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# THE UNCERTAIN FOUNDATION OF WORK PRODUCT

*Michael A. Blasie*<sup>1</sup>

## INTRODUCTION

Work product is a cornerstone of legal practice. Alongside the attorney-client privilege it forms the great bulwarks protecting attorney efforts from an adversary. Its significance pervades all litigation phases, from discovery to trial preparation. Yet how to classify the doctrine is elusive; it has overtones with discovery, procedural, evidentiary, and privilege issues.

But the true dilemma stems much deeper. Overlooked by scholars, practitioners, and courts alike are two crucial and fundamental issues: the basis for the doctrine and its proper scope. This Article documents the bizarre, untold origin story of this pivotal doctrine. The story takes us from the Supreme Court's invention of the doctrine, through its uncertain foundations, to its present, vital role in legal practice. On this journey, this Article identifies previously ignored assumptions that form the very roots of work product.

Work product originated in the seminal 1947 Supreme Court decision of *Hickman v. Taylor*.<sup>2</sup> But its birth was hardly traditional. While earlier cases disputed the concept, the phrase “work product” originated at oral argument before the Third Circuit.<sup>3</sup> After the Third Circuit's decision, the Supreme Court took a rare step; it rejected a proposed codified work product rule, granted *certiorari*, and decided *Hickman* on public policy grounds.<sup>4</sup>

The doctrine's growth post-*Hickman* is even more unusual. Several decades after *Hickman*, amendments to the Federal Rules of Civil and Criminal Procedure codified work product rules.<sup>5</sup> But these codified

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2. *Hickman v. Taylor*, 329 U.S. 495, 496 (1947).

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

4. See *infra* notes 84–99 and accompanying text.

5. See *infra* notes 150–160 and accompanying text.

versions did not mirror the language of *Hickman*. On the contrary, they diverged significantly. No one knows why. Stranger still is how courts reacted to this conflict. Instinctively, one would think the Rules preempt *Hickman*. Yet consistently federal courts have held the opposite. Like a Venn diagram, there is dual authority such that materials are protected either by a Federal Rule, *Hickman*, or both.<sup>6</sup>

Three essential questions arise. First, what is the basis of *Hickman v. Taylor*? Was the Supreme Court interpreting the Federal Rules, filling a gap in the Rules, creating a common law doctrine broader than the Rules, or doing something else? The classification informs whether *Hickman* endures after the passage of the codified Rules. Second, under what authority can federal courts expand a doctrine beyond the limits of a Federal Rule? By keeping *Hickman* alive, courts produced a unique doctrine that pulls from two very different sources of authority that define the doctrine differently. Third, given the answers to the preceding questions, is *Hickman v. Taylor* still binding law?

This Article answers these questions by tracking and interpreting the history of work product. Part II outlines its birth and evolution beginning with the history and events leading to *Hickman v. Taylor*. In doing so, it describes the unusual setting that primed the decision. What becomes clear is that work product arose shortly after the United States switched to a discovery-based civil justice system. Some courts obeyed the strict contours of the then recently released Federal Rules of Civil Procedure; others pursued a gut reaction to protect the attorney-client relationship. Then, in *Hickman*, the Supreme Court created the doctrine based on public policy. Work product emerged as an intensely practical doctrine that protects attorney work, but yields to an adversary's need to discover essential facts. The Article continues by describing the evolution of the doctrine post-*Hickman*, including reactions to the case, the creation of codified work product rules, and how federal courts treated *Hickman* in light of these rules.

Part III draws upon the history of work product and the Supreme Court's post-*Hickman* decisions to answer the three questions presented above. It concludes work product is not one doctrine, but two: the *Hickman* work product doctrine and the codified work product doctrine. More specifically, (i) the *Hickman* work product doctrine is still good law and is, at least in part, more expansive than the codified work product doctrine; (ii) federal courts can apply the *Hickman* doctrine beyond the scope of codified work product rules

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6. See *infra* notes 174–185 and accompanying text.

through an exercise of inherent power; and (iii) the codified work product doctrine preempts the *Hickman* work product doctrine when the two conflict.

Work product is about much more than the balance between a productive attorney-client relationship and the need to discover relevant material. Rather, it is about *who* strikes this balance. The animating principle behind these conclusions is that work product is subject to complete legislative control. While the judiciary invented the doctrine, the legislature controls our judicial system. From the number of federal courts, to the procedural and substantive rules of the civil justice system, all are subject to legislative control. There is a realm Congress cannot control, but work product is not in it.

## II. THE BIRTH AND EVOLUTION OF WORK PRODUCT

The switch to a discovery-based system maximized parties' ability to gain knowledge of the issues and facts before trial.<sup>7</sup> But courts quickly developed limits on this ability; the work product doctrine being one.<sup>8</sup> It is a practical doctrine that recognizes attorneys serve both the advancement of justice and the interests of their clients.<sup>9</sup> It protects from disclosure an attorney's case preparation materials, like research memoranda and witness interviews.<sup>10</sup> But its protection is not absolute.

"The central justification for the work product doctrine is that it preserves the privacy of preparation that is essential to the attorney's adversary role. Any invasion of this privacy could distort or modify the attorney's function to the detriment of the adversary system."<sup>11</sup> An additional rationale "emphasizes the need to protect the privacy of the attorney's mental processes."<sup>12</sup>

Work product consists of several principles. First, information regarding facts and witness statements are not protected by the attorney-client privilege.<sup>13</sup> Second, the need to protect a lawyer's files from discovery is important to the justice system but does not make the files absolutely immune from discovery.<sup>14</sup> Third, the party seeking

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7. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

8. *Id.* at 507–08.

9. *Id.* at 510.

10. *Id.* at 511.

11. Jeff A. Anderson, Gina E. Cadieux, George Hays E., and Michael B. Hingerty, *Work Product Doctrine*, 68 CORNELL L. REV. 760, 784–85 (1983).

12. *Id.*

13. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2022 (3d ed. 2010).

14. *Id.*

disclosure bears the burden of showing special circumstances warrant disclosure.<sup>15</sup> Fourth, when the moving party can obtain the desired information elsewhere, it is not a special circumstance.<sup>16</sup> Though work product covers both attorney and non-attorney case preparation, work revealing the mental processes and opinions of attorneys is particularly sacrosanct.<sup>17</sup>

The uniqueness and complexity of work product cannot be understated. As Professor Clermont observed:

Work product is the legal doctrine that central casting would send over. First, it boasts profundities, arising as it does from the colliding thrusts of our discovery and trial processes and from conflicting currents in our modified adversary system. Second, it will surface frequently, because the protected materials are commonly created by each side but uncommonly useful to the opponent. Third, it has generated a small mountain of lower-court case law, with the foothills forming a labyrinth of rules and wrinkles. In short, work product has for a couple of generations dramatically bewitched academics, bothered practitioners, and bewildered students.<sup>18</sup>

Often overlooked, however, is the history of work product. Tracking its origins and evolution explains why the Supreme Court created it and how work product has changed. This history also reveals the questionable assumptions modern courts, practitioners, and scholars rely upon.

#### A. *The Pre-Hickman Universe*

The pre-*Hickman* landscape was almost primordial. It was a time of galactic change and uncertainty. Most notably the federal system had recently switched from a minimalist discovery process to a liberal one, and the first version of the Federal Rules of Civil Procedure had just issued. *Hickman* raised an issue on the minds of many. But it was an issue that had no name, no doctrine, no rule on point, and no appellate authority. Into this morass, the Supreme Court dove headfirst.

Pre-1938 discovery and civil procedure is virtually unrecognizable to the modern era. There were no comprehensive federal civil rules.<sup>19</sup> Discovery was intensely limited.<sup>20</sup> The “sporting” theory of justice

15. *Id.*

16. *Id.*

17. *United States v. Nobles*, 422 U.S. 225, 238 (1975).

18. Kevin Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 758, 775 (1983).

19. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698–701 (1998).

20. William A. Morrow, Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney’s Work Product*, 17 WAYNE L. REV. 1145, 1147–48 (1971). See also 8 WRIGHT & MILLER, *supra* note 13, § 2001.

ruled and “a judicial proceeding was a battle of wits rather than a search for the truth, each side was protected to a large extent against disclosure of its case.”<sup>21</sup> There was very little document discovery and limited depositions.<sup>22</sup> Indeed, depositions “were intended only for the preservation of proof; any discovery that resulted was only accidental and incidental.”<sup>23</sup> Federal courts had limited discretionary power to authorize greater discovery and rarely exercised such power.<sup>24</sup> Unsurprisingly, there was no discussion of protecting attorney trial preparation materials. “Because his client’s case was largely immune from discovery in American courts prior to the Federal Rules, an attorney had no need for a protective doctrine either at law or in equity.”<sup>25</sup>

Beginning in the early 1900s some practitioners began advocating for uniform federal rules of civil procedure.<sup>26</sup> Although an act required federal courts to apply the procedure of the state in which they sat, this at times conflicted with federal procedural statutes and practices thereby causing costly confusion and difficulty predicting procedure.<sup>27</sup> There was also significant criticism of the often non-codified state court procedure, and a belief that uniform federal rules could provide a model for states to adopt.<sup>28</sup>

Finally, the movement succeeded with the 1934 passage of the Rules Enabling Act, which permitted the Supreme Court to create uniform rules for federal courts.<sup>29</sup> In 1938 the first Federal Rules of Civil Procedure (FRCP) issued.<sup>30</sup> The FRCP merged law and equity, simplified pleadings, and eliminated many restraints on discovery.<sup>31</sup> It also permitted more discovery than any state did at the time.<sup>32</sup>

21. 8 WRIGHT & MILLER, *supra* note 13, § 2001.

22. Subrin, *supra* note 19, at 698–701. *See also* 8 WRIGHT & MILLER, *supra* note 13, §§ 2001–2002; Anderson et al., *supra* note 11, at 765.

23. 8 WRIGHT & MILLER, *supra* note 13, § 2002.

24. MOTTOW, *supra* note 20, at 1147–48.

25. Anderson et al., *supra* note 11, at 765. During the late nineteenth century, England began to adopt liberal discovery procedures and English courts expanded the attorney-client privilege to include materials prepared for trial; this approach influenced some state courts but “had no impact on the federal courts, which had not yet embraced liberal discovery.” *Id.* at 766.

26. Subrin, *supra* note 19, at 692.

27. *Id.*

28. *Id.* at 693.

29. 28 U.S.C. § 2072; Subrin, *supra* note 19, at 691.

30. Subrin, *supra* note 19, at 691.

31. *Id.* at 719; Anderson et al., *supra* note 11, at 766–67.

32. “If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal Rules, but . . . no one state allowed the total panoply of devices” and the FRCP “eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.” 8 WRIGHT & MILLER, *supra* note 13, § 2001. *See also id.*, § 2002 (“Civil Rules 26 to 37 were intended to take the best of what were then modern English and state practices for discovery and make them

Overnight, discovery became the primary means of formulating issues and developing facts.<sup>33</sup> It promoted finding truth and eliminated “the old procedural elements of concealment and surprise.”<sup>34</sup> Previously, pretrial inquiry into issues and facts was narrowly confined and cumbersome; but now pleadings and discovery provided means to find facts, and to narrow and clarify issues.<sup>35</sup> “Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.”<sup>36</sup>

Between the birth of the FRCP in 1938 and the Supreme Court’s 1947 decision in *Hickman v. Taylor*, district courts addressed the concept of work product protection but often with little clarity or consistency. In short, the law of this fledgling unnamed doctrine was cloudy and inconsistent.<sup>37</sup>

On the one hand, several courts held “matters obtained or prepared as the result of an investigation in anticipation of litigation or in preparation for trial are generally subject to discovery.”<sup>38</sup> After all, the FRCP did not protect this material. While some complained the new “hospitality to pre-trial discovery . . . engendered fraud and perjury,” there was “perjury and coaching of witnesses in the old days” too.<sup>39</sup> Others saw unfairness when “a lawyer who . . . diligently prepared his case [was] obliged to let counsel for the adversary scrutinize his data.”<sup>40</sup> Opponents countered that such unfairness was outweighed by the “much-needed improvement in judicial ascertainment of the ‘facts’ of cases.”<sup>41</sup>

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available in the federal court.”); Subrin, *supra* note 19, at 719; Anderson et al., *supra* note 11, at 766–67.

