigation the court must have had in mind was the litigation between the IRS and the taxpayer over the amount of taxes owed, litigation that had not begun and might never begin.

The uncertain prospect for any litigation at the time the document was created in *Adlman* is similar to the facts of *Upjohn*.²⁴⁵ In both cases there were possible tax consequences of significant impact, and thus each taxpayer could credibly assert they were concerned about at least an IRS response and even a dispute. In both cases actual litigation was not present, but the possibility of litigation is often considered by counsel when doing factual research, drafting documents, or advising a client about a transaction. Accepting such a distant or indirect prospect of litigation as sufficient does provide an immediate formula for expanding the reach of Rule 26(b)(3), but it does so by placing some strain on the language of the rule.

²⁴⁰ See *id.* at 1201-03.

²⁴¹ See *id.* at 1202-03.

²⁴² See *id.* at 1205 (Kearse, J., dissenting).

²⁴³ See *id.* at 1199.

²⁴⁴ See *id.* at 1203.

²⁴⁵ *Upjohn Co. v. United States*, 449 U.S. 383, 386-88 (1981).

A second recent opinion extending work product protection is *In re Sealed Case*.²⁴⁶ The issue was whether a federal grand jury could enforce a subpoena issued to a lawyer for the Republican National Committee who had worked on a 1994 transaction that was later attacked as a possible campaign funding violation.²⁴⁷ The transaction was one subject of a complaint that was filed with the Federal Election Commission (FEC) in 1995; the subpoena came two years after that.²⁴⁸ The court said the record did not tell what happened to the complaint, and the court did not explain whether the FEC complaint was related to the later subpoena.²⁴⁹ The district court applied the “in anticipation of litigation” rule and found that the documents prepared before a complaint was filed with the FEC were not protected.²⁵⁰ The circuit court held that this timeline was too limited.²⁵¹ Instead, it concluded that the work product protection included documents prepared for a matter the client feared could lead to litigation.²⁵² The court suggested such a broad rule was necessary to avoid undermining lawyer effectiveness at the particularly critical stage when the client needs advice about how to proceed lawfully or needs legal advice assessing the potential risks of litigation from undertaking a particular step.²⁵³

The circuit court extracted various elements that had to be established to show that a document was prepared “because of the prospect of litigation,” concluding that the lawyer had to have “a subjective belief that litigation was a real possibility” and that the “belief must have been objectively reasonable.”²⁵⁴ The Court then described the choices as requiring either the existence of a specific claim or a broader test that considered all the relevant circumstances. The court rejected the narrower interpretation and held that the document could be work product if it was created when counsel “rendered legal advice in order to protect the client from future litigation about a particular transaction,”²⁵⁵ even if there was no specific claim at that time. The court expressed some concern that the record evidence could have been stronger on the lawyer’s subjective belief that there would be litigation, but found it sufficient.²⁵⁶ The Court also

²⁴⁶ 146 F.3d 881 (D.C. Cir. 1998).

²⁴⁷ *See id.* at 882-83.

²⁴⁸ *See id.* at 883.

²⁴⁹ *See id.*

²⁵⁰ *See id.* at 884.

²⁵¹ *See id.* at 888.

²⁵² *See In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).

²⁵³ *See id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 885.

²⁵⁶ *See id.* at 886.

found that the belief the transaction might lead to litigation was objectively reasonable.²⁵⁷

By repeating that the work product doctrine would not include documents counsel prepared “in the ordinary course of business or for other non-litigation purposes,” the court set a limit that would exclude some transaction documents from its broadened standard for determining what might be in anticipation of litigation.²⁵⁸ Perhaps it is notable that at this point in the opinion the court was not surveying policy arguments in protecting the specific documents, as it had earlier, but was simply recounting earlier precedent from the circuit.²⁵⁹ On this issue, the opinion fits well with many others that are cited by commentators to support broad application of work product protection for documents prepared “because of” litigation even though they limit the protection by tying the analysis to the language of Rule 26(b)(3).²⁶⁰ Like other opinions, it does not appear to have produced any examination of whether its policy could be better applied by abandoning the language of the rule as the sole authority for the work product doctrine.