33. Anderson et al., *supra* note 11, at 765.

34. *Stark v. American Dredging Co.*, 3 F.R.D. 300 (E.D. Pa. 1943) (internal quotations and citations omitted). See also 8 WRIGHT & MILLER, *supra* note 13, § 2001 (discussing purpose of FRCP); Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 205–08, 210, 213 (1942-1943) (discussing purpose and new mechanisms of FRCP).

35. *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).

36. *Id.* at 501.

37. FED. R. CIV. P. 30 advisory committee’s report on proposed 1946 amendment. See also *Hickman v. Taylor*, 153 F. 2d 212, 220 n. 13 (3d Cir. 1945). The Supreme Court would later observe “a great divergence of views among district courts.” *Hickman*, 329 U.S. at 500.

38. FED. R. CIV. P. 30 advisory committee’s report on proposed 1946 amendment (citing district court opinions issued between 1939 and 1945). See also Anderson et al, *supra* note 11, at 755–56, 767–68, 768 n. 50 (citing cases).

39. *Hoffman v. Palmer*, 129 F.2d 976, 997 (2d Cir. 1942).

40. *Id.*

41. *Id.*

However, many courts, for various reasons, ruled to the contrary and denied discovery of such information.<sup>42</sup> Some courts barred requests as seeking nonmaterial or hearsay evidence.<sup>43</sup> Others reasoned permitting such discovery would be unfair and would “penalize diligence and put a premium on laziness.”<sup>44</sup> Still others denied discovery because the moving party failed to provide a good reason for disclosure, or on the general principle that there is no discovery of another party’s case preparation.<sup>45</sup> Yet another group of courts reached the same conclusion without articulating any clear reason.<sup>46</sup> For example, one district court remarked that although it interpreted the FRCP lib-

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42. FED. R. CIV. P. 30 advisory committee’s report on proposed 1946 amendment. See *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (holding statements taken outside regular course of business were inadmissible and writing “It is, of course, not for us to take these reports out of the Act if Congress has put them in. But there is nothing in the background of the law on which this Act was built or in its legislative history which suggests for a moment that the business of preparing cases for trial should be included”).

43. FED. R. CIV. P. 30 advisory committee’s report on proposed 1946 amendment (citing district court opinions issued between 1939 and 1945).

44. FED. R. CIV. P. 30 advisory committee’s report on proposed 1946 amendment (citing district court opinions issued between 1939 and 1944).

45. FED. R. CIV. P. 30 advisory committee’s report on proposed 1946 amendment (citing district court opinions issued between 1939 and 1944). See also *Anderson et al.*, *supra* note 11, at 767–71 & nn. 50–75 (1983) (citing cases appealing to the “good cause” requirement in Rule 34 before ordering document production, and other cases interpreting the FRCP to prohibit discovery of such material even though the rules do not explicitly prohibit its discovery); *Farr v. Delaware, L. & W.R. Co.*, 7 F.R.D. 494, 495 (S.D.N.Y. 1944) (permitting production of accident reports made by officers or employees of party “in the regular course of the performance of his duty” but denying discovery of “any statement or other information acquired by or through the direction of counsel after notice of the accident and in furtherance of his preparation for the defense of the action” as “confidential, unless and until the same is presented to the court for examination and a specific ruling made with respect thereto”).

46. While Rule 34, which governed motions to produce, contained a requirement that a party show good cause why documents should be produced, many courts protected attorney investigations as a broad limitation on all forms of discovery in the federal rules. See, e.g., *Courteau v. Interlake S.S. Co.*, 1 F.R.D. 525, 526 (W.D. Mich. 1941) (denying motion seeking witness statements taken by defense in preparation for trial as one litigant may not make use of opponent’s case preparation “except in the most unusual circumstances”); *Piorkowski v. Socony Vacuum Oil Co.*, 1 F.R.D. 407, 408 (M.D. Pa. 1940) (“While the courts have made every effort to construe the rules for discovery as liberally as possible in order to permit all parties to obtain a full disclosure of the facts pertaining to the case, there have been established certain necessary limitations of the exercise of discovery powers. One of these limitations prevents the securing by one party of the results of the preparation for trial of another party.”); *Byers Theaters, Inc. v. Murphy*, 1 F.R.D. 286, 288–89 (W.D. Va. 1940) (“both law and reason dictate that the scope of interrogatories” and the FRCP “were not intended to be made the vehicle through which one litigant could make use of opponent’s preparation of his case.”); *Floridin Co. v. Attapulugus Clay Co.*, 26 F. Supp. 968, 973–74 (D. Del. 1939) (“The new Rules of Civil Procedure were not intended to permit a party to pry into the details of the other party’s preparation for trial.”); *McCarthy v. Palmer*, 29 F. Supp. 585, 586 (E.D.N.Y. 1939) (prohibiting discovery of “affidavits and similar materials secured by the other party by independent investigation incident to the preparation of the case for trial” because while the FRCP were “designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make



erally, it frequently “determine[d] how far a party may go in the examination of a witness” on any non-privileged relevant matter.<sup>47</sup> Yet in the same breath the court confined the ruling “to this particular case lest it might become the practice to conceal information, which might otherwise be obtainable, in the inter-office correspondence file, on the supposition that it would thus not be subject to production.”<sup>48</sup>

The absence of a dominant and well-reasoned view<sup>49</sup> caused immense confusion. After surveying district court opinions, the Third Circuit described decisions favoring one outcome as having an “undefined extent and uncertain nature,” while decisions reaching the opposite conclusion were “equally cloudy in definition and limited in scope.”<sup>50</sup> The absence of any appellate guidance further complicated matters.<sup>51</sup>

1944 witnessed an attempt at clarity by drafting a codified work product rule. The proposed FRCP amendment permitted protective orders to prevent “inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial.”<sup>52</sup> It did not provide absolute protection, but rather established the power to deny discovery in certain cases.<sup>53</sup> A second draft in 1945 noted the diverging court views, and explained that the main objection to the 1944 proposal concerned its failure to set a standard on when such protective orders are appropriate.<sup>54</sup> “In apparent despair, the Committee concluded: ‘If members of the profession can formulate a general statement of the standard for exercise of discretion, the Committee will welcome it and give it careful consideration.’”<sup>55</sup>

Just seven years after the adoption of the FRCP, a federal district court decided *Hickman v. Taylor*. At that time the term “work product” did not exist.

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use of his opponent’s preparation of his case. . . . It is fair to assume that, except in the most unusual circumstances, no such result was intended.”)

47. *French v. Zalstem-Zalessky*, 1 F.R.D. 508, 508–09 (S.D.N.Y. 1940) (concluding defendant did not have to produce “the result of its investigations in preparing for trial”).

48. *Id.*

49. See 8 WRIGHT & MILLER, *supra* note 13, § 2001 (summarizing various viewpoints); *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (“The importance of the problem, which has engendered a great divergence of views among district courts, led us to grant certiorari.”); James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 303–07 (1939-1940) (summarizing case law); Morrow, *supra* note 21, at 1152 (reviewing conflicting case law).

50. *Hickman v. Taylor*, 153 F.2d 212, 221 n.13 (3d Cir. 1945).

51. See *id.* at 214 n. 2.

52. Anderson et al., *supra* note 11, at 772.

53. *Id.*

54. *Id.*; 8 WRIGHT & MILLER, *supra* note 13, § 2001.

55. *Id.*

### B. *The Lineage of Hickman v. Taylor*

Five seamen died when a tugboat capsized.<sup>56</sup> Four days later, the tugboat company and its insurance carrier hired Mr. Fortenbaugh, an attorney, to “defend whatever litigation arose from the sinking in [sic] behalf of both the owners of the tug and the underwriters.”<sup>57</sup> Fortenbaugh interviewed and took witness statements from four survivors—all employees of the defendant tugboat company—and others with relevant information.<sup>58</sup> In some cases he made interview memoranda.<sup>59</sup>

The plaintiff sued the tugboat company and its owners under federal law for causing her husband’s death.<sup>60</sup> She filed an interrogatory under FRCP 33 seeking any statements from crewmembers of the capsized tugboat, or any other vessel “taken in connection with the towing of the car float and the sinking of the Tug.”<sup>61</sup> The interrogatory also requested copies of all written witness statements, and the details of any oral statements.<sup>62</sup> Later interrogatories sought the interview memoranda.<sup>63</sup> The defendants objected because the material was “privileged matter obtained in preparation for litigation.”<sup>64</sup>

As this case moved through the court system, so too did issues that plagued courts for generations. On its face, the FRCP permitted discovery of this material.<sup>65</sup> Some courts disagreed, but lacked any guidance from a statute, rule, or case law.<sup>66</sup> The name, source, scope, and classification of this infant doctrine were rarely addressed with detail or certainty.

#### 1. *District Court Decision*

The district court, sitting *en banc*, ordered production of (i) all written witness statements, (ii) the substance of any relevant facts learned through oral witness statements, and (iii) memoranda of witness interviews containing facts.<sup>67</sup> In doing so it highlighted core tenants of what became the work product doctrine.

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

57. *Id.* at 481.

58. *Id.*

59. *Id.*

60. *Id.* at 480.

61. *Id.*

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

63. *Id.* at 480–81.

64. *Id.*

65. See *supra* notes 38–41 and accompanying text.

66. See *supra* notes 42–48 and accompanying text.

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

The district court framed the issue as whether a party “should be required to produce written statements of witnesses and memoranda of oral statements . . . made to the party’s attorney.”<sup>68</sup> Note that the court did not frame the issue as an interpretation of the FRCP. Indeed, no one contested, nor did the court decide, the propriety of seeking this information under other rules. Rather, the decision applied to all forms of discovery.<sup>69</sup> This framing established both that no particular rule governed the issue (at least not at that time), and that the issue pervaded the entire code.<sup>70</sup>

The court held the decision rested on its discretion, reasoning that the FRCP gives trial courts “the widest discretion” to determine the discoverability of witness statements to an investigating party.<sup>71</sup> The “guiding principle” of this discretion is that the FRCP supports discovery of all relevant matters “to the fullest extent consistent with the orderly and efficient functioning of the judicial process.”<sup>72</sup>

The court went on to overturn its prior decision, and instead held it will strongly favor discovery in the absence of compelling reasons to the contrary.<sup>73</sup> “Unless, under the circumstances of any particular case, the Court is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked.”<sup>74</sup> Therefore, “even the fact that the chief purpose of taking [the notes] was to prepare for litigation” does not immunize the material from discovery.<sup>75</sup>

But the end of the opinion strikes a different chord. Despite language favoring broad discovery, the court drew a firm distinction between facts and opinions. For oral witness statements, the court ordered disclosures of fact statements, but not opinion statements.<sup>76</sup> For witness interview memoranda, the court ordered their production if they “consist of mere statements of fact” as they are then “in all respects equivalent to unsigned statements by the witnesses and are in no different category than the signed statements.”<sup>77</sup> However, the

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68. *Id.* at 481.

69. *Id.* at 481.

70. The Court distinguished the issue from the attorney-client privilege: “What has been said has to do with the Court’s discretion. The question of privileged communications between attorney and client is another matter and is governed by rules of law.” *Id.* at 482.

71. *Id.* at 481.

72. *Id.* (The only limitations are the requirement to show good cause for a deposition and certain discovery would not “promote the administration of justice in the particular case”).

73. *Hickman v. Taylor*, 4 F.R.D. 479, 481 (E.D. Pa. 1945).

74. *Id.* at 482.

75. *Id.*

76. *Id.*

77. *Id.*

court ordered Fortenbaugh to turn over to the court memoranda containing “notations of mental impressions, opinions, legal theories or other collateral matter;” the court would review them and disclose only the portions containing fact statements.<sup>78</sup> It reasoned “[d]iscovery should not be abused to become an instrument for obtaining knowledge of the opponent’s theories of the case or the opinions, impressions or the record of mental operations of his attorney. . . . [F]reedom in preparation for trial of a disputed issue under our judicial system contributes to satisfactory results, and there cannot be such freedom without some assurance of privacy within reasonable limits.”<sup>79</sup>

## 2. *Third Circuit Decision*

Loyal to their convictions, Mr. Fortenbaugh and his clients refused to turn over the documents and were found guilty of criminal contempt.<sup>80</sup> On appeal the Third Circuit, also sitting *en banc*, admitted candidly that the “case tests the limits, if any, of the scope of the discovery procedure under the Federal Rules.”<sup>81</sup> The Third Circuit also highlighted other unique difficulties: the FRCP did not “expressly cover” the issue,<sup>82</sup> the district courts were split,<sup>83</sup> and the FRCP Advisory Committee never reached a consensus or formulated a workable standard.<sup>84</sup> Ultimately, the court overturned the district court and held this “work product” material was protected as a public policy extension of the attorney-client privilege.<sup>85</sup>

To reach this holding the court relied on a few premises. First, the FRCP “intended to go far in making information known by one party available to the other.”<sup>86</sup> Second, there is no meaningful distinction between oral and written statements.<sup>87</sup> Lastly, the policies of the FRCP bound the courts: “When such a policy has been adopted either by rule-making court or legislature judges should go along with it.”<sup>88</sup> Each of these premises supported broad, liberal discovery—the hallmark of the FRCP movement.

78. *Id.* at 482–83.

79. *Hickman v. Taylor*, 4 F.R.D. 479, 482 (E.D. Pa. 1945).

80. *Hickman v. Taylor*, 153 F.2d 212, 214 (3d Cir. 1945).

81. *Id.*

82. *Id.* at 220.

83. *Id.*

84. The Committee stated adversary “files and their contents are not absolutely privileged . . . [but cannot] be delved into in every case without restriction.” *Id.* at 220 & n.12.

85. *Id.* at 223.

86. *Hickman v. Taylor*, 153 F.2d 212, 217 (3d Cir. 1945).

87. *Id.* at 219.

88. *Id.*

Despite these premises, the court expressed deep concern over how this issue affected the attorney-client privilege. All discovery rules are subject to and limited by the attorney-client privilege, regardless of whether the rules contain such an express limitation.<sup>89</sup> “[W]e cannot think a rule as old as that of [the attorney-client] privilege is to be lightly thrown overboard.”<sup>90</sup> But the testimonial attorney-client privilege did not apply to discovery.<sup>91</sup> Nonetheless, the material at issue indirectly affected the privilege. The court worried that if a lawyer disclosed witness statements made during an investigation and the witness made an inconsistent statement at trial, the lawyer could be called to verify the original statement.<sup>92</sup> Invoking the ethical code, the court cited the “professional tradition” that it is “undesirable” for a lawyer to advocate and testify for a client.<sup>93</sup>

Next the court drew an innovative distinction. Drawing on the English scope of discovery and a handful of district court decisions, the Third Circuit held the term “privilege” as used in the FRCP is broader than the term “privilege” in the law of evidence.<sup>94</sup> Although it was clear the material sought was privileged under the FRCP, the Court struggled to articulate the “phrasing of [its] conclusion.”<sup>95</sup> It was wary to announce that an attorney’s files are “impregnable,” a position that might preclude discovery of evidence a client gives to an attorney.<sup>96</sup> “But here we are dealing with intangible things, the results of the lawyer’s use of his tongue, his pen, and his head, for his client. This was talked about as the ‘work product of the lawyer’ in the argument of the case.”<sup>97</sup>

The Third Circuit announced “work product” not as a separate doctrine, but rather as a class of material protected by the discovery-exception of the attorney-client privilege. The Court justified “this frank extension of privilege beyond testimonial exclusion” as “a rule of public policy, and the policy is to aid people who have lawsuits and prospective lawsuits.”<sup>98</sup> This policy encourages clients to make full disclosures to their attorneys and encourages attorneys to “put their whole-souled efforts” into the case.<sup>99</sup>

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89. *Id.* at 221.

90. *Id.*

91. *Id.* at 222.

92. *Hickman v. Taylor*, 153 F.2d 212, 219–20 (3d Cir. 1945).

93. *Id.* at 220.

94. *Id.* at 222.

95. *Id.* at 222–23.

96. *Id.*

97. *Id.*

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

99. *Id.*

The Third Circuit was in a precarious position. The FRCP was an infant. Courts must follow the policies of the FRCP, which favor broad discovery. But here no rule governed. There was no appellate authority and district courts disagreed. The traditional formulation of the attorney-client privilege did not cover work product but there was a grave concern such discovery could indirectly undermine the privilege. So the Court drew upon case law, restatements, advisory committee notes, ethical and evidentiary rules, and English law. While it was clear to the court the sought material warranted protection, it struggled to articulate a standard or basis. Ultimately, it grafted onto the FRCP a common-law style public policy extension of the attorney-client privilege.

### 3. *An Attempted Intervention by the Judicial Conference*

A series of very unusual events followed the Third Circuit's December 1945 decision. In April the following year, the Supreme Court denied the petition for a writ of *certiorari*,<sup>100</sup> only to reverse itself and grant a petition for rehearing and a writ of *certiorari* one month later in May 1946.<sup>101</sup> The next month the FRCP Advisory Committee proposed an amendment to Rule 30 codifying work product protection.<sup>102</sup> While acknowledging several cases aligned with the Third Circuit's opinion, the Committee, with one member dissenting, disagreed.<sup>103</sup> It believed the term "privileged" in the FRCP only referred to the testimonial attorney-client privilege and did not extend to work product.<sup>104</sup> The proposed rule read:

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. No court shall 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.<sup>105</sup>

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100. *Hickman v. Taylor*, 327 U.S. 808 (1946).

101. *Hickman v. Taylor*, 328 U.S. 876 (1946).

102. FED. R. CIV. P. 30 advisory committee's report on proposed 1946 amendment.

103. *Id.*

104. *Id.*

105. Morrow, *supra* note 20, at 1153 & n. 47-48 (1971); 8 WRIGHT & MILLER, *supra* note 13, § 2021 ("This proposal was buttressed by an eight-page note canvassing the relevant authorities.").

Interestingly, the proposal bifurcated the doctrine and created two standards. It offered qualified protection to the “production or inspection” of materials prepared in anticipation of litigation by requiring the moving party to make a showing of unfair prejudice or undue hardship.<sup>106</sup> But it provided absolute protection for materials that reflect “an attorney’s mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of any expert.”<sup>107</sup> Although the proposal amended Rule 30, which governed depositions, it applied to all the main discovery mechanisms.<sup>108</sup>

The Supreme Court rejected the proposal. Although the Court did not explain why “it has usually been assumed that the Court preferred not to deal with the problem by rulemaking, but hoped to contribute to a resolution of the controversy by its decision in the Hickman case.”<sup>109</sup> On January 13, 1947 the Supreme Court decided *Hickman v. Taylor*.<sup>110</sup> In doing so it chose to create and develop a doctrine through its jurisprudence rather than through a codified rule.

#### 4. *Supreme Court Decision*

The Supreme Court affirmed the Third Circuit on different grounds, yet never explained its authority to create work product protection. While acknowledging it could decide the case on narrow procedural grounds because the plaintiff sought discovery under the incorrect rule,<sup>111</sup> the Court addressed the broader issue of whether any discovery devices can include “materials collected by an adverse party’s counsel in the course of preparation for possible litigation.”<sup>112</sup> Again, the issue pervaded the entire FRCP and no single rule governed.

The Court began by reinforcing the FRCP’s liberal discovery policy.<sup>113</sup> Nonetheless, “discovery, like all matters of procedure, has ultimate and necessary boundaries”—although the Court never identified the source of these boundaries.<sup>114</sup> Guiding the Court was the effect

106. FED. R. CIV. P. 30 advisory committee’s report on proposed 1946 amendment. The committee rejected standards of “fishing expedition,” “penalizes the diligent,” puts a “premium on laziness,” and a broad attorney-client privilege. *Id.*

107. *Id.*

108. *Id.*

109. 8 WRIGHT & MILLER, *supra* note 13, § 2021.

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

111. “But, under the circumstances, we deem it unnecessary and unwise to rest our decision upon this procedural irregularity, an irregularity which is not strongly urged upon us and which was disregarded in the two courts below.” *Id.* at 505.

112. *Id.* at 504–05.

113. *Id.* at 507 (“The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.”).

114. *Id.* at 507.

an unnecessary intrusion into an attorney's work would have on the profession. The Court emphasized that the plaintiff had other means of obtaining the witness statements, like by obtaining their prior testimony at a public hearing or by deposing the witnesses directly.<sup>115</sup> Thus, there was no showing of necessity or any indication denial of production would unduly prejudice plaintiff or cause "any hardship or injustice."<sup>116</sup> Somewhat summarily, the Court held no discovery rule contemplated the production of such material in these circumstances.<sup>117</sup> However, this bar was "not because the subject matter is privileged or irrelevant."<sup>118</sup> Rather, work product protection "falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims."<sup>119</sup>

This public policy is the regulation of the legal profession; specifically, the role of attorneys and how they can best serve clients. A lawyer is "an officer of the court [ ] bound to work for the advancement of justice" while also protecting client interests.<sup>120</sup> "It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."<sup>121</sup> Proper preparation of a case requires assembling information, determining which facts are relevant, preparing legal theories, and planning strategy "without undue and needless interference."<sup>122</sup> The term "work product" covers this kind of work.<sup>123</sup> A contrary rule risks "[i]nefficiency, unfairness, and sharp practices" that would demoralize the legal profession, and "the interests of the clients and the cause of justice would be poorly served."<sup>124</sup>

Nonetheless, work product protection is qualified. "Where relevant and non-privileged facts remain hidden in an attorney's file, and where production of those facts is essential to the preparation of one's

115. *Id.* at 504.

116. *Hickman v. Taylor*, 329 U.S. 495, 509 (1947).

117. *Id.*

118. *Id.* at 509–10.

119. *Id.* at 510.

120. *Id.*

121. *Id.*

122. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

123. *Id.*

124. *Id.* Justices Jackson and Frankfurter, concurring, focused on the necessity of the doctrine to the legal profession. "The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. *Id.* at 514–15 (Jackson, J., concurring). "It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court's order. . . . But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them." *Id.* at 518.



case, discovery may properly be had.”<sup>125</sup> Absolute protection would undermine the FRCP’s “liberal ideals.”<sup>126</sup> The burden of showing necessity is “implicit in the rules” and rests on the moving party because “the general policy against invading the privacy of an attorney’s course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure.”<sup>127</sup> This burden is higher to discover “an attorney’s recollection or impressions of oral witness statements.”<sup>128</sup>

### 5. *The Questions and Answers of Hickman*

And so work product was born. *Hickman* answers some questions while leaving others unanswered. For example, the Court affirmed that work product does not fall within the attorney-client privilege and is an issue that affects all civil discovery.<sup>129</sup> With no rule on point, it created work product protection in common law fashion based on “the public policy underlying the orderly prosecution and defense of legal claims.”<sup>130</sup>

But the Court did not explain the source of its power to create a new doctrine out of public policy alone. Which power the Court relied upon affects the viability of future modifications to, or even the elimination of, work product protection.