C. *Beyond the Coverage of Rule 26(b)(3)*

The extensive Advisory Committee’s Note that explained Rule 26(b)(3) when it was adopted in 1970 is another relevant source that addresses whether the rule might provide the only possible protection for all work product.²⁶¹ The Advisory Committee’s Note primarily focused on trial preparation material. It described how discovery of documents had been limited by both the requirement to show good cause under Rule 34 and the separate work product doctrine of *Hickman*.²⁶² It concluded that relevance had become the usual standard for good cause, and that the “overwhelming proportion” of the cases that had required more than relevance had involved trial preparation material.²⁶³ The Advisory Committee’s Note then explained that the good cause language in Rule 34 was being eliminated and replaced by the specific requirements of Rule 26(b)(3) for trial preparation material.²⁶⁴ Other kinds of material were covered with a general conclusion:

Apart from trial preparation, the fact that the materials sought are

²⁵⁷ *See id.*

²⁵⁸ *In re Sealed Case*, 146 F.3d 881, 887 (D.C. Cir. 1998).

²⁵⁹ *See id.* at 886-87.

²⁶⁰ *See* WRIGHT, MILLER & MARCUS, *supra* note 21, at 343-46.

²⁶¹ *See* 1970 Advisory Committee’s Note, *supra* note 17, at 487.

²⁶² *See id.* at 500.

²⁶³ *See id.*

²⁶⁴ *See id.*

documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order.²⁶⁵

The breadth of this description is not supported by any authority on the specific issue of non-litigation work product material prepared by counsel. The factual settings in the three cases the Advisory Committee cited earlier for the proposition that relevance was sufficient for non-litigation documents did not include a lawyer's work product.²⁶⁶ Similarly, when the Advisory Committee later described material "assembled in the ordinary course of business" as not protected by the new rule, the factual settings in the two cases that were cited did not include a lawyer's work product.²⁶⁷ The lack of caselaw in which an issue about non-litigation work product had been raised explains both why the Note did not discuss it, and why that silence does not compel a conclusion that either the Note or rule negate the possibility of protection for non-litigation work product.

Some federal courts have already recognized two additions to the work product protection of Rule 26(b)(3). The most common addition is for counsel's trial preparation material that has not been recorded in a document and is just remembered by counsel.²⁶⁸ Although such work product does not fit within the Rule 26(b)(3) protection for documents and tangible things, it does clearly fit within the protection of *Hickman*.²⁶⁹ Less frequently, the suggestion in the Advisory Committee's Note to use protective orders under Rule 26(c) has also been followed in a few cases involving work product material created by counsel for a nonparty. The leading opinion is *In re California Public Utilities Commission*,²⁷⁰ a Ninth Circuit decision that did not allow the Commission to assert work product protection in a case in which it was not a party.²⁷¹ It did suggest that the trial court could provide similar protection under Rule 26(c), on the ground that it would be oppressive to compel discovery of material that would

²⁶⁵ *Id.* at 500-01.

²⁶⁶ *See id.* at 500 (citing *Bell v. Commercial Ins. Co.*, 280 F.2d 514 (3d Cir. 1960); *Conn. Mutual Life Ins. Co. v. Shields*, 17 F.R.D. 273 (S.D.N.Y. 1959); *Houdry Process Corp. v. Commonwealth Oil Ref. Co.*, 24 F.R.D. 58 (S.D.N.Y. 1955)).

²⁶⁷ *See id.* at 501 (citing *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *United States v. N.Y. Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962)).

²⁶⁸ *See, e.g., Maynard v. Whirlpool Corp.*, 160 F.R.D. 85 (S.D. W. Va. 1995); *see also United States v. One Tract of Real Property*, 95 F.3d 422, 428 n.10 (6th Cir. 1996).

²⁶⁹ *See Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947).

²⁷⁰ 892 F.2d 778 (9th Cir. 1989).

²⁷¹ *See id.* at 781.

otherwise be characterized as work product.²⁷² Similarly, a District Court allowed the United States Department of Justice to regain documents that were work product in one proceeding but had been inadvertently disclosed to a party in a different case.²⁷³ The court found Rule 26(b)(3) did not apply by its very terms but then found equivalent authority to protect the material under Rule 26(c).²⁷⁴

The Advisory Committee also stated that material “assembled in the ordinary course of business” is “not under” the new protection of Rule 26(b)(3),²⁷⁵ but it did not attempt to define that category of material in any greater detail. The only two cases the Advisory Committee cited in support of that statement involved accident reports by non-lawyers, not transaction work product by counsel.²⁷⁶ In addition, the descriptive phrase of “not under” the new rule is far different from saying the material is not protected. In other words, the issue is not resolved by either the rule or the Advisory Committee’s Note, so *Hickman* and *Upjohn* could still provide a foundation when the federal courts address whether and how non-litigation work product should be protected.

V. WHAT A THIRD OPTION OFFERS A LAWYER OR JUDGE

The idea at the core of the third option is that the attorney-client privilege and work product doctrine are so inherently connected that trying to define the scope of the privilege without accounting for *Hickman* will inevitably go astray. The third option is one way to describe how they are connected. Doing no more than recognizing that discovery of transaction work product could be limited under the uncodified policy of *Hickman* would have an effect on both privilege law and discovery law, but in different ways. For the attorney-client privilege it is not necessary that the third option be fully defined and it is not essential to know its exact limits, because even the possibility of this alternative and the reasons it does or does not protect transaction documents will provide a different perspective about the proper scope of the privilege. The third option also provides a useful measure when sorting documents as privileged or not privileged, both for an attorney deciding whether to assert the privilege and for a judge deciding whether to sustain the assertion of the privilege. For discovery law, the effect will not be as immediate because it will be no more than a rough sketch of a possible development until lawyers actually assert the

²⁷² See *id.*

²⁷³ See *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680 (N.D. Ga. 1998).

²⁷⁴ See *id.* at 691-92.

²⁷⁵ 1970 Advisory Committee’s Note, *supra* note 17, at 501.

²⁷⁶ See *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *United States v. N.Y. Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962).

third option as the ground for withholding documents from discovery. Only then will judges have to decide how much of the uncodified policy of *Hickman* remains viable and define the limits of the uncodified policy.

The third option will not matter for many items in an attorney's transaction file. The attorney-client privilege is still sufficient to protect the documents in the transaction file that are factual disclosures by the client to counsel. That would include letters from the client to counsel that set out the client's understanding of the facts involved in the transaction or the client's objectives in the transaction, as well as copies of letters from counsel to the client that repeat the client's earlier disclosures. The privilege is also sufficient to protect documents in the transaction file that indirectly reveal the client's factual disclosures, so counsel will still need to imagine all the various ways in which material might be used and then assert the privilege to protect documents where there is a reasonable explanation of how it might indirectly reveal what the client said.

In every instance in which the privilege is the ground for refusing to disclose a document the explanation needs to be listed in the privilege log in sufficient detail to demonstrate to the judge that the document is privileged, and counsel needs to be ready to articulate a sufficient ground in support of the privilege.²⁷⁷ Although it is essential that the lawyer was providing legal advice, not business advice, if the privilege is to apply, it will not be sufficient to describe the document as providing legal advice or communicating with the client, because that description does not tie the content of the document to the client's disclosures to counsel. At times the document itself may provide clear evidence that it contains information from the client, but a regular flow of federal court opinions makes clear that the better course is to explain what makes the document privileged.²⁷⁸ Where the document is a composite, such as occurs when counsel annotates or edits a proposed contract document, the assertion of the privilege requires an explanation of the source of what the lawyer wrote.²⁷⁹

Both counsel asserting the attorney-client privilege and a judge ruling on that privilege ought to keep the categories of litigation work product and transaction work product in mind, because both provide a touchstone for

²⁷⁷ See *Pkfinans Int'l Corp. v. IBJ Schroder Leasing Corp.*, Nos. 93 Civ.5375 (SAS) (HBP), 96 Civ.1816 (SAS) (HBP), 1996 WL 525862 (S.D.N.Y. Sept. 17, 1996); *Phillips Elec. N. Am. Corp. v. Universal Elec. Inc.*, 892 F. Supp. 108 (D. Del. 1995); *McCaugherty v. Siffermann*, 132 F.R.D. 234 (N.D. Cal. 1990).