Some language does hint at whether the doctrine can change or evolve, but does not specify how. Parts of *Hickman* suggest work product protection is necessary to the justice system. To start, the

125. *Id.* at 511.

126. *Hickman v. Taylor*, 329 U.S. 495, 511–12 (1947).

127. *Id.*

128. While a showing of necessity to access written witness statements is possible, an equivalent showing to access oral statements is unlikely though not impossible. “Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.” *Id.* at 513. To force an attorney to testify what he remembers or what he saw fit to write down “could not qualify as evidence” and if used for impeachment or corroboration would make the attorney “much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.” *Id.* But “[i]f there should be a rare situation justifying production of these matters, petitioner’s case is not of that type.” *Id.*

129. *See supra* note 112.

130. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). As Professor Edward Cleary described it “The fact seems to be, however, that the Court was once more trapped by an apparently felt necessity of saving face by refusing to admit that a contingency had arisen which the rules had not foreseen or had dealt with improvidently. A court driven to critical scrutiny of its own rules occupies an ambiguous and embarrassing position, with no escape offered by the usual preference for judicial over legislative wisdom.” Edward W. Cleary, *Hickman v. Jencks Jurisprudence of the Adversary System*, 14 VAND. L. REV. 865, 866 (1960-1961).

Court held discovery has “ultimate and necessary boundaries.”<sup>131</sup> And “[i]t is essential that a lawyer work with a certain degree of privacy,” for that “is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.”<sup>132</sup> Even more strongly, the Court wrote “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”<sup>133</sup> Such language paints an outer limit to discovery. This language suggests the Court has authority to establish at least some form of work product protection that the other branches of government cannot modify or eliminate.

Yet other *Hickman* language suggests the opposite. There was widespread controversy throughout the profession over the issues raised in *Hickman*.<sup>134</sup> In fact, work product is “one of the most hazy frontiers of the discovery process.”<sup>135</sup> “But, until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right . . . we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.”<sup>136</sup> Such statements strongly suggest that either Congress, or the Supreme Court through its rulemaking power, can modify or even eliminate work product protection. Oddly though, shortly before deciding *Hickman*, the Supreme Court rejected a proposed rule.<sup>137</sup>

A close reading of *Hickman* sets up the overlooked conflict at the core of work product: who defines and controls work product? Though most courts and commentators focus only on *Hickman*’s definition of work product, the opinion’s language outlines the potential for modifications. *Hickman* was an intervention. Strong policies led to *Hickman* because there was no guidance from any other sources. But the Court carefully included noticeable deference to the FRCP and acknowledged the potential for a rule-based override.

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131. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

132. *Id.* at 511.

133. *Id.* at 510.

134. *Id.* at 513–14.

135. *Id.*

136. *Id.* at 514.

137. *Supra* notes 102–109 and accompanying text.

C. *The Aftermath of Hickman v. Taylor*

1. *Immediate Response*

*Hickman* did not settle matters or bring peace to this turbulent area of law. Work product was brand new, with no clear backstory and many moving parts. Disagreement was inevitable. Although designed to simplify procedure, as one judge explained, the FRCP has “been the subject of more interpretive legal literature than almost any branch of the law during my judicial tenure; and more particularly did the case of *Hickman v. Taylor* account for a large part of it—a veritable Pandora’s Box!”<sup>138</sup>

The confusion never subsided. Courts did not reach consensus. One significant source of confusion was whether *Hickman* applied to non-attorney work product. Because *Hickman* involved an attorney and emphasized the special role of attorneys in the legal system, many courts limited protection to attorney-created work product.<sup>139</sup> Other courts disagreed, finding “no logical basis” for distinguishing witness statements gathered by non-attorneys for attorneys.<sup>140</sup> Similarly, questions arose about what legal skills triggered protection and whether expert materials received protection.<sup>141</sup>

These questions were the tip of the iceberg. Courts disagreed about the burden of overcoming work product protection.<sup>142</sup> Many courts interpreted *Hickman*’s burden to be higher than the “good cause” requirement under Rule 34 to produce documents, while others treated the two standards as equivalent.<sup>143</sup> Others questioned whether protec-

138. *Viront v. Wheeling & Lake Erie Ry. Co.*, 10 F.R.D. 45 (N.D. Ohio 1950).

139. Anderson et al., *supra* note 11, at 780 & n. 133 (citing cases); FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment (citing cases); Cleary, *supra* note 130, 867–69 (discussing cases).

140. Anderson et al., *supra* note 11, at 780 & n.134; FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment (citing cases).

141. Morrow, *supra* note 20, at 1157.

142. FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment; 8 WRIGHT & MILLER, *supra* note 13, § 2025.

143. Anderson et al., *supra* note 11, at 780–81; FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment. *Accord* Morrow, *supra* note 20, at 1157 (“First, *Hickman* left three ‘good cause’ burdens to be met before discovery could be used: (1) good cause (relevance) for production of documents under rule 34; (2) good cause (hardship or necessity) to discover ordinary work-product; and (3) good cause (a ‘rare case’) to discover an attorney’s mental impressions—a test which the Court did not even attempt to define. The situation was distressing, as courts in the years after *Hickman* became confused and equated the good cause for work-product with a showing of relevance, dearly an erroneous interpretation of the meaning of *Hickman*.”). See also Notes, *Discovery: Work Product and Good Cause Development Since Hickman v. Taylor*, 36 IND. L.J. 186, 195–200 (1960-1961).

tion applied beyond discovery to trials.<sup>144</sup> Even the FRCP Advisory Committee acknowledged the immense confusion: “Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial.”<sup>145</sup>

In part due to these issues, many states otherwise adopting the federal discovery rules drafted their own detailed work product rule to solve the problems left open in *Hickman*.<sup>146</sup> But the federal system was slow to act. For nearly two decades, proposed FRCP amendments in 1953, 1955, and 1967 tried to clarify the burden to overcome work product protection. None succeeded.<sup>147</sup>

Finally, everything changed in 1970. While acknowledging the Supreme Court’s 1947 preference to solve the problem by judicial decision rather than by rule, the FRCP Advisory Committee felt “[s]ufficient experience has accumulated” with lower court applications of *Hickman* to warrant a “reappraisal” in the form of a codified rule.<sup>148</sup>

The 1970 amendment created FRCP 26(b)(3), which has not been significantly changed since then, and today reads:

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

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144. Edward W. Cleary, *Hickman v. Jencks Jurisprudence of the Adversary System*, 14 VAND. L. REV. 865, 870 (1960-1961).

145. FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment.

146. 8 WRIGHT & MILLER, *supra* note 13, § 2022.

147. Anderson et al., *supra* note 11, at 782–84; Morrow, *supra* note 20, at 1160; 8 WRIGHT & MILLER, *supra* note 13, § 2023.

148. FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment. For a history of the 1970 amendments see Morrow, *supra* note 20, at 1157–63.

ories of a party's attorney or other representative concerning the litigation.<sup>149</sup>

The Rule eliminated confusion by replacing the "good cause" requirement with a "substantial need" and "undue burden" standard. The committee elaborated that "substantial need" requires an assessment of importance, need, and alternative access.<sup>150</sup> The amendment also resolved whose work product was protected by extending protection to non-attorneys.<sup>151</sup>

But at the same time Rule 26 raised many new debates, perhaps even more than it solved. The Rule gave special protection to an attorney's "mental impressions, conclusions, opinions, or legal theories" (sometimes referred to as "opinion" or "core" work product). Yet the rule only protects "tangible things." Was intangible work product still protected? If so, was it subject to a different standard? Commentators disagreed.<sup>152</sup> While *Hickman* "soundly divided the subject into 'ordinary' and 'opinion' work product,"

Rule 26(b)(3) surprisingly, irrelevantly, and apparently inadvertently divided the same world into "tangible" and "intangible" work product. The rule implicitly recognized that both ordinary and opinion work product, deserving different degrees of protection, could appear in documents and tangible things. The rule left intangible work product on its own.<sup>153</sup>

As one set of commentators noted this "suggested the existence of some ill-defined bifurcation within the rule."<sup>154</sup> Why Rule 26 did not mimic the language of *Hickman* is a question left unanswered. Similarly, what justifies this distinction between tangible and intangible work product? Why is intangible work product left unprotected? These are issues rarely raised and never answered.

The Rule also limited protection to materials prepared "in anticipation of litigation." This created a new and problematic sub-doctrine. When does "anticipation" begin? Does protection extend beyond the anticipated litigation to subsequent litigation?<sup>155</sup> Other issues arose concerning waiver and which parties could assert the protection.<sup>156</sup>

149. FED. R. CIV. P. 26(b)(3); 8 WRIGHT & MILLER, *supra* note 13, § 2023.

150. FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

151. Anderson et al., *supra* note 11, at 782-84.

152. *Id.*

153. Clermont, *supra* note 18, at 756.

154. Anderson et al., *supra* note 11, at 782-84.

155. *Id.* at 784.

156. *Id.*

The 1974 amendments to Rules 16(a)(2) and (b)(2) of the Federal Rules of Criminal Procedure added work product protection in criminal cases. They currently state:

(a)(2) *Information Not Subject to Disclosure.* Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. §3500.

...  
 (b)(2) *Information Not Subject to Disclosure.* Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:  
 (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or  
 (B) a statement made to the defendant, or the defendant's attorney or agent, by:  
 (i) the defendant;  
 (ii) a government or defense witness; or  
 (iii) a prospective government or defense witness.<sup>157</sup>

Yet again, for reasons unknown, work product's allergy to consistency flared. Rule 16's language neither mirrors *Hickman* nor FRCP 26. Unlike its civil counterpart it is "cast in terms of the type of document involved (e.g., report), rather than in terms of the content (e.g., legal theory)."<sup>158</sup> The amendment process rejected altering the language to mirror its civil counterpart.<sup>159</sup>

Thus, the time period after the 1970 and 1974 amendments remained filled with disputes and conflicting opinions.<sup>160</sup> By at least one estimate, work product "is the most frequently litigated discovery issue."<sup>161</sup>

## 2. *Modern Interpretation of the Work Product Doctrine*

This Article has tracked work product chronologically to reach conclusions about its source and nature. At this point let us pause and take inventory. Professor Clermont summarized it well:

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157. FED. R. CRIM. P. 16(a)(2); FED. R. CRIM. P. 16(b)(2).

158. FED. R. CRIM. P. 16(a) advisory committee's note to 1974 amendment.

159. *Id.*

160. Anderson et al., *supra* note 11, at 782–84. For a comprehensive study of the dilemmas in applying the codified rules see Anderson et al., *supra* note 11.

161. *Id.* at 763.