²⁷⁸ See *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, No. Civ.A.97-3012, 1998 WL 310779 (E.D. La. June 10, 1998); *Phillips Elec. North Am. Corp.*, 892 F. Supp. 108 (D. Del. 1995).

²⁷⁹ See, e.g., *Interphase Corp. v. Rockwell Int'l Corp.*, No. 3-96-CV-0290-L, 1998 WL 664969 (N.D. Tex. Sept. 22, 1998); *United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994).

determining when a document is not privileged. As a rough measure, work product includes the documents, written by counsel in the course of providing legal advice, which do not contain the client's confidential disclosures. This measure does not have to be an exact discriminator and is not the sole standard. The privilege may not apply because the document involves business advice, because it was not confidential, or because counsel was simply sent an extra copy of a business document.²⁸⁰ Nevertheless, it can provide a useful guide for sorting transaction documents. A document that would be instantly recognized as work product, and nothing but work product, if it had been created in anticipation of litigation, should be regarded as unlikely to be privileged just because it was created earlier in time.

Even when material looks like it is work product and appears to have been created by counsel well in advance of the current litigation, there are other tactical factors for a lawyer to consider before trying to protect a document under the third option. In those circuits that have extended the work product protection of Rule 26(b)(3) well back in time by recognizing even the possibility of litigation as sufficient to find the document was created in anticipation of litigation,²⁸¹ counsel may prefer to assert just the rule and the circuit caselaw to protect such work product. In those circuits, the district judges or magistrate judges may likewise find sufficient authority to sustain the objection to discovery with the issues framed by the circuit caselaw.

The initial impetus to consider the value of the third option may come from a lawyer or a judge—perhaps from a lawyer trying to protect transaction work product that does not fit even the extended interpretations of Rule 26(b)(3), from a lawyer in a circuit with a narrow reading of the rule, or from a court that recognizes the need to reevaluate the limited choices currently available. There will still be more work to be done, because the third option provides only an alternative starting point and not a complete set of answers. One core idea of *Hickman* was that a lawyer providing relevant information and a candid assessment about a legal issue to a client should not be worried that the result of putting that advice in writing would be discovery of the document in any litigation.²⁸² That was not a sufficient reason to include all work product within the privilege, but it was sufficient to exclude it from routine discovery. This worry about the same potential exposure for transaction work product might likewise affect how lawyers provide information to a client during the research and negotiation of the transaction. Although both client and counsel might

²⁸⁰ See WEINSTEIN & BERGER, *supra* note 38, at 503-33 to 503-38.

²⁸¹ See *supra* notes 247-75 and accompanying text.

²⁸² See *Hickman*, 329 U.S. at 510-11.

hope that the transaction will become a success and that there will be no litigation, realistic counsel would realize that any transaction can lead to litigation.

Recognizing that the transaction work product doctrine might protect the documents counsel wrote to inform the client about facts revealed by the other party, facts learned from third parties, or counsel's drafting advice, would reduce the routine intrusion into counsel's transaction file but not exclude all possibility of discovery. Rule 26(b)(3) now requires certain procedural steps derived from the requirements of *Hickman*; the same steps could be applied by analogy to transaction work product protection. Instead of the all-or-nothing result that follows from the court's ruling when privilege is the basis for the objection to discovery, a ruling that documents are transaction work product would only exclude them from routine discovery. As *Hickman* suggested, an opposing party might be able to get the same information directly from the client using other discovery tools;²⁸³ if so, the facts would not be hidden in the transaction file alone. Even if the opposing party could not get the same information directly, it might not be sufficiently relevant to justify invading the privacy of either the attorney's work or the attorney's relationship with the client. On this issue the analogous application of the existing rule would put a burden on the party demanding discovery to show relevance and inability to obtain the information elsewhere.