Significant intellectual challenge and truly compelling importance compose the formula for disorder. So many commentators (and judges) wander into the moraine, focus hard but myopically on some tiny facet of the work-product doctrine, and leave a deposit of fresh confusion. One of the contributing causes of this disorder is the questionable legal process that produced the work-product doctrine. In the forties, the Supreme Court passed up the rulemaking route for the pointillist case method, kicking off the process of clarification with the great case of *Hickman v. Taylor*. In 1970, from the welter of conflicting decisions the rulemakers attempted to codify workable sensibleness, adopting the poorly executed Rule 26(b)(3). Today we thus enjoy intensified confusion.<sup>162</sup>

Even putting aside the interpretations of FRCP 26, Federal Rule of Criminal Procedure 16, and *Hickman*, there is a much larger issue. That these Rules and *Hickman* are different in significant ways is well established. Take FRCP 26 as an example: “One of the most significant features of the current work product doctrine is the coexistence of *Hickman* and Rule 26(b)(3).”<sup>163</sup> Some view FRCP 26 as narrower than *Hickman* because it applies only to tangible work product, while *Hickman* also protects intangible work product.<sup>164</sup> But others note FRCP 26 is broader than *Hickman* in that it protects non-attorney work product whereas *Hickman* only discusses attorney work product.<sup>165</sup> Moreover, FRCP 26 is subject to the methods of interpretation that apply to federal rules, whereas *Hickman* is a policy-driven analysis.<sup>166</sup> Yet all survive as governing sources of law.

Commentators conclude that FRCP 26(b)(3) embodies the “partial codification” of *Hickman v. Taylor*.<sup>167</sup> But this is more than academic theory. The Supreme Court has admitted this too: “The ‘strong public policy’ underlying the work-product doctrine . . . has been *substantially incorporated* in Federal Rule of Civil Procedure 26(b)(3).”<sup>168</sup> Consistently federal courts follow suit, holding Rule 26 “partially” codifies work product protection and *Hickman* governs uncoded intangible work product.<sup>169</sup> Yet no courts have explained why or identi-

162. Clermont, *supra* note 18, at 755–56.

163. Anderson et al., *supra* note 11, at 763.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See, e.g.*, Anderson et al., *supra* note 11, at 762, 784.

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

169. 8 WRIGHT & MILLER, *supra* note 13, §§ 2023–24 (“[T]he preexisting protections for intangible work product have continued application despite the 1970 amendment.”) (citing cases). *See, e.g.*, *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010) (“*Hickman* provides work-product protection for intangible work product independent of Rule 26(b)(3).”); *In re Centent Corp. Secs. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) (“It is clear from *Hickman* that work product protection extends to both tangible and intangible work product.”); *United States v.*

fied authority for ruling as such. After all, *Hickman* instructed it governs “until some rule or statute definitely prescribes otherwise.”<sup>170</sup> Now there are rules. So why is *Hickman* still relevant?

Currently there are, effectively, two work product doctrines: a codified branch and a *Hickman* branch. The implications are significant. Consider the question of whether protection extends to a non-party’s work product. Rule 26 provides no protection. If that is the only source of work product protection, a non-party must seek a protective order under another provision.<sup>171</sup> But if Rule 26 is a partial codification of *Hickman*, then a court can “continue to apply the *Hickman* policies to resolve questions which the Rule does not address.”<sup>172</sup> More fundamentally, which source governs the issue? Do courts look to the Rule, to *Hickman*, or to both?

### III. ANALYSIS

Courts, practitioners, and commentators have erred in focusing nearly exclusively on *Hickman* for answers. The decision is only partially instructive. The full spectrum of Supreme Court decisions about work product, coupled with an analysis of federal rulemaking power, provides answers. The *Hickman* work product doctrine is the product of federal courts’ inherent rulemaking power and is far more expansive than previously thought. But it is not limitless. If a rule or statute applies, it preempts *Hickman*.

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One Tract of Real Property Together With all Bldgs., Improvements, Appurtenances and Fixtures, 95 F.3d 422, 428 n.10 (6th Cir. 1996) (“When applying the work product privilege to such nontangible information, the principles enunciated in *Hickman* apply, as opposed to Rule 26(b)(3) of the Federal Rules of Civil Procedure, which applies only to ‘documents and tangible things.’”); *Alexander v. FBI*, 192 F.R.D. 12, 17 (D.D.C. 2000) (“To analyze an attorney work-product claim as to intangible work product, courts must look to the caselaw under *Hickman v. Taylor* . . . and its progeny and not to FED. R. CIV. P. 26(b)(3), which applies only to ‘documents and tangible things.’”); *Lopes v. Vieira*, 688 F. Supp. 2d 1050, 1069 (E.D. Cal. 2010) (“The work-product privilege was substantially incorporated into F.R.Civ.P. 26(b)(3)(A).”); *Byers v. Burleson*, 100 F.R.D. 436, 439 n.4 (D.D.C. 1983) (same); *In re Grand Jury Subpoena* (Legal Servs. Ctr.), 615 F. Supp. 958, 963 (D. Mass. 1985) (same); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587 (N.D. Ill. 1981) (same); *Loftis v. Amica Mut. Ins. Co.*, 175 F.R.D. 5, 11 (D. Conn. 1997) (same).

170. *Hickman v. Taylor*, 329 U.S. 495, 514 (1947).

171. *Anderson et al.*, *supra* note 11, at 861–64.

172. *Id.* at 862.



A. *Hickman Remains Good Law But is Much More Than a Discovery Doctrine*

Despite the confusion rampant within this crucial doctrine, the Supreme Court has rarely discussed *Hickman*.<sup>173</sup> In fact, the Court never squarely addressed the doctrine between *Hickman* and the amendments to FRCP 26 and Federal Rule of Criminal Procedure 16. Some later opinions refer to work product in passing and without elaboration; they simply reaffirm its general definition.<sup>174</sup>

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173. The Supreme Court has used the term “work product” to refer to many different concepts. In many cases the Court uses the term in a more descriptive or colloquial manner referring to the product or output of government entities or professionals. Such cases seem to have no bearing on the work product protection discussed here. *See, e.g.*, *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016) (Ginsburg, J., dissenting) (“the Court erred profoundly in that case by reading the work product of a Congress sitting in 1974 as . . . .”); *Mut. Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2481 (2013) (Breyer, J., dissenting) (“For another thing, the FDA has set forth its positions only in briefs filed in litigation, not in regulations, interpretations, or similar agency work product.”); *Alvarez v. Smith*, 558 U.S. 87, 99 (2009) (Stevens, J., dissenting) (“the improvidence of our grant provides an additional reason why we should not vacate the work product of our colleagues on the Court of Appeals.”); *Rapanos v. United States*, 547 U.S. 715, 788 (2006) (“Our unanimous decision . . . was faithful to our duty to respect the work product of the Legislative and Executive Branches of our Government.”); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 76 (2004) (Stevens, J., concurring) (“In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent when interpreting its work product.”); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 467 (2002) (“If we assume that Senators Rockefeller and Wallop correctly understood their work product, the provision is coherent.”) (referring to statements in Congressional Record); *Cent. State Univ. v. Am. Asso. of Univ. Professors*, 526 U.S. 124, 130 (1999) (Stevens, J., dissenting) (referring to the “work product of faculty members in Ohio’s several state universities”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341 (1995) (“[T]he anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment”); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting) (“But when our earlier opinion gives a statutory provision concrete meaning, which Congress elects not to amend during the ensuing 3 1/2 decades, our duty to respect Congress’ work product is strikingly similar to the duty of other federal courts to respect our work product.”); *Thompson v. Oklahoma*, 487 U.S. 815, 821–22 (1988) (“In performing that task, the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases.”).

174. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (involving assistant district attorney’s internal memorandum assessing a law enforcement affidavit and concluding “government employees’ work product” was not protected speech); *Dept. of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8 (2001) (concluding FOIA provision incorporating civil discovery privileges included “the privilege for attorney work-product and what is sometimes called the ‘deliberative process’ privilege. Work product protects mental processes of the attorney. . . while deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”) (internal quotations and citations omitted).

Complicating matters, courts have referred to work product using different terms,<sup>175</sup> including “qualified privilege,”<sup>176</sup> “work product privilege,”<sup>177</sup> and “work-product immunity.”<sup>178</sup> Courts are clear work product is not an evidentiary privilege,<sup>179</sup> but it may be a form of immunity or a “qualified privilege.”<sup>180</sup> While some might dismiss the naming as semantics, its nomenclature is part of the problem. FRCP 26 and Federal Rule of Criminal Procedure 16 address work product in the discovery context. But “immunity” carries connotations of trial protection while “privilege” suggests protection extending throughout all phases of a case. Fortunately, later Supreme Court decisions shed light on its scope.

Decided over two decades after *Hickman*, the 1975 criminal case of *United States v. Nobles* transformed the *Hickman* work product doctrine. In *Nobles*, the defense called one of its investigators to discuss what prosecution witnesses told him.<sup>181</sup> But the trial court conditioned the testimony on disclosure of the investigator’s written report, which was work product.<sup>182</sup> Federal Rule of Criminal Procedure 16 protected work product but only applied to pretrial discovery.<sup>183</sup> The Court concluded while work product protection applied, the defense waived this “qualified privilege” when it called the investigator.<sup>184</sup> In doing so, the Court issued its clearest holding on *Hickman* work product.

*Nobles* explicitly disproved several work product classifications and limits. First, the policies of *Hickman* apply to criminal trials; in fact, “its role in assuring the proper functioning of the criminal justice system is even more vital.”<sup>185</sup> Second, the Court identified “core” work

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175. See also *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 n.1 (N.D. Ohio 1953) (“The term, ‘work product of the attorney’ has been variously characterized a ‘privilege,’ ‘exemption,’ or ‘immunity.’ It matters little what terminology is employed, however, so long as it is understood that the phrase encompasses something apart from confidential communications between client and attorney.”).

176. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 183 (1979) (“We have in the past, however, recognized evidentiary privileges in order to protect interests and relationships . . . For example, *Hickman v. Taylor*, supra, created a qualified privilege for attorneys’ work products in part because, without such a privilege, [t]he effect on the legal profession would be demoralizing.”) (internal quotations omitted).

177. *FTC v. Grolier Inc.*, 462 U.S. 19 (1983).

178. *Id.* at 24.

179. 8 WRIGHT & MILLER, supra note 13, § 2023.

180. *Id.*

181. 422 U.S. 225, 227 (1975).

182. *Id.* at 229.

183. *Id.* at 235–36.

184. *Id.* at 239.

185. *Id.* at 238.

product (impliedly distinguishing “periphery” work product): “At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.”<sup>186</sup> Crucially, the Court defined this “core” without discussing whether such material is tangible or intangible. Third, acknowledging the post-*Hickman* confusion, the Court held protection applies to non-attorneys, noting that “the doctrine is an intensely practical one.”<sup>187</sup> *Nobles* thereby disproved those sources that described FRCP 26 as broader than *Hickman* because it applied to non-attorneys.<sup>188</sup> Fourth, the Court held that protection extends beyond discovery to the trial phase of a case (and potentially onward).<sup>189</sup> The driving forces leading to codification thought of work product as a discovery doctrine.<sup>190</sup> No more.<sup>191</sup>

Notably, *Nobles*’ context is similar to *Hickman*. Because Federal Rule of Criminal Procedure 16 only covered pretrial discovery, no rule governed the trial issue in *Nobles*. Yet again the Court called upon the public policies of *Hickman*, but again it did not explain its authority to do so.<sup>192</sup> The Court referenced the “federal judiciary’s inherent power” to require the prosecution to produce statements of its witnesses to the defense,<sup>193</sup> but never specified its authority to define and expand the *Hickman* work product doctrine.

Nonetheless, the precise scope of *Hickman/Nobles* remains unclear. *FTC v. Grolier Inc.* illustrates the ambiguity of their breadth. In *Grolier*, the Supreme Court held civil work product protection extended beyond the specific litigation the attorney prepared the materials

186. *Id.* at 238.

187. *United States v. Nobles*, 422 U.S. 225, 238–39 & n.13 (1975).

188. *See supra* note 164.

189. *United States v. Nobles*, 422 U.S. 225, 239 (1975). *Cf. Swidler & Berlin v. United States*, 524 U.S. 399, 415 (1998) (O’Connor, J., dissenting) (concluding the work product doctrine does not apply “where the material concerns a client who is no longer a potential party to adversarial litigation”).

190. In fact, the main dispute raised in the concurring opinion of Justice White is whether *Hickman* is limited to pretrial discovery. *United States v. Nobles*, 422 U.S. 225, 243 (1975). Justice White described the *Hickman* decision “entirely as one involving the plaintiff’s entitlement to pretrial discovery under the new Federal Rules.” *Id.* at 244 (White, J., concurring). He concluded the *Hickman* court did not conclude that work product fell within the attorney-client privilege (as the Third Circuit had concluded) because doing so would have prevented work product serving as evidence at trial. *Id.* at 245. Justice White noted Congress passed Rule 26 “which incorporated much of” *Hickman*. *Id.* at 246. He went on to assert the public policy in *Hickman* does not apply, or at least is not nearly as strong, in the evidentiary context. *Id.* at 254.

191. The Court would not “undertake here to delineate the scope of the doctrine at trial.” *Id.* at 239.

192. *United States v. Nobles*, 422 U.S. 225, 236–38 (1975).

193. *Id.* at 231.

for.<sup>194</sup> The Freedom of Information Act required making agency materials available to the public; however, an exception excluded materials not available “by law” to a party in litigation with the agency.<sup>195</sup> The question was “the extent, if any, to which the work product component of [the exemption] applies when the litigation for which the requested documents were generated has been terminated.”<sup>196</sup> To reach its conclusion, the Court relied on the text of Rule 26, which protected materials prepared for any litigation “as long as they were prepared by or for a party to the subsequent litigation.”<sup>197</sup> “Whatever problems such a construction of Rule 26(b)(3) may engender in the civil discovery area, it provides a satisfactory resolution to the question whether work-product documents are exempt under the FOIA.”<sup>198</sup>

Noticeably absent from the majority opinion is any discussion of *Hickman/Nobles* policies. One explanation is that because a rule governs there is no need to appeal to public policy. Another explanation is that Rule 26 is broader than the *Hickman/Nobles* doctrine and so these policies did not apply. Yet, concurring, Justice Brennan drew upon these policies: “A contrary interpretation such as that adopted by the Court of Appeals would work substantial harm to the policies that the doctrine is designed to serve and protect.”<sup>199</sup> Citing *Hickman*, he warned against the “demoralizing effect on the profession,” “harm to the interests of the attorney and his client,” and the “danger of inefficiency, unfairness, [and] sharp practices.”<sup>200</sup>

*Nobles* extended *Hickman* dramatically, but *Grolier* laid out a potentially important clarification. In light of *Grolier*, a court’s first stop may be to carefully assess any codified work product rules or statutory limitations on the doctrine. If those sources do not address the issue, only then does a court look to the public policies of *Hickman*. Still, courts have never endorsed a regimented two-step process and the answer remains unclear.<sup>201</sup>

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194. 462 U.S. 19, 28 (1983).

195. *Id.* at 20.

196. *Id.*

197. *Id.* at 25.

198. *Id.* at 25–26 (citations omitted).

199. *Id.* at 29.

200. *FTC v. Grolier Inc.*, 462 U.S. 19, 30–31.

201. In its 1996 decision in *United States v. Armstrong* the Supreme Court held Federal Rule of Criminal Procedure 16(a)(1)(C) “authorizes defendants to examine Government documents material to the preparation of their defense against the Government’s case in chief, but not to the preparation of selective-prosecution claims.” 517 U.S. 456, 463 (1996). Concurring, Justice Breyer argued the majority inferred a “case in chief” limitation in part because the defense would likely need work product to make its case for a selective-prosecution claim and a different

*B. Federal Courts Apply Hickman Through Their Inherent Power to Create Rules*

The Supreme Court's authority to decide *Hickman/Nobles* is unknown. Also unknown is the authority for federal courts to apply *Hickman* policy considerations to supplement codified rules. The answer is the firmly established, rarely invoked, nebulous inherent powers of federal courts.

*1. The Federal Rulemaking Process*

The primary way federal rules, like the rules of civil, criminal, and appellate procedure, are created is through a congressional delegation of rulemaking power to the judiciary via the Rules Enabling Act. The Act permits the Supreme Court to create "general rules of practice and procedure and rules of evidence" for cases in federal courts.<sup>202</sup> To assist with the rulemaking process, Congress created the Judicial Conference to draft proposed rules and amendments.<sup>203</sup> Although the Judicial Conference plays a significant practical role, the power to issue new rules remains solely with the Court. The Supreme Court has rejected,<sup>204</sup> modified,<sup>205</sup> and taken no action<sup>206</sup> on proposed rules. The Court must submit all proposed amendments for congressional review. When Congress elects not to intervene, the proposals take effect.<sup>207</sup>

There are several statutory limits on this rulemaking process. First, no proposed rules can "abridge, enlarge or modify any substantive

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provision of Rule 16 prevented disclosure of work product. *Id.* at 473. But the work product provision may itself contain an implicit exception as it does not offer absolute protection. *Id.* at 473-74. "Of course, to read the work-product exception as containing some such implicit exception itself represents a departure from the Rule's literal language. But, is it not far easier to believe the Rule's authors intended some such small implicit exception to an exception, consistent with the language and purpose of the Rule, than that they intended the very large exception created by the Court?" *Id.* at 474.

202. 28 U.S.C. § 2072(a) (2012). Congress has also authorized the Supreme Court and all federal courts to create internal "rules for the conduct of their business" (i.e. local rules) so long as such rules are "consistent with Acts of Congress" and rules passed via the Rules Enabling Act. 28 U.S.C. § 2071(a) (2012).

203. 28 U.S.C. § 331 (2012).

204. JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 54, 100 (1977) (court rejected proposed work product rule because of pending case).

205. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1004 (3d ed. 2008) (Supreme Court made changes to first proposed set of the Federal Rules of Civil Procedure); WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES, FEDERAL JUDICIAL CENTER, 13-15, 31 (1981).

206. 4 WRIGHT & MILLER, *supra* note 205, § 1006 (referencing 1955 rule proposals); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 843 (1993) (Court refused to transmit amendment implicating foreign relations).

207. 28 U.S.C. § 2074(a) (2012).

right.”<sup>208</sup> Notably, unlike the attorney-client privilege, the work product doctrine is procedural and thus always governed by federal law even when a federal court decides a case under diversity jurisdiction.<sup>209</sup> Second, if “laws” and a rule conflict, the more recent one prevails.<sup>210</sup> Research revealed no cases deciding whether “laws” includes case law such that a rule supersedes a conflicting court decision (like *Hickman*). Third, any proposed rule “creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”<sup>211</sup> Although sometimes referred to as a “qualified privilege,” work product is not an evidentiary privilege.<sup>212</sup> But, muddying the waters, Congress, not the Supreme Court, enacted Federal Rule of Evidence 502, which outlines the subject matter waiver of both the attorney-client privilege and work product.<sup>213</sup>

This process assumes Congress controls federal court procedure and may delegate such power to the judiciary. Courts agree that with Congress’s power to create inferior courts comes the ability to control the procedure of such courts.<sup>214</sup> As the Supreme Court has explained, “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States.”<sup>215</sup>

208. 28 U.S.C. § 2072(a), (b).

209. 8 WRIGHT & MILLER, *supra* note 13, § 2023 (“At least since the adoption of Rule 26(b)(3) in 1970, it has been clear that in federal court the question whether material is protected as work product is governed by federal law even if the case is in federal court solely on grounds of diversity of citizenship.”). See *e.g.*, *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 472 (6th Cir. 2006) (“In a diversity case, the court applies federal law to resolve work product claims and state law to resolve attorney-client claims”); *Baker v. GM*, 209 F.3d 1051, 1053 (8th Cir. 2000) (same); *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 703 n. 10 (10th Cir. 1998) (same); *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988) (“Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. P. 26(b)(3). . .”).

210. 28 U.S.C. § 2072(b) (2012); *United States v. Wilson*, 306 F.3d 231, 236 (5th Cir. 2002) (finding rule of appellate procedure abrogates or abolishes conflicting federal statute); *United States v. Kim*, 298 F.3d 746, 749 (9th Cir. 2002) (same).

211. 28 U.S.C. § 2074(b).

212. 8 WRIGHT & MILLER, *supra* note 13, § 2023.

213. FED R. EVID. 502; Pub. L. No. 110-322, §1(a) (2008).

214. *Livingston v. Story*, 34 U.S. 632, 656 (1835) (“And that the power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt.”); WRIGHT & MILLER, *supra* note 206, § 1001 (“The whole history of federal judicial procedure, the submission of the Federal Rules of Civil Procedure and the amendments thereto to Congress in accordance with the Rules Enabling Act of 1934, and the decisions of the Supreme Court, all are premised on the authority of Congress to make procedural rules and to delegate that power to the Supreme Court.”).

215. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941).

## 2. *The Equally Well-Established Yet Amorphous Inherent Powers of Federal Courts to Create Rules*

What if the federal rules are silent on an issue? What if neither Congress nor the Supreme Court have used their rulemaking power to address an issue? This was the scenario in *Hickman* and this is where the concept of inherent powers comes into play.

In *Eash v. Riggins Trucking, Inc.*,<sup>216</sup> the Third Circuit explained that federal courts have inherent powers to create procedural rules.<sup>217</sup> “That the Federal courts *have power*, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century.”<sup>218</sup> These inherent powers are “vested in the courts upon their creation” and “not derived from any statute.”<sup>219</sup> They range from creating rules regulating attorney conduct to rules for managing a court’s docket.<sup>220</sup> Examples include the power to hold people in contempt, dismiss a case for failure to prosecute, reprimand attorneys, and tax costs on appeal.<sup>221</sup> While the use of these powers is rare and rife with “conceptual and definitional problems” that have “bedeviled commentators for years,” the *Eash* court identified three distinct types of inherent powers.<sup>222</sup>

One type is an inherent power to create useful rules, the “Useful Rules Power.”<sup>223</sup> For example, in *In re Peterson*, the Supreme Court upheld a district court’s power to appoint an auditor to assist its understanding of the case despite no rule permitting or preventing the appointment.<sup>224</sup> The Court stated, “at least in the absence of legislation to the contrary” courts have an “inherent power to provide themselves with appropriate instruments required for the performance of their duties.”<sup>225</sup> This includes the power to “appoint persons unconnected with the court to aid judges in the performance of specific judi-

216. 757 F.2d 557 (3d Cir. 1985).

217. *Id.* at 561–62.

218. *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 101 (1962). The number of assertions of inherent power by federal courts led one scholar to note the following: “the only fair question. . . is not whether inherent power exists at all, but rather, what is the scope of such power?” Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 626 (1957).

219. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

220. *Id.*

221. *Id.* (citing cases).

222. *Id.* at 561–63.

223. *Id.* at 563.

224. *In re Peterson*, 253 U.S. 300, 312–13 (1920).