A recent decision by the Second Circuit illustrates both when the federal courts will limit discovery of non-litigation work product and why the evolution of the uncodified doctrine in these cases can be easily overlooked.²⁸⁴ The facts of *In re Grand Jury Proceedings* involved a 1998 meeting of representatives of a company with officials of the Federal Bureau of Alcohol, Tobacco and Firearms (ATF) to discuss whether the company was facilitating illegal firearms transactions.²⁸⁵ There was no pending litigation at the time, and the company claimed it was assured its limited role meant it did not need to be concerned about legal liability.²⁸⁶ At the time the company's counsel created some non-privileged documents and had an assistant take notes at the ATF meeting.²⁸⁷ A year later the company's counsel testified before a grand jury about the ATF meeting but withheld the notes as work product. The government moved for production of the notes and asked the court to bar the company from asserting work product protection for all documents concerning the subject the grand jury

²⁸³ See *id.* at 511-12.

²⁸⁴ See *In re Grand Jury Proceedings*, 219 F.3d 175 (2d Cir. 2000).

²⁸⁵ See *id.* at 179.

²⁸⁶ See *id.*

²⁸⁷ See *id.* at 180.

was investigating.²⁸⁸ The district court held that the work product protection had been waived, found that the government had shown sufficient need for the notes, and ordered them produced.²⁸⁹ The Second Circuit reversed for reconsideration of the waiver issue.²⁹⁰

Although the Second Circuit left the issue of whether any item was work product for the trial court on remand,²⁹¹ it did outline some “Governing Principles” as a foundation for the remand on the waiver issue.²⁹² Although the grand jury was investigating a criminal offense, the court did not distinguish the rule in criminal cases from the rule that would apply if the material had been demanded in civil discovery; it noted that the Supreme Court had “applied”²⁹³ the work product doctrine of *Hickman v. Taylor* in a criminal case in *United States v. Nobles*.²⁹⁴ The court also noted the different standards for fact and opinion work-product under Rule 26(b)(3) but did not apply that Rule and did not describe the material as prepared in anticipation of litigation. The relevant part of the opinion quoted the policy arguments of *Hickman* as applicable to a demand for disclosure of non-litigation material,²⁹⁵ clearly suggesting that the policy should apply to the documents in dispute. While this means the facts of the case show a situation in which a federal court did not permit routine discovery of non-litigation work product, the opinion does not advertise the result in that way. In that regard this opinion is similar to *Upjohn*,²⁹⁶ where the facts must also be read carefully to recognize the implications of the Supreme Court’s holding.

As lawyers assert the third option, the extent of protection for transaction work product can evolve in response to the facts of various cases. It may not take the twenty-three years between *Hickman* and Rule 26(b)(3), but eventually there would be enough caselaw and commentary to suggest whether Rule 26(b)(3) needs to be expanded to cover other kinds of work product and whether material such as transaction work product should receive the same or different protection than litigation work product. Among the questions the courts still need to explore is the question whether the transaction work product category should include only the work of lawyers instead of the broad description of all who can create litigation work product under Rule 26(b)(3). Until those details emerge, the third

²⁸⁸ See *id.* at 181.

²⁸⁹ See *id.* at 181-82.

²⁹⁰ See *In re Grand Jury Proceedings*, 219 F.3d 175, 192 (2d Cir. 2000).

²⁹¹ See *id.* at 190 n. 11.

²⁹² See *id.* at 190.

²⁹³ See *id.*

²⁹⁴ 422 U.S. 225 (1975).

²⁹⁵ See *In re Grand Jury Proceedings*, 219 F.3d at 190.

²⁹⁶ 449 U.S. 383 (1981).

option at least can provide an alternative to a litigant who believes that a lawyer's non-privileged transaction work product should not be routinely discoverable, an alternative to judges who conclude there should be some protection from routine discovery but are unwilling to overextend the language of Rule 26(b)(3), and a more coherent alternative that does not distort the traditional scope of the attorney-client privilege.