225. *Id.* at 312.

cial duties.”<sup>226</sup> Other examples cited by the *Eash* Court are the power to certify questions to a state court, grant bail in a situation not dealt with by statute, and dismiss a suit under the doctrine of *forum non conveniens*.<sup>227</sup>

Sounding deceptively simple and intuitive, the doctrinal basis and boundaries of this power are less clear. In *In re Peterson* the Supreme Court suggested it is an equitable power. Since “the commencement of our government, [such inherent power] has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners.”<sup>228</sup> In fact, exertions of inherent power extend back to the founding of the country. In 1790, the Supreme Court established requirements for attorneys who could appear before it<sup>229</sup> and adopted “the practice of the courts of King’s Bench and Chancery in England, as affording outlines for the practice of this court . . . .”<sup>230</sup> Similarly, prior to the Federal Rules of Evidence, courts created evidentiary rules in common law fashion.<sup>231</sup>

The key limitation of the Useful Rules Power is that its use cannot contravene legislation.<sup>232</sup> Recall that in *In re Peterson* the Court upheld the appointment of an auditor “at least in the absence of legislation to the contrary.”<sup>233</sup> Illustrating this limit is *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>234</sup> where despite the Court’s inherent power to assess attorney’s fees it could not do so. The Court held

226. *Id.*

227. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 564 (3d Cir. 1985). See also *United States v. Wells*, 519 U.S. 482, 505–10 (1997) (Stevens, J., dissenting) (implying a materiality requirement into a federal false statement statute in part because “[w]hen Congress enacted the current version of the law in 1948, a period marked by a spirit of cooperation between Congress and the Federal Judiciary, Congress looked to the courts to play an important role in the lawmaking process by relying on common-law tradition and common sense to fill gaps in the law—even to imply causes of action and remedies that were not set forth in statutory text”).

228. *In re Peterson*, 253 U.S. 300, 312–13 (1920). See also *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) (inherent powers are “rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.”).

229. *Appointment of Justices*, 2 U.S. 399, 399 (1790).

230. *Hayburn’s Case*, 2 U.S. 408, 411 (1792).

231. See, e.g., *Funk v. United States*, 290 U.S. 371, 382 (1933) (federal courts could articulate current common law rules on spousal testimony in the absence of congressional legislation); *McNabb v. United States*, 318 U.S. 332, 340–41 (1943) (the Court held a criminal confession inadmissible because of a court’s inherent power over the creation and maintenance of “civilized standards of procedure and evidence.”).

232. *Thomas v. Arn*, 474 U.S. 140, 148 (1985) (“Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions.”).

233. *In re Peterson*, 253 U.S. 300, 312–13 (1920).

234. 421 U.S. 240 (1975).



that federal law created a list of inapplicable exceptions to the general ban on awarding attorney fees, and thus creating a new exception would conflict with congressional policy.<sup>235</sup> Similarly, in *Societe Internationale v. Rogers*, the Court refused to use its inherent power to dismiss a claim for noncompliance with a discovery order because a FRCP provision controlled.<sup>236</sup> Additionally, *Bank of Nova Scotia v. United States* barred federal courts from using their “supervisory power” to circumvent a rule of criminal procedure.<sup>237</sup> Thus, this power is a gap-filling measure. When there is no rule or law on point courts can use their equitable, inherent Useful Rules Power to step in.

But inherent powers exist that do not stem from practicality and do not yield to every law, rule, and policy of another branch of government. A second form of inherent power is the ability to create rules “essential to the administration of justice” and “‘absolutely essential’ for the functioning of the judiciary” (the “Qualified Essential Rules Power”).<sup>238</sup> It is “implied from strict functional necessity” and can be regulated through legislation but may not be “abrogated nor rendered practically inoperative.”<sup>239</sup> This type of inherent power permits courts to fine for contempt or to imprison to preserve courtroom order, both of which “are powers which cannot be dispensed within a court, because they are necessary to the exercise of all other[ ] [judicial powers]. . . .”<sup>240</sup> For example, the Supreme Court has noted that the contempt power is inherent in all courts because it is essential to the administration of justice that courts be able to vindicate their own authority without complete dependence on other branches.<sup>241</sup> Without it, “what the Constitution now fittingly calls ‘the judicial power of the United States’ would be a mere mockery.”<sup>242</sup> The power to dismiss *sua sponte* for lack of prosecution is also an inherent power of federal

235. *Id.* at 269.

236. 357 U.S. 197, 207 (1958). *See also* *Mills v. Bank of United States*, 24 U.S. 431, 439–40 (1826) (upholding local rule designed to further justice and save costs in part because it did not interfere with any rules of evidence). *Cf.* *Shane v. McNeil*, 41 N.W. 166, 168 (Iowa 1889) (legislature enabled judicial conference to make laws but if conference fails to act each court has common law power to make rules that do not conflict with laws or conference’s rules).

237. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (“We now hold that a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a).”).

238. *Eash v. Riggins Trucking, Inc.*, 757 F.2d. 557, 562–63 (3d Cir. 1985) (quoting *Levine v. United States*, 362 U.S. 610, 616 (1959)).

239. *Id.* at 562–63.

240. *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812).

241. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795–96 (1987).

242. *Id.* at 796 (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). *See* *Willy v. Coastal Corp.*, 503 U.S. 131, 132 n.12 (1992) (acknowledging inherent power), *aff’d* *Mistretta v. United States*, 488 U.S. 361, 392 (1989).

courts, “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”<sup>243</sup> One could view the Qualified Essential Rules Power, which is perhaps the most ambiguous of the court’s inherent powers, as a limit on legislative authority. Some powers must exist and while Congress can step in and regulate them, some portion of these powers is beyond congressional control and lies exclusively within the province of the judiciary.

The third and most powerful form of inherent power permits federal courts to act in direct contradiction of legislation.<sup>244</sup> According to the *Eash* court, once Congress creates a federal court, that court is vested with the judicial powers of Article III.<sup>245</sup> This “irreducible inherent authority” covers “an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms ‘court’ and ‘judicial power’” (the “Fundamental Rules Power”).<sup>246</sup> Examples of such power are rare,<sup>247</sup> but may include rules that protect against legislation that prevents judges from judging or inhibits “the effective resolution of justiciable controversies.”<sup>248</sup> For instance, the Supreme Court protected the independence of the judiciary by banning legislative “rules of decision” because “Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power.”<sup>249</sup> The dimensions of this power are notoriously unclear, in part because federal courts have rarely, if ever, applied such a power.<sup>250</sup> The boundaries of this power “are not possible to locate

243. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962).

244. *Eash v. Riggins Trucking, Inc.*, 757 F.2d. 557, 562 (3d Cir. 1985).

245. U.S. CONST., art. III, § 1. (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (stating Article III Section 1 protects judiciary from other branches and protects litigant rights); *Stump v. Sparkman*, 435 U.S. 349, 368 (1978) (Stewart, J., dissenting) (judicial independence benefits litigants).

246. *Eash v. Riggins Trucking, Inc.*, 757 F.2d. 557, 562 (3d Cir. 1985).

247. See A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 29–33 (1958) (describing instances in which legislatures might abridge judicial power through rulemaking).

248. *Id.* at 30.

249. *United States v. Klein*, 80 U.S. 128, 146–47 (1871).

250. Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 43 (2011) (“The third category of cases, in which the Court has found inherent authority to act in an area where Congress has spoken, are the most difficult to reconcile. Nevertheless, even in these cases, the Court has never explicitly claimed a power superior to that of Congress. Instead, the Court has always found that Congress did not foreclose the inherent power at issue.”).

with exactitude” and such a power “must be exercised with great restraint and caution.” Regardless of the lack of clarity, the Fundamental Rules Power is essential to the separation of powers.<sup>251</sup>

### 3. *Courts Used Their Inherent Power to Create the Hickman Work Product Doctrine*

Although never recognized by courts, *Hickman* falls within the contours of the inherent powers doctrine. *Hickman* (and *Nobles*) arose when no rule or statute governed and compelling policies applied. *Hickman* is based on public policy and not on any statutory or constitutional source. The public policy is “the orderly prosecution and defense of legal claims,”<sup>252</sup> which, like exertions of inherent power, concerns the administration of justice and resolution of cases. The critical question is which type of inherent power the Court used to decide *Hickman*.

Recall the strong language of *Hickman* about the critical roles of the work product doctrine. The Court noted “discovery, like all matters of procedure, has ultimate and necessary boundaries.”<sup>253</sup> Plus, “it is essential that a lawyer work with a certain degree of privacy,” for that “is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.”<sup>254</sup> And “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”<sup>255</sup> This language suggests neither rules nor statutes can, in whole or in part, eliminate or curtail work product. Such language supports the use of the Qualified Essential Rules Power or even the Fundamental Rules Power.

But remember, the Court wrote that the public policies in *Hickman* apply “until some rule or statute definitely prescribes otherwise.”<sup>256</sup> This concern has been present since the beginning. When the Third Circuit decided *Hickman* it carefully noted courts must abide by policies “adopted either by rule-making court or legislature.”<sup>257</sup> Tellingly, in *Nobles* the Supreme Court upheld a waiver of work product protection. Because no codified rule applied, *Nobles* was a public policy ex-

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251. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562 (3d Cir. 1985).

252. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

253. *Id.* at 507.

254. *Id.* at 510–11.

255. *Id.* at 510.

256. *Id.* at 514.

257. *Hickman v. Taylor*, 153 F.2d 212, 219 (3d Cir. 1945).

tension of *Hickman*. Yet the Court found waiver was possible. This conclusion suggests countervailing public policies can override work product protection. Discussed more fully below, later Supreme Court decisions also suggest rules and statutes can eliminate or curtail the *Hickman* work product doctrine. These decisions suggest, and this Article concludes, courts are relying on the Useful Rules Power.

Adding weight to this conclusion is Professor Barton's view that Congress's Article I power under the Necessary and Proper Clause, not Article III's Judicial Powers Clause, controls the judiciary's use of inherent powers.<sup>258</sup> After analyzing the Constitution's text and history, and Supreme Court precedent, Professor Barton concluded that "Congress has near plenary authority over the structure and procedure of the federal courts" and "the judiciary has substantial authority to act [only] when Congress has not acted."<sup>259</sup>

### C. *The Limits of the Hickman Work Product Doctrine: Rules and Statutes Preempt Hickman*

The *Hickman* work product doctrine likely stems from the Useful Rules Power and thus can be limited and even eliminated by rules and statutes. A preemption analysis involves assessing the public policies underlying *Hickman*. Work product protects attorney preparation and the privacy of attorney mental processes.<sup>260</sup> While these policies undoubtedly are important, they are subject to an override under the separation of powers. In light of the decisions and authorities discussed below, the policies of *Hickman* are not so essential and fundamental to the judicial system so as to withstand editing and modification by the democratically elected legislative and executive branches.

#### 1. *Public Policy Opposing Absolute Work Product Protection*

Elevating work product protection to a more privileged category covered by either the Qualified Essential Rules or Fundamental Rules Powers creates several problems. First, it alters work product from being a public policy to being a structural component of the judicial system. Such a seismic change would be odd given that work product only arose after a switch to a discovery-based judicial system. Indeed, the doctrine has evolved because of different views on policy. In the beginning the Supreme Court rejected a rule granting expansive

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258. Barton, *supra* note 252, at 5, 39.

259. *Id.* at 5–6; *see also* Degen v. United States, 517 U.S. 820, 823 (1996) ("In many instances the inherent powers of the courts may be controlled or overridden by statute or rule.").

260. Anderson et al., *supra* note 11, at 784–85.

power and instead decided *Hickman*. When *Hickman* proved unmanageable the Judicial Conference developed Rules 26(b)(3) and 16. And the choice to have discovery is itself a public policy determination; nothing—other than policy considerations—prevents Congress from choosing a different system or returning to the pre-FRCP era. Unlike individual constitutional rights, structural protections are usually not waivable.<sup>261</sup> Thus, if courts deem work product essential or fundamental to the integrity of the judicial system it would strip from attorneys and clients the discretion to waive protection (which not even the attorney-client privilege does). Such absolute protection raises the ethical issue of whether attorneys are bound to protect the integrity of the judicial system by avoiding waiver even when it may be in the client's best interest to waive protection. Also, currently in certain circumstances an unintentional disclosure can lead to waiver of undisclosed protected material.<sup>262</sup> This exception, and the waiver of protection, conflicts with notions of fundamental or essential protection.

Second, elevating work product to a higher level of protection would compound the problems of an already unwieldy doctrine. If work product plays a core role in the justice system, is its disclosure reversible error? If the trial court erred, or the attorney improperly disclosed work product material (intentionally or unintentionally), how could it not be reversible error if work product is essential to the justice system? Could a court apply a workable standard weighing the effect of such disclosure on the integrity of the judicial system? Would its disclosure support a finding of an unfair trial, denial of due process, or ineffective assistance of counsel? If it is essential or fundamental, can it ever be waived? If so, how do courts determine when such waiver applies and the scope of the waiver? Since its birth courts struggled to define work product and articulate workable standards. This elevation of protection would create a Russian nesting doll of Pandora's boxes.

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261. See, e.g., *Freytag v. C.I.R.*, 501 U.S. 868, 880 (1991) ("Neither Congress nor the Executive can agree to waive [the Appointment Clause's] structural protection."); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986) ("When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect."); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543-44 (9th Cir. 1984) ("The component of the separation of powers rule that protects the integrity of the constitutional structure, as distinct from the component that protects the rights of the litigants, cannot be waived by the parties . . . .")

262. FED. R. EVID. 502(b).

Perhaps the strongest countervailing policy comes from Federal Rule of Evidence 502, which recognizes a subject-matter waiver of undisclosed, otherwise-protected work product. Under the rule, an *intentional* disclosure of work product will waive protection to undisclosed material concerning the same subject matter when “they ought in fairness be considered together.”<sup>263</sup> The rule protects undisclosed material from waiver by an *unintentional* disclosure only if the “holder” of the protection “took reasonable steps to prevent disclosure” and “promptly took reasonable steps to rectify the error.”<sup>264</sup> Crucially, this rule permits the intentional and unintentional acts of attorneys and clients to waive protection of undisclosed protected material. Furthermore, the rule defines “work product protection” as “the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”<sup>265</sup> Notably the Rule references both tangible and intangible material. Recall that FRCP 26(b)(3) only applies to tangible material while *Hickman* spoke of tangible and intangible material. This phrasing suggests the phrase “applicable law” refers to protection stemming from both rules and *Hickman*. Thus, the rule permits the acts of attorneys and clients to waive both codified work product and *Hickman* work product protection. Notably, there is no exception for core work product. As a rule of evidence passed by Congress, it establishes federal policy.<sup>266</sup>

## 2. Preemption of *Hickman*

Two Supreme Court decisions support the view that rules and statutes can preempt *Hickman*. In 1976 the Supreme Court approved a congressional curtailment of work product protection. *Goldberg v. United States* concerned the Jencks Act, which permitted criminal defendants access to any statements adopted or approved by prosecution witnesses.<sup>267</sup> While such statements might be work product, the Court held they were discoverable under the statute.<sup>268</sup> However, in the same breath, the Court was careful to explain why the Jencks Act did not undermine the public policies of *Hickman*. Specifically, (i) there is no danger an attorney will distort a witness’s statements when the witness adopts or approves the attorney’s notes, (ii) there is a clear

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263. FED. R. EVID. 502(a).

264. FED. R. EVID. 502(b).

265. FED. R. EVID. 502(g)(2).

266. Pub. L. No. 110-322, §1(a) (2008).

267. 425 U.S. 94, 104 (1976).

268. *Id.* at 105-08.

and congressionally recognized purpose of disclosure to impeach witnesses and thus ensure a fair and just criminal trial, (iii) the lawyer is not serving as a witness, and (iv) there is no plausible concern that government attorneys will be called to authenticate their notes or will feel compelled to testify.<sup>269</sup> Nonetheless, the case reflects a statutory override stripping protection of otherwise protected material.

Later, the Supreme Court more explicitly referenced the possibility of a congressional override. Its 1981 decision in *Upjohn Co. v. United States* held work product material gathered by a corporate counsel was immune from an IRS summons. The Court reasoned the summons were “subject to the traditional privileges and limitations” and “[n]othing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine.”<sup>270</sup> *Upjohn* shows courts look to whether Congress has altered work product protection in a particular case, as it did in *Goldberg*.

Both cases support the view that Congress can override work product protection, but neither expands on how much rules and statutes can limit the doctrine, or whether Congress could eliminate the doctrine.

Under the logic of *Goldberg* and *Upjohn* there is a compelling argument that *Hickman* does not supplement FRCP 26 to protect intangible work product. With a rule on point, the Useful Rules Power does not apply. As Professor Clermont argued, within the realm covered by FRCP 26, “the rule preempts *Hickman*” and potentially more narrowly construes the anticipation of litigation requirement.<sup>271</sup> Thus, for certain questions within the scope of the rule, “authoritative answers derive from the rule and not from *Hickman*.”<sup>272</sup> While *Hickman*’s policies may “inform a reading of the rule,” “[n]evertheless, interpreting a rule presents a task jurisprudentially distinct from elaborating a case-law doctrine.”<sup>273</sup> Therefore, *Hickman* governs questions raised beyond the scope of FRCP 26, like work product assertions at trial or pertaining to non-parties.<sup>274</sup> By specifically limiting protection to tangible work product, intangible work product is arguably within the policy scope of FRCP 26 but excluded from protection. Thus, like

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269. *Id.* at 107.

270. 449 U.S. 383, 399–400 (1981) (emphasis added).

271. Clermont, *supra* note 18, at 757.

272. *Id.*

273. *Id.*

274. *Id.* at 757–58.

the scenario in *Alyeska Pipeline Service Co.*,<sup>275</sup> courts lack the inherent power to contravene the text and policy of the rule.

### 3. Preemption of Core Work Product Protection

The great battleground is whether a rule or statute can override *Hickman's* protection of core work product. Advocates seeking protection could argue that, unlike the material at issue in *Goldberg* and *Upjohn*, core work product is protected by a stronger form of inherent power, like the Qualified Essential Rules or Fundamental Rules Powers. They would call upon *Hickman's* strong “necessary” and “essential” language.

In *Upjohn*, the Court noted there is a higher burden to obtain work product of oral witness statements for they could reveal an attorney's mental impressions.<sup>276</sup> *Upjohn* recognized that some courts have held no showing of necessity can overcome work product protection of oral witness statements. Other courts grant oral witness statements special but not inalienable protection.<sup>277</sup> Without deciding the issue, the Court appealed to both *Hickman* and FRCP 26:

As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship. While we are not prepared at this juncture to say that such material is always protected by the work product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.<sup>278</sup>

Thus, *Upjohn* leaves the issue open.

But several sources undermine the notion that core work product can receive absolute protection. *Hickman's* protection of core work product derives from public policy. Recall that the Supreme Court rejected the 1946 proposed work product rule that granted absolute protection to core work product and instead decided *Hickman*.<sup>279</sup> Although rare, courts have permitted discovery of core work product when these policies were not present or contrary policies overrode them.<sup>280</sup> The “necessary” and “essential” language in *Hickman* is best viewed as the Court applying strong language to support the highly

275. 421 U.S. 240 (1975).

276. *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981).

277. *Id.* at 401.

278. *Id.* at 401–02.

279. 8 WRIGHT & MILLER, *supra* note 13, § 2026.

280. Morrow, *supra* note 20, at 1162 & 1165 n. 75 (citing examples); 8 WRIGHT & MILLER, *supra* note 13, § 2026 (“[L]ower courts have found such disclosure justified principally where the material is directly at issue, particularly if the lawyer or law firm is a party to the litigation.”).



unusual step of ruling on the grounds of public policy. The Court's apprehension seemed to acknowledge it was filling in a gap until a rule applied.

In at least one context several lower courts have suggested a statute or rule could authorize the disclosure of core work product. There is a split amongst courts as to what extent FRCP 26(b)(4) permits disclosure of work product materials related to expert reports. Some say the 1993 FRCP amendments broadened the scope of expert discovery and are "widely interpreted to override work product protections for materials provided to retained expert witnesses" including core work product.<sup>281</sup> Other courts conclude the rule permits disclosure of factual work product and not core work product, but the rule could do so if there was clear language: "For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute."<sup>282</sup> Regardless, what all these courts agree on is that (i) at a minimum FRCP 26(b)(4) overrides factual work product protection and (ii) a rule or statute can override opinion work product.

#### D. Summary

In light of its origin and history, the *Hickman* work product doctrine stems from the Useful Rules inherent power of courts. While its importance is undeniable, it is not a proper exercise of the Qualified Essential Rules or Fundamental Rules Powers given repeated language from its birth to the present day suggesting rules and statutes can curtail any aspect of protection. Also, advocates can waive its protection, which is inconsistent with something fundamental to the structure of the judicial system.<sup>283</sup> Further, absolute protection would

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281. 8 WRIGHT & MILLER, *supra* note 13, § 2031. See, e.g., *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) ("In this Court's view, new Rule 26 and its supporting commentary reveal that the drafters considered the imperfect alignment between 26(b)(3) and 26(b)(4) under the old Rule, and clearly resolved it by providing that the requirements of (a)(2) 'trump' any assertion of work product or privilege."); *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D. Cal. 1991) ("For reasons set forth at length below, we hold that, absent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product.")

282. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995); see, e.g., *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-43 (E.D.N.Y. 1997) ("Rule 26(a) should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the Federal Rules of Civil Procedure."); *Nexus Prods. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 8-11 (D. Mass. 1999).

283. FED. R. EVID. 502.

favor—rather than balance—the judicial system’s interests to the exclusion of client interests. While core work product merits distinction and special protection, modern case law suggests it too is subject to a legislative or rule-based override. Although rare, courts have permitted discovery of core work product or have suggested a willingness to permit such discovery. Thus, the most likely explanation is that *Hickman* work product is the result of the Useful Rules Power and is preempted by any conflicting rule or statute.

#### IV. CONCLUSION

With good reason work product has been intensely litigated in courts and thoroughly discussed by advisory committees. Its unique status as a “qualified privilege” that stems from both codified rules and Supreme Court common law justified solely on the grounds of public policy, readily distinguishes it from any other doctrine. But courts, practitioners, and scholars cannot turn away from the inherent complexities of the doctrine, settle for a superficial understanding, and adopt assumptions with questionable foundations. Historically, courts have always acknowledged the need to defer to the legislature on policy decisions about the judicial system. Even the strongest of policies does not alter the separation of powers.

By engaging the doctrine and understanding its history, glimpses of clarity appear. First, the Supreme Court and federal courts created and expanded the *Hickman* work product doctrine through the use of their inherent powers. Second, *Hickman* and its progeny survive despite the codification of the work product doctrine. Third, even in the context of the highly protected realm of core work product, a rule or statute can override the *Hickman* work product doctrine.

The impact of these conclusions can change the course of litigation and trials. Most notably, work product is not as expansive as most courts and practitioners assume. The varying coverage between the codified rules and *Hickman* creates an opening for discovery. At the same time, courts will struggle to rule on this claim. A decision requires explaining the basis for the Supreme Court’s decision in *Hickman*. That is an answer courts have no precedent on. If courts agree with this Article, then they will issue a rare, but thorough, ruling about inherent powers. While clarity is certainly needed, it will be difficult to provide concrete analysis using such a nebulous doctrine. Work product is often spoken of as a purely discovery doctrine or a doctrine defined in a subset of a rule. But it is so much more and implicates some of the most challenging and essential parts of a judicial system.

Perhaps the best course is for the Judicial Conference to re-examine the codified rules, which have remained largely unchanged since their inception. The Conference should consider whether the rules should align with one another, and whether the rules should match or exceed the scope of *Hickman*. The Conference should also consider whether there is a need for codified rules about work product protection outside the discovery context.

We have come a long way since the concerns raised in the first days of the FRCP, addressed in *Hickman*, and revisited in the FRCP and criminal rules. But many of the work product issues perplexing courts and practitioners remain.